

In the name of almighty Allah who has unlimited jurisdiction over and beyond the universe.

BEFORE THE COURT OF
ADDITIONAL SESSIONS JUDGE/JUDGE SPECIAL COURT, ORAKZAI

Special Case No.12/3 of 2021

Date of institution: 30.06.2021

Date of decision: 26.11.2022

The State

.....Versus.....

Muhammad Saleem son of Qismat Khan, resident of Qaum Malak Deen
Khel, Tappa Karta Khel, village Khato Cheena, District Khyber.


..... (Accused facing trial)

**Case FIR No.14, Dated 08.02.2021 u/s 9-D of KP-CNSA, 2019
registered at Police Station Kalaya Orakzai.**

JUDGMENT

Accused named above faced trial before this Court in case FIR No.14
dated 08.02.2021 u/s 9-D of Khyber Pakhtunkhwa Control of Narcotics
Substance Act, 2019, registered at Police Station Kalaya, Orakzai.

2. Facts of the case are such that Nasir Khan SI along with other police
officials of Police Station Kalaya Orakzai, laid barricade on spy information
regarding the smuggling of chars. One person came towards the barricade from
Mishti side who was riding on Motorcycle. The said person turned back his
Motorcycle upon seeing the Police Party and escaped from the spot. Police
Party chased him and the person threw plastic sack white in color and left
behind the Motorcycle. The person decamped towards the populated area. On


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search of the said plastic sack, the complainant found 08 packets of chars, which were wrapped in yellow scotch tape, having weight of 1200 grams of each packet with total quantity of 9600 grams. Murasila was drafted at the place of occurrence and sent to Police Station for bringing criminal law into motion which was given effect in the stated FIR that culminated into present case. The accused was later on arrested.

3. After conclusion of the investigation, complete challan against the accused facing trial was presented. He was summoned being on bail and on appearance, he has been provided prescribed documents of case in line with Section 265-C of the Code of Criminal Procedure-1898. Charge against the accused was framed to which he pleaded not guilty and claimed trial.

4. Prosecution was directed to produce evidence. The prosecution in order to prove its case against the accused, produced and examined as many as six (06) witnesses. The prosecution evidence is sketched below for ease of reference and determination of guilt or innocence of accused:

5. Ain Ullah Muharrir, who had registered the FIR Ex.PA on receipt of Murasila, was examined as PW-1. Raza Ali constable was examined as PW-2, who produced record pertaining to dispatch of case property to the FSL for chemical analysis. The star prosecution witness was complainant Nasir Ahmad SI, whose statement was recorded as PW-3. He confirmed the Murasila Ex.3/2


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to be true. Recovery of contraband vide recovery memo Ex.PW 3/1 was testified to be genuine. One of the marginal witness to the recovery memo was

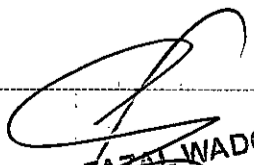
Wajid Khan Constable, who was examined as PW-4. It was testified that the recovery was made from the plastic sack thrown by the accused and was documented vide recovery memo Ex.PW-3/1. Raees Khan SI was examined as PW-5, who has submitted the complete challan Ex.PW-5/1 against the accused.

Investigation Officer of the case was Shal Muhammad SHO who entered the witness box as PW-6. Preparation of site plan Ex.PB and examination of witnesses was confirmed by this witness.

6. After the closure of prosecution evidence, statements of accused was recorded u/s 342 of the Cr.PC. Accused neither opted examination on oath nor opted to produce evidence in his defence.

7. Learned APP for the State and counsel for the accused have been heard and gone through the record with their assistance.

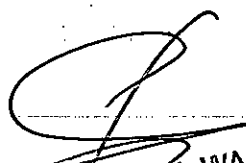
8. It was argued by learned APP that the recovery of narcotics is proved beyond doubt as is evident from the testimony of PW-3 and PW-4. That the recovery memo Ex.PW.3/1 has been proved to be correct and the testimony of the PWs has no contradiction on material particulars. That the offence is heinous in nature and there is nothing on record which could show any kind of *mala fide* on part of police in charging the accused. He concluded


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that though accused has not been arrested on the spot yet he has been named in the contents of FIR before arrest as proceedings have been conducted on spy information and accused is well known smuggler.

9. Conversely, learned defence counsel argued that no recovery has been made from possession of the accused and that the police have planted the recovery of narcotics against him with ulterior motive. That no independent witness came forward to support the prosecution case and that the testimony adduced by the prosecution is full of contradictions on material particulars. It was argued that as such very strong and consistent testimony would be required in order to prove his guilt which is missing in present case. He concluded that samples have been sent with considerable delay which creates a reasonable doubt.

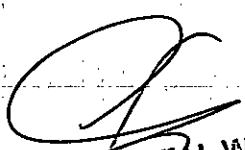
10. Chain of custody of the recovered material play pivotal role in the cases of Narcotics. The departure and arrival of the Police Party, transportation of the recovered material to Police Station, its entry in the relevant register, custody at Police Station, prompt and safe transmission of material to FSL are questions of paramount importance. In present case, the samples of chars were sent to the FSL with unexplained delay of 14 days which is obviously a substantial delay doubted the case reasonably. It has been settled in "Qaisar etc. vs State" case reported as 2022 SCMR 1641 by August the Supreme Court of Pakistan, that any break in the chain of safe custody or safe transmission of representative samples, makes the report of chemical examiner worthless and unreliable for justifying conviction of the accused.


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11. It is admitted fact that accused was neither arrested from the spot nor the alleged chars have been recovered from his immediate possession. The local police in the FIR has mentioned that the accused was boarded on the motorcycle, and the Motorcycle and chars were thrown behind at the spot while the police was having local pick-up, yet the escaping of the accused on foot is not appealing to prudent mind. The prosecution plea of direct nomination on the score of accused being well known smuggler is also unbelievable as there is no other FIR or criminal history sheet of the accused on record. The Investigation Officer while recording his statement as PW-6 has categorically admitted the fact that it is the single FIR against the accused and thus the plea of being well known smuggler is just presumption which cannot be based for judicial determination.

12. The features of accused are not mentioned in the initial report and thus his charging by name is questionable. It is the plea of prosecution that accused escaped from the spot and was nominated directly in the FIR for the reason of spy information about the accuse being prominent smuggler. There is no previous history sheet of the accused nor other FIRs of the similar nature have been registered; therefore, the plea to the extent of renowned smuggler is just assumption. As for as spy information is concerned, the feature of accused were supposed to be pen downed in initial report and identification parade was required on arrest of the accused for confirming the fact that it was accused who escaped from the spot.

13. The IO has not investigated regarding the ownership of the Motorcycles and neither any oral or documentary evidence has been produced in this


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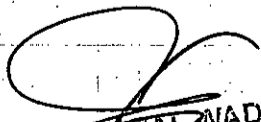
respect. The Motorcycle was disowned by the accused in his statement. Nothing had been brought on record that the investigation officer has approached the concerned department from the where the ownership of Motorcycle could easily have been made.

12. The examination of record as discussed above has given birth to reasonable doubt, the benefit of which has to be extended in favour of accused as was ordained in 2003 PLD 84 [Peshawar]. These facts and circumstances render the evidence as insufficient to believe the mode and manner of the crime narrated.

13. No witness from public either associated with recovery of chars or to cite as marginal witness to the recovery memo Ex.PW-3/1. The Complainant in his evidence speaks about the spy information but no private witness has been associated that create serious doubt as was laid down in 2015 PCr.LJ-1430 [Peshawar].

14. The accused facing trial have not recorded confession before the Court. He remained in police custody for sufficient time but no further recovery was made. The case property has not been produced before learned Area Magistrate while producing accused for grant of police custody and thus mandatory provision of law has been violated. The accused has no previous criminal history in such like offences.

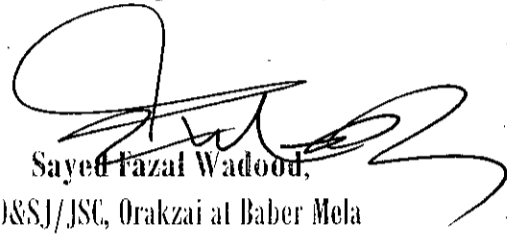
15. In the light of above discussion, it is being held that the prosecution evidence is falling in insufficient category of cogency; whereas, the secure category evidence is full of material contradictions that had given birth to reasonable doubt. Consequently, the benefit of doubt is extended to the accused


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facing trial and resultantly, accused Muhammad Saleem son of Qismat Khan resident of Qaum Malak Deen Khel, Tappa Karta Khel, village Khato Cheena, District Khyber is acquitted from the charges levelled against him. He is on bail, his bails bonds stand canceled and his sureties are absolved from the liabilities of bail bonds. Case property; the chars, shall be destroyed; whereas, the Motorcycle being unclaimed be confiscated to State, after expiry of period of appeal/revision. File be consigned to District Record Room, Orakzai after its necessary completion and compilation within the span allowed for.

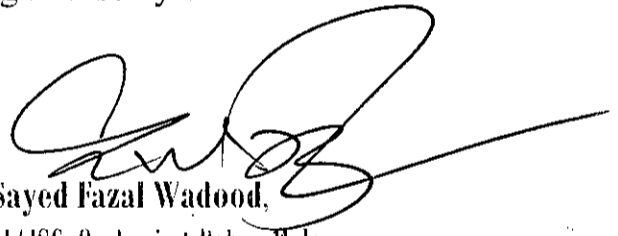
ANNOUNCED

26.11.2022


Sayed Fazal Wadood,
AD&SJ/JSC, Orakzai at Baber Mela

CERTIFICATE:

Certified that this Judgment is consisting upon seven (07) pages; each page has been read over and signed by me after making necessary corrections therein.


Sayed Fazal Wadood,
AD&SJ/JSC, Orakzai at Baber Mela