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

Case No. 05/03 of 2024

Date of institution: 01.04.2024

Date of decision: 01.11.2024

Date of consignment:

State through Muqaddar Khan ASHO of the Kalaya Police Station, District Orakzai (complainant)

Versus

1. Gulyas Khan s/o Mehmood Khan, r/o Caste Bezot, District Orakzai. (accused facing trial)
2. Muhammad Hamza s/o Gulyas Khan, r/o Caste Bezot, District Orakzai. (accused facing trial)

FIR No. 07 DATED: 30.01.2024 U/S 9-D CNSA

KALAYA POLICE STATION, ORAKZAI

JUDGMENT

1. Accused Gulyas Khan and Muhammad Hamza are facing trial in the subject case.
2. Muqadar Khan ASHO, complainant, along with police officials were on patrolling of the area, where they had confronted two persons approaching from Zaridar side on their motorcycle, who on seeing the police party turned the motorcycle; however, a person occupying pillion seat fell down along with plastic sack whereas the motorcycle rider made his escape good; that the fallen person was overpowered and searched but nothing incriminating recovered from his person but the search of the sack led the complainant to the recovery of 05 packets of chars wrapped with yellow scotch tape; that each packet weighed 1000 grams making total quantity of 5000 grams; that 10 grams chars from each packet was separated and sealed into parcel

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Addl. District & Sessions Judge-II
Orakzai at Babbar Mela,
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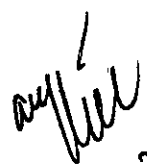
no. 1-5 for FSL, while, the balance 4950 grams chars along with white sack was sealed in parcel no. 6; that the videography of the recovery proceedings made through cell phone was saved in USB and sealed in parcel no. 7; that the person on cursory interrogation disclosed his name Muhammad Hamza while disclosed the name of escaped accused as Gulyas Khan; that he disclosed the recovered chars to be their ownership; that Muhammad Hamza was arrested on the spot and accused Gulyas Khan was arrested on 13.02.2024; 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.
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. The statement of Muqadar Khan ASHO (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 1/1, to be genuine; he arrested the accused Hamza and issued his card of arrest, Exh.PW 1/2, and drafted murasila, Exh.PW 1/3, and produced case property, Exh.P-1 to Exh.P-2. One of the marginal witnesses to the recovery memo was Manzoor Ali, who was examined as PW-2; he testified that recovery was made from accused and was documented vide recovery memo in his presence; he took the murasila, recovery

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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 Muhammad Haneef, who entered in the witness box as PW-3; he prepared the site plan, Exh.PW 3/1, and vide application, Exh.PW 3/2, produced accused Hamza before the learned Judicial Magistrate; he has sent the parcel samples to FSL vide application, Exh.PW 3/3, and route certificate, Exh.PW 3/4; he placed on file the attested copies of daily diaries, Exh.PW 3/5, and attested copy from the extract of register no. 19, Exh.PW 3/6; that he arrested Galyas Khan on 13.02.2024 and issued his card of arrest, Exh.PW 3/7; he produced accused before the learned Judicial Magistrate through his application, Exh.PW 3/8 and Exh.PW 3/9; he produced FSL reports, Exh.PW 3/10 and Exh.PW 3/11; on completion of investigation, he handed over the case file to SHO for onward submission of complete challan against the accused. Nasir Ahmed SHO was examined as PW-4, who prepared the complete challan, Exh.PW 4/1, against the accused. Statement of Muhammad Jameel Muharrir was examined as PW-5, who on receipt of murasila, card of arrest & recovery memo has registered the FIR, Exh.PW 5/1, and kept the case property in the *malkhana* for safe custody. PW-6 is the statement of Nazid Khan, who has taken parcels no. 1-5 to FSL Peshawar for chemical analysis.

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.


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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 the recovery of contrabands 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 recovered from accused, are positive; that there is no malafide on part of the prosecution to falsely involve the accused in the case, thus, 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 doubt; that prosecution evidence is contradictory in nature and 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 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. The evidence led by prosecution, arguments advanced by the learned counsel for parties and record available before the court makes this court to conclude that the local police was present at the spot, where accused appeared on their motorcycle; however, they on seeing the police turned the direction to make their escape, however, accused Gulyas made his escape good, whereas, accused Hamza sitting on pillion seat along with a sack fell from the motorcycle, who was arrested and chars weighing 5000 grams recovered during search of

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the sack, which accused Hamza allegedly disclosed their ownership; therefore, it is bounden duty of prosecution to prove its case against them beyond shadow of doubt from the moment of their present at the place of occurrence at relevant time, approaching of the accused on motorcycle, their taking U-turn on seeing the police, falling down of the accused Hamza and sack from the motorcycle, making the escape good by accused Gulyas, recovery of chars from the sack in presence of witnesses, to take the samples from the recovered chars, preparation of recovery memo, drafting the murasila, witnessing of the whole proceedings by marginal witnesses, registration of case, safe custody of recovered chars, investigation of 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 for FSL and consistency of the witnesses in their depositions, which are the most important aspects of the case for proving the commission of an offence by the accused because mere receipt of positive FSL report in respect of chars from the chemical analyst not supported by the evidence especially with reference mode and manner about commission of offence by accused questions the truthfulness of prosecution version.

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13. As per record, complainant has allegedly recovered the contraband, taken samples from each packet, packed and sealed each test sample in separate parcels no. 1-5, which as per last column of register no. 19, Exh.PW 3/6, shows that these samples were taken to the FSL Peshawar for chemical analysis by Nazid Khan (PW-6), who stated

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that these parcels were delivered to him by investigation officer in his office and the offices of Muharrir of the police station and the investigation officer are situated separately. There is nothing on the record that as to when, where and by whom these test parcels were delivered to investigation officer for onward delivery to Nazid Khan, which not only doubts delivery of these parcels by Muharrir of the police station to the investigation officer but also shows break in chain of safe custody of samples and transmission thereof to the laboratory; therefore, forensic laboratory report cannot be relied with conviction.

14. Besides above, learned counsel for accused argued that as per record five parcels were allegedly made from the recovered chars but extract of register no. 19, Exh.PW 3/6, provides about taking the parcel no. 1 by Nazid Khan to FSL, Peshawar. Contention of learned counsel for accused could have easily been overlooked for the same being considered as result of incomplete print from the original register but the daily diary report dated 02.02.2024, sheet no. 3 of Exh.PW 3/5, speaks about taking six parcels i.e. parcels no. 1-6 to FSL, Peshawar by Nazid Khan for chemical analysis, which not only creates doubt about the number of parcels handed over to him but also leads to the inference that chars taken to the FSL, Peshawar might be different from the one allegedly recovered from the accused.

15. So far investigation of the case by the investigation officer (PW-3) is related, it is observed that the investigation officer has not put full efforts in investigating the case and completed the investigation in hurry due to which he failed to reweigh the contraband in order to

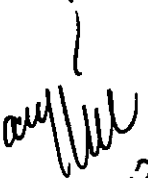
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ascertain that the recovered chars was actually of the same weight as was told to him by seizing officer or otherwise. Likewise, he did not show the presence of Constable Muhammad Ayaz on the spot and in the site plan nor did record his statement, whereas, he has also failed to recover the motorcycle through which the accused were allegedly transporting the case property. So much so the visit of investigation officer to the spot is also doubtful because record provides that the occurrence had allegedly taken place on 30.01.2022 at 1710 hours, the case was registered at 1845 hours and he has reached to the spot at 1910 hours, which was the time when there was a pitch dark and *Isha* prayer timings had begun at 1910 hours but surprisingly, when he was asked about the time he reached to the spot, the investigation officer replied that when he reached to the spot, there was sunlight/daylight that is totally out of mind and makes one to think that which part of world he had visited at relevant time, when there was sunlight at 1910 hours. On same footings, daily diary no. 13 provides that the investigation officer had left the police station for spot at 1855 hours and he stated to have reached to the place of occurrence at 1910 hours, whereas, complainant (PW-1) deviated him stating that the investigation officer had reached to the spot at 1855 hours, which is a glaring contradiction in the statements of both witnesses and also leads to the inference that the investigation officer had not visited the spot and conducted the whole investigation in the police station or somewhere else during daylight and completed the documentation just to fill up the lacunae.

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16. Besides, association of Manzoor Ali (PW-2) with complainant to the spot has also become doubtful because complainant (PW-1) stated that they had left the police station for patrolling of the area at 1340 hours & they first visited Feroz Khel Mela, then Uthman Khel, then returned to village Goen and from there they went to Qalat, where the occurrence had taken place, where they consumed fifty minutes on whole recovery proceedings, while, Manzoor Ali stated that they had left the police station at about 1700 hours and they first visited Kalaya then came to Qalat, where they have just spent five minutes, which are glaring contradictions. Similarly, complainant stated that they had not chased the motorcycle rider while PW-2 negated him saying that they had chased him up to 30-40 paces. Notwithstanding the contradiction noted above, the question arises that when one of the accused had fallen down and overpowered by the police so easily then as to why the police had not chased the other accused despite fact that they were four in number and had police vehicle. Similarly, according to the site plan, the police was present at point 'A' and accused were approaching from Qalat Ziarat through constructed road, which is a straight road and one can easily be seen from the distance, but it is strange to note that accused still continued the ride, and reached to point 'B', where took a U-turn to runaway instead of turning back from the initial point. More so, the detail mentioned in the site plan also clarifies that the police vehicle was present at point 'A' when they had seen the accused at point 'B' and chased them in the official vehicle until point '1A', which is also contrary to the prosecution story and the statements of prosecution witnesses.


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17. Muhammad Jameel (PW-5) also admitted that there is no detail in the register no. 19 that who had transmitted parcel no. 6 from police station to district *malkhana*, whereas, remand order of the learned judicial magistrate also nowhere provides the production of case property before him and thus mandatory provision of section 33 of the Act have been violated.
18. Admittedly, the complainant had taken in possession the cell phone and computerized national identity card of the accused but the same were not brought on record through recovery memo. Even, he failed to mention the registration number of motorcycle on record despite fact that accused Hamza allegedly confessed his guilt before him.
19. Record provides that though a huge quantity of chars has been allegedly recovered from possession of accused 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.
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 did not make any effort as such to collect 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 makes case of prosecution 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 beyond shadow of doubt: hence, accused Gulyas Khan and Hamza Khan 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 after the expiry of period provided for appeal/revision.
23. File consigned to record room after completion and compilation.



Announced
01.11.2024

Abdul Basit
Additional Sessions Judge-II, Orakzai

CERTIFICATE

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



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