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*In the name of almighty Allah who has unlimited
jurisdiction over and beyond the universe.*

BEFORE THE COURT OF
ADDITIONAL SESSIONS JUDGE/JUDGE SPECIAL COURT, ORAKZAI

Special Case No.21/3 of 2021

Date of institution: 27.07.2021

Date of decision: 16.05.2023

The State

.....Versus.....

1. Bait Ullah son of Maloom Jan, resident of Qaum Aka Khel, Tappa Rawakali, District Khyber.
2. Muhammad Anwar son of Yar Marjan resident of Qaum Aka Khel, Tappa Rawakali, District Khyber.

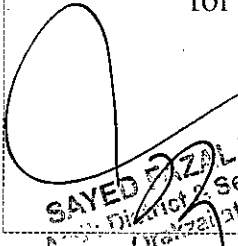
..... (Accused on trial)

**Case FIR No.02, Dated 28.03.2021 u/s 9-D of KP-CNSA, 2019
Registered at Police Station Mishti Mela Orakzai.**

JUDGMENT

Accused named above faced trial before this Court in case FIR No.02 dated 28.03.2021 registered under Section 9-D of Khyber Pakhtunkhwa Control of Narcotics Substance Act, 2019, at Police Station Mishti Mela, Orakzai.

2. Muhammad Younis SHO along with other police officials of Police Station Mishti Mela Orakzai, upon receiving spy information regarding the smuggling of chars, made their availability assured on barricade. Two person, riding on Motorcycle, appeared from Sangra's direction. They were stopped for the purpose of checking. On search, the complainant recovered a white


SAYED FAZAL WADOOD
Additional District & Sessions Judge
Orakzai at Hanou

color sack having 04 packets of chars garda from the lap of Muhammad Anwar who was sitting on the rear seat of the Motorcycle. Similarly, on body search of the driver of the Motorcycle namely Bait Ullah, the complainant also recovered 02 packets of chars garda from his trouser fold which were wrapped in yellow scotch tape, having weight of 1100 grams of each packet with total quantity of 6600 of all recovered 06 packets. Accused were arrested on the spot. Murasila was drafted at the place of occurrence and sent to Police Station for bringing criminal law into motion which was given effect in the captioned FIR that culminated into present case.

3. On conclusion of the investigation, complete challan against both the accused facing trial was presented. They were summoned being on bail and on appearance, they have been provided prescribed documents of case in line with Section 265-C of the Code of Criminal Procedure-1898. Charge against both the accused was framed to which they pleaded not guilty and claimed trial.

4. Prosecution was directed to produce evidence. The prosecution in order to prove its case against the accused, produced and examined as many as five (05) witnesses. The prosecution evidence is sketched below for ease of reference in determination of guilt or innocence of accused:

5. Kaleem Ullah constable was examined as PW-1, who had taken the parcels No. 1 to 6 to the FSL for chemical analysis. He exhibited road

certificate as Ex.PW-1/1. Muhammad Jamil, who had registered the FIR Ex.PA on receipt of Murasila, was examined as PW-2. He produced copy of Register No. 19 as Ex.PW-2/1. The star prosecution witness was complainant Muhammad Younis SHO, whose statement was recorded as PW-3. He confirmed recovery of contraband vide Recovery Memo Ex.PW-3/1. He confirmed that he issued the card of arrest of the accused and exhibited the same as Ex.PW-3/2. He also prepared Murasila as Ex.PW-3/3. One of the marginal witness to the recovery memo was Muhammad Waseem Constable, who was examined as PW-4. Investigation Officer of the case was Muhammad Riaz SI who entered into the witness box as PW-5. Preparation of Site Plan Ex.PW-5/1 and examination of witnesses was confirmed by this witness. He exhibited application as Ex.PW-5/2 which was submitted to Illaqa Magistrate for physical custody of the accused. He also produced road permit certificate as Ex.PW-5/3, application to ETO Kohat for verification of Motorcycle as Ex.PW-5/4, application to DPO as Ex.PW-5/5, verification detail given by Excise and Taxation Authority Kohat as Ex.PW-5/6 and Roznamcha report as Ex.PW-5/7.

6. After the closure of prosecution evidence, statements of accused were recorded u/s 342 of the Code of Criminal Procedure, 1898. Accused neither opted examination on oath nor chosen to produce evidence in their defence.

7. Learned APP for the State and learned defense counsel have been heard at length; the core points thereof, are being reflected below.

8. It was argued by learned APP that the recovery of narcotics is proved beyond doubt as is evident from the testimony of PW-3 and PW-4. That the recovery memo Ex.PW.3/1 has been proved to be correct and the testimony of the PWs has not been contradicted on material particulars. The offence is heinous in nature and there is nothing on record which could show any kind of *mala fide* on part of police in charging the accused. He concluded that accused have been arrested on the spot and have been specifically named in the contents of FIR. The case being proved necessitates conviction and sentence of both the accused.

9. Conversely, learned defence counsel argued that no recovery has been made from possession of the accused and that the police have planted the recovery of narcotics against them with ulterior motive. That no independent witness came forward to support the prosecution case and that the testimony adduced by the prosecution is full of contradictions on material particulars. It was argued that as such very strong and consistent testimony would be required in order to prove their guilt which is missing in present case.

10. It is in the contents of FIR that the Murasila has been handed over to Umar Zaman 1266 for its transmission to Police Station for lodging FIR but this Umar Zaman being important witness has not been produced for his examination. In a case titled "Javid etc. vs State" Hon'ble the Peshawar High

Court, Peshawar has ordained in a Judgement reported as 2020 YLR 311 that a Police Official to whom Murasila has been handed over for its transmission to Police Station with the object of lodging formal FIR is important witness whose production in evidence is necessary.

11. Chain of custody of the recovered material play pivotal role in the cases of Narcotics. The departure and arrival of the Police Party, transportation of the recovered material to Police Station, its entry in the relevant register, custody at Police Station and prompt and safe transmission of material to FSL are questions of paramount importance. In present case, the samples of chars were sent to the FSL on 30th March, 2021 while date of receiving of the parcels is 31st March, 2021 which fact is categorically admitted by PW-5, the Investigation Officer. This one day has neither been explained by the carrier (PW-1) nor Investigation Officer (PW-5) which is obviously a substantial dent in safe transmission of case property. It has been settled in "Qaisar etc. vs State" case reported as 2022 SCMR 1641 by August the Supreme Court of Pakistan, that any break in the chain of safe custody or safe transmission of representative samples, makes the report of chemical examiner worthless and unreliable for justifying conviction of the accused.

12. The accused facing trial have not recorded confession before the Court. They remained in police custody for sufficient time but no further recovery was made. The accused have no previous criminal history in such like offences.

13. The Motorcycle allegedly recovered from the direct possession of both the accused is not ownership of any of them being reflected from the

documents of Excise & Taxation Office, Kohat exhibited as Ex.PW-5/5 and Ex.PW-5/6.

14. The prosecution alleged that a sack of white color has been found in the lap of accused sitting on the rear seat but this sack has neither been shown on recovery memo nor produced in evidence which speaks about doubt in the mode and manner of recovery.

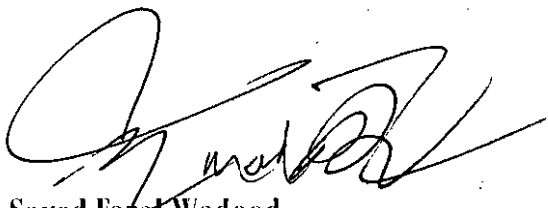
15. The examination of record as discussed above has given birth to reasonable doubt, the benefit of which has to be extended in favour of accused as was ordained in 2003 PLD 84 [Peshawar]. These facts and circumstances render the evidence as insufficient to believe the mode and manner of the crime narrated.

16. No witness from public either associated with recovery of chars or to cite as marginal witness to the recovery memo Ex.PW-3/1. The ocular account of evidence is contradictory on material points like timings of Murasila, departure from the spot and arrival to the Police Station. PW-3 states that all the documents (Murasila, card of arrest and recovery memo) have been handed over to Umar Zaman; whereas, PW-2 negates such version except that of Murasila received by him through Umar Zaman.

17. In the light of above discussion, it is being held that the prosecution evidence is falling under insufficient category of cogency; whereas, the secure category evidence is full of material contradictions that had given birth to reasonable doubt. Consequently, the benefit of doubt is extended to the accused facing trial and resultantly, accused Muhammad Anwar son of Yar Marjan and Bait Ullah son of Maloom Jan both residents of Qaum Aka Khel, Tehsil Bara,

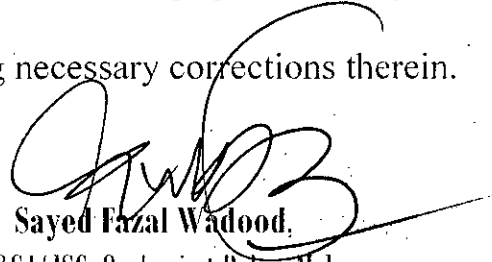
District Khyber are acquitted from the charges levelled against them. They are on bail, their bails bonds stand canceled and their sureties are absolved from the liabilities of bail bonds. Case property be dealt with in accordance with law on expiry of the period available for appeal/revision. File be consigned to District Record Room, Orakzai after its necessary completion and compilation within the span allowed for.

ANNOUNCED
16.05.2023


Sayed Fazal Wadood,
AD&SJ/JSC, Orakzai at Baber Mela

CERTIFICATE:

Certified that this Judgment is consisting upon seven (07) pages; each page has been read over and signed by me after making necessary corrections therein.


Sayed Fazal Wadood,
AD&SJ/JSC, Orakzai at Baber Mela