

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.2/2 of 2021

Date of institution: 11.01.2021

Date of decision: 18.02.2022

The State through Pehlwan son of Zaliman Shah, resident of Qaum Rabia Khel, Tappa Suleman Khel, village Khangar Pur, Tehsil Upper, District Orakzai.

.....(Complainant)

...Versus...

1. Khadim Gul son of Badshah Gul, Caste Sada Khel, village Ghondaki Tehsil Upper, District Orakzai.

.....(Accused facing Trial)

2. Sharab Gul son of Nawab Gul, resident of Matti Kada, Orakzai.

.....(Absconding accused)

**Case FIR No.47, Dated 23.09.2020 u/s 302-324/34 of the Pakistan Penal Code, 1860
Registered at Police Station Ghiljo Orakzai.**

JUDGMENT

The facts contended in first information report are such that on 23-09-2020, complainant Pahlwan while reporting the incident stated that the accused Khadim Gul alongwith co-accused Sharab Gul came to the place of occurrence; where, Sharab Gul ordered Khadim Gul to kill him and his brother. The accused Khadim Gul started firing on them as result of which, brother of complainant namely Umar Farooq hit who died instantly; whereas, complainant luckily escaped unhurt. Dispute over the landed property was disclosed as motive of the offence. The contents of application have been based for lodging FIR bearing No.47 dated 23-09-2020 that has been registered under Section 302-324/34 of the Pakistan Penal Code, 1860, in the Police Station Ghiljo, Orakzai.

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2. After conclusion of the investigation, complete challan was routed to the Court of Hon'ble the District & Sessions Judge, Orakzai which was entrusted to this Court for further proceedings. Sharab Gul (absconding accused) was avoiding his lawful arrest as was confirmed from the examination of DFC who recorded statement as SW-1 and thus evidence against him was procured in absentia by attracting provisions under Section-512 of the Code of Criminal Procedure, 1898. Khadim Gul (co-accused facing trial) being on bail was summoned by the then learned Trial Judge on seeing that reasonable grounds to proceed with the trial of accused are existing. On appearance, he was supplied copies of statements and other documents prescribed under 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.

3. Prosecution was directed to produce evidence. The prosecution, in order to prove its case against the accused, produced as many as eight (08) witnesses. Such evidence is reproduced below for ease of reference and for just determination of guilt or innocence of the accused:

(i). Muhammad Ishaq SI/IO, of PS Ghiljo Orakzai, was examined as PW-1, who stated that *"on 02-10-2020 I took parcel No. 1 consist of blue color Qamees Shalwar and red color banyan of deceased to the FSL vide road certificate Ex.PW-1/1. I deposited the garments of deceased in the FSL against a receipt and returned to the PS where I handed over the receipt to the Muharrir. My statement was recorded by the Io u/s 161 Cr.PC.*

(ii). PW-2 is the statement of Abdul Malik ASI of Police Station Ghiljo, who deposed that *"I am the marginal witness of recovery Ex.PW-3/1 vide which IO took into possession last worn clothes blood stained of the*

deceased Umar Farooq consisting one Shilwar one Qamees blue color, one Banyan red color brought by constable Raheel and sealed into parcel No. 1 in my presence as well as in the presence of other marginal witness Muhammad Hanif similarly I am also the marginal to the recovery memo Ex.PW-3/2 vide which the IO took into possession footage of CCTV cameras from the operator of District Court Orakzai which was saved in the memory card. Similarly, the CCTV footage of Muslim Abad market in respect of accused was taken into possession from the operator which was also saved in memory card. Today I have seen the above documents which correctly bears my signatures.”

(iii). Muhammad Naseem, Line Officer, Police Headquarter Orakzai at Baber Mela, was examined as PW-3, who stated that “during the days of occurrence I was SHO PS upper Orakzai. On 23.09.2020 I was on gusht when I received information about the occurrence and came to Misthti Mela Hospital where in emergency room the dead body of deceased Umar Farooq was lying and along with the dead body the complainant Pehlwan s/o Zalman Shah was present who reported to me about the occurrence. I reduced the report of complainant in the shape Murasila Ex.PA which was read over and explained to the complainant who after admitting the same correct thumb impressed the same. I prepared the injury sheet of deceased Ex.PW-2/1 and inquest report Ex.PW-2/2 and referred the dead body of deceased Umar Farooq to the doctor under the escort of Constable Muhammad Raheel. On completion of investigation I submitted the complete challan Ex.PW-2/3 against the accused. Today I have seen the above documents which are correct and correctly bears my signatures”.

(iv). PW-4 is the statement of Dr. Usama Ahmed Niazi Medical Officer Civil Hospital Mishti Mela, who deposed that “on 23/09/2020 I have

[Handwritten Signature]
 SAVED BY: SAADAT KHAN
 Adm. Officer, Sessions Judge
 Orakzai, Feroze

conducted post mortem examination of deceased namely Umar Farooq s/o Zali Man Shah aged about 19/20 years' r/o caste Rabia Khel, Tappa Ayaz Khel village Khanjar Pur District Orakzai brought by police identified by Muhammad Mushtaq s/o Shah Nawaz Khan and on examination of the dead body I found the following;

External Appearance:

There is no mark of the ligature

Condition of subject stout emaciated, decomposed etc, clothing: Fresh body, blood stained sky blue color clothes

Wounds, bruises, position, size and nature:

A case of fire arm injury

Wounds Detail;

Entry about 2 X 2 cm on the right side of mid of the sternum.

An exist fire arm wound about 2.5 X 2.5 cm on the right side of back of thorax.

There was black charring marks around entry wounds. Skin is burnt. Hair near the entry wound are burnt.

Cranium and Spinal Cord:

Intact

Thorax:

Walls pierced. Pleurae, right lung, blood vessel damaged.

Abdomen:

Intact

Muscles, bones and joints:

Intact

Remarks of the medical officer:

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In my opinion this is a fire arm injury. Sky blue color cloths were hand over to police constable. Wounds and their nature is mentioned on the sketch paper and specific portion of PM report. Cause of death, fire arm injury. Excessive bleeding and vital organs damaged. There was black charring mark around the entry wounds. Skin is burnt and hair near the entry wounds are burnt.

Probable time that elapse.....

Between injury and death; On spot death.

Between death and Post Mortem; approximately 2 to 3 hours.


Today I have seen the PM report prepared by me consist of 06 sheets including the factorial which is Ex.PM which correctly bears my signature. Similarly the injury sheet and inquest report also correctly bears my endorsement which are Ex.PM/1 and Ex.PM/2 respectively”

(v). Gul Asghar ASI PS Upper Orakzai, was examined as PW-5; stated that “during relevant days I was Muharrir in the PS Ghiljo. In the instant case the constable Arman Khan brought the Murasila to the PS sent by Naseem Khan SHO. I correctly incorporated the contents of Murasila into FIR Ex.PA/1. My statement was recorded by the IO u/s 161 Cr.PC. Today I have seen the FIR which is correct and correctly bears my signature”.

(vi). PW-6 is the statement of Pehlwan Khan son of Zaliman Shah resident of Khangar Pur, Caste Rabia Khel Sub Caste Ayaz Khel, who deposed that “on 23-09-2020, at 13:15 hours I along with the my brother deceased namely Umar Farooq were present near our home meanwhile the accused Khadim Gul son of Badshah Gul resident of Ghunda Katay presently Darwezi Palosa and accused Sharab Gul son of Nawab Gul resident of Khi Kadda duly armed with weapons came there. The accused Sharab Gul ordered to accused Khadim Gul to kill us and upon the same

order the accused Khadim Gul made firing at us and due to the firing my brother decease Umar Farooq got hit and died while I remained unhurt luckily. The motive behind the occurrence was dispute over the land. I reported the occurrence to the local police at Mishti Mela Hospital emergency room. My report was lodged in shape of Murasila already Ex.PA. Report was read over to me and I thumb impressed the same as a token of its correctness. The IO prepared site plan on my pointation. Today I have seen my report which is correct and correctly bears my thumb impression. I charge the above named accused for commission of offense.”

(vii). Malak Abdul Janan SHO of the Police Station Daboori, was examined as PW-7, who stated that “during relevant days, I was posted as SI investigation PS Ghiljo. After registration of instant case its investigation was entrusted to me. I visited the spot the prepared site plan Ex.PB. I also took into possession the blood stained garments of the deceased containing Shalwar Qamees of blue colour one banyan having cut marks and sealed the same into parcel No.1 P-1 vide recovery memo already Ex.PW-3/1 in ten presence of the marginal witnesses. I have prepared the legal heirs list of the deceased which Ex.PW-7/1. During my investigation the accused facing trial applied for BBA and after its recalling I have arrested the accused issue card of arrest Ex.PW-7/2. I interrogated the accused and recorded his statement under section 161 Cr.PC. I produced the accused before Illaqa Magistrate for Police custody vide my application Ex.PW-7/3. One day custody was granted. After expiry of Police custody I again produced the accused before the Illaqa Magistrate for further Police custody vide my application Ex.PW-7/4 and application was turned down. I also obtained the CCTC footage from the sessions Court through memory card and also took footage record of Muslim Abad Jannah



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Plaza Market vide recovery memo already Ex.PW-3/2 in the presence of marginal witnesses. I sent the blood stained garments to the FSL vide my application Ex.PW-7/5 vide road certificate Ex.PW-7/6 and also received FSL result Ex.PZ. I also took the memory card to the FSL vide my application Ex.PW-7/7 road certificate EX.PW-7/8 and also received the FSL result along with photographs Ex.PZ/1, PZ/2 and PZ/3. I also obtained CDR date which is available on file Ex.PW-7/8. I recorded the statement of PWs under section 161 Cr.PC. The accused Sharab Gul was avoiding his lawful arrest so I initiated proceedings under section 204 and 87 Cr.PC vide my application Ex.PW-7/9 and Ex.PW-7/10 respectively. Today I have seen all the relevant documents which are correct and correctly bear my signatures”.

(viii). PW-8 is the statement of Muhammad Mushtaq son of Shah Nazar resident of Khangar Pur, Lower Orakzai, who deposed that “on dated 23-09-2020, I identified the dead body of deceased Umar Farooq son of Zaliman Shah to Police Officials and concerned doctor at Civil Hospital Mishti Mela and I also endorsed thumb impression on inquest report. On dated 24-09-2020 my statement was recorded by IO under Section 161 Cr.PC. Today I have seen my thumb impression which is correct.”

4. 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.

5. 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


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sufficient to establish the guilt of accused. There is no delay in reporting the incident and the FIR has promptly been lodged. The circumstantial evidence in shape of recoveries, medico legal report and scientific evidence corroborates the ocular account. He added that the offence is heinous in nature which has been proved beyond doubt entailing conviction of the accused.

6. Mr. Abid Ali Advocate representing the complainant endorsed the arguments of the learned prosecutor and added that, blood stained cloths, direct evidence, motive, post mortem report 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.

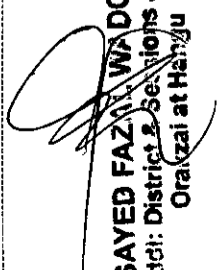
7. On the contrary, learned counsel for the accused contended that evidence available on the file is deficient and the story advanced by the prosecution is not appealable to prudent mind. It was added that there is no independent witness of the occurrence and the evidence available on the file is full of contradictions. The occurrence has allegedly been happened on 23rd September, 2020 at 13:15 hours; whereas, the accused facing trial was recording his statement before the Court of Additional District & Sessions Judge, Orakzai at Baber Mela Hangu on same date and time, in Case No.1 of 2020, filed as a complaint under Illegal Dispossession Act, 2005. On completion of examination in Court premises, the accused has visited Muslim Abad Jinnah Plaza Hangu; the CCTV footage of Court premises and Plaza coupled with the CDR is available that reflects the story as concocted and negates the presence of accused on place of occurrence. He submitted that prosecution has not been able to prove the case beyond shadow of doubt and requested for acquittal of the accused.


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8. The guilt or innocence of accused facing trial is being determined 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, as below:

A). Motive is energetic source of mind which provides propelling force and gives impetus to perform any action or to do any act. It 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. But similarly, motive is double edged weapon and can equally be stretched against the accused in favor of the complainant and vice versa. The motive on one hand provides fuel for commission of the offence and create the chance of false implication on other hand. In present case, the motive of dispute over landed property has, at least to the extent of accused facing trial, played the role of false implication as accused has not been proved present at the spot. He was in the premises of Judicial Complex and then at Hangu Bazar on the day of occurrence; the detail of which will be discussed under paragraph covering plea of alibi.

B. Promptness in reporting the incident to police is another area which is required to be focused after discussing nomination and identification of accused. The distance between the place of occurrence and Police Station Ghiljo is recorded as 3 to 4 KM and the time consumed in reporting the matter is 1 hour and 45 minutes which is obviously a delay that has not been explained.

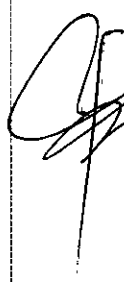

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C. The mode and manner in which crime is committed is the next question to be discussed as identification, nomination of accused, existence of motive in shape of dispute over landed property and promptness of report have already been discussed above. It is the case of prosecution that complainant Pehlwan Khan and his deceased brother namely Umar Farooq were present near their home on 23rd of September, 2020 at 13:15 hours. Accused Khadim Gul and absconding accused Sharab Gul, duly armed with weapons reached the spot; Sharab Gul (absconding accused) ordered Khadim Gul (accused facing trial) to kill the complainant and his brother and thus he started firing. Umar Farooq got hit and died while complainant escaped unhurt. The motive is dispute over landed property. The ocular evidence is that of complainant examined as PW-6. He confirmed contents of the FIR with addition of associating the Investigation Officer in preparation of Site Plan Ex.PB. This is the ocular evidence of direct source which testify the mode and manner of the offence committed. But, the plea of alibi taken at the very earliest available opportunity has given birth to some serious questions over the mode and manner described in Murasila, FIR and subsequently prepared documents. The investigation officer while recorded his statement as PW-7 narrates on this plea of alibi in the following words:

C-i. "It is correctly mentioned by me during the course of investigation that after obtaining the CCTV footage of the Court Room of ASJ-II, the accused was shown present inside the said Court and as per my investigation the accused remained in the Court from 10:23 and left the Court's premises of Orakzai at about 11:03 Am. It is correctly verified by me during the course of investigation that the accused after leaving the Court's premises, has also been seen in the CCTV footage of Al-

Jannat Plaza situated at Muslim Abad in Hangu City, till 12:41 PM. I have also recorded the statement of different PWs in this regard. The plea of alibi taken by the accused was verified by me during the course of my investigation. The distance between upper Ghiljo and the Hangu can be covered within 45 minutes. It is correct that the said distance cannot be covered in less time than the time mentioned by me as 45 minutes. The distance between Orakzai HQ and Al-Jannat plaza might be 2 KM. It is correctly mentioned by me in my investigation that all the material collected by me in this case have verified the presence of the accused at the placed mentioned in the CCTV footages at the relevant date and time of occurrence and the same are in favour of accused.”

C-ii. The above assertion of the investigation officer has fully been corroborated by circumstantial evidence as he obtained the CCTV footage from the District Judicial Complex, Orakzai at Baber Mela through memory card and also took the footage record of Muslim Abad Jannah Plaza Market vide Recovery Memo Ex.PW-3/2, testified by marginal witnesses. These pieces of circumstantial evidence have further been testified by FSL vide Application Ex.PW-7/7 and Road Certificate Ex.PW-7/8. Report of Digital Forensic Expert (Ex.P-2) reflects that there is no editing and alteration found and annexed thereto the captured photographs from such video which are available on file as Ex.PW-2/2 and Ex.PW-2/3. The scientific evidence is confirming the presence of accused first at Court and then at Bazar on the day of occurrence. The CDR Ex.PW-7/8 available on file is also speaking about the presence of accused far away from the place of occurrence. The PW-5 Gul Asghar and PW-7 categorically admits that the distance between the place of occurrence and that of accused shown in the Bazar cannot be


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covered within the available span of time. In this scenario, Judgement reported as 2012 PCr.LJ (FSC) 816 provides that *“alibi had two basic ingredients; a defence by an accused person that he was some elsewhere at the time the crime in question was committed and the evidence given to prove that. Alibi was a form of defense, whereby a defendant attempted through reasonable evidence to prove that he was elsewhere when the crime in question was committed. Fact of an accused having been elsewhere, when the crime in question was committed had to be proved in reasonable legal terms. In legal usage and parlance, it would offer an explanation to avoid blame or justify action; as an excuse and was not merely personal excuse, but entailed reasonable satisfactory evidence. In the touch stone of this guideline, the plea of alibi taken at the very early stage was proved through direct and corroborative evidence; that too, confirmed by scientific evidence and thus is being relied upon by this Court. When the plea of alibi has been proved as true, what shall be the natural outcome of the circumstances, has already been discussed in a case reported as 2003 SCMR 150; reasonable possibility of the defence put forward by the accused being true, reacts upon the whole case in consequence whereof the accused is entitled to the benefit of doubt on the ground that the prosecution has not proved its case beyond reasonable doubt.*

C-iii. Sequel to above, the mode and manner in which the crime has allegedly been committed is reasonably doubtful; the benefit of which shall always be given to the accused not as a matter of grace but as a matter of right.

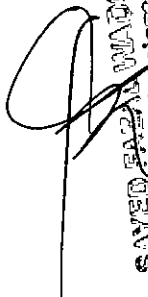
D. The Site Plan Ex.PB reflects that point No. 1 is allotted to deceased while point No.3 is allotted to accused Khadim Gul and the distance shown

is 20 paces which is equal to 30 feet according to Malak Abdul Janan Investigation Officer in his statement recorded as PW-7. The doctor while recording his statement as PW-4 confirmed Postmortem Report (Ex.PM), endorsement on injury sheet and inquest report (PM-1 and PM-2) which reflect that there was black charring marks around entry wound; skin and hair near the entry wound are burnt; and, thus testify that the fire was made from close distance not that of 30 feet. In such a manner, the post mortem report and injury sheet are negating the contents of FIR Ex.PA and entries in site plan Ex. PB.

9. The plea of alibi taken at the earliest stage; that too, proved with cogent direct circumstantial and scientific evidence, contradiction between the site plan and medico legal reports, unexplained delay, use of motive for false implication, defective and insufficient ocular evidence, no recovery, no corroboration, CCTV footage, CDR report, FSL results and other grounds had given birth to reasonable doubts in prosecution case. The benefit of such reasonable doubts are being given to accused facing trial.

10. As far as absconding accused Sharab Gul son of Nawab is concerned, he is fugitive from law and does not surrender to process of justice, is not entitled to any relief. He is willfully avoiding the arrest and had proceeded against by attracting provision of section-512 of the Code of Criminal Procedure 1898 with the object to preserve evidence against him. He is declared proclaimed offender. Perpetual warrant of arrest be issued against him and necessary entries be made in the register of police station concerned.

11. For what has been discussed above, the prosecution has not proved the offence of murder of deceased namely Umar Farooq, the brother of


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complainant, against the accused facing trial namely Khadim Gul son of Badshah Gul beyond the shadow of reasonable doubt. Resultantly, in case FIR bearing No. 47 dated 23-09-2020, registered under section(s) 302/324/34 of the Pakistan Penal Code, 1860 at Police Station Ghiljo Orakzai, for the murder/Qatl-e-amad of deceased named above, the accused facing trial Khadim Gul son of Badshah Gul, is hereby acquitted from the charges levelled against him. He is on bail, his bails bonds stand canceled and his sureties are absolved from the liabilities of bail bonds. 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.

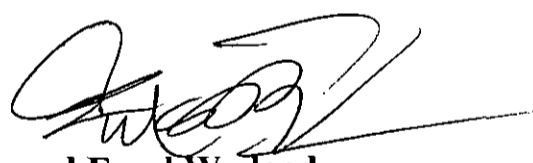
ANNOUNCED
18.02.2022



Sayed Fazal Wadood
Additional Sessions Judge Orakzai

CERTIFICATE:

Certified that this Judgment consists of fourteen (14) pages; each page has been read over and signed by me after making necessary corrections therein.



Sayed Fazal Wadood
Additional Sessions Judge Orakzai