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**IN THE COURT OF SHAUKAT ALI; ADDITIONAL SESSIONS
JUDGE-II, ORAKZAI AT BABAR MELA, HANGU**

Session case No: 01 of 2019
Date of Institution: 11.05.2019
Date of Decision: 22.10.2019

State through Mamoor Khan S/o Jannat Khan R/o Shekhan Tapa Samozai
Darrant District Lower Orakzai
.....(*complainant*)

VERSUS

Raj Wali S/o Khan Afzal R/o Mushti Khel, Chapper Mishti Lower Orakzai
.....(*Accused Facing Trial*)

1. Noor Zali,
2. Payo Wali,
3. Nabeer Ullah Ss/o Khan Afzal &
4. Naseer Ullah S/o Sher Afzal R/o Mushti Khel, Chapper Mishti
Lower Orakzai

.....(*Absconding accused*)

Present:

Mr. Syed Amir Shah, APP for State,
Mr. Haseeb Ullah Khan Advocate, counsel, for Complainant,
Mr. Sana Ullah Khan Advocate, counsel, for accused facing trial.

**CASE INFORMATION REPORT NO. 1164/APA/L DATED 09.05.2017 U/S
302/34 PPC OF POLICE STATION LOWER ORAKZAI**

JUDGMENT

The prosecution story is that on 09.05.2017 the then Political Naib Tehsildar Central Orakzai reported that a boy namely Kamran S/o Muslim Din R/o Margheyo Chan aged (three years) Chapper Mishti went missing, that hectic efforts were made for the search of the child in the vicinity, but

the child could not be found, that several private *Jirgas* were also convened to know about the where about of the missing child but in vain, that after consultation it was decided to hire the services of sniffer dogs for the search of the child, that Lieutenant Colonel Ashraf Ijaz (Retired) was contacted and a sniffer dog was taken to the spot where the dog was freed for search, that the dog after covering a distance of $\frac{3}{4}$ KM entered in the house of accused and sat in a cote, that the processes was repeated on the request of the elders of the locality and the dog again entered in the house of accused. The complaint then charged the accused facing trial along with the absconding accused for the commission of the offence by submitting an application to the then PA of erstwhile FATA. The case was pending before the Political Administration of erstwhile FATA and during the pendency of the case the complainant submitted application that DNA test of some humane remains (Bones) may be carried out that had been recovered by them expecting those to be of missing Kamran. The bones were dispatched to IB & GE Islamabad for DNA profiling for the confirmation of the biological relationship as the DNA testing facility was not available in Orakzai. The report of IB & GE Islamabad was received in positive with the report that the unknown dead body belongs to the son of Muslim Din S/o Mamoor Khan.

After the merger of erstwhile FATA in KPK the case file was transferred to the District Courts Orakzai and was entrusted to this court for trial. The accused were summoned and in response to the summon, the accused facing trial Raj wali appeared before the court whereas accused

Noor Zali, Payo Wali, Nabeer Ullah and Naseer Ullah did not appear, therefore they were proceeded under section 512 Cr.P.C. Formal Charge was framed against the accused Raj Wali on 05.07.2019 to which the accused pleaded not guilty and claimed trial. The prosecution was allowed to produce its evidence in support of the charge against the accused.

During the trial of the case the prosecution produced 07 witnesses; the gist of the prosecution evidence is as follows;

PW.01 is the statement of Mohammad Ayaz who was Jirga member appointed by the Political Administration to carry out Jirga between the parties for the settlement of the dispute,

PW.02 is the statement of Mohammad Zahid Muharrir to AC Central Orakzai who submitted information report Ex.PW-2/1 regarding the missing of minor to the quarter concerned.

PW.03 is the statement of Mamoor Khan, the complainant and grandfather of the minor who reiterated the contents of application ExpW-3/4 submitted by him to the PA Orakzai.

PW.04 is the statement of Muslim Din, the father of the minor who also charged the accused for kidnapping and murder of his son Kamran.

PW.05 is the statement of Seyed Nouman Ali Shah the then AC Lower Orakzai who dispatched the recovered bone of the minor to a Lab at PIMS Islamabad for DNA report and also constituted Jirgas for the settlement of the dispute between the parties.



PW.06 is the statement of Rahim Uddin in whose presence the proceedings of the sniffer dog was carried out. The bone was recovered in his presence and he prepared video of that recovery that is Ex.PW-6/1.

PW.07 is the statement of Abbas Afridi AC Lower Orakzai who constituted and convened Jirga in the instant case for the disposal of the dispute.

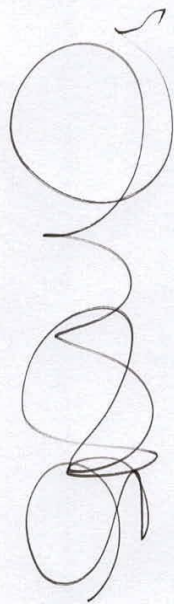
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On 08.10.2019, the prosecution closed its evidence and on 10.10.2019 the statement of accused was recorded U/s 342 Cr.P.C wherein the accused denied the allegations of the prosecution, however he refused to be examined on oath or to produce defense evidence, therefore, the case was fixed for final arguments.

Arguments of APP for the state assisted by counsel for the complainant and counsel for the accused heard and record perused

The case of the prosecution is un-witnessed and entirely based on circumstantial evidence. Placing reliance on circumstantial evidence, in cases involving capital punishment, the stringent principle is that such evidence must be of the nature, where all circumstances must be so inter linked, making out a single chain, an unbroken one, where one end of the same touches the dead body and the other the neck of the accused. Any missing link in the chain would render the same unreliable for recording a conviction on a capital charge.

The minor was missing, as per prosecution version, from on his way to home when he was sent back home by his father from their fields where

he had gone along with his father. The complainant party came to know about the missing of the minor when they returned home from their fields at about 01 PM. The complainant had neither charged anybody for the missing of his grandson nor was the initial information report lodged by him. The accused was even not suspected for the offence and it was after the alleged sniffer dog that entered into the house of the accused when the complainant charged the accused in his application submitted to the then PA of erstwhile FATA. Though as per version of the complainant the sniffer dog had entered into the house of the accused but through sniffer dog the accused could not be specifically nominated nor in consequences of the search by the sniffer dog had any incriminating material been recovered from the house of accused neither from anywhere else nor the minor could be traced. The bone of the minor was recovered by the complainant party from the nearby mountains themselves. It is not appealable to mind that the dog instead of proceeding to place at a distance of half KM from the house of the complainant party as stated by PW-03, where the bones were hidden, entered into the house of the accused, after covering distance of $\frac{3}{4}$ KM, therefore, the possibility could not be ruled out that dog misjudged or mistaken the track and it is because of the fact due to which the detection by a dog could not be believed nor such detection may be always admitted as correct. The accused had been involved in the case on the basis of tracking the house of accused by sniffer dog arrange privately by the complainant party, however the record does not speak about the handler of the sniffer dog who is unknown and was not examined by the prosecution to support the spot proceedings through sniffer dog.



Besides that there is nothing on record in the shape of documentary evidence that the dog had been taken to the spot for the search of the accused or any permission was sought to that effect. The complainant (PW-03) stated that the dog was taken to the spot after obtaining permission from the then PA, however PW-03 was negated by Nouman Ali Shan AC (PW-05) who stated that no such permission was obtained from the PA. It is also not brought on record that the handler of the dog was a qualified and trained person from a recognized institution and that the dog was tested by recognized institution as reliable to trace out the crime or criminal or the dog had past history of detection of such criminal, therefore, it could not be held that the dog was sufficiently trained to trace human scent or identify criminals. Neither any application was presented to the PA for obtaining permission to take the sniffer dog to the spot nor had any certificate been issued by the handler of the dog to the complainant or to the PA regarding the spot proceedings. The only evidence on which the prosecution mainly bank on against the accused is the tracking by the sniffer dog which is in the circumstances of the case is a weak piece of evidence could not be relied nor the same could be made basis for the conviction of the accused.

The second piece of evidence on which the prosecution relied is the decision of Jirga Ex- PW-1/1 wherein it was decided that the complainant shall produce witnesses to take oath that the accused had committed the offence. The prosecution contended that the complainant party was willing to produce ten persons to take oath but the accused denied the verdict of the Jirga, hence this fact shows that the accused has committed the offence. In

criminal disputes, where cases are registered under the FCR (now repealed) by the then Political Agent a criminal reference was required to be sent to the Council of Elders as provided under section 11 of the FCR. The reference was required to be sent to the Council of Elders by making an order in writing referring the question for finding of guilt or innocence of any person or persons accused of any offence or offences for its findings who after holding necessary inquiry and hearing the parties and witnesses submit its finding to the PA. In the instant case no such order in writing is available on record referring the question for finding the guilt or innocence of the accused to the Council of Elders. Furthermore, there is nothing on record that the names of Jirga members nominated by the PA were communicated to the accused as provided u/s 11(2) of the FCR. Abbas Afridi AC Lower Orakzai (PW-07) also stated in his cross examination that there is no order of reference or issues in the instant case, therefore when the matter had not been referred to the Council of Elders u/s 11 of the FCR then in such circumstances the decision of Jirga Ex-PW-1/1 is not admissible in evidence and the same could not be relied upon being illegal.

Admittedly the occurrence had not been witnessed by any person. The complainant (PW-03) stated in his cross examination that when he reached home after his work in his fields he came to know about the missing of minor Kamran and further stated that he had not seen any one taking the minor on his return from the fields. Furthermore, no one from the locality came forward to state before the inquiry officer that he had seen the minor in the company of the accused or taking the minor from the

alleged place. Though the complainant alleged that he produced ten persons for taking oath that the accused has committed the offence but non from those ten persons were produced before the court to support the allegations against the accused. The accused remained in custody but the accused neither recorded his confession nor any incriminating material has been recovered from his possession. The bones and other articles of the minor were also not recovered on the pointation of accused rather those were recovered by the complainant party themselves therefore such recovery could not be used as an evidence against the accused. It can be held that the case of the prosecution is of no evidence and the circumstantial evidence available on file does not connect the accused with the commission of the offence.

As sequel to the above discussion, the prosecution failed to bring home the guilt of the accused beyond any reasonable shadow of doubt; therefore, the accused facing trial namely Raj Wali is acquitted in the instant case from the charges leveled against him by extending him the benefit of doubt. The accused is on bail; his sureties are discharged from the liability of bail bonds.

The accused Noor Zali, Payo Wali, Nabeer Ullah and Naseer Ullah are still absconding, therefore perpetual warrant of arrest be issued against them and their names be entered in the relevant register of proclaimed offenders kept in the police station concerned. The accused be arrested when and where found and be produced before the court.

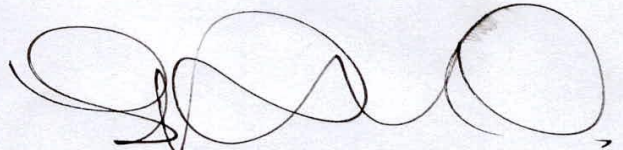
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The case property be kept intact till the expiry of period of appeal or revision and where after the same be dealt with in accordance with law.

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

Announced

22 October, 2019



(Shaukat Ali)

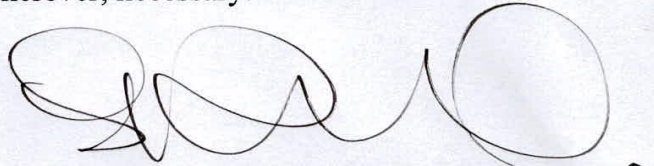
Additional Sessions Judge-II,

Orakzai at Baber Mela

SHAUKAT ALI
Addl: District & Sessions Judge-II,
Orakzai at Hangu

CERTIFICATE

Certified that this judgment consists of 09 pages. Each page has been read corrected and signed by me wherever, necessary.



Additional Sessions Judge-II,

Orakzai at Baber Mela

SHAUKAT ALI
Addl: District & Sessions Judge-II,
Orakzai at Hangu