

**IN THE COURT OF JAMAL SHAH MAHSOOD,
ADDITIONAL SESSIONS JUDGE-I, ORAKZAI**

Case No. 2/2 PPC of 2019

Date of Original Institution (before Assistant Commissioner, Orakzai)	05-08-2018
Date of Transfer to this Court	01-04-2019
Date of Decision	29-02-2020

The State

Vs

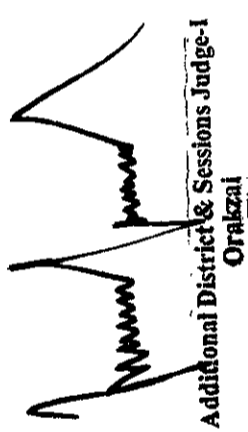
1. **Mukamil Khan**
2. **Latif Ur Rehman**
3. **Salim Khan**; all 03 sons of Amir Syed
4. **Muhammad Rafiq** s/o Niazmin Khan; all 04 belonging to Sheikhan caste of Orakzai and residents of Umerzai, Lower Orakzai
(Accused)

- Case: Information Report No. 1702/AC/L
- Dated: 05-08-2018
- U/ss.: 302/324/34 PPC
- Registered with: Assistant Commissioner (AC), Lower Orakzai

- DPP Umar Niaz, APP Zohaib Ahmad Sher and APP Syed Amir Shah for State
- Aurangzeb Khan Bangash and Haseeb Ullah Khan Advocates, for complainant Koko Rehman and injured Shah Nawaz
- Syed Muzahir Hussain, Muhammad Luqman Iqbal, Sana Ullah Khan and Abid Ali Advocates, for defense

JUDGMENT:

1. The 04 accused, namely Mukamil, Latif, Salim and Rafiq, are charged with the commission of murders, while sharing common intention, of 04 persons (Shehzada s/o Lalzada, Javid s/o Lalzada, Ishrat s/o Shehzada and Fazal Rahim s/o Fazal Manan) with firearms, and for attempting at the life and causing injuries to Shah Nawaz (PW-2) s/o Shehzada.


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2. The incident of present case allegedly occurred on 05-08-2018. At that time FATA Interim Governance Regulations, 2018 (FIGR), was the applicable law; whereunder, the Deputy Commissioner (DC) and Assistant Commissioner (AC) had the jurisdiction to decide certain criminal cases through a special procedure. After annulment of FIGR, the DC and AC lost jurisdiction and the case was transferred to this court, through Peshawar High Court, Peshawar.

3. Before transfer, the present case remained pending before AC, Lower Orakzai (Judge under FIGR) for about 08 months. Under section 13 of FIGR, the DC was required to register the criminal case and the accused was required to be produced before the AC (Judge) within 24 hours of arrest. The AC (Judge) was then to make an order in writing for referring the matter to a Council of Elders (CoE) for its findings on facts; which Council was required to hold necessary inquiry and hearing of the parties and witnesses, before submitting its findings to the Judge. This CoE was required to be constituted within 10 days from the arrest of accused and it was required to submit its findings before the Judge within 90 days. However, during pendency of the instant case before AC (Judge), no proper proceedings under FIGR were conducted. Even the order sheets and relevant documents are not properly signed, and it is difficult to determine the nature of proceedings and the authenticity of these documents.

4. After transfer of instant case to this Court, the accused and the complainant were summoned. There is no proper record in the

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case as no proper proceedings were conducted by the previous administration/Judge under the relevant law of FIGR. In fact, there was no investigation/inquiry conducted in the case at all. After transfer of case to this court, the prosecution was directed to submit list of its witnesses by this Court and all necessary documents which the prosecution wanted to produce/exhibit were allowed during trial.

5. The facts of the occurrence, according to the Information Report No. 1702/AC/L, dated 05-08-2018 (sent by AC Lower Orakzai to DC Orakzai) - Ex. PW 5/1, are that on that day, at around 08:00 pm, sudden firing on spur of the moment between Mukamil (accused No.1) and Shehzada (deceased) had resulted in the deaths of 04 individuals (Shehzada, Javid, Ashrat and Fazal Rahim) and bullet injuries to 03 others (including accused Mukamil and Latif). The motive was recorded as dispute over piece of land. That Levy and Orakzai Scout personnel were sent to the spot to evacuate the injured and affect ceasefire. The AC noted that action/investigation was under way and that further details would follow.

6. On taking cognizance of the case by this court, charge was framed against the accused on 18-09-2019, in line with the allegations available on record. Accused M. Rafiq has remained abroad; his attendance before this court was dispensed with during trial, and charge was framed against him through his counsel, Abid Ali Advocate. All the accused pleaded not guilty and claimed trial. The prosecution was directed to submit list of


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witnesses, which was placed on file. Five (05) PWs were produced during trial by the prosecution and the defense was given opportunity to cross-examine these PWs.

7. The gist of prosecution evidence is as follows:

- **PW-1** is Koko Rehman (complainant). He narrated the events of the occurrence, as an alleged eyewitness, and other related proceedings of the case.
- **PW-2** is Shah Nawaz, an injured. He narrated the events of the occurrence as an alleged eyewitness.
- **PW-3** is Malik Laiq Khan, a member of Jirga. He deposed some facts in respect of a grand Jirga (Komzona) of 06 tribes, before which some proceedings were conducted and house of accused was burnt down by the Komzona.
- **PW-4** is Dr. Asghar Shah, the In-Charge/Administrator of DHQ hospital Mishti Mela. He produced Indoor Patient Register of hospital, wherein names of the 04 deceased and injured Shah Nawaz are mentioned at serial No. 1241 to 1245 under the date 05-08-2018.
- **PW-5** is Noman Ali Shah, who was serving as AC (Judge) Lower Orakzai during the days of occurrence. On receipt of information about the occurrence, he sent this information to DC through letter No. 1702/AC/L (Ex. PW-5/1). He further deposed in respect of arrest of accused Mukamil and Latif; and also, of accused M. Rafiq u/s 20 of FIGR, 2018 (information report Ex. PW 5/2). Further, he deposed about proceedings in respect of burning down house of accused and fine (*nagha*) ordered by local

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jirga (Komzona) (information reports Ex. PW 5/3, Ex. PW 5/4 and Ex. PW 5/5).

8. On close of prosecution evidence, statements of accused were recorded. They denied the prosecution evidence; however, they did not wish to produce any evidence in defense or to get themselves examined on oath. Thereafter, the prosecution and defense counsel were heard. Written arguments submitted by counsel for the complainant were also considered. My findings on the conclusion of trial are as follows.

9. As stated above, the present case remained pending before AC for about 08 months and was registered before extension of normal law to this area; therefore, there is no proper FIR or police investigation in the case. The documents available on record have not been prepared under the relevant provisions of either FIGR or the CrPC. In these circumstances, the depositions of alleged eyewitnesses (PW-1 & PW-2) are the linchpin of prosecution case.


10. Koko Rehman (PW-1), the alleged eyewitness and complainant of the case, stated in his examination in chief that on the fateful day he was proceeding towards mosque for maghrib prayers in company of his brother Shehzada (deceased), Muhammad Javid (deceased), Ishrat Ullah (deceased), Shah Nawaz (injured/PW-2), Habib Ur Rehman and Wahid Gul. That in the meanwhile the 04 accused (Mukamil, Rafiq, Salim and Latif) started firing. That due to this firing Shehzada, Javid and Ishrat Ullah from among his company and one passerby (Muhammad Rahim), were hit

and they died on the spot; while Shah Nawaz was injured. The complainant mentioned the names of Wahid Gul, Shah Nawaz (PW-2) and Habib Ur Rehman as witnesses of the occurrence, apart from himself. Shah Nawaz (PW-2) also made a similar statement. The other two alleged eye witnesses, Wahid Gul and Habib Ur Rehman, named by PW-1 in his examination in chief, have not been produced by the prosecution during trial; moreover, their names were introduced for the first time by prosecution during statement of PW-1.

11. The complainant/PW-1 admits that he made his first application to AC Lower Orakzai on 10-08-2018 (Ex. PW-1/2) and that he did not make any report in respect of the occurrence before then. Ex. PW-5/1, which can be called the first information report, was based on hearsay and the name of the informant has not been mentioned therein. The occurrence, as mentioned in Ex. PW-5/1, took place on the spur of the moment. Neither the detailed role played by each of the accused nor other necessary information has been given in Ex. PW-5/1, nor in the statements of alleged eye witnesses (PW-1 & PW-2). In fact, Ex. PW-5/1 does not nominate any one as accused and it is simply mentioned that sudden firing on the spur of the moment took place between Mukamil (accused no.1) and Shehzada (deceased). The name of accused Latif is mentioned as one of the injured; while the names of other two accused are not even mentioned in this first information report. The name of Muhammad Rafiq (accused no.4) surfaced for the first time in a letter (Ex. PW-5/2) issued

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by Assistant Commissioner to Deputy Commissioner, Orakzai on the next day of occurrence. It is not alleged that accused Muhammad Rafiq had taken part in the occurrence; but that he was arrested u/s 20 of FIGR for acting in hostile and subversive manner, without giving any details. The name of accused Salim surfaced for the first time in the application (Ex. PW-1/2) of complainant Koko Rehman to Assistant Commissioner, Orakzai. In this application the complainant alleged that all four accused facing trial had made firing on the fateful day.


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12. So far it has been observed that the allegation against the accused facing trial was not brought forth in a concrete manner immediately after the occurrence. The exact spot of occurrence was not mentioned; the names of the accused were mentioned piecemeal; the exact motive/reason behind the occurrence was first mentioned as land dispute in FIR but the same was denied by the complainant Koko Rehman in his applications dated 10-08-2018 and 16-08-2018 (Ex. PW-1/2 and Ex. PW-1/1). In these circumstances the statements of prosecution witnesses are required to be scrutinized minutely.

13. The complainant PW-1 admits that he made his first statement/application in respect of the occurrence on 10-08-2018, i.e. five days after the occurrence. He explained this delay on the pretext that he was occupied in funeral and mourning. The initial stance of the alleged eyewitnesses was that the occurrence had taken place on the way towards mosque, however, during cross examination the complainant (PW-1) changed the spot of

occurrence and stated that the same had taken place inside a damaged house of one Nazra Din. The complainant also admitted that he was not injured in the occurrence. Moreover, the time of occurrence was specified by complainant during cross examination as 7:30 pm, after *maghrib azan*.

14. On the other hand, Shahnawaz PW-2, stated that the occurrence had taken place before maghrib time. None of the alleged eyewitnesses have given any details about the specific role played by each of the accused and it is merely mentioned that 04 accused made firing which resulted in the deaths and the injuries to Shahnawaz (PW-2). This Shahnawaz admitted that he could not produce any medical evidence in respect of injuries sustained by him. Moreover, it is an admitted fact of the case that no post-mortem report in respect of any deceased was prepared nor any medical evidence was procured immediately after the occurrence. Some photocopies of medical record of LRH Hospital in respect of injured Shahnawaz are available on record, however, the doctors who prepared the same could neither be identified nor produced for evidence during instant trial.

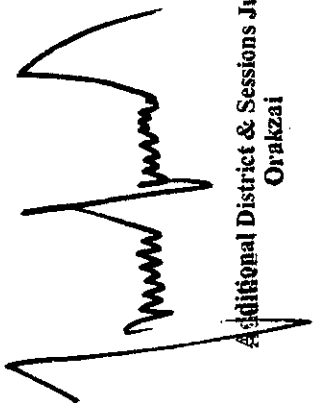
15. Another intriguing aspect of the case is that the first information report states that 02 accused, namely Latif and Mukamil, had sustained injuries during the incident. The alleged eyewitnesses have completely remained silent about this aspect and no mention is made about any firing having been made by the present complainant side. The accused have also stifled this aspect of the case and no cross case was registered or

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investigated in respect of the alleged injuries to accused Mukamil and Latif. Although, none of the PWs have deposed in respect of the injuries sustained by accused Mukamil and Latif, however, the Information Report (Ex. PW-5/1) cannot be disregarded outright. Thus, it is evident that the true facts of the incident have not been brought before this court during trial.

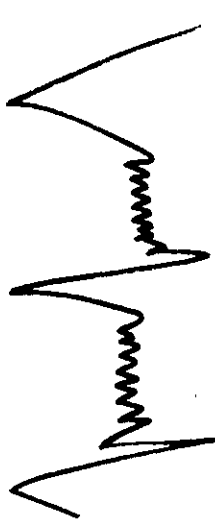
16. One Malak Laiq Khan (PW-3), an elder of the locality, was produced by prosecution to depose in respect of grand jirga (Komzona), which had allegedly burnt down the house of the accused. However, this witness admits that he is not eyewitness of the occurrence. The prosecution could also not produce any corroborative evidence to verify that the house of the accused was actually burnt down. Even if the same was verified, it would not be of much help to prove the guilt of the accused; as the Komzona was admittedly convened without intervention of political authorities and it is not certain is to how and why it was determined to burn down the house.

17. As far as medical evidence is concerned, the prosecution produced doctor Asghar Shah (PW-4), the administrator of DHQ hospital Orakzai. However, his evidence could only prove that the names of the 04 deceased and injured Shahnawaz were entered in the Indoor Patient Register of the hospital, under the date 05-08-2018. The doctor admitted that these entries have not been signed by any doctor and that neither the name of any doctor is mentioned against these entries.


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18. The Assistant Commissioner (PW-5) had drafted the First Information Report of the case. Admittedly, this report was based on hearsay, and the name of informant has not been mentioned. PW-5 had conducted other proceedings in the case as well - mostly writing Information Reports to the Deputy Commissioner. However, he is not a substantial witness in the case and has only recorded information received by him through different unnamed sources. PW-1 had stated during his cross examination that 03 of the accused, without naming them, were arrested from the spot after the occurrence by Levy officials; however, according to PW-5, accused Mukamil, Latif and Rafiq were arrested on the next day of occurrence, i.e. 06-08-2018.

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19. The motive behind the occurrence has also remained shrouded in mystery. The complainant party consistently stated that they had no dispute and neither enmity with the accused party. However, the First Information Report (Ex. PW-5/1) states that the motive behind occurrence was dispute over a piece of land. This motive has remained ambiguous till the end of trial.

20. The ocular account given by prosecution, as discussed above, is doubtful and suspicious. The exact time, mode & manner and locality of the occurrence is unclear. The formal witnesses produced by prosecution have not deposed about any substantial aspect of the case. In fact, the procedure as laid down in FIGR, 2018 was not adopted before transfer of case to this court, which resulted in loss of important evidence. In absence of strong and

reliable ocular account, the other corroborating evidence loses its worth and the same is not worth consideration.


21. In criminal cases prompt lodging of report and recording of statements of alleged eyewitnesses lends credence to the evidence given during trial and rules out the possibility of deliberation and consultation on part of the prosecution witnesses. In present case an undue delay had occurred in reporting of the FIR, from information given by complainant. Moreover, the lapses on part of officials of erstwhile Political Administration and absence of any formal or informal investigation has resulted in much confusion and loss of material evidence in the case.

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22. In cases entailing capital punishment the evidence is required to be scrutinized minutely and strictly. The prosecution is required to produce evidence of prime quality, in order to bring home the charge against accused. Not many, but a single reasonable doubt is enough for acquittal of accused in such cases. Having found the prosecution evidence doubtful in many respects, the benefit of doubt must be extended the accused. Resultantly, the accused facing trial, Mukamil, Latif, Salim and M. Rafiq, are acquitted of the charge leveled against them in the instant case. All accused are on bail; they are set at liberty and their sureties are discharged from the liability of bail bonds. Judgement announced in open court.


23. Let a copy of this judgment be sent to the office of DPP Orakzai, in terms of section 373 CrPC: and this file be consigned to the record room after its proper completion and compilation.

Announced
29-02-2020


Jamal Shah Mahsood
ASJ-I Orakzai

CERTIFICATE

It is hereby certified that above order/judgment consists of 12 pages, and each page has been signed.


Jamal Shah Mahsood
ASJ-I Orakzai