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**In the court of Additional Sessions Judge-II/Judge Special
Court, Orakzai.**

Special case No.....01 of 2020

Date of Institution..... 21.01.2020

Date of Decision..... 18.03. 2020

State through Muhammad Shafiq SHO Police Station Lower Orakzai
.....(*complainant*)

VERSUS

1. Muhammad Shabir s/o Azeem Khan R/o Feroz Khel
Karghan District Orakzai.
2. Noor Saif Khan s/o Habib Ullah Khan R/o Beezot Tappa
Meer Kali Khel Karghan District Orakzai.
..... (**Accused Facing Trial**)

Reresented By:

Syed Amir Shah APP for State

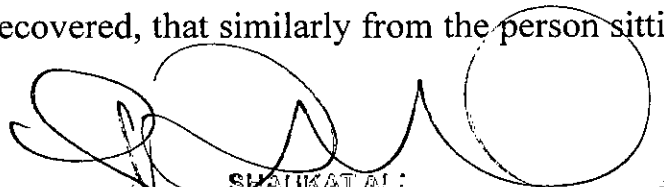
Mr. Akbar Yousaf Khalil Advocate,

Mr. Sanna Ullah Khan Advocate, counsels for accused

**CASE FIR NO. 43 DATED 04.12.2019 U/S 9-D KP CNSA OF POLICE
STATION LOWER ORAKZAI**

JUDGMENT

Brief facts of the case are that on 04-12-2019 the complainant Muhammad Shafiq Khan SHO along with Aftab Ahmad ASI, Fazal Hameed HC, Constable Khan Wada and other police officials were on gusht where during gusht the complainant received information that chars will be smuggled on a motorcycle from Sultan Zai, that on that information barricade was laid down at Sultan Zai road near Algadha and in the meanwhile a motorcycle came from Sultan Zai side and two persons were riding on the said motorcycle which was signaled to stop, that the motorcycle stopped at a distance and from the person driving the motorcycle one plastic envelope blue color was recovered, that similarly from the person sitting on the rare seat of


SHAUKAT ALI
Addl: District & Sessions Judge-II,
Orakzai at Mangu

motorcycle and envelope blue color was also recovered, that both the persons were deboarded from the motorcycle and the driver disclosed his name Muhammad Shabir and on search of the plastic envelope two packets chars *Garda* were recovered which were wrapped in a plastic tap and on weighment each packet was 1200/1200 grams total 2400 grams whereas the envelope was 20 grams when it was weight separately, that from each packet 10/10 grams chars *Garda* was separated for FSL and sealed into parcel No 1 and 2 while the remaining chars *Garda* 2380 grams sealed into parcel No.3, that the other person disclosed his name Noor Saif Khan and on search of the plastic envelope recovered from him two packets chars *Garda* was recovered which was wrapped in a plastic tap and on weighment each packet was 1200/ 1200 grams total 2400 grams whereas the envelope was 20 grams when it was weight separately, that from each packet 10/10 grams chars *Garda* was separated for FSL and sealed into parcel No 4 and 5 while the remaining chars *Garda* 2380 grams sealed into parcel No.6. The chars along with motorcycle was taken into possession and the accused were duly arrested. The complainant drafted the Murasila Ex.PA/1 and sent the same through Constable Khan Wada to the PS for registration of FIR against the accused on the basis of which the case FIR Ex.PA was registered against the accused. After registration of the FIR, the copy of FIR and Murasila was entrusted to the investigation staff for the purpose of investigation.

After registration of the case, the case was investigated. During investigation, the investigation officer prepared the site plan Ex.PB and also dispatched the samples to the FSL for chemical examiner's report and


SHAUKAT ALI
Addl: District & Sessions Judge-II,
Orakzai at Hangu

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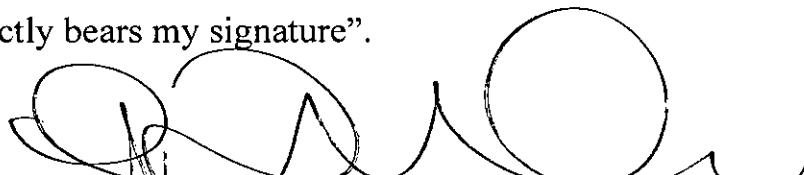
received FSL report Ex.PK in affirmative. which was placed on file. The I.O, during investigation, recorded the statements of PWs u/s 161 Cr.P.C. After completion of investigation, complete challan was submitted by the SHO against the accused for trial.

On 21.01.2020, complete challan was received by this Court for the trial of accused. The accused, being in custody, were summoned through *Zamima Bay* who were produced before the Court on 24-01-2020 and after compliance of provision of 265-C Cr.P.C, charge was framed against the accused on 03.02.2020, to which the accused pleaded not guilty and claimed trial, therefore, the prosecution was allowed to produce its evidence.

During the trial of the case, the prosecution examined five PWs and on 10.03.2020 abandoned the remaining PWs and closed its evidence;

The statements of the prosecution witnesses are as under:

PW-1 is the statement of Libab Ali Muharrir who stated that “ I was present in the PS when Khan Wada constable took the Murasila, recovery memo and card of arrest and handed over the same to me in the PS. I charged out case FIR Ex.PA on the basis of Murasila and incorporated the contents of Murasila into FIR. I handed over the copy of FIR, Murasila and card of arrest to the IO. Later on when the SHO came to the PS he handed over the case property to me. The case property containing parcels for FSL, motor cycle and remaining case property. I made entry of the case property in the register and kept the case property in the Maal Khana of the PS. Today I have seen the FIR which correctly bears my signature”.


SHAIKAT ALI
Addl. District & Sessions Judge-II,
Orakzai at Hangu

PW-2 is the statement of Ameer Nawaz constable who stated that "On 12-12-2019 Shal Muhammad IO handed over to me parcels No. 1 to 5 along with application to the FSL and road certificate for taking the same to the FSL laboratory Peshawar. I took the above said articles to FSL Peshawar and handed over the same to the official to the laboratory. The official of the laboratory put his stamp and signature on the road certificate as a token of receipt and when I came to the PS I handed over the same receipt to the IO. My statement was also recorded by the IO under 161 Cr.P.C".

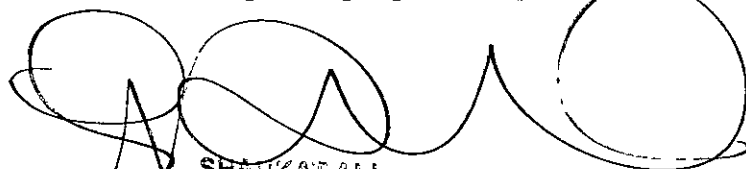
PW-3 is the statement of Aftab Ahmad ASI who stated that "I am the marginal witness to the recovery memo Ex.PW-3/1 vide which Seizing officer took into possession one plastic shopper of blue color from the possession of accused Shabir containing two packets chars which was weighed on digital scale which was 1200 grams total 2400 grams while the shaper was 20 grams on its weighment. 10/10 grams were separated for FSL from each packet and packed into parcel No. 1 and 2 while the remaining chars was packed into parcel No. 3 along with the blue shopper. Similarly from accused Noor Saif the seizing officer took into possession one blue shopper containing two packets chars which was weighed on digital scale which was 1200 grams each total 2400 grams while the shopper was 20 grams on its weighment. 10/10 grams were separated for FSL from each packet and packed into parcel No. 4 and 5 while the remaining chars was packed into parcel No. 6 along with the blue shopper. The complainant affixed three stamps of MK on the parcel and one stamp was kept inside the parcel. The complainant first prepared the Murasila and then the recovery memo and card of arrest of the accused. The



SHAUKAT ALI
Addl: District & Sessions Judge-II,
Orakzai at Hangu

accused were boarded in the official vehicle. Then the IO came to the spot at about 3:00 PM. The IO recorded our statements. The case property is before the court today in parcel No. 3 and 6 along with the motor cycle which are Ex.P-1 to Ex.P-3. Today I have seen the recovery memo which is correct and correctly bears my signature”.

PW-4 is the statement of Muhammad Shafiq SI/SHO who stated that “I was on gusht and during gusht I received information that the accused are proceeding from Sultan Zai side and shall cross Sultan Zai Algharah. I proceeded to the spot where I put barricade. The accused came to the spot and I signaled them to stop and they stopped at a distance. I came near to the accused. The accused had a blue shopper in his lap and on search of the shopper there were two packets chars in it. The other accused setting on the rare seat, a blue shopper was also recovered from his lap containing two packets chars. The accused were deboarded from the motor cycle. The chars were weighted on digital scale. The packet was 1200grams each along with the scotch tab in which the chars were ribbed. The blue shopper was weighed separately which was 20 grams. 10/10 grams were separated from the packet for FSL and packed into parcels. I drafted the Murasila which was handed over to Khan Wada constable for taking the same to the PS. I was present on the spot when at about 3:00 PM the IO came to the spot. On my pointation the IO prepared the site plan Ex.PB. I packed into parcel No.1 and 2 the samples of the chars recovered from the first accused and remaining packed into parcel No.3 and in parcel No. 4 and 5 the samples of packets recovered from the other accused and the remaining case property in parcel No.6. I prepared the



SHAKAT ALI
Addl. District & Sessions Judge-II,
Orakzai at Hangu

card of arrest and recovery memo and along with the Murasila I sent the card of arrest and recovery memo to the PS. The Murasila is Ex.PA/1 while recovery memo is already Ex.PW-3/1. The card of arrest of accused is Ex.PW-4/1. Today I have seen the documents which is correct and correctly bears my signature”.

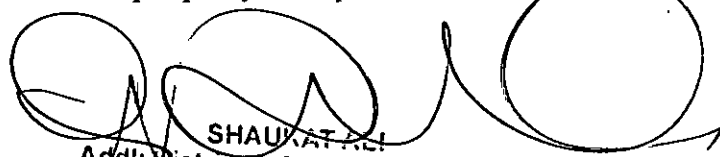
PW-5 is the statement of Shal Muhammad SI/SHO who stated that “I was busy in preparation of site plan and investigation in case FIR No. 42 dated 04-12-2019 u/s 9(D) CNSA PS Lower Orakzai. Constable Muhammad Riaz brought copy of FIR and Murasila to me and then I proceeded to the spot. On the spot I prepared site plan Ex.PB/ recovery sketch on pointation of complainant SHO Muhammad Shafiq Khan. I recorded statement of complainant, marginal witnesses of the recovery memo. The SHO have shown me the case property and accused on spot. I returned to the PS where I recorded the statement of Muharrir Lebab Ali regarding safe custody of the case property. The accused were handed over to me formally who were in the lock-up of PS. I interrogated the accused. On 05-12-2019 I produced the accused along with the case property before the Illaqa Magistrate vide my application EX.PW-5/1 for custody and two days custody was granted. I interrogated the accused during their custody. On the expiry of custody I produced the accused for further custody vide my application Ex.PW-5/2. I recorded the statements of accused u/s 161 Cr.PC during their custody. The request for further custody was turn down and the accused were remanded to Judicial Lock-up. During the course of investigation I placed on file copies of naqal mad No. 4 and 10 and naqal mad No. 7 and 11 dated 04-12-2019


SHAUKAT ALI
Addl. District & Sessions Judge-II,
Orakzai at Hangu

regarding departure and arrival of the SHO and of mine which are Ex.PW-5/4 and Ex.PW-5/5 respectively. I have also placed on file road permit certificate Ex.PW-5/6 and copy of register 19 Ex.PW-5/7. As the chassis No of the motorcycle were tempered therefore I added section 468 and 471 PPC vide perwana ezadgi Ex.PW- 5/8. On 12-12-2019 I sent the samples of Chars in parcels No. 1,2,4 and 5 to the FSL for chemical analysis through constable Ameer Nawaz who took the same to the FSL Peshawar and after his returned I recorded his statement u/s 161 Cr.PC. I received the FSL report inn positive which is Ex.PK. The motorcycle was also examined through FSL Peshawar vide latter No. 63/PA/DPO/ORK dated 27-01-2020 Ex.PW-5/9 the report whereof is Ex.PK/1. After completion of investigation I handed over the case file to SHO for submission of complete challan against the accused. Today I have seen the above documents prepared by me which are correct and correctly bear my signature”.

After the prosecution closed its evidence, the statements of the accused were recorded under section 342 Cr.P.C on 16-03-2020. The accused denied the allegation of the prosecution however they refused to be examined on oath or to produce defense evidence, therefore case was adjourned for final arguments.

Learned APP for the State argued that the accused is arrested red handed along with huge quantity of chars, that the samples were taken from the contraband that were in safe custody of the police, which were timely sent to the FSL, that the FSL report is in positive which supports the version of prosecution, that the case property was produced before the Court, which was

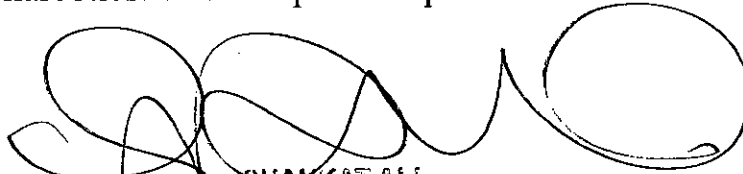

SHAUKAT ALI
Addl: District & Sessions Judge-II,
Orakzai at Hangu

exhibited, that the PWs are consistent in their statements who supported the recovery from the accused, the learned APP lastly argued that the prosecution has proved the case against the accused beyond any shadow of doubt.

On the other hand, learned counsel for accused opposed the arguments of learned APP for the state and argued that the prosecution witnesses are not consistent in their statements and there are major contradictions on material points in the statements of prosecution witnesses, which create doubts in the case of prosecution, that the prosecution failed to prove the safe custody of the samples and the samples were sent to the FSL with an unexplained delay, that the FSL report did not mention the protocols of tests therefore such FSL report cannot be used against the accused, that the prosecution failed to produce PW Khan Wada who took the Murasila to the PS, so the very chain of the occurrence stating from the spot has not been established, that the case of prosecution is full of doubts, the benefit of which shall be extended to the accused. Learned counsel for accused referred and relied on 2018 SCMR 2039, 2015 SCMR 1002 and on an unreported judgement of august Peshawar High Court in Cr.A.742-P of 2019 decided on 01-08-2019.

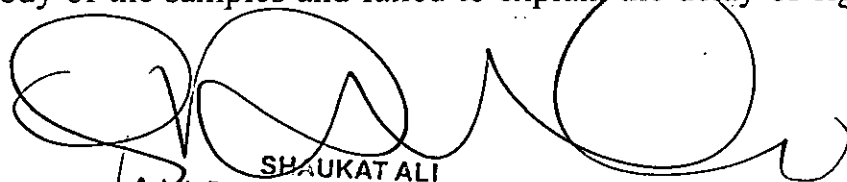
Arguments of learned APP for the State and learned counsel for the accused heard and available record perused.

The accused were allegedly arrested by Muhammad Shafiq SHO (PW-4) on the road leading to Sultan Zai near Algadha after receiving prior information that the accused shall proceed from Sultan Zai side while smuggling narcotics. The complainant put barricade near Algadha on Sultan


SHAUKAT ALI
Addl: District & Sessions Judge-II,
Orakzai at Hangu

Zai road and when the accused allegedly reached there, they were stopped and the alleged contraband was recovered from their possession. The complainant, however despite prior information did not associate private witnesses to the recovery proceedings and both the witnesses to the recovery memo Ex.PW-3/1 are police officials. It was held by the august Balochistan High Court in case reported in 2017 MLD 288 in case titled Shahid Dada vs State that no private witness was associated by the investigation officer at the time of alleged recovery despite having spy information about the offence manner of recovery had therefore lost its sanctity. Therefore in such circumstances the recovery against the accused could not be believed.

The accused were arrested on 04-12-019 vide their arrest card Ex.PW-4/1 and from the alleged recovery samples were separated and sealed into separate parcels for FSL report however the samples were sent and received by the FSL on 12-12-2019 as evident from road permission certificate Ex.Pw-5/6 and FSL report Ex.PK. which shows that the samples were sent to the FSL with the delay of eight days. It was required under the Control of Narcotics Substance Rules that the samples shall be dispatched within 72 hours however in the instant case the samples were sent beyond the period of 72 hours and such delay is nowhere explained. Shal Muhammad IO (PW-5) stated in his cross examination that it is correct that the samples were dispatched to the FSL after a delay of one week and further stated that I have not mentioned that due to the two days off I kept the samples in safe custody or not. The prosecution could not prove through cogent and reliable witnesses the safe custody of the samples and failed to explain the delay of eight days

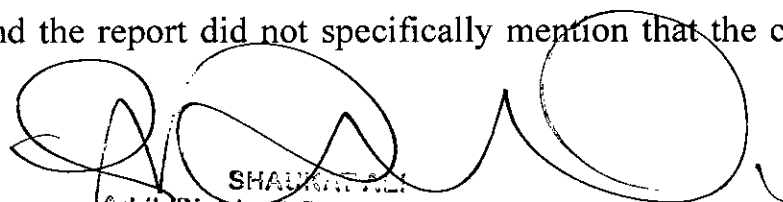


SHAUKAT ALI
Addl: District & Sessions Judge-II,
Orakzai at Hangu

in dispatching the samples to the FSL. No cogent reason has been put forward for such delay therefore the delay in such circumstances is fatal for the case of prosecution which facts is alone sufficient to cast of shadow of doubts on the FSL report and recovery of contraband from the possession of accused.

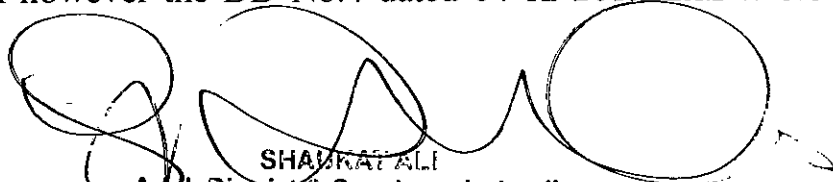
The FSL report Ex.PK does not mentioned the basis upon which the chemical examiner concluded that the samples taken from each and every recovered packet transmitted to the FSL for chemical analysis contained chars. Under Rule 6 of the Control of Narcotics Substance Rule after test of analysis the result thereof together with full protocols of the test applied shall be signed in quadruplicate and supplied forthwith to the sender as specified in Form II however the FSL report Ex.PK does not mention such protocols of the test applied and the relevant columns are kept blank which is a failure to comply with the relevant rules therefore non compliance of Rule 6 in such contexts would render the report of Govt Analyst inconclusive and un reliable and such report produced by the prosecution could not be relied and the same could not be made basis for the conviction of accused. Reliance placed on 2015 SCMR 1002.

The record would further reflect that the alleged contraband recovered for the possession of accused were chars *Garda* and 10/10 grams samples separated from the said recovered contraband and sealed into separated parcels were also chars *Garda* which were sent to the FSL for chemical analysis and report. The chars *Garda* which is always in soft form however the FSL report Ex.PK shows that the samples were on its physical examination brown solid and the report did not specifically mention that the chars was


SHAHEEN ULLAH
Addl. District & Sessions Judge-II,
Orakzai at Hangu

Pukhta or *Garda* which also cast a shadow of doubt on the recovery of contraband from the possession of accused.

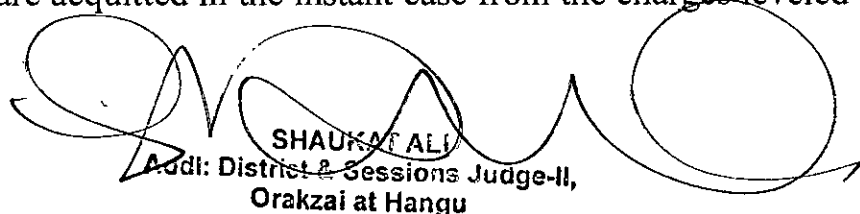
Besides there are also major contradictions in the statements of prosecution witnesses. The Murasila Ex.PA/1 shows that the complainant along with Aftab Ahmad ASI, Fazal Hameed HC, Constable Khan Zada and other police officials were are local *gusht*, however the daily dairy No. 4 dated 04-12-2019 Ex.PW-5/3 shows that the complainant was accompanied only by constable Fazal Hameed, Khan Wada, Muhammad Sadiq and one driver Tajaul whereas the mad report shows that Aftab ASI (PW-3) did not accompanied the complainant during *gusht* which makes the presence of Aftab Ahmad ASI at the time of alleged arrest of accused doubtful. The daily dairy Ex.PW-5/3 negates the statement of PW-3 and contents of Murasila Ex.PA/1. Furthermore Aftab Ahmad ASI (PW-3) stated during his cross examination that they were in official vehicle during *gusht* which was driven by him and during his chief examination PW-3 stated that the accused were boarded in the official vehicle however the statement of Aftab Ahmad ASI negated by Muhammad Shafiq SHO (PW-4) that he left the PS in a private vehicle for *gusht* which is correctly mentioned in DD No. 4 dated 04-12-2019. Furthermore, Muhammad Shafiq SHO was accompanied by his driver Tajaul which is mentioned in DD No.4 therefore the statement of Aftab Ahmad ASI that he was driving the vehicle is not worth reliable which further makes his presence on the spot highly doubtful. Complainant Muhammad Shafiq SHO stated during his cross examination that he left the PS for *gusht* at about 9:00/9:30 AM however the DD No.4 dated 04-12-2019 Ex.PW-5/3 further


SHAIKAT ALI
Addl: District & Sessions Judge-II,
Orakzai at Hangu

negates the statement of PW-4 which shows that the complainant left the PS at 11:20 hours, hence the arrest of the accused and the recovery of alleged contraband from their possession in the mode and manner is doubtful mentioned by the prosecution. PW-3 stated that the complainant prepared the Murasila, recovery memo and card of arrest of accused. Muhammad Shafiq SHO also stated in examination in chief that he prepared card of arrest, recovery memo and Murasila, however during his cross examination he contradicted the statement of PW-3 and his own statement by stating that the Murasila, recovery memo and card of arrest is not in his hand writing and it was written by Aftab ASI on his dictation. It is nowhere mentioned in the statement of prosecution witnesses nor available on record that the Murasila, recovery memo and card of arrest were prepared on the dictation of PW-4, hence in such circumstance the statement of prosecution witnesses could not be relied nor the same could be made basis for the conviction of accused.

It is not essential that there should be many circumstances creating doubts in the case of prosecution even a single circumstance that creates a reasonable doubt in a prudent mind regarding the guilt of accused then the accused shall be entitled to such benefit not as a matter of grace or concession but as a matter of right. In the case against accused, there are numerous doubts, the benefit of which shall be extended to the accused as a matter of right as it is better that ten guilty persons escape than that one innocent suffer.

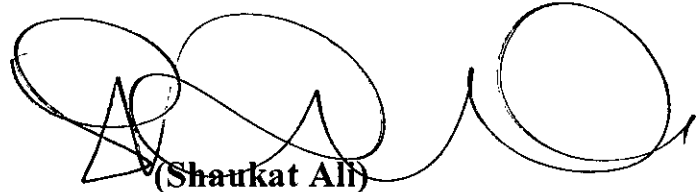
As sequel to the above discussion, the prosecution has failed to bring home guilt of the accused beyond any reasonable shadow of doubt therefore; the accused are acquitted in the instant case from the charges leveled against


SHAUKAT ALI
Addl: District & Sessions Judge-II,
Orakzai at Hangu

them by extending them the benefit of doubt. The accused are in custody; they be released forthwith if not required in any other case.

The case property i.e. contraband and motorcycle be kept intact till the expiry of period of appeal/revision and where after the same be dealt with in accordance with law.

Announced
18-03-2020

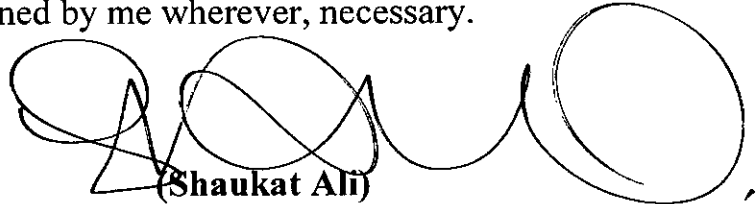


(Shaukat Ali)
Additional Sessions Judge-II/Judge Special Court,

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Orakzai at Hangu

CERTIFICATE

Certified that this judgment consists of -13- pages. Each page has been read, corrected and signed by me wherever, necessary.



(Shaukat Ali)
Additional Sessions Judge-II/Judge Special Court,

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