

IN THE COURT OF SHAUKAT AHMAD KHAN
SESSIONS JUDGE, ORAKZAI AT BABER MELA

SESSION CASE NO. : 26/2 OF 2021
DATE OF INSTITUTION : 24.03.2021
DATE OF DECISION : 30.11.2021

STATE THROUGH GUL NAWAB S/O FAJAR KHAN, AGED ABOUT 42 YEARS, R/O BANR KHORGAYI, TEHSIL ALPORI, DISTRICT SHANGLA

------(Complainant)

VS

1. SAFDAR ALI S/O BAHAR ALI, AGED ABOUT 41 YEARS, R/O CASTE BAR MUHAMMAD KHEL, TAPA TERAYI, DAPA KADA BAZAR, TEHSIL LOWER DISTRICT ORAKZAI
2. SYED SHAMS UL HASSAN S/O MIR HASSAN JAAN, AGED ABOUT 31 YEARS, BAR MUHAMMAD KHEL, TAPA BABA NAWASI KHAMAL, KALAY SAIDAN, KUREZ TEHSIL LOWER DISTRICT ORAKZAI

------(Accused Facing Trial on bail)

Present: Umar Niaz, District Public Prosecutor.
: Syed Muzahir Hussain Advocate for accused.

FIR No. 96
U/S: 302/324/427/34 PPC

Dated: 18.02.2021
Police Station: Kalaya

JUDGEMENT
30.11.2021

The accused named above faced trial for the offence u/s 302/324/427/34 PPC vide FIR no. 96, dated 18.02.2021 of PS Kalaya.

The case of the prosecution as per contents of Murasila Ex. PA/1 based FIR Ex. PA is; that on 18.08.2020 at 1240 hours at DHQ hospital Mishti Mela, the complainant, Gul Nawab, PW-12 made a report to the local police to the fact that he alongwith his maternal cousin Asmani Room (deceased) had gone to Uqab Coal Company at Dowli in connection of some work and upon their way back on foot, a

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motorcar 1986 Corolla driving by Nasir Malook with Haji Sar Khan seated in the rear seat of motorcar, stopped. They boarded the motorcar and at about 08:30 am when they reached the place of occurrence, two unknown persons duly armed appeared and one of the persons started firing at them due to which Asmani Room got hit and died on the spot while driver Nasir Malook also got injured. That both the accused decamped from the spot. The complainant/PW-12 charged unknown accused for the commission of offence. The report of the complainant was verified by Umar Rehman s/o Abdul Khaliq by putting his thumb impression over the same. The Murasila Ex. PA/1 was drafted by Muhammad Riaz SI/PW-10 which was sent to the PS through constable Haj Wali, on the basis of which FIR Ex. PA was drafted by PW-3 Libab Ali AMHC. The injury sheet Ex. PW 10/1 and inquest report Ex. PW 10/2 was drafted by PW-10 Muhammad Riaz SI and forwarded the deceased to the doctor for post-mortem examination, upon which PW-5/Dr. Mujahid Hussain conducted autopsy on the dead body of the deceased vide his report Ex. PM. The injured Nasir Malook was attended by PW-9/Dr. Zeeshan Haider at RHC Kurez upon injury sheet Ex. PW 6/1 prepared by Zaman Ali incharge PP Kurez, vide MLC Ex. PW 9/1.

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(3). After registration of FIR, initially it was handed over to IO/PW-15, Aftab Ahmad SHO for investigation.

Accordingly, after receipt of FIR, PW-15 reached the spot, took into possession blood through cotton (Ex. P1) from the place of deceased, blood through cotton (Ex. P2) from the place of injured, 12 empty shells of 7.62 bore (Ex. P3) and the motorcar in question (Ex. P6) vide recovery memo Ex. PC. He prepared site plan Ex. PB at the pointation of complainant/PW-12. The IO/PW-15 took into possession blood-stained shalwar, Kamees and vest of the deceased vide recovery memo Ex. PC/1 and blood-stained shalwar and vest Ex. P5 of injured Nasir Malook vide recovery memo Ex. PC/2. Thereafter, the case file was handed over to Shal Muhammad SI/PW-14 for onward investigation. He prepared list of LRs of the deceased, took into possession blood-stained garments of injured vide recovery memo Ex. PC/2, sent parcels no. 1 to 5 to FSL vide his applications and road permit certificates through constable Muhammad Zahid and placed on file the result of FSL Ex. PZ and Ex. PZ/1.

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On 18.08.2020, the complainant/PW-12 Gul Nawab and Haji Sar Khan recorded their statements u/s 164 Cr.P.C wherein they charged the accused namely, Safdar Ali and Syed Shams UI Hassan for the commission of offence. After arrest of the accused, they made pointation of the spot of occurrence vide pointation memo Ex. PW 14/16. The IO/PW-14 recorded statements of marginal witnesses, conducted identification parade of the accused at Central Jail Kohat


before the Judicial Magistrate, Orakzai/PW-11. After completion of investigation, he handed over the case file to SHO for submission of complete challan.

(4). Upon receipt of case file for the purpose of trial, the accused were summoned, copies of the record were provided to them u/s 265-C Cr.P.C and formal charge was framed against them to which they pleaded not guilty and claimed trial. The prosecution examined as many as 15 witnesses. The gist of the evidence of prosecution is as follow;

I. Malak Abdul Janan SHO is PW-1. He has submitted complete challan Ex. PW 1/1 on 08.03.202 against the accused facing trial.

II. Muhammad Shafiq SI is PW-2. He has submitted final report/untraced challan Ex. PW 2/1 on 15.11.202 against unknown accused.

III. Libab Ali AMHC appeared in the witness box as PW-3. He has incorporated the contents of Murasila into FIR Ex. PA. Similarly, he has received the case property i.e., parcels no. 1 to 5 with motorcar bearing no. 7946 model 1986. He has kept the case property in mal khana of the PS and parked the motorcar in PS. The details of case property were also entered by him in register no. 19.


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- IV. Azeem Khan is PW-4 who has identified the dead body of deceased Asmani Room before the local police and doctor. He stated that the inquest report correctly bears his thumb impression.
- V. Dr. Mujahid Hussain, CMO, DHQ Mishti Mela is PW-5. He has conducted post-mortem examination of the deceased vide his report Ex. PM.
- VI. Zaman Ali HC appeared in the witness box as PW-6. He has prepared injury sheet Ex. PW 6/1 of the injured Nasir Malook and handed it over to the doctor for medical examination.
- VII. Constable Mir Hashim is PW-7. He received injury sheet and inquest report of the deceased from Muhammad Riaz SI and handed over the same to doctor for post-mortem examination. He has also taken the blood-stained garments of the deceased to the PS and handed it over to Shal Muhammad SI/PW-14.
- VIII. Constable Muhammad Zahid appeared in the witness box as PW-8 being marginal witness of recovery memos Ex. PC, Ex. PC/1 and Ex. PC/2 vide which the IO has taken into possession blood through cotton and blood-stained shalwar, kamees

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with vest of the deceased as well as of the injured.
He has also taken parcels to the FSL on
31.08.2020.

IX. Dr. Zeeshan Haider, MO, BHU Dowli is PW-9.
He has prepared medico legal report Ex. PW 9/1
of the injured and referred the injured Nasir
Malook to Kohat for further treatment.

X. Muhammad Riaz SI, Incharge report centre DHQ
hospital Mishti Mela is PW-10. He has drafted the
Murasila Ex. PA/1. He also stated that he had
prepared injury sheet Ex. PW 10/1 and inquest
report Ex. PW 10/2 of the deceased and handed
over the same to doctor.

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XI. Mr. Rehmat Ullah, CJ/JM-I, Orakzai appeared in
the witness box as PW-11. The complainant/PW-
12 and injured Nasir Malook PW-13 has identified
the accused Shams Ul Hassan and Safdar Ali
during identification parade on 03.03.2021 before
the learned Magistrate/PW-11. He has drafted his
report consists of 03 pages, Ex. PW 11/1.

XII. Complainant, Gul Nawab is PW-12. He repeated
the story of Murasila Ex. PA/1. He also verified
his statement recorded u/s 164 Cr.P.C Ex. PW
12/1 wherein he has charged the accused for the

commission of offence with active role of firing to the accused Shams UI Hassan. He also deposed that he has identified the accused during identification parade at Central Jail Kohat.

XIII. Nasir Malook is PW-13. He stated that he is eyewitness of the occurrence, that on the day of occurrence he alongwith his father Haji Sar Khan were on their way towards Gazdara for a jirga and on way they boarded two persons namely, Asmani Room and Gul Nawab, in their motorcar. When they reached the place of occurrence, two unknown persons duly armed appeared and started firing at them due to which Asmani Room got hit and died on the spot while he got injured. That both the accused decamped from the spot. Whereafter, he was shifted to Civil Hosptial Kurez where after receiving of first-aid he was shifted to LRH Peshawar. He further stated that on 18.08.2020 he and complainant Gul Nawab have charged the accused facing trial in their statement recorded u/s 164 Cr.P.C. He also deposed that he has identified the accused during identification parade at Central Jail Kohat.

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XIV. Shal Muhammad SHO is PW-14. After initial investigation conducted by Aftab Hassan SHO,

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PW-15, Shal Muhammad has continued the investigation by preparing list of LRs of deceased, taking into possession blood-stained garments of injured vide recovery memo Ex. PC/2, recording statements of marginal witnesses, sending parcels no. 1 to 5 to FSL vide his applications and road permit certificates through constable Muhammad Zahid, placing on file FSL reports Ex. PZ and Ex. PZ/1, recording statements of complainant Gul Nawab and eyewitness Haji Sar Khan u/s 161 Cr.P.C, arresting the accused Shams UI Hassan vide card of arrest Ex. PW 14/10, producing him before the court of Judicial Magistrate vide his application Ex. PW 14/11, submitting application Ex. PW 14/13 for proceedings against the absconding accused, arresting the accused Safdar Ali vide card of arrest Ex. PW 14/14, producing him before the court of JM, submitting application Ex. PW 14/18 for identification parade of the accused and submission of case file to SHO for onward proceedings.

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XV. Aftab Hassan SHO is PW-15. He has conducted initial investigation by visiting the spot, preparing the site plan Ex. PB and taking into possession blood through cotton from the places of deceased

and injured (Ex. P1 & Ex. P2) besides recovering 12 empty shells of 7.62 bore (Ex. P3) alongwith motorcar bearing no. 7946 (Ex. P6) vide recovery memo Ex. PC. He has also taken into possession blood-stained garments of the deceased (Ex. P4) vide recovery memo Ex. PC/1 and recorded statements of marginal witnesses.

(5). After closure of evidence of the prosecution, statements of both the accused recorded u/s 342 Cr.P.C but they neither wished to be examined on oath nor opted to produce evidence in defence. Accordingly, arguments of the learned DPP for the State and counsel for the accused facing trial heard and case file perused.

(6). Learned DPP for the State argued that though the accused facing trial are not directly nominated in the FIR but the complainant and injured Gul Nawab have nominated both the accused in their statements u/s 164 Cr.P.C. Both the complainant and the injured Nasir Malook have identified the accused in identification parade. The case of the prosecution is also supported by a site plan Ex. PB which has been verified by the accused by making pointation on the spot. The recoveries made from the spot in the form of blood and empties also support the case of prosecution. The motorcar with bullet marks was also taken into possession which further supports the case of prosecution. The medical evidence

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brought on record also favours the case of prosecution. The complainant, the injured eyewitness, the witnesses of the recovery and the IO have been produced by the prosecution as witnesses, whom have fully supported the case of the prosecution and their statements have been lengthy cross examined but nothing contradictory could be extracted from the mouth of any of the witness of the prosecution and that the prosecution has proved its case beyond shadow of any doubt.

(7). Learned counsel for the defence argued that the accused facing trial are not nominated in the FIR rather they have been charged by the complainant and the alleged eyewitness in their statements recorded u/s 164 Cr.P.C after about 05 months of the occurrence and that too on the basis of their information and satisfaction but no source of information or satisfaction has been disclosed. That the alleged identification of the accused during identification parade also does not favour the case of prosecution for the reason that neither the complainant in the FIR nor he and the injured in their statements recorded u/s 164 Cr.P.C have disclosed the physical features of the accused or that they could identify the accused if brought before them. Similarly, the application for the identification parade has been submitted by the police after about 20 days of the arrest of the accused; therefore, the possibility that during this period the accused would have been shown to the identifying witnesses, cannot be ruled out. That

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there is no direct or circumstantial evidence available on file against the accused facing trial; therefore, they deserve honourable acquittal.

- (8). In the light of arguments advanced by the learned DPP for the State, arguments of the learned counsel for the defence and the available record it is observed that as per medical evidence available on file in the form of post-mortem report Ex. PM, the deceased Asmani Room has died of unnatural death by receiving injuries to vital parts of his body i.e., on his head and chest on account of firearm. Similarly, the injured Nasir Malook as per MLC Ex. PW 9/1 has also received firearm injury. The recoveries made from the spot in the form of blood from the place of deceased and place of injured and recovery of empties also confirm the venue of occurrence.

Initially, the report was made against unknown accused. It was after about 05 months of the occurrence when the accused facing trial were charged for the commission of offence by the complainant and injured Nasir Malook in their statements u/s 164 Cr.P.C on the basis of their information and satisfaction. After arrest of both the accused, pointation of the spot of occurrence was made through the accused vide pointation memo Ex. PW 14/16. The identification parade was conducted in the presence of Judicial Magistrate, Orakzai in Central Jail Kohat where the accused facing trial Safdar Ali was identified by complainant Gul Nawab and accused Shams

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Ul Hassan was identified by injured Nasir Malook. The prosecution in order to prove its stance has produced complainant as PW-12, the injured Nasir Malook as PW-13 and the investigation officer as PW-14.

In these circumstances the available evidence against the accused facing trial is the statements of the complainant and injured recorded u/s 164 Cr.P.C, the pointation memo Ex. PW 14/16 and the identification parade report Ex. PW 11/1.

The statements of complainant and injured u/s 164 Cr.P.C have been recorded after about 05 months of the occurrence wherein they have charged the accused facing trial for the commission of offence on basis of their information and satisfaction but no source of information or satisfaction has been disclosed. Even in their court statements as PW-12 and PW-13, they have not uttered a single word in this respect. In this respect the complainant Gul Nawab when put a specific question in his cross examination, he stated that,

"I cannot disclose the name of person who told me the name of accused being involved in the commission of offence"

So far, the pointation of the spot of occurrence through the accused, is concerned, no private person of the locality has been associated with the process of making pointation through the accused facing trial.

With respect to identification of the accused during identification parade it is observed that as per report of the

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complainant unknown accused are charged for the commission of offence. Neither the physical features of the accused are mentioned in the FIR nor it is mentioned in the report/FIR that the complainant could identify the accused, if brought before him. Even in statements u/s 164 Cr.P.C of the complainant and injured, it has not been disclosed that they could identify the accused. Second, the accused Shams Ul Hassan has been arrested on 06.02.2021 while accused Safdar Ali has been arrested on 17.02.2021 but the application for identification of the accused in identification parade has been moved on 02.03.2021 after about more than 20 days of the arrest of the accused; therefore, during this period the possibility that they have been shown to the identifying witnesses prior to the identification parade cannot be ruled out. In this respect when the injured/PW-13 was cross examined, he stated that,


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"The photographs of the accused were not shown to me in a cell phone by the police prior to identification parade. Self-stated that I cannot disclose the name of person who had shown the photographs of the accused to me in a cell phone."

Moreover, as per Murasila Ex. PA/1 the role of firing has been attributed to one of the unknown accused; however, the witnesses while identifying the accused during the identification parade, has not specified the roles of the accused.

(9). Hence, in view of what is discussed above in absence of any ocular or circumstantial evidence, the aforementioned pieces of documents cannot be held to prove the charge against the accused facing trial leading to failure of the prosecution to bring home the charge against the accused facing trial. Hence, accused Safdar Ali and Syed Shams Ul Hassan are acquitted of the charges levelled against him. Accused are on bail. Their bail bonds stand cancelled and their sureties are released of the liabilities of bail bonds. Case property be disposed of in accordance with law but after the expiry of period provided for appeal/revision. Consign.


Pronounced
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CERTIFICATE

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

Dated: 30.11.2021


(SHAUKAT AHMAD KHAN)
Sessions Judge, Orakzai,
at Baber Mela

