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STATE VS MUMTAZ ALI
FIR No. 24 | Dated: 08.10.2021 | U/S: 9 (d) of Khyber
Pakhtunkhwa CNSA 2019 | Police Station: Kurez Boya

IN THE COURT OF SHAUKAT AHMAD KHAN
SESSIONS JUDGE/JUDGE SPECIAL COURT,
ORAKZAI (AT BABER MELA)

SPECIAL CASE NO. : 67/3 OF 2021
DATE OF INSTITUTION : 22.12.2021
DATE OF DECISION : 14.10.2022

STATE THROUGH NAIMAT KHAN SHO, POLICE STATION KUREZ
BOYA

.....(COMPLAINANT)

-VERSUS-

MUMTAZ ALI S/O AMJAD ALI, AGED ABOUT 32 YEARS, R/O
CASTE MANI KHEL, TAPA SABZI KHEL, P/O KUREZ, STARSAM,
TEHSIL LOWER DISTRICT ORAKZAI

..... (ACCUSED FACING TRIAL)

Present: Muhammad Zubair, Assistant Public Prosecutor for state.
: Syed Muzahir Hussain Advocate for accused facing trial.

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Pakhtunkhwa Control of Narcotic Substances Act, 2019
Police Station: Kurez Boya

JUDGEMENT
14.10.2022

The accused named above faced trial for the offence
u/s 9 (d) of the Khyber Pakhtunkhwa CNSA, 2019 vide FIR
No. 24, dated 08.10.2021 of Police Station Kurez Boya.

(2). The case of the prosecution as per contents of Murasila
based FIR is; that on 08.10.2021, complainant Naimat Khan
SHO along with Shah Sawar ASI, Gul Taj HC and constable
Junaid Ali acting on information regarding smuggling of
narcotics through Starsam, laid a picket at Starsam where at
about 1400 hours a person holding a plastic bag in his right
hand on way towards the picket, on seeing the police party
tried to escape but was overpowered. The search of the plastic
bag holding by the accused led to the recovery of 10 packets

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of chars, each weighing 500 grams, making a total of 5000 grams from possession of the accused while the empty plastic bag was also weighed which turned out to be 30 grams. The complainant separated 10 grams of chars from each packet for chemical analysis through FSL, sealed the same into parcels no. 1 to 10 whereas the remaining quantity of chars weighing 4900 grams along with plastic bag were sealed in parcel no. 11 and affixing monograms on all the parcels. The accused disclosed his name as **Mumtaz Ali** s/o Amjad Ali who was accordingly arrested by issuing his card of arrest Ex. PW 3/1. The complainant took into possession the recovered chars vide recovery memo Ex. PC. Murasila Ex. PA/1 was drafted and sent to the PS through constable Gul Taj Ali which was converted into FIR Ex. PA by Zaman Ali MHC.

(3). After registration of FIR, it was handed over to Ishtiaq Hassan SI for investigation. Accordingly, after receipt of FIR, he reached the spot, prepared site plan Ex. PB on pointation of complainant and recorded the statements of PWs u/s 161 Cr.P.C. On 11.10.2021, the IO sent the samples for chemical analysis to FSL vide application Ex. PW 5/2 through constable Akseer Ali, and road permit certificate Ex. PW 5/3, the result whereof Ex. PK was received and placed on file by him. After completion of investigation, he handed over the case file to Inspector Naimat Ali who submitted complete challan against the accused facing trial.

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(4). Upon receipt of case file for the purpose of trial, the accused was summoned through addendum-B from sub-jail Orakzai being in custody, copies of the record were provided to him in line with section 265-C Cr.P.C and formal charge was framed against him to which he pleaded not guilty and claimed trial. Accordingly, the witnesses were summoned and examined. The gist of the evidence is as follow;

- I. Constable Akseer Ali is PW-1. He deposed that he has taken the samples of recovered chars in parcels no. 1 to 10 to the FSL for chemical analysis on 11.10.2021 and after submission of the same, he was given the receipt of the parcels which he handed over to the IO.
- II. Moharrir Zaman Ali appeared in the witness box as PW-2. He has registered the FIR Ex. PA by incorporating the contents of Murasila Ex. PA/1 therein. He also deposed in respect of the case property received by him from the complainant duly packed and sealed which he had kept in mal khana in safe custody. The witness further deposed that he has recorded entry of the case property in register no. 19 and handed over the samples of the case property to the IO for sending the same to FSL on 11.10.2021.


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- III. Inspector Naimat Ali is the complainant of the case. He appeared in the witness box as PW-3. In his statement he repeated the story narrated in the FIR.
- IV. FC Junaid Ali is PW-4. He besides being eyewitness of occurrence is marginal witness of recovery memo Ex. PC as well vide which the complainant/PW-3 has taken into possession the recovered chars. He also reiterated the contents of FIR in his statement.
- V. Lastly, Investigating Officer Ishtiaq Hassan SI was examined as PW-5 who in his evidence deposed in respect of the investigation carried out by him in the instant case. He has prepared the site plan Ex. PB on pointation of the complainant, recorded the statements of witnesses on the spot, produced the accused before the court of Judicial Magistrate vide his application Ex. PW 5/1, sent the representative samples to FSL along with application addressed to the incharge FSL Ex. PW 5/2 and road permit certificate Ex. PW 5/3 and result of the same Ex. PK was placed on file by him, annexing copy of register no. 19 Ex. PW 2/1 as well as copies of daily diaries regarding departure and return of the complainant and

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submitted the case file to Inspector Naimat Ali for
its onward submission.

(5). Prosecution closed its evidence whereafter statement of
the accused was recorded u/s 342 Cr.P.C but the accused
neither wished to be examined on oath nor opted to produce
any evidence in defence. Accordingly, arguments of the
learned DPP for the State and counsel for the accused facing
trial heard and case file perused.

(6). Learned DPP for the state submitted that the accused
facing trial is directly nominated in the FIR, huge quantity of
chars has been recovered from possession of the accused
facing trial, the recovered chars are sealed and sampled on the
spot by the complainant, the IO has conducted investigation
on the spot, the samples for chemical analysis have been
transmitted to the FSL within the prescribed period which have
been found positive for chars vide report of FSL Ex. PK. The
complainant, the witness of the recovery, the official
transmitted the sample to the FSL and the IO have been
produced by the prosecution as witnesses, whom have fully
supported the case of the prosecution and their statements have
been lengthy cross examined but nothing contradictory could
be extracted from the mouth of any of the witness of the
prosecution and that the prosecution has proved its case
beyond shadow of any doubt.

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(7). Learned counsel for the defence argued that though the accused facing trial is directly nominated in the FIR, the alleged chars have been shown recovered from his possession and the report of FSL support the case of prosecution; however, the accused facing trial is falsely implicated in the instant case and nothing has been recovered from his possession. He argued that the prosecution has failed to prove the mode and manner of recovery and the mode and manner of investigation allegedly conducted by the IO on the spot, as detailed by the prosecution on the case file. He concluded that there are various dents in the case of prosecution leading to its failure to bring home the charge against the accused facing trial.

(8). In the light of arguments advanced by the learned DPP for the State, arguments of the learned counsel for the defence and the available record, following are the points for determination of charge against the accused facing trial:

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- (i). Whether the recovery is proved to have been made from possession of accused facing trial in the mode and manner as detailed in the Murasila?
- (ii). Whether the occurrence has taken place and the investigation have been conducted in the mode and manner as detailed in the file?
- (iii). Whether the recovered substance is proved through report of FSL as chars?

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(9). As per contents of Murasila Ex. PA/1, the complainant, Naimat Khan SHO/PW-3 along with Shah Sawar ASI, Gul Taj HC and constable Junaid Ali/PW-4 acting on information regarding smuggling of narcotics via Starsam has laid a picket at Starsam, where at about 1400 hours, a person holding a plastic bag in his right hand on way towards picket, on seeing the police party has tried to escape but he has been overpowered. The search of the plastic bag holding by the accused has led to the recovery of 10 packets of chars, each weighing 500 grams, making a total of 5000 grams from possession of the accused while the empty was also weighed which turned out to be 30 grams. The complainant/PW-3 on the spot has shown himself separated 10 grams of chars from each packet for chemical analysis through FSL, sealed the same into parcels no. 1 to 10 whereas the remaining quantity of chars weighing 4900 grams along with plastic bag have been shown sealed in parcel no. 11, affixing monograms on all the parcels. The accused disclosing his name as **Mumtaz Ali** s/o Amjad Ali, has been shown arrested on the spot by issuing his card of arrest Ex. PW 3/1. The complainant/PW-3 has shown taken into possession the recovered chars vide recovery memo Ex. PC. Murasila Ex. PA/1 has also been shown drafted and sent to the PS through constable Gul Taj Ali which has been converted into FIR Ex. PA by Zaman Ali MHC/PW-2.

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The prosecution in order to prove the recovery of chars in the mode and manner as detailed in the Murasila Ex. PA/1 and recovery memo Ex. PC, examined the complainant, Inspector Naimat Ali as PW-3. In his examination in chief, he has reiterated the story detailed in the Murasila Ex. PA/1. The stance of the prosecution has further been supported by the statement of constable Junaid Ali as PW-4 who besides being eyewitness of the occurrence is a marginal witness of the recovery memo Ex. PC as well. He has narrated the same story as narrated by the complainant in his statement as PW-4. Both the witnesses are unanimous on the point of their departure from the PS, their arrival on the spot, laying on a picket on the spot, the interception of the accused, recovery of chars from the accused, the colour of chars, weighing of the chars, separation of 10 grams of chars from each of the parcel, sealing all the parcels including the empty bag in different parcels, affixing monogram of 'IH' on each parcel, drafting of the Murasila, recovery memo and card of arrest, transmitting of the documents from the spot to the PS through constable Gul Taj Ali and registration of the FIR.

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In cross examination, the PW-3/complainant Naimat Ali has explained that the information regarding the smuggling was received to him in Nanoki area at about 12:30 pm which is at a distance of about 05/06 km from the place of occurrence and that they laid a picket on the spot at 01:30 pm.

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With respect to mode and manner of the arrest of the accused, the complainant in his cross examination stated that the accused was first seen at a distance of 50 yards away from the place of occurrence and at a distance of 15/20 yards away from the police party he tried to escape but after running for about 40/50 yards he was overpowered. He has further stated that at a distance of 50 yards away, the police party was visible to the accused. This query when put in cross examination to PW-4/Junaid Ali FC, who is eyewitness of the occurrence, he also confirmed that the accused was first seen at a distance of 40/50 yards, that the accused tried to escape but he was overpowered, that he cannot tell that as to which direction the accused tried to escape and that the accused was arrested slight away from the road at a distance of 01/02 yards.

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Keeping in view the aforementioned cross examination of the PWs in juxtaposition to the site plan Ex. PB prepared on the pointation of the complainant, the place where the accused has allegedly first seen at a distance of 50 yards from police party and the place from where the accused tried to escape i.e., 20 yards away from police party, have not been shown in the site plan Ex. PB. Similarly, as per site plan the accused has been shown on way towards the police party on a straight road with trees on both sides of the road and mountainous area on southern side of the road but strange

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enough the accused with a huge quantity of chars in his possession has opted to approach towards the police party and decided to make his escape good when he reaches the police party at a distance of 15/20 yards and that too towards the police party instead of having opportunity to escape when he first saw the police party in the trees or towards mountainous area.

With respect to process of separation of samples and the process of packing and sealing, the complainant in his cross examination stated that the recovered chars were in the form of slabs of grey colour wrapped in yellow colour scotch tape. The packets sealed in parcel no. 11 when opened in the court at the request of counsel for accused, these were found packed in yellow colour scotch tape with no visible sign of cut for separation of samples. The witness on seeing the lacuna tried to cover it by explaining that after cutting each packet for separation of samples, these were repacked with yellow colour scotch tape. Similarly, the colour of chars was also not found grey rather it was "مہندی" colour.

With respect to drafting of Murasila, recovery memo and card of arrest, PW-3 in cross examination claimed that all the three documents were prepared by him in his own handwriting. In order to verify the fact, the witness was made to write a portion of Murasila dictated in the court - placed on file as Ex. PW 3/D-1 - where besides great difference of

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handwriting the witness has also made spelling mistakes of more than 04 words in one line paragraph and the same clearly depicts that all the three documents are not drafted by him in his own handwriting. Moreover, constable Gul Taj Ali who has transmitted the Murasila, recovery memo and card of arrest from the spot to the police station for registration of FIR, has also not been examined as witness and as such the chain of events from the arrest and recovery on the spot, the registration of FIR, conducting of investigation by the IO on the spot till transmission of the accused and case property to the police station, has not been proved.

Hence, in view of what is discussed above, it is held that the occurrence has not taken place in the mode and manner as detailed in the Murasila and the proceedings allegedly conducted on the spot have also not been conducted in the mode and manner as detailed on the file.

With respect to transmission of the case property from the spot to the Police Station and sending the representative samples to the FSL, the case of prosecution is, that after sampling and sealing of case property in parcels on the spot, these were brought by the complainant/PW-3 to the Police Station and handed over the same to Moharrir Zaman Ali /PW-2, who deposited the same in Mal khana. The representative samples on 11.10.2021 were handed over by Moharrir of the Police Station to the IO who transmitted the

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same to FSL through constable Akseer Ali vide road permit certificate. In order to prove its case, the prosecution produced Moharrir Zaman Ali as PW-2, constable Akseer Ali as PW-1 and IO as PW-5. They have supported the case of prosecution in their examination in chief. In cross examination, PW-2 who has allegedly entered case property in register no.19, has admitted that register no. 19 neither bears the signature of the IO nor that of him. Register no. 19 Ex. PW 2/1 is also extract and neither original nor copy of the same has been produced before the court. Moreover, as per cross examination of the IO as PW-5, he has produced the accused before the court along with case property but nothing in that respect is mentioned in register no. 19 that as to when and to whom the Moharrir/PW-2 has handed over the case property for production of the same before the court. The occurrence has taken place on 08.10.2022 but the representative samples were sent to the FSL on 01.10.2022 with a delay of 03 days in violation of the Rule (6) of the Control of Narcotics Substance (Government Analyst) Rules, 2001 and the prosecution has failed to prove safe custody of case property during this period.

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Hence, in view of what is discussed above, though the representative samples, as per report of FSL Ex. PK, have been found positive for Chars but keeping in view the failure of the prosecution to prove the safe custody of the case property, its transmission to the PS and transmission of the representative

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sample to the FSL within the prescribed period of 72 hours, it is held that the case of prosecution is not substantiated through the report of FSL.

(10). In the light of aforementioned discussion, it is held that the prosecution has failed to prove the alleged recovery of chars from possession of the accused facing trial. It also failed to prove the mode and manner of recovery and the mode and manner of proceedings conducted on the spot as alleged by the prosecution. Similarly, the prosecution has also failed to prove the safe custody of case property and transmission of the representative sample within the prescribed period. All these facts lead to the failure of prosecution to prove the case against the accused beyond shadow of doubt. Therefore, the accused namely, **Mumtaz Ali** is acquitted of the charge levelled against him by extending him the benefit of doubt. Accused is on bail, his bail bonds stand cancelled and his sureties are released of the liabilities of bail bonds. The chars be destroyed after the expiry of period provided for appeal/revision in accordance with law. Consign.

Pronounced


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SHAUKAT AHMAD KHAN
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CERTIFICATE

Certified that this judgement consists of thirteen (13) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 14.10.2022


SHAUKAT AHMAD KHAN
Sessions Judge/Judge Special Court,
Orakzai at Baber Mela

