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

Case No. 30/3 of 2023

Date of original institution: 07.08.2023

Date of institution to this court: 07.09.2023

Date of decision: 01.04.2024

Date of consignment:

State through Sardar Khan ASHO of the Kurez Boya Police Station District Orakzai (complainant)

Versus

Naseem Gul s/o Ambra Gul, resident of Shaho Khel, District Khyber (the accused facing trial)

FIR No. 22 DATED 21.06.2023 U/S 9-D CNSA
KUREZ BOYA POLICE STATION, ORAKZAI

Judgment

1. Accused Naseem Gul is facing trial in the subject case registered under section 9-D CNSA of Kurez Boya Police Station, Orakzai.
2. Sardar Khan ASHO, the complainant, along with police officials on receiving spy information about smuggling of narcotics, arranged a barricade at place of occurrence, where at about 0720 hours, a flying coach registration no. LWN-4401 of white color approached and stopped by complainant for search; that 04 persons, out of whom two persons were veiled, seated on second seat of the flying coach were found suspicious, who were deboarded; that veil of two persons were removed and they were found males and disclosed their names as Danish and Rahid; that body search of Danish led the complainant to the recovery of 09 packets of chars tied with his abdomen and a Samsung touch mobile phone from his personal possession, whereas,

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body search of Rahid led the recovery of 09 packets of chars tied with his abdomen; that the recovered 18 packets chars were having weight of 1000 grams each making total quantity of 18000 grams; that 10 grams chars from each packet was separated for FSL, which were sealed in parcels no. 1 to 18 and the remaining 17820 grams chars was sealed in parcel no. 19; that veil and banyan of accused Danish were sealed in parcel no. 20 and veil and banyan of accused Rahid were sealed in parcel no. 21; that recovery proceedings were recorded in mobile phone and saved into USB which was sealed into parcel no. 22; that on cursory interrogation, the arrested accused told that the said chars belonged to Farooq and Naseem Gul, who were occupying the second seat in the vehicle; that they were also bodily searched and a touch mobile phone Infinix was recovered from the possession of Farooq and thus both the above mobile sets were sealed in parcel no. 23; that they were arrested on the spot, hence, the FIR.

3. On completion of investigation, complete challan under section 9-D CNSA against accused was put in court.
4. Accused was summoned. On his attendance, the copies of the case furnished to him under section 265-C Cr.PC. The accused was then charge sheeted u/s 9-D CNSA, to which he pleaded not his guilt and claimed trial.
5. Prosecution produced following evidence in support of its case;
6. PW-1 is the statement of Khayal Hassan constable has taken parcels no. 1-18 containing samples of chars to FSL Peshawar for chemical analysis. Statement of Sardar Khan SI (complainant) was recorded

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as PW-2, who confirmed the initial report, Ex.PW 6/1, and recovery of the contraband vide recovery memo, Ex.PW 2/1, to be true. He arrested the accused and issued his card of arrest, Exh.PW 2/2, and drafted the murasila, Exh.PW-2/3. He place the remaining chars excluding samples for FSL weighing 17820 grams in parcel no. 19, Exh.P-1, veil and banyan of accused Danish in parcel no. 20, Exh.P-2 and veil and black banyan of accused Rahid in parcel no. 21, Exh.P-3. He placed USB in parcel no. 22, Ex.P-4 containing video of recovery proceedings. One of the marginal witnesses to the recovery memo was Muhammad Waseem Constable, who was examined as PW-4. He testified that the recovery was made from accused and was documented vide recovery memo. He took the murasila, recovery memo and card of arrest to the police station for registration of FIR. Mohsin Ali SI was investigation officer of the case, who entered in the witness box as PW-4. He prepared site plan, Exh.PW 4/1. He has confirmed the preparation of site plan and examination of witnesses. He produced the accused before the Area Judicial Magistrate vide application, Exh.PW 4/2. He also produced FSL application, Exh.PW 4/3, and road certificate, Exh.PW 4/4. He vide application, Exh.PW 4/5, produced accused before the Court for recording confessional statement. He produced memo, Exh.PW 4/6, vide which father name of Farooq was rectified. He also produced copies of daily diary reports, Exh.PW 4/7; copies of register no. 19, Exh.PW 4/8, and FSL report, Exh.PW 4/9. After completion of investigation, he handed over the case file to the SHO for onward submission of complete challan against the accused. PW-5 is the

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statement of Altaf Ali SHO, who has submitted complete challan, Exh.PW 5/1, against the Naseem Gul and separate challan against juvenile accused, Exh.PW 5/2. Asmat Ali Muharrir was examined as PW-6, who on receipt of murasila registered the FIR, Exh.6/1, and also locked the accused in police station and kept the case property in *maalkhana* for safe custody vide register no. 19. He made entries in the daily diaries and also made entries regarding the parcels no. 19 to 21 in register no. 21.

7. Prosecution closed its evidence. The statement of accused was recorded under section 342 CrPC, wherein, he again denied from the charges and adhered to his innocence. In his replies to questions, he neither wished to be examined under oath nor to produce evidence in defense.

8. Arguments heard and record perused.

9. 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 possession of accused; that prosecution witnesses are consistent in their statements in respect of recovery of narcotics from accused; that FSL result in respect of the samples, separated from the contraband recovered from accused are in positive; that there is no malafide on part of prosecution to falsely involve the accused in the case, therefore, he requested to award him maximum punishment.

10. 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;

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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 has not confessed his guilt; that the case against the accused is not proved and request is made for the acquittal of accused.

11. The record available before the court and arguments advanced by learned counsel for parties leads me to a conclusion that the local police on spy information arranged a barricade, stopped a flying coach and recovered 18000 grams chars from Danish and Rahid, who stated the same to be the ownership of accused facing trial and co-accused Farooq, which was taken into possession and the accused facing trial along with other co-accused were arrested on the spot. It is bounden duty of prosecution to prove its case beyond shadow of a reasonable doubt from the moment of receiving the spy information by the local police to the interception of accused, recovery of the contraband, taking samples from recovered contraband, preparation of the recovery memo, drafting the murasila, witnessing the whole proceedings by marginal witnesses, registration of case, safe custody of recovered articles, investigation of the case and laboratory reports etc. It is worth mentioning that contraband was allegedly recovered from direct possession of accused Danish and Rahid, whereas, no contraband or incriminating material as such recovered from possession of accused facing trial and accused Farooq, who were charged since accused Danish and Rahid told that the chars belonged to them.

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12. To prove this, prosecution has led the evidence of many witnesses to establish the safe custody and safe transmission of the drug from the spot recovery till its receipt by the Narcotics Testing Laboratory satisfactorily as well as to establish the mode and manner of the commission of offence, which are the most important aspects of the case because in narcotics cases, the chain of safe custody is the fundamental as the report of the Government Analyst is the main evidence for the purpose of conviction. The prosecution must establish that chain of custody was unbroken, unsuspecting, safe and secure. Any break in the chain of custody i.e. safe custody or safe transmission impairs and vitiates the conclusiveness and reliability of the report of the Government Analyst, thus, rendering it incapable of sustaining conviction, the reliance is place on Zahir Shah versus The State (2019 SCMR 2004). No doubt, the seizing officer (PW-2) has arrested the accused facing trial, recovered the contraband and mobile phones, prepared the recovery memo, issued the card of arrest of accused facing trial; however, his statement is silent about handing over of the recovery memo and card of arrest to constable Muhammad Waseem for onward transmission to Muharrir of the police station except handing over of murasila report. The statement of complainant (PW-2) is also silent about delivery of mobile sets and contraband including the samples allegedly separated from the recovered chars to Muharrir of the police station for safe custody in the *malkhana*. Likewise, constable Muhammad Waseem (PW-3) just spoke about the receipt of murasila report for onward submission to the police station and did not utter a single word about receipt of

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recovery memo and card of arrest and its delivery to Muharrir of the police station. On the other side, Asmat Ali, Muharrir of the police station (PW-6), told in his statement that card of arrest of accused & recovery memo were handed over to him by constable Muhammad Waseem, whereas, seizing officer has handed over him the accused and parcel no. 1-22, which he entered in the register no. 19 of the police station and kept in the *malkhana*, however, there is no entry in extract of register no. 19, Exh.PW 4/8, about the name of person, who has delivered him the case property. On the other side, although, Muharrir (PW-6) told that he has handed over the parcels no. 1-18, test samples, and parcel no. 19-22, remaining case properties, to the investigation officer for onward submission for FSL and Magistrate respectively, however, the extract of register no. 19, Exh.PW 4/8, admittedly does not provide any entry/detail about delivery of test samples and the case properties to the investigation officer for onward submission for FSL and production before the Magistrate. Even, the Muharrir (PW-6) admitted that he has not mentioned this fact in the daily diary of the police station nor the fact of return of the case property to the police station and its depositing in the *malkhana*. The extract of register no. 19, Exh.PW 4/8, only provides about transmission of parcels no. 1-18 to FSL Peshawar through constable Khayal Hussain, whereas, there is also nothing on record that as to who has delivered him those parcels for transmission to FSL Peshawar, which creates doubt about the chain of safe custody of case property in the police station, its delivery to the investigation officer and then to Khayal Hussain. Even, the date, time and his


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signature are also not mentioned in the register no. 19, whereas, he has admitted that last column of the register no. 19 is neither written nor signed by him. Muharrir (PW-6) of the police station has even admitted the use of whitener and overwriting in the second line of the last column of the register no. 19, Exh.PW 4/8, which not only doubts about the genuine entry in the register but also infers the fake entry in the register to gain desired result and thus the chain of safe custody of samples was broken and transmission thereof to the laboratory had become doubtful; therefore, the forensic laboratory report cannot be relied against the accused facing trial.

13. More so, though the test samples have been allegedly separated from each packet and sealed in parcels no. 1-18, however, not a single packet from which the test samples were separated has been given any corresponding number so as to verify that such and such samples were taken from corresponding packet and thus also leads to adverse inference that all the tests samples might have been taken from single packet for positive results.

14. Record provides that though a huge quantity of chars has been allegedly recovered but the seizing officer (PW-2) admittedly did not mention the kind of chars in his report that as to whether the recovered chars was in *pukhta* or *garda* form, which further creates doubt in the prosecution story and draws an adverse inference that nothing as such had recovered from the accused facing trial but the local police had entangled the accused facing trial in a concocted case.

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15. Importantly, the statement of complainant (PW-2) suggests that the murasila report, recovery memo and card of arrest were drafted by him, however, in reply to a question, he straightaway replied that he is illiterate, cannot read or write and he has not scribed the above documents. To justify his position, he explained that all the above documents were prepared by a constable on his dictation. On the other side, Muhammad Waseem, marginal witness (PW-3), deposed that all the above documents were prepared by complainant and in the vehicle that not only questions the credibility of the statement of marginal witness but his presence on the spot. Even, the presence of marginal witness on the spot at the time of commission of offence can further be doubted from contradictions brought in his statement because Muhammad Waseem deposed that after receipt of murasila, he has left the spot for police station at 1000 hours (10.00 am) in the local vehicle, while, the distance between spot and police station was 35/36 kilometers, which the witness deposed to could have been covered in 60 minutes (one hour); therefore, it was not possible for him to reach to the police station earlier than 1100 hours, however, FIR suggests that it was registered at 1010 hours, which is not possible. Even, the marginal witness deposed that the investigation officer has reached to the spot at about 1030 hours and spent 30-40 minutes there having availed the fact that the investigation officer might have returned from the spot around 1100-1110 hours but the complainant (PW-2) stated that investigation officer has reached to the spot at 1100 hours and spent two hours there, which is a huge contradiction in the statements of both these witnesses.

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16. This would be at the cost of repetition that marginal witness, PW-2, took the murasila to police station at 1000 hours but little ahead stated that they had left the spot on completing the spot proceedings at 1000 hours (10.00 am). Likewise, after a while he negated his own stance stating that they have returned to the police station after completing the whole proceedings around 1145 hours, whereas, the daily diary no. 8 dated 21.06.2023, Exh.PW 4/7, provides that they have returned to the police station at 1350 hours. Similarly, he stated that the investigation officer left the spot at 1200 hours, which is negated by investigation officer stating that he has left the spot at 1330 hours, which appears to be blowing hot and cold at the same breath and casts serious doubts in the prosecution case.

17. The complainant (PW-2) though deposed that murasila report etc. was drafted on his dictation but strange to note that he did not remember the name of constable, who has written those documents. Even, he admitted that there is no difference in hand writings of card of arrest, murasila report, recovery memo and site plan, which draws adverse inference with respect of fact that either the site plan was prepared by the constable, who has drafted the murasila etc. or the investigation officer has scribed all above documents and conducted the investigation before the registration of case. This is also strange to note that the complainant has stopped the flying coach, took the mobile number of the driver of flying coach, as evident from the statement of investigation officer, however, he did not know the name of driver, which avails that the occurrence might have taken place in a mode and manner different from narrated in the report.

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18. Importantly, total 23 parcels were made in the instant case; however, marginal witness (PW-3) deposed that total 18 parcels were made in the instant case. Likewise, PW-2 deposed that other passengers were also present in the flying coach at the time of occurrence; however, neither the complainant bothered to cite a single independent person as marginal witness to the whole proceedings nor did investigation officer record the statement of single independent person to fortify the prosecution case. Although, the investigation officer stated that he has recorded statement of driver of the flying coach but he was not produced as witness before the court and thus best available evidence was withheld by the prosecution.

19. Similarly, it is also on record that one of the prosecution witnesses Afsar Ali Shah was second marginal witness to the recovery memo but he was not produced by the prosecution for reasons best known to them and closed the evidence. So, in the situation, not only adverse inference under Article 129 (g) of The Qanun-e-Shahadat Order, 1984 can safely be drawn, but the legal inference could also be drawn that if the said witness had entered into the witness box then he would not have supported the prosecution case.

20. Statements of complainant (PW-2) and marginal witness (PW-3) provide that on receipt of spy information, they had left for the spot and they were also accompanied by Afsar Ali Shah and driver Syed Hasan Raza and did not name any other person, however, daily diary no. 16 dated 21.06.2023, Exh.PW 4/7, speaks about accompanying of Saeed Gul with them as well but his name is neither mentioned in the murasila report, FIR, the site plan etc. nor in the statements of any prosecution witnesses, which further put dent in prosecution case.

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21. Record and statements of investigation officer provides that Khayal Hasan (PW-1) not only accompanied the investigation officer to the spot at the time of investigation but also allegedly took the samples of chars to the FSL Peshawar for chemical analysis, however, when his statement was recorded, he stated that he has just took the test samples to the FSL Peshawar and did not participate in any other proceedings with the investigation officer, which not only vitiates his statement but also questions the statement of investigation officer, from which an adverse inference can be drawn that the investigation officer might not have paid any visit to the spot and conducted the investigation in the police station.


22. It is known to all that when recovery is effected from the accused, the seizing officer prepares the recovery memo, card of arrest and murasila report on the spot, where after, murasila etc. is sent to police station for registration of the case and an FIR is registered. In the instant case, perusal of recovery memo and card of arrest of the accused provide that it contains the FIR number, which is not possible before registration of the case. Even, the seizing officer (PW-2) was confronted with the recovery memo and card of arrest with an aim to check whether any addition or deletion was made in it or not but he after thorough perusal answered that no addition or deletion was made in it, which apprehends that recovery memo and card of arrest of the accused were prepared in the police station and not on the spot and thus creates doubt about the mode and manner of the recovery of alleged contraband and time of occurrence.

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- 23. From above appreciation of evidence it is held that the proceedings of making arrest and seizure of narcotics from accused facing trial by the police had become doubtful. It is also by now a settled principle of law that it is not necessary that there should be many circumstances creating doubts rather a single circumstance, creating reasonable doubt in prudent mind about guilt of accused makes him entitled to its benefit, not as a matter of grace or concession but as a matter of right, the wisdom is drawn from case law reported in 2023 YLR 2579 of august Peshawar High Court [Mingora Bench]. In view of above discussed facts, it is held that the prosecution has failed to bring home the guilt against the accused, hence, while extending the benefit of doubt, the accused Naseem Gul is acquitted from the charge leveled against him. As accused is on bail, therefore, his sureties are discharged from liabilities of the bail bonds.
- 24. Case property i.e. chars be destroyed, while, the recovered mobile phone sets be returned to last possessors both after expiry of period provided for the appeal/revision.
- 25. File consigned to record room after completion and compilation.


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CERTIFICATE

It is certified that my judgment consists of thirteen (13) pages and each page is duly signed by me after necessary corrections.

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