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IN THE COURT OF FARMAN ULLAH SENIOR CIVIL JUDGE/JUDICIAL MAGISTRATE, ORAKZAI AT BABER MELA, HANGU.

Case No.....07/2 of 2020
Date of Institution.....14.10.2020
Date of Decision.....18.11.2021

State through Muhammad Rasool s/o Mehmood Khan Koyi Kaly Dabori Upper Orakzai
.....*(Complainant)*

VERSUS

1. Muhammad Shamim s/o Jan Muhammad; aged about 25 years r/o Qoam Mishti, Tappa Haider Khel, District Orakzai
2. Amin Ullah s/o Jalal Gul; aged about 20 years r/o Qoam Mala Khel, Dabori District Orakzai
3. Waris Khan s/o Kamal Din; aged about 30 years r/o Qoam Mishti, Tappa Daway Khel, District Orakzai

..... *(Accused Facing Trial)*

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Senior Civil Judge
Orakzai at Baber Mela

18.11.2021

Represented by:
Mr. Amir Shah APP for State,
Mr. Ihsan Ullah Advocate counsel for complainant,
Mr. Sana Ullah Khan Advocate counsel for accused Muhammad Shamim and Waris Khan,
Mr. Abid Ali Advocate and Muhammad Khan Khattak Advocate, counsel for accused Amin Ullah,

CASE FIR NO. 14 DATED 13.04.2020 U/S 379/411/34 PPC OF POLICE STATION GHILJO UPPER ORAKZAI

JUDGMENT

Brief facts of the case in hand are that on 06-04-2020 at about 8:00 hours the complainant was grazing the cattle at Masooma Sambogh Kundi Khel, He left the cattle there in the mountain and went to home for lunch and performing prayer. At Asar vela he came back there for taking the cattle and he came to know that 02 cows and calves were missing while remaining cattle were taken to home. That he started searching the missing 02 cows and calves and came

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to know that 01 cow and 01 calf were purchased by Lateef resident of Gulistan Samana . On such information he along with his cousin namely Ahmad Ullah went to the house of Lateef and found his cow and calf in the house of Lateef. On inquiry, Lateef stated that he has purchased cow and calf from one Shamim at sale consideration of Rs.60,000/- and out of which he paid Rs. 40,000/- while remaining 20,000/- are outstanding against him. Thereafter, Lateef called Shamim to come to his house and received the remaining sale consideration and after some time Shamim came there. On inquiry Shamim stated that Amin Ullah and Waris Khan are involved with me in the commission of offence and he further stated that other cow and calf were taken by him to the house of one Sher Buhadar at District Kohat. Thereafter the complainant took the cow and calf in his custody and he produced the same before the police and charged the above mentioned accused for the commission of offence.

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After completion of investigation complete challan was submitted to the court for the trial of accused. Accused were summoned. The accused appeared before the Court on 01-07-2020 and after compliance of provision of 241-A Cr.P.C. Charge was framed against the accused on 14.07.2020, to which the accused pleaded not guilty and claimed trial, thereafter, the Prosecution was allowed to produce its evidence in support of its case against the accused. During the trial of the case, the prosecution examined 06 PWs.

The gist of the prosecution evidence is as under:

PW-1 is the statement of Jahanzeb Khan SI, who stated "During relevant days, I was posted as SHO PS upper Ghiljo and on the report of complainant

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FIR Ex-PW- 1/1 was chalked out by me. Similarly, after completion of investigation, I submitted complete challan against the accused which is Ex-PW 1/2. Today, I have seen the relevant documents which are correct and correctly bear my signatures".

PW-2 is the statement of Latif Khan, who stated "On 07.04.2020 accused namely Shamim was passing near my house having two cows along with two calves. I asked him whether he wants to sell the cows and calves. On which accused told me that yes, he is selling the same and thus I purchased one cow and one calf from accused at Rs. 60,000/-, out of which Rs.40,000/- were paid to him while remaining Rs 20,000/- to be paid later on. While other cow and calf were taken by the Shamim to somewhere else. On 13.04.2020 Muhmmad Rasool came to my house and told me that he has having my cow and calf. On which I stated that I purchased one cow and one calf from Shamim at Rs.60,000/- out of which Rs. 40,000/- were paid while the remaining amount will be paid later on. Thereafter, I called Shamim through cell phone and handed over cow and calf to Muhammad Rasool in his presence. My statement u/s 164 Cr.PC was recorded before the court on 14.04.2020. I have seen it, which is correct and correctly by my thumb impression".

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PW-3 is the statement of Dost Muhammad who stated "The stolen cow and calf were handed over by the IO to Muhammad Rasool in my presence and presence of other witness vide Superdari Nama Ex.PW-3/1 and Ex.PW-3/2, which correctly bears my signature as well as signature of other witness".

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PW-4 is the statement of Abdul Malik ASI/IO who stated "During the days of occurrence I was posted as ASI/IO PS Upper Orakzai. On 13.04.2020 at about 10:20 hours copy of FIR was handed over to me in the instant case for investigation. The complainant brought the accused namely Shamim along with cow and calf to the PS. I arrested the accused Shamim and issued his card of arrest, which is Ex.PW-4/1 and sent him to police lock-up. I handed over the cow and calf to the complainant on Superdari Nama which is already Ex.PW-3/1 in the presence of marginal witnesses. I proceeded along with the complainant to spot and prepared the site plan on pointation of complainant, which is Ex.PB. Thereafter I went to the village Kio Kalay and arrest the accused namely Amin Ullah and issued his card of arrest is Ex.PW-4/2. I along with the complainant went to the house of one Latif, situated in the village Durangi Samana but he was found absent. Thereafter, I along with the complainant went to the house of one Sher Bahadar, situated at tehsil Lachi, District Kohat. I recovered the stolen cow and calf from the house of Sher Bahadar and handed over the same to the complainant on Superdari vide Superdari Nama already Ex.PW-3/2 in presence of marginal witnesses. Thereafter, I came to the PS. On 14.04.2021 I submitted an application to Illaqa/Judicial Magistrate for 05 days police custody vide my application Ex.PW-4/3. One day custody was granted. On 15.04.2020 I submitted an application to Illaqa Magistrate for recording confessional statement u/s 364 Cr.PC of the accused vide my application is Ex.PW-4/4. The accused Shamim recorded his confessional statement before the Judicial Magistrate while accused Amin Ullah refused to confess his guilt. On 18.04.2020 I drafted application before the Illaqa Magistrate for obtaining warrant u/s 204 Cr.PC

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vide my application which is Ex.PW-4/5. On 19.04.2020 I arrested the accused namely Waris Khan in village Sambog and issued his card of arrest, which is Ex.PW-4/6. On 20.04.2020 I submitted application before the Illaqa Magistrate with the request for 03 days police custody vide application Ex.PW-4/7. One day custody was granted. On 21.04.2021 I drafted application with request for 02 days police custody which is Ex.PW-4/8. However, the accused was sent to the Judicial Lock-up. On 14.04.2020 I drafted application before Illaqa Magistrate for recording statement of one Latif Khan u/s 164 Cr.PC which is Ex.PW-4/9. I recorded the statements of all the PWs u/s 161 Cr.PC including accused. After completion of investigation in the instant case, I submitted the case file to the SHO for onward proceedings. Today I have seen all the documents, which are correct and correctly bears my signature".

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PW-5 is the statement of Muhammad Rasool who stated "On 06.04.2020 at about 8:00 hrs I was grazing cattle at Masoma Sambog Kundi Khel and at about 11:30 am, left the cattle in the mountain and came back to home for lunch and performing prayer. At Asar Vela I came there for taking and collecting the cattle where I came to know that 02 cows and calves were missing while the remaining cattle were taken to home. I started searching the missing 02 cows and calves and came to know that my 01 cow and 01 calf has been purchased by one Lateef. Upon that information I along with my cousin Ahmad Ullah went to the house of Latif, and he stated that he purchased cow and calf from one Shamim at Rs. 60,000/-. Out of which Rs.40,000/- were paid while the remaining Rs. 20,000/- are out standing against me. In the meanwhile, he called Shamim to come to his home to receive the remaining sale amount. After

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some time Shamim came there and I asked about another cow and calf, upon which Shamim stated that he has taken another cow and calf to the house of one Sher Bahadar of district Kohat and also disclosed that Amin Ullah and Waris Khan are involved with him in commission of offence. I produced the stolen one cow and calf before the police. I charged the above mentioned accused for the commission of offence. Delay in lodging FIR is due to searching of missing cows and calves. Today I have seen my report which is correct and correctly bears my signature. The IO prepared the site plan on my pointation".

PW-6 is the statement of Mr. Rehmat Ullah Wazir CJ/JM-I who stated "On 15.04.2020 Abdul Malik ASI/IO produced accused namely Muhammad Shamim and Amin Ullah before me for recording their confessional statement u/s 164/364 Cr.PC. However, the accused namely Amin Ullah refused to confessed his guilt while accused namely Muhammad Shamim confessed his guilt before me. Before recording his confessional statement, the 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 were complied with and thereafter, the confessional statement of accused was recorded with his own free will in his mother tongue Pashto, which was translated by me in Urdu. The confessional statement was read over and explained to the accused, who after admitting the same as correct put his thumb impression. 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. Thereafter, accused was handed over to Naib Court to take him

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to the judicial lock-up/sub-jail Orakzai at Baber Mela, Hangu which is at the distance of around 90 meters from the Court. While the accused namely Amin Ullah was also sent to Judicial Lock-up Orakzai at Baber Mela. The questionnaire is Ex. PW 6/1, confessional statement of accused is Ex. PW 6/2 while certificate is Ex. PW 6/3. Today I have seen the above exhibited documents which are correct and correctly signed by me".

On 14.09.2021 the prosecution closed its evidence, the statements of the accused were recorded under section 342 Cr.P.C on 21-09-2021. The accused denied the allegations of the prosecution but refused to be examined on oath or to produce evidence in defense, therefore case was fixed for final arguments.

Arguments of learned APP for the State, counsel for the complainant and accused heard and available record gone through.

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Records depicts that complainant reported the occurrence on 13.04.2020 at PS to the effect that on event full day, he was grazing his cattle at Sambog Kandi and in the meanwhile he went to his house for lunch and performing prayer but when he came back, two cows along calves were found missing. Thereafter, he started search of missing cattle and came to know that one cow and calf has been purchased by Latif resident of village Gulistan Samana. On such information, he along with his cousin Ahmad Ullah went to house of Latif and found there his one cow and calf. On inquiry, Latif disclosed that he has purchased the same from Shamim at sale consideration of Rs. 60,000/- and has paid Rs.40,000/- while remaining Rs. 20,000/- are outstanding against him. In the meanwhile, Latif called on Shamim to come to his house and receive the

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remaining sale consideration. After sometime, Shamim came there and admitted that he along with Amin Ullah and Waris are involved in commission of offence and further disclosed that other cow and calf were taken by him to the house of one Sher Bahadar at Kohat and are still there. That recovered cow and calf were taken into the custody by complainant and produced at police station. On the basis of such allegations, accused facing trial were charged for stealing of two cows and calves of complainant. In order to prove the guilt of accused, the prosecution as many as 06 (six) witnesses (PW-01 to PW-06).

From the contents of FIR, it is an admitted position that neither stolen cattle were recovered by the police from the possession of either accused nor from the possession of Latif Khan rather one stolen cow and calf were allegedly produced by the complainant himself at police station. While other one cow and calf were allegedly recovered by the police from the house of Sher Bahdar at district Kohat. However, no recovery memo is available on file, which could show that police have taken the recovered stolen cow and calf in their custody. Rather only Superdari Nama Ex.PW-3/1 and Ex.PW-3/2 are available on file and as per which one cow and calf were produced by the complainant to the police and the same were returned to him on Superdari while other cow and calf were recovered by the police from the house of Sher Bahadar. PW-03 is stated to be the marginal witness of Superdari Nama Ex.PW-3/1 and Ex.PW-3/2, who stated in his examination in chief that in his presence, the IO handed over stolen cows and calves to the complainant. However, his statement is completely silent that one cow and calf were produced by the complainant to police and other cow and calf were recovered by the police from the house of

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Sher Bahadar in his presence and thereafter, the same were handed over to the complainant on Superdari. During cross examination he admitted that no recovery was affected from either accused in his presence. Moreover, IO appearing as PW-04 stated during his cross examination that he has not recorded the statement of Dost Muhammad (PW-03) and Ahmad u/s 161 Cr.PC regarding the recovery of cattle. Similarly, PW-04 stated that he along with the complainant went to the house of Sher Bahadar, situated at Tehsil Lachi, District Kohat and from there recovered other cow and calf. During cross examination stated that complainant along with his two relatives and 04 police officials also accompanied him to the house of Sher Bahadar and Muharrir of the PS might have entered his departure in his Daily Diary but copy of the same is not available on file. PW-04 also stated that he did not associate the police of district Kohat regarding the recovery of cows from the house of Sher Bahadar. Furthermore, PW-04 stated that house of Sher Bahadar was pointed to him at Kohat by the complainant but complainant appearing as PW-05 stated during cross examination that address of Sher Bahadar was traced out by the police and he was not aware about the house of the Sher Bahadar. So, there is material contradiction between the statement of complainant and IO of the case regarding the tracing the house of Sher Bahadar and nature of contradiction coupled with other facts stated by the PW-04 during cross examination are such which make the entire episode of recovery of one stolen cow and calf from the house of Sher Bahadar doubtful to high degree. In addition, the stolen cows were not handed over to the complainant on Superdari by the court rather IO has allegedly given the same on Superdari to the complainant, which put further

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questions on the story of prosecution regarding the recovery of stolen cows and calves.

It is an admitted position that no recovery of stolen property has been affected from possession of either accused. Similarly, complainant appearing as PW-05 has categorically stated that he has not seen either of accused while taking the cattle. Moreover, no other witness was produced by prosecution to establish the accused facing trail have taken cattle of the complainant from place of occurrence. It is also evident from record that accused namely Amin Ullah and Waris have been charged in the instant case only on the basis of statement of other accused namely Muhammad Shamim and except statement of accused Muhammad Shamim recorded u/s 164/364 Cr.PC Ex.PW-6/2 no other direct or circumstantial evidence is available on file which could connect accused Waris and Muhammad Amin is commission of offence. Now the question for the court is that whether on the basis of statement of co-accused namely Muhammad Shamim recorded u/s 164/364 Cr.PC, the other accused Waris Khan and Muhammad Amin can be held guilty of the offence? To answer the question, the statement of accused Muhammad Shamim recorded u/s 164/364 Cr.PC Ex.PW-6/2 is to be analyzed, wherein, he stated that accused Waris was his friend, who telephonically called him to come to the Terrah for tour. On which he went there and thereafter, Amin and Waris took him to the hill for enjoyment and told him that they are owner of these grazing cattle. They requested him to take these 04 cows to Hangu and thus Waris accompanied him to Ghiljo while Amin returned on the way to Ghiljo. Thereafter, he took the

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cattle and sold one cow along with calf at Samana of Rs.60,000/- and other cow and calf were handed over to Sher Bahadar and Akbar Sadique at Kohat.

So from the statement of accused Muhammad Shamim recorded u/s 164/364 Cr.PC Ex.PW-6/2, it is evident that entire role of the guilt has been attributed to the other accused Waris Khan and Amin Ullah, while he himself has impliedly claimed innocence in commission of offence. As accused Shamim has not confessed his guilt and has attributed the entire role in commission of offence to other co-accused, hence in such eventuality, the same statement cannot be used against other co-accused. Similarly, no other corroborative evidence is available on file, which could connect the other co-accused Waris Khan and Amin Ullah in commission of offence.

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As for as the statement of accused Muhammad Shamim Ex.PW-6/2 against himself is concerned, though he has admitted same facts regarding selling of one cow and calf and handing over of another cow and calf to Sher Bahadar yet such facts uttered by him amount to admission but it is not confession as the element of admitting guilt is missing. For confession, it is essential that a person making confession must also admit his guilt in commission of offence. Being such position, the statement recorded by the accused Shamim u/s 164/364 Cr.PC, could not be termed a confessional statement and such sole statement could not made base for conviction of accused, particularly when other evidence is deficient to connect the accused in commission of offence.

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To conclude, it is held that Prosecution could not prove its case against accused beyond reasonable shadow of doubt, hence be extending the benefits of doubt, the accused facing trial are acquitted from charges leveled against them. Their sureties stand absolved from liability of bail bonds.

File be consigned to the Record Room after its necessary completion and compilation.

Announced
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Senior Civil Judge
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Farman Ullah
Senior Civil Judge/JM,
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CERTIFICATE

Certified that this judgment consisting of -12- pages. Each page has been read, corrected wherever, necessary and signed by me.

FARMANULLAH
Senior Civil Judge
Orakzai at Baber Mela

Farman Ullah
Senior Civil Judge/JM
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