

48

IN THE COURT OF ABDUL BASIT

**ADDITIONAL SESSIONS JUDGE-II/JUDGE SPECIAL COURT,
ORAKZAI**

Case No. 01/03 of 2024

Date of institution: 02.01.2024

Date of decision: 04.11.2024

State through Muhammad Younis SHO of the Kurez Boya Police Station
Orakzai (complainant)

Versus

Mutawir Ali s/o Hameed Ali, Qaum Mani Khel, Tappa Isa Khel, Tehsil
Lower, District Orakzai. (accused facing trial)

**FIR No. 50 DATED 26.11.2023 U/S 9-D CNSA
KUREZ BOYA POLICE STATION, ORAKZAI**

Judgment

1. Accused Mutawir Ali is facing trial in the subject case registered under section 9-D CNSA of Kurez Boya Police Station, Orakzai.
2. Muhammad Younis SHO, complainant, along with police officials during routine patrolling arranged a barricade at place of occurrence, where at about 1900 hours, a person coming from Mani Khel side was stopped being suspicious by the complainant for the purpose of search; that white color shopping bag recovered from his possession, which contained a packet of charas weighing 1100 grams wrapped in yellow scotch tape; that 10 grams charas from packet was separated for FSL and sealed into parcels no. 1 and the remaining charas along with recovered sack were sealed into parcel no. 2; that videography of the scene/occurrence was made through mobile phone that was converted and saved in a USB, which was sealed into parcel no. 3; that the case property was taken into possession and accused was arrested on the spot, hence, the FIR.

amf
04.11.2024
Abdul Basit
Addl. District & Sessions Judge-II
Orakzai at Baber Mela,
Hangu

49

3. On completion of investigation, complete challan under section 9-D CNSA was put in court against the accused.
4. Accused was summoned. 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.
5. Prosecution produced following evidence in support of its case;
6. PW-1 is the statement of Intekhab Ali Muharrir, who on receipt of murasila registered the FIR, Exh.1/1. He kept the case property in *malkhana* for safe custody and made entries in the register no. 19, Exh.PW 1/2. He has also made entries in daily diary, Exh.PW 1/3. The statement of Muhammad Younis (complainant) was recorded as PW-2, who confirmed the initial report, recovery of the contraband vide recovery memo, Ex.PW 2/1, to be true. He arrested the accused and issued his card of arrest, Exh.PW 2/2, and drafted the murasila report, Exh.PW 2/3. He produced charas along with plastic shopping bag in parcels no. 2, Exh.PW. P-1 and USB in parcel no. 3, Exh.P-2. He has finally submitted complete challan, Exh.PW 2/4, against the accused. One of the marginal witnesses to the recovery memo was Saleem Khan Constable, who was examined as PW-3. He testified that the recovery was made from accused and documented vides recovery memo. He took the murasila, recovery memo and card of arrest to the police station for registration of FIR. Hashim Khan was investigation officer of the case, who entered in the witness box as PW-4. He has prepared and confirmed the preparation of site plan, Exh.PW 4/1, and examination of the witnesses. He exhibited three

ayy
04.11.2024
Abdul Basit
Addl. District & Sessions Judge-II
Orakzai at Baber Mela,
Hangu

50

photographs, Exh.PW 4/2. He produced the accused before the Area Judicial Magistrate vides application, Exh.PW 4/3, drafted a letter to the FSL, Exh.PW 4/4, and road permit certificate, Exh.PW 4/5. On completion of investigation, he handed over the case file to SHO for onward submission of complete challan against the accused; he also added that he has taken samples of charas to FSL laboratory for chemical examination, submitted the application, Exh.PW 4/4, and placed on file acknowledgement receipt, Exh.PW 4/5.

7. Prosecution closed its evidence. Statement of accused was recorded u/section 342 CrPC, wherein, he again denied from the charges and adhered to his innocence. In reply to a question, he neither wished to be examined under oath nor to produce evidence in defense.
8. Arguments heard and record perused.
9. Learned Dy.PP for State argued that the prosecution has proved the case against the accused; that prosecution witnesses are consistent in their statements in respect of recovery of narcotics from accused; that FSL result in respect of the samples, separated from contraband recovered from accused is in positive; that there is no malafide on the part of prosecution to falsely involve the accused in the instant case, therefore, he requested to award him maximum punishment. Counsel for the accused argued that prosecution has failed to prove its case against accused 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 complainant has not recorded the statement of any private person regarding recovery; that the

Handwritten signature
11/11/2024
Abdul Basit
Addl. District & Sessions Judge-II
Orakzai of Bahar Malar, O.
Hingga

(51)

accused has not confessed his guilt; that the case against the accused is not proved and request is made for the acquittal of accused.

11. The record available before the court and arguments advanced by learned counsel for parties led me to the conclusion that the local police during patrolling arranged a barricade, intercepted the accused and recovered 1100 grams charas from his possession, which was taken into possession and the accused was arrested on the spot. It is duty of prosecution to prove its case against accused beyond shadow of doubt from the moment of the interception of the accused, his body search that led the recovery of contraband, taking of samples from recovered contraband, preparation of recovery memo, drafting 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 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 establish 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 report of the 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 conclusiveness and reliability of the report of Government Analyst, thus, rendering it incapable of sustaining conviction.

Handwritten signature: *ayy*
Abdul Basit
District Sessions Judge-II
Orakzai Bahar, Mela,
Mangru

52

12. Viewing the arguments advanced by learned counsel for parties, the evidence and record before the court, it is observed that the local police has alleged that they were on patrol duty and had arranged a barricade near place of occurrence when the accused appeared, who carried a white color shopping bag, which was checked and chars weighing 1100 grams wrapped in yellow scotch tape recovered from it and accused was arrested. The prosecution, in order to substantiate its plea, recorded the statement of complainant as PW-2, who reiterated facts of the case without single deviation. Though he was subjected to lengthy cross-examination, however, the learned defense counsel failed to bring any substance favoring the accused. No doubt, learned defense counsel raised an objection that not a single private witness has been associated during the whole proceedings, however, non-association of private persons at the time of recovery of the contraband from the possession of accused does not vitiates recovery proceedings because it is settled law that the police officials are as good witnesses as public the witnesses, whereas, on the other side the public also avoids becoming witness in criminal cases due to enmity factor. Importantly, section 31 of The Khyber Pakhtunkhwa Control of Narcotics Substances Act, 2019 provides that provisions of section 103 CrPC in the narcotics cases are mandatory only when search of a dwelling house is intended, whereas, in rest of the cases, the local police may follow it in appropriate cases with necessary changes, if any required. The relevant provision of law is reproduced below as ready reference;

ay
Abdul Basir
Addl. District Sessions Judge-II
Orakzai of Babar Mela,
Orakzai

(53)

31. Mode of making searches and arrest. The provisions of the Code, except those of section 103, shall, mutatis mutandis, apply to all searches and arrests. Provided that section 103 of Code shall, in case of search of dwelling house, be strictly observed.

In this case, the accused was arrested and recovery was effected from his possession in a public place and not during his house search; therefore, non-association of private witnesses by the police is not damaging to case nor it vitiates the proceedings.

13. Besides, it is evident from record that complainant has searched the accused, recovered the contraband from his possession, weighed it through digital scale, separated and sealed the ten grams of chars as sample for chemical analysis while sealed the balance contraband in another parcel, prepared the recovery memo, issued card of arrest of the accused, drafted the murasila and transmitted the murasila to the police station through constable Saleem Khan.

14. Saleem Khan appeared in the witness box as PW-3 and corroborated the above facts, which fully support the prosecution version. Nothing contrary as such could have been brought on record by defense while cross-examining both these witnesses.

In like manner, Intikhab Ali (PW-1), Muharrir of the police station produced extract of register 19 containing diaries no. 07 & 13 dated 26.11.2023 about the departure & arrival of complainant, according to which complainant along with witnesses to the recovery memo and other police officials have left the police station at 1640 hours and were on patrol duty of the area and had arranged barricade at the given area, where they have confronted the accused and complainant

ayl
11.2024
Abdul Basit
Addl. District & Sessions Judge-II
Orakzai at Bohar Meta.
Hangu

(54)

has recovered from his possession the chars weighing 1100 grams, whereat, he prepared the recovery memo, issued card of arrest of the accused and drafted the murasila, which were handed over to Saleem Khan, who took to police station and the instant case was registered. On same manner, Moharrir of Police Station (PW-1) on receipt of murasila incorporated the contents of report into FIR, Exh.PW 1/1, where after, copies of the FIR and murasila were handed over to investigation officer for investigation of the case at 2030 hours, who along with two police officials visited the spot on receipt of the copies, where he found the complainant and other police officials already present there and conducted the investigation. As darkness had prevailed; therefore, the investigation officer (PW-4) prepared the site plan on pointation of complainant under the headlights of the police vehicle, recorded the statements of all prosecution witnesses, produced the accused along with the case property and applied for three days physical remand of the accused from the court of learned Judicial Magistrate, Orakzai, however, his application was turned down and the accused was remanded to the judicial lock-up.

Since, Muharrir of the police station (PW-1) has produced attested copies of extract of register no. 19, according to which the parcels containing the contraband and USB were received by him and kept those in safe custody by depositing the same in *maalkhana* of the Police Station, whereas, sample of the contraband was delivered to the investigation officer for Forensic Test Laboratory, Peshawar through route certificate, which fact is also fully corroborated by the investigation officer in his statement recorded as PW-4.

16.
Adl. District & Sessions Judge-I,
Orakzai (et Babar Mela,
Hangu

(55)

17. Importantly, the videography of the whole arrest and recovery proceedings have been made by local police and saved in the USB, Exh.P2. Likewise, the photos of the accused at the time of his arrest were also taken, which aptly suggests the recovery of the contraband wrapped in yellowish scotch tape from accused on spot.
18. The recovery of contraband by complainant, preparation of sample and its delivery to investigation officer in sealed condition is proved from evidence. Likewise, complainant (PW-2) has onward delivered the contraband in sealed condition to Moharrir of the Police Station, who kept it safe in the *maalkhana* of the police station, where after, it was delivered to investigation officer, who took it to Peshawar for FSL and delivered there to authorized officer, who subjected the sample to chemical analysis and submitted the report; thus, chain of the recovery of contraband from possession of the accused by the complainant, its sealing and placing in the safe custody and then its safe transmission to authorized officer at FSL Peshawar is proved from the record.
19. Report of the Government Analyst for Narcotics, Forensic Science Laboratory, Peshawar dated: 28.11.2023, Exh.PK, also provides that parcel no. 1 sent for the chemical analysis was received by the testing laboratory with intact seals, which was opened, subjected to the physical and chemical test/analysis, which revealed the sample contained to be the "charas"; therefore, this can safely be concluded that contraband so recovered from the possession of the accused was nothing but dangerous article i.e. charas.

ayy i
M
A
Addl. District & Sessions Judge-II
Orakzai at Baber Mela,
Hangu

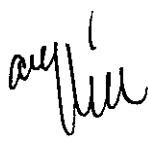
20. There are couples of contradictions in prosecution story like there is difference of timing noted about return of murasila career from the police station to spot in the statements of complainant (PW-2) and murasila career (PW-3). Likewise, complainant stated that when he has handed over the case property to Muharrir of police station, he has signed the register no. 19 but when he was confronted with the record, his signature was not found there. The above shortcomings are not worth affecting the merits of the case because from these no adverse inference about non-recovery of contraband from accused can be drawn. Besides, these are minor contradictions having no effect on merits of the case especially when evidence and facts of the case being coherent are established and proved from record. Even otherwise, difference of an hour appearing in the statements of witnesses is negligible especially when the statements of witnesses are recorded after a considerable length of time because it is not expected from a human to memorize the event with such precision.

21. In view of above, it is held that prosecution has proved its case against accused beyond shadow of doubt & successfully established the recovery of 1100 grams of chars from the possession of accused. Likewise, prosecution also proved the safe custody and transmission of the case property from point of recovery to until its chemical examination through laboratory, hence, I hold accused Mutawir Ali son of Hameed Ali guilty for possessing & carrying the contraband, convict and sentence him to simple imprisonment for one (01) year and fine of rupees five (05) lac under section 9 (d) of The Khyber Pakhtunkhwa Control of Narcotics Substances Act, 2019.

7
 ayf
 11.11.2024
 Abdul Basit
 Addl. District & Sessions Judge-II
 Orakzai at Baher Mela,
 Hangu

57

22. The fine amount shall be deposited in the government exchequer against the proper receipt. In default of payment of fine, the accused has to undergo further simple imprisonment for one (01) month. As the convict was on bail; therefore, benefit of section 382-B CrPC is not extended to him.
23. Attested copy of this judgment is furnished to the convict free of cost and to this effect his thumb impression is obtained on margin of order sheet as acknowledgment receipt with further direction that he can prefer an appeal against this judgment and order before august Peshawar High Court, Peshawar as per law. Another copy is sent to The District Public Prosecutor, Orakzai within the meaning of section 373 of The Criminal Procedure Code, 1898.
24. Case property is directed to be destroyed in accordance with law after expiry of period provided for appeal/revision.
25. File consigned to record room after completion and compilation.

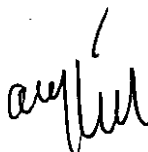


Announced
04.11.2024

Abdul Basit
Additional Sessions Judge-II/JSC,
Orakzai

CERTIFICATE

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



Announced
04.11.2024

Abdul Basit
Additional Sessions Judge-II/JSC,
Orakzai