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

Case No. 32/03 of 2023

Date of institution: 08.11.2023

Date of decision: 01.10.2024

Date of consignment:

The State through Nasir Ahmed SHO of Kalaya Police Station Orakzai
(complainant)

Versus

1. Mubeen Khan son of Sharab Deen, r/o Qaum Kamar Khel, Sultan Zai, District Orakzai
2. Jamshidullah son of Sharab Deen, r/o Qaum Kamar Khel, Sultan Zai, District Orakzai (**accused facing trial**)
3. Muhammad Imran son of Gul Mir Haq r/o Tari Kalay, Qaum Mishti, District Orakzai and
4. Abdul Aziz son of Yar Muhammad r/o Qaum Zakha Khel, District Orakzai (**absconding accused**)

FIR No. 88 DATED 29.08.2023 U/S 9-D CNSA

KALAYA POLICE STATION, ORAKZAI

JUDGMENT

1. Accused Mubeen Khan and Jamshidullah are facing trial, whereas, accused Muhammad Imran and Abdul Aziz are absconding accused in the subject case.
2. Nasir Ahmed SHO, complainant, along with Muqadar Khan SI and other police officials during patrolling of the area got information that some persons have kept a huge quantity of narcotics in bags at Wach Pull Algada to smuggle the same to Bara District Kyber; that they rushed to the spot and found 05 persons along with their bags present there; that they on seeing the police vehicle left their bags, fled away from the spot taking advantage of nearby forests/shrubs/bushes and made their escape good except the one, who along with

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white color bag was overpowered; that upon search of the bag, 09 packets chars wrapped with yellow scotch tape each weighing 1000 grams making total quantity as 9000 grams recovered and accused disclosed his name Umar Hayat; that upon interrogation accused Umar Hayat disclosed that two plastic bags white in color belonged to Muhammad Imran son of Gul Mir, two plastic bags one in yellow color and second in white color belonged to accused Abdul Aziz, two bags each belonged to Mubeen Afridi and Jamshid Afridi; that those eight bags left by escaped accused were checked and the police recovered 20 packets of chars each packet wrapped with a yellow scotch tape weighing to be 1000 grams making total quantity to be 20000 grams chars from each bag having rendered the fact that the each flitted accused was carrying 40000 grams of chars in two bags; that 10 grams of chars from each packet was separated through sharp object for FSL and the same was sealed in parcels no. 01-169 while the balance chars recovered from Umar Hayat and four above named accused was sealed in parcels no. 170-178 respectively; that 09 empty bags were sealed in parcel No. 179; that accused Umar Hayat was arrested on the spot; that the murasila was drafted at the place of occurrence and sent to the police station for bringing criminal law into motion; hence, the FIR.

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3. On completion of investigation, complete challan under section 9-D CNSA read with section 512 CrPC was put in court against accused facing trial and the absconding accused. As accused Umar Hayat was juvenile; therefore, separate challan under The Juvenile Act was received against him.

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4. As accused Muhammad Imran and Abdul Aziz were absconding; therefore, statement of search witness was recorded and prosecution was allowed to commence the trial against them in their absentia to preserve the evidence.
5. Accused facing trials were summoned. On their attendance, copies of the case were furnished to them under section 265-C Cr.PC. The accused facing trials were charge sheeted u/s 9-D CNSA, to which they pleaded not their guilt and claimed trial.
6. Prosecution produced following evidence in support of its case;
7. The statement of Nasir Ahmed SHO (complainant) was recorded as PW-1, who confirmed the initial report to be true and testified the recovery of contraband through recovery memo, Exh.PW 1/2, to be genuine; that he arrested the accused Umar Hayat on the spot and issued his card of arrest, Exh.PW 1/1, and drafted murasila, Exh.PW 1/3; he produced the case property, Exh.P-1 to Exh.P-10, and on completion of investigation submitted complete the challan against accused Umar Hayat and challan u/s 512 Cr.PC against remaining accused. One of the marginal witnesses to the recovery memo was Muqadar Khan ASHO, who was examined as PW-3; he testified that recovery was made from accused and was documented vide recovery memo in his presence. Another marginal witness to the recovery memo was Muhammad Irshad constable who testified that recovery was made in his presence and 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. Investigation Officer of the case was Menhaz Hussain IO, who entered in the witness box as

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PW-4; he prepared the site plan, Exh.PW 4/1; he took USB vide recovery memo, Exh.PW 4/2, and sealed the same in parcel no. 180, Exh.P-11; he vides application, Exh.PW 4/3, produced the accused before the Judicial Magistrate; he sent letter to the FSL, Exh.PW 4/4, and application, Exh.PW 4/5, and road permit certificate, Exh.PW 4/6; he also sent USB to FSL vide road permit certificate, Exh.PW 4/7; he applied for warrant u/s 204 Cr.PC and proclamation notices vide applications Exh.PW 4/8 and Exh.PW 4/9; he placed on file the copy of FSL, Exh.PA, and issued the formal card of arrest, Exh.PW 4/10; that after cancellation of the BBA, he produced accused before Judicial Magistrate vide applications, Exh.PW 4/11 & Exh.PW 4/12; he has produced accused before Judicial Magistrate for recording confessional statement and on completion of investigation handed over the case file to the SHO for onward submission of complete challan in the present case. Intekhab Ali Muharrir, was examined as PW-5, who on receipt of murasila report has registered FIR, Exh.PW 5/1; he locked the accused in the lockup and kept the case property in the *malkhana* for safe custody through entry in register no. 19, Exh.PW 5/2; he produced DD regarding the proceedings, Exh.PW 5/3. PW-6 is the statement of Abdul Wadood, who has taken the parcels no. 1 to 169 and 180 to FSL Peshawar for chemical analysis.

8. Prosecution closed its evidence.
9. 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.

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10. Arguments heard and record perused.
11. Learned Dy.PP for State argued that the prosecution has proved the case against accused beyond shadow of doubt; that the recovery of contraband is proved from accused; that prosecution witnesses are consistent in their statements in respect of recovery of narcotics from accused; that FSL results in respect of the samples, separated from the contraband, are positive; 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.
12. Counsel for the accused facing trial argued that prosecution has failed to prove its case against accused facing trial beyond reasonable shadow of doubt; that prosecution evidence contradicts and suffers major inconsistencies; that prosecution case is full of doubts because prosecution witnesses materially contradicted each other; that the statement of single private person regarding recovery has not been recorded; that recovery is not effected from immediate possession of accused facing trial; that the accused facing trial have not confessed their guilt; that the case against the accused facing trial is not proved and request is made for their acquittal.
13. Viewing the arguments advanced by learned counsel for parties and record available before the court, it is concluded that the local police has recovered huge quantity of contraband from the bags left behind by the accused facing trial and absconding accused; therefore, it is bounden duty of prosecution to prove its case against them beyond shadow of a reasonable doubt from the moment of receiving the spy information, their visit to spot, transportation of chars by accused,

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taking of samples from the recovered chars, preparation of recovery memo, drafting of the murasila, witnessing of whole proceedings by marginal witnesses, videography, 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 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 the mode and manner 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 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 conviction, the reliance is place on Zahir Shah versus The State (2019 SCMR 2004).

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14. As per record, complainant has allegedly recovered the contraband, taken samples from each packet, packed and sealed each test sample in separate parcels no. 1-169, which as per last column of serial no. 65 of register no. 19, Exh.PW 5/2, shows that these parcels were taken to FSL Peshawar by Abdul Wadood (PW-6), who stated that these parcels were delivered to him by the investigation officer for onward submission to FSL, Peshawar. Intikhab Ali (PW-5), Muharrir of the police station admitted that the record is silent about the fact that as to whom he has delivered the test samples for FSL, whereas,

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there are also no entries in register no. 19 that who had delivered the test samples to constable Abdul Wadood, which creates doubt as to how, when and by whom these test samples were delivered to the investigation officer. Record further suggests that the occurrence had allegedly taken place on 29.08.2023 but the test samples were sent for chemical examination on 02.09.2023, which clearly indicates delay of two days in sending the test samples to FSL that is violation of the rules, which say that sample for chemical analysis must be received by the FSL within three days i.e. 72 hours from the date of occurrence, which above facts not only doubt delivery of these test samples by Muharrir of police station to the investigation officer but also shows break in chain of safe custody of samples and transmission thereof to laboratory; thus, forensic laboratory report cannot be believed.

15. Muharrir (PW-5) of the police station also admitted that entries in register no. 19 are also silent as to who had handed over the case property to the investigation officer for its production before the learned judicial magistrate and whether it was actually produced before the learned judicial magistrate or not, which depicts that the case property was handed over to the investigation officer for its production before the learned judicial magistrate, however, the order dated 30.08.2023 of the learned Judicial Magistrate-I, Kalaya, Orakzai provides that the investigation officer had not produced the case property before him, which is further violation of mandatory provision of Section 33 of the Act.

16. Importantly, the contents of the murasila report explicitly provides that when the police party reached to the spot, they had found five persons along with bags present on the spot, out of whom accused

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facing trial and absconding accused on seeing the police vehicle decamped from there and accused namely Umar Hayat was arrested; however, when the examination-in-chiefs of complainant (PW-1), marginal witness to recovery memo (PW-2) and murasila carrier (PW-3) recorded, they categorically stated that when they reached to the spot, the accused on seeing them tried to make their escape good, however, they had overpowered them, which is totally in contrast to the stance taken in murasila report on one hand and also shows that they had initially arrested the accused facing trial but later on let them go for the reasons best known to them. If it is believed that they had made their escape good, even then, it is an admitted fact that the contraband has not been recovered from the immediate possession of accused facing trial. Likewise, no other incriminating material has been recovered from possession of the accused facing trial. Besides above, this is quite strange to note that police party consisted of large number and were in official vehicle, whereas, accused facing trial were having no transport facility but despite that accused facing trial made their escape good except accused Umar Hayat, which does not appeal to prudent mind because if one accused could have been arrested on the spot then the accused facing trial could have also been arrested because police party was armed with weapons and consisted of nine persons and they could have easily chased and arrested them. Similarly, record is also silent as to fact that had police party made any effort to chase the accused facing trial, which creates doubts in genuineness of prosecution case.

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17. Likewise, murasila report is completely silent about capturing of the videography of the recovery proceedings by police; however, record provides that videography of the alleged recovery proceedings was captured, saved in a USB, which was handed over to investigation officer vide recovery memo, Exh.PW 4/2, and sealed in parcel no. 180; however, there is nothing on record that who had made the video. If it is supposed that videography of the recovery proceedings was actually made then complainant and witnesses were supposed to mention this fact in their statements but their examination-in-chiefs are silent about this fact. Complainant (PW-1) and murasila carrier (PW-3); however, in reply to a question deposed that the USB was handed over to investigation officer on the spot, which presupposes that it was delivered to Muharrir of the police station by investigation officer for safe custody; however, the statement of Muharrir (PW-5) provides that complainant/SHO (PW-1) had handed over him parcels no. 1-180 in sealed condition, which means that the investigation officer had returned the USB to the complainant but whole record is silent about this.

18. Complainant stated that he had spent 3-4 minutes on preparation and sealing of one parcel; therefore, if there were 180 parcels then he must have consumed around 9-12 hours on preparation and sealing of one parcel. Let us, however, presume that the complainant had consumed one minute on preparation and sealing of each parcel, still it would have consumed his three hours to prepare and seal each parcel. Likewise, he stated that he had also consumed 25 minutes on preparation of recovery memo, 25 minutes on preparation of murasila and five minutes on preparation of card of arrest, which transpires

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that he had consumed around four hours on whole proceedings and handed over the murasila to Muhammad Irshad (PW-3), who took it to the police station for registration of case, which assumes that case should not have been registered earlier than 2200 hours; however, record transpires that the case was registered at 2120 hours, which is unbelievable because if occurrence had taken place at 1805 hours and complainant had consumed minimum four hours on recovery proceedings, then, how the case can be registered earlier than 2200 hours. Besides this, murasila carrier (PW-3) deposed that murasila was handed over to him at 1900 hours (07 pm) and he returned to the spot at 2000 hours (08 pm), whereas, the investigation officer came to the spot at 2200 hours (10 pm), which all facts are in conflict with the statement of complainant and record and leads to inference that neither marginal witnesses to the recovery memo had accompanied the complainant to the spot nor the occurrence had happened in a mode and manner stated in the report.

19. Statements of investigation officer (PW-4) provides that when he visited the spot, he was also accompanied by two police officials, who as per daily diary no. 15 dated 29.08.2023 were Abdul Wadood and Gul Kareem; however, Abdul Wadood (PW-6) stated that he has just taken test samples to the FSL Peshawar and did not participate in any other proceedings with the investigation officer, which not only vitiates the statement of investigation officer but also questions the entries made in the daily diary, from which an adverse inference can be drawn that the investigation officer might not have paid any visit to the spot and conducted the investigation in the police station and made the entries in daily diaries just to complete the formalities.

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20. The record further reflects that accused facing trial were not known to the complainant and their names were disclosed to him by the arrested accused Umar Hayat; however, when investigation officer was asked as to whether he had conducted any identification parade of the accused facing trial, he replied in negative and in order to fill up the lacunae added that complainant had told him that accused facing trial were already known to him, which is total in conflict with the facts of record. Had this been the fact, the complainant must have brought this on file that accused facing trials were already known to him and he had recognized them. More so, there is also contradiction in the statement of the investigation officer and rests of the witnesses as the earlier deposed that when he reached to the spot, there were 3/4 police officials present at the place of occurrence, whereas, record and statements of other witnesses provides that they consisted of at least 9 persons, which further leads to believe the fact that the investigation officer had not visited the spot and documented the investigation proceedings somewhere else.

21. Statement of witness to recovery memo (PW-2) is also in conflict with the record data because he deposed that they had returned to the police station after spot proceedings at 2200 hours, while, statement of complainant and record provides that they had reached back to the police station at 0030 hours. The presence of witness to the recovery memo on the spot also becomes doubtful because he has shown ignorance to facts in his replies to most of the questions. Even, he did not know that what document was prepared by the complainant first. This is of sheer surprise that he had stated to have recorded the

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statement of complainant in the shape of site plan. Had he been present on the spot, he must have told that through which transport/source the murasila carrier went to the police station and returned back but he could not, which speaks volume about his professional capabilities and extremely doubts his presence on the spot as well.

22. Record provides that though a huge quantity of chars has been allegedly recovered by the police but the 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. He, however, stated that it was chars *garda*, which is normally in dust form, however, FSL report provides that it was in solid shape, which leads to inference that the actual recovered article/stuff from accused was something else and the test samples sent to the laboratory for expert opinion was chars to obtain desirable results.

23. 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 facing trial and police officials present on the spot at the time of occurrence.

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24. 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].

25. From above appreciation of evidence it is held that the proceedings of making arrest of accused facing trial and seizure of narcotics had become doubtful. Moreover, so many discrepancies & contradictions in the case of prosecution have been observed, the accumulative effect of which provides that prosecution has failed to bring home the guilt against the accused facing trial beyond shadow of doubt; therefore, in view of these facts, the prosecution has failed to prove the commission of offence by the accused facing trial in the mode, manner and time stated by them, hence, while extending the benefit of doubt, the accused facing trial Mubeen Khan son of Sharab Deen and Jamshidullah son of Sharab Deen are acquitted from the charges leveled against them. As accused facing trial are on bail; therefore, their sureties are discharged from the liability of bail bonds.

26. So far absconding accused Muhammad Imran son of Gul Mir Haq and Abdul Aziz son of Yar Muhammad are concerned, it is held that they have also been nominated in the FIR and in absence of any rebuttal on their part, there exists prima facie strong case against them; that is why, perpetual warrant of arrest is issued against them.

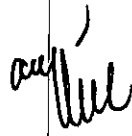
Name of accused Muhammad Imran son of Gul Mir Haq and Abdul

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Aziz son of Yar Muhammad be entered in the register maintained for proclaimed offenders of the concerned police station and in the office of DPO, Orakzai. On their arrest, supplementary challan along with detail of this file be submitted before the concerned court during court hours accordingly.

27. Case properties are kept intact till arrest and trial of absconding accused and be produced before the trial court as and when required.
28. File consigned to record room after completion and compilation.

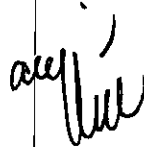


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CERTIFICATE

It is certified that this judgment of consists of fourteen (14) pages and each page is duly signed by me after necessary corrections.



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