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IN THE COURT OF ADDITIONAL SESSIONS JUDGE-II ORAKZAI

Session case No. 07/2
Date of Institution: 24.08.2019
Date of Decision: 08.06.2020

State through Noor Nabi s/o Ghulam Nabi r/o Largi Tang Kuriz District
Lower Orakzai.....(**complainant**)

VERSUS

Shams-u-Reman s/o Muhammad Ghulam r/o Shawa Mela Kuriz
District Lower Orakzai..... (**Accused Facing Trial**)

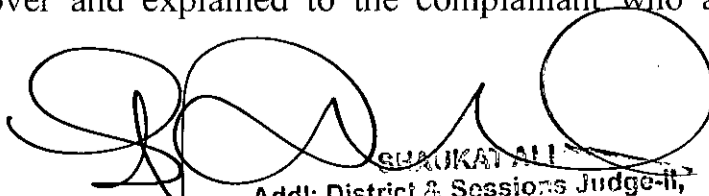
Represented by:

Mr. Umar Niaz, DPP for State
Mr. Haseeb Ullah Advocate counsel for complainant
Mr. Sher Shah Advocate, counsel for accused

**CASE FIR NO.13 DATED 15.06.2019 U/S 302/34 PPC OF POLICE
STATION LOWER ORAKZAI (KALAYA)**

JUDGMENT

The prosecution story is that on 15-06-2019 Mujahid Khan SHO received information about the occurrence and came to RHC Kuriz where the dead body of Naimat Ali deceased was laying in emergency room. The complainant Noor Nabi s/o Ghulam Nabi who was present with the dead body reported that he along with Taqweem Ali and Niamat Ali were busy in ploughing their fields through tractor bearing registration No. SAE-1958, that in the meanwhile the accused Shams-ur-Rehman and Muharram Ali s/o Shams-ur-Rehman r/o Shawa Mela Kuriz appeared duly arm with Kalashnikov, that accused Shams-ur-Rehman ordered his son Muharram Ali to fire upon which Muharram Ali started firing on Niamat Ali as a result of which Niamat Ali got hit and injured who succumbed to his injuries on his way to the hospital. The motive for the occurrence disclosed as land dispute. The report of complainant reduced into the shape of Murasila Ex-PA/1 which was read over and explained to the complainant who after admitting the

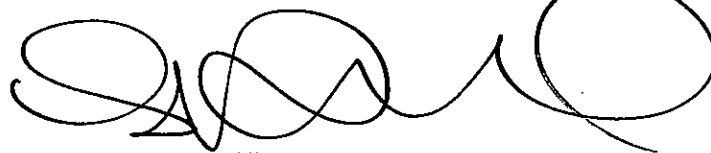

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 contents of Murasila correct thumb impressed the same while Taqween Ali s/o Faqeer Ali verified the Murasila and also thumb impressed the same. The injury sheet and inquest report of the deceased was prepared and the deceased was referred for post mortem examination to the hospital under the escort of Ejad Ali HC. The Murasila was sent to the PS through Constable Khyber for registration of FIR on the basis of which FIR Ex.PA was registered against the accused.

After registration of the FIR investigation was carried out in the case and 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 from the place of deceased, garments of the deceased and 05 empties of 7.62 bore and sent the said articles to the FSL for analysis and report. The IO recorded the statement of PWs u/s 161 Cr.P.C and after completion of investigation the case file was submitted to the SHO for submission of challan against the accused.

Complete challan against the accused was submitted which was received by this court on 24.08.2019 for trial against the accused. The accused Shams-ur-Rehman who was in Judicial Lock-up was summoned through *Zamima Bay* and was produced before the court on 26-08-2019. After compliance of 265-C Cr.P.C, charge was framed against accused on 29.08.2019 to which the accused pleaded not guilty and claimed trial. The prosecution was allowed to produce its evidence and during the trial of the case, the prosecution produced and examined 08 PWs.

The statements of prosecution witnesses are as under:



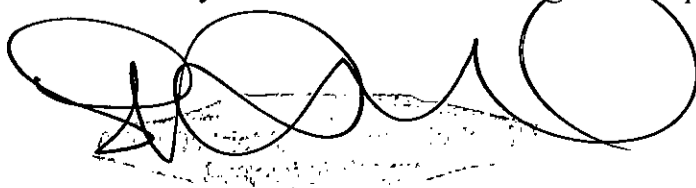
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PW-1 is the statement of Lebab Ali MHC who stated that "On receipt of Murasila I incorporated the contents of Murasila into FIR which is Ex-PA. Today I have seen the FIR which correctly bears my signature. The Murasila was sent to the PS by the SHO Mujahid Ali through the hand of constable Khaiber".

PW-2 is the statement of Mujahid Khan SI who stated that "During relevant days I was posted as SHO PS Lower Orakzai. I received information about the occurrence and came to RHC Kuriz where the dead body of Naimat Ali deceased was laying in emergency room. The complainant Noor Nabi s/o Ghulam Nabi who was present with the dead body reported the occurrence to me which I reduced into the shape of Murasila Ex-PA/1 which was read over and explained to the complainant who after admitting the contents of Murasila correct thumb impressed the same while Taqween Ali s/o Faqeer Ali verified the Murasila and also thumb impressed the same. The injury sheet in inquest report of the deceased was prepared by me and the deceased was referred for post mortem examination to the doctor under the escort of Ejad Ali HC. The injury sheet of the deceased Ex-PW-2/1 and the inquest report Ex-PW-2/2. I sent the Murasila to the PS through constable Khaiber for registration of FIR. Today I have seen the above documents which are correct and correctly bears my signature".

PW-3 is the statement of Zahid Khan constable who stated that "The instant case during the investigation the accused admitted his guilt and let the Police Party to the spot where the accused pointed out the spot to the IO and also pointed out the place, from where the accused ordered his son Muharram Ali to kill Niamat Ali. I along with the other margin witness to the pointation nemo namely Meer Nawaz Khan signed the pointation memo



on the spot. The pointation memo was thumb impressed by the accused also. Today I have seen the pointation memo Ex-PW-3/1 which is correct and correctly bears my signature”.

PW-4 is the statement of Noor Nabi who stated that “The deceased Naimat Ali is my cousin. On 15/06/2019 I along with Taqweem Ali and Naimat Ali deceased were busy in our fields in ploughing through tractor. In the meanwhile, the accused Shams-u-Rehman along with his son Muharram Ali came there duly armed with Kalashnikov and accused Shams-u-Rehman who is the father of accused Muharram Ali, ordered Muharram Ali to fire and as a result of his firing Naimat Ali got hit and injured. The accused after the occurrence went to the house. We shifted Naimat Ali to KDA hospital Kohat who succumbed to his injuries on the way to the hospital. The motive for the occurrence is dispute over the landed property. I reported the occurrence to the police at RHC Kuriz and my report was reduced in the shape of Murasila which is already Ex.PA/1. I thumb impressed the report whereas Taqweem Ali also thumb impressed the report as verifier. The IO prepared the site plan on my pointation. Today I have seen the Murasila which correctly bears my thumb impression. I charged the accused for the murder of Naimat Ali”.

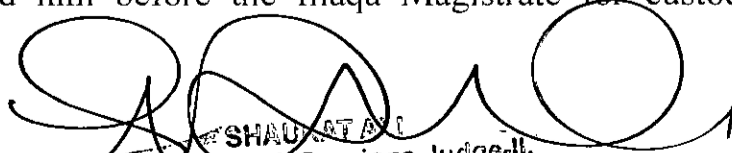
PW-5 is the statement of Taqweem Ali who stated that “The deceased Naimat Ali is my cousin. On 15/06/2019 I along with Noor Nabi and Naimat Ali deceased were busy in our fields in ploughing through tractor. In the meanwhile, the accused Shams-u-Rehman along with his son Muharram Ali came there duly armed with Kalashnikov and accused Shams-u-Rehman who is the father of accused Muharram Ali, ordered Muharram Ali to fire and as a result of his firing Naimat Ali got hit and injured. We shifted Naimat Ali to KDA hospital Kohat who succumbed to his injuries on the way to the hospital. The motive for the occurrence is dispute over the landed property.


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The complainant Noor Nabi reported the occurrence to the police at RHC Kuriz and I verified the report and thumb impressed the same which is already Ex.PA/1. I identified the dead body of deceased before the police and doctor. Today I have seen the Murasila which correctly bears my thumb impression. I charged the accused for the murder of Naimat Ali”.

PW-6 is the statement of Dr. Abdul Haq Medical Officers who conducted post mortem examination of deceased Niamat Ali s/o Muhabat Ali brought by police.

PW-7 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 through cotton from the place of deceased and sealed the same in parcel No. 1 and also took into possession 05 empties of 7.62 bore which were lying in scattered condition from the place of accused which I sealed into parcel No. 2 and affix 3/3 monogram in the name of SH vide recovery memo Ex.PW-7/1 in the presence of marginal witnesses. Similarly I also took into possession the blood stained garments of the deceased having corresponding cut marks produce by the constable Tafseer Ali sent by the doctor and sealed the same into parcel No. 3 and also affixed the monogram in the name SH vide recovery memo Ex.PW-7/2 in the presence of the marginal witnesses. The accused Muharram Ali was arrested in case FIR No. 14 dated 16/06/2019 u/c 15-AA PS Lower Orakzai. I also arrested him in the instant case and issued card of arrest Ex.PW-7/3 and on the following day I produced him before the Illaqa Magistrate for custody vide my


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application Ex.PW-7/4. Two days custody was granted. I interrogated the accused, recorded his statement u/s 161 Cr.P.C and on the expiry of custody I produced him before the Illaqa Magistrate for the judicial remand vide my application Ex.PW-7/5 and the accused was sent to the judicial lock-up. During my investigation the accused Sham-u Rehman applied for BBA which was recalled and I arrested him and on 06/07/2019 I vide my application Ex.PW-7/6 producing for custody to the Illaqa Magistrate and two days was granted. I interrogated the accused and during custody the accused led the police party to the place of occurrence and pointed out the place of occurrence of me in the presence of witnesses. I prepared pointation memo Ex.PW-7/7 in the presence of marginal witnesses. I took the photo graphs of the pointation proceeding which are Ex.PW-7/8 consisting of 08 photos. I recorded statement of accuse Shams-u-Rehman u/s 161 Cr.P.C. The accused confessed his guilt and I produced him for confession before the Illaqa Magistrate vide my application Ex.PW-7/9. The accused refused to record confession and was sent to Judicial Lock-up. I sent the blood stained earth, garments of the deceased, empties and recovered Kalashnikov to the FSL for analysis and report vide my application Ex.PW-7/10 and Ex.PW-7/11 respectively. I received the report of FSL which are Ex.PZ and Ex.PZ/1 and placed on file. I prepared the list of legal heires of decease which are Ex.PW-7/12. I placed on file the application submitted by Niamat Ali Malaria Supervisor to agency surgeon which is Ex.PW-7/13. I recorded the statement of PWs u/s 161 Cr.P.C and after completion of investigation I handed over the case file to the SHO for submission of challan against the accused. Today I have seen the above documents prepared by me which are correct and correctly bear my signature".

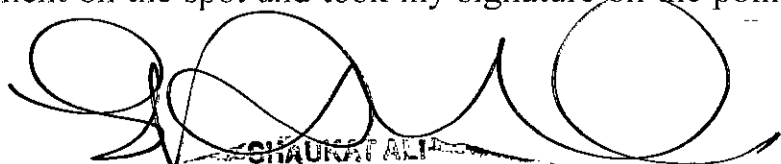


Investigating Officer
Police Station

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PW-8 is the statement of Yaseen Khan constable who stated that "I am the marginal witness to the recovery memo already exhibited Ex.PW-7/1 vide which IO took into possession blood stained earth through cotton from the place of deceased and sealed the same in parcel No.1 Ex.P-1. Similarly the IO also took into possession five empties of 7.62 bore freshly discharged which was laying in scattered condition from the place of accused and sealed the same in parcel No. 2 Ex.P-2. 3/3 mono grams in the name of SH was affixed on the parcels. I along with the other marginal witness namely Shahid Khan signed the recovery memo. I am also the marginal witness to the memo already exhibited Ex.PW-7/2 vide which IO took into possession blood stained garments of the deceased containing Shalwar Kamees blue color and banyan white color having corresponding cut marks sent by the doctor through the hand of constable Tafseer Ali and sealed the same into parcel No.3 Ex.P-3. Mono grams in the name of SH was affixed on the parcel. I also signed the same memo in the presence of other marginal witness namely Shahid Khan. My statement was recorded by the IO u/s 161 Cr.PC. Today I have seen the above documents which are correct and correctly bear my signature".

PW-9 is the statement of Ameer Nawaz constable who stated that "I was present along with the IO and other police Nafri and took the accused Shams-u-Rehman to the spot. When we reached to the spot there we the police officials first deboarded from the vehicle and then the accused was deboarded. The accused was then ahead of us and lead us to the place of occurrence and pointed out the place by the accused where he was present. The accused also pointed out the place of accused Muharram Ali. The IO recorded my statement on the spot and took my signature on the pointation

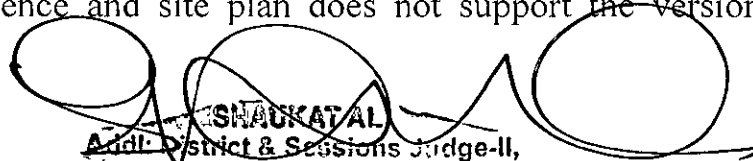


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memo which is already Ex.PW-7/7. Muhammad Zahid constable also signed the pointation memo. Today I have seen the pointation memo which are correct and correctly bear my signature”.

On 03.03.2020, the prosecution closed its evidence and the case was fixed for statement of accused. On 10-03-2020 the statements of accused was recorded u/s 342 Cr.P.C wherein the accused denied the allegations leveled against him however he refused to be examined on oath or to produce defense evidence, therefore, the case was fixed for final arguments. 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 for a broad day light occurrence; the description of weapon and motive for the occurrence given in the FIR has been proved; that the venue of occurrence and recovery of article from the spot is confirmed by the 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 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 this is a case of single accused charged for the murder of deceased where substitution in case of single accused is rare phenomenon; that the prosecution has successfully the guilt of the accused through cogent & confidence inspiring evidence available on file.

Conversely learned counsel for the accused argued that the statement of eye witnesses are full of contradiction and could not be relied nor their statement could be made basis for the commission of accused, that the circumstantial evidence and site plan does not support the version of the


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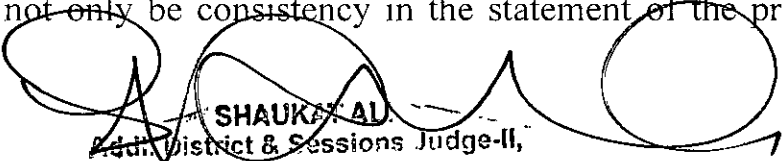
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complainant and eye witness, that the motive attributed to the accused is not proved through cogent evidence; that the evidence of prosecution witnesses is suffering from material contradiction creating serious doubt in the prosecution case; that the time of occurrence is negated by PW-02 which put a dent in the prosecution case; that though in case of single accused substitution is rare phenomenon but there must be trust worthy and confidence inspiring ocular account which is lacking against the accused. That the prosecution case is full of doubt, the benefit of the same is to be extended to the accused.

Arguments of Learned DPP for the state assisted by learned counsel for the complainant and arguments of learned counsel for the accused heard and record of the case perused.

The complainant Noor Nabi (PW-04) reported to the police in Emergency Room at RHC Kuriz that the accused facing trial appeared in the place of occurrence duly armed where they were ploughing their fields through tractor. The accuse Shams-ur-Rehman ordered his son Muharram Ali to fire upon which he started firing and as a result of his firing Niamat Ali deceased got hit and injured who succumbed to his injuries on his way to the hospital. The motive was disclosed land dispute between the parties.

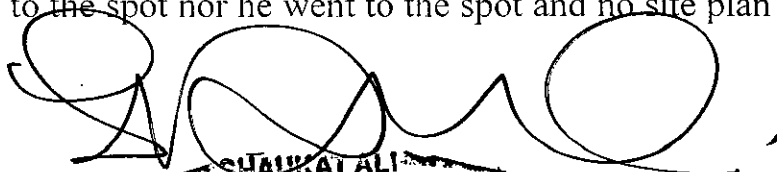
The case of the prosecution is mainly hinges on the evidence of eyewitnesses, namely Noor Nabi and Taqveem Ali; however ocular account of the occurrence produced by the prosecution could only be believed if the prosecution could able to establish their presence on the place of occurrence and make a cogent and confidence inspiring statement regarding the occurrence. Furthermore, to test the testimony of a witness, it is necessary that there must not only be consistency in the statement of the prosecution


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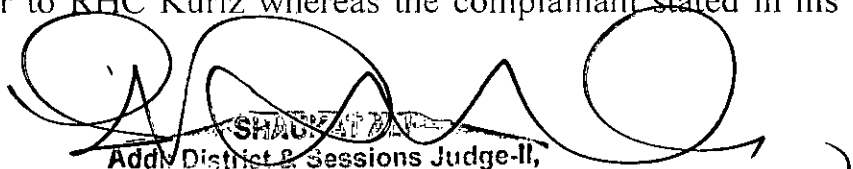
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witnesses with regard to mode and manner of occurrence but their statement must be true and must be supported by the circumstantial evidence of the case available on file. The prosecution examined complainant Noor Nabi (PW-04) and Taqweem Ali (PW-05) who narrated the ocular account of the case. Both the witnesses stated their presence with the deceased at the place of occurrence and accompanying the deceased to the hospital for report and PM examination, however the statement of both the eye witnesses need a thorough scrutiny to know that whether their statements are true, worth reliable, confidence inspiring and could be made basis for the conviction of the accused facing trial.

Noor Nabi complainant (PW-04) deposed that as a result of firing of accused Moharram Ali the deceased got hit and injured and succumbed his injury on his way to the hospital, however during his cross examination the complainant negated his own statement by stating that when they reached to RHC Kuriz the deceased then injured was alive and further stated that deceased then injured was unconscious and was unable to talk which makes the statement of complainant unworthy of credit. In the course of cross examination PW-04 stated that the distance between the accused and deceased might be 100 paces whereas in the site plane which is prepare at the instance of complainant the distance between the accused and deceased is shown as 30 paces. Furthermore, it is also worth perusal that complainant (PW-04) stated in his examination in chief that the IO prepared the site plane Ex.PB at his instance and pointation and similar is the statement of the IO that he prepared the site plan at the instance of complainant, however during cross examination complainant stated that after the report he did not accompany the police to the spot nor he went to the spot and no site plan was


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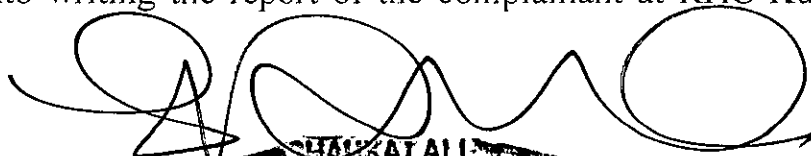
prepared at his instance, which makes the presence of complainant on the spot at the time of occurrence and witnessing the occurrence not believable. The Murasila Ex.PA/1 also reflects that the complainant reported that the deceased then injured succumbed to his injuries on his way to the hospital and deceased was shifted to the RHC Hospital Kuriz in a pickup which was available on the spot. The complainant negated his own version recorded in the Murasilla and also negated statement of Taqveem Ali eye witness (PW-05) who stated that the deceased succumbed to the injuries on the way to the hospital when complainant stated in his cross examination that the deceased was alive when they reached to RHC Kuriz who was shifted within 10/15 minutes which makes their evidence shabby and not reliable. Furthermore, eyewitness Taqveem Ali (PW-05) stated during his cross examination that they took the deceased to RHC Kuriz in a motor car in which the deceased then injured was seated and the motor car was of their villager who negated the statement of PW-04 who stated that they took the deceased to the hospital in a pickup which was available on the spot. Taqveem Ali (PW-05) in his cross examination stated that he along with complainant and deceased Niamat Ali were present on the spot and no other persons were present on the spot and they took the decease to RHC Kuriz, however the presence of PW-05 at RHC Kuriz is negated by complainant (PW-04) who stated that he was accompanied to RHC Kuriz in the pickup by Sahawat Ali and Sehrab Ali. Had Taqveem Ali who is the cousin of the deceased being present on the spot would have definitely accompanied the deceased to RHC Kuriz, therefore his evidence as eye witness could not be believed. Taqveem Ali (PW-05) stated in his cross examination that no other person was present on the spot except complainant, he himself and the deceased Niamat Ali and they took the deceased in motor car to RHC Kuriz whereas the complainant stated in his


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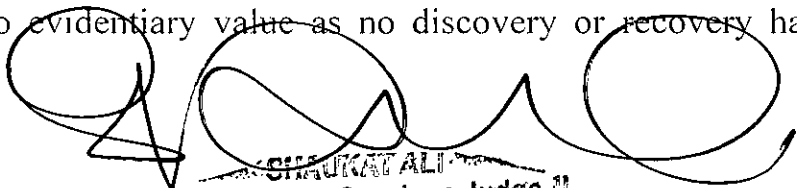
cross examination that he was accompanied to RHC Kuriz in the pickup by Sahawat Ali and Sehrab Ali. PW-04 further stated that at the time of firing he was present on the spot and no other persons were present with him except those mentioned in the Murasila, however PW-05 negated the statement of complainant by stating in his cross examination that Sehrab Ali was present at the place of occurrence at the time of firing, however both Sahawat Ali and Sehrab Ali are neither cited as a witnesses nor their statement were recorded u/s 161 Cr.PC. Furthermore, complainant is also the identifier of the dead body whose PM was conducted in LMH Kohat but the complainant stated in his cross examination that he did not accompany the deceased to LMH Kohat, however despite the fact he is the identifier of dead body in the PM report. The statement of the prosecution witnesses reflects the presence prosecution witnesses on the spot at the time of occurrence is highly doubtful and their evidence could not be believed to connect the accused with the commission of the offence. The peculiar facts of the case and evidence available on file would suggest that the complainant and eye witness were not present at the time of occurrence, and those were Sahawat Ali and Sahrab Ali who were present on the spot and shifted the deceased then injured to the hospital however the prosecution witnesses concealed their presence on the spot and neither their statement were recorded nor they were cited as witnesses in the case. The evidence on file shows that the complainant and eye witness who were relative of the deceased later on reached to the spot or to the hospital and were cited as witnesses of the occurrence.

The time of occurrence mentioned in the Murasila Ex.PA is 14:30 hours/02:30 PM and the time of report is 15:30 hours. Mujahid Khan SI (PW-02) reduced into writing the report of the complainant at RHC Kuriz,


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however during cross examination Mujahid Khan Stated that he received information about the occurrence about 02:00 PM during Gusht in the locality. The time when Mujahid Khan received information is 02:00 PM which time before the occurrence whereas the occurrence allegedly took place at 02:30 PM which negates the version of the complainant and the time of occurrence at 02:30 PM at the place of occurrence. Besides Taqweem Ali (PW-05) stated in his cross examination that they reached to RHC Kuriz at about 02:30 PM which is the time of occurrence and further stated that they shifted the deceased then injured to RHC Kuriz from the spot within 10/15 minutes therefore on this score there are doubts with regard to the time of occurrence and the mode and manner of occurrence which put dents in the case of prosecution.

The weapon of offence was allegedly recovered from accused Muharram Ali and separated case FIR No. 14 Dated 16-06-2019 u/s 15-AA PS Lower Orakzai was registered however the said weapon of offence was not take into possession in the present case against the accused nor the case property which is the alleged weapon of offence is exhibited in the present case against the accused. The witnesses in whose presence the weapon of offence was recovered from the accused were neither cited as a witnesses in the case nor they were examined as witnesses to prove the recovery of Kalashnikov from the possession of accused as alleged by the prosecution, therefore the Kalashnikov which is the alleged weapon of offence could not be used as an evidence against the accused nor the FSL report in respect of Kalashnikov could be believed in the case against the accused. So far as the pointation of the place of occurrence by the accused is concerned such pointation has no evidentiary value as no discovery or recovery has been

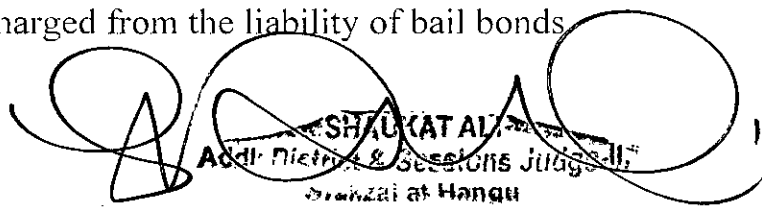

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effected in consequences of such pointation. Muhammad Zahid Constable (PW-03) and Ameer Nawaz Khan Constable (PW-09) who are the marginal witnesses of pointation memo EX.PW-7/7 also stated in their cross examination that no recovery or discovery has been effected on the pointation of accused, therefore such pointation is of no avail for the prosecution.

Though the recovery of blood stained earth through cotton form the spot from the place of deceased, his last worn blood stained clothes recovery 05 crime empties of 7.62 bore from the spot vide recover memo Ex.PW-7/1 and Post Mortem report Ex.PM of the deceased explain the murder of the deceased Niamat Ali with fire arm but by whom is shrouded mystery as the statement of the complainant and eye witness could not be relied and believed, therefore when there is no eye witness to be relied upon, then there is nothing to be corroborated by the recoveries.

The motive attributed by the complainant in the FIR for the alleged occurrence is land dispute with the accused. The prosecution could not prove the alleged motive by producing any documentary evidence of any civil case or dispute pending with the accused regarding the alleged land. The motive once alleged by the prosecution and later on failed to prove through confidence inspiring evidence then it would be fatal for the prosecution case and the occurrence could not be believed.

In view of the above discussion the prosecution failed to bring home guilt of the accused beyond any reasonable shadow of doubt; therefore, the accused ~~Shams-ur-Rehman~~ ^{him} is acquitted in the instant case from the charges leveled against ^{him} by extending him the benefit of doubt. The accused is on bail, he sureties are discharged from the liability of bail bonds.

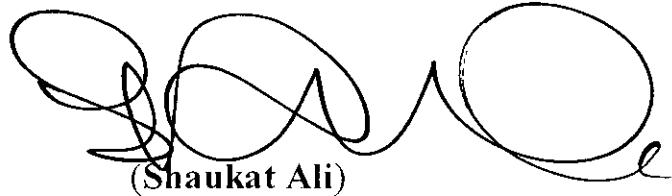


 SHAMZAT ALI
 Addl. District & Sessions Judge
 Dera Gazi Khan

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

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

Announced
08th June, 2020

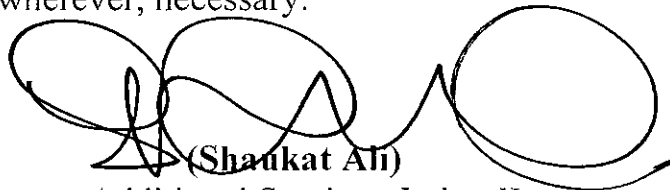


(Shaukat Ali)
Additional Sessions Judge-II
Orakzai at Babar Mela
Add: District & Sessions Judge-II,
Orakzai at Hangu

CERTIFICATE

Certified that this judgment consists of 15 pages. Each page has been read corrected and signed by me wherever, necessary.

Announced
08th June, 2020



(Shaukat Ali)
Additional Sessions Judge-II
Orakzai at Baber Mela
SHAUKAT ALI
Add: District & Sessions Judge-II,
Orakzai at Hangu