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IN THE COURT OF ABDUL BASIT
**ADDITIONAL SESSIONS JUDGE-II/JUDGE SPECIAL COURT/
JUDGE JUVENILE COURT/JUDGE CHILD PROTECTION COURT,**
ORAKZAI

Case No. 02/23 JC of 2023

Date of institution: 21.02.2023

Date of decision: 02.04.2024

Date of consignment:

State through Shal Muhammad SHO of the Kalaya Police Station Orakzai
(complainant)

Versus

Waseem Akram s/o Malak Jan, Qaum Sunni Stori Khel, Tarkho Sam,
District Orakzai (accused facing trial)

FIR No. 117 DATED 20.11.2022 U/S 9-D CNSA

KALAYA POLICE STATION, ORAKZAI

Judgment

1. Accused Waseem Akram is facing trial in the subject case registered under section 9-D CNSA of Kalaya Police Station, Orakzai.
2. Shal Muhammad SHO, the complainant, along with police officials on receiving spy information about smuggling of narcotics through motorcycle, arranged a barricade at place of occurrence, where at about 1800 hours, the above named rider approached on motorcycle, who with the help of torch was signaled to stop he accelerated the speed and hit the constable Muhammad Younas with intention to kill, who fell down and sustained severe injuries; that accused has also fallen down from the motorcycle and sustained injuries, who was overpowered; that injury sheet of the injured constable was prepared, who was shifted to the THQ Hospital Kalaya under the escort of constable Muhammad Ayaz; that complainant bodily searched the accused, who had worn two grey color waistcoats; that the first

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waistcoat had three pocket and the second consisted had two pockets; that complainant has recovered 4 packets of chars each from three pockets, three packets of chars from fourth pocket and two packets of chars from fifth pocket making total recovery of 17 packets each containing 1000 grams chars total weighing 17000 grams (17 kilogram); that 10 grams chars from each packet was separated for FSL which were sealed into parcels no. 1-17 and the remaining chars was sealed into parcels no. 18-34; that waistcoats weighing 415 grams were sealed into parcel no. 35; that case property along with motorcycle bearing engine no. US12541260 and chassis no. US125-41757 in damaged condition; that injury sheet of accused was also prepared and he was shifted to the THQ Hospital Kalaya under the escort of Muhammad Rasool; that the recovered articles were taken into possession by the local police and accused was arrested, hence, the FIR.

3. On completion of investigation, complete challan under section 9-D CNSA was put in court against the accused.
4. Accused was summoned through *zamima bay*. On his attendance, the copies of the case furnished to accused under section 265-C Cr.PC. The accused was then charge sheeted u/s 9-D of The KP Control of Narcotics Substance Act 2019, to which he pleaded not his guilt and claimed trial.
5. Prosecution produced following evidence in support of its case;
6. PW-1 is statement of Aftab Ahmed SI, who has prepared juvenile challan, Exh.PW 1/1, on the direction of court. The statement of Shal Muhammad (complainant) was recorded as PW-2, who confirmed the initial report, Ex.PW 8/1; prepared the injury sheet of Muhammad

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Younas, Exh.PW 2/1, took into his possession the contraband and motorcycle vide recovery memo, Ex.PW 2/2; he arrested the accused and issued his card of arrest, Exh.PW 2/3, prepared injury sheet of accused, Exh.PW 2/4, and drafted the Murasila, Exh.PW 2/5. He produced remaining chars excluding samples for FSL in parcel no. 18-34, Exh.P-1-17, waistcoats in parcel no. 35, Exh.P-18, and motorcycle, Ex.P-19. After completion of investigation, he submitted complete challan, Exh.PW 2/6 and Exh.PW 2/7, against the accused in instant case. One of the marginal witnesses to the recovery memo was Taj Gul, who was examined as PW-3. He testified that the recovery was made from accused and was documented vide recovery memo in his presence. He took the murasila, recovery memo and card of arrest to police station for registration of FIR. Muhammad Haneef OII/SI was investigation officer of the case, who entered in the witness box as PW-4. He prepared site plan, Exh.PW 4/1, and confirmed the preparation of site plan and examination of witnesses. He produced blood stained pebbles in parcel no. 36, Ex.PW 4/1-A, which were recovered from the place of injured Muhammad Younas, and vides application, Exh.PW 4/2, produced the accused before Judicial Magistrate. He made applications to the SP Investigation Exh.PW 4/3 and Exh.PW 4/4. He produced FSL applications and road certificates, Exh.PW 4/5 to Exh.PW 4/8, respectively. He had submitted application, Exh.PW 4/9, before Judicial Magistrate for issuance of *zamima-B*, Exh.PW 4/9-A. Vide application, Exh.PW 4/10, two days custody was granted. He prepared pointation memo, Exh.PW 4/11. Vide application, Exh.PW 4/12, he produced accused for confessional statement before the Judicial Magistrate. He also

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produced daily diary reports, Exh.PD, and register no. 19, Exh.PR, FSL reports, Exh.PW 4/13 to Exh.PW 4/15. He prepared memo of addition of section of law, Exh.PW 4/16 and Exh.PW 4/17. PW-5 is the statement of Muhammad Raziq, who has taken the parcels to FSL Peshawar. PW-6 is the statement of Khalil ur Rehman constable who is marginal witness to the recovery memo, already Exh.PW 4/1. Dr. Farooq Azam was examined as PW-7, who has examined injured Muhammad Younas and accused. He produced the reports, Exh.PW 7/1-Exh.PW 7/3, respecting examination of injured Muhammad Younas and accused. Asmat Ali Muharrir was examined as PW-8, who on receipt of the murasila, recovery memo and card of arrest, registered the FIR, Exh.PW 8/1, and also kept the case property in *maalkhana* for safe custody vide register no. 19, already Exh.PWR. He produced the DD report, Exh.PB. Statement of Muhammad Younas constable was recorded as PW-9, who confirmed that accused Waseem Akram intentionally hit him with motorcycle due to which he got severe injuries. Statement of Gul Kareem constable was recorded as PW-10 who is the marginal witness to the recovery memo, already Exh.PW 4/11, vide which accused made pointation to the investigation officer.

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. Learned APP for State argued that the prosecution has proved the case against accused beyond shadow of reasonable doubt; that

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

9. 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 recovery is not effected from the immediate possession of accused; that accused has not confessed his guilt; that the case against the accused is not proved and request is made for the acquittal of accused.

10. Arguments heard and record perused.


11. Viewing the arguments advanced by learned counsel for parties and record available before the court, it is concluded that local police on spy information had arranged a barricade and intercepted a motorcycle rider approaching to them, however, the accused accelerated the speed, hit the constable Muhammad Younas, the injured, who fell down and received severe injuries, whereas, the accused has also fallen down from the motorcycle, received injuries but during his body searched led the recovery of 17 packets containing 17000 grams of chars from five pockets of two waistcoats he was wearing, which were taken into possession and accused was arrested on the spot. It is bounden duty of prosecution to prove its case against the

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accused beyond shadow of a reasonable doubt from the moment of receiving the spy information by local police to the interception of accused, his transportation of contraband on 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; therefore, court has to see the mode and manner of the recovery of contraband and chain of safe 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.

12. As per record, complainant has allegedly recovered the contraband, taken samples from each packet, packed and sealed each test sample in separate parcels no. 1-17, which as per evidence were allegedly received by investigation officer for FSL; however, there is no entry in last column of register no. 19, Exh.PWR, as to whether these parcels were actually delivered by Muharrir of 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. Rather, the entry in the last column of the extract only reflects taking of parcels no. 1-17 to FSL Peshawar through Constable Muhammad Raziq and there is no detail as to whom and when those parcels were handed over and delivered to Muhammad Raziq for taking to FSL Peshawar. This is also pertinent to mention that according to daily diary no. 5 dated 22.11.2022, Exh.PWD, investigation officer along with Muhammad


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Raziq has taken parcels no. 1-17 along with case properties of other cases to FSL Peshawar for chemical analysis; however, the statement of Muhammad Raziq (PW-5) provides that the investigation officer has handed over him these parcels for submission to FSL Peshawar, which he took there and he has not participated in any other proceedings with the investigation officer nor did he gone with the investigation officer anywhere, which questions the entries made in the daily diary as well as creates doubt about chain of safe custody of samples and transmission thereof to the laboratory for chemical analysis; therefore, due to these reasons forensic laboratory report cannot be believed.

13. The contents of report also provide the commission of two fold offences; first over speeding, hitting, causing injuries to constable and following the recovery of contraband. Although for both these offences separate challan have been received, however, witnesses to both the occurrence are one and the same. Complainant admitted that he did not mention in the murasila report that who was present with him at the barricade, however, stated that their names were given in the daily diary. Perusal of daily diary does not provide association of injured Muhammad Younas from police station to the spot rather evidence provides that the local police had arranged barricade near Shiraz Garhi Check Post, where the injured was serving and present at relevant time along with two other constables adjacent to barricade as evident from the point marked 4 in the site plan, Exh.PW 4/1. Taj Gul (PW-3), however, contradicted stating that Muhammad Younas had also accompanied them from the police station to the spot but the daily diaries are silent about this fact.

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14. The statement of complainant (PW-2) provides that he took around 1½ hour in completing the whole proceedings on the spot, whereby, also handed over the murasila, recovery memo and card of arrest to Taj Gul at 1930 hours for taking to the police station for registration of the case and left the spot for police station along with constables including Muhammad Ayaz at about 2200 hours but it is on record that constable Muhammad Ayaz has escorted the injured to the hospital, therefore, he was supposed to be not with the complainant at the time of his return to the police station. Complainant, however, stated that by that time Muhammad Ayaz had returned from hospital to the spot, which cannot be believed to be true because Taj Gul (PW-3) not only deviated from his stance but also stated that he has returned to the spot around 2030 hours and constables Muhammad Rasool & Muhammad Ayaz did not return from hospital to the spot in his presence. On contrary, Khalil-ur-Rehman (PW-6) had accompanied investigation officer to the spot and told that when they had reached to the spot, constables Muhammad Rasool, Muhammad Ayaz etc. were already present there, which above statements of the three witnesses are fully contradictory to each other and leads to inference that these witnesses were not present on the spot at the same time and were deposing falsely to entangle the accused in the instant case. Besides above, there is also conflict in the statements of prosecution witnesses because according to investigation officer (PW-4), Khalil-ur-Rehman (PW-6) and the injured (PW-9) told that the In-Charge of the check post was Abdul Qayum, however, Taj Gul (PW-3) negated them stating that that was Farooq, which clearly suggests that Taj Gul was not present on the spot and was introduced later on to

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strengthen prosecution case. Likewise, there are also contradictions noted in the statements of prosecution witnesses as Taj Gul (PW-3) deposed that he has received the murasila at 1900 hours & reached to the police station at 1930 hours, however, complainant (PW-2) deposed that he has completed the proceedings at 1930 hours, where after, handed over the murasila to Taj Gul for taking to the police station for registration of case. Likewise, complainant (PW-2) deposed that he has left the spot for police station at about 2200 hours, however, Taj Gul (PW-3) stated that they have left the spot at about 2100 hours, which provides a difference of one hour, which further creates doubt in the prosecution case and establishes that Taj Gul had not accompanied complainant but was later on introduced.

- 16. Although, the statement of driver Abid Gul was not recorded and his statement recorded u/section 161 CrPC has no relevancy, however, sometimes the facts not relevant to the case becomes relevant and change the whole scenario. In the instant case too, complainant though handed over the murasila etc. to Taj Gul for taking to the police station for lodging of an FIR, which Taj Gul has allegedly taken to the police station on motorcycle he took from the checkpost, however, the investigation officer (PW-4) endorsed that Abid Gul, driver of the police vehicle, in his 161 CrPC statement deposed that he along with Taj Gul had left for the police station for handing over the murasila to the Muharrir, which on one hand envisages that Taj Gul did not go to the police station alone and on the other hand provides that he had gone to the police station in official vehicle and not on motorcycle.

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17. It is evident from statement of complainant (PW-2) that the injured Muhammad Younas was shifted to the hospital under the escort of Muhammad Ayaz, whereas, the accused being injured was shifted to the hospital under the escort of Muhammad Rasool but strange to note that he did not remember that through which means both the injured were shifted to hospital. Taj Muhammad, however, clarified that both the injured were shifted to the hospital through private vehicles. Contrary to this, investigation officer (PW-4) stated that Abid Gul, driver of official vehicle, in his statement recorded under section 161 CrPC mentioned that injured Muhammad Younas was shifted to hospital in Government ambulance along with Muhammad Ayaz and Muhammad Rasool, which facts are utterly in conflict with the statements of complainant and Taj Gul, which casts serious doubt in the prosecution case. Similarly, the investigation officer in reply to a question also stated that according to 161 CrPC statement of Muhammad Rasool, the accused was shifted by him to THQ hospital in Government ambulance. More so, complainant admitted that he has not witnessed In-Charge of the Shiraz Garhi Checkpost during the whole proceedings, whereas, investigation officer (PW-4) stated that during his visit to the spot, In-Charge of the checkpost was not present there because he was with injured in hospital, which speaks volume about the mode and manner of the commission of offence.

18. Since, the occurrence has allegedly taken place in front of Shiraz Garhi Checkpost and allegedly one of the constable Muhammad Younas of the checkpost has sustained injuries in the unfortunate incident, however, the investigation officer (PW-4) did not bother to record the statement of single police official present in the checkpost

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so as to strengthen the prosecution version or at least to establish the fact that on relevant day, Muhammad Younas was present there on duty.

19. This is also astonishing to note that the case was registered at 2030 hours, where after, the copy of FIR was handed over to investigation officer for investigation. The investigation officer accompanied with him two police officials and a driver and proceeded to the spot in police vehicle and conducted the investigation, however, Taj Gul (PW-3) deviated stating that the investigation officer along with two police officials came to the spot on motorcycle at 2000 hours, the time the case was not yet registered and was not handed over to investigation officer to investigate. Likewise, Taj Gul deposed that the investigation officer has recorded his statement at 2100, whereas, the investigation officer stated that he has recorded the statements of Taj Gul and Abdul Sattar at 2150 hours. Had Taj Gul been present there, he must have stated that complainant has first prepared the injury sheet of Muhammad Younas and then prepared the recovery memo etc. as told by the complainant; however, he stated that the complainant has first prepared the card of arrest of the accused. Even, he admitted that he has not stated anything about preparation of injury sheets in his 161 CrPC statement, which further confirms his absence on the spot.

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Likewise, complainant has alleged that he has consumed 1½ hours in the whole recovery proceedings etc., however, Taj Gul deposed that complainant has spent around 10 minutes each in the preparation of each parcel, which becomes 170 minutes (almost 3 hours) and 45 minutes on preparation of murasila etc., which means that around

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03.30 hours would have been consumed on the whole proceedings; therefore, if the occurrence has allegedly taken place at 1800 hours, then, the complainant should not have handed over him the murasila etc. for taking to the police station earlier than 2130 hours, however, record speaks otherwise. Even, Taj Gul deposed that there was no other police official present on the spot except him, complainant, Muhammad Younas, Muhammad Ayaz and Muhammad Rasool, whereas, statement of complainant and site plan also provides the presence of Abdul Sattar and Abid Gul on the spot as well.

21. The Muharrir of the police station (PW-8) admitted that he has not mentioned in register no. 19 about the handing over the motorcycle in question to investigation officer for FSL, whereas, also admitted that the daily diary no. 7 dated 21.11.2022 was written after using the whitener on previously recorded entry, which leads to inference that the entry in daily diary no. 7 was fabricated one. The Muharrir (PW-8) even admitted that he has not mentioned in daily diary no. 7 and register no. 19 that he has collected the case property from the *malkhana* of police station and handed over to investigation officer for production before the learned Judicial Magistrate.

22. 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


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doubtful and this is the cardinal principle of law that benefit of the 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 Waseem Akram is acquitted from the charge leveled against him. Since, accused is behind the bars; therefore, he be released forthwith, if not required in any other case. Zamima bay, if any, in this case is cancelled.

23. Case property i.e. chas be destroyed, while, the motorcycle being not deciphered with any other chasses number as per chemical examiner report be returned to lawful owner subject of his furnishing the registration documents or ownership proof both after expiry of period provided for appeal/revision.
24. File consigned to record room after completion and compilation.


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CERTIFICATE

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

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Judge Juvenile Court/JCPC,
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