

100

1

IN THE COURT OF ADDITIONAL SESSIONS JUDGE-II ORAKZAI

Session case No. 05 of 2020
Date of Institution: 06.05.2020
Date of Decision: 16.04.2021

State through Saleem Khan ASHO PS Upper Orakzai District Orakzai
.....(*complainant*)

VERSUS

Noor Rehman s/o Masti Khan r/o Mula Khel Tappa Char Khela
Ghostang Upper Orakzai..... (**Accused Facing Trial**)

Represented by:

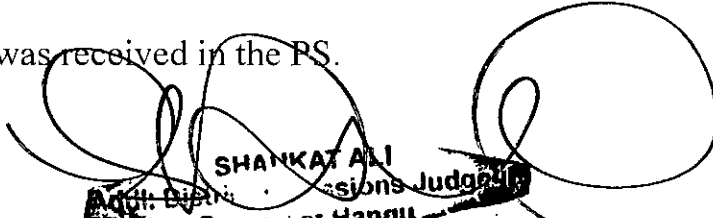
Mr. Amir Shah APP for State

Mr. Imad Azam Khan Advocate, counsel for accused

**CASE FIR NO.09 DATED 08.02.2020 U/S 302/311 PPC OF POLICE
STATION UPPER ORAKZAI (Ghiljo)**

JUDGMENT


The prosecution story is that on 08.02.2020 Saleem Khan ASHO came to the house of Noor Rehman after receiving information regarding the occurrence where in the courtyard a dead body was laying who was murdered with fire arm weapon by some unknown person, that after verification it was found that Mst Peena Bibi d/o Masti Khan aged about 18/19 years resident of caste Mula Khel Ghostang has been murdered by his brother accused Noor Rehman due to illicit relationship with her co-villagers deceased Gul Nawab s/o Hamesh Gul and Muhammad Shafiq s/o Ahmed Gul by firing through fire arm weapon, that in the house no one was present and the complainant prepared the injury sheet and inquest report of the deceased and thereafter the dead body was referred for PM examination to Civil Hospital Mishti Mela under the escort of Dilawar Khan HC. The complainant Saleem Khan ASHO drafted the Murasila and sent the same through Muhammad Jaleel HC for registration of FIR and the contents of Murasila was reduced into FIR Ex.PW after the Murasila was received in the PS.


SHANKAT ALI
Additional Sessions Judge
Orakzai at Hangu

After registration of the FIR investigation was carried out in the case and in the course of investigation, the investigation officer inspected the spot and prepared the site plan Ex. PB. During spot inspection the I.O took into possession blood stained earth from the place of deceased and empties of 30 bore from the place of accused and sent the said articles to the FSL for analysis and report, the report were received which were placed on file. The accused Noor Rehman was arrested. The accused Noor Rehman was produced before the court for custody which was granted and during custody he was interrogated. During custody the accused pointed out the place of occurrence and one 30 bore pistol with fixed charger was also recovered on the pointation of accused being weapon of offence. The accused also confessed the commission of offence during custody and on the expiry of custody the accused was produced for recording his confession before the Magistrate where the accused recorded his confession and thereafter the accused was sent to Judicial Lockup. The IO recorded the statement of PWs u/s 161 Cr.P.C and after completion of investigation the case file was submitted to the SHO for submission of challan against the accused.

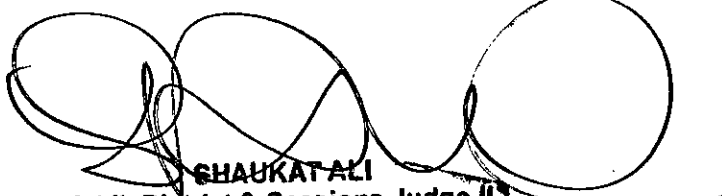
Complete challan against the accused was submitted which was received by this court on 06.05.2020 for trial against the accused. The accused Noor Rehman who was in Judicial Lock-up was summoned through *Zamima Bay* and was produced before the court on 28-05-2020. After compliance of 265-C Cr.P.C, charge was framed against accused on 04.06.2020 to which the accused pleaded not guilty and claimed trial. The prosecution was allowed to produce its evidence and during the trial of the case, the prosecution produced and examined 07 PWs.

The statements of prosecution witnesses are as under:


SHAIKAT ALI
Add: District & Sessions Judge-II,
Orakzal at Hangu

PW-1 is the statement of Abdul Manan MM who stated that "on 08-02-2020 I received Murasila brought by the constable Syed Karim sent by Saleem Khan SI/ASHO and on the receipt of Murasila I correctly incorporated the contents of Murasila into FIR Ex.PA. Today I have seen the FIR which correctly bears my signature. I received the case property containing five parcels and entry of the parcels were incorporated in the register 19 of PS. My statement was recorded by IO u/s 161 Cr.PC".

PW-2 is the statement of Nawaz Shareef SI who stated that "I am the marginal witness to the recovery memo Ex.PW-2/1 vide which the IO took into possession 03 empties of 30 bore freshly discharged from the place of the accused Noor Rehman from the point allotted as "A" to the accused in the site plan and sealed the same in parcel No. 1 Ex.P-1. Similarly I also took into possession blood stained earth from the place of deceased Mst; Peena Bibi and sealed the same in parcel No.2 Ex.P-2. 3/3 monograms in the name of GJ were affixed on the parcel. I along with the other marginal witness Waqas Khan FC signed the recovery memo. Similarly I am also the marginal witness to the recovery memo Ex.PW-2/2 vide which the IO took into possession garments belonging to the deceased Mst; Peena Bibi produced by the constable Ashraf Ali signed by the doctor and sealed the same into parcel No. 3 Ex.P-3. 03 monograms in the name of GJ affixed. I along with the other marginal witness Waqas Khan FC signed the recovery memo. I am also the marginal witness of the pointation memo Ex.PW-2/3 vide which the accused Noor Rehman pointed out the place of occurrence , his presence as well as places of deceased Mst; Peena Bibi. Similarly I am also the marginal witness to the recovery memo/fard muqarara Ex.PW-2/4 also exhibited vide which the IO recovered one pistol of 30 bore without No along with fixed charger containing 03 rounds of 30 bore which was recovered in case FIR No. 7 dated

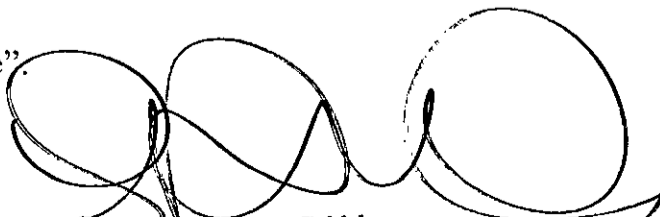

SHAUKAT ALI
Addl: District & Sessions Judge-I,
Orakzai at Hangu

08-08-2020 u/s 302/34 PPC. Which is also the weapon of offence in the instant case. I also signed the recovery memo in the presence of other witness Muhammad Waqas. My statement was recorded u/s 161 Cr.PC. Today I have seen all relevant documents which are correct and correctly bears my signature”.

PW-3 is the statement of Saleem Khan SI/ASHO who stated that “on 08-02-2020 I received information about the occurrence upon the same information I rushed to the spot of occurrence. One dead body of deceased Mst; Peena Bibi was laying in the yard of the house of the Masti Khan. On inquiry I came to know that the deceased Mst; Peena Bibi was murdered by his brother Noor Rehman on the pretext of honor having illicit relations with deceased Gul Nawab and Muhammad Shafiq. I prepared the inquest report and injury sheet of the deceased and handed over the same to Dilawar Khan HC who also escorted the dead body to the hospital. I prepared Murasila and sent the Murasila to the PS for registration of FIR through the hand of Muhammad Jaleel HC. On 09-02-2020 I the Io prepared the site plan at my instance. The Murasila is Ex.PA/1, inquest report is Ex.PW-3/1 and injury sheet is Ex.PW-3/2. Today I have seen all the relevant documents which are correct and correctly bears my signature”.

PW-4 is the statement of Jahanzeb Khan Reader to DSP who stated that “on completion of investigation I submitted complete challan in the instant case against the accused which is Ex.PW-4/1. Today I have seen the complete challan which is correct and correctly bears my signature”.

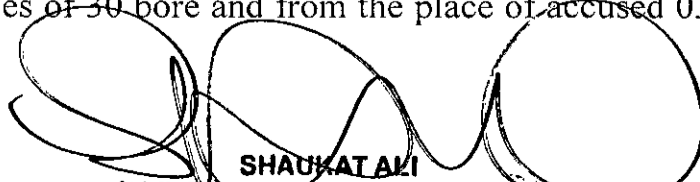
PW-5 is the statement of Dr. Sidra Hameed WMO DHQ Hangu who stated that “On 08/02/2020 I conducted post mortem examination of deceased Mst: Peena Bibi d/o Masti Khan aged about 18 years r/o Mala Khel District Orakzai brought by police”.


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

100

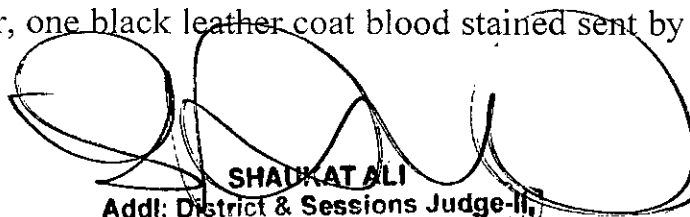
PW-6 is the statement of Muhammad Intiaz Judicial Magistrate-II District Courts Orakzai who stated that “on 12.02.2020, accused Noor Rehman s/o Masti Khan was produced by investigation Officer SI Muhammad Ishaq before me for recording his confessional statement u/s 164/364 Cr.P.C. Handcuffs of the accused were removed and all the police officials along with the staff members of the court were asked to leave the court room. All the codal formalities complied with and then the confessional statement of accused was recorded at his own free will in his mother tongue Pashto which is translated by me in Urdu. The confessional statement was read over and explain to the accused who after admitting the same correct was thumb impressed by him. After recording the confessional statement, original statement was handed over to IO while photo copy of the same was retained within the court in safe custody. Then after accused was handed over to Naib Court namely Mr. Izaz Ahmad and Hajid Rehman to take him to the judicial lock-up/sub-jail Orakzai at Baber Mela, Hangu which is at the distance of around 90 meters from the Court. The questionnaire is Ex. PW 6/1, confessional statement of accused Ex. PW 6/2 while certificate is Ex. PW 6/3. Today I have seen the above exhibited confessional statement which is correct and correctly signed by me.”

PW-7 is the statement of Muhammad Ishaq SI/IO who stated that “after registration of FIR No. 7, 8 and 9, on 08-02-2020 the copies of the all the three FIRs and Murasila of each case were handed over to me for investigation. On 09-02-2020 I visited first the spot of deceased Muhammad Shafiq and Gul Nawab. During spot inspection I took into possession in case FIR No. 7 blood from the place of deceased Muhammad Shafiq and sealed into parcel No.1. and from the place of accused Noor Rehman I took into possession 03 empties of 30 bore and from the place of accused 03 empties


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

108

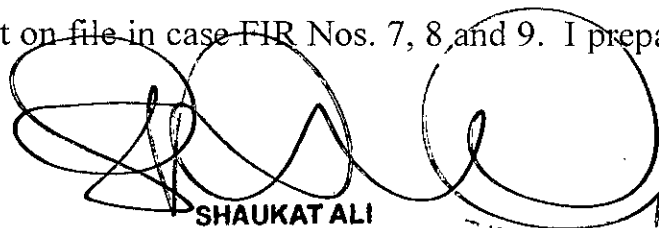
of 30 bore and from the place of accused Amin Khan 05 empties of 30 bore freshly discharged and sealed into parcel No. 2, 3 and 4 respectively I put my signature on the empties with pointed object vide recovery memo already Ex.PW-2/1 in the presence of marginal witnesses. I also recovered in case FIR No. 8 from the place of deceased Gul Nawab blood stained earth and sealed into parcel No. 1. I also took into possession 05 empties of 30 bore from the place of accused Noor Rehman and sealed into parcel No. 2 and from near the place of accused Javid 05 empties of 30 bore were recovered which was sealed into parcel No. 3 and similarly from the place of accused Amin Khan 03 empties of 30 bore and sealed into parcel No. 4. All the empties were freshly discharged. I prepared recovery memo in case FIR No. 8 which is also Ex.PW-2/1. I prepared the site plan Ex.PB at the instance of eye witness Ihsan Ullah. I recorded the statement of Ihsan Ullah eye witness on the spot and also recorded the statement margin witnesses to the recovery memo Ex.PW-2/1. After the spot inspection in case FIR No. 7 and 8 I visited the place of occurrence in case FIR No. 9. I took into possession 03 empties of 30 bore from the place of accused Noor Rehman which were freshly discharged and also took into possession blood stained earth from the place of deceased Peena Bibi and sealed into parcel No. 2 in the presence of marginal witness vide recovery memo already Ex.PW-2/1. I prepared site plan Ex.PB in case FIR No. 9 on the pointation of Saleem Khan ASHO. I searched the accused for the purpose of his arrest and in this respect the house of accused was searched and prepared search memo Ex.PW-7/1. I arrested accused Noor Rehman vide his card of arrest Ex.PW-7/2 whereas the accused Javid and Amin could not be arrested. I was present on the spot where I received the garments of deceased Muhammad Shafiq consist of Qamees Shalwar black color, one black leather coat blood stained sent by the doctor


SHAIKAT ALI
Addl: District & Sessions Judge-II,
Orakzai at Mangal

106

7

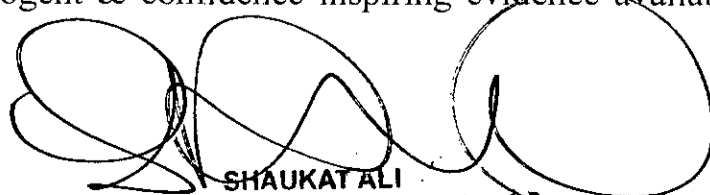
through constable Ashraf Ali and sealed into parcel No. 5 vide recovery memo already Ex.PW-2/2 in case FIR No. 7 in the presence of marginal witnesses. I also took into possession the blood stained garments of deceased Gul Nawab consist of Qamees Shalwar black color one banyan and one leather coat black color and sealed into parcel No. 5 vide recovery memo already Ex.PW-2/2 in case FIR No.8. I also took into possession in case FIR No. 9 the blood stained garments of deceased mst; Peena Bibi consist of Qamees Shalwar, flowered chadar black color brought by Ashraf Ali constable and I sealed into parcel No.3 vide recovery memo already Ex.PW-2/2. I searched the accused Javid and Amin in the vicinity but they were not available and were avoiding their arrest. I returned to the PS after inspection of spots of all the three cases. I interrogated accused Noor Rehman. On the next day i.e. 10-02-2020 I produced the accused for custody before the Illaqa Magistrate vide my application Ex.PW-7/3 which was allowed and 02 days police custody was granted. The accused was interrogated during custody. The accused pointed out the place of occurrence vide pointation memo already Ex.PW-2/3. On the pointation of accused one pistol 30 bore without No. with fixed charger containing 03 rounds of 30 bore was recovered vide recovery memo already Ex.PW-2/4 which the weapon of offence in all the FIRs No. 7,8, and 9. I prepared the sketch of pointation by the accused Noor Rehman Ex.PW-7/4. I recorded the statement of witnesses to the pointation memo. The accused confessed his guilt during investigation and I recorded the statement of accused u/s 161 Cr.PC. I produced the accused vide my application Ex.PW-7/5 for recording his confessional statement and the accused confessed his guilt before the Illaqa magistrate and thereafter the accused was sent to Judicial Lock-up. I received the PM reports of the 03 deceased and placed it on file in case FIR Nos. 7, 8, and 9. I prepared list of


SHAUKAT ALI
Addl: District & Sessions Judge-(I)
Orakzai at Hangu

legal heirs of deceased Muhammad Shafiq and Gul Nawab in case FIR No. 7 and 8. I dispatched the blood stained earth and garments of the deceased to the FSL through constable Waqas vide application Ex.PW-7/6. I also sent the empties of 30 bore vide my application Ex.PW-7/7 to the arm expert. The road certificates in this respect are Ex.PW-7/8 and Ex.PW-7/9. I received the FSL reports Ex.PZ and Ex.PZ/1. I also added section 311 PPC in the case against the accused. I recorded the statement of prosecution witnesses. On completion of investigation I handed over the case file to the SHO for onward submission. Today I have seen all the documents prepared by me which are correct and correctly bears my signature”.

On 04.03.2021, the prosecution closed its evidence and the case was fixed for statement of accused. On 18-03-2021 the statements of accused was recorded u/s 342 Cr.P.C wherein the accused denied the allegations leveled against him however he refused to be examined on oath or to produce defense evidence, therefore, the case was fixed for final arguments.

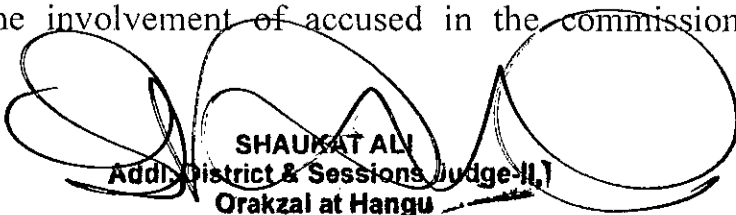
Learned APP for the state argued that the blood and empties has been recovered from the spot which confirm the venue of offence, that the weapon of offence was recovered on the pointation of accused which support the case of prosecution against the accused, that the FSL reports available on file also supports the version of prosecution, that the accused was produced before the Illaqa Magistrate for recording his confession who recorded voluntary and true confession which fully connect the accused with the commission of offence, that the confession and recoveries in the shape of circumstantial evidence in the case against accused established the case of prosecution against the accused, that the prosecution has successfully proved the guilt of the accused through cogent & confidence inspiring evidence available on file.


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

Conversely learned counsel for the accused opposed the arguments of learned APP and argued that the confessional statement of accused is not true and voluntary which is recorded after 02 days custody of accused, that no proper identification of accused was made by the learned Judicial Magistrate before recording his confession and no time was provided to the accused to ponder before recording his confession, that the accused was handed over to the Police Officials after recording his confession and the confession was not recorded in an atmosphere free of fear, therefore such the confession of accused lost its sanctity and voluntary nature, that the empties and 30 bore pistol was sent to the FSL with delay which is not explained in the evidence of prosecution, that the crime weapon was already present with the Police official and is planted against the accused which was neither recovered from the possession of the accused at the time of his arrest nor the same was recovered from the house of accused at the time of search. That the prosecution case is full of doubts, the benefit of the same is to be extended to the accused. Learned counsel for the accused referred and relied on 2016 SCMR 274, 2013 MLD 632, 2019 P.Cr.LJ 1014, 2020 YLR 1398, 2019 P.Cr.LJ 1073, 2020 P.Cr.LJ 729, 2016 P.Cr.LJ 836, 2016 P.Cr.LJ 1815, 2013 YLR 230, 2019 P.Cr.LJ 46, 2017 YLR 515, 2017 YLR Note.160, 2017 YLR 69, 2016 P.Cr.LJ 1068, 2020 YLR 2609, 2020 YLR 360, 2018 P.Cr.LJ Note.192, 2016 P.Cr.LJ Note.80 and 2020 MLD 1862.


Arguments of Learned APP for the state assisted by learned counsel for the complainant and arguments of learned counsel for the accused has been heard and record of the case perused.

The occurrence of the instant case in unseen and no one either from the inmates of the house or from the co-villagers came forward to record statement regarding the involvement of accused in the commission of


SHAUKAT ALI
 Addl. District & Sessions Judge-II,
 Orakzal at Hangu

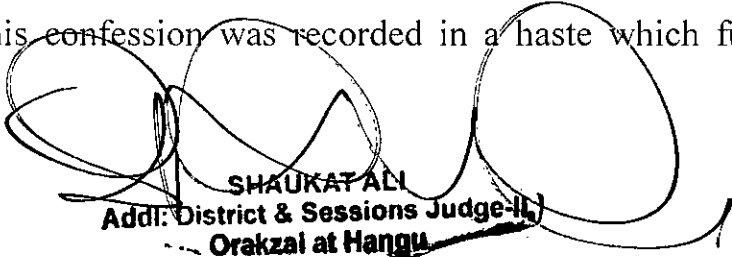
offence. Saleem Khan SI (PW-3) after receiving information rushed to the place of occurrence where the dead body of deceased Mst peena Bibi was lying and Saleem Khan SI on his own instance charged the accused facing trial in his report in the shape of Murasila Ex.PA/1. Saleem Khan SI has not given any justification of his satisfaction regarding the involvement of accused and stated in his cross examination that there is no eye witness of the occurrence, therefore the statement of Saleem Khan SI is not sufficient to connect the accused with the commission of offence.

The vital piece of evidence in the prosecution case against the accused is the confession of accused recorded on 12-02-2020 Ex.PW-6/1 to Ex.PW-6/3 before the learned Judicial Magistrate (PW-6). The accused was arrested vide his card of arrest Ex.PW-7/2 on 09-02-2020; on the next day of the occurrence and was produced before the Ilaqa Magistrate for custody vide application Ex.PW-7/3 on 10-02-2020 and 02 days custody of accused was granted. The accused when produced on 10-02-2020 for custody did not opt to record confession. The investigation Officer stated in his cross examination that the Magistrate had not inquired from the accused when he first produced the accused before the Magistrate for custody and the accused did not confessed before the Magistrate when he was produced for custody on 10-02-2020. The IO further stated that he had not told the Magistrate on 10-02-2020 that the accused confessed before him and his statement should be recorded. The accused on 10-02-2020 did not record confession nor was he inquired by the Magistrate before granting Police custody therefore if the accused was willing to record confession he would have recorded it on 10-10-2020 when he was first produced before the learned Magistrate. When the accused was remanded in the custody of police for 02 days and on the expiry of custody produced before the learned Magistrate the accused recorded his


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

confession. When the accused was asked that why he is recording his confession in Question No. 14 of the questionnaire Ex.PW-9/1 the accused answered that he is recording confession because he is nominated as an accused in the case. The confession recorded after 02 days of custody of accused weakened the voluntary nature and evidentiary value of confession.

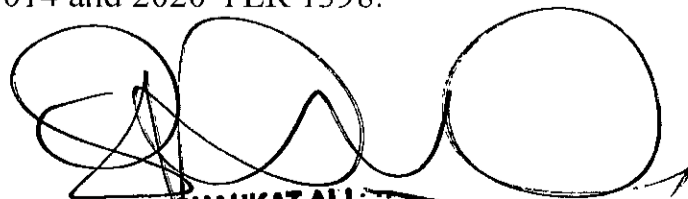
The confession must be recorded after it is ensured by the Magistrate that the accused is recording confession voluntarily and all signs of fear were removed before recording confession. The accused shall be provided assurance that whether if he record confession or not. He shall not be handed over to the police. The Judicial Magistrate in Q. No.4 of the questionnaire had asked the accused that if he is willing to record confession or refused to record. In both the cases he shall not be handed over to the Police, however after recording confession of accused he was handed over to the Naib Courts namely Aizaz Khan and Hajid Rehman to take him to Judicial Lockup who both were police official and were in uniform. The Investigation Officer negated the Judicial Magistrate and stated in his cross examination that the accused was handed over to him after recording his confession and he took the accused to Jail. The Judicial Magistrate in violation of Q. No.4 of questionnaire Ex.PW-9/1 handed over the accused to the police in uniform to take the accused to Judicial Lockup after recording his confession. It is also worth perusal that the learned Magistrate has not provided time to the accused to ponder before recording confession. The accused shall be provided sufficient time after the first warning and it is not only the right of the accused to have time to ponder before recording confession but it was also the duty of learned Judicial Magistrate to provide time for pondering before recording confession, however in this case no time has been provided to the accused and his confession was recorded in a haste which further


SHAUKAT ALI
Addl. District & Sessions Judge-II
Orakzal at Hangu

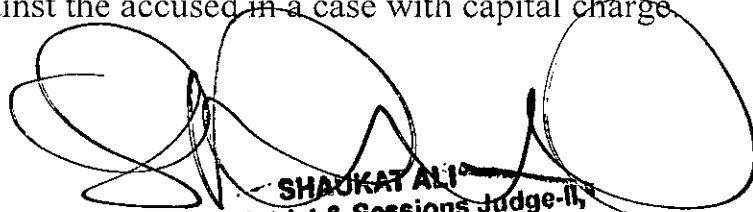
(u)

diminished the voluntary nature of confession hence could not be relied upon for the conviction of accused in offence entailing capital punishment.

There is another crucial point in the case against accused which has rendered the confession not worth reliable that the learned Magistrate (PW-9) stated in his cross examination that the accused was produced before him for recording his confession in all the 03 confessions at 14:40 hours and all the 03 confession were recorded after court hours at 15:20 hours. The learned Magistrate further stated that he completed recording of confession at 16:34 hours and thereafter he has not recorded the confession of accused. Muhammad Ishaq IO in the course of his cross examination state that he produced the accused before the learned Magistrate at 09:30 hours. The IO further stated that the accused was handed over to him after recording his confession at about 12:45 hours and he took the accused to Jail at 12:45 hours. It is a glaring contradiction that when the accused was took to Jail by IO at 12:45 hours then who was the person that was produced before the learned Magistrate at 14:40 hours for recording his confession and who was the accuse whose confession statement was recorded by the learned Judicial Magistrate at 16:34 hours. When the accused was produced before the Magistrate his identity was not confirmed by the Magistrate. Neither the questionnaire nor the certificate to the confession speaks about the identity of accused in the form of CNIC, identification mark or physical appearance of accused to confirm that the accused making the confession actually the one who is charged in the case. The confession of accused has thus lost its evidentiary value and totally unreliable and untrustworthy could not be taken into consideration against the accused. Reliance is placed on 2016 SCMR 274, 2019 P.Cr.LJ 1014 and 2020 YLR 1398.


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

The other aspect of the prosecution case is that empties of 30 bore have been shown recovered from the spot vide recovery memo ExpPW-2/1 on 09-02-2020 and sent to the FSL on 24-02-2020 vide application ExpPW-10/7 and road certificate ExpPW-10/9 along with the 30 bore pistol shown recovered on the pointation of accused on 11-02-2020 vide recovery memo ExpPW-2/4. The prosecution has not explained in it evidence the safe custody of empties since 09-02-2020 till 24-02-2020. Similarly the safe custody of the weapon of offence pistol 30 bore has not explained since it recovery on 11-02-2020 till its sending to the FSL on 24-02-2020 hence that piece of evidence lost its weight and could not be used against the accused. The house of accused was searched on 09-02-2020 by the IO vide search memo ExpPW-10/1 but on that day neither the accused were found in their home nor any thing incriminating was recovered from the house of the accused. When the accused was arrested vide his card of arrest ExpPW-10/2 in the nearby fields to the west of the house of accused nothing incriminating was recovered from his personal possession nor from his house. Salim Khan SI also visited the house of the accused along with the IO on 09.02-2020 and pointed out the place of occurrence to the IO in the house of accused but the pistol was not recovered. Abdul Manan Madad Moharrir (PW-01) stated in his cross examination that at the time of scribing of Case FIR No.9 the accused was not present in the PS and further stated that the accused was brought to the PS at evening time along with pistol 30 bore which was seen by me. The FIR of all the three cases were scribed on 08.02.2020 which shows that the pistol was available with the police on 08-02-2020 which was later on shown as weapon of offence recovered on the pointation of accused on 11-02-2020. The crime weapon and empties in such circumstances has no evidentiary value and the FSL report has lost its sanctity could not be used against the accused in a case with capital charge.


SHAIKAT ALI
Addl: District & Sessions Judge-II,
Q: Kzai at Hangu

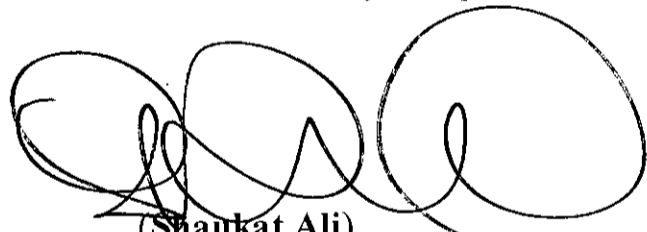
The evidence so far produced by the prosecution available on file is weak, dilapidated and not worth reliable which could not connect the accused with the commission of murder of the deceased. It is well settled principle of the criminal administration of justice that many doubts are not needed in the prosecution case; even when there is a single fact in the prosecution case which creates reasonable doubt in the mind of a prudent person regarding the guilt of the accused the benefit of such doubt shall be extended to the accused not as a matter of grace or concession but as a matter of right.

The prosecution failed to bring home the guilt of the accused beyond any reasonable shadow of doubt; therefore, the accused facing trial Noor Rehman is hereby acquitted in the instant case from the charges leveled against him by extending him the benefit of doubt. The accused is in custody, he be set at liberty forthwith if not required in any other case.

Case property be kept intact till the expiry of period of appeal/revision and thereafter the same may be dealt with in accordance with law.

File be consigned to the record room after necessary completion and compilation.

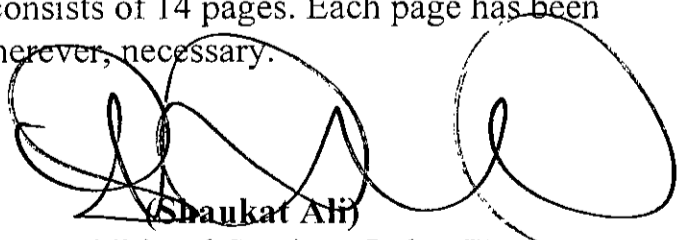
Announced: 16th April, 2021


(Shaukat Ali)
Additional Sessions Judge-II
Orakzai at Babar Mela

CERTIFICATE

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

Announced
16th April, 2021


(Shaukat Ali)
Additional Sessions Judge-II
Orakzai at Baber Mela