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IN THE COURT OF SHAUKAT ALI, ADDITIONAL SESSIONS  
JUDGE-II, ORAKZAI

Session case No. 08 of 2019  
Date of Institution: 17.10.2019  
Date of Decision: 24.02.2020

State through Nejat Ali s/o Ayan Ali r/o Meerako Payan District Lower  
Orakzai.....(*complainant*)

**VERSUS**

1. Munsif Ali,
2. Rajab Ali Ss/o Qambar Ali r/o Bar Muhammad Khel, Kuriz,  
Lower Orakzai
3. Bashir Hassan s/o Ghareeb Hassan r/o Bar Muhammad Khel,  
Kuriz, Lower Orakzai ..... (**Accused Facing Trial**)

**Represented by:**

Mr. Umer Niaz, DPP for State

Mr. Syed Basit Ali Shah Advocate counsel for complainant

Mr. Javid Muhammad and Jabir Hussain Advocates, counsels for accused

**CASE FIR NO.28 DATED 21.08.2019 U/S 302/324/34 PPC OF  
POLICE STATION LOWER ORAKZAI(KALAYA)**

**JUDGMENT**

The prosecution story is that on 21.08.2019 during gusht ASHO Khurshid Khan received information regarding the occurrence and rush to the spot along with police Nafri where the complainant Nijat Ali s/o Ayan Ali was present and reported that on 21/08/2019 he along with his brother Ishaq Ali and nephew Afsar Ali were proceeding to the nearby shop for purchase of house hold articles; that his brother Ishaq Ali was going ahead of them; that when they reached to the place of occurrence, there from the

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nearby mountains the accused facing trial started firing on them as a result of which his brother Ishaq Ali got hit and died on the spot while he and his nephew escaped unhurt. The motive for the occurrence was disclosed by the complainant as blood feud enmity. The report of the complainant was reduced into writing in the shape of Murasilla Ex.PA/1 which was sent to the PS for the registration of the case on the basis of which the case FIR Ex.PA was registered against the accused. The injury and inquest report of the deceased Ishaq Ali was prepared for the purpose of PM examination and autopsy of the dead body was conducted in DHQ Hospital Hangu by the doctor.

Investigation was carried out in the case. In the course of investigation, the investigation officer inspected the spot and prepared the site plan Ex.PB at the instant of complainant. During spot inspection the I.O took into possession blood stained earth and blood stained clothes of deceased, 11 empties of 7.62 bore and sent the same to the FSL for analysis, recorded statements of PWs and after completion of investigation submitted the case file to the SHO for submission of complete challan.

Complete challan against the accused was submitted which was received by this court on 17.10.2019 for trial against the accused. The accused Munsif Ali, Rajab Ali and Bashir Hassan who were in Judicial Lock-up were summoned through *Zamima Bay* and were produced before the court on 19-10-2019. After compliance of 265-C Cr.P.C, charge was framed against accused on 24.10.2019 to which the accused pleaded not

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guilty and claimed trial. The prosecution was allowed to produce its evidence and during the trial of the case, the prosecution produced and examined 10 PWs.

The statements of prosecution witnesses are as under:

**PW-1** is the statement of Mujahid Khan S.I who stated that "During the relevant days I was posted as SHO PS Lower Orakzai. On completion of investigation I submitted complete challan on 21/09/2019 against all the accused which is Ex- PW-1/1. Today I have seen the complete challan which is correct and correctly bears my signature".

**PW-2** is the statement of Libab Ali MHC who stated that "I received Murasila through constable Ashraf Ali sent by ASHO Khurshid Anwar and correctly incorporated the contents of Murasila into FIR. Today I have seen the copy of FIR which is Ex PA which is correct and correctly bears my signature".

**PW-3** is the statement of Dr. Wahid Gul Medical Officers who conducted post mortem examination of deceased Ishaq Ali s/o Ayan Ali brought by Shah Wali Khan Constable.

**PW-4** is the statement of Zahir Ali who stated that "On 21/08/2019 I identified the dead body of Ishaq Ali before the police and the doctor. My statement was recorded by the IO to this effect".

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PW-5 is the statement of Shal Muhammad I.O who stated that "After registration of the instant case I was entrusted with the investigation of the instant case. I visited the spot and prepared the site plan Ex.PB at the instant of complainant. During spot inspection I took at the position blood stain earth, 11 empties of 7.62 bore which were lying in scattered condition which I sealed into parcel No. 1 Ex.P-1 and parcel No. 2 Ex.P-2 and affixed 3/3 seals of MK on each parcel vide recovery memo Ex.PW-5/1 in the presence of marginal witnesses. From the spot I proceeded towards the house of accused for their arrest however the accused were not available in their home. I came back to the PS. In the PS constable Shah Wali handed over to me blood stain clothes of the deceased containing blue color Shalwar and Qameez, one bunyan white color and sealed into Parcel No. 3 Ex.P-3 and affixed three seals of MK on the parcel vide recovery memo Ex.PW-5/2 in the presence of marginal witnesses. I submitted application Ex.PW-5/3 to the Illaqa magistrate for obtaining warrants against the accused. In the meanwhile, the accused got pre-arrest bail and I issued their card of arrest Ex.PW-5/4. I interrogated the accused during investigation. The BBA of the accused was recalled and I arrested the accused and produced them before the Illaqa magistrate for seeking custody vide my application Ex.PW-5/5. The application was allowed and 03 days custody was granted subject to pre and post medical examination. The accused Rajab Ali was found unfit for police custody therefore I again produced accused Rajab Ali before the Magistrate for Judicial remand vide my

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application Ex.PW-5/6 and the accused was sent to the Judicial lockup. I interrogated the accused Munsif Ali and Bashir Hussain during investigation. On the expiry of custody, I again produced accused Munsif Alia nd Bashir Hussain for further custody vide my application Ex.PW-5/7 but the request for further custody was declined and the accused were remanded to Judicial lockup. I recorded the statement of accused u/s 161 Cr.P.C. I sent the blood stain clothes, empties and blood satin earth to the FSL for report vide my applications Ex.PW-5/8 and Ex.PW-5/9. The road certificates are Ex.PW-5/10 and Ex.PW-5/11. I received the FSL reports Ex.PZ and Ex.PZ/1 and placed it on file.( STO by the defense counsel that Ex.PW-5/8 to Ex.PW-5/11 are photocopies and cannot be exhibited in evidence being inadmissible). I also prepared the list of legal heirs of deceased which is Ex.PW-5/12. I recorded the statements of PWs and after completion of investigation handed over the case file to the SHO for submission of Challan against the accused. today I have seen the documents which were prepared by me which are correct and correctly bears my signature".

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**PW-6** is the statement of Muhammad Zaman constable who stated that "I was present in the PS where Shal Muhammad I.O ordered me to be prepared for proceeding to the place of occurrence. When we reached to the place of occurrence there the IO took into possession blood stained earth and eleven empties of 7.62 bore. The IO prepared the recovery memo which is already Ex.PW-5/1 and case property is already Ex.P-1 and Ex.P-2

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respectively. I signed the recovery memo on the spot. We returned to the PS. The IO took into possession blood stained garments of the deceased vide recovery memo already exhibited as Ex.PW-5/2 in the garments as Ex.P-3. I signed the recovery memo and my statement was recorded. Today I have seen both the recovery memos which are correct and correctly bears my signature”.

PW-7 is the statement of Khurshid Khan ASHO who stated that “On 21/08/2019 during gusht I received information regarding the occurrence and rush to the spot along with police Nafri where the complainant Nijat Ali s/o Ayan Ali was present and reported the occurrence to me and the report of the complainant was reduced into writing in the shape of Murasila by one Anar Gul ASI on my dictation which was read over and explain to the complainant who after admitting the same correct thump impress the same. Whereas Afsar Ali/ Kusar Ali verified the contents of Murasila also thump impress the same. I sent the Murasila to the PS through constable Ashraf Ali for registration of FIR against the accused. the dead body of Ishaq Ali was sent to Civil Hospital Hangu from Kuriz for the purpose of post mortem examination. Today I have seen the Murasila which is EX.PA/1 which correct and correctly bear my signature”.

PW-8 is the statement of Shah Sawar ASI who stated that “On 21/08/2019 I received direction from my high ups to reach the RHC hospital Kuriz and my high ups also informed me about the occurrence. I reached to RHC Kuriz where the dead body of the deceased was laying.

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The doctor on duty was not available in RHC Kuriz. I informed my high ups who directed me to take the dead body to the DHQ Hangu for PM examination. The constable Sehrab prepared the injury sheet in inquest report on my dictation which are Ex.PW-8/1 while the inquest report Ex.PW-8/2. I took the dead body to DHQ Hangu for PM examination and handed over the dead body along with injury sheet and inquest report to the doctor for PM examination. The PM report and blood stained clothes of the deceased were handed over to Shah Wali constable by the doctor who took the same to the PS. Today I have seen the injury sheet and inquest report which is correct and correctly bears my signature”.

**PW-9** is the statement of Nejat Ali who stated that “On 21/08/2019 I along with my brother Ishaq Ali and my nephew Afsar Ali were proceeding to the nearby shop for purchase of house hold articles. In the meanwhile, the accused facing trail appeared duly armed. My brother Ishaq Ali was a few paces ahead of us and I asked him to return and in the meanwhile the accused started firing upon us and we fell down on the earth and as result of firing of accused my brother Ishaq Ali got hit and died on the spot. The accused after the firing decamped from the spot. We shouted upon which our co-villagers rushed to the spot. The police who were also informed by the co-villagers rushed to the spot. Police along with the co-villagers shifted the dead body to the hospital. After that the police came to the spot and recorded my statement and that of Afsar Ali. The IO also visited the spot and we pointed out the place of occurrence to him. My thumb impression

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and that of Afsar Ali was taken on that statement by the police. The IO during spot inspection took into possession blood stained earth and empties and remained on the spot for about one hour. I charged the accused for the murder of my brother Ishaq Ali. My report was already Ex.PA”.

PW-10 is the statement of Afsar Ali who stated that “On 21/08/2019 I along with my uncles Ishaq Ali and Nejat Ali were proceeding to the nearby shop for purchase of house hold articles. In the meanwhile, the accused facing trail appeared duly armed. My uncle Ishaq Ali was a few paces ahead of us and we asked him to return and in the meanwhile the accused started firing upon us as result of firing of accused my uncle Ishaq Ali got hit and died on the spot. We shouted upon which our co-villagers rushed to the spot. The police who were also informed by the co-villagers rushed to the spot. Police along with the co-villagers shifted the dead body to the hospital. After that other police came to the spot and we reported the occurrence to them. The IO also visited the spot and we pointed out the place of occurrence to him. I charged the accused for the murder my uncle Ishaq Ali”.

On 10.02.2020, the prosecution closed its evidence and the case was fixed for statement of accused. On 11-02-2020 the statements of accused were recorded u/s 342 Cr.P.C wherein the accused denied the allegations leveled against them however they refused to be examined on oath or to produce defense evidence, therefore, the case was fixed for final arguments.



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Learned DPP for the stated assisted by the learned counsels for the complainant argued that the complainant has charged the accused in a promptly lodged FIR; that the venue of occurrence and recovery of empties from the spot is confirmed by the site plan and witnesses which support the version of the complainant; that the PM report support the version of the complainant and the time of occurrence given by the eye witness; that the complainant and eye witness were not shattered during their cross examination and made consistent statement who fully supported the commission of offence by the accused and no single improvement was made by them in their statement; that the motive was previous enmity which is fully proved by the prosecution; that the plea of alibi taken by the accused is not proved; that the accused went in to hiding for 8/9 days after the occurrence which shows their involment in the commission of the offence for which the accused failed to furnish any explanation; that the prosecution has successfully proved the guilt of the accused through cogent & confidence inspiring evidence available on file.

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Conversely learned counsel for the accused argued that the occurrence has not taken place in the mode and manner mention by the prosecution and the version of the complainant is not appealable to a prudent mind; that the medical report and site plan does not support the version of the complainant and the medical report has negated the ocular testimony; that the alleged motive attributed to the accused not proved through cogent evidence; that the CNIC numbers of complainant and eye witness are not mentioned on

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the Murasilla; that Afsar Ali is not shown as eye witness in the report; that the complainant and eye witness failed to established their presence at time of alleged occurrence through cogent evidence; that their testimony is suffering from material contradictions creating serious doubt in the prosecution case; that the prosecution case is full of doubt, the benefit of the same may be extended to the accused. Learned counsel for the accused referred and relied on 2019 PCr.L.J 186, 2020 PCr.L.J 68, 2018 YLR 1223, 2018 YLR 1745.

Arguments of learned DPP for the state assisted by learned counsel for the complainant and arguments of learned counsel for the accused already heard at length and available record perused.

The case of the prosecution is that the complainant Nijat Ali (PW-09) reported to Khurshid Khan ASHO (PW-07) that on 21-08-2019 he along with his brother Ishaq Ali and nephew Afsar Ali were proceeding to the nearby shop for purchase of house hold articles; that his brother deceased Ishaq Ali was a few paces ahead of them and when they reached to the place of occurrence, there from the nearby mountain from the front side the accused facing trial started firing upon them as a result of which his brother Ishaq Ali got hit and died on the spot while they escaped unhurt. The motive for the occurrence was disclosed as previous blood feud enmity.

The complainant (PW-09); brother of deceased and one Afsar Ali (PW-10); nephew of deceased narrated ocular account of the case and the

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whole case of prosecution primarily hinges on the ocular account of PW-09 and PW-10. The ocular account of the occurrence produced by the prosecution may only be relied if the prosecution could able to prove the presence of prosecution witnesses on the spot at the time of occurrence, witnessing the occurrence and their evidence is also supported by the circumstances of the case by making a true and consistent statement regarding the occurrence. Besides, to test the veracity of the testimony of a witness, it is not only that there must be consistency in the statement of the prosecution witnesses but it shall also be seen that whether the version was probable or not or the occurrence has taken place in the mode and manner as narrated by the complainant/prosecution.

The complainant (PW-09) in his report Ex.PA has specifically mentioned that the accused from the nearby mountain started firing on them which caused the death of his brother Ishaq Ali whereas fortunately the complainant and his nephew escaped unhurt. Afsar Ali (PW-10) belied the complainant and stated in his cross examination that there is no forest or mountain near the place of occurrence and further stated in his cross examination that no firing was made from the mountain. Furthermore, the record shows that the alleged place of occurrence as reported by the complainant is a thoroughfare leading to the shop that is also shown in Murasilla Ex.PA and the site plan Ex.PB prepared on the pointation of complainant. The complainant in his own statement during cross examination stated that the occurrence did not take place on the road rather

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the place of occurrence is a vacant place near the fields and further stated that the area where the occurrence took place might be three marlas. Afsar Ali (PW-10) stated about the place of occurrence that it was thoroughfare which leads to the shop. Both the prosecution witnesses belied each other regarding the place of occurrence. The recovery of empties from the place of alleged occurrence is also doubtful for the reason that when Khurshid Khan ASHO (PW-07) came to the spot and recorded the report of the complainant also inspected the spot who stated in his cross examination that he inspected the place of occurrence thoroughly but did not notice any empty on the spot. Shaal Mohammad Khan I.O (PW-05) stated in his cross examination that he on his own accord took into possession the empties from the spot. The prosecution witnesses are not consistent in their statement regarding the alleged venue of offence and belied each other, therefore, in view of the contradictions in the statement of prosecution witnesses, it would not be safe to rely on their statements for the conviction of the accused on a capital charge.

The complainant has not given the description of weapons in the Murasilla Ex.PA with which the accused were armed however in their statement they mentioned that the accused were armed with Kalashnikovs. The complainant (PW-09) stated in his cross examination that all the three accused started firing simultaneously whereas Afsar Ali (PW-10) in his cross examination that the first fire was made by accused Bashir and after that the other co-accused made firing which further contradicted the

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complainant. In the report Ex.PA the accused are charge for firing on the complainant and Afsar Ali whereas in cross examination PW-10 stated the accused escaped after the firing and did not make any firing upon them. The site plane was prepared at the instance of complainant wherein accused Munsif Ali is at point No.5 in center but when the complainant at whose instance the alleged site plan was prepared, was asked about the position of accused on the spot, he stated that accused Bashir was in the center. This statement of the complainant belied the site plan Ex.PB. The alleged eye witness Afsar Ali (PW-10) residing in Wah Cantt for the last ten years and came for evidence from Wah Cantt but the witness could not justified his presence in the village on the day of occurrence and also failed to identify the accused Munsif Ali in the court when the counsel for accused during his cross examination asked Afsar Ali (PW-10) to identify the accused Munsif Ali upon which the witness while pointing towards accused Munsif Ali stated that he is Rajab Ali. The presence of PW Afsar Ali on the spot is also not believable that when he was asked about the name of the shopkeeper towards whom they were proceeding for purchase of house hold articles, he replied that he do not known the name of the shopkeeper. Furthermore, it is not appealable to a prudent mind that the accused who were allegedly armed with Kalashnikovs: a sophisticated weapon and as highlighted in the site plan Ex.PB that the complainant and eye witness were at a short distance shown at point No.2 &3 and were also within the range of the guns of accused but except the deceased they had not received even a single

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scratch. In such case, total escape of the complainant and eye witness was highly improbable which also put question mark on the presence of complainant and eye witness on the spot; hence the eye witness account on that score is also doubtful.

The occurrence has not been taken place in the mode and manner as alleged by the complainant rather the same has taken place in some other manner not witnessed by the complainant and alleged eye witness. Afsar Ali (PW-10) stated in his cross examination that the police rushed to the spot after fifteen minutes of the occurrence however at that time no report was made as the complainant was required to report if he was present at that time which shows that the complainant was not present at the time of occurrence and later on came to the spot and it was due that reason the complainant did not report to the police who first visited the alleged place of occurrence. Afsar Ali, nephew of the deceased as stated by him did not accompany the deceased to the hospital. The complainant Nijat Ali (PW-09): brother of the deceased was also not present along with the dead body in the hospital. Had the complainant and eye witness been present at the time of occurrence they being brother and nephew of the deceased would have definitely accompanied the dead body to the hospital for PM examination and had they been present with the deceased at the time of occurrence, they have definitely signed the PM and Inquest reports as identifier which cast serious doubt on their presence on the spot. Furthermore it is not appealable to a prudent mind that the complainant

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who is the real brother of the deceased and eye witness Afsar Ali (PW-10); the nephew of deceased is neither making any efforts to shift the dead body to PS for lodging the report with the police nor accompanying the dead body of his deceased brother to the hospital and just waiting for the police on the spot for report who arrives to the spot after 45 minutes as stated by PW-07. The presence of complainant and eye witness on the crime spot due to their unnatural conduct has become highly doubtful. In such circumstances it could be safely held that the complainant and eye witness were not present at the time of occurrence, and those were the co-villagers

who rushed to the spot and took the dead body of the deceased to the hospital.

Dr. Wahid Gul Medical Officer (PW-03) conducted the PM examination of the dead body and stated that he received the dead body through police constable and the dead body was identified before him by the said police constable. The Medical Officer further stated that in the injury sheet Ex.PW-3/1 and inquest report Ex,PW-3/2 produced by the police, the injuries were not mentioned. The medical report prepared after PM examination by the CMO, however shows entry and exit wounds on right thigh of the deceased and a supra occipital lacerated wound. Furthermore, the clothes of the deceased consist of light blue shalwar, qamees and one banyan which were taken into possession by the I.O in the P.S vide recovery memo Ex.PW-5/2 and sealed into parcels having no cut marks on it. Shaal Mohammad I.O (PW-05) stated in his cross examination

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that he has examined the blood stained clothes of the deceased; that there was no cut mark on the clothes of the deceased, which negates the version of the complainant and makes the case of the prosecution doubtful. The complainant and eyewitness also made material improvement in their version in order to make their evidence consistent with the medical evidence. In the FIR and in their police statement they stated that when they reached the place of occurrence there the accused from the nearby mountain from the front side started firing upon them. In the site plan the accused are shown allegedly firing from front side whereas in the medical report injuries including supra occipital lacerated wound noticed on the body of the deceased are not consistent with the statements of prosecution witnesses. In their statements in court they stated that the deceased was a few paces ahead of them and they asked him to return where in the meanwhile the accused started firing upon them and they fell down on the earth and a result of firing Ishaq Ali got hit and died on the spot. This improvement was made because the medical office had mentioned occipital lacerated wound in the PM report and such statement was made to show the manner in which the deceased sustained those injuries mentioned in the PM report which cast serious doubt on the veracity of their testimony and further made the evidence of the eye-witnesses of doubtful character. There are numerous infirmities in the statement of the prosecution witnesses which make their entire statements highly doubtful and not believable.



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The complainant in the FIR has attributed the motive for the occurrence as previous blood feud enmity with the accused; however the prosecution could not prove the alleged motive by producing any documentary or oral evidence. The motive once alleged by the prosecution and later on could not prove through confidence inspiring evidence then it would be fatal for the prosecution case and the occurrence could not be believed. The evidence on file is not inspiring confidence and trustworthy could not be relied upon and could not be made basis for the conviction of accused. It is held by the apex courts in plethora of judgments that so many doubts are not needed in the prosecution case; even when there is a single circumstance in the prosecution case that creates reasonable doubt in the mind of a prudent person regarding the guilt of the accused the benefit of such doubt shall be extended to the accused. Guidance is drawn from case title Akbar Khan v Nazar Gul & 6 others reported in 2020 PCr.L.J 68

The recovery of blood stained earth from the place of deceased, his last worn blood stained clothes recovery of alleged crime empties from the spot vide recover memo Ex.PW-5/1 and Ex.PW-5/2 and Post Mortem report of the deceased may explain the murder of the deceased Ishaq Ali with firearm but by whom is shrouded mystery as the statement of the complainant and eye witness could not be relied and believed as their presence on the spot and witnessing the occurrence has not been established, therefore when there is no eye witness to be relied upon, then there is nothing to be corroborated by the recoveries. Once the ocular

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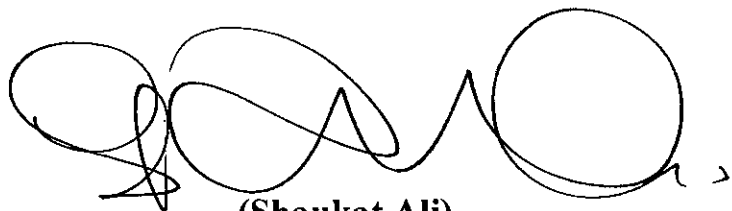
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 account is disbelieved, then no other evidence will be sufficient for recording conviction regarding a capital charge.

As sequel to the above discussion, the prosecution has failed to bring home the guilt of the accused beyond any reasonable shadow of doubt; therefore, the accused facing trial namely Munsif Ali, Rajab Ali and Bashir Hassan are acquitted in the instant case from the charges leveled against them by extending them the benefit of doubt. The accused are in custody; they be set at liberty forthwith if not required in any other case.

The case property be kept intact till the expiry of period of appeal or revision and where after the same be dealt with in accordance with law.

File be consigned to the record room after necessary completion and compilation.

**Announced**  
 24/02/2020



(Shaukat Ali)

Additional Sessions Judge-II

Orakzai at Baber Mela

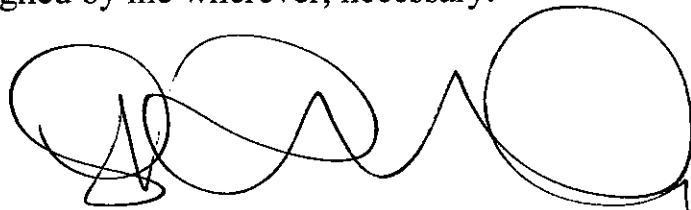
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**CERTIFICATE**

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



(Shaukat Ali)

Additional Sessions Judge-II/

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