

(56)

STATE VS TAHIR
FIR No. 39 | Dated: 15.04.2023 | U/S: 9 (d) CNSA
| Police Station: Kalaya

IN THE COURT OF SYED OBAIDULLAH SHAH
SESSIONS JUDGE/JUDGE SPECIAL COURT, ORAKZAI
(AT BABER MELA)

SPECIAL CASE NO. : 30/3 OF 2023
DATE OF ORIGINAL : 16.08.2023
DATE OF DECISION : 29.03.2024

STATE THROUGH AFTAB HASSAN ASHO POLICE STATION
KALAYA

.....(COMPLAINANT)

-VERSUS-

TAHIR S/O SARFARAZ KHAN, AGED ABOUT 18/19 YEARS, R/O
GHARI AFRIDI, ABAD MEERA SAROZAI, DISTRICT
PESHAWAR

..... (ACCUSED FACING TRIAL)

Present : Umar Niaz, District Public Prosecutor for the State.
: Sana Ullah Khan Advocate, the counsel for accused facing
trial.

FIR No. 39 **Dated:** 15.04.2023 **U/S:** 9 (d) of the
Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019
Police Station: Kalaya

JUDGEMENT
29.03.2024

The above-named accused faced trial for the offence
u/s 9 (d) of the Khyber Pakhtunkhwa CNSA, 2019 vide
FIR No. 39, dated 15.04.2023 of Police Station Kalaya.

(2). The case of the prosecution as outlined in the
Murasila based FIR is as follows; that on 15.04.2023, the
complainant Aftab Hassan ASHO along with constables
Junaid Ali No. 1607 and Gulshid Ali No. 1528 having laid
a picket were present on the spot, where at about 1500
hours a motorcycle boarded by a person heading from
Feroz Khel towards the picket, was stopped for the purpose
of checking. The rider was made come down of the
motorcycle but nothing incriminating was recovered from


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him. The search of the motorcycle led the complainant to the recovery of 02 packets of chars, wrapped with yellow colour of scotch tape, each weighing 1000 grams, making a total of 2000 grams from under the seat which was opened with the help of its key. The complainant separated 10 grams of chars from each packet for chemical analysis through FSL, sealed the same into parcels no. 1 to 2 whereas the remaining quantity of chars weighing 990/990 grams were sealed in parcels no. 2 and 3 by affixing/placing monogram of "AH" on all parcels. The complainant took into possession the motorcycle without registration number bearing Engine No. RMI 2283032 and Chassis No. SR.705622889 and the chars vide recovery memo. The accused disclosed his name as **Tahir** s/o Sarfaraz Khan who was accordingly arrested on the spot by issuing his card of arrest. Murasila was drafted and sent to police station through Constable Gulshid Ali which was converted into FIR by Muhammad Jameel MHC.

(3). After registration of FIR, it was handed over to Investigating Officer Muhammad Hanif OII/PW-6 for investigation. Accordingly, after receipt of copy of FIR, Murasila, card of arrest and recovery memo, he/PW-6 reached the spot, prepared site plan Ex. PB on pointation of the complainant and recorded the statements of PWs u/s 161 Cr.P.C. On 20.04.2023, the OII/PW-6 sent the samples

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of chars for chemical analysis to FSL through constable Gul Karim along with application addressed to the incharge FSL Ex. PW 6/3 and road permit certificate Ex. PW 6/4, the result whereof Ex. PK was received and placed on file by him. After completion of investigation, the IO/PW-6 handed over the case file to SHO for submission of complete challan against the accused facing trial.

(4). Upon receipt of the case file for the purpose of trial, the accused was summoned, copies of the record were provided to him in line with section 265-C CrPC 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. Aftab Ahmad SHO is appeared in the witness box as PW-1. He has submitted complete challan Ex. PW 1/1 against the accused facing trial in the instant case.

II. Constable Gul Karim is PW-2. He has taken the samples of chars in parcels no. 1 and 2 to the FSL for chemical analysis on 20.04.2023 and after submission of the same, he has handed over the receipt of the parcels to the OII.

III. Muhammad Jameel MHC appeared in the witness box as PW-3. He has incorporated the contents of


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Murasila Ex. PW 4/3 into FIR Ex. PA. He has received the case property from the complainant duly packed and sealed which he had kept in mal khana in safe custody besides parked the motorcycle in vicinity of the police station and put the accused behind the lock-up. The witness further deposed that he has recorded entry of the case property in Register No. 19 Ex. PW 3/1 and has handed over the samples of the case property to the OII for sending the same to FSL on 20.04.2023.

IV. Aftab Hassan ASHO is the complainant of the case. He, as PW-4, repeated the same story as narrated in the FIR.

V. Constable Gulshid Ali appeared as PW-5. He besides being eyewitness of the occurrence is marginal witness of recovery memo Ex. PW 4/2 as well vide which the complainant has taken into possession the recovered chas and the motorcycle. He has also reiterated the contents of FIR in his statement.

VI. Investigating Officer Muhammad Hanif was examined as PW-6 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.


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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 applications Ex. PW 6/1 and Ex. PW 6/2, sent the representative samples to FSL along with application addressed to the incharge FSL Ex. PW 6/3 and road permit certificate Ex. PW 6/4 and result of the same Ex. PK was placed on file by him. He has placed on file copy of Register No. 19 Ex. PW 3/1, copies of daily diaries Ex. PW 6/5 and Ex. PW 6/6 and submitted the case file to SHO for onward proceedings.

(5). Prosecution closed its evidence whereafter the statement of 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 learned 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 were sealed and sampled on the spot by the complainant, the OII conducted investigation on the spot, the samples for chemical analysis were transmitted to the FSL and the same have been found


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positive for chars vide report of FSL Ex. PK. The complainant, the witnesses of the recovery, the official transmitted the samples to the FSL and the OII 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.

(7). Learned counsel for the defence argued that though the accused facing trial is directly nominated in the FIR and the report of FSL supports 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 OII 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 learned DPP for the State, arguments of 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 occurrence has taken place in the mode and manner as alleged by the prosecution?
 - (ii). Whether the investigation has been carried out in the mode and manner as alleged by the prosecution?
 - (iii). Whether the case of prosecution is substantiated through report of FSL?
- (9). The case of prosecution, as per contents of Murasila Ex. PW 4/3, court statements of Aftab Hassan ASHO as PW-4 and Constable Gulshid Ali as PW-5 is, that the complainant Aftab Hassan ASHO/PW-4 along with constables Junaid Ali No. 1607 and Gulshid Ali No. 1528/PW-5 having laid a picket were present on the spot, where at about 1500 hours a motorcycle boarded by a person heading from Feroz Khel towards the picket, was stopped for purpose of checking. The rider was made come down of the motorcycle but nothing incriminating was recovered from him. The search of the motorcycle led the complainant/PW-4 to the recovery of 02 packets of chars, wrapped with yellow colour of scotch tape, each weighing 1000 grams, making a total of 2000 grams from under the seat which was opened with the help of its key. The complainant/PW-4 separated 10 grams of chars from each packet for chemical analysis through FSL, sealed the same into parcels no. 1 to 2 whereas the remaining quantity of

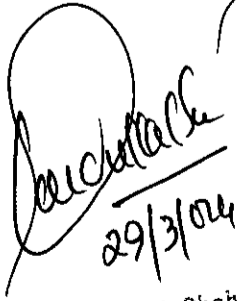

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chars weighing 990/990 grams were sealed in parcels no. 2 and 3 by affixing/placing monogram of "AH" on all parcels. The complainant/PW-4 took into possession the motorcycle without registration number bearing Engine No. RMI 2283032 and Chassis No. SR.705622889 and the chars vide recovery memo Ex. PW 4/2. The accused disclosed his name as **Tahir** s/o Sarfaraz Khan who was accordingly arrested on the spot by issuing his card of arrest Ex. PW 4/1. Murasila Ex. PW 4/3 was drafted and sent to police station through Constable Gulshid Ali/PW-5 which was converted into FIR Ex. PA by Muhammad Jameel MHC/PW-3. After registration of FIR, the case has been handed over to Muhammad Hanif/PW-6, the IO of the case. The IO has visited the spot and conducted investigation by making a site plan Ex. PB on pointation of Aftab Hassan ASHO/PW-4 and recorded the statements of marginal witnesses u/s 161 CrPC.

The prosecution in order to prove its case in the mode and manner as alleged, has examined Aftab Hassan ASHO, the complainant of the case, as PW-4 who has reiterated the contents of Murasila Ex. PW 4/3 and Constable Gulshid Ali, the eyewitness witness of the occurrence and marginal witness of recovery memo Ex. PW 4/2 as PW-4 who besides repeating the same story as narrated in the FIR, has stated to have taken the documents


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to the police station for registration of FIR and handed over the documents to Muhammad Jameel MHC/PW-3 who has registered the FIR Ex. PA.

According to the entries in the Daily Diary Ex. PW 6/5, the complainant/PW-4 accompanied by other police officials embarked on patrolling the area at about 1430 hours (02:30 pm). Upon reaching the place of occurrence, the complainant/PW-4 intercepted the accused, made recovery from his possession, prepared parcels, drafted documents and dispatched them to police station through Constable Gulshid Ali/PW-5 for the registration of FIR. But the said Gulshid Ali in his cross examination as PW-5 mentioned leaving the spot for taking the documents to police station around 02:40 pm, raising doubts about the feasibility of completing all proceedings within a mere 10 minutes. In addition, the complainant/PW-4 mentioned the time of departure of PW-5 from the spot as 1540 hours (03:40 pm) which contradicted the stance of eyewitness as well as that of the Moharrir who registered the FIR Ex. PA wherein this time corresponded to the registration of the FIR. Moreover, although the complainant/PW-4 was present on a picket at Utman Khel Check-Post where the occurrence has taken place but neither he/PW-4 nor the eyewitness/PW-5 were acquainted with the name of the Incharge of the said check-post. It is noteworthy that the


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IO/PW-6 has not recorded statement of any witness present on the check-post to confirm the events, particularly the presence of the complainant's party. Furthermore, the complainant at the very outset of his cross examination stated that he has not made any videography of the spot proceedings which is an utter violation and ignorance of the order of the august Peshawar High Court, Peshawar in **Cr. MBA No. 2729-P/2022 in case titled Imdad Ullah VS The State rendered on 25.11.2022** which mandated videography of spot proceedings from April 15th, 2023. The complainant/PW-4 stated to have left the spot after completing his proceedings prior to the IO/PW-6; however, PW-5 negated this stance by stating that they along with the IO left the spot.

Regarding the retrieval of the alleged contraband, according to the details outlined in the Murasila Ex. PW 4/3, it is noted that the recovery has not been made from personal possession of the accused instead it was from the motorcycle; however, the recovery was not effected on pointation of the accused. It is pertinent to mention that neither the motorcycle was registered in the name of accused nor there was any document which could show any nexus with him nor there was any receipt through which the motorcycle was given to him on rent. Moreover, a driving license was not taken into possession from the accused


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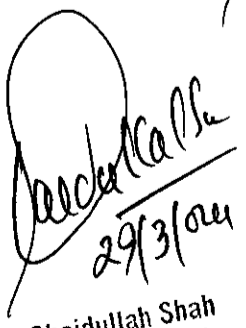
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which is repellent to the common sense that without driving license a person would drive a motorcycle or whether he is able to drive or not, which aspect of the case has created reasonable doubt in the prosecution case.

With regard to the recovery of the motorcycle, as documented in the Murasila Ex. PW 4/3, the complainant/PW-4 recovered a CD-70 motorcycle without registration number having Engine No. RMI 2283032 and Chassis No. SR.705622889 from possession of the accused which was handed over by PW-4 to the Moharrir/PW-3 who in his statement confirmed this fact in the following words;

"The motorcycle CD70 bearing Engine No. RMI2283032 and Chassis No. SR-705622889 was formally handed over to me and I parked the motorcycle in vicinity of the PS. I made entry of the case property in Register No. 19 of the PS which is Ex. PW 3/1 (original seen and returned)."

In contrast, the register no. 19 Ex. PW 3/1 reveals that there is no entry of any motorcycle in the said exhibited document besides it bears no signature of the Moharrir; however, the original register no. 19 produced before the court exhibited as Ex. PW 3/X-1 bears the details of the motorcycle as well as the signature of the Moharrir. This suggests that the entry was subsequently made, yet no


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clarification has been provided by any witness regarding this matter. Moreover, PW-3 in his cross examination stated that he has entered the FIR number on the recovery memo and the card of arrest before handing it over to the IO for investigation. But the documents i.e., recovery memo and card of arrest available on file negates this stance whereupon no FIR number has been mentioned.

The aforementioned statements testifying the prosecution version, create serious doubts regarding the mode and manner of the occurrence as alleged by the prosecution.

- (10). With respect to process of investigation on the spot, as per available record, the IO has visited the spot and prepared site plan Ex. PB on pointation of the complainant and recorded the statements of witnesses u/s 161 CrPC. Nevertheless, careful examination of the site plan Ex. PB shows that the place of occurrence is a straight road. It raises a question as to how a person in possession of a significant quantity of contraband could proceed directly towards the police party despite being clearly visible to him. Similarly, as previously discussed, the motorcycle allegedly recovered from the accused has not been documented in the copy of register no. 19 available on file as Ex. PW 3/1 rather the original register which includes the particulars, has not been considered by the IO,


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disregarding this discrepancy. Moving further with the case, as mentioned earlier, the complainant/PW-4 was present on a check-post where, according to the statement of IO/PW-6, one police official was deputed on duty but the IO has not even recorded his statement let alone the statement of the Incharge of the check-post. These aspects of the case casts shadow of doubts regarding presence of the complainant party on the spot and the investigation carried out by the IO/PW-6 in the mode and manner as alleged.

- (11). With respect to safe custody of transportation of case property from the spot to the police station, entry of the same in register No. 19 and later on sending the same to the FSL for chemical analysis, the case of prosecution is, that the complainant/PW-4 transported the case property from the spot to the police station and handed over the same to Moharrir who makes its entry in register no. 19 and the IO on 20.04.2023 sent the representative samples in parcels no. 1 to 2 to the FSL through constable Gul Karim/PW-2. In order to prove its case, the prosecution relied upon the statements of Aftab Hassan ASHO as PW-4, Muhammad Jameel MHC as PW-3, constable Gul Karim as PW-2 and Muhammad Hanif OII as PW-6.

The testimonies of prosecution witnesses and the available record shows that the occurrence has taken place


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on 15.04.2023 while the samples of chars in parcels no. 1 and 2 have been sent to the Forensic Science Laboratory (FSL) through constable Gul Karim/PW-2 on 20.04.2023 with a delay of 05-days but this delay has not been explained by any of the witness nor any documentary evidence has been produced by the IO/PW-6 which makes the positive FSL report less significant. Muhammad Jameel MHC in his examination in chief as PW-3 stated that he has received the case property i.e., parcels no. 1 to 4 and the motorcycle in question and has made entry of the same in register no. 19 Ex. PW 3/1 but an inconsistency arises as register no. 19 Ex. PW 3/1 contradicts this assertion, lacking any entry of the motorcycle. The Moharrir/PW-3 produced original register no. 19 Ex. PW 3/X-1 before the court wherein these entries were added which clearly indicates that these have later on been added. Though the FSL report Ex. PK regarding chars is positive but these glaring contradictions between the statements of prosecution witnesses and the record significantly undermine the strength of the prosecution's case and the FSL report alone cannot be taken into consideration for conviction of the accused.

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 in the


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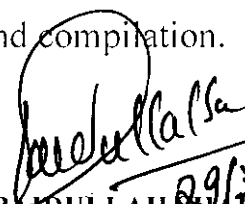
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mode and manner as detailed in the report. Similarly, the prosecution has also failed to prove the alleged mode and manner of the investigation carried out by the IO on the spot. The prosecution also failed to prove the safe custody of case property. All these facts lead to the failure of prosecution to prove the case against the accused beyond shadow of doubt. Therefore, the accused namely, **Tahir** 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 case property i.e., chargs be destroyed after the expiry of period provided for appeal/revision while the motorcycle be returned to its lawful owner.

Judgment announced. File of this court be consigned to record after its necessary completion and compilation.

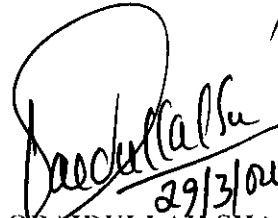
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CERTIFICATE

Certified that this judgment consists of fifteen (15) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 29.03.2024


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Sessions Judge/Judge Special Court,
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