

**IN THE COURT OF JAMAL SHAH MAHSOOD,
ADDITIONAL SESSIONS JUDGE-I, ORAKZAI**

Case No. 8/2 PPC of 2019

Date of Institution 18-12-2019

Date of Decision 30-07-2020

The State

Vs

1. **Juma Khan** s/o Abdul Rehman
2. **Fazal Janan** s/o Habib Ur Rehman
3. **Habib Ur Rehman** s/o Abdul Rehman
4. **Noor Janan** s/o Abdul Rehman
5. **Gul Janan** s/o Abdul Rehman
6. **Muhammad Ullah** s/o Juma Khan
7. **Saeed Ullah** s/o Abdul Rehman
8. **Muhammad Shanif** s/o Gul Janan (**juvenile accused**)
9. **Ms. Amila Jan** w/o Habib Ur Rehman (**absconding accused**)
10. **Ms. Shahida Bibi** w/o Gul Janan (**absconding accused**)
(all belonging to Mishti caste, tapa Mamozai; r/o Tutamela, Shaho Khel, **Orakzai**)

(Accused)

- FIR No. 34
- Dated: 30-09-2019
- U/Ss.: 302/311/201/109/34/120 (B) of PPC
- Registered in: P.S. Lower Orakzai

- DPP Umar Niaz Khan and APP Syed Amir Shah for State
- Syed Muzahir Hussain and Abid Ali Advocates, for defense

JUDGMENT:

1. The 10 accused, named above, are accused for criminally conspiring and then committing the *qatl e amd* (murder) of one Ms. Hajra Bibi (wife of juvenile accused Muhammad Shanif), by strangulation. Accused Juma Khan and Fazal Janan have remained in custody, while the rest of the 06 accused-facing-trial

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are on bail. Two accused, namely Ms. Amila Jan and Ms. Shahida Bibi, are absconding and proceedings in respect of them have been conducted u/s 512 (1) CrPC.

2. The FIR of the instant case was registered on report of Mujahid Khan SHO (Complainant/PW-3) on 30-09-2019. The SHO reported that he received information that Juma Khan and Fazal Janan (accused no. 1 & 2) had committed murder of one Ms. Hajra Bibi in village Tutamela, Shaho Khel and that the dead body had been buried - the motive being that the deceased had illicit relationship with a co-villager, namely Farooq s/o Zarman Shah; that on receiving this information he (the SHO) went to the village of occurrence, along with some police officials, and on local inquiry it was confirmed that the crime had in fact been committed - and that it had been committed on the pretext of honour. The SHO then reported this matter to the PS, through a murasila (Ex. PA/1); and directed the officials at PS to hand over the case to investigation staff, after registering the same.
3. During investigation 08 other persons (accused no. 3 to 10) were also nominated as accused. They were nominated on the basis of confessional statements (made by accused M. Shanif, Juma Khan and Fazal Janan), in which names of other family members were revealed as criminal conspirators and instigators. After submission of the challans for trial of the 08 accused (02 in custody and 06 on bail), they were summoned to face the instant trial.

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4. Accused no. 08, Muhammad Shanif, is a juvenile (aged about 15 years according to card of arrest). Since all accused belonged to the same family it was considered in his interest to be jointly charged and tried with other co-accused - in terms of section 12(2) of Juvenile Justice System Act, 2018. For the most part of the trial the physical presence of juvenile accused Muhammad Shanif, and some other on-bail accused, before court was dispensed with; they were represented by their counsels.

5. In answer to the charge all 08 accused pleaded not guilty and claimed trial. In order to prove the charge against them, the prosecution has produced 08 PWs during the trial.

6. The gist of prosecution evidence is as follows:

PW-1 is Dr. Saba Gul, who had conducted post-mortem examination (Ex PM) of deceased Ms. Hajra Bibi, during exhumation proceedings, conducted on 04-10-2019. The cause of death was reported by her as strangulation. However, no marks of ligature were found on neck due to decomposition of body.

PW-2 is Labab Ali, HC, who was serving as Additional Muharrir in PS Lower Orakzai during the relevant days. He had entered the contents of murasila (Ex. PA/1) in the FIR register (Ex. PA); and handed over the murasila and copy of FIR to investigation staff.

PW-3 is Mujahid Khan, SI, who was serving as SHO of PS during the relevant days. He is the complainant of the case and reiterated the contents of his murasila (Ex. PA/1). He further stated that, on

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02-10-2019, he had arrested accused Juma Khan and Fazal Janan from their village and had issued their card of arrest (Ex. PW-3/1).

PW-4 is Hakim Ali, ASI, who was accompanying SHO Mujahid Khan (PW-3) on the day of registration of FIR. He narrated about the events mentioned in FIR. He further stated that, on 01-10-2019, he had visited the spot again in company of IO Shal Muhammad (PW-8) where a rope was recovered by IO in his presence. He is a witness of recovery memo of rope (Ex. PW-4/1) and produced the same before court during his statement.

PW-5 is Ishtiaq Hassan SI, who has submitted interim challan and later complete challan against the accused before court.

PW-6 is Judicial Magistrate Muhammad Imtiaz, who deposed in respect of the confessional statements of accused Juma Khan and Fazal Janan (Ex PW 6/1 and Ex PW 6/2), which were recorded by him, on 05-10-2019.

PW-7 is Constable Amir Nawaz; in his presence the juvenile accused Muhammad Shanif had pointed out different spots, at the place of occurrence, to the IO, on 02-10-2019. He is a witness of pointation memo (Ex. PW-7/1), which was prepared by IO.

PW-8 is Shal Muhammad SI, who was the Investigating Officer of the case, who conducted the following proceedings:

- On 01-10-2019 (next day of FIR), visited the spot (the house of accused) and the room where the murder had

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allegedly occurred. There he took into possession a piece of rope, measuring 02 yards, which was tied to an iron bar in the ceiling (recovery memo Ex. PW 4/1). Recorded statements of witnesses of recovery memo and prepared site plan (Ex. PB).

- On return to PS, he obtained card of arrest of accused Juma Khan and Fazal Janan, and interrogated these 02 accused; who had been arrested by the SHO (PW-3).
- On 02-10-2019, he produced Muhammad Shanif (later accused) before Judicial Magistrate for recording his statement u/s 164 CrPC (Ex. PW-8/2).
- Drafted an application, dated 02-10-2019, for exhumation of the dead body and filed the same before JM-II.
- Took juvenile accused Mohammad Shanif to the spot of occurrence for pointation proceedings (Ex. PB/1, as additions in Ex. PB).
- Obtained 02 days further custody of accused Juma Khan and Fazal Janan from JM-II, on 03-10-2019; added section 109 PPC in the case, in light of statement of Muhammad Shanif recorded u/s 164 CrPC, after consultation with the prosecution office (Ex. PW 8/5).
- Carried out the exhumation proceedings, on 04-10-2019, in presence of Judicial Magistrate, doctor and other police officials (Ex. PW-8/6 to Ex. PW-8/9).
- Recorded confessional statements of accused Juma Khan and Fazal Janan u/s 161 Cr PC, on 04-10-2019. On the

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following day produced these 02 accused before JM-II (PW-6) for recording of their judicial confession (Ex PW 6/1 and Ex PW 6/2).

- Initiated proclamation proceedings against the then 08 absconding accused, on 22-10-2019 (Ex. PW-8/11 to Ex. PW-8/12).
- Issue cards of arrest (Ex. PW-8/13 and Ex. PW-8/15) of 06 accused namely Habib Ur Rehman, Noor Janan, Saeed Ullah, Muhammad Shanif, Gul Janan and Muhammad Ullah after they had obtained interim BBAs. Recorded statements of these accused u/s 161 CrPC, after rejection of their BBAs and before lodging them in jail.
- Handed over the case file to SHO, on conclusion of investigation.

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7. The defense counsels were given an opportunity to cross examine these PWs.
8. On close of prosecution evidence, separate statements of each of the 08 accused facing trial were recorded. They all denied the prosecution evidence; however, they did not wish to produce any evidence in defense or to get themselves examined on oath. Thereafter, the prosecution and the defense counsels were heard. My findings, in light of the evidence brought on record and the arguments of the parties, are as follows.
9. The prosecution has not produced any ocular and substantial evidence against the accused during trial. The primary pieces of evidence brought forward by the prosecution are the judicial

confessions of 02 accused (namely Juma Khan and Fazal Janan) and the medio-legal evidence in shape of post mortem report of the deceased. The other pieces of evidence brought on record can be looked into only if the prosecution succeeds in establishing the primary evidence first. Needless to mention that the charge entails capital punishment and the prosecution was required to prove the charge against accused through cogent and reliable evidence, which is beyond shadow of any reasonable doubt.

10. To begin with, the prosecution evidence is shaky in respect of the time of alleged occurrence and also in respect of the timings & circumstances surrounding the receipt of information of occurrence and its registration. According to murasila and FIR (Ex-PA/1 and Ex-PA), the time of occurrence was 1600 hrs. (of 30-09-2019), and the time of report (i.e. time of dispatch of murasila from spot to PS) was 2000 hrs. In his statement as PW-3, the complainant/SHO stated that he was present in the PS where he received information about the occurrence, early in the morning and that he left the PS at 07:00 am. That he reached the spot at 11:00 am, and dispatched the murasila from spot at 11:30 am. He mentioned the time of his own return to the PS as 06:00 pm. The distance between the place of occurrence was mentioned by him as 3 to 4 hours.

11. The SHO could not name any independent witness from whom he would have identified the location of the house of occurrence, he was not in knowledge of the surroundings of the place of occurrence. In order to clear out these ambiguities, no evidence

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- in shape of extracts of Daily Diary of PS, was produced by prosecution. Hakim Ali (PW-4), a police official who accompanied the SHO to the spot on that day, stated during cross-examination that they had left the spot at 12:00 midnight and reached back to PS at 03:30 am.

12. These contradictions make the facts of the Complainant-SHO visiting the spot and making local inquiry before registration of FIR doubtful. The facts of receipt of information and departure or arrival of SHO have not been proved by the prosecution, through reliable evidence. Prompt registration of FIR in a lawful manner is thus not proved; making the prosecution susceptible to foul play.

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13. The names of accused Juma Khan and Fazal Janan were revealed to the SHO by some named source in the circumstances stated above. The names of remaining accused were revealed to the IO for the first time, allegedly, by juvenile accused Mohammad Shanif. The statement of juvenile accused recorded by the IO u/s 161 CrPC was in the nature of a confessional statement. However, when the juvenile accused was produced before Judicial Magistrate for getting this statement recorded u/s 164 CrPC, the proper procedure u/s 364 CrPC was not adopted at all. Thus, this statement cannot be used against any of the accused.

14. Judicial Confessions of 02 accused were, however, obtained by the police during trial, on 05-10-2019. In order to prove these confessions, the concerned Judicial Magistrate, Muhammad Intiaz, was produced as PW-6. The perusal of evidence in

respect of recording of judicial confessions leads me to a strong opinion that the same are not worth reliance upon. The reasons for the same follow.

15. These 02 accused were arrested by SHO/Complainant (PW-3) in un-explained circumstances, on 02-10-2019. They had remained in police custody for about 04 days: they were, previous to recording of judicial confessions, produced before the same Judicial Magistrate on the next day of their alleged arrest but they had not made any confession on that day. Confessional statement recorded after prolonged police custody is always considered an unreliable piece of evidence.

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16. The JM (PW-6) admitted that he had not verified the identity of the accused making confessions through their CNICs, or through any mark of identification. He further admitted that he had not independently verified the identities of the persons who were produced before him for confessional statements. The JM admitted that the accused were made to sit outside the court after recording of their answers to several questions of the questioners (Ex-PW 6/1 and Ex-PW 6/2) and that the IO of the case was also out of his court at that time. The IO, Shal Muhammad (PW-6), initially stated that accused were not handed over to him by the JM after recording of the confessional statements, but later in the same statement he admitted that according to case diaries the accused were handed over to him after recording of their judicial confessions and that he had lodged them in jail.

17. In exceptional circumstances a judicial confession may be solely used as basis for conviction of an offence. However, for this to happen the circumstances and the procedure adopted for recording of such confession must be impeccable. In cases entailing capital punishment, with no other piece of corroborative evidence than confessional statement, the worth of adopting such recommended procedures increases further. In the present case it is doubtful that the accused were even made aware of the nature of proceedings in which the confessions were recorded. The prosecution has failed to prove that the accused had made a voluntary confession. Thus, the confessions are discarded, being unreliable pieces of evidence.

18. As far as medical evidence is concerned, the doctor (PW-1) has opined that the death had occurred due to strangulation. Medical evidence is never considered a substantial piece of evidence. The suggestion or stance taken by the defense, during cross examination and statements of accused, that the deceased had committed suicide; and the stance of prosecution that she was murdered are both before court. The prosecution was required to prove its stance through primary evidence, in which duty it has failed. Whereas, the accused were not required to prove their stance but only to create sufficient doubt in prosecution case. In the present case the prosecution has only brought up probabilities and not substantial evidence to prove murder. Thus, the medical evidence is also not helpful to prosecution case in present circumstances.

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19. The motive in the present case was alleged as honor killing. Motive is always considered as a double-edged weapon. In the present case the allegation of illicit relationship of deceased with another person could very well be a reason or motivation for her committing suicide.

20. The above discussion comes to the conclusion that no substantial evidence, in shape of ocular account, is available against the accused. The judicial confessions brought on record are not reliable; moreover, retracted evidence can only be used as corroborative piece of evidence and not as substantial evidence. The medico-legal evidence is also of no help to prosecution. The exact time, mode and manner of the occurrence remain unclear. The formal witnesses produced by prosecution have not deposed about any substantial aspect of the case.

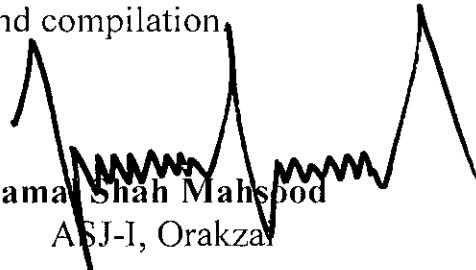
21. In cases entailing capital punishment the evidence is required to be scrutinized minutely and strictly. The prosecution is required to produce evidence of prime quality, in order to bring home the charge against accused. Not many, but a single reasonable doubt is enough for acquittal of accused in such cases. Having found the prosecution evidence doubtful in many respects, the benefit of doubt must be extended the accused. Resultantly, all 08 accused facing trial, Juma Khan, Fazal Janan, Habib Ur Rehman, Noor Janan, Gul Janan, Muhammad Ullah, Saeed Ullah and Muhammad Shanif, are acquitted of the charge leveled against them in the instant case. The 06 on-bail accused are set at liberty

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and their sureties are discharged from the liability of bail bonds. While release warrant of accused Juma Khan and Fazal Janan shall be prepared and they shall be release from custody if not required in any other case. Judgment announced in open court.


22. The evidence against the absconding accused Ms. Amila Jan and Ms. Shahida Bibi shall remain preserved in terms of 512 (1) CrPC, till their arrest and trial. Warrants of arrest against these two absconding accused were issued during investigation and the same shall remain in field till executed or cancelled.
23. Let a copy of this judgment be sent to the office of DPP Orakzai, in terms of section 373 CrPC: and this file be consigned to the record room after its proper completion and compilation.

Announced
30-07-2020


Jama Shah Mahsood
ASJ-I, Orakzai

CERTIFICATE

It is hereby certified that above order/judgment consists of 12 pages, and each page has been signed.


Jama Shah Mahsood
ASJ-I, Orakzai