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In the name of almighty Allah who has got unlimited jurisdiction over and beyond the universe.

BEFORE THE COURT OF
ADDITIONAL SESSIONS JUDGE, ORAKZAI

Case No.1/2 of 2021

Date of institution: 11.01.2021

Date of decision: 23.11.2021

The State through Taj Muhammad Khan son of Nawab Khan aged about 40 years, resident of tribe Bezooti, sub tribe Betani, Jalaka Mela, Tehsil Lower and District Orakzai.....(**Complainant**)

...**Versus**...

1. Habib Khan son of Habib Ullah, aged about 44 years, resident of Jalaka Mela tribe Bezooti Jalaka Mela, Tehsil Lower and District Orakzai (**Absconding accused in previous trial; whereas, accused facing trial of present case**).

2. Arabistan son of Habib Ullah, aged about 38 years, resident of Jalaka Mela tribe Bezooti Jalaka Mela, Tehsil Lower and District Orakzai.

(**Accused of earlier trial whose case has finally been determined vide Judgement dated 05-03-2020 in Sessions case No. 6/2 of 2019**).

**Case FIR No.18, Dated 25.06.2019 u/s 302-324-337 F(i)/34 of the Pakistan Penal Code, 1860
Registered at Police Station Kalaya Orakzai.**

JUDGMENT

Taj Muhammad Khan son of Nawab Khan (hereinafter called complainant) appeared in Police Station Kalaya, with written application for bringing criminal law into motion against accused on 25th of June, 2019.

It was contended therein that on 7th of May, 2019, the complainant and Akhtar Muhammad son of Subhan Khan were cultivating their fields when Habib Khan son of Habib Ullah (hereinafter called accused facing trial or accused) and Arabistan son of Habib Ullah (hereinafter called person acquitted or co-accused acquitted), duly armed with Kalashnikovs emerged

from their dwelling house and targeted complainant and his companion


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through indiscriminate firing with intention of killing them. The daughter of complainant namely Basya Bibi (minor) being present nearby the complainant was hit with gunshot of the accused facing trial and resultantly died at the spot. The companion of complainant Akhtar Muhammad got hit and thereby sustained injuries in the firing of Arabistan (co-accused acquitted). Dispute over the landed property was disclosed as motive of the offence committed as the accused party was intending to occupy the land of complainant. The contents of application have been based for lodging FIR bearing No.18 dated 25-06-2019 that has been registered under Section 302-324-337-F(i)/34 of the Pakistan Penal Code, 1860 in the Police Station Kalaya Orakzai.

2. After conclusion of the investigation, complete challan was routed to the Court of Hon'ble the District & Sessions Judge, Orakzai. Habib Khan (accused facing trial) was absconding and thus evidence against him was procured in absentia by attracting provisions under Section-512 of the Code of Criminal Procedure, 1898. Arabistan (co-accused acquitted) being on bail was tried by the said Court and on conclusion of trial, the accused facing trial being absconding was declared proclaimed offender; whereas, co-accused acquitted was extended benefit of doubt resulting as acquittal vide Judgement dated 05-03-2020.

3. Habib Khan being proclaimed offender was later on arrested and complete challan was put in Court on 11th of January, 2021. The accused facing trial being behind the bar was summoned through "zamima bay". On production, he was supplied statements and documents prescribed in Section 265-C (1) of the Code of Criminal Procedure-1898. Charge against the accused was framed to which he pleaded not guilty and claimed trial.


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4. Prosecution was directed to produce its evidence. The prosecution in order to prove its case against the accused, produced as many as twelve (12) witnesses. The prosecution evidence is reproduced below for ease of reference and determination of guilt or innocence of the accused:

(i). Mujahid Khan Sub Inspector, Lal Mela Check post of PS Lower Orakzai, was examined as PW-1, who stated that *"in the instant case I have registered the FIR Ex.PA/1 on the application of the complainant Taj Muhammad which correctly bears my signature. I also arrested acquitted accused Arabistan and issued his card of arrest Ex.PW-1/1 which also correctly bears my signature. In the case against accused Arabistan I have submitted complete challan against the accused Arabistan.*

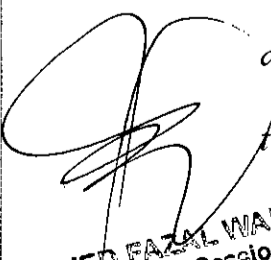
(ii). PW-2 is the statement of Muhammad Shafiq SHO of Police Station Kalaya, who deposed that *"after completion of investigation against accused Habib Khan I submitted supplementary challan on 15-12-2020 against the accused which is Ex.PW-2/1 and correctly bears my signature.*

(iii). MalaKhel s/o Alibaz Khan, resident of Bezot Jalaka Mela District Orakzai, was examined as PW-3, stated that *"the deceased Basya Bibi was my niece. On 26.07.2019 I have pointed out the grave of deceased Basya Bibi situated in the graveyard of Jalaka Mela to the Police, Doctor and Judicial Magistrate along with other official present there. The IO prepared pointation memo of the grave on the spot which is correct and correctly bears my thumb impression and Ex.PW-3/1. Thereafter I along with PW Shah Jihan dig out the grave and recovered the dead body of deceased Basya Bibi and handed over to the officials for examination. The IO prepared the identification memo of deceased which is Ex.PW-3/2 which also correctly bears my thumb impression. The above exhibited documents were also thumb impressed by PW Shah Jihan on the spot. I along with PW*

Shah Jihan also thumb impressed the inquest report of deceased Basya Bibi. After examination of the dead body it was again buried".

(iv). PW-4 is the statement of Amir Nawaz constable of Police Station Kalaya, who deposed that "during the days of occurrence I was posted in the Investigation Unit of PS Kalaya. I am the marginal witness of the recovery memo Ex.PW-4/1 vide which I took into possession 3 color photos of the deceased Basia Bibi which were produced by the complainant Taj Muhammad on the spot on 25-06-2019. Today I have seen the recovery memo which is correctly bears my signature as well as signature of other marginal witness. The photos are exhibited as Ex.P1 to P3. Similarly I am also the marginal witness of the recovery memo Ex.PW-4/2 vide which I took into possession blood stained garments of the deceased which include Shalwar of green color, Qamees yellow color and flowered Chadar which were produced by the complainant to the IO. The IO sealed the same into parcel Ex.P4. I along with the other marginal witness Ainullah signed the recovery memo. Today I have seen the recovery memo which is correct and correctly bears my signature. My stated was recorded u/s 161 Cr.PC."

(v). Dr. Aisha Anwar TMO at Saidu Teaching Hospital Swat, was examined as PW-5; stated that "During relevant days I was posted as Female Medical Officer at Mishti Mela Hospital, Orakzai. In the instant case on application of the Police and complainant party exhumation of the dead body of deceased Basia Bibi was carried out on 26/07/2019 at about 10 am in the graveyard of the locality. Besides me, one Abdur Rauf the Nursing Supervisor was also present along with the official of other departments. The grave of the deceased was identified by the relatives of the deceased and after competition of the digging the body of deceased was


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recovered and I started my examination. During the examination of her dead body I found the following.

A five years old Basia Bibi 2-1/2 was found and then she was buried after not doing any investigation/Post Martum. So now the body of deceased exhumated form the grave. There was a decate body smell and decomposition was there. I found one oval shape wound at glabella region which was the entry wound and below the occipital region there was an exit wound.

I. External Appearance:

II. Cranium and Spinal Cord:

I did only external physical examination of the dead body.

III. Thorax:

Not examined.

Abdomen:

Not examined.

IV. Muscles, bones and joints:

One wound at the glabellar region round/oval shape found.

V. Remarks of the medical officer:

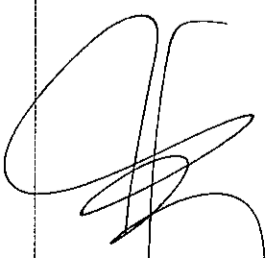
I found one fire arm entry and exit wound as mentioned above which was the cause of death of the deceased.

PROBABLE TIME THAT ELAPSE BETWEEN INJURY AND DEATH;

Round over 05 minutes on the spot.

a) **Between death and Post Mortem; 02 months and 19 days.**

Today I have seen the PM report prepared by me consist of 06 sheets including the factorial which is Ex.PM. I have also endorsed the injury



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sheet of the deceased which is Ex.PW/1. Today I have seen all the relevant documents which correctly bears my signature”.

(vi). PW-6 is the statement of Dr. Muhammad Zubair, Senior Medical Officer, DHQ Hospital, Kohat, who deposed that “On 07.05.2019 at about 03:05PM, I examined injured, Akhtar Muhammad S/O Shah Jehan Khan aged about 27 years caste Bezoti R/O Jalaka Mela, District Orakzai and found the following:

General Condition: Patient/ Injured conscious oriented in time and surroundings.

Injuries: Two stitched wounds one over medial aspect of right elbow and another one about 1 ½ inch below and lateral to wound no. 1.

Above Right Elbow back slab given and admitted to orthopedic unit by orthopedic surgeon.

X-Rays were advised to the injured of right forearm

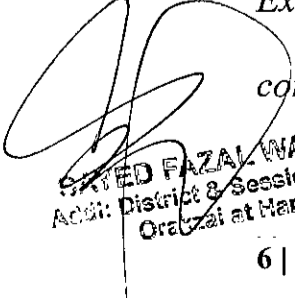
Probable duration of injury: Within four hours

On 01.07.2019 I perused and examined the X-Ray report (Opinion of the radiologist) and discharge slip of orthopedic unit of KDA Hospital and found no bone lesion and patient treated conservatively in orthopedic unit.

The nature of injury is simple.

Kind of weapon used: Kind of weapon cannot be ascertained as the wounds are already stitched.

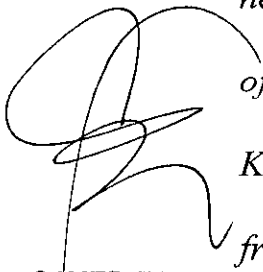
Today I have seen my medico legal report Ex.PW-6/1 which is correct and correctly bears my signature. The report of radiologist is Ex. PW-6/2 available on the medico legal report. Similarly, the X-Ray of the injured is Ex. PW-6/3 and discharge slip is Ex. PW-6/4. The injury sheet also correctly bears my endorsement.”


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(vii). Mehmood Khan Medical Technician, BHU, Karghan, Lower Orakzai, was examined as PW-7, who stated that *"I am running a private clinic at Feroz Khel Mela. The clinic of Dr. Alaf Khan is situated in front of my clinic. On 07-05-2019, at about 12:00 noon, complainant Taj Muhammad along with other co-villagers brought one injured Akhtar Muhammad to me for first aid and medical treatment. I examined him and stitches his firearms injuries/wounds on his right hand. After dressing and stitching his wounds, I told the complainant Taj Muhammad to take the injured Akhtar Muhammad to some other hospital for further treatment"*.

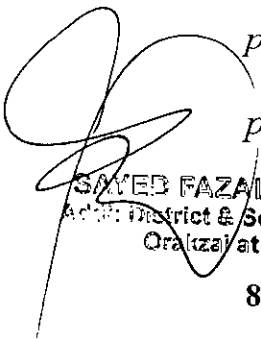
(viii). PW-9 (this witness was wrongly numbered as 9 instead of 8, which is arithmetic mistake that has not been removed for avoiding difficulties) is the statement of Dr. Alif Khan, who deposed that *"I am running a private clinic at Feroz Khel Mela. The Clinic of Mehmood Khan, medical technician, is situated in front of my clinic. On 07.05.2019 at about 12:00 hrs noon, complainant Taj Muhammad along with other co-villager brought minor child namely Basya Bibi for first Aid and medical treatment. I examined her and found her dead. I found on firearm injury on the forehead of the deceased. I clean the blood on her face besides bandaged around her head. After confirmation of her death and the minor deceased was handed over to the complainant and co-villagers"*

(ix). Taj Muhammad son of Nawab Khan, was examined as PW-10, stated that *"deceased Basya Bibi was my daughter while PW Akhtar Muhammad is my nephew. On the day of occurrence i.e. 07.05.2019 I along with my nephew, Akhtar Muhammad were busy in ploughing of our fields by means of tractor near our house. At about 11:45AM accused facing trial, Habib Khan and co-accused, Arabistan duly armed with Kalashnikovs came out from their house and started indiscriminate firing on us, resultantly due to*



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the firing of Habib Khan, my daughter Basya Bibi who was present near to us got hit and died on spot. Co-accused, Arabistan was standing on spot for the help of accused facing trial, Habib Khan. Due to the firing of co-accused on Arabistan my nephew, Akhtar Muhammad got hit on his hand and injured. As we were empty handed therefore, we could not respond. After sometime some people attracted to the spot and we shifted the injured and deceased Basya Bibi to the nearby clinics and first-aid was given to injured Akhtar Muhammad and was referred to KDA hospital, Kohat for further treatment. The injury of deceased was cleaned and bandage was wrapped on the wound in the said clinic. Thereafter, we took the dead body to our house and performed her funeral prayers. For registration of the case I approached to the local Police but the DSP, Lower Orakzai did not register the case on account of having no facilities of equipment and trained staff due to the transformation of new system. Thereafter, on 24.06.2019 I again approached the local Police and submitted one written application to DSP for registration of the case and thereafter my case was registered on 25.06.2019. Today I have seen my application Ex. PW-10/1 which is correct and correctly bears my thumb impression. After registration of the case, Investigation Officer, Shal Muhammad Khan came to the spot and I pointed out the place of occurrence to him, who prepared site plan on my pointation. On the spot I handed over the three-color photos as well as the blood-stained garments of the deceased to the IO in presence of marginal witnesses. Motive for the commission of offence is that accused party forcibly attempted to occupy our fields. On 26.07.2019 in exhumation proceedings were carried out by the officials. During exhumation proceedings I identified the grave of my deceased daughter to the officials.



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I charged the accused for causing murder of my daughter as well as causing injury to the PW Akhtar Muhammad.”

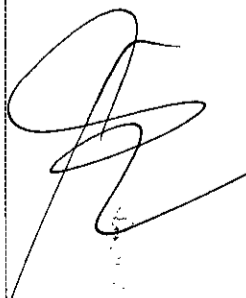
(x). PW-11 is the statement of Akhtar Muhammad son of Shah Jahan, who deposed that *“complainant, Taj Muhammad is my uncle while deceased Basya Bibi is the daughter of Taj Muhammad. On the day of occurrence, I along with complainant, Taj Muhammad were busy in ploughing the fields. At about 11:45AM accused Habib Khan and co-accused duly armed with Kalashnikovs came out from their house and started firing on us. Due to the firing of accused facing trial Habib Khan, Basya Bibi who was present near to us got hit and died on the spot. When I attracted towards deceased, the co-accused Arabistan opened fire on me due to which I got hit on my right hand. Thereafter, I and deceased Basya Bibi were shifted to the nearby clinics. In the clinic first-aid was given to me and then I was referred to the KDA hospital. In the clinic bandage was wrapped around the wound of deceased and from there she was shifted to her house. I was admitted in KDA hospital and after two days treatment I was discharged. On 25.06.2019 my statement was recorded by the IO in the Kalaya Headquarter. Motive for the occurrence is the attempt of the accused to illegally occupy the fields. I charged the accused for the commission of offence.”*

(xi). Muhammad Imtiaz Shinwari, Civil Judge/Judicial Magistrate, District Swabi was examined as PW-12, who state that *“on 22.07.2019, IO, Shal Muhammad Khan submitted an application before Hon’ble District & Sessions Judge, Orakzai for exhumation of dead body of deceased, Basya Bibi which was entrusted to me for necessary action and I accordingly issued necessary directions to the SHO, PS Kalaya for proper arrangement for exhumation of the dead body which was scheduled for 26.07.2019.*

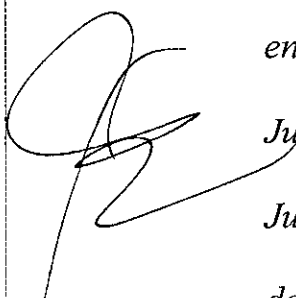
Medical Superintendent of DHQ hospital, Lower Orakzai was also directed for constitution of Medical board/team for exhumation/post-mortem of the dead body.

On the date fixed, I along with police officials and medical team visited the grave of the deceased and started the process of exhumation. The grave of the deceased was identified by Malakhel and Shah Jehan who were the relatives of the deceased. The digging of the grave was carried out by Shah Jehan Khan and Malakhel and after the recovery of the dead body, the body of the deceased was identified by the above-mentioned PW's. Thereafter the dead body was handed over to the medical team who conducted post-mortem proceedings. After completion of post-mortem the dead body was buried again. On the next day, I prepared my report of exhumation proceedings mentioned above and handed over the same to the IO who placed the same on judicial file. Today I have seen my exhumation proceeding report consist of four (4) pages Ex. PW-13/1, which is correct and correctly bears my signature."

(xii). PW-13 is the statement of Shal Muhammad SHO, Police Station Kalaya, who deposed that "during relevant days I was posted as SI investigation at PS Kalaya after registration of the FIR on 25.06.2019, the copy of FIR and application of the complainant were entrusted to me for investigation and I visited the spot. On the spot I prepared site plan Ex. PB on pointation of complainant. The complainant, Taj Muhammad handed over three colour photos (already exhibited as Ex. P1 to Ex. P3) of the deceased to me which I took into possession in presence of marginal witnesses vide recovery memo exhibited as Ex. PW-13/1. Similarly, complainant also handed over blood-stained garments of the deceased including Shalwar, Qamees and Chaddar which are Ex. P4 and I packed



and sealed the same into parcel no. 1 in presence of marginal witnesses vide recovery memo exhibited as Ex. PW-13/2. Thereafter, on my dictation Anar Gul, ASI recorded statements of marginal witnesses and injured PW Akhtar Muhammad U/S 161 Cr.P.C. Accused Arabistan was arrested by the SHO on 27.06.2019 and was handed over to me for investigation along with his card of arrest and I produced him before the court of Judicial Magistrate on 28.06.2019 for obtaining his physical custody vide my application Ex. PW-13/3, as a result of which three days physical custody was granted. I interrogated the accused and recorded his statement U/S 161 Cr.P.C and produced him before the court of Judicial Magistrate vide my application Ex. PW-13/4 on 01.07.2019 and the accused was sent to the Judicial Lockup. During course of investigation I prepared list of legal heirs of deceased Ex. PW-13/5. On 11.07.2019 I sent the blood-stained garments to the FSL through constable, Ameer Nawaz, the report of which I received later on, on 05.08.2019 which is placed on file and the same is Ex. PZ. As the accused Habib Khan was avoiding his lawful arrest therefore, I submitted application Ex. PW-13/6 before the court of Judicial Magistrate on 16.07.2019 for issuance of warrant 204 Cr.P.C and then on 18.07.2019 I submitted application Ex. PW-13/7 for issuance of proclamation notices U/S 87 Cr.P.C. I then recorded statement of search witness Shah Alam U/S 161 Cr.P.C. On 19.07.2019 I submitted one application Ex. PW-13/8 before this court for obtaining permission of exhumation of the dead body of the deceased, Basya Bibi which was entrusted to the Judicial Magistrate for further proceeding. The learned Judicial Magistrate fixed the date for exhumation. On 26.07.2019 learned Judicial Magistrate along with his staff, Officials from the health department, Police Officials and PW Mulakhel, Taj Muhammad and Shah


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Jahan attended the exhumation proceeding. The grave of the deceased was duly identified by the complainant, Taj Muhammad and I accordingly prepared grave pointation memo which is Ex. PW-13/9. Thereafter, the dead body was identified and I prepared identification memo of the dead body exhibited as Ex. PW-13/10. I also prepared injury sheet of the deceased at the graveyard on the same day which is exhibited as Ex. 13/11 and inquest report Ex. PW-13/12. I recorded statement of marginal witnesses of the pointation memo and identification memo. During course of investigation I received and placed on file exhumation report and post-mortem report. During investigation Anar Gul, ASI drafted various documents on my dictation. All the documents prepared by me or prepared on my dictation are correct and correctly bear my signatures. After completion of investigation I handed over casefile to SHO for submission of challan.

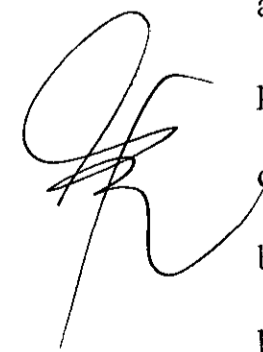
Similarly, I have also investigated the case to the extent of accused Habib Khan. After recalling of his BBA, I have arrested the accused Habib Khan and issued his card of arrest Ex.PW-13/13 and produced him before the Illaqa Magistrate for obtaining 05 days Police custody on 12.11.2020 vide my application Ex.PW-13/14. One day custody was granted. I interrogated the accused. On 12.12.2020 I again produced the accused for further 03 days custody vide my application Ex.PW-13/15 and 02 days custody was granted. On 14.12.2020, I produced the accused before the Illaqa Magistrate further 03 days Police custody vide my application Ex.PW-13/16. My application was turned down and the accused was sent to Judicial Lockup. I recorded his statement under section 161 Cr.PC. After completion of my investigation, I handed over the case file to the SHO for onward submission of supplementary challan against the accused Habib

Khan. Today I have seen all the relevant documents which are correct and correctly bear my signatures”

5. On closure of prosecution evidence, statement of accused was recorded u/s 342 of the Code of Criminal Procedure-1898; wherein, accused professed innocence and did not opt to produce defense evidence or to be examined on oath.

6. Learned APP for the State argued that accused is directly charged in the contents of FIR; that too, with specific role of committing murder of deceased. Motive for the commission of offence is available in shape of dispute over landed property. Ocular evidence available on the file is sufficient to establish the guilt of accused. The delay in registration of criminal case was the merger of the area and introduction of new legal system. The accused was specifically charged for the brutal murder of an innocent minor girl that has been proved through direct as well as circumstantial evidence. He added that the offence is heinous in nature and prosecution has proved its case beyond doubt entailing conviction of the accused.

7. Mr. Haseeb Ullah Advocate representing the complainant endorsed the arguments of the learned prosecutor and added that due to introduction of new legal system in the area being part of merged district, the delay was caused in registration of the case. Similarly, the deceased was not examined and therefore the post mortem examination report was initially not prepared. The case was later on registered and exhumation of the body of deceased was conducted which is rectification on part of State Machinery; but, if not so considered as valid rectification; even then, the complainant being private person cannot be penalized for the act of any Government



Functionaries. He added that acquitted accused was charged for sustaining injuries to the complainant while the accused facing trial is specifically charged for murder of deceased as a single accused and thus rule of consistency is not applicable. Photographs, blood stained cloths, direct evidence, motive, exhumation and other material available on file prove the case beyond shadow of doubt which may be culminated into conviction and sentencing of accused with capital punishment.

8. On the contrary, learned counsel for the accused contended that evidence available on the file is deficient and the story advanced by the prosecution is not appealable to prudent mind. It was added that there is no independent witness of the occurrence and the evidence available on the file is full of contradictions. The occurrence has allegedly been happened on 7th of May, 2019; whereas, the FIR has been registered on 25th of June, 2019, which is unexplained delay and is sufficient to hold that the case is after thought and the story has been concocted. He also referred the acquittal of co-accused. He submitted that prosecution has not been able to prove the case beyond shadow of doubt and requested for acquittal of the accused.

9. The guilt or innocence of accused facing trial on the basis of all types of evidence available on file; duly assessed and appreciated in light of the professional assistance rendered by learned the prosecutor and counsel representing parties, is being determined as follows.

a). Accused acquitted and accused facing trial have directly been nominated by names with specific role in the contents of FIR Ex.PA/1. The accused facing trial has been attributed role of firing and as a result of which, the murder of deceased "Basya Bibi". The motive in shape of

dispute over landed property was existed between the parties. They are co-villagers and it was a broad daylight occurrence which is ruling out the chance of any doubt of the identity of accused.

b. Motive is energetic source of mind which provides propelling force and gives impetus to perform any action or to do any act. Emotions are found concealed in the thoughts and mind of an accused, which remain secret and concealed till their exposure through spoken words or actions and can be adjudged from events occurred or to have taken place of going to happen at a relevant time. Motive is the cause, manner and method of thoughts in the mind of a person for performing action which is hidden in the mind of accused. In this legal background, the factual situation of present case is that there is landed property which is apple of discord between the complainant party and accused party. The incident had also been occurred on the soil of such disputed land as reflected in site plan Ex.PB and statements of complainant and injured witness examined as PW10 and PW-11.

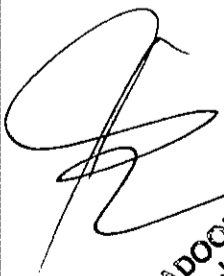
c. Promptness in reporting the incident to police is another area which is required to be focused after discussing nomination and identification of accused; especially, where there is motive existing. Under Section-154 of the Code of Criminal Procedure, 1898, it is the responsibility and obligation of the Police Officer to immediately record the statement of person reporting any incident but at the same time, it is also the responsibility of every citizen to immediately lodge the FIR for every cognizable offence so that the Law may be set into motion and timely action could be taken against the criminals. Promptness in reporting the matter is encouraged with the object to obtain first hand spontaneous information of the occurrence in



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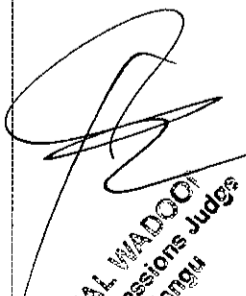
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order to exclude the possibility of fabrication of story or consultation and deliberation. The instant FIR has been lodged with considerable delay of about one and half month. The police has obtained written application from complainant in the instant case and thereby lodged FIR by mentioning in specific column of FIR numbered six (06) that no delay on part of the police has been occurred but failed to explain the delay caused on part of the complainant. The police and complainant are equally responsible for prompt reporting and immediate lodging of FIR when cognizable offence is committed. This specific column in FIR has been designed to explain the delay in both the cases either on part of police or on part of the complainant. The police by mentioning that no delay has been caused on their part is seemingly misuse of authority as the police were required to mention reason of delay on part of complainant as well. The reason of such omission is that the complainant had promptly reported the matter to police but the police has delayed lodging of FIR on the score of merger of the area from FATA to the Province of Khyber Pakhtunkhwa and consequently unavailability of register of FIR and daily diary in police station. The complainant while recording his statement as PW-10 categorically stated that "*For registration of the case I approached to the local Police but the DSP, Lower Orakzai did not register the case on account of having no facilities of equipment and trained staff due to the transformation of new system. Thereafter, on 24.06.2019 I again approached the local Police and submitted one written application to DSP for registration of the case and thereafter my case was registered on 25.06.2019. Today I have seen my application Ex. PW-10/1 which is correct and correctly bears my thumb impression.*" This part of the examination in chief has not specifically been cross examined by the defense. Mr. Mujahid Khan SI of Lal Mela Check-post Orakzai Police

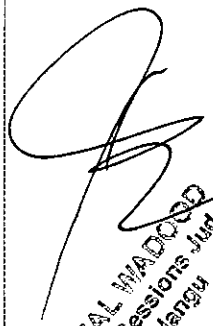

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Station of Lower Orakzai Kalaya, confirmed the reason of delay pleaded by complainant in his statement recorded as PW-1; which speaks “XX.... *The complainant had submitted application on 25-06-2019 for report. The police station in District Orakzai was established since 01-03-2019 self-stated during those days register of FIR and Roz Namcha were not handed over to us. The instant case FIR No. 18 and it is correct before the instant FIR 17 FIRs were registered. The date of occurrence is 07-05-2019 and the date of report is 25-06-2019. The complainant had signed the application submitted by him for registration of FIR. I had incorporated the contents of application in DD. After registration the FIR I handed over the copy of FIR to investigation staff for investigation*”. All these facts on record explains the delay and at least, the delay on part of the complainant is justified. As far as justification of delay on part of Police is concerned, it has been occurred due to non-availability of the book of FIR and book of daily diary but why other cases up to FIR No. 17 have been registered prior to the present case, is question that cannot be answered by the Police. But again the law on the point is very much clear that individual cannot be penalized for the act or omission of any government functionary. More so, the delay in lodging the FIR is not *per se* fatal unless fabrication of story or consultation on part of complainant has not been established. In present case, the deliberation, consultation, fabrication of story of such like that contrive advantage to complainant or to the disadvantage of accused has not been detected despite a lengthy cross-examination of the complainant examined as PW-10.

d. The mode and manner in which crime is committed is the next question to be discussed as identification, nomination of accused, existence of motive in shape of dispute over landed property and promptness of report


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have already been discussed above. It is the case of prosecution that complainant Taj Muhammad and injured witness Akhtar Muhammad were working in the farming fields on 7th of May, 2019. It was 11:45 AM when Arabistan (accused acquitted) and Habib Khan (accused facing trial), duly armed with Kalashnikovs, appeared from their dwelling house and started indiscriminate firing aimed to kill them. The minor daughter of complainant namely Basya Bibi being present nearby was hit and died on the spot due to firing of accused facing trial; whereas, Akhtar Muhammad got hit and injured on his right hand due to firing of accused acquitted. The motive is dispute over landed property. The ocular evidence is that of complainant examined as PW-10 and the injured witness examined as PW-11. Both of them confirmed contents of the FIR with addition of associating the Investigation Officer in preparation of site plan Ex.PB; presentation of 03 photographs of the deceased Basya Bibi Ex.PW-13/1 and Ex.P-1, P-2, P-3; and presentation of blood stained garments. They testified the proceedings conducted in connection with injured as well as deceased in the Hospital. The complainant had also confirmed the exhumation proceedings of the deceased body. This is the ocular evidence of direct source which testify the mode and manner of the offence committed. The complainant Taj Muhammad and injured witness Akhtar Muhammad being examined as PW-10 and PW-11 are natural witnesses of the crime scene and their presence at the spot being working in their own farming fields is natural course of things and therefore, their evidence is confidence inspiring for being of secure degree of cogency. They have been subjected to lengthy cross-examination by the defense but nothing material contradiction has been surfaced. The minor discrepancies like distance between the complainant party and accused party mentioned by injured witness PW-11



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as 20 to 25 paces and that of complainant mentioning it in his statement as PW-10 as 20 to 22 paces etc. are completely ignorable as the incident had taken place in the year 2019 and the statements have been recorded in 2021; that too, due to absconsion of accused facing trial, and such like contradictions may happen in mutual course. Concluding the discussion, it is safely inferred that the mode and manner of the occurrence alleged in the written application has been proved by the ocular account of evidence and this Court has no reason to disbelieve the evidence of the eye witnesses.

e. Corroboratory evidence of the incident when consulted reveals that Basya Bibi (deceased) was died on the spot and thus was buried spontaneously as no concept of preparation of post mortem report was prevailing before merger of the area into the Province. However, this irregularity was rectified later on through application Ex.PW-13/6 for conduct of exhumation. On 26th of July 2019, the team of police officials, health employees and complainant along with witnesses for exhumation proceedings, headed by learned Judicial Magistrate conducted exhumation. The grave pointation memo Ex.PW-13/9 was prepared followed by injury sheet of the deceased Ex.PW-13/11; inquest report Ex.PW-13/12 and statements of marginal witnesses of such pointation memos was recorded. PW-9 is the statement of Dr. Alif Khan who runs a private clinic in the locality confirming the production of the body of Basya Bibi in his clinic. He testifies that the minor deceased Basya Bibi was examined by him who was found dead due to fire arm injury on forehead. PW-7 is the statement of Mehmood Khan medical technician BHU Karghan who is witness of the injury sustained by Akhtar Muhammad (injured witness) but being the role of such injury attributed to acquitted accused is not the subject of discussion of the present case. Similar is the case of statement of Dr. Muhammad

Zubair Senior Medical Officer DHQ Hospital Kohat who is the witness of medico legal report Ex.PW-6/1, Radiology report Ex.PW-6/2, X-ray of the injured Ex.PW-6/3 and discharge slip of the injured witness as Ex.PW-6/4 but being out of the ambit of the present case, is not worth discussion. Dr. Aisha Anwar, female medical officer at Mishti Mela Orakzai produced post mortem report Ex.PM in her statement recorded as PW-5. She has also endorsed the injury sheet of the deceased that has been prepared by the Investigation Officer. She confirmed fire arm entry and exit wound and assigned this as cause of death of the deceased. She in her cross examination clarified that entry wound was on forehead of the deceased and it was fire arm injury. Amir Nawaz constable testified photos Ex.P-1 to P-3, blood stained garments Ex.PW-4/2 and parcel Ex.P-4. Malakhel is the maternal uncle of deceased who testified his presence and pointation of the grave of deceased Basya Bibi in his statement recorded as PW-3. Muhammad Imtiaz Shinwari, learned the Area Magistrate presented exhumation proceedings report Ex.PW-12/1 in his statement recorded as PW-12. The post mortem report of the deceased Ex.PM, injury sheet Ex.PW-13/11 and the stance of complainant recorded in FIR are in consonance and is cogent supporting evidence which is corroborating the ocular evidence.

f. The photographs of the deceased Ex.P-1 to P-3 and blood stained garments Ex.PW-4/2 are spot recoveries testified by recovery witness examined as PW-4. As far as weapon of offense is concerned, it's not being recovered is understandable as accused remain absconding for more than one and half year and not recovery of weapon of offence in such circumstances is ignorable fact.


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g. Accused facing trial disappeared from the locality that necessitated submission of application Ex.PW-13/6 for issuance of warrant under section-204 of the Code of Criminal Procedure-1898. Proclamation notice was issued under section-87 of the Code of Criminal Procedure-1898 and accused was declared proclaimed offender. Accused facing trial appeared when the co-accused charged for mere injuries to injured witness Akhtar Muhammad was acquitted after completion of trial. This conduct of accused facing trial while avoiding lawful arrest, proclamation and surrender after prolonged absconson; that too, when co-accused was acquitted at the conclusion of trial, is another factor that may be considered as a good piece of circumstantial evidence against the accused facing trial.

10. The direct nomination of accused with no chance of misidentification; promptly reporting the incident with justification for delay in lodging FIR; recoveries of blood stained garments and photographs of deceased; establishing motive; presence of ocular evidence; natural witnesses present on the spot; corroboration through post mortem report and exhumation proceedings; FSL report and circumstantial evidence prove the mode and manner of the offence committed by the accused facing trial.

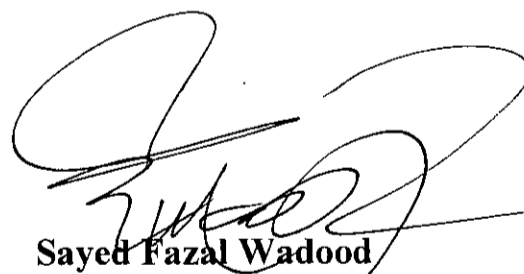
11. For what has been discussed above, the prosecution has proved the offence of murder of minor daughter of complainant namely Basya Bibi (deceased) against the accused facing trial namely Habib Khan son of Habib ullah Khan beyond the shadow of doubt. Resultantly, in case FIR bearing No. 18 dated 25-06-2019, registered under section 302/324/337 F(i)/34 of the Pakistan Penal Code, 1860 at Police Station Kalaya Orakzai, for the murder/Qatl-e-amad of deceased Basya Bibi, the accused facing trial Habib Khan son of Habib Ullah Khan, is hereby convicted and sentenced


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under section 302(b) of the Pakistan Penal Code-1860 to life imprisonment (25 years) rigorous imprisonment as Tazir and the accused/convict shall also pay an amount of Rupees one Million (1,000,000) as compensation to the legal heirs of deceased within the meaning of Section-544(a) of the Code of Criminal Procedure-1898 and in default of payment of the same amount, he shall further undergo six months simple imprisonment while the amount shall be recovered as land revenue under the provision of West Pakistan Land Revenue Act-1967. The benefit of section 382(b) of the Code of Criminal Procedure-1898 is also extended in favour of the convict. The convict/accused is already in custody; hence, he is being sent to Jail through conviction warrant. Attested copy of this judgement be sent to District Public Prosecutor within the meaning of section-373; whereas, attested copy of this judgement be supplied to convict in term of section-371 of the Code of Criminal Procedure-1898. Case property be dealt with as per law after expiry of period of appeal/revision. File be consigned to District Record Room, Orakzai after its necessary completion and compilation within the span allowed for.

ANNOUNCED

30.11.2021




Sayed Fazal Wadood

Additional Sessions Judge Orakzai

CERTIFICATE:

Certified that this Judgment consists of twenty two (22) pages; each page has been read over and signed by me after making necessary corrections therein.



Sayed Fazal Wadood

Additional Sessions Judge Orakzai