

IN THE COURT OF BAKHT ZADA
ADDITIONAL SESSIONS JUDGE-I/JUDGE SPECIAL COURT, ORAKZAI
(AT BABER MELA)

SPECIAL CASE NO. : 2/3 OF 2024
DATE OF ORIGINAL INSTITUTION : 21.08.2024
DATE OF PRESENT INSTITUTION : 21.11.2024
DATE OF DECISION : 19.12.2024

STATE THROUGH MUHAMMAD YOUNAS SHO, PS MISHTI
MELA
.....(COMPLAINANT)

-VERSUS-

1. RAZA BADSHAH S/O SAKHI BADSHAH, R/O QAUM MISHTI, VILLAGE MIR GHARRA
 2. AHMAD HUSSAIN S/O SHANDI GUL, QAUM MISHTI, VILLAGE TAGHA SAAM.
- (ACCUSED FACING TRIAL)

JUDGEMENT
19.12.2024

Accused named above are facing trial in case FIR
No. 43, dated 29.06.2024, registered U/S 11 (b) KP
CNSA/5 Exp of PS Mishti Mela, District Orakzai.

- (2). Facts of the prosecution case as reported in
Murasila by the complainant Muhammad Younas SHO,
PS Mishti Mela are that there were public complaints
against the renowned drug dealers namely Raza Badshah
and Ahmed Hussain and they were kept under
surveillance and upon receiving spy information regarding
their presence at a room situated at Mir Gharra Mountain
for the purpose of selling ICE. On the said information,
complainant/SHO on 29.06.2024 at 1300 hours, along
with Fazal Hameed No. 1247, Saleem Khan No. 1242,
Murad Gul No. 1264 and other police officials raided the
room and found two persons there, who were

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overpowered. They disclosed their names as Raza

Badshah and Ahmed Hussain. During search, complainant/SHO recovered a blue colour plastic sack from right hand of Raza Badshah and two hand grenades bearing No. POF71 and POF197, one each from each side pocket of his shirt. BDU staff was called for diffusing the hand grenades. On checking the plastic sack ICE were recovered which were found to be 600 grams on weighing through digital scale, out of which one gram was separated and packed into parcel No. 1 for sending the same to FSL for chemical analysis, while remaining 599 grams were packed and sealed into parcel No. 2. Similarly, the complainant/SHO also recovered a white colour plastic sack from right hand of accused Ahmed Hussain and recovered two hand grenades bearing No. 4093PFM-2 and 38124 each from both side pockets of his shirt. On checking the plastic sack, ICE were recovered which were found to be 200 grams on weighing through digital scale, out of which one gram was separated and packed into parcel No. 3 for sending the same to FSL for chemical analysis, while remaining 199 grams were packed and sealed into parcel No. 4. BDU staff on their arrival diffused all the recovered hand grenades on the spot. Two hand grenades recovered from Raza Badshah were packed and sealed into parcel No. 5. Similarly, the two hand grenades recovered from Ahmed Hussain were packed and sealed into parcel No. 6. Videography of the

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spot proceedings was made in mobile phone, which was

converted into USB and sealed the same in parcel No. 7.

The parcels were sealed by putting 1/1 stamp of monograms "MY" inside each parcel, while 3/3 seals of the same monograms were affixed on all the parcels. All the parcels were taken into possession and recovery memo was prepared. Both the accused were arrested at the spot and their card of arrest was issued. Murasila along with card of arrest and recovery memo were handed over to Constable Saleem Khan No. 1242 for taking the same to PS registration of FIR.

(3). After registration of FIR No. 43, dated 29.06.2024, registered U/S 11 (b) CNSA/5 Explosive Act, 2013 of PS Kurez Boya, District Orakzai, the same was handed over to Investigating Officer, who visited the spot, prepared site plan Ex. PB at the pointation of the complainant/SHO. After completion of investigation, he returned the case file to SHO for submission of complete challan.

(4). Complete challan in the instant case was submitted against the accused facing trial. Separate challans under the Explosive Act and Control of Narcotics Substances Act were submitted. The accused were in Judicial Lock-up, who were summoned through "Zamima Bay". On 31.08.2024, the accused were brought before the court and provisions of 265-C of the Code of Criminal Procedure,

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1898, was complied with. Formal charge against the

accused were framed on 13.09.2024, to which they

pleaded not guilty and claimed trial, whereafter the

prosecution witnesses were summoned.

- (5). The prosecution recorded the statements of as many as seven (07) PWs, the gist of their evidence is as under. The gist of the evidence is as follow;

I. PW-01, Saeed Khan: On 02.07.2024, the Investigation Officer handed over to him parcel No. 1 & 3 in sealed condition containing samples of ICE and parcel No. 5 & 6 containing two hand grenades each for transmission to FSL and BDU, Peshawar along with road permit certificate and applications addressed to FSL authorities and BDU, Peshawar. He took parcel No. 1 & 3 to FSL, Peshawar and delivered it to the concerned official and obtained the acknowledgment over the same, while parcel No. 5 & 6 were delivered to BDU, Peshawar and obtained the acknowledgment over the same. His statement was recorded by the IO U/S 161 Cr. PC. He was cross examined by the defence counsel.

II. PW-02, Ishtiaq Ali BDS Head Constable. On 29.06.2024, he received information from PS that complainant/SHO has recovered 04 hand grenades. Upon this information, he along with

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Complainant/SHO handed over 04 hand grenades to him. He removed the detonator from the hand grenades and diffused the same. He prepared his report Ex. PW-2/1 and handed over the hand grenades and report to SHO. His statement was recorded by the IO U/S 161 Cr. PC. He was cross examined by the defense counsel at length.

III. PW-03, Muhammad Younas SHO/Complainant.

Stated on oath that there were public complaints that renowned drug dealers namely Raza Badshah and Ahmed Hussain were running ICE business and they were kept under surveillance and upon receiving spy information that they are present at a room situated at Mir Gharra Mountain for the purpose of selling ICE. That the complainant/SHO on 29.06.2024 at 1300 hours, along with Fazal Hameed No. 1247, Saleem Khan No. 1242, Murad Gul No. 1264 and other police officials raided the room and found two persons there, who were overpowered and they disclosed their names as Raza Badshah and Ahmed Hussain. They were searched and complainant/SHO recovered a blue colour plastic sack from right hand of Raza Badshah. On further search, he recovered one hand grenade

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each bearing No. POF71 and POF197 from both

the side pockets of his shirt. BDU staff was called for diffusing the hand grenades. On checking the plastic sack he recovered ICE, which were found to be 600 grams weighed through digital scale, out of which one gram was separated and packed into parcel No. 1 for sending the same to FSL for chemical analysis, while remaining 599 grams were packed and sealed into parcel No. 2 Ex. P-1. Similarly, the complainant/SHO also recovered a white colour plastic sack from right hand of Ahmed Hussain and on his further search, recovered one hand grenade each bearing No. 4093PFM-2 and 38124 from both side pockets of his shirt. On checking the plastic sack he recovered ICE, which were found to be 200 grams on weighing through digital scale, out of which one gram was separated and packed into parcel No. 3 for sending the same to FSL for chemical analysis, while remaining 199 grams were packed and sealed into parcel No. 4 Ex. P-2. BDU staff on their arrival diffused all the recovered hand grenades on the spot and two hand grenades belongs to Raza Badshah were packed and sealed into parcel No. 5. Similarly, the two hand grenades recovered from Ahmed Hussain were

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packed and sealed into parcel No. 6. Videography

of the spot proceedings was made in mobile phone which was converted into USB and sealed the same in parcel No. 7 Ex. P-3. The parcels were sealed by putting 1/1 stamp of monograms "MY" inside each parcel, while 3/3 seals of the same monograms were affixed on all the parcels. All the parcels were taken into possession vide recovery memo Ex. PW-3/1. The accused were arrested and their card of arrest Ex. PW-3/2 was issued. Murasila Ex. PW-3/3 was prepared. The IO prepared site plan at his pointation. His statement was also subjected to lengthy cross examination by the defence counsel.

IV. PW-04, Muhammad Saeed MHC. On 29.06.2024, constable Saleem Khan No. 1242 brought Murasila report, card of arrest and recovery memo from Muhammad Younas SHO which were handed over to him in PS. He incorporated the contents of Murasila into FIR Ex. PW-4/1. Copy of FIR was handed over to IO in the PS. On return of SHO from the spot, he handed over parcels No. 1 to 7 in sealed condition which he kept the same in Mall Khana of the PS and made entry in register-19. On 02.07.2024, he handed over the parcels No. 1, 3,

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Peshawar. DDs regarding departure and arrival of SHO are Ex. PW-4/3 & Ex. PW-4/4. His statement U/S 161 Cr. PC was recorded by the IO. He was also cross examined by the defense counsel.

V. PW-05, Fazal Hameed Constable: He was present with complainant/SHO and he is marginal witness to the recovery memo already exhibited as Ex. PW-3/1. He repeated the same story as alleged by PW-03/Complainant. His statement was also recorded by the IO U/S 161 Cr. PC and he was also cross examined by the defense counsel.

VI. PW-06, Muhammad Saleem. He was present with complainant/SHO. He repeated the same story as alleged by PW-03/Complainant. His statement was also recorded by the IO U/S 161 Cr. PC and he was also cross examined by the defense counsel.

VII. PW-07, Muhammad Hanif, SI. He is IO of the case. He stated that after registration of the instant case copy of FIR along with relevant documents were handed over to him for investigation. He along with investigation staff proceeded to the spot. After reaching the spot, the

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SHO along with police officials and accused

were present at the spot. The SHO shown to him case property in sealed condition having the stamps of "MY". The SHO pointed out the place of occurrence to him and he prepared site plan at the instance of SHO which is Ex. PB. Thereafter, he recorded the statements of PWs U/S 161 Cr. PC. After spot inspection, investigation staff returned to the PS where in PS he recorded the statement of Moharrir Saeed regarding the registration of FIR and safe custody of case property and BDU Incharge Ishtiaq Ali. Thereafter, he interrogated the accused. On 30.06.2024, he vide his application Ex. PW-7/1 produced both the accused before Ilqa Magistrate for obtaining their physical custody along with case property which was allowed and one day police custody was granted. He interrogated the accused. During interrogation accused confessed their guilt before him and he recorded their statements U/S 161 Cr. PC and on 01.07.2024, he vide his application Ex. PW-7/2 produced the accused before Ilqa Magistrate for recording their confessional statement, but they refused to confess their guilt before the court and were sent to the Judicial Lock-up. On 02.07.2024, he collected parcel No. 1 & 3

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containing one gram ICE each and parcel No. 5

& 6 containing two hand grenades each from Moharrir of the PS and sent it to FSL for chemical analysis and Incharge BDU Peshawar along with applications addressed to FSL authority and BDU, Peshawar Ex. PW-7/3 and Ex. PW-7/4 and road certificates Ex. PW-7/5 & Ex. PW-7/6 through constables Saeed Khan No. 167. After depositing the parcel No. 1 & 3 in FSL, Peshawar and parcel No. 5 & 6 in BDU, Peshawar and acknowledgement stamp on the certificates were affixed by the officials concerned. He recorded the statement of Constable Saeed Khan No. 167 and Moharrir Muhammad Saeed regarding the handing over the case property and its onward transmission to FSL and BDU. After receiving the FSL & BDU reports regarding ICE and hand grenades, he placed on file which are Ex. PK and Ex. PK/1. He also placed on file sanction for prosecution against accused which is Ex. PW-7/7. He also recorded the statement of PWs U/S 161 Cr. PC. After completion of investigation, he handed over the case file to the SHO for submission of complete challan.


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(6). Prosecution abandoned PW Murad Gul being

witness of the same facts as deposed by PW Fazal Hameed and closed its evidence whereafter the statement of accused was recorded u/s 342 Cr.PC, but the accused neither wished to be examined on oath, nor opted to produce any evidence in defense.

(7). **Arguments:**

Learned DyPP for the state argued that the complainant has conducted raid at the room of the accused facing trial after receiving spy information and they were arrested red handed at the spot. That the recovery has been affected from direct possession of the accused facing trial in presence of the marginal witnesses of the recovery memos. He argued that the statements of PWs as well as FSL report are fully in line with the prosecution case and there is no contradiction to prove fatal for their case. He further argued that the statements of PWs have remained intact during the lengthy cross examinations by the defense counsel. He prayed that accused facing trial are involved in the commission of the offense which is heinous in nature and dangerous drug ICE has been recovered from their possession. He prayed for conviction of the accused facing trial in the instant case.

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(8). On the other hand, learned counsel for the accused facing trial argued that despite of prior spy information,

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the complainant has neither associated any private

witness with him to the recovery proceedings, nor he has conducted any test purchase. He argued that the statements of PWs were badly shattered during the course of cross examination. He contended that the place of occurrence is situated at the top of the mountain and there is no access of vehicle to the spot and one has to reach there by walking and climbing the mountain, so it is not appealing to prudent minds that the accused were present with narcotics and explosive and they had not decamped from the spot. It is also not appealing to prudent mind that the accused might have not seen the police while approaching the place of occurrence. That the whole story is based on lies and there is nothing on record to prove the alleged recoveries against the accused facing trial. He prayed for acquittal of the accused facing trial.

(9). Findings:

After hearing arguments, available record perused.

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It is the case of prosecution that on 29.06.2024 at 1300 hours, on complaints regarding selling of ICE, raid was conducted at a room situated at Mir Gharra mountain Nari Talab, where the complainant arrested accused facing trial Raza Badshah and recovered 600 grams ICE from his right hand and two hand grenades, one each from each side pockets of his shirt. Similarly, he

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recovered 200 grams ICE from the left hand of accused

facing trial Ahmed Hussain and two hand grenades, one each from each side pockets of his shirt. That one gram ICE from each packet was separated for FSL and BDU staff was called for diffusing the hand grenades, who reached to the spot and diffused the recovered hand grenades.

- (10). Complainant Muhammad Younas SHO appeared as PW-03 and he repeated the whole story as alleged in the Murasila Ex. PW-3/3, but during cross examination, he failed to state the nature of complaints received to him against the accused facing trial. He admitted that he has not made any entry in the DD regarding such complaints and that he has not made any test purchase despite of prior information. According to the allegations in the report, the accused facing trial were busy in selling ICE at the place of occurrence in a room which is situated at the top of the mountain, but neither any scale has been recovered from the possession of the accused facing trial, nor the accused facing trial had made any attempt to make good their escape from the place of occurrence despite of having a lot of time when the police parked their vehicles and started climbing the mountain. It is also astonishing fact that despite of being busy in selling ICE, no money has been recovered from the possession of any of the accused facing trial. The site plan Ex. PB

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shows that a room in the place of occurrence has been constructed by the accused facing trial, but no evidence regarding the ownership of the room has been placed on record. It is also strange that the accused facing trial were present in the room which is surrounded by forest and mountains from all the four sides, but they were not in possession of any kind of arms i.e., pistol or gun, rather the prosecution has alleged the recovery of hand grenades against them which is also not appealing because in such a deserted and dangerous place which is surrounded by mountains and forest, but the inmates have no weapons like pistol or gun for their self-defence, rather they were shown in possession of hand grenades which usually kept for attack on someone rather than for self defense and that is the reason that the recovery seems concocted and engineered. Learned defense counsel produced copy of FIR No. 44, dated 29.06.2024, Murasila and recovery memo which shows that similar nature of FIR No. 44, dated 29.06.2024 is subsequently registered to the instant case on the same day at 1740 hours by the same complainant and same kind of recovery in shape of ICE and hand grenades were made and astonishingly the same marginal witnesses are also cited on the recovery memo of the said FIR. It is general principal of evidence that if a witness lies in respect a particular event and the same proved on record otherwise, in such circumstances his remaining statement

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also become doubtful and cannot be believed. PW-05

Fazal Hameed who is marginal witness in both the instant FIR No. 43 and in subsequent FIR No. 44 has stated during his cross examination that after return to the PS in the present case, they have not left the PS on the same day, if his this statement is considered correct then how he signed the recovery memo in case FIR No. 44, dated 29.06.2024 registered at 1900 hours. The statements of marginal witnesses, in respect of the crime scene and the number of police officials present at the spot, are not unanimous. The complainant in Murasila Ex. PW-3/3 and in his examination in chief as PW-03 has shown the presence of Fazal Hameed No. 1247, Saleem Khan No. 1242 and Murad Gul No. 1264 and other police officials and nowhere he has mentioned the presence of driver Sami Ul Haq with him at the place of occurrence, but during cross examination he has stated that driver Sami Ul Haq was also present with him. PW-05 marginal witness of the recovery memo has made further improvement and stated that they were 5/6 police officials at the time of leaving the PS, but according to him 8/10 officials were present on the spot at the time of raid. Although PW-03 during his volunteer statement has stated that he accompanied 2/3 police officials from Mishti Mela check post, but neither their names are mentioned in the report, nor any DD is available on the case file in respect of their presence at the spot at the

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time of occurrence. PW-06 during his cross examination

stated that BDU officials came to the spot at 1400 hours, while PW-03/complainant stated during cross examination that BDU staff reached to the place of occurrence at about 01:25PM to 01:30PM.

- (11). PW-06 stated that complainant/PW-03 handed over the sealed parcels to investigation officer on the spot, but on the other hand PW-04 Muhammad Saeed MHC has stated during his examination in chief that the SHO handed over to him parcel No. 1 to 7 in sealed condition. This contradiction between the statements of PW-04 and PW-06 are making the transit of case property to PS doubtful. Above all the last but not the least fatal ground for the case of prosecution is that today, before announcement of order, this court requisitioned the parcel No. 7 (Ex. P-3) containing USB wherein the alleged video of the occurrence was recorded by the complainant, the same is received from Mall Khana and de-sealed in presence of the learned Sr. PP for the state and learned defense counsel, but instead of USB, an empty card jacket was found wherein no memory card exists. Meaning thereby that the whole proceedings were engineered and concocted and in fact no videography was conducted by the complainant at the time of occurrence and in order to fulfil the formality, an empty card jacket is sealed in the parcel. The empty

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jacket is again re-sealed in presence of the learned Sr. PP

for the state and learned defense counsel by affixing seal of monogram "AS" and the same is returned to district Mall Khana. However, photo of the parcel is taken and placed on file. This fact is also recorded in the last order sheet. The videography of the process of recovery seizer and arrest is a crucial piece of evidence and the necessity and significance of collecting evidence through the use of modern techniques and devices have been recognized, not only by the legislature by amending article 164 of the Qanoon-E-Shahadat Order, 1984 through the criminal laws (amendment) Act, 2023, but also by the August Supreme Court in its judgement "**Zahid Sarfaraz Gill vs State**" (2024 SCMR 934) and by the Peshawar High Court in case titled "**Imdad Ullah vs State**" (2024 PCrLJ 652 Peshawar). Apart from others the non-preparation of videography is alone sufficient ground for the acquittal of the accused facing trial in the instant case.

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Keeping in view the above discussion, the prosecution failed to prove their case against the accused facing trial beyond any shadow of doubt, I, therefore acquit the accused facing trial from the charges levelled against them by extending benefit of doubt. They are in custody. They be released forthwith if not required in any other case. Case property be kept intact till the expiry of period provided for appeal/revision under the law.

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Case file be consigned to the record room after its

necessary completion and compilation.

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CERTIFICATE

Certified that this judgment consists of eighteen (18) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 19.12.2024

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Sessions Judge-I/Judge Special Court,
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