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

Case No. 08/03 of 2023

Date of institution: 01.02.2023

Date of decision: 01.07.2024

Date of consignment:

State through Muhammad Younis SHO of Central Mishti Mela Police Station Orakzai (complainant)

Versus

1. Miraj Gul s/o Khumar Gul, r/o village Tagha Sam, Caste Mishti, District Orakzai. (accused facing trial)
2. Inamullah s/o Fazal Wahid, r/o village Tagha Sam, Caste Mishti, District Orakzai. (accused facing trial)

FIR No. 45 DATED: 29.11.2022 U/S 9-D CNSA

CENTRAL MISHTI MELA POLICE STATION, ORAKZAI

JUDGMENT

1. Accused Miraj Gul and Inamullah are facing trial in the subject case.
2. Muhammad Younis SHO, complainant, along with police officials had arranged barricade on main road Mishti Bazar to Dara Hasanzai when in the meanwhile two persons riding on a red color Honda motorcycle appeared, who on seeing the police party turned the motorcycle, whereat, the police party chased them in official vehicle; that after covering some distance, a person sitting on pillion seat holding a sack in his hands jumped from motorcycle, ran towards nearby populated area, dropped the sack at some distance and made his escape good in the nearby *abadi*; that the sack was taken into possession by the police and checked, which contained chars garda weighing 9900 grams, out of which 10 grams chars was separated

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and sealed in parcel no. 1 for FSL, while, the remaining 9890 grams chars along with white sack was sealed in parcel no. 2; that rider of motorcycle was also having a white color sack on the tank of his motorcycle, which was taken into possession and checked that led the recovery of chars garda weighing 2400 grams, out of which 10 grams chars was separated and packed in parcel no. 3 for FSL, while the remaining 2390 grams chars along with blue shopping bag and white sack were sealed in parcel no. 4; that case property along with red color Honda motorcycle engine no. 3772529, chassis no. U-454868 without number was taken into possession; that rider of the motorcycle disclosed his name as Inamullah son of Fazal Wahid, who on cursory interrogation disclosed the name of escaped accused as Miraj Gul son of Khumar Gul; that accused Inamulla was arrested on the spot and accused Miraj Gul was arrested on 20.12.2022; that the murasila was drafted at the place of occurrence and sent to police station for bringing criminal law into motion; hence, the FIR.

3. On completion of investigation, complete challan under section 9-D CNSA was put in court against the accused facing trial.
4. Accused were summoned. On their attendance, the copies of the case furnished to them under section 265-C Cr.PC. The accused were then charge sheeted u/s 9-D CNSA, to which they pleaded not their guilt and claimed trial.
5. Prosecution produced following evidence in support of its case;
6. Saeed Khan Muharrir, was examined as PW-1, who on receipt of the murasila report has registered the FIR, Ex.PA; he locked the accused in the lockup and kept the case property in the *malkhana* for safe

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custody through entry in register no. 19, Exh.PW 1/1. The statement of Muhammad Younis SHO (complainant) was recorded as PW-2, who confirmed the initial report, Exh.PA, to be true and testified the recovery of contraband through recovery memo, Exh.PW 2/1, to be genuine; he arrested the accused Inamullah and issued his card of arrest, Exh.PW 2/2, and drafted murasila, Exh.PA/1; he produced case property, Exh.P-1 to Exh.P-2, and motorcycle. Exh.P-3, and on completion of investigation submitted complete challan, Exh.PW 2/3, against accused. One of the marginal witnesses to the recovery memo was Abdul Saif, who was examined as PW-3; he testified that 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 the police station and handed over the same to the Muharrir for registration of case. Statement of Raheemullah was recorded as PW-4, who stated that on 22.12.2022, the investigation officer took the accused to the spot, where the investigation officer prepared pointation memo, Exh.PW 4/1, on pointation of accused; similarly, the investigation officer took the accused Inamullah and prepared pointation memo, Exh.PW 4/2, on pointation of accused. PW-5 is the statement of Muhammad Khaleel, who has taken the parcels no. 1-3 to FSL Peshawar for chemical analysis. Investigation Officer of the case was Abdul Manaf, who entered in the witness box as PW-6; he prepared the site plan, Exh.PW 6/1, and through application, Exh.PW 6/2, produced the accused before the Judicial Magistrate; he sent the parcels no. 1 & 3 to FSL vide application, Exh.PW 6/3, and route certificate, Exh.PW 6/4; he prepared the

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pointation memo, already Exh.PW 4/2, on the pointation of accused and took pictures on the spot, Exh.PW 6/5; he vides application, Exh.PW 6/6, produced accused before the Judicial Magistrate for confession and made application to SP investigation, Exh.PW 6/7; he placed on file the excise report, Exh.PW 6/8, registration copy of motorcycle, Exh.PW 6/9, warrant 204 Cr.PC application, Exh.PW 6/10, warrants, Exh.PW 6/11, the report of DFC, Exh.PW 6/12, application for proclamation notice, Exh.PW 6/13, and proclamation notice, Exh.PW 6/14; the absconding accused was arrested vide card of arrest, Exh.PW 6/15, and was produced to the Judicial Magistrate vides application, Exh.PW 6/16; he produced accused Miraj Gul before Judicial Magistrate for confession vide application, Exh.PW 6/17; he produced FSL report, Exh.PW 6/18, copy of daily diary, Exh.PW 6/19, and on completion of investigation, handed over the case file to the SHO for onward submission of complete challan, Exh.PW 6/20, against the accused facing trial.

7. Prosecution closed its evidence.
8. The statements of accused were recorded under section 342 Cr.PC, wherein, they again denied from the charges and adhered to their innocence. In reply to questions, they neither wished to be examined under oath nor to produce evidence in defense.
9. Arguments heard and record perused.
10. 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 accused; that prosecution witnesses are consistent in their statements in respect of recovery of narcotics from

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accused; that FSL results in respect of the samples, separated from the contraband recovered from accused; that there is no malafide on part of the prosecution to falsely involve the accused in the case, therefore, he requested to award them 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 contradicts & suffers major inconsistencies; that prosecution case is full of doubts because prosecution witnesses materially contradicted each other; that the statement of any private person regarding recovery has not been recorded; that recovery is not effected from the immediate possession of accused; that the accused have not confessed their guilt; that the case against the accused is not proved and request is made for their acquittal.
12. Viewing the arguments advanced by learned counsel for parties and record available before the court, it is concluded that the local police had arranged a barricade, where accused facing trial appeared on their motorcycle, however, they on seeing police turned the direction to make their escape, whereat, the local police chased them and the accused Miraj Gul sitting on pillion seat jumped from the motorcycle and made his escape good throwing behind a sack of chars, whereas, accused Inamullah was arrested and chars weighing 2400 grams recovered from the sack he was carrying on tank of the motorcycle. It is bounden duty of prosecution to prove its case against them beyond shadow of a reasonable doubt from the moment of presence of all police officials on the spot, receiving spy information by local police to the interception of accused, their transportation of chars,

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taking of samples from recovered chars, preparation of recovery memo, drafting of the 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 and 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. As per record, complainant has allegedly recovered the contraband, taken samples from each packet, packed and sealed each test sample in the separate parcels no. 1 & 3, which as per last column of serial no. 35 of register no. 19, Exh.PW 1/1, shows that these were taken to FSL Peshawar by Khaleel-ur-Rehman (PW-5), who stated that these parcels were delivered to him by OII for onward submission to FSL, Peshawar. There is, however, nothing on record that as to when and by whom those test parcels were delivered to the OII for onward delivery to Khaleel-ur-Rehman, which not only doubts delivery of these parcels by Muharrir of the police station to the investigation officer (OII) but also shows the break in chain of safe custody of samples and transmission thereof to the laboratory; thus, forensic laboratory report cannot be believed.

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13. Besides above, the presence of complainant/seizing officer ((PW-2) on the spot at the time of occurrence is also found doubtful because he has stated that during days of occurrence, the Maghrib prayer was offered at 1725 hours (05.25 pm) and the occurrence has taken place

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after Maghrib prayer, whereas, he has arrested the accused Inamullah at 1750 hours (05.50 pm), however, contents of murasila report and FIR provides that the occurrence has allegedly taken place at 1640, which is also the time of arrest of accused Inamullah. On contrary, Abdul Saif, marginal witness to recovery memo (PW-3), has also negated the seizing officer deposing that accused have approached towards them at about 1640 hours (04.40 pm) and by that time the call for Maghrib prayer was not made. Similarly, complainant (PW-2) stated that when they have left for patrolling, first they have proceeded to Mishti Mela, where they have spent around 20 minutes, however, Abdul Saif (PW-3) deviated him stating that first they have paid visit to Mandaty Adda, where they remained for about 15 minutes, where after, they have proceeded to Hasan Zai Darra and he did not mention about their visit to Mishti Mela, which also creates doubt in prosecution case; therefore, if the statement of complainant is believed to be true then there appears a wide contradiction about time of occurrence coupled with factum of their places of patrolling, which not only creates serious doubt about mode and manner about the commission of offence but also presence of complainant at the crime scene at given time as well.

14. Similarly, complainant stated that he along with constable Umar had chased the accused Miraj in nearby area, whereas, marginal witness (PW-3) did not remember the names of persons, who have chased him, which is unbelievable. Likewise, PW-2 stated that he has taken into possession the case property along with motorcycle in presence of marginal witnesses, whereas, marginal witness (PW-3) deposed

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that he has collected the leftover contraband, Exh.P1, from ground and handed over to SHO, while, the case property, Exh.P2, the one lying on the tank of motorcycle was collected by SHO himself. More so, complainant (PW-2) deposed that the contraband was weighed without sacks, while, marginal witness (PW-3) negated him stating that it was weighed along with the sacks. Although, complainant stated that the accused driving the motorcycle was overpowered and arrested on the spot, however, he did not tell that he has arrested him because his statement provides that he along with constable Umar has started chase of accused Miraj, which means that the remaining police officials allegedly accompanied the complainant and the other police officials have arrested the accused Inamullah. On contrary, marginal witness (PW-3) stated that the accused Inamullah was overpowered and apprehended by SHO/complainant, which is also evident from statement of investigation officer, which if believed to be true then it infers that it was not the complainant but the other police officials, who have chased accused Miraj; therefore, all this makes the proceedings of arrest and chase of accused doubtful.

15. Complainant (PW-2) has also admitted this correct that a person can be seen from far distance, where the barricade was arranged; thus, the question arises that why the accused have taken so long time to turn the direction of motorcycle and got apprehended by the police, who were standing at considerable distance as per site plan and had to take the time to start the vehicle and chase them.

16. The investigation officer (PW-6) stated that he has checked the recovered contraband in sealed condition, according to which the

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chars was in hard form and whole of the chars dropped by accused Miraj Gul was in the shape of only one slab; however, complainant contradicted him stating that the recovered chars was in shape of pieces, which means that the contraband shown to investigation officer was different than recovered from the spot. Similarly, case property produced before the court was in shapes of 10-12 pieces; however, complainant has admittedly taken only two samples of 10 grams of chars from each sack for FSL and did not collect the samples from each piece. Even, he has not mentioned the number of pieces in his report, which makes the whole exercise of recovery of the contraband and taking of samples doubtful because this cannot be stated with certainty that from which piece the alleged samples had been taken and whether the other alleged recovered pieces were also the chars or not.

17. Furthermore, according to murasila report etc., the chars placed in parcels no. 1 & 2 was recovered from accused Miraj Gul, while, the chars placed in parcels no. 3 & 4 was allegedly recovered from accused Inamullah, however, investigation officer (PW-6) stated that the chars recovered from Inamullah was in parcels no. 1 & 2, while, the chars recovered from accused Miraj Gul was placed in parcels no. 3 & 4, which not only shows lack of interest of the investigation officer in the case but also poor investigation on his part.

18. Though, there is no mandatory provision in CNSA cases to associate private witnesses, however, their association is also not expressly barred, where there is availability of the public on the spot. In the instant case, record shows that the recovery has allegedly been made

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from public place i.e. on road during daylight and absence of public is not expected at the spot at the relevant time; therefore, the local police was supposed to associate private witnesses but they did not. Even, the statement of complainant suggests that murasila carrier has taken the murasila etc. to the police station by taking a lift from a private motorcyclist, who could have been cited as marginal witness to the recovery memo and other proceedings of the case Likewise, investigation officer (PW-6) of the case has also not recorded the statement of said motorcyclist under section 161 CrPC, which shows that local police has intentionally not cited him witness due to fear that the true facts of the case might be disclosed.

19. Besides above, admittedly no recovery of contraband has been made from immediate possession of accused Miraj Gul, whereas, it also does not appeal to mind that Inamullah shall carry a small quantity of chars by placing the same on tank of the motorcycle.
20. Since, the mode and manner of the occurrence has been doubted due differences in the statements of prosecution witnesses; therefore, the most reliable and helping evidence in such scenario could have been the call data record of the complainant, accused and investigation officer, which could have led their presence on the spot, movement of the murasila carrier from police station back to the spot either in person or with the investigation officer and also the movement of investigation officer from police station to the spot, however, the investigation officer candidly stated that he has not collected any CDR data of accused and police officials present on the spot at the time of occurrence.

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21. 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 above makes the prosecution case 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 Inamullah and Miraj Gul are acquitted from the charge leveled against them. They are on bails; thus, their sureties are discharged from the liability of the bail bonds.
22. Case property i.e. the contraband be destroyed in accordance with law, whereas, the motorcycle in question be dealt with in accordance with law after the expiry of period provided for appeal/revision.
23. File consigned to record room after completion and compilation.


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CERTIFICATE

It is certified that this judgment of consists of eleven (11) pages and each page is duly signed by me after necessary corrections.

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