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IN THE COURT OF ABDUL BASIT
ADDITIONAL SESSIONS JUDGE-II/JUDGE SPECIAL COURT,
ORAKZAI

Case No. 02/03 of 2022

Date of institution: 20.01.2022

Date of decision: 12.03.2024

Date of consignment:

State through Ibrahim Khan SHO of Ghiljo Police Station Orakzai
(complainant)

Versus

1. Muhammad Israr s/o Mirasan Gul (aged about 29/30 years) r/o village Kot Kalay, Caste Ali Khel, District Orakzai.
2. Khwag Muhammad s/o Khay Badshah r/o village Kot Kalay, Caste Ali Khel, District Orakzai. (accused facing trial)

FIR No. 40 DATED: 12.12.2021 U/S 9-D CNSA

GHILJO POLICE STATION, ORAKZAI

JUDGMENT

1. Accused Muhammad Israr and Khwag Muhammad are facing trial in the subject case registered under section 9-D CNSA of Ghiljo Police Station, Orakzai.
2. Ibrahim Khan SHO, the complainant, along with police officials upon receiving spy information regarding smuggling of narcotics has arranged barricade at place of occurrence, where, around 1200 hours a motorcycle Honda 125 of black color approached and stopped by complainant; that two persons were riding on it; that both persons were bodily searched but nothing incrementing recovered from their personal possessions, however, search of motorcycle led the police to recovery of 05 packets chars from secret cavity made beneath the seat of motorcycle; that each recovered packets of chars weighed

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1050 gram making total quantity to be 5050 grams; that 10 grams chars was separated for FSL from each packet, which were sealed into parcels no. 1 to 5 and the remaining 5000 grams chars was sealed into parcel no. 6 to 10; that accused were arrested on the spot, murasila was drafted at the place of occurrence and sent to police station for bringing criminal law into motion; hence, the FIR.

3. On completion of investigation, complete challan under section 9-D CNSA was put in court against the accused facing trial.
4. Accused were summoned. On their attendance, the copies of the case furnished to them under section 265-C Cr.PC. The accused were then charge sheeted u/s 9-D CNSA to which they pleaded not their guilt and claimed trial.
5. Prosecution produced following evidence in support of its case;
6. Abdul Malik Muharrir, was examined as PW-1, who on receipt of the murasila report, card of arrest and recovery memo has registered the FIR, Ex.PA. He also kept the case property in the *malkhana* for safe custody vide register no. 19. The statement of Ibrahim Khan SI (complainant) was recorded as PW-2. He confirmed the initial report Ex.PA, to be true and testified the recovery of contraband through recovery memo, Exh.PW 2/1, to be genuine. He arrested the accused and issued their card of arrest, Exh.PW 2/2, and drafted murasila, Exh.PA/1. He produced case property Exh.P-1 to P-6 on completion of investigation, submitted complete challan, Exh.PW 2/3, against accused. One of the marginal witnesses to the recovery memo was Rasool Muhammad Constable, who was examined as PW-3. He testified that recovery was made from accused and was documented

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vide recovery memo. He took the murasila, recovery memo and card of arrest to the police station and handed over the same to the Muharrir for registration of FIR. Investigation Officer of the case was Sajjad Khan SI, who entered in the witness box as PW-4. He prepared the site plan, Exh.PW 4/1, and vides application, Exh.PW 4/2, produced accused before the Judicial Magistrate. He drafted applications to FSL, Exh.PW 4/3 and Exh.PW 4/4, and himself has taken the parcels to FSL vide road permit certificate, Exh.PW 4/5. He has produced FSL results in respect of motorcycle, Ex.PA, and contraband, Ex.PA/1.

7. Prosecution closed its evidence.
8. The statements of accused were recorded under section 342 CrPC, wherein, they again denied from the charges and adhered to their innocence. In reply to questions, they neither wished to be examined under oath nor to produce evidence in defense.
9. Arguments heard and record perused.
10. Learned Dy.PP for State argued that the prosecution has proved the case against accused beyond shadow of doubt; that recovery of contrabands is proved from accused; that prosecution witnesses are consistent in their statements in respect of recovery of narcotics from accused; that FSL results in respect of the samples, separated from the contraband recovered from accused, and motorcycle are in positive; that there is no malafide on part of the prosecution to falsely involve the accused in the case, therefore, he requested to award them maximum punishment.

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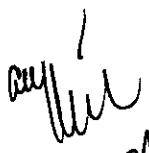
11. Counsel for the accused argued that prosecution has failed to prove its case against accused beyond reasonable shadow of doubt; that prosecution evidence contradicts & suffers major inconsistencies; that prosecution case is full of doubts because prosecution witnesses materially contradicted each other; that complainant has not recorded the statement of any private person regarding recovery; that recovery is not effected from the immediate possession of accused; that the accused have not confessed their guilt; that the case against the accused is not proved and request is made for the acquittal of accused.

12. Viewing the arguments advanced by learned counsel for parties and record available before the court, it is concluded that the local police on spy information had arranged a barricade and intercepted the motorcycle, wherefrom, recovered 5050 grams chars placed inside the secret cavity made beneath the seat of motorcycle, which were taken into possession and accused facing trial were arrested on the spot. It is bounden duty of prosecution to prove its case against them beyond shadow of a reasonable doubt from the moment of receiving the spy information by local police to the interception of accused, their transportation of contraband in motorcycle, taking of samples from recovered contraband, preparation of recovery memo, drafting murasila, witnessing of whole proceedings by marginal witnesses, registration of case, safe custody of recovered articles, investigation of the case and laboratory reports etc. To prove this, prosecution has led the evidence of many witnesses and the court has to see the mode and manner of the recovery of contraband and chain of safe

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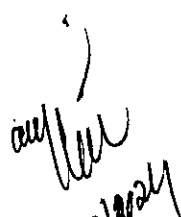
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transmission of the contraband from spot to the police station and then FSL and consistency of the witnesses in their depositions, which are the most important aspects of the case. As per record, the complainant has allegedly recovered the contraband, taken samples from each packet, packed and sealed each test sample in separate parcel bearing no. 1-5, which as per evidence were allegedly received by investigation officer, who took the same to forensic laboratory for chemical analysis; however, there is no entry in last column of serial no. 36 of register no. 19, attested copy of extract is available on file, as to whether these parcels were actually delivered by Muharrir of the police station to investigation officer or not, which not only doubts delivery of these parcels by Muharrir of the police station to investigation officer but also questions safe custody of contraband. Similarly, the statement of investigation officer (PW-4) also perused, who stated that entry pertaining to sample of parcels no. 1-5 made in register no. 19 do not provide any detail as to whether those were collected in sealed condition and born the monogram or not, which makes the receipt of samples by the Muharrir of the police station in sealed condition quite dubious. There is no second opinion that when case property is handed over to Muharrir of the police station, he enters it in register no. 19 of the police station maintained for said purpose, however, Muharrir of the police station neither produced the register no. 19 nor referred its extract in evidence, which further doubt about the genuine entries in the register. If the delivery of case property is admitted, even then, there is no record of police station or daily diaries produced before the court showing delivery of case


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property by Muharrir of the police station to the investigation officer for its production before Area Judicial Magistrate nor about handing over of the test samples by Muharrir of police station to investigation officer, who has allegedly transmitted parcels no. 1-5 to laboratory for chemical analysis; therefore, the chain of safe custody of samples was broken and transmission thereof to the laboratory had become doubtful; therefore, forensic laboratory report cannot be believed.

- 13. There are few contradictions also noted in the prosecution story. Complainant (PW-2) deposed that he has just shown the accused, case property and made pointation to the investigation officer on the spot, whereas, handed over the recovered contraband, motorcycle and accused to Muharrir of police station, however, the investigation officer contradicted him deposing that complainant (seizing officer) has handed over him the parcel & motorcycle on the spot. Likewise, Rasool Muhammad (PW-3) was the witness to recovery proceedings and also took the murasila etc. to police station, where the case was registered, investigation was handed over to investigation officer in the police station and from there he has returned to the spot with the investigation officer (inadvertently the word seizing officer was written in the evidence) but investigation officer stated that when he reached to the spot, the murasila carrier was already present there, which means that Rasool Muhammad has not gone there with the investigation officer and above facts leads to inference that either no occurrence has taken place and if any taken place, then, it has taken place in a mode and manner different from the story stated above, which puts serious dent in the prosecution version. On the other


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hand, if it is construed that the recovery witness has returned to the spot with seizing officer, even then, it spoils the prosecution version because the seizing officer had allegedly handed over the murasila etc. to recovery witness on the spot to carry the same to police station for registration of case and he remained on the spot with the accused & case properties, which otherwise, creates conflict in the version of both witnesses and leads to adverse inferences.

14. Recovery memo witness (PW-3) also deposed that since the seizing officer had recovered the contraband from accused; thus, he did not know that whether the packets were lying in sequence or otherwise, which means that if the alleged recovery was made by complainant and marginal witness did not know the sequence of the placement of recovered packets, then, it means that recovery was not made in his presence nor he was present on the spot and was cited marginal witness to the recovery memo later on to fill up the lacunae.

15. Likewise, complainant deposed that when he has made pointation of the spot to the investigation officer, shown him the accused and case property, then, the investigation officer did nothing in his presence, which infers that the site plan was prepared by investigation officer later on and not on pointation of the complainant and thus makes the preparation of site plan on pointation of complainant doubtful. Even, complainant deposed that the investigation officer has drafted the application for FSL on the spot but later on deviated saying that since he was not present with investigation officer; therefore, cannot say that he has drafted the application on the spot or in the police station, which makes him untrustworthy witness.

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16. Since, the mode and manner of the occurrence has been doubted due differences in the statements of prosecution witnesses; therefore, the most reliable and helping evidence in such scenario could have been the call data record of the complainant, accused and investigation officer, which could have led their presence on the spot, movement of the murasila carrier from police station back to the spot either in person or with the investigation officer and also the movement of investigation officer from police station to the spot, however, the investigation officer candidly stated that he has not collected any CDR data of accused and prosecution parties.

17. The contraband was admittedly not effected from the personal possessions of the accused facing trial rather from the secret cavities allegedly made beneath the motorcycle, which were allegedly made by the accused as per statement of the complainant, however, there is no proof as such of this fact on the record, whereas, it also raises a question as to whether accused were in active knowledge of the recovered contraband or not. Had, the ownership of motorcycle been established then this would have become easier to ascertain the real culprit, however, the investigation officer badly failed to ascertain that who was the owner of motorcycle in question, which further makes the case of prosecution doubtful.

18. Complainant (PW-2) admitted that seals of case property produced before the court were broken, who explained the same might have been broken due to transportation of the case property, however, it is equally possible that seals of the case property might have been broken later on and the recovered articles might have been replaced

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with the chars to strengthen the prosecution case. On same footings, contraband was allegedly recovered from secret cavities specifically made beneath the seat of motorcycle; however, he did not measure the length and width of secret cavities to bring on record that those five packets could have actually be placed/fitted in said cavity or not. Similarly, when on the request of learned defense counsel, the permission was granted to place those packets in a sequence these were recovered from the spot and to take the measurement, the same were placed in sequence to each other and length of those packets came out to be 3 feet 9 inches, which was not appealing to prudent mind because the length of seats of motorcycle is normally 2 feet and it is hardly possible to place those five packets in said area as per measurement told. To cover up the shortcoming, the complainant though volunteered that those packets were placed in the secret cavities close to each other but due to non-measurement of length and width of seat/cavity and non-production of any proof of secret cavities on the file, his stance cannot be trusted.

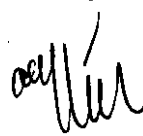
19. From above appreciation of evidence and lacunae noted above, it is evident that the prosecution has badly failed to prove the mode and manner of making arrest and seizure of narcotics from accused, which has become doubtful. Moreover there are many discrepancies and contradictions in prosecution case, which have been discussed in detail above. In view of above facts, it is held that admittedly a huge quantity of chars has been shown to be recovered by police but the accumulative effect of lacunae noted makes the prosecution case doubtful and this is the cardinal principle of law that benefit of the

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slightest doubt in criminal case would be extended to the accused being favorite child of law. It is, therefore, held that prosecution has failed to bring home the guilt against accused facing trial beyond shadow of doubt: hence, accused Muhammad Israr and Khwag Muhammad are acquitted from the charge leveled against them. They are on bails; therefore, their sureties are discharged from the liability of the bail bonds.

20. Case property i.e. the contraband be destroyed in accordance with law, whereas, the motorcycle in question be returned to lawful on his production of original documents both after the expiry of period provided for appeal/revision.
21. File consigned to record room after completion and compilation.

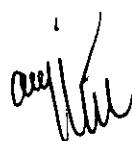


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CERTIFICATE

It is certified that this judgment of consists of ten (10) pages and each page is duly signed by me after necessary corrections.



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