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

Case No. 33/03 of 2023

Date of institution: 02.12.2023

Date of decision: 02.05.2024

State through Muhammad Younis SHO of the Kurez Boya Police Station  
Orakzai (complainant)

Versus

Khatir Khan s/o Almar Khan, Qaum Aka Khel, District Khyber (accused  
facing trial)

**FIR No. 40 DATED 13.10.2023 U/S 9-D CNSA  
KUREZ BOYA POLICE STATION, ORAKZAI**

**Judgment**

1. Accused Khatir Khan is facing trial in the subject case registered under section 9-D CNSA of Kurez Boya Police Station, Orakzai.
2. Muhammad Younis SHO, complainant, along with police officials on receiving spy information about smuggling of narcotics through double cabin Datsun had arranged a barricade at place of occurrence, where at about 1030 hours, the above detailed vehicle approached and stopped by complainant for search; that driver of vehicle was deboarded and searched but nothing incriminating recovered from his possession; that as per spy information, search of the vehicle led the recovery of 10 packets chars wrapped in yellow scotch tape from secret cavity made beneath the right seat of rear part of the vehicle, each packet having weight of 1000 grams with total quantity of 10,000 grams; that 10 grams chars from each packet was separated for FSL, which were sealed into parcels no. 1-10 and the remaining chars was sealed into parcel no. 11; that further search of the vehicle led the recovery of 10 packets chars wrapped in yellow scotch tape

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from secret cavity made beneath the left seat of rear part of the vehicle, each packet having weight of 1000 grams with total quantity of 10,000 grams; that 10 grams chars from each packet was separated for FSL, which were sealed into parcels no. 12-21 and the remaining chars was sealed into parcel no. 22; that occurrence was captured through videography saved in USB, which was sealed into parcel no. 23; that the contraband, USB and Double Cabin Datsun Registration No. BA-9624-Peshawar was taken into possession and accused was arrested on the spot, hence, 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 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 Khiyal Hassan constable, who has taken the parcels 1-10 and 12-21 containing samples of chars and parcel no. 23 containing USB to the FSL Peshawar for chemical analysis. PW-2 is the statement of Asmat Ali Muharrir, who on receipt of murasila registered the FIR, Exh.2/1. He kept the case property in *malkhana* for safe custody, parked the vehicle in police station and made entries in register no.19, Exh.PW 2/2. He has also made entries in daily diary register, Exh.PW 2/3. The statement of Muhammad Younis SHO (complainant) was recorded as PW-3, who confirmed the initial report, recovery of contraband and vehicle vide recovery

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memo, Ex.PW 3/1, to be true. He arrested the accused, issued his card of arrest, Exh.PW 3/2, drafted the murasila report, Exh.PW 3/3, and photographs, Exh.PW 3/4, taken on the spot. He produced two sacks of remaining chars 9900 grams each packed in parcel no. 11, Exh.P-1, and parcel no. 22, Exh.P-2, and the USB sealed in parcel no. 3, Exh.P-3, while Double Cabin Datsun No. BA-9624/Peshawar Exh.P-4. He was re-examined and stated that he has also submitted complete challan, Exh.PW 3/4, against the accused. Mohsin Ali IO was investigation officer of the case, who entered in the witness box as PW-4. He has prepared and confirmed the preparation of site plan, Exh.PW 4/1, and examination of witnesses. He had produced the accused before Area Judicial Magistrate vides application, Exh.PW 4/2, and sent the parcel no. 01 to 10 and 12 to 21 vide application to FSL, Exh.PW 4/3, and road permit certificate Exh.PW 4/4 through Constable Khiyal Hussain. He produced accused before Judicial Magistrate for recording his confessional statement vides application, Exh.PW 4/5, and forwarded two letters to SP investigation, Exh.PW 4/6 and Exh.PW 4/7, regarding the vehicle. He exhibited Excise & Taxation report, Exh.PW 4/8, and the FSL reports, Exh.PW 4/9 and Exh.PW 4/10. On completion of investigation, he handed over the case file to SHO for onward submission of complete challan against the accused. One of the marginal witnesses to recovery memo was Abbas Ali Shah Constable, who was examined as PW-5. He testified that the recovery was made from accused and documented vide recovery memo. He took the murasila, recovery memo and card of arrest to the police station for registration of FIR.

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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 reply to a question, 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 is 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 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; that prosecution case is full of doubts because prosecution witnesses materially contradicted each other; that the 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.

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11. The record available before the court and arguments advanced by learned counsel for parties led me to the conclusion that the local police on spy information arranged a barricade and intercepted the vehicle registration no. BA-9624-Peshawar, wherefrom, recovered 20000 grams chars placed in its secret cavities made beneath the left and right seats of rear part of the vehicle, which were taken into possession by the police, the accused was arrested and the vehicle seized. It is bounden duty of prosecution to prove its case against accused beyond shadow of a reasonable doubt from the moment of receiving the spy information by the police to the interception of accused, his body search, transportation of contraband in the vehicle, taking of samples from the recovered contraband, preparation of the recovery memo, drafting of the murasila, witnessing of the whole proceedings by marginal witnesses, registration of case, safe custody and transmission of recovered articles, investigation of the case and laboratory reports etc. To prove this, prosecution led the evidence of as many witnesses as it wished. In narcotics cases, mode and manner of the commission of offence, recovery of contraband, separation of parcels for the test, its safe custody and finally the transmission to laboratory has become immensely vital in these days to establish the genuineness of prosecution story.

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12. To prove this, prosecution has led the evidence of many witnesses to establish the safe custody and transmission of the drug from the spot recovery till its receipt by 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

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narcotics cases, the chain of safe custody is the fundamental as the report of 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 the conviction, the reliance is placed on Zahir Shah versus The State case reported in 2019 SCMR 2004. Extract of register no. 19, Exh.PW 2/2, though provides the receipt of contraband, USB and the vehicle by Muharrir of police station and keeping these in the *malkhana*, whereas, it also provides that parcels no. 1-10, 12-21 & USB were sent to laboratory for examination through Khiyal Hussain, however, there is nothing on record that as to how and when these samples have come into his hands. The statement of Khiyal Hussain (PW-1) suggests that these tests samples were delivered to him by investigation officer (PW-4), who has also confirmed this fact in his statement, however, register no. 19, Exh.PW 2/2, is silent about the date and acknowledgement about receiving of parcels no. 1-10, 12-21 & USB by investigation officer. Likewise, there is nothing in black and white as to who has handed over those parcels to the investigation officer and when, where and at what time, especially, when it is admitted by Muharrir (PW-2) that there is no record/entry in register no. 19 about handing over any parcel to the investigation officer. Likewise, it is admitted by Muharrir of police station (PW-2) that the register no. 19 does not provide the name of police station in column no. 2 nor any date, time

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have been given about the depositing of the case property in the *malkhana* that creates serious concerns about delivery of contraband to the investigation officer, his onward delivery to Khiyal Hussain and safe transmission of contraband to the forensic laboratory.

13. Record provides that though a huge quantity of chars has been allegedly recovered from the vehicle but complainant admittedly did not mention the kind of chars in his report that as to whether the recovered chars was in *pukhta* or *garda* form. Even, investigation officer did not bother to collect evidence that whether the recovered chars was in *pukhta* or *garda* form, however, in reply to a question, he stated that the recovered case property appeared to be in soft state, which leads to inference that it was in powder shape. On the other side, FSL report, Exh.PW 4/9, provides that the chars was in solid form that not only contradicts the fact stated by investigation officer but also casts serious doubt about the recovery allegedly effected from accused and the samples sent to the laboratory for chemical analysis.

14. The truthfulness, trustworthiness and credibility of the witnesses are something that strengthens the foundation of the prosecution case. The *murasila* report provides that complainant on receipt of spy information has rushed to the spot, arranged the barricade and the occurrence has happened. Now, question arises that at what time and place, complainant has received the spy information. The statement of complainant provides that he was present in the police station when received the spy information, whereat, he rushed to the spot and occurrence had taken place, however, *murasila* report is silent

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about this fact, nevertheless, daily diary no. 3 dated 13.10.2023, Exh.PW 2/3, provides that complainant along with police officials had left the police station at 08.20 am for patrolling of the area and there is no mentioning of fact about receiving any spy information about the occurrence and leaving the police station by complainant for the spot to arrange a barricade for the arrest of accused. Even, the diary no. 8 of the very date further clarifies that complainant had received spy information during patrolling, which means that the statement of complainant is not based on true accounts of facts. Even, marginal witness to recovery memo (PW-5), who was accompanying the complainant, had no knowledge that as to where the complainant has received the spy information, which further raises an eye brow to the fact as to whether he was actually accompanying the complainant at the time of occurrence or not because he even did not know that how many police officials had accompanied the investigation officer.

15. The veracity of statement of complainant is found further doubtful when few contradictions were noted in the statements of prosecution witnesses. Complainant deposed that he has made photographs on the spot, however, admitted that this fact was not mentioned in the murasila. There is admittedly over-writing made in murasila report about the date of occurrence and the date of report, which changes in dates are visible through naked eye but complainant was adamant to a fact that no digit/date as such has been replaced. Similarly, the seizing officer deposed that he himself has drafted the murasila and written the word packet with Urdu alphabet "pay" having three dots, however, study of murasila provides that he has written the word

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packet with Urdu alphabet "fay", which infers that the murasila was drafted by someone else and not by him and questions the veracity of his statement. His statement also becomes doubtful when he at one place, he stated that after completion of the proceedings by investigation officer, all police officials, who have accompanied him, have left the spot for police station in official vehicle but later on deviated from stance saying that he has driven the vehicle of accused and shifted to the police station. If his statement is believed to be true, even then, investigation officer contradicted him saying that complainant along with his police *nafri* returned to the police station in their official vehicle, wherein, the complainant was sitting in the front seat, constables Mohtashim and Abbas Ali Shah have occupied the rear seats and the vehicle was driven by the driver. The investigation officer though tried to cover up the lacunae stating that the vehicle of accused was brought to the police station by the police but he did not remember the name of the constable, who has driven away the vehicle of the accused from spot to the police station, which part of his statement cannot be trusted and appears to be result of afterthought. On the other hand, Abbas Ali Shah (PW-5) deviated both of them stating that he along with the complainant/SHO has returned to the police station in official vehicle, whereas, the other police officials have returned to the police station in the recovered vehicle of the accused, which above conflicting statements casts serious doubts about the shifting of the recovered vehicle from spot to police station and makes the statements of all these prosecution

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witnesses untrustworthy on one hand and infers that the occurrence has not taken place in the mode and manner narrated by them.

16. There is also contradiction in the statement of investigation officer (PW-4) and marginal witness (PW-5) as the earlier stated that he has recorded the statements of witnesses at 02.35 pm and left the spot at 03.40 pm, whereas, the latter stated that the investigation officer has recorded his statement at 02.00 pm and left the spot for police station at 02.40 pm. Moreover, the investigation officer stated that when he has visited the spot, he was also accompanied by Constable Khiyal Hussain, however, the latter stated that he has just transmitted the case property/parcels to the laboratory and did not participate in any other proceedings with the investigation officer, which further shows that he was wrongly shown in association with the investigation officer at the time of his visit to the spot and puts dent in the case.
17. Record provides that accused was arrested for trafficking the chars in the vehicle; however, there is no evidence on record that the vehicle was registered in his name or not. Even, no driving license had been recovered from possession of the accused; so in absence of any driving license, it could not be stated with certainty that who was on driving seat of the car at relevant time, so mere disclosing the accused as driver of the vehicle was not sufficient qua corroboration of version of prosecution particularly when no recovery had been effected from the immediate possession of the accused. Material discrepancies existed in the statements of prosecution witnesses, which also gave a hint that the prosecution case was not free from

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doubt, the benefit of which is to be extended to accused, the wisdom is drawn from case law reported in 2023 PCrLJ 154 [Peshawar].

18. More so, the Muharrir of the police station (PW-2) admitted that whenever they took case property from the *malkhana* for handing over to the police for its production before the Area Magistrate and its receiving back to the police station for depositing in the *malkhana*, they make entry in the register no. 19 but he admitted that there is no detail as such mentioned in the register no. 19. Even, he admitted that these facts of handing over the case property to the investigation officer for production before the Area Magistrate and taking back from him after its production before the Area Magistrate are also not mentioned in daily diaries no. 5 and 7 dated 14.10.2023. Similarly, investigation officer also admitted that record is also silent as to how and by whom the case property was shifted from *malkhana* of the police station to the district *malkhana*; therefore, these facts cast serious doubt about the recovery of contraband. Although, the investigation officer (PW-4) made an attempt to cover up this fact stating that entries of these facts were made in the daily diaries, however, no evidence as such was brought on file in this respect and therefore not only makes the statement of investigation officer untrustworthy but it is also in violation of the mandatory provision of Section 33 of the Act.

19. 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 is sent to police station for registration of the case and an FIR is registered. In the

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instant case, perusal of recovery memo and card of arrest of the accused provide that it contains FIR number; therefore, apprehends that recovery memo and card of arrest of the accused were prepared in the police station and not on the spot and creates doubt about the mode and manner of transportation of alleged contraband by the accused.

20. From above appreciation of evidence it is held that the proceedings of making arrest and seizure of narcotics from accused by the police had become doubtful. Moreover there are many major discrepancies and contradictions in the case of prosecution as discussed above, which creates reasonable doubt about the commission of offence by accused in a mode and manner stated by the prosecution and does not suggest the conviction of accused. Besides, it is 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 prove the case against the accused, hence, while extending the benefit of doubt, the accused Khatir Khan is acquitted from the charge leveled against him. As accused is behind the bars; therefore, he is directed to be released forthwith, if not required in any other case. *Zamima bay* issued in the instant case is cancelled.

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21. Case property i.e. cars be destroyed and the vehicle in question having not been deciphered with different chassis number as per chemical examiner report be returned to the lawful owner subject of his furnishing the original documents/registration papers both after expiry of period provided for the appeal/revision.
22. File consigned to record room after completion and compilation.


**Announced**  
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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.

**Announced**  
02.05.2024

  
**Abdul Basit**  
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