

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

Case No. 09/2 PPC of 2020

Date of original Institution (before D&SJ)	22-01-2020
Date of transfer to this court	27-01-2020
Date of Decision	07-12-2020

The State (through SHO Muhammad Shafiq)

Vs

Muhammad Ismail (aged about 38 years) s/o Haider Shah; r/o Darwikhel Mishti, village Khawaja Khizar, Lower Orakzai. Presently confined in sub-jail Orakzai, at Baber Mela Hangu.

(Accused)

- FIR No. 41
- Dated: 01-12-2019
- U/Ss.: 302/311/201 of PPC & 15 KP-AA
- Registered in: P.S. Lower Orakzai

- APP Syed Aamir Shah, for State
- Sardar Ali Khan and Mudassir Ijaz Advocates, for defense

JUDGMENT:

1. The above-named accused is charged for the murders of Hazrat Bilal and Shada Bibi. These murders were allegedly committed on the pretext of honor. The accused is also charged for causing disappearance of evidence of murder in the present case and for possession of one Kalashnikov, having 05 live rounds, without permit - which is alleged to be the weapon of offence.
2. The facts of the case, as mentioned in FIR, are; that the complainant, SHO Muhammad Shafiq (PW-7), was on patrol of area when he received information that one Shada Bibi w/o Israf Shah and one Hazrat Bilal s/o Noorzali – both residents of village Khawaja Khizar, had been murdered in the name of honour because of illicit relationship between the two; that on receipt of this

information the SHO, along with a police party, went to the place of occurrence in the said village; that on inquiry, a relative of deceased (Sabir Shah PW-2) verified the occurrence and told the SHO that Muhammad Ismail (accused facing trial) had committed the murders of his sister-in-law (*bhabhi*) Shada Bibi and of Hazrat Bilal – because of illicit relationship between the two deceased. The SHO was further informed that the dead bodies had been buried after the commission of murders. On obtaining these details the SHO prepared a murasila (Ex. PA/1) and sent it to PS for registration of FIR and for investigation in the case. In the murasila the SHO also mentioned that the accused shall be arrested and that an application for exhumation shall be filed before Sessions Judge. The time of occurrence was mentioned at the top of murasila as 11:00 hrs. and the time of report as 16:00 hrs., on 01-12-2019. Upon this murasila the FIR of this case was registered at 18:45 hrs., on the same date.

3. Further relevant facts are that during investigation the accused was arrested, on 02-12-2019 (i.e. the next day of occurrence); that a Kalashnikov was recovered on his pointation, that he made judicial confession and that post-mortem reports of both the deceased were obtained during exhumation proceedings. On completion of investigation, challan was submitted against him and the same was subsequently transferred to this court for trial.
4. The accused was summoned from jail to answer the charge. Formal charge was framed against him, under four heads (i.e. two heads for the murders, one for causing disappearance of evidence and one for

possession of a Kalashnikov without permit); he pleaded not guilty and claimed trial. The accused engaged legal counsel for his defense.

5. In order to prove the charge against the accused, the prosecution has produced 11 PWs during this trial.
6. The gist of prosecution evidence is as follows:

PW-1 is one Muhammad Zareen, an uncle of deceased Hazrat Bilal. He deposed in respect of the exhumation proceedings, as identifier of grave and the dead body of his nephew Hazrat Bilal. The identification memos exhibited as Ex. PW-1/1 & Ex. PW-1/2.

PW-2 is one Sabir Shah, a grand-uncle of deceased Shada Bibi. He too deposed in respect of the exhumation proceedings, as identifier of grave and the dead body of his grand-niece Shada Bibi. The identification memos exhibited as Ex. PW-2/1 & Ex. PW-2/2.

PW-3 is Noorzali Shah, the father of deceased Hazrat Bilal. He deposed that on the day of occurrence accused Muhammad Ismail had told him (PW-3) that he (accused) murdered Hazrat Bilal and Shada Bibi because of illicit relationship between the two.

PW-4 is one Ali Muhammad, the Imam of local mosque in village Khawaja Khizar. He deposed that he had led the Namaz-e-Janaza of deceased Shada Bibi in the afternoon of the day of occurrence.

PW-5 is Dr. Sidra Hameed, a Woman Medical Officer. She was serving at DHQ hospital Mishti Mela, during days of occurrence. She deposed that she had conducted post-mortem examination (Ex. PM) of deceased Shada Bibi, during exhumation proceedings on 11-12-2019. She reported mild decomposition and bloating of the dead-body. She further reported multiple firearm entry and exit wounds

on glabella, right arm and legs. She verified her endorsements on injury sheet and inquest report of deceased Shada Bibi.

PW-6 is Dr. Muhammad Hafeez, who was posted as Casualty Medical Officer in DHQ Mishti Mela during the days of occurrence. He deposed in respect of post-mortem examination (Ex. PM/1) of deceased Hazrat Bilal, which was conducted during exhumation proceedings on 11-12-2019. He reported mild decomposition and bloating of the dead body. He further reported multiple entry and exit wounds on thorax, back, left arm and left thigh region. He verified his endorsements on injury sheet and inquest report.

Additional District & Sessions Judge-1
Orakzai

PW-7 is Muhammad Shafiq SI, the SHO of PS Lower Orakzai; he is complainant of the case. He deposed in respect of the matters reported by him in murasila (Ex. PA/1). He added some details about the time of information received by him and the time of his arrival in the village of occurrence. He had also submitted challan against the accused in office of DPP, Orakzai, on completion of investigation.

PW-8 is Aftab Ahmad ASI, who drafted the FIR (Ex. PA), on the basis of murasila sent by complainant-SHO (PW-7).

PW-9 is Constable Amir Nawaz, who was attached with investigation branch of PS Lower Orakzai during relevant days. He is a witness of almost all the proceedings undertaken and recoveries made by the IO in present case. He deposed that he, along with other police officials, visited the spots of occurrence with investigating officer (PW-10) - the first visit to spot, on the next day of occurrence. He is a marginal witness to recovery memo (Ex. PW-9/1) of blood-stained pebbles and the 03 empties (freshly discharged) recovered from the

spot of deceased Hazrat Bilal. He produced the parcel of blood-stained pebbles as Ex. P-1, and parcel of empties as Ex. P-2. He further deposed that nothing was recovered from the spot of deceased Shada Bibi. Further that they arrested the accused while leaving the spot of deceased Shada Bibi. On 03-12-2019, this PW again accompanied the IO and accused Ismail to the spots of occurrence; where accused made pointation of different spots (pointation memo Ex. PW-9/2). Further that the crime weapon (Kalashnikov no. S03109 - with 05 live rounds) was recovered on pointation of accused from one room in his house, and sealed by the IO in a parcel - produced during trial as Ex. P-3 with recovery memo as Ex. PW-9/3. He further deposed that on 12-12-2019, he took the 03 parcels (of blood-stained pebbles, crime empties and recovered Kalashnikov) to FSL Peshawar (copies of road certificates Mark-A & Mark-B).

Additional District & Sessions Judge-1
Orakzai

PW-10 is Shal Muhammad SI; the Investigating Officer of the case. He conducted the following proceedings:

- He was present in the PS, on 01-12-2019, when the Muharrir handed over to him the copy of FIR and the murasila.
- He went to village Khawaja Khizar for his first visit on the next day of recording of FIR. He stated that the investigation was entrusted to him late in the evening and that he could not visit the spot immediately as it was a far away place.
- He visited the spot of deceased Hazrat Bilal, along with a police party, and inspected the same. Recovered blood-stained pebbles

and 03 empties; which were sealed into separate parcels (P-1 & P-2) and taken into possession through recovery memo (Ex. PW-9/1).

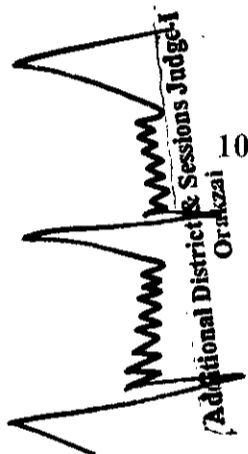
- Prepared site-plan of this spot (Ex. PB) and took one picture (Ex. PW-10/1).
- Visited the spot of deceased Shada Bibi. Found no blood as the spot has been cleaned with salt water; however, he found bullets marks and took pictures of these marks (Ex. PW-10/2 & Ex. PW-10/3).
- Prepared single site-plan of both the spots of deceased.
- His police party came across accused Ismail while they were leaving the spot of deceased Shada Bibi; inquiry was made from the accused in respect of his identity and he was arrested (card of arrest Ex. PW-10/4).
- Returned to the PS and interrogated the accused, who confessed his guilt.
- On the next day, 03-12-2019, he produced the accused before JM and obtained further custody of 01 day (application is Ex. PW-10/5).
- While returning to PS from the court of JM, he interrogated the accused, who again made confession. So, the IO took the accused to the spots of occurrence for pointation proceedings.
- Made additions to the site-plan with the red ink and prepared the pointation memo (Ex. PW-9/2).
- Recovered one Kalashnikov, with 05 live rounds, from a box inside the room of accused Ismail (recovery memo Ex. PW-9/3). Issued memo of addition of section 15 KP-AA (Ex. PW-10/6).

- Took the accused for physical examination to Kalaya hospital and then returned to the PS, where accused again confessed to the crime.
- On 04-12-2019, produced the accused before JM for recording of judicial confession, vide application (Ex. PW-10/7). The accused made judicial confession and the IO obtained handcuffs of accused from Naib Court later in the day.
- On 03-12-2019, he filed an application (Ex. PE) for exhumation of dead bodies.
- Remained present during exhumation proceedings, conducted on 11-12-2019.
- Prepared inquest reports and injury sheets of deceased Hazrat Bilal (Ex. PW-10/8 & Ex. PW-10/9) and Shada Bibi (Ex. PW-10/10 & Ex. PW-10/11).
- Prepared memos of identification of graves and identification of dead bodies (Ex. PW-1/1, Ex. PW-1/2, Ex. PW-2/1, Ex. PW-2/2).
- On 12-12-2019, he sent parcels no. 1, 2 & 3 to FSL - through Constable Amir Nawaz (PW-9).
- Placed the FSL results on file (Ex. PZ & Ex. PZ/1).
- Prepared lists of legal heirs of both the deceased (Ex. PW-10/12 & Ex. PW-10/13).
- Recorded statements of the relevant witnesses u/s 161 CrPC.
- On completion of investigation he handed over the file to SHO.

PW-11 is Muhammad Imtiaz (Judicial Magistrate), who had recorded judicial confession of accused. Certificate, confessional statement and questionnaire exhibited as Ex. PW-11/1 to Ex. PW-11/3. He was

also present during exhumation proceedings and prepared reports in respect of these proceedings (Ex. PW-11/4 & Ex. PW-11/5).

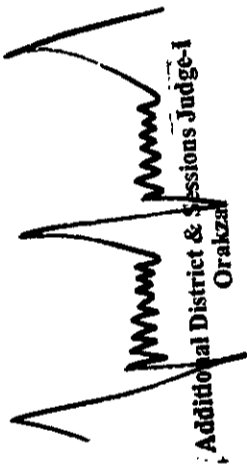
7. The defense counsels were given opportunity to cross examine these PWs.
8. On close of prosecution evidence, statement of accused was recorded; he denied the charge and the prosecution evidence. However, he did not wish to get himself examined on oath or to produce any evidence in defense.
9. Thereafter, the prosecution and the defense counsel were heard; and record perused. My findings, in light of the evidence brought on record and the arguments of the parties, are as follows.


Additional District & Sessions Judge-I
Orakzai

10. Admittedly, no eyewitness of the alleged murders has come forward in the present case. The information in respect of the murders was initially received by the complainant-SHO from an undisclosed source and Ismail (the accused facing trial) was nominated as accused by one Sabir Shah (PW-2). During his statement in trial PW-2 admitted that he was not an eyewitness of the occurrence; moreover, he did not mention anything about meeting the complainant-SHO (PW-7) or nominating accused Ismail, at the time of drafting of murasila.
11. The time and place of occurrence are mentioned in the murasila simply as 11 hours on 01-12-2019, and the place of occurrence simply as village Khawaja Khizar. In the murasila the complainant-SHO stated that after receiving information about the occurrence he immediately went to the spot of occurrence in village Khawaja Khizar. However, in his statement recorded during trial the SHO (PW-7) denied having visited the spot and deposed that he only

went to village Khawaja Khizar and met Sabir Shah (PW-2) on the road side. In the site plan (Ex. PB), however, two separate spots have been given for each murder; one a coal mine belonging to Bilal Afridi and the other the house of deceased Shada Bibi. The distance between these two spots is mentioned as 3-4 km. In these circumstances it is clear that the investigation agency has failed to establish the timings of both the occurrences and the prosecution has also failed to bring on record clear evidence as to how the date and time of occurrence were initially ascertained by the SHO-complainant.

12. The IO has prepared a single site-plan of both these spots, which according to prosecution case are 3-4 km apart. The spot of deceased Hazrat Bilal "A" is shown as an enclosure while the empties are shown as recovered from a spot "B" outside this enclosure. Whereas, the spot of deceased Shada Bibi has been shown as her 06-room house. It has not been brought on record that who else was living in the said house at the time of commission of murder of Shada Bibi. In a tribal society, generally, a woman does not reside alone, nor does she own a house. When a murder is alleged to have been committed inside a dwelling house, it becomes very important to bring on record the names of inmates of that house, so that the trial may feel confident about the circumstances around the death which it is trying. The investigation agency and the prosecution has completely ignored these important aspects of the case. No independent witness was associated with the proceedings regarding the identification of spots of occurrence.


Additional District & Sessions Judge-1
Orakzai

13. Thus, so far, it is clear that there is no eye-witness account in respect of the murders, that the timings of both the murders are not known and that there is nothing on record to show that who could have been present when the alleged murders were committed.
14. In absence of eyewitness account, the prosecution has brought the judicial confession of accused and the recovery of crime weapon on his pointation (along with the FSL report, matching this weapon with the empties recovered from spot of deceased Hazrat Bilal) as the main pieces of evidence, against the accused facing trial.
15. As far as the recovery of crime empties is concerned, the same (having smell of fresh discharge) were allegedly taken into possession by IO on 02-12-2019 (next day of occurrence), through a recovery memo having only police officials as witnesses of recovery proceedings. These empties were allegedly recovered from outside a mine, belonging to one Bilal Afridi (not a prosecution witness). The Kalashnikov in question was allegedly recovered, on 03-12-2019 - on pointing of accused, from the very room in which Shada Bibi was allegedly murdered. The Kalashnikov was also stated to have smell of freshly discharged bullets (02 days after the alleged occurrence). These articles were sent to FSL, Peshawar together on 12-12-2019 (09 days after the recovery of Kalashnikov). This case property was never produced before JM, in terms of section 170 (2) of CrPC, and no evidence has been produced to prove its safe and proper custody.
16. The lacunas and doubts, in prosecution case, in respect of these recoveries are; that provisions of section 103 CrPC were not complied with during alleged recovery of empties and Kalashnikov;

Additional District & Sessions Judge-1
Orakzai

the house/room from where the Kalashnikov was recovered has not been established to have been in the exclusive control of accused; smell of fresh discharge - even after one and two days from the day of occurrence, is improbable; safe and proper custody of these articles has not been established by the prosecution; and the delay in sending these articles to FSL has also not been explained. Thus, the evidence in respect of recoveries and the FSL report is not reliable and the same must be rejected.

17. The second piece of evidence relied upon by the prosecution is the retracted confession of accused facing trial, recorded by Judicial Magistrate (PW-11). It is an established principle of criminal law that conviction cannot be based solely on a retracted confession. The prosecution, in furtherance of justice, is bound to bring on record substantial evidence against an accused, and a retracted confession can then be looked into as corroborating this substantial evidence. Courts require evidence beyond shadow of any reasonable doubt, especially in cases entailing capital punishment. There is no substantial or reliable circumstantial evidence in the present case, as has been discussed above, however the proceedings of judicial confession are discussed below to see whether the judicial confession is a reliable piece of evidence against accused facing trial.

18. For the purpose of ascertaining the worth of judicial confession in present case the whole series of events, from nomination of accused till the recording of his confessional statement by JM, must be scrutinized. According to complainant (PW-7) the accused facing trial was nominated as the culprit by Sabir Shah (PW-2). The said

Additional District & Sessions Judge
Orakzai

Sabir Shah in his statement (as PW-2) has not uttered a single word about having met the SHO or about having made any such statement nominating accused. He further admitted that he was not an eyewitness of the occurrence.

19. The arrest of accused was made in strange circumstances. The IO (PW-10) and Constable Amir Nawaz (PW-9) stated that while they were leaving the spot of deceased Shada Bibi, after first visit to the spot, they came across one person who was interrogated and his identity was revealed as accused Ismail; upon which he was arrested. The IO stated in his examination in chief that the accused made confession before him while the accused was taken to the PS after arrest. However, instead of producing the accused before JM for recording of confessional statement, the IO applied for further custody of accused through (application Ex. PW-10/5). In this application the IO specifically stated the reasons for obtaining further custody was pointing of spot of occurrence from accused and for recovery of crime weapon.
20. After one day of further custody, in which pointation proceedings were conducted and recovery of Kalashnikov was indeed procured, the accused was again produced before JM for recording of confessional statement. The keeping of accused in police custody by the IO for 2 more days, despite the admitted fact that accused has confessed to his guilt immediately after arrest, casts a serious doubt on the voluntariness of the judicial confession.
21. The Judicial Magistrate (PW-11) admitted that he had not verified the identity of accused independently, but only relied upon the police record for this purpose; further admitted that he did not even ask the

Additional District & Sessions Judge-1
Orakzai

name of the accused. The JM admits that he did not bring on record anything about the educational qualification of accused.

22. The suspicious conduct of IO - in keeping accused in his custody for 2 days despite the alleged confession immediately after arrest; the seeking of extension of police custody by the IO, for the purpose of procuring pointation and recovery of crime weapon; and the lack of reliable source or method for identification of accused at the time of recording of judicial confession, have all made the voluntariness of confession really doubtful. Even the statement which is recorded as judicial confession is a confusing one, which negates the prosecution case in respect of spot of death of Hazrat Bilal and the number of fires made at both spots. For the above reasons I don't think that the statement recorded as judicial confession was procured through a voluntary process being understood by the accused. Rather, it seems that the confession statement was obtained only to provide support to the allegation made by SHO in murasila.

Additional District & Sessions Judge-I
Orakzai

23. Another interesting aspect of the case is that Noorzali Shah PW-3 (the father of deceased Hazrat Bilal) had filed an application u/s 22-A CrPC, before this court (as ex-officio Justice of Peace), on 08-02-2020, for registration of FIR in the matter of murder of his son. In this application it was alleged that his son Hazrat Bilal was murdered by Nazrab Shah and Ali Akbar, while his deceased son was working in a coal mine. Noorzali Shah had also mentioned names of two persons as eyewitnesses in this application. The DPO-Orakzai had submitted comments in respect of this application and rejected the allegations of father of deceased Noorzali Shah. The application was ultimately dismissed, as the FIR in case of murder of Noorzali Shah

had already been recorded. However, in the instant trial Noorzali Shah (PW-3) suppressed the facts of his application u/s 22-A CrPC and simply alleged that accused facing trial had confessed before him on the day of occurrence regarding murder of Hazrat Bilal. The copies of application u/s 22-A CrPC and order on the same were submitted by defense counsel during arguments, and have been placed on file.

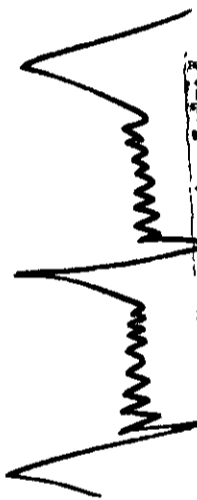
24. The motive in the present case was alleged as honor killing. It is sad but nevertheless it is true that ocular account in such cases is hard to come by, as the society as a whole upholds the falsely inculcated notions of honour and the social opinion is in favour of the offender who commits murder in name of the honour. However, this scenario would not cast a burden on court of law to start convicting people brought before it as accused in such cases. The burden in such a scenario would lie heavily on investigation and prosecution to bring on record sufficient evidence, circumstantial and forensic, which would enable the court to satisfy its mind regarding culpability of accused facing trial.

25. As far as the charge in respect of causing disappearance of evidence is concerned; the allegation against accused facing trial is that he washed the blood of deceased Shada Bibi from the spot of murder with salt-water. This allegation seems preposterous; the floor of room where deceased Shada Bibi was allegedly murdered is described in the site-plan as *kacha* (mud) floor. No witness of the said washing for purpose of disappearance of evidence has been produced neither any other procedure adopted to prove use of salt-water for washing blood from a mud-floor. No mud was obtained

Additional District & Sessions Judge-I
Orakzai

from this spot for purpose of FSL analysis, neither any bullet-heads recovered from the spots where bullet marks were alleged to be present. The allegation of washing of blood with salt-water from a mud-floor clearly speaks of the dishonesty on part of the IO.

26. The Kalashnikov was not recovered from the direct possession of accused. Rather, the same was allegedly recovered on pointing of accused from a box inside the room where the murder of Shada Bidi had occurred. The IO had admittedly inspected this room on a previous visit but not recovered anything. No independent witness from locality was associated with this recovery. Thus, the alleged recovery of Kalashnikov from accused is also doubtful.


Additional District & Sessions Judge-I
Orakzai

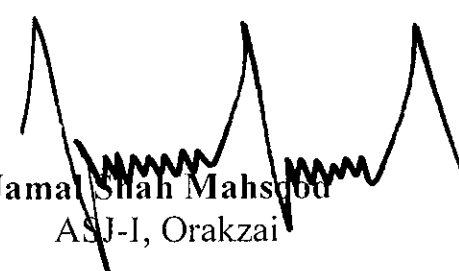
27. The crux of above discussion is that no direct/substantial evidence, in shape of ocular account, is available against the accused. The judicial confession brought on record is not reliable; moreover, retracted evidence can only be used to corroborate substantial evidence. The statements of all prosecution witness are contradictory, which create further doubts on the prosecution case rather than clearly implicating the accused facing trial. In the present case all pieces of evidence are doubtful; and one doubtful piece of evidence cannot be taken to corroborate another doubtful piece of evidence. The exact spots, times, mode and manner of the occurrence have all remained doubtful

28. 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. The prosecution evidence in

present case is doubtful in many respects and the benefit of each doubt must be extended to the accused as of right.

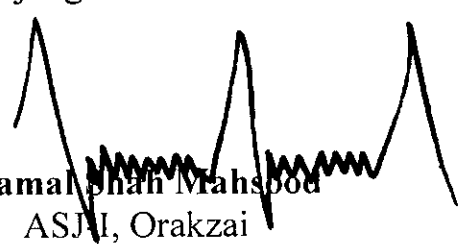
29. Resultantly, the accused facing trial, Muhammad Ismail, is **acquitted** of the charges leveled against him in the present case, u/ss. 302 (two counts), 201 PPC & 15 KPAA. The accused is in custody; release warrant of the accused prepared and sent to sub-jail, Baber Mela Hangu. The accused shall be released from custody, if not required in any other case. Judgment announced in open court.
30. The case property shall be kept intact till period of appeal/revision; thereafter, the same may be dealt with/disposed of in accordance with law.
31. Let a copy of this judgment be sent to the office of DPP Orakzai, in terms of section 373 CrPC.
32. Let this file be consigned to the record room after its proper completion and compilation.

Announced
07-12-2020


Jamal Shah Mahsood
ASJ-I, Orakzai

CERTIFICATE

It is hereby certified that above order/judgment consists of 16 pages, and each page has been signed.


Jamal Shah Mahsood
ASJ-I, Orakzai