

(20)

**IN THE COURT OF ADDITIONAL SESSIONS JUDGE-II ORAKZAI**  
**AT BABAR MELA**

Sessions Case No.....05 of 2019

Date of Institution.....11.07.2019

Date of decision.....13.11.2019

State.....(Complainant)

Vs

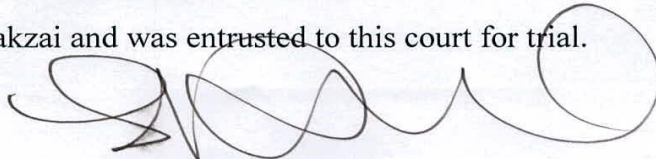
1. Syed Mushtaq Hussain s/o Syed Habib Hussain,
2. Syed Arif Hussain s/o Syed Abid Hussain,
3. Syed Mir Shah Hussain s/o Syed Ali r/o Bukhari Saidan,  
Andkhel Payan Shia Stori Khel District Lower  
Orakzai..... (Accused/Petitioners)

**ORDER**  
**13.11.2019**

Accused/petitioners Syed Mushtaq Hussain, Syed Arif Hussain and Syed Mir Shah Hussain on bail present. Complainant party also present.

This order is intended to dispose of application submitted by the accused/petitioners u/s 265-K Cr.P.C for their acquittal in case vide information No. 1007/APA/L dated 29/04/2016 u/s 302/34 PPC PS Lower Orakzai.

The brief facts of the case are that on 29/04/2016 it was reported to APA Lower Orakzai that at about 2:30 PM Mir Shah Hussain, Mushtaq Hussain and Arif etc Bukhari Saidan Shia Stori Khel fired on one Gulshan Ali s/o Nazar Ali Und Khel Shia Stori Khel and as a result of their firing one Gulshan Ali got hit and died on spot. Motive behind the offence was stated to be a dispute over the landed property between the parties. The instant case was pending before the AC Lower Orakzai. On 04/07/2019 Muhammad Altaf Hussain submitted an application to District & Sessions Judge Orakzai for the transfer of instant case to the District Court Orakzai being a murder case. The application was allowed vide order dated 11/07/2019 and the case was transferred from AC Lower Orakzai to District Court Orakzai and was entrusted to this court for trial.



The accused were summoned who appeared before the court on 18/07/2019 and provision of 265-C Cr.P.C was complied with. On 29/08/2019 formal charge was framed against the accused 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 05 witnesses; the gist of the prosecution evidence is as follows;

**PW.01** is the statement of Ibne Ali who was present at the time of occurrence and is the eye witness of the case.

**PW.02** is the statement of Ahmal Hussain who is also the eye witness of the occurrence.

**PW.03** is the statement of Syed Abdul Abbas who was Jirga member between the parties for the settlement of the dispute.

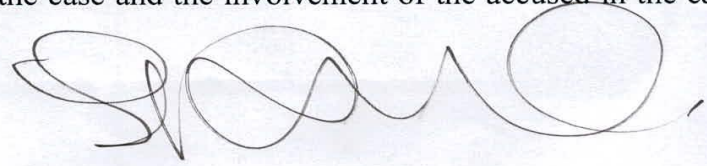
**PW.04** is the statement of Shal Muhammad who arrested the accused and issued their card of arrest which is Ex.PW-4/1. On the next day he produced the accused to the Illaqa Judicial Magistrate. He interrogated the accused and conducted partial investigation.

**PW.05** is the statement of Altaf Hussain who reiterated the contents of information report and charged the accused for the commission of offence.

On 10/10/2019 during trial of the case, counsel for the accused submitted an application u/s 265-K Cr. P.C for the acquittal of accused in the instant case. Notice of the application was issued to the prosecution and the application was fixed for arguments.

Arguments of counsel for the accused/petitioners and APP for the state assisted by learned counsel for complainant on the said application already heard and record perused.

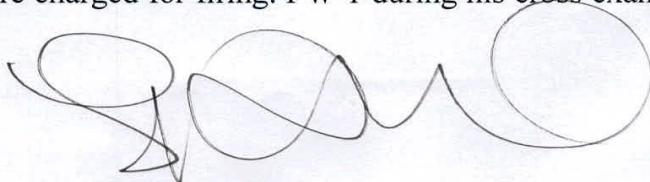
The perusal of record would transpire that the case against accused was registered vide information report No. 1007/APA/L Dated 29/04/2016 after receiving information by the then APA Lower Orakzai regarding the occurrence. Only the information report was available against the accused on record and on the basis of that report no inquiry was conducted to dig out the facts of the case and the involvement of the accused in the case against



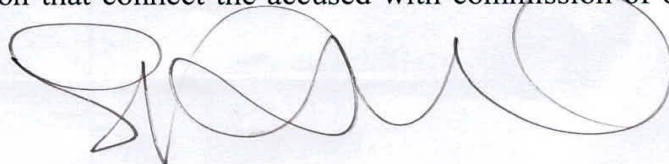
them. Furthermore, no findings regarding the guilt or innocence of the accused is available on file that were required under the law at the time of registration of the case against the accused. The information report neither disclosed the name of the complainant nor the names of alleged eye witnesses who recorded their statements after the laps of more than three years of the occurrence. Since the registration of the case the complainant and the eye witnesses have not charged the accused for commission of offence nor they recorded their statements. It cannot be determined from the report and available record that what was the source of information regarding the occurrence to APA Lower Orakzai on 29/04/2016.

The whole record is silent about the fact except the information report that the accused had committed the offence. The various applications available on file do not reflect the names of the accused and eye witnesses. In those applications the accused are nowhere charged by name by the complainant, the alleged eye witnesses or legal heirs of deceased. The record shows that the whole tribe of Bukhari Saidan had been charged for firing and no specific role of firing is attributed to the accused or anyone else. Furthermore, jirgas were also held but in those jirgas the accused/petitioners are also not charged specifically by the complainant party except the general charge of murder had been brought against the whole tribe of Bukhari Saidan.

The eye witnesses Ibne Ali (PW-1) and Ahmal Hassan (PW-2) who were introduced in the instant case as eye witnesses after more than three years recorded their statements. Ibne Ali (PW-1) stated during his chief examination that the accused started firing and in the first round of firing they hit the tractor and damaged its tyres while they escaped unhurt at that first round of firing and further stated that after 2/3 minutes of the first round of firing the accused Mir Shah Hussain came and started firing from road as a result of which his brother Gulshan Ali got hit and died on the spot. PW-1 only charged accused Mir Shah Hussain without mentioning the name of others accused facing trial or attributing them the role of firing and his statement contradicts the information report where all the three accused facing trial are charged for firing. PW-1 during his cross examination stated



that the first round of firing was made from the houses that damaged the tractor and its tyres. Ahmal Hassan (PW-2) narrated a different version and stated during his examination chief that the Bukhari Saidan which includes the accused facing trial and other relatives and tribe's members started firing from various places upon them as a result of which his nephew Gulshan Ali got hit and died on the spot. PW-2 in his statement has not charged the accused facing trial specifically for firing on the deceased rather the other relatives whose names are unknown and tribe's members are charged for firing therefore it cannot be held that the accused had made firing on the deceased. PW-2 in his cross examination stated that the first round of firing started from the road which is a distance of 200 meters from the place of occurrence which negated the statement of PW-1 who stated that the first round of fire was made from the houses that damaged the tractor and its tyres. PW-2 further stated in his cross examination that he cannot say that from where the second and third firing started and self-stated that the firing was from various sides and the place from where each fire was made is difficult to specify which further negates the statement of Ibne Ali (PW-1) that after 2/3 minutes of the first round of firing the accused Mir Shah Hussain came and started firing from the road. The statement of the prosecution witnesses (PW-1 and PW2) who are the alleged eye witnesses are contradictory and could not be believed. The statement of PW-1 and PW-2 are not confidence inspiring and could not be made basis for the conviction of accused for a capital charge of murder. Altaf Hussain (PW-5), the alleged complainant of the case is not the eye witness of the occurrence who stated in his cross examination that he got inform about the occurrence at about 1:00 PM through his relative by phone. PW-5 has not charged the accused later on during partial investigation nor he recorded his statement before the I.O, therefore the statement of PW-5 also not worth reliable and does not connect the accused with the offence. Furthermore, when the accused were arrested by the police after their BBA was recalled, the case was partially investigated by Shal Muhammad SI (PW-4) who stated during his cross examination that he has not brought on record any material during his investigation that connect the accused with commission of offence and



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further stated that except the information report the names of the accused are not available in the whole file which creates further doubts regarding the involvement of accused in the commission of offence.

Besides, the post mortem report of the deceased is not available to a certain the nature of injury and the cause of death. Neither the site plan is prepared nor any incriminating material has been recovered from the spot to confirm the venue of offence. The tractor that allegedly damaged in the occurrence was not produced nor the driver of the tractor was produced as a witness who was allegedly present at the time of occurrence. In the absence of cogent and tangible evidence, mere oral allegations are not sufficient to bring home the guilt against the accused. The material evidence has been produced by the prosecution against the accused which is not reliable being contradictory. The case against the accused is based on weak evidence and as such to proceed with the trial of the case against the accused would be a futile exercise as the ultimate result would be the acquittal of accused. The court u/s 265-K Cr.P.C has ample powers to acquit the accused at any stage of the case when there is no possibility or probability of his conviction. The record of the present case would reflect that the remaining evidence against the accused is not material to connect them with the commission of the offence, therefore there is no possibility of the conviction of accused.

In view of the above discussion the application submitted by the accused/petitioners u/s 265-K Cr.P.C is accepted and the accused are hereby acquitted from the charges leveled against them. The accused are on bail; their sureties are discharged from liability of bail bonds. Case property if any be dealt with in accordance with law.

File be consigned to District Record Room Orakzai after its necessary completion and compilation.

**Announced**  
**13.11.2019**



(SHAUKAT ALI)  
Additional Sessions Judge-II,  
Orakzai at Babar Mela

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