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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.9/2 of 2021

Date of institution: 13.07.2021
Date of decision: 18.04.2022

The State through Hamesh Gul son of Ramzan, resident of Qaum Mala Khel, village Ghostang Daboori, District Orakzai.

.....(Complainant)

...Versus...

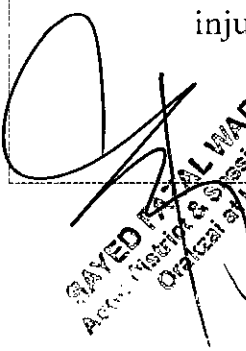
Muhammad Javid son of Mishti Khan, aged about 23/24 years, resident of Qaum Mala Khel village Ghostang Daboori, District Orakzai.

.....(Accused facing trial)

Case FIR No.07, Dated 08.02.2020 u/s 302/311/34 of the Pakistan Penal Code, 1860 and Section-15 of KP Arms Act, 2013; registered at Police Station Ghiljo, District Orakzai.

JUDGMENT

The prosecution case is that on 8th of February, 2020, Saleem Khan ASHO received information that a dead body has been brought to Civil Hospital Mishti Mela. He along with Police official paid visit to the Emergency Room of Civil Hospital, Mishti Mela where the dead body of Muhammad Shafiq s/o Ahmed Gul was lying. Ahmed Gul, the father of deceased, was present who reported that his son Muhammad Shafiq had gone to the mosque to offer prayer and after prayer, he was coming home back. When he reached to the place of occurrence, the accused Noor Rehman, Javid and Amin Khan Son(s) of Masti Khan, duly armed, started firing on him and as a result of their firing, he got hit and died on the spot. The report of the complainant was reduced into writing Murasila. The injury sheet and inquest report of the deceased was prepared and the deceased


SAYED FAZAL WADOOD
Acting District & Sessions Judge
Orakzai District
Hangu

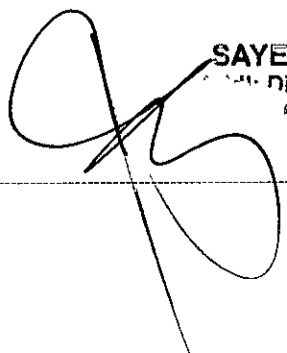
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61

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. The prosecution was allowed to produce its evidence and during the trial of the case, the prosecution produced and examined 08 PWs. The evidence is reproduced below for ease of reference and determination of guilt or innocence of the accused:

(i). Saleem Khan SHO, PS Ghiljo Orakzai, was examined as PW-1, who stated that *“during relevant days I was posted as ASHO to the PS Ghiljo. On 28-02-2020, I received information about the occurrence upon the same information. I rushed to the Civil Hospital Mishti Mela. In emergency room, one deceased Muhammad Shafiq dead body was present. The father of the deceased Ahmad Gul reported the matter to me. I endorsed report in shape of Murasila which was read over to him and thumb impressed the same by the complainant as a token of its correctness. I prepared the inquest report and injury sheet of the deceased and handed over the same to constable Aslam Farooq. I sent the Murasila to the PS for registration of FIR through the hands of Constable Syed Kareem. The Murasila is Ex.PA/1, inquest report is Ex.PW-1/1 and injury sheet is Ex.PW-1/2. I have also arrested the accused in the instant case and issued card of arrest which is Ex.PW-1/3. Today I have seen all the relevant documents which are correct and correctly bears my signature.*

(ii). PW-2 is the statement of Dr. Ijaz Medical Officer, who deposed that *“during the days of occurrence I was posted as MO at Civil Hospital Mishti Mela. On 08/02/2020 I conducted Post Mortem examination of deceased Muhammad Shafiq son of Ahmad Gul aged about 25 years r/o District Orakzai*



SAYED FAZAL WADOOD
District & Sessions Judge
Orakzai at Hangul

(62) (62)

brought by Saleem ASHO identified by his father Ahmed Gul and on examination of the dead body I found the following:

External Appearance

Mark of ligature on neck and dissection etc: Nil

Condition of subject stout emaciated etc, Home used clothing (black clothes).

Wounds, bruises, positions, size and nature

Multiple entry and exit wounds on neck

Cranium and Spinal Cord

Scalp, skull and vertebrae

02 entry wounds on right lateral side of neck of which exit is left lateral side of neck. 01 entry wound on back side of neck of which exist wound on left lateral ear of which half of the ear is missing.

Thorax- intact

Abdomen- intact

Muscles, bones and joints

No Wounds

Remarks of the Medical Officer

02 entry wounds on right lateral side of neck of which exit is left lateral side of neck. One entry wound on back side of neck of which exit wound on left lateral ear of which half of the ear is missing. It was fire arm injury.

The probable time that elapsed:

(a) Between injury and death- Nil

(b) Between death and post mortem- 2 to 3 hours

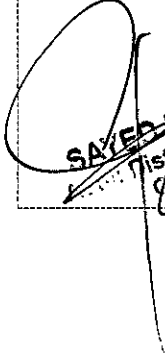

SAYED FAZAL WADOOD
District & Sessions Judge
Orakzai at Hangu

Today I have seen the post mortem report prepared by me consist on 06 pages including the pictorial which is Ex.PM which is correct and correctly bears my signature.

(iii). Abdul Manan, MM Police Station Ghiljo, was examined as PW-3, stated that "on 08-02-2020, I received Murasila brought by the constable Syed Karim sent by Saleem Khan SI/ASHO and on the receipt of Murasila I correctly incorporated the contents of Murasila into FIR Ex.PA. Today I have seen the FIR which correctly bears my signature. I received the case property and entered the same in the register No. 19 of the PS, to this extent my statement was recorded by IO u/s 161 Cr.PC."

(iv). PW-4 is the statement of Sajjad Khan OII of Police Station Ghiljo, who deposed that "on the days of occurrence I was posted as Incharge of Investigation PS Ghiljo Upper Orakzai. On 08-06-2021 the card of arrest of the accused Muhammad Javid was handed over to me by the SHO. On 09-06-2021 I drafted an application before the Illaqa Judicial Magistrate with the request of 07 days Police custody vide my application Ex.PW-4/1. 2 days custody was granted. On 11-06-2021, I drafted an application before the Illaqa Magistrate with the request of further 05 days Police custody vide my application Ex.PW-4/2. My application was turned down. I recorded the statement of accused under section 161 Cr.PC. After completion of investigation in instant case, the case file forwarded to SHO for onward proceedings."

(v). Nawaz Sharif, SI Police Station Ghiljo Orakzai, was examined as PW-5; stated that "I am the marginal witness to the recovery memo vide which the IO took into possession blood stained earth from the place of the deceased


SAYED FAZAL WADOOD
District & Sessions Judge
Orakzai at Hangu

2
(84) (62)

Muhammad Shafiq and sealed the same in parcel No. 1. The IO also took into the possession 03 empties of 30 bore from the place of the accused Noor Rehman which was laying in scattered condition and also took into possession 03 empties of 30 bore near the place of accused Javid. Further the IO also took into possession 05 empties of 30 bore from the place of Ameen Khan which was freshly discharged and sealed the same into parcel No. 2,3, 4 respectively. 3/3 monograms in the name of GJ were affixed on the parcel. I along with the other marginal witness Muhammad Haneef FC signed the recovery memo. The recovery memo is Ex.PW-5/1 and case property is Ex.P-1 to 4 respectively. Similarly I am also the marginal witness to the recovery memo Ex.PW-5/2 vide which the IO took into possession garments belonging to the deceased Muhammad Shafiq which was sealed into parcel No. 5 Ex.P-5. 03 monograms in the name of GJ affixed. I along with the other marginal witness namely Ashraf Ali FC PS Ghaljo. Similarly during the course of investigation the accused Noor Rehman pointed out the place of occurrence his presence as well as places of accused Javid and Ameen Khan mentioned in the site plan. The place of deceased Muhammad Shafiq and eye witness Ihsan Ullah. In this respect the pointation memo was prepared and I along with the other witness constable Waqas Khan signed the same which is Ex.PW-5/3. Similarly I am also the marginal witness to the recovery memo Ex.PW-5/4 vide which the IO recovered one pistol of 30 bore without No along with faxed magazines containing 03 rounds of 30 bore which was thrown by the accused in his room after the occurrence which was sealed in parcel No. 6 Ex.P-6. My statement was recorded u/s 161 Cr.PC. Today I have seen all the relevant documents which are correct and correctly bears my signature”


SAYED FAZAL WADOOD
District & Sessions Judge
Orakzai at Hangu

2
(68) (63)

(vi). PW-6 is the statement of Jahanzeb Khan, SHO PS Ghiljo Orakzai, who deposed that *"on completion of investigation I submitted complete challan in the instant case against the accused which is Ex.PW-6/1. Today I have seen the complete challan which is correct and correctly bears my signature"*

(vii). Arif Khan son of Khan Sabeel, r/o Ghustang Mala Khel Upper Orakzai, was examined as PW-7, stated that *"I identified the dead body of deceased before the doctor and police and my statement was recorded u/s 161 Cr.PC by the police. I put my thumb impression on the inquest report as identifier"*

(viii). PW-8 is the statement of Muhammad Ishaq, SI/IO PS Daboori, who deposed that *"after registration of FIR No. 7, 8 and 9, on 08-02-2020 the copies of the all the three FIRs and Murasila of each case were handed over to me for investigation. On 09-02-2020 I visited first the spot of deceased Muhammad Shafiq and Gul Nawab. During spot inspection I took into possession in case FIR No. 7 blood from the place of deceased Muhammad Shafiq and sealed into parcel No.1. and from the place of accused Noor Rehman I took into possession 03 empties of 30 bore and from the place of accused 03 empties of 30 bore and from the place of accused Amin Khan 05 empties of 30 bore freshly discharged and sealed into parcel No. 2, 3 and 4 respectively I put my signature on the empties with pointed object vide recovery memo already Ex.PW-5/1 in the presence of marginal witnesses. I also recovered in case FIR No. 8 from the place of deceased Gul Nawab blood stained earth and sealed into parcel No. 1. I also took into possession 05 empties of 30 bore from the place of accused Noor Rehman and sealed into parcel No. 2 and from near the place of accused Javid 05 empties of 30 bore were recovered which was sealed into parcel No. 3 and similarly from the place of accused Amin Khan 03 empties of 30 bore and sealed*


SAYED FAZAL WADOOD
Asst. District & Sessions Judge
Orakzai at Hangu

2
66
64

into parcel No. 4. All the empties were freshly discharged. I prepared recovery memo in case FIR No. 8 which is already Ex.PW-5/1. I prepared the site plan Ex.PB at the instance of eye witness Ihsan Ullah. I recorded the statement of Ihsan Ullah eye witness on the spot and also recorded the statement of marginal witnesses to the recovery memo. After the spot inspection in case FIR No. 7 and 8 I visited the place of occurrence in case FIR No. 9. I took into possession 03 empties of 30 bore from the place of accused Noor Rehman which were freshly discharged and also took into possession blood stained earth from the place of deceased Peena Bibi and sealed into parcel No. 2 in the presence of marginal witness. I prepared site plan in case FIR No. 9 on the pointation of Saleem Khan ASHO. I searched the accused for the purpose of his arrest and in this respect the house of accused was searched and prepared search memo. I arrested accused Noor Rehman vide his card of arrest. Whereas the accused Javid and Amin could not be arrested. I was present on the spot where I received the garments of deceased Muhammad Shafiq consist of Qamees Shalwar black color, one black leather coat blood stained sent by the doctor through constable Ashraf Ali and sealed into parcel No. 5 vide recovery memo already Ex.PW-5/2 in case FIR No. 7 in the presence of marginal witnesses. I also took into possession the blood stained garments of deceased Gul Nawab consist of Qamees Shalwar black color one banyan and one leather coat black color and sealed into parcel No. 5 vide recovery memo already Ex.PW-5/1 in case FIR No.8. I also took into possession in case FIR No. 9 the blood stained garments of deceased mst; Peena Bibi consist of Qamees Shalwar, flowered chadar black color brought by Ashraf Ali constable and I sealed into parcel No.3 vide recovery memo. I searched the accused Javid and Amin in the vicinity but they

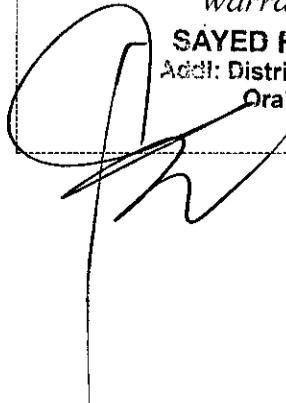
RAYED FAZAL WADOOD
District & Sessions Judge
Creekza at Hangu

67 65

were not available and were avoiding their arrest and I prepared search memo Ex.PW-8/1. I returned to the PS after inspection of spots of all the three cases. I have also arrested the accused Noor Rehman and issued his card of arrest Ex.PW-8/2. I interrogated accused Noor Rehman. On the next day i.e. 10-02-2020 I produced the accused for custody before the Illaqa Magistrate vide my application Ex.PW-8/3 which was allowed and 02 days police custody was granted. The accused was interrogated during custody. The accused pointed out the place of occurrence vide pointation memo already Ex.PW-5/3. On the pointation of accused one pistol 30 bore without No. with fixed charger containing 03 rounds of 30 bore was recovered vide recovery memo already Ex.PW-5/4 which the weapon of offence in all the FIRs No. 7,8, and 9. I prepared the sketch of pointation by the accused Noor Rehman Ex.PW-8/4. I recorded the statement of witnesses to the pointation memo. The accused confessed his guilt during investigation and I recorded the statement of accused u/s 161 Cr.PC. I produced the accused vide my application Ex.PW-8/5 for recording his confessional statement and the accused confessed his guilt before the Illaqa magistrate and thereafter the accused was sent to Judicial Lock-up. I received the PM reports of the 03 deceased and placed it on file in case FIR Nos. 7, 8 and 9. I prepared list of legal heirs of deceased Muhammad Shafiq which is Ex.PW-8/6. I dispatched the blood stained earth and garments of the deceased to the FSL through constable Waqas vide application Ex.PW-8/7. I also sent the empties of 30 bore vide my application Ex.PW-8/8 to the arm expert. The road certificates in this respect are Ex.PW-8/9 and Ex.PW-8/10. I received the FSL reports Ex.PZ and Ex.PZ/1. I recorded the statement of witnesses. I obtained

warrant u/s 204 Cr.PC and proclamation u/s 87 Cr.PC against accused Javid

SAYED FAZAL WADOOD
Addl: District & Sessions Judge
Orakzai at Hangu



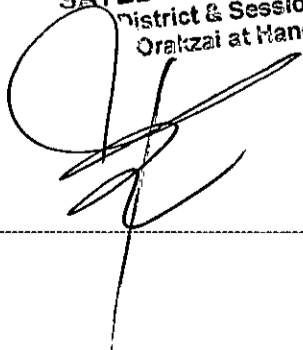
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and Amin Khan incase FIR No. 7 and 8 vide my application Ex.PW-8/11 and Ex.PW-8/12. I also added section 311 PPC in the case against the accused. On completion of investigation I handed over the case file to the SHO for onward submission. Today I have seen all the documents prepared by me which are correct and correctly bears my signature”

5. The complainant and eye witness both have been issued notice to record their statements as prosecution witnesses but the notices returned unserved. On repeating notices, it was surfaced that the complainant as well as the eye witness have shifted to some unknown place and are not available to be examined by the Court. The SHO concerned was tasked to trace out both the persons being important witnesses of the occurrence but he also failed to trace them out or arrest them. Statement of DFC concerned was recorded as CW-01; wherein, he confirmed the fact of shifting of both the witnesses to some unknown place. The Senior Prosecutor and defense counsel agreed on transposing the statements of complainant and eye witnesses as PW-9 and PW-10. Their joint statement was recorded and both the statements earlier recorded in the trial of co-accused in Criminal Case No. 6/2 of the year 2020 have been transposed in instant case; however, the portion dealing the confession being irrelevant to the present accused shall be excluded from consideration.

6. On closure of the prosecution evidence, the statement of accused was recorded under section 342 Criminal Procedure Code, 1898, wherein, the accused denied the allegations leveled against him; however, he refused to be examined on oath or to produce defense evidence.

SAYED FAZAL WADOOD
District & Sessions Judge
Orakzai at Mangu



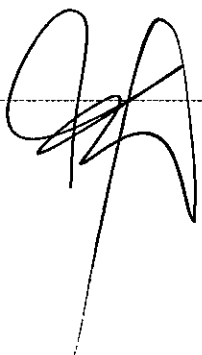
7. Senior Public Prosecutor for the State argued that accused is directly charged with specific role of firing on the deceased. The blood stained earth and empties have been recovered from the spot which confirm the venue of offence. FSL reports available on file also supports the version of prosecution. He concluded that direct and circumstantial evidence in the case against accused established the case of prosecution which is cogent and confidence inspiring evidence and sufficient to prove guilt of accused.

8. Conversely, counsel for the accused opposed the arguments of Sr.PP by stating that the complainant did not appear as eye witness as he was not present at the time of occurrence. The eye witness Ihsan ullah was later on introduced in the case and his name is neither mentioned in the report by the complainant nor in his statement before the court; hence, his evidence is not believable even if he was examined. The complainant and eye witness Ihsan Ullah did not testify the event and thus ocular evidence is not available. Empties and 30 bore pistol was sent to the FSL with delay which is not explained in the evidence of prosecution. The crime weapon was already in possession of Police official and is planted against the accused which was neither recovered from the possession of the accused at the time of his arrest nor was the same recovered from the house of accused at the time of search. That the prosecution case is full of doubts, the benefit of the same is required to be extended to the accused in line with the judgements reported as 2020 MLD 1862, 2020 YLR 1398, 2020 P.Cr.LJ 729, 2016 P.Cr.LJ 836, 2016 P.Cr.LJ 1815, 2013 YLR 230, 2019 P.Cr.LJ 46.

9. The prime evidence of the prosecution is the confession of guilt of co-

accused Noor Rehman. His confessional statement was recorded in line with

SAYED FAZAL WADOOD
Addl: District & Sessions Judge
Orakzai at Hangu



2
76 68

Section 164 read with 364 of the Code of Criminal Procedure, 1898 by the then learned Judicial Magistrate; but, this confession has already been discarded by the then learned Trial Judge vide Judgement dated 16-04-2021 passed in a Session Case No. 06 of 2020. It is clear from record that the accused facing trial is Muhammad Javid who is not the maker of confession. Confession made by co-accused (Noor Rehman) who has already been acquitted is retracted and uncorroborated; therefore, cannot be considered as substantive piece of evidence. The confession or a retracted confession of a co-accused are almost on the same footing, and both of them require the strongest corroboration with a view to base conviction on the facts stated therein. If there is no independent corroboration then the conviction of the co-accused merely on the confession is illegal; settled in a Judgement reported as 1982 SCMR 321.

10. Ocular evidence of the incidents is reportedly the complainant and one Ihsan Ullah. Both the alleged eye witnesses failed to appear before the Court and to be examined. They have been issued notices, warrant of arrest and all efforts have been ensured to procure their evidence being important for reaching to the just conclusion of the matter; but, all in vain as they have shifted to some unknown place. Their examination as PW-5 and PW-8 in Case No.06/2 of 2020 pertaining to the trial of co-accused have already been disbelieved by the then learned Trial Judge on the score of being planted due to relationship with deceased. Similarly, this ocular evidence has already been questioned to be ocular evidence in Judgement dated 16-04-2021. The witnesses so listed as ocular did not record their statements and thus no further evaluation of the transposed statements is required. The Investigation Officer has categorically

SAYED FAZAL WADOOD
Addl: District & Sessions Judge
Orakzai at Hangu

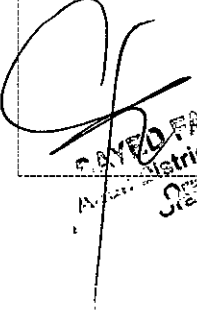
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stated that complainant is not the eye witness and the second eye witness Ihsan Ullah is chance witness with no explanation of being available at the spot.

11. Three empties of 30 bore pistol have been shown recovered from the spot vide recovery memo Ex.PW-5/1 and this has been attributed to the accused facing trial. Prosecution has recovered empties of same nature and attributed some of empties to one accused and rest to other without explaining the distribution criteria. It was neither from direct possession of accused facing trial nor recovered on his pointation.

12. The absence of complainant and eye witness followed by their no examination as witnesses in trial of this accused commenced on supplementary challan; the evidence available on file has already been disbelieved by my learned Predecessor in Office in trial of co-accused; the acquittal of co-accused vide Judgement dated 16-04-2021; no recovery of weapon of offence except empties attributed to present accused without any logical or scientific formula; no ocular evidence; circumstantial evidence disconnected; major contradictions in the oral evidence; and, not proving the manner and mode of offence had given birth to reasonable doubts in the prosecution case; the benefit of which shall be extended in favor of accused as is mandated by law.

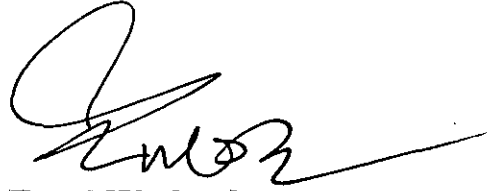
13. For what has been discussed above, the prosecution has not proved the case against the accused facing trial namely Muhammad Javid son of Masti Khan beyond the reasonable doubt. Resultantly, in case FIR bearing No. 07 dated 08-02-2020, registered under section(s) 302/311/34 of the Pakistan Penal Code, 1860 read with Section 15 KP Arms Act, 2013 Police Station Upper Orakzai, the accused is hereby acquitted from the charges levelled against him. He is in


FAYAZ WADOOD
District & Sessions Judge
Orakzai at Hangu

2 (72) (70)

custody and be set at liberty if not required in any other case. 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
18.04.2022



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