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

Session case No: 04 of 2020

Date of Institution: 14.02.2020

Date of Decision: 27.07.2020

State through Zain Akbar S/o Khayalmad Shah R/o Khwa Dara, Mishti Kalay, District Lower Orakzai.

.....(**Complainant**)

VERSUS

1. Hasham Khan s/o Stori Gul
2. Said Umar s/o Awlia Din r/o Stori Khel, Khwa Dara
3. Abdul Khanan s/o Sial Khan, r/o Stori Khel, Tarkho Sam, Lower Orakzai (**Accused Facing Trial**)

Represented by:

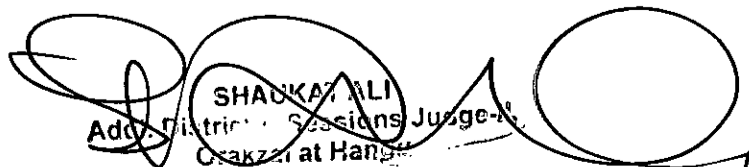
Mr. Umar Niaz, DPP for State,

Mr. Sana Ullah Khan Advocate, counsel, for accused facing trial.

**CASE INFORMATION REPORT NO. 812/APA/L DATED 08.04.2016 U/S
302/34 PPC OF POLICE STATION LOWER ORAKZAI**

JUDGMENT

The prosecution story is that on 08-04-2016 the accused facing trial along with deceased Khalid s/o Khyalman Shah Mishti r/o Khwa Dara were on their way from Mishti Mela to Anjari on Kacha road with Chars when reached to Bezot area at about 03:00 AM, some unknown persons opened fire at them as a result of which Khalid got hit and died. The accused were charged for the murder of Khalid vide information report ibid. During the proceedings of the case before the then Political Administration the accused were arrested and the case was inquired by the then Political Administration and was pending before them. After the merger of erstwhile FATA in KPK the case file was transferred to the District Courts Orakzai and was entrusted

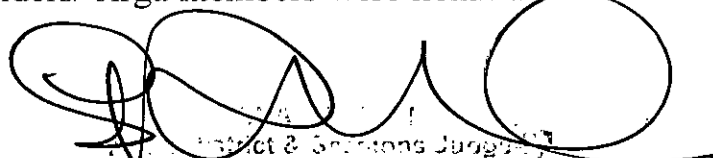

SHAUKAT ALI
Add. District Sessions Judge-II
Orakzai at Hangu

to this court for trial. The accused appeared before the court and after compliance of 265-C Cr.PC, formal Charge was framed against the accused on 07.05.2020 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 06 witnesses; the gist of the prosecution evidence is as follows;

PW.01 is the statement of Malik Najmul Hassan who stated that "I along with other elders/ Jirga members were nominated for settlement of murder dispute of deceased Khalid (Nephew of the complainant Zain Akbar) and accused/respondents. I along with Badshah Khan, Ghafil Rehman, Shah Muhammad Khan, Malooq Khan held Jirga on 21-02-2018 and we Jirga members gave our verdict as per customs and tradition of Orakzai tribe. We recorded the statements of both the parties to the dispute. The complainant in his statement charged the accused/respondents for the murder of deceased Khalid whereas the respondents in their statement admitted that they took the deceased Khalid on the eventful night with them however they denied the allegation of murder. We gave a decision that accused/respondents shall identify the culprits and if they failed to identify the culprits then the complainant shall produce five persons who shall depose on oath that the accused had took the deceased with them and they have murdered him. We the Jirga members submitted the decision of Jirga to the APA Lower Orakzai for further proceedings. The Jirga decision is Ex.PW-1/1 consist of 03 pages. We also framed the issues which are Ex.PW-1/2 consist of 03 pages. The above exhibits which correctly bears my signature."

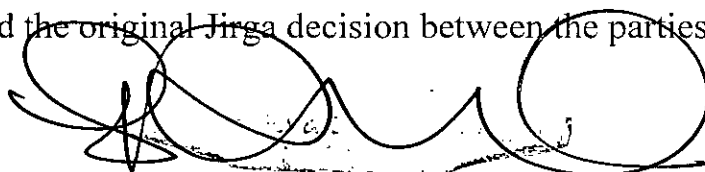
PW.02 is the statement of Shah Muhammad who stated that " I along with other elders/ Jirga members were nominated for settlement of murder


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dispute of deceased Khalid (Nephew of the complainant Zain Akbar) and accused/respondents. I along with Badshah Khan, Ghafil Rehman, Najmul Hassan, Malooq Khan held Jirga on 21-02-2018 and we Jirga members gave our verdict as per customs and tradition of Orakzai tribe. We recorded the statements of both the parties to the dispute. The complainant in his statement charged the accused/respondents for the murder of deceased Khalid whereas the respondents in their statement admitted that they took the deceased Khalid on the eventful night with them however they denied the allegation of murder. We gave a decision that accused/respondents shall identify the culprits and if they failed to identify the culprits then the complainant shall produce five persons who shall depose on oath that the accused had took the deceased with them and they have murdered him. We the Jirga members submitted the decision of Jirga to the APA Lower Orakzai for further proceedings. The Jirga decision is already exhibited as Ex.PW-1/1 consist of 03 pages. We also framed the issues which are already exhibited as Ex.PW-1/2 consist of 03 pages. The above exhibits which correctly bears my signature.”

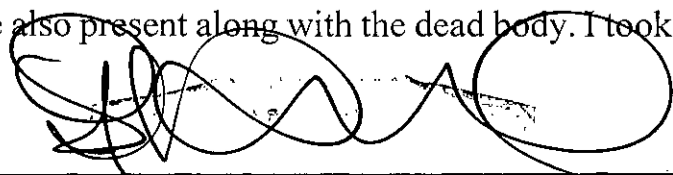
PW.03 is the statement of Muhammad Ullah who state that “On 11-03-2020 we convened a Jirga between complainant and accused party. The Jirga members were Malak Din, Meena Gul and Malak Asghar Shah along with me. We decided that accused/respondents are responsible for the murder of Khalid Khan who is the nephew of complainant Zain Akbar therefore we imposed Rs. 15 lac as damages (Tawan) on accused party that is to be paid to the complainant in 03 instalments. First instalment shall be paid on 25-03-2020, second instalment and 3rd instalment shall be paid on 10-06-2020 and 10-09-2020 respectively. The dates of 1st and 2nd instalments have been lapsed and the amount is still unpaid by the accused/respondents. Today I produced the original Jirga decision between the parties the copy of



which is Ex.PW-3/1 (original seen and returned) which is correct and correctly bears my signature.”

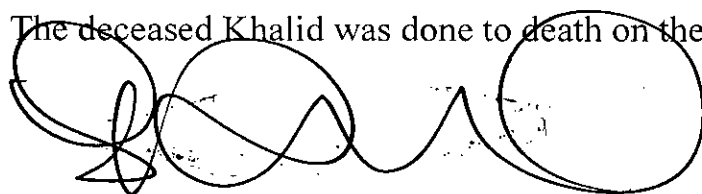
PW.04 is the statement of Malak Din Khan who stated that “on 11-03-2020 we convened a Jirga between complainant and accused party. The Jirga members were Muhammad Ullah, Meena Gul and Malak Asghar Shah. We decided that accused/respondents are responsible for the murder of Khalid Khan who is the nephew of complainant Zain Akbar therefore we imposed Rs. 15 lac as damages (Tawan) on accused party that is to be paid to the complainant in 03 instalments. First instalment shall be paid on 25-03-2020, second instalment and 3rd instalment shall be paid on 10-06-2020 and 10-09-2020 respectively. The dates of 1st and 2nd instalments have been lapsed and the amount is still unpaid by the accused/respondents. Today I produced the original Jirga decision between the parties the copy of which is already exhibited as Ex.PW-3/1 (original seen and returned) which is correct and correctly bears my signature.”

PW.05 is the statement of Zain Akbar who stated that “The deceased Khalid Khan was my nephew. On 07-04-2016 my nephew deceased Khalid left home with accused facing trial. Accused party along with deceased remained at the home of one Bahadar r/o Beezot and thereafter left his house. At night time my nephew was murdered however I do not know that who murdered my nephew and the accused are well aware that who committed the murder. After the murder of deceased the dead body along with weapon of offence was brought to the house of Bahadar mentioned above who refused to retained the dead body however the weapon of offence was retained by the said Bahadar at his home. On the next day I was informed by one Musahad my co-villager about the murder of my nephew Khalid. On that information I came to Otman Khel where the dead body was laying and the accused were also present along with the dead body. I took the dead body



to my village and the matter was reported to then Political Administration. During the course of proceeding before the then PA Jirga was constituted and according to the verdict of Jirga the accused were asked to disclose the accused if they have not committed the murder but they failed. Similarly after that I was asked to produce five persons from my family to depose on oath that the accused have committed the murder of deceased Khalid but the accused refused the offer of oath which was to be administered to the persons that were produced by me. During the proceedings Bahadar in whose home the weapon of offence was kept also refuse to take oath about his innocence. After the merger of FATA the case was transferred to this court and during the trial a private Jirga was convened on 11-03-2020 wherein the accused Sayed Umar refused the decision of Jirga however the accused Hashim and Abdul Khanan accepted the decision of Jirga and were ready to pay the compensation to the legal heirs of deceased. However after now nothing has been paid to the legal heirs of deceased. I have seen all the applications, Jirga verdicts and issues framed for decision of Jirga which are correct and correctly bear my signatures. I charged the accused for the murder of my nephew Khalid.”

PW.06 is the statement of Hafeez-u-Din Tehsildar who stated that “On 08-04-2016 at about 6:00 AM I received information about the firing in village Bezot, on this information I directed the official of Levies of Bezot village to inquire about the firing. The Levies officials found trail of blood on the spot at village Bezot. On collecting further information it was found that one dead body was laying in the area of village Utman Khel Miangano Kalay. The dead body was identified is Khalid s/o Khyalmaid Shah Tribe Mishti. On further information it was revealed that deceased Khalid was in the company of some other friends namely Hashim Khan, Syed Umar and Abdul Khanan. The deceased Khalid was done to death on the said night by



someone best known to the accused. Accused Hashim Khan was taken into the custody by Orakzai scout while accuse Syed Umar and Abdul Khanan were taken into custody by then PA for inquiry and investigation. The dead body was handed over to the legal heirs of deceased. To this effect I prepared my report which is Ex.PW-6/1 which is correct and correctly bears my signature. I sent the above mentioned report to APA Orakzai. During course of investigation I recorded statement of accused which are placed on file. On completion of investigation/inquiry I prepared the report on behalf of APA Lower Orakzai which is correct and correctly bears my signature which is Ex.PW-6/2. I well acquainted with the signature of Aziz Ullah the then APA Orakzai who has submitted information reports dated 19-06-2016 Ex.PW-6/3, information report dated 05-07-2016 Ex.PW-6/4 and information report dated 14-07-2016 Ex.PW-6/5 which correctly bears signature of Aziz Ullah Khan. During course of investigation the statements of accused were also recorded which are placed on file. Similarly one other report of Aziz Ullah Khan dated 31-08-2016 Ex.PW-6/6 is also correct and correctly bears his signature.”

On 14.07.2020, the prosecution closed its evidence and on 18.07.2020 the statement of accused were recorded u/s 342 Cr.P.C wherein the accused denied the allegations of the prosecution, however they refused to be examined on oath or to produce defense evidence, therefore, the case was fixed for final arguments.

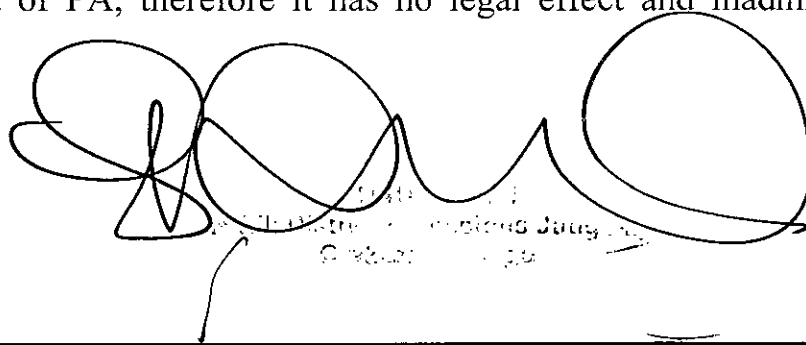
Arguments of DPP for the state and counsel for the accused heard and record perused.

The case of prosecution was initiated against the accused facing trial on information report Ex.PW-6/2 which states that last night on 08-04-2016 some unknown persons opened fire near Bezot village. In this connection the

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 Addl: District / Sessions Judge (I),
 Orakzai at Nangu

levy personnel were deputed to ascertain actual position. The levy personnel informed that a dead body is found in village Miangano Kaly Utman Khel which was known as Khalid s/o Khayalman Shah Mishti r/o Khwa Dara. The information report further mentions that the accused along with deceased were on way from Mishti Mela to Anjani on Kacha road with chars when reached to Bezot area at about 03:00 AM, some unknown persons opened fire as a result of which Khalid got hit and died and his dead body was handed over to his relatives.

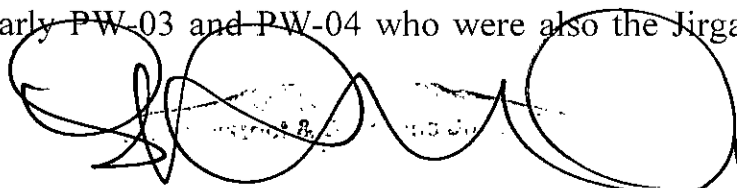
Under the FCR (now repealed) before the then Political Administration in criminal disputes, where cases are registered under the FCR by the then Political Agent a criminal reference was required to be sent to the Council of Elders as provided under section 11 of the FCR. The reference was required to 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, after the information report Ex.PW-6/2 no inquiry has been conducted in the instant case. The inquiry officer had neither visited the spot nor recorded the statement of any witness acquainted with the facts and circumstances of the case. There is nothing on record that the matter has been referred to the Jirga nor there is any verdict duly endorsed by the then PA available on file and the Jirga opinion Ex.PW-1/2 is rendered without following the law which also does not bear the endorsement of PA, therefore it has no legal effect and inadmissible in evidence.



The block contains a handwritten signature in black ink, which is highly stylized and illegible. Below the signature is a circular official stamp. The text within the stamp is partially obscured by the signature but appears to include the name 'S. J. J.' and the title 'S. J. J.'. The stamp is located at the bottom right of the page.

The case of 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 complainant himself is not the eye witness of the occurrence nor could he produce any person claiming to be the eye witness of the occurrence or to be acquainted with the facts of the case. In the instant case the spot has not been examined and no recovery whatsoever has been carried out in the case to incriminate the accused for the commission of offence. The accused also remained in the custody however neither they have pointed out the place of occurrence nor any recovery nor discovery had been affected on their pointation. Furthermore the accused had also not confessed their guilt. The injury sheet, inquest report and PM report of the deceased is also not available on file nor such examination of the deceased had been carried out, therefore neither the place of occurrence is confirmed nor the cause of death of the deceased could be ascertain and in such circumstances the version of the prosecution that the deceased died as a result of firing is not supported from the available record.

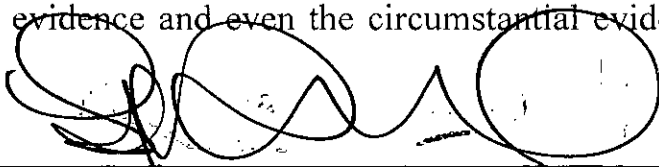
The prosecution produced Jirga members who participated to resolve the dispute during the proceedings of the case to some extent held before the then Political Administration who recorded their statements as PW-01 and PW-02, however both the PWs stated in their cross examination that during the course of Jirga they inquired into the matter however they could not find any proof regarding the involvement of the accused in the murder of deceased. Similarly PW-03 and PW-04 who were also the Jirga members



and convened Jirga to resolve the matter also stated in their cross examination that the complainant could not produce any solid evidence regarding the involvement of accused in the murder of deceased. The Jirga members who were produced by the complainant as his witnesses also do not support the case of the complainant and during the Jirga proceedings they could not collect any evidence to connect the accused with the commission of offence.

The complainant Zain Akbar (PW-05) also deposed in the case against the accused. The complainant stated in his examination in chief that at night time his nephew was murdered however he does not know that who murdered his nephew and the accused are well aware that who committed the murder. The complainant though had alleged that the deceased left home with the accused, however the complainant stated in his cross examination that he was not informed by the deceased Khalid that he left home with the accused and self-stated that he had informed her wife but to prove this fact the complainant could not produce any witness or even the wife of deceased, therefore that fact also could not be believe. Hafeez-u-Din Tehsildar (PW-06) had received the first information report about the firing in village Bezot and he prepared the report Ex.PW-6/1 and sent the said report to the APA Orakzai. On completion of investigation/inquiry he also prepared the report Ex.PW-6/2 on behalf of APA Lower Orakzai. Hafeez-u-Din (PW-06) stated in his cross examination that the accused had not confessed the commission of offence before me and further stated that nothing incriminating was recovered from possession of accused. PW-06 stated that as per investigation/inquiry report no evidence is brought on record to connect the accused with the commission of offence.

After going through the record it can be safely held that the case of prosecution is of no evidence and even the circumstantial evidence in the



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case against the accused is lacking and nothing is available on record to prove the alleged offence or to connect the accused with the commission of offence, therefore this court finds the accused not guilty.

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 Hashim Khan, Said Umar and Abdul Khanan are acquitted in the instant case from the charges leveled against them by extending them the benefit of doubt. The accused are on bail; their sureties are discharged from the liability of bail bonds.

The case property if any 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
27 July, 2020

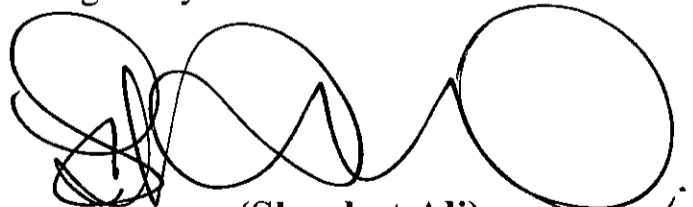


(Shaukat Ali)

Additional Sessions Judge-II,
Orakzai at Baber Mela

CERTIFICATE

Certified that this judgment consists of 10 pages. Each page has been read, corrected wherever necessary and signed by me.



(Shaukat Ali)

Additional Sessions Judge-II,
Orakzai at Baber Mela