

(5)

IN THE COURT OF ASGHAR SHAH
SESSIONS JUDGE, ORAKZAI AT BABER MELA

SESSION CASE NO. : 10/2 OF 2020
DATE OF INSTITUTION : 16.01.2020
DATE OF DECISION : 22.01.2021

STATE THROUGH GUL AMIN S/O GUL MANAN, RESIDENT OF
SANGRANI, LOWER ORAKZAI, DISTRICT ORAKZAI

------(Complainant)

VS


MUHAMMAD SALAM ALIAS ABDUL SALAM S/O ABDUL
KHALIQ, AGED ABOUT 29,30 YEARS, R/O FERAZ KHEL, SUB
TRIBE QEEMAT KHEL, SANGRANI, LOWER ORAKZAI,
DISTRICT ORAKZAI

------(Accused Facing Trial in Custody)


Present: Umar Niaz, District Public Prosecutor.
: Fawad Hussain Advocate for complainant.
: Haseeb Ullah Khan Advocate for accused facing trial.

JUDGEMENT
22.01.2021

Succinctly, stated facts of the case are that, on
06.05.2019, complainant, Gul Amin through an
application approached the DPO, Orakzai to the effect
that on 05.05.2019, at about 07:30 am, he and his
paternal cousin, Malak Khan Zaman s/o Gul Khanan
alongwith Alif Khan s/o Talib Jaan and Tawiz Gul s/o
Speen Asghar were going to participate in a jirga at
village Sangrani. That Malak Khan Zaman was ahead of


(ASGHAR SHAH)
Sessions Judge, Orakzai,
at Baber Mela

them in the fields while they were following behind him. That, when they reached the fields of one, Shal Muhammad, the accused facing trial Abdul Salam who was already sitting there appeared from the fields and started firing at Malak Khan Zaman from a distance of 5/6 meter with firearm weapon, due to which Malak Khan Zaman got hit on his neck, chest, hands and back and died on the spot. That, being empty handed they could not respond and the accused after making 15/20 shots escaped towards the village side. No motive for the occurrence was cited. It was stated that the occurrence has been witnessed besides them by one, Gul Sheerin s/o Gul Amin who was following them. Hence, the request was made for registration of FIR but having found no result, the complainant approached the Justice of Peace/ASJ-I, Orakzai through Misc. Petition no. 3 of 2019 on 14.05.2019 which was accepted vide order dated 23.05.2019, and accordingly, FIR Ex. PA was registered against accused facing trial.



 (ASGHAR SHAH)
 Sessions Judge, Orakzai,
 at Baber Mela

(2). In the instant case, despite proceedings u/s 204 Cr.P.C and 87 Cr.P.C, accused facing trial failed to appear. Hence, he was proceeded u/s 512 Cr.P.C and was

declared proclaimed offender by this court on 04.11.2019 and his perpetual warrant was issued.

(3). Later on, the accused was arrested and after completion of investigation, supplementary challan was submitted against him for the purpose of trial. The accused was summoned from jail being in custody and upon his appearance, the proceedings were initiated against him by providing copies of the case U/S 265-C Cr.P.C and he was charge sheeted to which he pleaded not guilty and claimed trial and accordingly the witnesses were summoned who deposed in the following manner.

(4). Muhammad Shafiq SHO as PW-1 appeared before the court and deposed that he has submitted supplementary challan Ex. PW 1/1 against the accused facing trial. Muhammad Fayyaz DFC appeared as PW-2 and stated to have carried out proceeding u/s 204 Cr.P.C and 87 Cr.P.C Ex. PW 2/1 to Ex. PW 2/4 against the accused facing trial. Mujahid Khan SI as PW-3 stated that he has registered FIR Ex. PA as well as submitted interim challan Ex. PW 3/1 and complete challan Ex. PW 3/2 against the accused facing trial. Dr. Muhammad Hafeez as PW-4 stated to have carried out the exhumation/post-mortem proceedings of the deceased


(ASGHAR SHAH)
Sessions Judge, Orakzai,
at Baber Meia


Malak Khan Zaman through PM report Ex. PM. Bakht Jamal as PW-5 deposed that he has identified the grave of deceased Malak Khan Zaman to the officials during exhumation proceedings besides he is the marginal witness to the pointation memo of grave and pointation memo of deceased Khan Zaman vide Ex. PW 5/1 and Ex. PW 5/2 respectively. Similarly, Muhammad Imtiaz Judicial Magistrate as PW-6 stated to have supervised exhumation proceedings of the deceased and submitted report Ex. PW 6/1. Complainant, Gul Amin as PW-7 and eyewitness, Alif Jaan as PW-8 in their statements repeated the story of FIR Ex. PA. Likewise, Khursheed Khan ASHO/investigating officer as PW-9 deposed in respect of partial investigation and taking into possession the blood-stained garments of the deceased as well as 10 empty shells of 7.62 bore from the complainant through recovery memo Ex. PC, preparation of site plan Ex. PB, recording of statements of the witnesses and drafting of applications Ex. PW 9/1 and Ex. PW 9/2 for examination of blood-stained garments and empty shells through FSL. Lastly, Shal Muhammad SI as PW-10 deposed in respect of the remaining investigation carried out by him as well as marginal witness to the recovery memo Ex. PC vide



(ASGHAR SHAH)
Sessions Judge, Orakzai,
at Baber Mela


which the IO taken into possession the blood-stained garments of the deceased and 10 empty shells of 7.62 bore from the complainant. The witness also deposed with regard to the exhumation proceedings being initiated by him, preparation of pointation memo of identification of graveyard, pointation memo of deceased, inquest report, preparation of list of legal heirs of deceased, initiated proceedings of abscondence of accused facing trial, sending blood-stained garments of deceased and empty shells to the FSL, receipt of FSL reports regarding blood-stained garments and empty shells, recording statements of witnesses, preparation of card of arrest and submission of case file upon completion of investigation to the SHO for submission of challan against the accused facing trial.

- (5). Thereafter, learned DPP for the State assisted by counsel for the complainant closed the prosecution evidence being complete. However, the accused neither wished to be examined on oath nor produced evidence in defence. Accordingly, arguments of the learned DPP for the state, counsel for the complainant and counsel for the accused facing trial heard and case file perused. The counsel for the state and complainant submitted that the


(ASGHAR SHAH)
Sessions Judge, Orakzai,
at Baber Mela

single accused is charged for the daylight occurrence in the newly merged District where the ordinary people were unaware of the legal proceedings. They were of the view that the charging of single accused has ousted the chances of substitution or false implication. It was further submitted that technicalities to be avoided in order to achieve the ultimate goal of justice. It was their view that they have proved the case on account of ocular, medical and circumstantial evidence supported by the spot recoveries besides the accused remained absconder for sufficient time, hence requested for the conviction of accused facing trial. On the other hand, the defence counsel submitted his arguments the other way round.

- (6). From the arguments and record available on file it reveals that there is delay of 18 days in lodging the FIR. With regard to delay, the prosecution was of the view that the area being newly merged in the KP Province, the people of the locality were unaware of the new legal system introduced by that time. It was further submitted that on the very day of occurrence they have approached the local police and informed them about the occurrence but being unaware of the legal proceedings, the local police did not record their report. However, it has to be



(ASGHAR SHAH)
Sessions Judge, Orakzai,
at Baber Mela

noted that ignorance of law is no excuse. It is on the record that the occurrence has took place on 05.05.2019 and on the following day of the occurrence i.e., 06.05.2019, the complainant approached the District Police Officer through his written application of even dated Ex. PW 7/1 for recording their report but however in the said application there is nothing mentioned that they have earlier approached the local police regarding the non-lodging of their report besides none of the police officials appeared for evidence uttered a single word that they were approached for the registration of FIR on the very day of occurrence. The complainant, Gul Ameen as PW-7 in his evidence did not utter a single name of the police official to whom they approached for registration of FIR soon after the occurrence. The FIR in the case in hand was registered on the orders of Justice of Peace Orakzai on 23.05.2019. Thus, the very delay in lodging the report has not been sufficiently explained would denote that the report has been lodged with proper consultation, deliberation with malafidy intention to involve the accused facing trial for certain ulterior motives and the report is thus not free from the interference of the outer segment.



(ASGHAR SHAH)
Sessions Judge, Orakzai,
at Baber Mela

(7). In the initial report of the complainant, it has been alleged that the single accused facing trial, Muhammad Salam has made 15/20 fire shots at the deceased, Malak Khan Zaman which means that the occurrence is committed by a single accused. However, when the situation is confronted with the recovery of 10 empties of 7.62 bore allegedly collected by the complainant from the spot and taken into possession by the local police through recovery memo Ex. PC with the report of the FSL Ex. PK/1 regarding the recovered empties, then it transpires that the report of the FSL is showing that the recovered empties were fired from different bore weapons which means that the occurrence was not committed by a single person but some other persons also involved therein whose names were not brought on record by the complainant for the reasons best known to him. With regard to the empties, it was the contention of the IO, Khursheed Khan ASHO that the complainant has collected the same from the place of accused. However, in the site plan Ex. PB which was prepared at the instance of the complainant, no place is assigned to the said empties besides the eyewitness, Alif Jaan PW-8 shown ignorance regarding the collection of empties by


(ASGHAR SHAH)
Sessions Judge, Orakzai,
at Baber Mela

the complainant. As such, the very recovery of empties from the spot is doubtful.

- (8). After the occurrence, complainant handed over blood-stained garments of the deceased containing shalwar-kamees, bunyan and waist-coat and the same were taken into possession by the local police through recovery memo Ex. PC and in the said recovery memo the local police have mentioned that the blood-stained garments are having corresponding cut marks whereas the report of FSL Ex. PK has only confirmed the presence of human blood on the said garments but has not determined that the blood present on the garments was of same group. The recovery of blood-stained garments and report of FSL Ex. PK is also not supported by the medical account showing the single fire shot at the right cheek of the deceased. Thus, the very presence of corresponding cut marks on the alleged blood-stained garments of the deceased is questionable. Moreover, both the FSL reports regarding blood-stained garments and empty shells when gone through, it reveals that the said articles were sent to the FSL on 11.07.2019 though they were taken into possession on 23.05.2019 i.e., after 48 days of its recovery. No reason of delay in sending the




(ASGHAR SHAH)
Sessions Judge, Orakzai,
at Baber Mela

same to the FSL has been furnished which doubts its availability in between its recovery and its dispatch to the FSL.

(9). The evidence when further scanned, it provides that the complainant alleges 15/20 fire shots at the deceased whereby he received injuries on neck, chest, both hands and on his back. But however as per exhumation report Ex. PM, the deceased received a single fire shot on his right cheek having oval shape. As such, the said medical report have negated the version of the complainant regarding the receipt of fire shots to the deceased at neck, chest, hands and back.

(10). The ocular account has also material contradictions in their statements as the complainant, Gul Ameen PW-7 in his evidence deposed that after the occurrence they shifted the injured to the nearby Hujra of one, Maimul Hassan but the other eyewitness, Alif Jaan PW-8 contradicted the complainant by deposing that after the occurrence they shifted the deceased to his own house. In the application Ex. PW 7/1 addressed to the DPO, Orakzai as well as in the evidence the complainant alleged that by the time occurrence the deceased was ahead of them following by the PWs but the eyewitness


(ASGHAR SHAH)
Sessions Judge, Orakzai,
at Baber Mela


PW-8 while contradicting the complainant deposed that he (PW-8) was ahead of all the PWs and deceased. The position of the complainant at the spot when confronted with the site plan Ex. PB, it reveals that he has been given point no. 3 in between the deceased and eyewitness, Alif Jaan which totally negates the version of the complainant taken in the initial report, application Ex. PW 7/1 as well as in the evidence recorded in the court. The complainant in his evidence deposed that by the time of occurrence the accused was at their left side but however the situation is otherwise when we see the receipt of fire shot of the deceased on the right cheek.

(Signature)
 (ASGHAR SHAH)
 Sessions Judge, Orakzai,
 at Baber Mela

(11) In the instant case right from the initial report till date, no motive for the occurrence is alleged by the complainant but however during the evidence it came to the light that one, Gul Zaman was the brother of complainant who was killed by the deceased, Malak Khan Zaman and one, Shireen, the son of complainant. The suggestion that the deceased was done to death by the complainant and his son was though denied, yet it smelling that something fishy fishy has been done to the deceased not brought on record for the reasons best known to the complainant. As such, these material

contradictions in the evidence of the ocular account would denote that the occurrence is either unwitnessed or the witnesses have not deposed in the manner in which the occurrence was alleged to have had been committed.

- (12). The unexplained delay in nominating the accused facing trial for the occurrence and the delay proved to be the consequence of consultation and deliberation, absence of independent witnesses, absence of pointation, confession or recovery of crime weapon from the possession of accused facing trial, no past criminal history of accused facing trial, contradictions in the version of the complainant and the eyewitness, failure to disclose the motive would denote that the occurrence has not taken place in the mode and manner as alleged by the complainant and rather the mode and manner alleged by the complainant party failed to establish. It seems that either the occurrence is unwitnessed or complainant party was not present at the site of occurrence at the relevant time or has not narrated the occurrence in the mode and manner in which it was alleged to have been committed. The only ground of abscondence is immaterial when it is not corroborated with other evidence available on the case file.


(ASGHAR SHAH)
Sessions Judge, Orakzai,
at Baber Mela

(13). Thus, in the light of above, it is held that sufficient dents and doubts are attracted to the case of complainant, the evidence led in the case is not confidence inspiring and have failed to prove the case against the accused facing trial beyond any shadow of doubts. Hence, benefit of doubt so cropped up must be extended in the favour of accused facing trial. Accordingly, while extending the benefit of doubt, accused facing trial, Muhammad Salam alias Abdul Salam, he is acquitted of the charges levelled against him through the FIR in question. Accused is in custody, he be released forthwith, if not required in any other case. Proper release/acquittal warrant be prepared and send to the sub-jail, Orakzai. Case property be disposed of in accordance with law but after the expiry of period provided for appeal/revision. Copy of judgement be issued to the prosecution, complainant and accused free of cost.

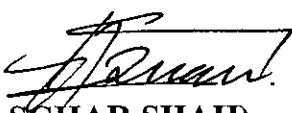


(ASGHAR SHAH)
Sessions Judge, Orakzai,
at Baber Mela



(14). File be consigned to Session Record Room after its completion and compilation.


Announced
22.01.2021


(ASGHAR SHAH)
Sessions Judge, Orakzai,
at Baber Mela

CERTIFICATE

Certified that this judgment consists of fourteen (14) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 22.01.2021


(ASGHAR SHAH)
Sessions Judge, Orakzai,
at Baber Mela