IN THE COURT OF ADDITIONAL SESSIONS JUDGE-II ORAKZAI

Session case No. 06 of 2020
Date of Institution: 06.05.2020
Date of Decision: 16.04.2021

State through Ahmed Gul s/o Muhammad Khan r/o Ghostang Mula Khel 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)**

Javid and Amin Khan Ss/o Masti Khan r/o Mula Khel Tappa Char Khela Ghostang Upper Orakzai.....**(Absconding Accused)**

Represented by:
Mr.Amir Shah APP for State
Mr. Noor Awaz Advocate counsel for complainant
Mr. Imad Azam Khan Advocate, counsel for accused

CASE FIR NO.07 DATED 08.02.2020 U/S 302/34/311 PPC OF POLICE STATION UPPER ORAKZAI (Ghiljo)

JUDGMENT

The prosecution story is that on 08.02.2020 Saleem Khan ASHO received information that a dead body has been brought to Civil Hospital Mishti Mela, that on that information he along with Police official came to the emergency room of Civil Hospital Mishti Mela where the dead body of Muhammad Shafiq s/o Ahmed Gul was lying, that along with the dead body Ahmed Gul the father of deceased was present who reported that his son Muhammad Shafiq had gone to the mosque to offer prayer and after prayer he was coming home and when reached to the place of occurrence, there the accused Noor Rehman, Javid and Amin Khan Ss/o Masti Khan were present duly armed, that the accused on seeing his son started firing on him and as a result of their firing he got hit and died on the spot. The report of the complainant was reduced in the shape of Murasila which was read over and

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explained to the complainant and the complainant after admitting the same correct thumb impressed the same. The injury sheet and inquest report of the deceased was prepared and the deceased was referred under the escort of Constable Aslam Farooq to the Hospital for PM examination. The Murasila was sent to the PS through Constable Syed Kareem for registration of FIR against the accused.

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 at the instant of eye witness Ihsan Ullah and in the presence of complainant. 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 whereas the absconding accused were proceeded u/s 204 and 87 Cr.PC. 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

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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 accused Javid and Amin Khan were absconding therefore statement of DFC was recorded as SW-1 and thereafter the absconding accused were proceeded u/s 512 Cr.PC. The prosecution was allowed to produce its evidence and during the trial of the case, the prosecution produced and examined 10 PWs.

The statements of prosecution witnesses are as under:

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 vide which the IO took into possession blood stained earth from the place of the deceased Muhammad Shafiq and sealed the same in parcel No.1. The IO also took into the possession 03 empties of 30 bore from the place of the accused Noor Rehman which was laying in scattered condition and also took into possession 03 empties of 30 bore near the place of accused Javid. Further the IO also took into possession 05 empties of 30 bore from the place of Ameen Khan which was freshly discharged and sealed the same into parcel No. 2,3, 4 respectively. 3/3 monograms in the name of GJ were affixed on the parcel. I along with the other marginal witness Muhammad Haneef FC signed the recovery memo.

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The recovery memo is Ex.PW-2/1 and case property is Ex.P-1 to 4 respectively. Similarly I am also the marginal witness to the recovery memo Ex.PW-2/3 vide which the IO took into possession garments belonging to the deceased Muhammad Shafiq which was sealed into parcel No. 5 Ex.P-5. 03 monograms in the name of GJ affixed. I along with the other marginal witness namely Ashraf Ali FC PS Ghaljo. Similarly during the course of investigation the accused Noor Rehman pointed out the place of occurrence his presence as well as places of accused Javid and Ameen Khan mentioned in the site plan. The place of deceased Muhammad Shafiq and eye witness Ihsan Ullah. In this respect the pointation memo was prepared and I along with the other witness constable Waqas Khan signed the same which is Ex.PW-2/3. Similarly I am also the marginal witness to the recovery memo Ex.PW-2/4 vide which the IO recovered one pistol of 30 bore without No along with faxed magazines containing 03 rounds of 30 bore which was thrown by the accused in his room after the occurrence which was sealed in parcel No. 6 Ex.P-6. My statement was recorded u/s 161 Cr.PC. Today I have seen all the 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 Civil hospital Mishti Mela in emergency room one deceased Muhammad Shafiq dead body was present. The father of the deceased namely Ahmad Gul reported the matter to me. I endorses report in shape of Murasila which was read over to him and thumb impressed the same by the complainant as a token of its correctness. I prepared the inquest report and injury sheet of the deceased and handed over the same to Constable Aslam Farooq. I sent the Murasila to the PS for registration of FIR through

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the hand of Constable Syed Kareem. 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 headquarter Orakzai 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 Ahmad Gul who stated that Muhammad Shafiq was my son. "On 08-02-2020 my son had gone to the mosque for prayer. After the prayer when he was coming back to home. When reached to the spot the three persons appeared namely Rehman, Javid and Ameen and started firing at my son as a result of which he got hit and died on the spot. After that Gul Nawab came out of the shop and reached there. The accused also made firing upon him and he also died there. We took the dead bodies to the hospital in a separate vehicle where I reported the matter to the local police. The report was read out to me I thumb impressed the same as a token of it correctness. When we completed proceeding at the hospital at Sham Wela (Maghrib time) we went to our home. At the following day the police contacted me and asked me to come to the place of occurrence. I along with Ihsan Ullah went to the spot where the site plan was prepared in my instance. The police also took into possession the blood on the spot and empties. I charged the above accused for the commission of offence. Today I have seen the Murasila which correctly bears my thumb impression".

PW-6 is the statement of Arif Khan who stated that "I identified the dead body of deceased before the doctor and police and my statement was recorded

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u/s 161 Cr.PC by the police. I put my thumb impression on the inquest report as identifier".

PW-7 is the statement of Dr. Ijaz Medical Officer Type D Hospital Sabir Abad Karak, who conducted post mortem examination of deceased Muhammad Shafiq s/o Ahmad Gul".

PW-8 is the statement of Ihsan Ullah constable who stated that "I along with Shafiq deceased had gone to the mosque for offering zuhar prayer. On return from the mosque after offering zuhar prayer I was a few paces ahead of Shafiq. In the meanwhile I saw the accused coming from their home side and started firing on Shafiq who got hit on the spot. After hearing the fire shots Gul Nawab deceased came out from the shop of Ziawar Khan. The accused also starting firing on Gul Nawab deceased after going near him a few paces who also got hit and died. I was then proceeding towards my home where the father of both the deceased namely Hamish Gul and Ahmad Gul were coming from their home and I informed them about the occurrence. Ahmad Gul and Hamish Gul came to the spot and I did not accompanied them and I went home. On the next day the police recorded my statement. Ahmad Gul father of deceased Shafiq asked me to come to the spot and on that I came to the spot where I pointed out the place of occurrence to the police and on my pointation the site plan was prepared. The IO recovered empties from the places of accused and also recovered blood from the place of deceased Shafiq and were sealed. After recovery of the empties and blood the IO prepared the site plan. The IO thereafter starting proceedings in the matter of deceased Gul Nawab and also recovered empties from the place of accused and recovered blood from the place of deceased and were sealed into parcels. The IO thereafter prepared the site plan".

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PW-9 is the statement of Muhammad Imtiaz 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 9/1, confessional statement of accused Ex. PW 9/2 while certificate is Ex. PW 9/3. Today I have seen the above exhibited confessional statement which is correct and correctly signed by me".

PW-10 is the statement of Muhammad Ishaq SI/IO PS Upper Orakzai 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

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Rehman I took into possession 03 empties of 30 bore and from the place of accused 03 empties 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-10/1. I arrested accused Noor Rehman vide his card of arrest Ex.PW-10/2 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

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Shalwar black color, one black leather coat blood stained sent by the doctor 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-10/3 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-10/4. 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-10/5 for recording his confessional statement and the accsued 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

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deceased and placed it on file in case FIR Nos. 7, 8 and 9. I prepared list of legal heirs of deceased Muhammad Shafiq and Gul Nawab which is Ex.PW-10/5. I dispatched the blood stained earth and garments of the deceased to the FSL through constable Waqas vide application Ex.PW-10/6. I also sent the empties of 30 bore vide my application Ex.PW-10/7 to the arm expert. The road certificates in this respect are Ex.PW-10/8 and Ex.PW-10/9. I received the FSL reports Ex.PZ and Ex.PZ/1. I recorded the statement of witnesses. I obtained warrant u/s 204 Cr.PC and proclamation u/s 87 Cr.PC against accused Javid and Amin Khan incase FIR No. 7 and 8 vide my application Ex.PW-10/10 and Ex.PW-10/11. I also added section 311 PPC in the case against the accused. 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 stated assisted by the learned counsels for the complainant argued that accused is directly charge with specific role of firing on the deceased, 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

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fully connect the accused with the commission of offence, that the case against accused is also supported by the statement of eye witness Ihsan Ullah, that the direct and 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.

Conversely learned counsel for the accused opposed the arguments of learned APP and counsel for the complainant 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 complainant is not the eye witness of the occurrence and he was not present at the time of occurrence, that the eye witness Ihsan ullah was later on introduced in the case and his name is neither mentioned in the report by the complainant nor in his statement before the court, hence his evidence is not worth reliable, 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

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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 vital piece of evidence in the prosecution case against the accused is the confession of accused recorded on 12-02-2020 Ex.PW-9/1 to Ex.PW-9/3 before the learned Judicial Magistrate (PW-9). The accused was arrested vide his card of arrest Ex.PW-10/2 on 09-02-2020; on the next day of the occurrence and was produced before the Ilaqa Magistrate for custody vide application Ex.PW-10/3 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

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remanded in the custody of police for 02 days and on the expiry of custody produced before the learned Magistrate the accused recorded his 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 and did not state that he record confession because he committed the offence. 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

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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 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

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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.

Now adverting to the ocular account of the prosecution case. Complainant (PW-05) is the father of deceased who reported the occurrence to Saleem Khan SI (PW-03) in emergency room Mishti Mella Hospital Orakzai and his report was reduced in the shape of Murasila Ex.PA. The complainant reported the occurrence to the police as an eye witness of the occurrence, however the material available on the case file and the statement of investigation officer (PW-10) shows that the complainant is not the eye witness of the occurrence and he later on after receiving information of the occurrence attracted to the spot. The complainant posed himself as an eye witness of the occurrence. Mohammad Ishaq IO during the course of his cross examination stated that complainants of the case FIR Nos. 7 & 8 are not the eye witnesses of the occurrence and further stated that as per his investigation Ihsanullah (PW-08) informed the complainant near to their houses about the occurrence. Ihsanullah (PW-08) the alleged eye witness of the occurrence also denied the complainant to be the eyewitness of the occurrence who stated in his cross examination that it is correct that Ahmad Gul and Hamish Gul are not the eye witnesses of the occurrence. The Investigation Officer and PW Ihsan Ullah negated the complainant to be the eye witness of the occurrence, therefor the statement of the complainant narrating the mode and manner of the occurrence as an eye witness could not be believed and is unreliable, hence such statement could not be made basis for the conviction of accused.

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The other important evidence is the statement of eye witness Ihsanullah who was neither named by the complainant in his report in the shape of Mursilla nor in his statement before the court. Ihsan Ullah (PW.08) stated in his examination in chief that he informed the complainant about the occurrence, however the complainant has nowhere stated that he was informed by IhsanUllah about the occurrence and the fact that Ihsanullah was the eye witness of the occurrence. If Ishan Ullah was the eye witness of the occurrence and had informed the complainant about the murder of his son then the complainant would have definitely mentioned him in his report or in his statement as PW.05. The eye witness was later on introduced by the prosecution in the case against the accused. The fact that the eyewitness was later on introduced, confirmed by the IO who state in the course of his cross examination that he has not recorded the statement of IhsanUllah on 08-02-2020 in both the cases and on 09-02-2020 he compelled PW IhsanUllah to record his statement and then on 09-02-2020 he recorded his statement. It is very astonishing that the alleged eye witness being the co-villager and relative of the deceased after witnessing the occurrence of double murder went home peacefully as if nothing happened. The eye witness did not make efforts to shift the dead bodies to the hospital or to their homes and was just a spectator and on the next day came out to be eye witness of the occurrence. Such unnatural conduct of the eye witness Ihsan Ullah put a question mark about his presence on the spot at the time of occurrence. Furthermore, the presence of eye witness Ihsan Ullah is also not justified in evidence of prosecution. The eye witness stated in his cross examination that he had come to the Mosque for Zuhar prayer however the time of occurrence was not the time for Zuhar prayer and further stated that he remained on the spot for about 02 minutes and then left the spot towards his home whereas the occurrence in case FIR No.8 took place after 10

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minutes of occurrence in the instant case which does not justify his presence at the time of occurrence. The IO stated in his cross examination that the eye witness has not told him about the Zuhar prayer in the mosque near the place of occurrence and he has not verified during his investigation that PW Ihsan Ullah and both the deceased offered Zuhar prayer in the mosque near the place of occurrence on the day of occurrence. The IO further stated that he has not verified the cause of presence of PW Ihsan Ullah, therefore in such circumstances no credence could be given to the statement of PW Ihsan Ullah. Reliance is placed on 2016 P.Cr.LJ Note.80 (Peshawar).

The other aspect of the prosecution case is that empties of 30 bore have been shown recovered from the spot vide recovery memo ExPW-2/1 on 09-02-2020 and sent to the FSL on 24-02-2020 vide application ExPW-10/7 and road certificate ExPW-10/9 along with the 30 bore pistol shown recovered on the pointation of accused on 11-02-2020 vide recovery memo ExPW-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 ExPW-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 ExPW-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

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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 it sanctity could not be used against the accused in a case with capital charge.

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.

The accused Javid and Amin Khan are still absconding and avoiding their lawful arrest, therefore perpetual warrant of arrest be issued against them and their names be entered in the relevant register of POs kept in the PS. They

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be arrested when and where found and be produced before the court. The case property be kept intact till the arrest of absconding accused.

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

Announced:
16-04-2021

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

CERTIFICATE

Certified that this judgment consists of 19 pages. Each page has been read corrected and signed by me wherever, necessary.

Announced
16-04-2021

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