

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

BEFORE THE COURT OF
ADDITIONAL SESSIONS JUDGE, ORAKZAI

Cr. Revision No. 3/10 (R) of 2022

Date of institution: 12.05.2022
Date of decision: 29.06.2022

Tajid Ali son of Asad Ali r/o Qaum Mani Khel, Qalat, Kalaya District
Orakzai. **(Petitioner/complainant)**

...Versus...

The State through Mst Ainola Jan widow of Asad Ali r/o Laki Mela Qalat
Kalaya Orakzai. **(Respondent/2nd party)**


**Criminal Revision against Order No.3 dated 11.05.2022 in Case No. 2/4 of
2022.**

JUDGMENT

The petitioner/accused Tajid Ali has moved instant Criminal Revision
Petition against the Order of learned Senior Civil Judge, Orakzai/Magistrate
empowered under Section-30 of Code of Criminal Procedure, 1898; whereby,
application for recording statement of witness under Section 164 of Code of
Criminal Procedure, 1898 has been allowed.

2. Petition is grounded that petitioner is complainant in case registered vide
FIR bearing No. 36 dated 06-04-2022 under Section 302/34 of the Pakistan Penal
Code, 1860, of Police Station Kalaya. He being complainant has charged Waiz
Ali and Tanwar Ali for commission of Qatl-e-amd of his brother deceased Qasid
Ali. A lady namely Ainola Jan who happens to be the real mother of complainant
and step mother of the deceased has been persuaded by accused party to present
application for recording statement as witness under Section 164 Code of
Criminal Procedure, 1898. This application was accepted vide impugned Order
without affording opportunity of cross examination to the petitioner/complainant.

The lady Mst Ainola Jan has already been divorced by the father of complainant


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Addl. District Sessions Judge
Orakzai at Hangu

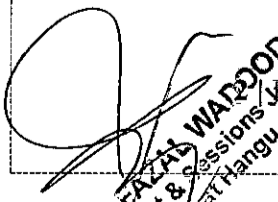
and deceased and she is by now residing in the house of the rivals of complainant and deceased. The statement so recorded is based on mala fide to indulge the complainant and eye witness as accused and to save the real nominated accused with whom she is residing and are her nephews. The prosecution has not forwarded application nor has opportunity been provided either to complainant or prosecution to cross examine the lady witness. It was prayed that either the statement may be discarded or the complainant may be provided opportunity of cross examination.

3. Learned counsel representing petitioner/complainant argued that the witness being divorced by the father of deceased and complainant as well as permanent resident of the house of nominated accused has moved the Court with application for recording statement under Section 164 Code of Criminal Procedure, 1898 with mala fide to implicate the eye witness and complainant as accused and to save the nominated accused from the clutches of criminal law already brought into motion against them. He concluded that right of cross examination being valuable right of the petitioner has illegally been denied that needs interference of this Court.

4. Respondent was issued Notice bearing No. 2592 dated 19-05-2022 which was duly served through lady with the channel of his nephew namely Intekhab. He put appearance on 03-06-2022 and remained in attendance but absent today.

5. Counsel for petitioner and APP were heard at length and case record gone through.

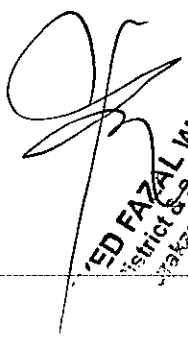
6. Perusal of case file reflects that learned Senior Civil Judge has recorded statement of the lady as witness by attracting jurisdiction under Section 164


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Additional District & Sessions Judge
Orakzai, FATA

Code of Criminal Procedure, 1898, which is within his power and competence. Law on the subject is crystal clear that the Magistrate has got power to record statement not only at the instance of police but also at the instance of accused, aggrieved person or that of the witness himself; case reported as 2005 YLR 1403 can be referred for drawing the wisdom. Hence, recording of statement was valid, legal and in accordance with law.

7. When it has been inferred that statement was rightly recorded, the question for determination in instant criminal revision is mere second part of the statement where the right of cross examination starts. It is prevailing practice that the Magistrates competent to record statement under Section 164 Cr.PC, records the statement at the instance of Police, accused, complainant and witness and does not issue notice to the opposite party. The Court treats such like statements at par with the statement recorded under Section 161 Cr.PC by the Police and uses it only for the purpose of contradiction and corroboration at the time of trial. In this very preposition, a case reported as 2001 PCr.LJ 199 may be referred for taking guidance; the relevant part is reproduce herein below:-

“The statement of a witness u/s 164, Cr.PC is a step towards collection of evidence during the course of investigation and not receiving the evidence. It cannot be considered as a higher pedestal that this. The statement u/s 164 is also meant for corroboration or contradiction if recorded in absence of the accused. The statement of witness u/s 164 can only be acted upon as a substantive piece of evidence if it is recorded in presence of the accused after sufficient notice and proper opportunity for cross examination is given to such

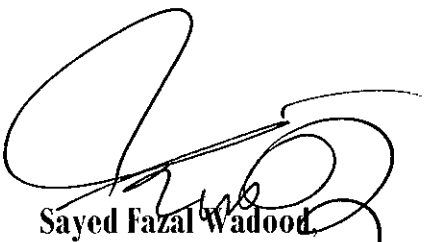

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Muzakki, Mangaluru

accused. The evidentiary value of the statement u/s 164 Cr.PC depends upon the peculiar facts and circumstances of the case.

8. The order sheet of the present case reflects that the complainant of original case was before the Court and has objected over the acceptance of application and when availability of the complainant being aggrieved person was insured, it was necessary for the learned Magistrate to provide opportunity of cross examination.

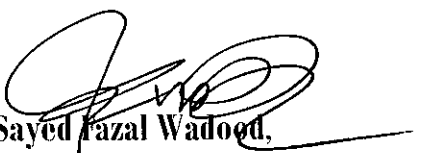
9. In view of above observations, this Court holds the opinion that there exist ground for interference in the impugned Order. Resultantly, instant Criminal Revision Petition stands allowed. Learned Magistrate is therefore directed to provide opportunity of cross examination over the statement recorded under Section 164 Code of Criminal Procedure, 1898. Requisitioned record be returned back with copy of this Judgement and file of this Court be consigned to District Record Room, Orakzai after necessary completion and compilation within span allowed for.

Announced in the open Court
29.06.2022


Sayed Fazal Wadood,
AD&SJ, Orakzai at Baber Mela

CERTIFICATE.

Certified that this Judgment consists of three (03) pages; each of which has been signed by the undersigned after making necessary corrections therein and read over.


Sayed Fazal Wadood,
AD&SJ, Orakzai at Baber Mela