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

Case no. 31/3 of 2023

Date of institution: 03.11.2023

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 9-D CNSA
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

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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, 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.

4. On completion of investigation, complete challan under section 9-D CNSA was put in court against the accused.

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 CNSA, to which he pleaded not his guilt and claimed trial.

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

7. The statement of Muhammad Younis SHO was recorded as PW-1; he confirmed the initial report to be true; recovery of contraband,

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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 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

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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.

8. 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.

10. Learned DyPP for State argued that the prosecution has proved the case against accused beyond shadow of reasonable doubt; that recovery of huge contrabands is proved from the possession of the

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accused. 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 charas 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.

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 & 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 two sacks from second seat; the first sack contained 18 packets of charas and second sack contained 17 packets of charas, each packet weighed 1000 grams charas making total quantity to be 35000 grams, out of which 10/10 grams of charas from each packet was separated, packed and sealed in separate parcels, which were sent to the laboratory for chemical analysis. The accused was arrested for

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transporting the charas; therefore, the court has to see as to whether the incident has occurred in the mode, manner and 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 transportation of contraband in the vehicle, taking samples from recovered narcotics, preparation of recovery memo, drafting 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.

13. 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, manner and time 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 because the report of Government Analyst is the main evidence for the purpose of conviction. Prosecution must establish that chain of custody was unbroken, unsuspecting, safe and secure. Any break in 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 wisdom is drawn from case law reported in "Zahir Shah versus The State" case (2019 SCMR 2004). As per record, complainant has allegedly recovered the contraband, taken samples

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from each packet, packed and sealed each test sample in separate parcel bearing no. 1-35; however, he has admittedly did not mention anywhere in his entire record that to whom he has handed over the contraband. On the other side, though statement of Muharrir (PW-3) suggests that he has handed over the parcels no. 1-35 to investigation officer for onward transmission for FSL, while, Khayal Hassan (PW-4) has also endorsed that investigation officer has handed over him parcels no. 1-35, 38 & 39 for onward transmission to FSL, however, on one hand contents of register no. 19 are silent about handing over these parcels by Muharrir of police station to investigation officer, which is also admitted by Muharrir (PW-3), whereas, on the other hand, there is nothing on record to suggest that on what date & time, these parcels were handed over to investigation officer and then to samples carrier (PW-4) for onward transmission to FSL. Besides this, the statement of Muharrir is also silent about delivery of parcels no. 38 and 39 to investigation officer or samples carrier, which gives rise to question that if Muharrir of the police station has not handed over parcels no. 38 and 39 to investigation officer, then, how these parcels have come to his hand in spite of fact that these were placed safely in the *malkhana*, which not only question the safe custody of the recovered articles but also reflects that chain of safe custody of the samples was broken and transmission thereof to laboratory had become doubtful; therefore, forensic laboratory report cannot be relied against the accused.

14. This is astonishing to note that complainant has allegedly recovered 35 packets of charas from both the sacks, however, when those sacks

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were opened in the court, only 34 packets were recovered from it. If it is supposed that complainant might have erred counting the exact number of packets on the spot, even then, he has admittedly taken samples from 35 packets by making cut marks on each packet, packed and sealed those in parcels no. 1-35, which means that 35 packets were allegedly recovered but still one packet is missing. This is also strange to note that the FSL report about contraband also provides the receipt of 35 parcels, which all were found to be charas; therefore, the question arises that if the seizing officer has allegedly recovered 35 packets of charas from two sacks, which were also sealed on the spot and placed in the *malkhana* of the police station for safe custody, then, why the packet no. 35 is missing. On same way, complainant has admitted that he has taken samples from all packets by making cut mark on each packet, however, when a packet was randomly taken from the sack and the scotch tape was removed in the open court, there was no cut mark etc. found on that for taking the sample as was alleged by the witness, which not only leads to inference that a planted case has been registered against accused but also doubts the safe custody of the parcels in *malkhana* of the police station. Similarly, though the samples have allegedly been separated from each packet and sealed in parcels no. 1-35, 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 test samples might have been taken from single packet to obtain positive results.

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15. In reply to a question, the seizing officer (PW-1) admitted that he knows and can differentiate between charas *garda* and charas *pukhta* but strange enough complainant admittedly did not mention the kind of charas in his report as to whether the recovered charas was in *pukhta* or *garda*. Likewise, the seizing officer (PW-1) stated that the recovered packets were neither in slim, slab, oval or round shapes but those were in square shapes having round corners, however, when those two sacks were opened on the request of learned counsel for accused, only ten packets were found in square shapes, whereas, rests of the packets were in round/cake shapes having round corners, which is a glaring anomaly in respect of the recovered contraband and creates doubt about the genuine recovery.

16. 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

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station was 34/35 kilometers, which is not humanly possible to be covered within 10 minutes. Rather, the witnesses deposed that it takes them not less than 40 minutes approximately to reach there; therefore, all this clearly indicates that constable Yaseenullah was not present with the 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.

17. 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, which avails that if the recovery of the contraband was supposed to be genuine, even then, the mode, manner, time of occurrence were different, which makes the recovery doubtful. This further infers that had the police made any recovery from the vehicle on the spot 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 further doubts the genuine recovery.

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18. 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*.

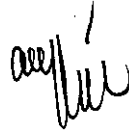
19. Record provides that accused was arrested for trafficking thirty five kilograms charas in the flying coach, which was admittedly not the ownership of accused but investigation officer during investigation came to know that it was the ownership of someone else, who had given it to Bahar Ali, however, neither the owner nor Bahar Ali were made accused nor did he interrogate them about the contraband. 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.

20. From above appreciation of evidence it is held that the proceedings of making arrest of accused, transportation and seizure of narcotics from his possession had become doubtful. Moreover, the 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. As accused Muhammad Nasir is in custody and behind the bars; therefore, he be released forthwith in the instant case.

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21. Case property i.e. the charas be destroyed as per 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.
22. File consigned to record room after completion and compilation.

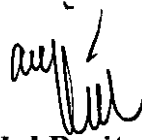


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CERTIFICATE

It is certified that this judgment of mine consists of twelve (12) pages. Each page is duly signed by me after necessary corrections.



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