

IN THE COURT OF ASGHAR SHAH
SESSIONS JUDGE, ORAKZAI (AT BABER MELA)

SESSION CASE NO. : 2/19 OF 2019
DATE OF INSTITUTION : 11.08.2018
DATE OF TRANSFER : 01.04.2019
DATE OF DECISION : 26.09.2019

STATE THROUGH ASSISTANT COMMISSIONER LOWER ORAKZAI AND ONE, SHERBAZ KHAN S/O LAL BAZ KHAN AGED ABOUT 41 YEARS R/O SECTION UTHMAN KHEL, SUB SECTION BRANAKA KHEL, PANJOKHEL, PO FEROUZ KHEL, TEHSIL AND DISTRICT ORAKZAI.

------(Complainant)

VS

1. YUNAS KHAN S/O NOOKAR KHAN AGED ABOUT 26 YEARS R/O TRIBE UTHMAN KHEL, MIYAGAN KALAY TEHSIL LOWER DISTRICT ORAKZAI.

------(Accused Facing Trial)

2. IMRAN S/O AQAL SHAH TRIBE UTHMAN KHEL, SUB TRIBE FATAH KHAN KHEL R/O MAINDANO KALAY DISTRICT ORAKZAI.

------(Absconding Accused)

Present: Umar Niaz, District Public Prosecutor.

: Haseeb Ullah Khan Advocate, for complainant.

: Sanaullah Khan Advocate, for accused facing trial.

JUDGEMENT
26.09.2019

Through information report Ex. PW3/1 bearing number 1747/AC/L Dated Kalaya, the August 11, 2018 the Assistant Commissioner Lower Orakzai informed the Deputy Commissioner District Orakzai regarding the accidental murder of one, Sher Zaman S/O Lal Baz Khan at the hands of accused facing trial, Younas Khan by means of gun. Thereafter, on 04.09.2018 one, Sherbaz Khan the brother of deceased through his application Ex. PW1/1 charged the accused facing trial and the absconding

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accused for the deliberate murder of his brother, instead of accidental murder.

- (2). After the abolishment of FCR and establishment of regular courts, the case in hand was sent to this court for the purpose of trial.
- (3). Upon the receipt of case file, notice was issued to both the accused but the co-accused Imran failed to appear, hence he was proceeded U/S 512 Cr.P.C whereas accused facing trial was summoned from the jail as by then he was in custody (Accused facing trial was later on released on bail by the Peshawar High Court, Peshawar). Upon his appearance, the proceedings were initiated against him by providing copies of the case U/S 265-C Cr.P.C and he was charge sheeted to which he pleaded not guilty and claimed trial and accordingly the witnesses were summoned who deposed in the following manner.

Sherbaz Khan S/O Lal Baz Khan as PW-1 deposed

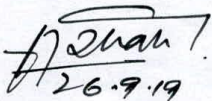
“that deceased Sher Zaman was my brother. On the day of occurrence i.e 11.08.2018 on hearing the noise of firing at near the place of occurrence, I along with my uncle Seen Muhammad were informed by PW Karar Khan and Abdul Nasir about the occurrence and then we rushed to the spot and found Sher Zaman who was lying on ground in injured condition in front of the house of accused on trial at some distance. The people present on the spot informed us that firing was made by accused Muhammad Younas. Thereafter, with the help of other

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persons present there we put the injured on a cot and shifted him in a Datsun to the clinic of one, Haji Shaheen for first-aid. Thereafter, on the way to Kohat while shifting the injured, he informed us that he has been fired at by the accused facing trial Muhammad Younas. On the way my brother succumbed to the injuries and died so we returned to our village. After that the Jirga of the elders tried to settle the matter as per Riway of the locality but failing to reach a conclusion, I charged the accused namely Muhammad Younas and absconding accused Imran s/o Aqal Shah on 04.09.2018 and submitted an application to Assistant Commissioner Lower Orakzai. Today I have seen my application Ex.PW1/1 which is correct and bears my signature correctly. Motive for the commission of offence is dispute over cattle in past. I charged the accused on trial and absconding accused Imran for the occurrence.”

Seen Muhammad S/O Zarif Khan as PW-2
deposed

“that deceased Sher Zaman was my nephew. On the day of occurrence, I along with complainant Sherbaz Khan were on our way to nearby village for purchase of cattle for Eid-Ul-Azha. Near the house of one, Rajokay we heard the noise of fire shots, we attracted to the house of accused. We found deceased then injured wearing black clothes coming out from the house of accused Muhammad Younas. Accused Muhammad Younas made


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firing upon him due to which he got hit and injured. Thereafter, we arranged vehicle and shifted the injured to the clinic of a local doctor namely Haji Shaheen for first-aid and then we shifted him in another vehicle for proceeding towards Kohat but on the way the injured died and we returned back to our village. On the way the injured disclosed the fact that he was fired at by absconding accused Imran inside his Hujra while accused made firing on him in our sight. The motive for the occurrence is the cattle dispute of the past between the parties. After the occurrence the elders of the locality tried to settle the matter through Jirga but they failed and the accused party refused to settle the matter through Jirga. Therefore, the complainant charged the accused later on”

**Syed Noman Ali Shah, Assistant Commissioner,
Sub Division Bithani, Lucky Marwat as PW-3** deposed

“During the relevant days I was posted as Assistant Commissioner, Lower Orakzai. On 11.08.2018 an incident of murder took place of one, Muhammad Zaman for which I prepared information report Ex. PW3/1 which is correct and correctly signed by me. Later on, during the course of investigation accused Younas Khan recorded his statement before my Reader which is thumb impressed by the accused, the same is Ex. PW 3/2. On 04.09.2018, complainant Sherbaz Khan (Brother of deceased) submitted an application already Ex. As Ex.

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PW1/1 to me and charged accused facing trial along with absconding accused Imran for the murder of deceased. No official Jirga was held in the instant case”

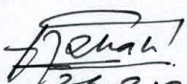
- (4). Thereafter, prosecution closed their evidence where after statement of accused was recorded U/S 342 Cr.P.C but the accused neither wished to be examined on oath nor produced evidence in defence. Accordingly, arguments of the learned DPP for the state, counsel for the complainant and counsel for the accused facing trial heard and case file perused.
- (5). From the arguments and record available on file it reveals that in the instant case we have the initial report of the Assistant Commissioner Ex. PW-3/1, the report of complainant Ex. PW-1/1, confessional statement of accused facing trial Younas Khan Ex. PW-3/2, the alleged dying declaration of deceased then injured disclosed before the ocular account besides the deposition of complainant, Sherbaz Khan PW-1, eye witness Seen Muhammad PW-2 and the statement of Assistant Commissioner as PW-3.
- (6). As for as the report of the Assistant Commissioner is concerned the same is not the substantive piece of evidence but just an information conveyed by him regarding the occurrence to the Deputy Commissioner, District Orakzai as the same was prevailing practice in the locality under the interim system of administration of justice called **FATA Interim Governance Regulations, 2018 (FIGR)** which was promulgated in order to repeal the century old Frontier Crimes Regulation, 1901 (FCR). In the said report of the Assistant Commissioner, the occurrence was termed as accidental. However, when complainant, Sherbaz Khan

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appeared before the Assistant Commissioner, Lower Orakzai after 23 days of the occurrence, he charged the accused facing trial along with absconding accused for the deliberate murder of his brother through his written application Ex. PW-1/1.

(7). At the moment the report of the Assistant Commissioner and that of the complainant regarding the murder of deceased being accidental or otherwise are contradictory to each other. Hence, for the determination of the said question when the ocular and circumstantial account is consulted then it transpires that nothing was brought on record to prove that the murder of deceased was either accidental or otherwise. However, the one question is clear that the murder of the deceased has taken place, so the court has to determine as to whether it was committed by the accused in the mode and manner as alleged by the complainant or as reported by the Assistant Commissioner.

(8). When the record is scanned, it reveals that the murder has taken place on 11.08.2018 and on the same day, the Assistant Commissioner reported the matter to the Deputy Commissioner, Orakzai by terming the same as accidental murder. However, in support of the said version he could not substantiate any solid evidence. Also, the Assistant Commissioner is not the eye witness of the occurrence and the information regarding the occurrence might have been conveyed to him by somebody else but the said third person was neither named in the initial report nor in the statement recorded in the court as PW-3. On the other hand, complainant, Sherbaz Khan as PW-1 deposed that the deceased was done to death by the accused facing trial alongwith absconding

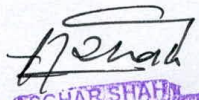

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accused deliberately for the motive of dispute over cattle that has taken place somewhere in the past. Complainant also produce one, Seen Muhammad PW-2 in support of his contention. However, when the ocular account is gone through, it provides that sufficient material contradictions are available in their evidence. The complainant in his evidence deposed that he is not the eye witness of the occurrence and upon hearing the fire shots when he along with PW Seen Muhammad attracted to the spot i.e. the front of house of the accused facing trial then on the way they were informed by the witnesses namely Karar Khan and Abdul Nasir about the occurrence besides the other people present at the spot informed them regarding the firing on the deceased being allegedly made by the accused facing trial Younas Khan. However, none of the said witnesses were produced hence, adverse inference under article 129 of the Qanooni Shahadat Order, 1984 would be drawn against the complainant to the effect that had such witnesses were produced, their evidence would have gone against the version of the complainant. But however, the PW Seen Muhammad contradicted the version of the complainant by deposing that accused Younas Khan made firing on the deceased in his presence. The complainant in his evidence deposed that when they reached to the place of occurrence, the deceased then injured was laying in injured condition in front of the house of the accused facing trial Younas Khan. However, the PW-2 Seen Muhammad contradicted the complainant on the said version by deposing that by the said time they saw the deceased then injured wearing black clothes coming out from the house of accused facing trial. The role of

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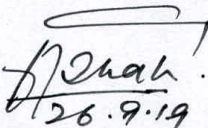
firing at the deceased is attributed by the complainant to the accused facing trial Younas Khan inside the Hujra of said accused and it was further alleged by him that absconding accused though present with gun at the spot had made no firing at the deceased but the PW Seen Muhammad deposed that the deceased then injured disclosed him that the absconding accused also made firing on him inside the Hujra of accused Younas Khan. The complainant in his evidence deposed that on their way to Kohat the deceased then injured disclosed to them that he has been fired at by the accused facing trial Younas Khan while the PW-2 alleged that such disclosure was made inside the clinic of one, Dr. Shaheen where the deceased then injured was shifted soon after the occurrence. The complainant alleged that the PW Seen Muhammad was not boarded in the Datson while shifting the deceased to the clinic but the said PW bent upon by alleging that he boarded in the said vehicle. The witnesses are also in contradiction regarding the putting of deceased then injured via cot in Datson to the clinic or was shifted through shoulders. The witnesses are also not supporting each other regarding the fact of shifting of deceased then injured firstly to the clinic and then to the District Kohat either through one or two Datsons. The complainant alleged that since the first Datson vide which the deceased then injured was shifted to the clinic was having no legal documents hence they arranged another Datson after some time in order to shift the deceased then injured to District Kohat whereas, the witness Seen Muhammad deposed that one Datson was used in the whole episode. These material contradictions in the statements of the


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private witnesses would denote that either they were not present at the spot at the relevant time of occurrence or have not deposed in the mode and manner as the alleged in their initial report.

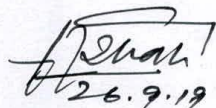
(9). As for as the confessional statement Ex. PW-3/2 of the accused facing trial Younas Khan is concerned, the same has got no legal value at all as the witness of the same i.e. Assistant Commissioner PW-3 in his very examination in chief deposed that it was recorded by his Reader and that's too inside the premises of sub jail besides the same is neither signed nor endorsed by the said witness hence, the three-fold proof which is required to believe a judicial confession i.e. that the same is truly made, infact made and made voluntarily besides made in accordance with law is missing in the said confession statement. As such the said confessional statement is discarded as such.

(10). Though the Assistant Commissioner has charged the accused facing trial on the very day of the occurrence however, he was nominated by the complainant after 23 days of the occurrence and the reason of delay has been explained that by the said time they were busy to resolve the matter through Jirga of the elders and failing to get the desired result, the complainant charged the accused accordingly. However, the Assistant Commissioner PW-3 in his evidence deposed that no Jirga was held in the instant case besides neither the Jirga members were named nor produced by the complainant to support his version as such the pre-consultation and deliberation is clearly visible in the report of the complainant and the said report is thus not free from the interference of the outer segment.


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- (11). With regard to the motive, the past dispute over cattle is cited as the reason of the occurrence however, the motive as per many dictums of the superior courts is a double edged weapon and can be used either way as if the complainant alleges the said motive to be the reason for the occurrence then charging of the accused for the said motive malafidly cannot be ruled out as well besides the motive alleged also failed to establish.
- (12). As for as the dying declaration of deceased then injured is concerned, the same also suffer from certain legal infirmities. Firstly, the same was not made before any authorized officer. Secondly, the same was not reduced in to black and white. Thirdly, the medical account pertaining to the coherent condition of the deceased then injured was not brought on record besides the ocular account is in contradiction with each other regarding the making of such alleged dying declaration at a particular place.
- (13). Furthermore, neither the weapon of offence was recovered nor the dead body was subjected to post-mortem report to determine the death of deceased by means of the firearm weapon or otherwise besides the accused facing trial Younas Khan has neither legally confessed his guilt nor the allegations of accidental or deliberate murder of deceased were proved against him. As such failing to martial their troops towards conclusion of trial in the favour of prosecution has resulted in the creation of sufficient dents and doubts in their version. Hence, by extending the benefit of doubt to the accused Younas Khan, he is acquitted of the charges levelled against him through the case in hand. He is on bail; his sureties stand discharged from the liability of the bail


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bonds. Case property, if any, be kept intact till the arrest of absconding accused Imran.

(14). However, a Prima-Facie case exist against the absconding accused Imran S/O Aqal Shah hence, he is declared as proclaimed offender. Perpetual warrant of arrest be issued against him and DPO Orakzai is directed to enter his name in the register of proclaimed offenders. All the legal course be adopted for the arrest of the proclaimed offender and he be brought before the court as and when arrested.

(15). File be consigned to Sessions Record Room after its completion and compilation.

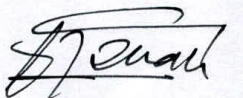
Announced
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at Baber Mela
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Orakzai at Hangu.

CERTIFICATE

Certified that this judgment consists upon eleven (11) pages. Each page has been read, corrected where-ever necessary and signed by me.

Dated: 26.09.2019.


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at Baber Mela
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