

(64)

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

Case no. 34/3 of 2023

Date of institution: 07.12.2023

Date of decision: 04.06.2024

Date of consignment:

State through Muhammad Younis SHO, Kurez Boya Police Station, District Orakzai (complainant)

Versus

Muhammad Nasir (aged about 20/21 years) s/o Gul Ali r/o Qaum Stori Khel, Tappa Aand Khel, Tazi Khel, District Orakzai. (accused)

FIR No. 37 DATED: 15.09.2023 U/S 15AA
KUREAZ BOYA POLICE STATION, ORAKZAI

JUDGMENT

1. Accused Muhammad Nasir is facing trial in the subject case.
2. Muhammad Younis, the complainant, along with police officials during patrolling received information about smuggling of narcotics through Flying Coach from Anjani side towards Kohat; that upon said information, they rushed to the Aandkhel Payan main road and arranged barricade, where at about 2130 hours, the flying coach registration no. LWE-9423/Lahore engine no. IKZ017639 Chasses no. KZH1107000670 white color appeared and intercepted by the complainant for the purpose of search; that only one passenger was seated in the front seat of vehicle; that during the search of vehicle, the police found 02 white colored sacks which the driver disclosed to be his ownership; that upon search of sacks; one sack contained 18 packets of charas wrapped with yellow scotch tape and the second sack contained 17 packets of charas wrapped with yellow scotch

ayyl
09/06/2024
Abdul Basit
Addl. District & Sessions Judge-II
Orakzai at Baber Mela,
Hangu

(65)

tape; that each packet weighed to be 1000 grams with total quantity of 18000 grams 17000 grams respectively making total quantity of 35000 grams of charas; that 10/10 grams of charas was separated from each packet for chemical analysis, which were sealed in parcels no. 1 to 35; that the balance remaining 17820 grams charas of first sack was sealed in parcel no. 36 and the balance 16830 grams charas of second sack was sealed in parcel no. 37; that on further search of the vehicle, one Kalashnikov folding butt no. 16224022 with fixed charger containing 16 live rounds of 7.62 bore were also recovered from beneath the driving seat, which were sealed into parcel no. 38. That driver of the vehicle claimed it his ownership for which he could not produce any permit or license; that the occurrence was recorded through mobile phone's camera and saved into USB, which was sealed in parcel no. 39; that the accused disclosed his name as Muhammad Nasir son of Gul Ali, who was arrested on the spot, hence, the FIR.

3. The complainant reduced the above facts in the shape of murasila, Exh.PW 1/3, on strength of which subject case was registered.

On completion of investigation, complete challan under section 15-AA was put in court against the accused.

5. 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/section 15-AA, to which he pleaded not his guilt and claimed trial.

6. Prosecution produced following evidence in support of its case;

all
Abdul Basit
Addl. District & Sessions Judge-II
Muzkera at Baher Mela,
Mingou

66

7. The statement of Muhammad Younis SHO was recorded as PW-1; he confirmed the initial report to be true; recovery of contraband, Kalashnikov, vehicle and USB vide recovery memo, Exh.PW 1/1, was testified to be genuine; he arrested the accused and issued his card of arrest, Ex.PW 1/2; he drafted the murasila, Exh.PW 1/3; he produced charas in parcel no. 36, Exh.P1, and parcel no. 37, Exh.P2, Kalashnikov along with 16 live rounds of 7.62 bore in parcel no. 38, Exh.P3, and produced vehicle, Exh.P5; that after completion of the investigation, he submitted complete challan, Exh.PW 1/4. One of marginal witnesses to recovery memo was Yaseenullah Constable, who was examined as PW-2; he has testified that recovery was made from accused, which was documented vide recovery memo in his presence; 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. Asmat Ali, Muharrir of the police station was examined as PW-3, who on receipt of murasila has registered FIR, Exh.PW 3/1; he has also kept the case property in the *malkhana* for safe custody; he made entries in register no. 19 and produced copy of the same, Exh.PW 3/2, and daily diary, Exh.PW 3/3. PW-4 is the statement of Khayal Hassan constable, who has taken parcels no. 1-35, 38 and 39 to FSL Peshawar for chemical analysis; he is also marginal witness to recovery memo, Exh.PW 4/1, vide which Kinan Ali produced the agreement deed regarding the flying coach. Hashim Khan, investigation officer of the case, appeared in witness box as PW-5; he has confirmed the preparation of site plan, Exh,PB, and examination of witnesses; he took into possession registration form

Recd
11/11
09/06/2024
Abdul Basit
Addl. District & Sessions Judge-II
Orakzai at Baher Mela,
Hangu

of the vehicle vide recovery memo, Exh.PW 5/1; he produced before the court the copy of registration of vehicle, Exh.P5, and copy of sale deed, Exh.P6; he had produced the accused before the Area Judicial Magistrate vide application, Ex.PW-5/2; he vide application, Exh.PW 5/3, produced witness Murtaza Ali before the court for recording his statement u/section 164 Cr.PC; he vides application, Exh.PW 5/4, produced accused for confessional statement before Judicial Magistrate; he drafted application, Exh.PW 5/5, to FSL and road permit certificate, Exh.PW 5/6, vide which he sent the parcel no. 1 to 35 and 39 to FSL through constable Khiyal Hussain; he also sent parcel no. 38 to FSL vide road certificate, Exh.PW 5/7; that he produced FSL reports, Exh.PW 5/8 to Exh.PW 5/10; on completion of investigation, he handed over the case file to SHO for onward submission of complete challan against the accused. PW-6 is the statement of Murtaza Ali, who stated that on 15.09.2023, he was boarded in front seat with driver Nasir Ali and the flying coach was stopped by the police and searched; that upon search, recovery of 02 white color sacks containing 35 packets of charas and Kalashnikov along with 16 live rounds were effected from the flying coach. Prosecution closed its evidence. The statement of accused facing trial was recorded under section 342 CrPC, wherein, he again denied from the charges and adhered to his innocence. In replies to the questions, he neither wished to be examined under oath nor to produce evidence in defense.

9. Arguments heard and record perused.


ayy
 07/09/2024
 Abdul Basit
 Addl. District & Sessions Judge-II
 Orakzai at Baber Mechi,
 Hungru

10. Learned DyPP for State argued that the prosecution has proved the case against accused beyond shadow of reasonable doubt; that recovery of Kalashnikov is proved from possession of the accused; that the prosecution witnesses are consistent in their statements; that FSL result is in positive; that there is no malafide on the part of the prosecution to falsely involve the accused in the case thus requested to award him maximum punishment.
11. Counsel for the accused argued that prosecution has failed to prove its case against accused beyond reasonable shadow of doubt; that prosecution evidence materially contradicts and suffers from major inconsistencies; that the prosecution case is full of doubts because prosecution witnesses materially contradicted each other; that recovery is not effected from the immediate possession of accused but from the vehicle, which is not the ownership 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.
12. Viewing the arguments advanced by learned counsel for parties and record before the court, it is concluded that the local police on spy information had arranged a barricade and intercepted a flying coach that was driven by accused and a passenger was found seated on the front seat. The complainant during search of the vehicle recovered a Kalashnikov along with ammunition, the arm and ammunition, from beneath the driving seat of the vehicle, which were sent to laboratory for chemical analysis. The accused was arrested for carrying the prohibited bore weapon without any permit, license and any lawful justification; therefore, the court has to see as to whether the incident

ay/ll
09/06/2024
Abdul Basit
Addl. District & Sessions Judge-II
Orakzai at Baber Mela,
Hanay

has occurred in the mode, manner & at stated time. The prosecution, in order to bring home the guilt against accused, has to prove its case against accused beyond shadow of a reasonable doubt from the moment of receiving the spy information by local police to the interception of accused, his carrying the arm and ammunition without lawful authority, preparation of recovery memo, drafting the murasila, witnessing of the whole proceedings by marginal witnesses, registration of case, safe custody and the transmission of recovered arm etc., investigation of the case and laboratory reports etc.

13. To prove this, prosecution has led the evidence of many witnesses to establish its case. This is to add here that besides the recovery of arm and ammunition, the local police has also recovered a huge quantity of charas from the vehicle; therefore, recovery of the arm in question, its safe custody and transmission is to be seen in juxtaposition with the recovered contraband because it will help the court to determine the mode, manner and time of the commission of offence, which are the most important aspects of the case. As per record, complainant has allegedly recovered the arm etc. from beneath the driving seat of the vehicle; however, he has admittedly did not mention anywhere in his entire record that to whom he has handed over the same. On the other side, the statement of Muharrir (PW-3) does not provide any detail about handing over the parcel no. 38 to investigation officer for onward transmission for FSL, whereas, contents of register no. 19 are also silent about the handing over this parcel by Muharrir of police station to the investigation officer, which is also admitted by Muharrir (PW-3). Likewise, there is nothing on record to suggest


 09/06/2024
 Abdul Basit
 Addl. District & Sessions Judge-II
 Orakzai at Baher Mela,
 Hangu


that on what date & time, this parcel was handed over to investigation officer and then to carrier (PW-4) for onward transmission to FSL, which gives rise to question that if Muharrir of the police station has not handed over parcels no. 38 to investigation officer, then, how this parcel has come into his hand in spite of fact that this was placed safely in the *malkhana*, which not only questions the safe custody of the arm etc. but this also envisages that the recovered arm etc. might have been replaced.

14. Importantly, the complainant (PW-1) has admitted that before the occurrence of this case, he had already drafted another murasila report, which he had handed over to constable Yaseenullah (PW-2) at 2105 hours and the latter had taken that to police station, where FIR No. 36 of even date was registered at 2120 hours, which facts are evident from daily diaries no. 15 & 16 of 15.09.2023, Exh.PW 3/3 (4 sheets) and admission of PW-3; therefore, if it is admitted that constable Yaseenullah was in the police station at 2120 hours, then, it was not humanly possible for him to be present with complainant at 2130 hours i.e. the time of occurrence of instant case, to witness all the proceedings, to become witness to the recovery memo and take the murasila to the police station for registration of this case because contents of FIR and statements of the witnesses explicitly provide that the distance between place of occurrence and police station was 34/35 kilometers, which is not humanly possible to be covered within 10 minutes. Rather, witnesses deposed that it takes them not less than 40 minutes to reach there; therefore, all this clearly indicates that constable Yaseenullah was not present with the

Handwritten signature
Abdul Basit
Addl. District & Sessions Judge-II
Orakzai at Baber Mela,
Hangu

complainant at the time of occurrence and these documents were prepared somewhere else and in different timings, which cannot be believed to be true and thus not only casts serious doubt about the alleged occurrence in the prescribed mode, manner and time but also reflects that all these witnesses were not honest.

- 15. In addition to above, complainant has alleged that a passenger was also sitting on the front seat of the vehicle at the time of occurrence but surprisingly his name was not brought in the murasila report etc. Although, investigation officer (PW-5) tried to cover up the lacunae by recording his statement and the alleged passenger was produced before the court as witness, however, he (PW-6) contradicted stating that there were four passengers in the vehicle and no recovery had been made in his presence. He (PW-6) stated that when police had taken them to the police station, there the police told that narcotics had been recovered from the said vehicle, whereas, he did not utter a single word about recovery of arm etc. from the vehicle, which avails that no recovery of the arm etc. was actually effected from accused/ the vehicle. This further avails that had the police actually recovered any arm etc. from the vehicle at place of occurrence or even in the police station, then, the complainant must have cited the passenger as witness to the recovery memo but his not citing the passenger as witness in the case not only doubts the genuine recovery but this also shows violation to the provision of section 103 CrPC and thus on the one hand the best available evidence was withheld and on another hand, both the marginal witnesses to the recovery memo are police officials despite an independent witness was available.


 09/06/2024
Abdul Basit
 Addl. District & Sessions Judge-II
 Orakzai of Baber Mela,
 Hamgu

16. There is yet another anomaly noted in prosecution evidence because contents of register no. 19 and route certificate provides that USB was also sent to laboratory for checking, whereas, the investigation officer deposed that he has not sent it there, which further doubts the delivery of tests samples and USB by Muharrir of the police station to investigation officer and its safe custody in the *malkhana*.
17. Record provides that accused was arrested for carrying a prohibited bore weapon in the flying coach, which was not the ownership of accused but investigation officer during investigation came to know that it was the ownership of someone else, who had given it to Bahar Ali, however, neither the owner nor Bahar Ali were made accused nor did he interrogate them about the arm etc. On same footings, neither the complainant has recovered any driving license from the accused nor has accused been interrogated on this point. Material discrepancies existed in the statements of prosecution witnesses, which also gave a hint that the prosecution case was not free from doubt, the benefit of which is to be extended to accused.
18. From above appreciation of evidence it is held that the proceedings of making arrest of accused and recovery of prohibited bore weapon etc. from beneath the driving seat of the vehicle driven by accused had become doubtful. Moreover, absence of constable Yaseenullah on spot at the time of occurrence coupled with the existence of many major discrepancies and contradictions in the prosecution case infers that prosecution has failed to bring home the guilt against accused, hence, while extending the benefit of doubt, the accused Muhammad Nasir is acquitted from the charge leveled against him.

aqil
Mu
09/06/2024
Abdul Basit
Addl. District & Sessions Judge-II
Orakzai at Bahar Mala,
Hangu

- 19. As accused Muhammad Nasir is in custody and behind the bars; therefore, he be released forthwith in the instant case. Case property i.e. the Kalashnikov in question and the recovered cartridges are confiscated in favour of the State and be dealt with in accordance with law after expiry of period of appeal etc., whereas, the flying coach in question has not been deciphered with different chasses number etc. as per chemical examiner report, which had already been returned to the lawful owner on *superdari*; therefore, said *superdari* order is confirmed on the existing bail bonds subject to any claim by a lawful owner, who may claim its title before a competent/ proper forum.
- 20. File consigned to record room after completion and compilation.

Announced
04.06.2024

Abdul Basit
Additional Sessions Judge-II/JSC,
Orakzai

CERTIFICATE

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

Announced
04.06.2024

Abdul Basit
Additional Sessions Judge-II/JSC,
Orakzai