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**IN THE COURT OF ABDUL BASIT
ADDITIONAL SESSIONS JUDGE-II/JUDGE SPECIAL COURT,
ORAKZAI**

Case no. 06/02 of 2022

Date of institution: 21.06.2022

Date of decision: 02.02.2024

Date of consignment:

The State through Sher Rehman son of Malak Rehman aged about 28 years, caste Bar Muhammad Khel, tappa Mirazi Khel, resident of Sra Khoona, District Orakzai (Complainant)

Versus

Sabit Ali son of Amir Mehdi caste Bar Muhammad Khel, Tappa Mirazi Khel, resident of Sra Khoona of District Orakzai (accused facing trial)

**FIR No. 09 DATED: 20.03.2022 U/S 302 PPC
KUREZ BOYA POLICE STATION, ORAKZAI**

JUDGMENT

1. Accused named above is facing trial in subject FIR No. 09 dated 20.03.2022 u/s 302 PPC of Kurez Boya Police Station, Orakzai.
2. Brief facts are that, the police party on receiving the information of occurrence, rushed to Tehsil Headquarter Hospital, Kalaya & found Sajid Ali s/o Malak Rehman (the deceased) lying dead there; that Sher Rehman, (the complainant) being brother of deceased reported to the police in the THQ Hospital that on 20.03.2022 at 1600 hours, he was present in his home when heard the fire shots from joint hujra situated near to the house; that he rushed to the joint hujra and found dead body of his brother Sajid Ali besmeared with blood lying there and accused Sabit armed was making his escape from the place of occurrence; that he called the accused to stop but he did not; that the occurrence was witnessed by complainant, who has charged the accused for murder of his brother Sajid Ali.

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3. Accused was arrested on 24.03.2022 and complete challan was submitted against him for trial.
4. Accused was summoned through *zamima bay*. On his attendance, the copies of the case furnished to accused under section 265-C Cr.PC. The accused was then charge sheeted u/s 302 PPC to which he pleaded not his guilt and claimed trial.
5. Prosecution produced following evidence in support of its case;
6. PW-1 is the statement of Muharrir Ain Ullah, who incorporated the contents of murasila into FIR, Exh.PA, and kept the case property in *malkhana* for safe custody. Hassan Jan SI was examined as PW-2, who has incorporated the report of complainant into murasila, Exh. PA, prepared injury sheet, Exh.PW 2/1, and inquest report, Exh.PW 2/2. Mohsin Ali, SI/IO was examined as PW-3, who has conducted the investigation in instant case. He prepared site plan, Exh.PB. He produced Parcel No. 1 containing blood stained earth, Ex.P-1, two empties of .30 bore in parcel No. 2, Ex.P-2, and recovery memo, Exh.PW 3/1, regarding parcel no.1 and 2. Similarly, he produced parcel no. 3, Ex.P-3, containing shirt and trouser alongwith banyan of deceased and parcel no. 4, Ex.P-4, containing spent bullet and took those parcels through recovery memo, Exh.PW 3/2. He has prepared list of legal heirs, Exh.PW 3/3. He arrested the accused on 24.03.2022 and issued his card of arrest, Exh.PW 3/4. He drafted two applications, Exh.PW 3/5 and Exh.PW 3/6, before the Judicial Magistrate for obtaining physical custody of accused. He sent parcel no. 1 and 3 to FSL through constable Shamsher Ali vide application, Exh.PW 3/7, and road permit certificate, Exh.PW 3/8. He also sent

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parcels no. 2 and 4 through constable Shamsher Ali vide application, Exh.PW 3/9, and road permit certificate, Exh.PW 3/10. He produced FSL reports, Ex.PZ and Ex.PZ-1. He produced daily diary regarding departure and arrival of SHO and constable Shamsher Ali, Exh.PW 3/11 and Exh.PW 3/12. After completion of investigation, he handed over case file to SHO for onward submission of challan. Shamsher Ali constable was examined as PW-4, who submitted that both the recovery memos were prepared by the investigation officer in his presence. The IO handed over the parcels no. 1-4 for submission of the same to FSL for chemical analysis and he took the same to FSL. Dr. Mujahid Hussain, was examined as PW-5, who has conducted the post-mortem examination of deceased Sajid Ali. He exhibited the injury sheet, Exh.PW 5/1, inquest report, Exh.PW 5/2 and the post mortem report, Exh.PA. PW-6 is the statement of constable Navid Ali, who handed over injury sheet and inquest report to doctor on duty at DHQ hospital Mishti Mela. He returned to the PS with injury sheet, inquest report and blood stained garments of the deceased and one spent bullet and handed over the same to investigation officer in the PS. Statement of complainant Sher Rehman was recorded as PW-7, who had shifted the dead body of his deceased brother to the hospital for post mortem examination and has charged the accused for murder of his brother and verified the contents of his report. Nafeeda Jan (widow of the deceased Sajid Ali) was examined as PW-8, who stated that a dispute on theft of cows had taken place between accused Sabit ali and her deceased husband Sajid Ali. That on eventful day, she heard the fire shots, came out of her house and

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found Sabit Ali standing under the tree with pistol in his hand after committing the murder of her husband. She charged accused Sabit Ali for committing murder of her husband. PW Muhammad Hussain was abandoned by the prosecution being abroad, PW Shams Ali and Shahadat Ali were abandoned being won over, constable Akseer Ali was abandoned being witness of the same fact narrated by PW-4 and PW Khair-un-Nissa was abandoned being dead.

7. The prosecution closed its evidence.
8. The statement of accused was recorded under section 342 CrPC, wherein, he again denied from the charges and adhered to his innocence. In reply to a question, he neither wished to be examined under oath nor to produce evidence in defense.
9. Arguments heard and record perused.
10. Learned APP for State argued that the prosecution has proved the case against accused beyond shadow of reasonable doubt; that prosecution witnesses are consistent in their statements; that FSL result is in positive; that there is no malafide on part of prosecution to falsely involve the accused in the case, thus, requested to award him maximum punishment.

Counsel for accused argued that prosecution has failed to prove its case against accused beyond reasonable shadow of doubt; that prosecution evidence contradicts & suffers major inconsistencies; that prosecution case is full of doubts because prosecution witnesses materially contradicted each other; that the accused facing trial has not confessed his guilt; that case against accused is not proved and request is made for the acquittal of accused.

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12. In view of arguments advanced by learned counsel for parties, the evidence and record before the court, it is held that all cases are decided on the basis of evidence led by parties. In criminal cases, prosecution is mostly burdened to prove the case against accused by producing undented evidence on file. The Qanun-e-Shahadat Order, 1984 provides that evidence is either oral or documentary. In criminal cases, most of times, the nature of evidence is oral. Article 71 of The Qanun-e-Shahadat Order, 1984 provides that when evidence is oral, it must in all cases, whatever, be direct that is to say; if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; if it refers to a fact which could be perceived by any other sensor or in any other manner; it must be the evidence of a witness who says he perceived it by that sense or in that manner; if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. In the instant case, complainant has alleged that he was present in his home, when he heard fire shots from joint hujra situated near to his home, whereat, he rushed to the hujra and found his brother besmeared with blood lying dead there and the accused armed with weapon was making his escape good. Similarly, Mst. Nafida Jan also came in the witness box and deposed that on eventful day she heard the fire shots at about 4'o clock, whereat, she came out and saw the accused standing under the tree while holding pistol in his hand, which shows that both these witnesses have not seen accused committing the murder


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or making fire at deceased rather the earlier has seen him making his escape good from the place of occurrence, whereas, the latter saw him standing under the tree holding the pistol in his hand, which avails that there is no direct evidence on record and fate of the whole case shall be based on circumstantial evidence.

13. This is a general phenomenon that when an accused commits any crime or offence, he leaves the spot as earlier as possible, however, in the instant complainant deposed that as soon he heard the fire shots, he rushed to the place of occurrence situated at a distance of 500 paces, which he has covered in three minutes time but this is strange to observe that accused was still waiting for him to come and see him making his escape good. Besides, he deposed that they have shifted the deceased to THQ Hospital Kalaya (the hospital), where he has made the report, which is strange because complainant himself reported that when he attracted to the hujra, he found the deceased lying dead there but despite this, the deceased was shifted to the hospital instead of taking to police station for lodging the report.

14. There are also contradictions observed in the prosecution case. The complainant (PW-7) deposed that after shifting the deceased to the hospital, they remained in the hospital for three hours, did not visit any other hospital and left for home around 11.30 pm, however, the investigation officer explained that at first the deceased was brought to Kalaya Hospital but due to non-availability of facilities there, the deceased was shifted to DHQ Hospital, Mishti Mela, where from, he has received the post-mortem report. Similarly, post-mortem report available on file also provides that at first the station of post-mortem

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of deceased was entered as THQ Hospital Kalaya, however, it was admittedly removed by using whitener and replaced with The DHQ, Mishti Mela. To this, doctor (PW-5) explained that earlier the name of Dr. Mujahid was written there mistakenly; therefore, in order to make the correction, the whitener was used and correction was made accordingly, which not only makes the statement of doctor false but also makes post-mortem report prepared by him to be untrustworthy because the words "Kalaya THQ" can still easily be read beneath the whitener. In addition to this, the doctor has not mentioned in post-mortem report the time of production of deceased and time he has consumed in the post-mortem.

15. There is also contradiction noted with regard to time of occurrence and time of post-mortem of deceased because as per complainant, the occurrence has allegedly taken place about at 04.00 pm, whereas, he has shifted the dead body to the hospital at 08.30 pm, where he first made the report and left the hospital at 11.30 pm, however, as per statement of investigation officer (PW-3), there were no proper facilities available in the hospital and the dead body was shifted to DHQ Mishtil Mela, where the post-mortem of the deceased was allegedly conducted and the time between death and post-mortem was reported as four hours, which should not have been earlier than five hours i.e. 09.00 pm from time of making the report.

16. In same manner, Mst. Nafida Jan (PW-8) though alleged that she has seen accused holding the pistol in his hand under the tree but this does not appeal to prudent mind that a person after committing the murder of a person shall keep holding the pistol in his hand and

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would be standing relax holding a pistol in his hand under the tree. She has also admitted that she was not eye-witness of the case and when the occurrence has taken place, she was at home; therefore, her statement cannot be relied on this score too.

17. The site plan is also an important piece of evidence but it appears that prosecution has also managed to prepare a concocted site plan just to fill up the lacunae. The complainant straightaway stated that the local police did not prepare the site plan on his pointation; however, investigation officer (PW-3) deposed that he has prepared the site plan on the pointation of complainant, which questions the genuineness of site plan. Even, the site plan also appears to be bogus because admittedly no one has seen accused making fire at deceased but point mark 2 referred in the site plan provides that accused has made fires at deceased from said point. Likewise, there is neither any place marked in the site plan reflecting that as to from which point, the complainant has seen the accused nor any point was given to accused that on such a point, the accused was present, when the complainant has seen the accused making his escape good. More so, the complainant has alleged that there was a joint hujra situated near the house, however, site plan only reflects that the occurrence has taken place inside Imam Bargah. Even, the site plan is not endorsed or signed by complainant nor it is mentioned there that investigation officer has prepared it on his own personal observations.

18. More so, the FIR was chalked out at 2030 hours (10.30 pm) but investigation officer (PW-3) stated that copies of murasila report and FIR was handed over to him at 2230 hours, at the exact time, it was about to be chalked. So much so, investigation officer also stated

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that he has left the police station at 2240 hours and reached to the spot at 2340 hours (11.40 pm), however, Shamsher Ali (PW-4), the one who has accompanied the investigation officer to the spot for investigation, has been found to be more fast and stated that they have reached to the spot at 2340 hours (10.40 pm), which is out of mind. This witness also deposed that investigation officer has also recorded the statement Shams Ali but strange enough he was not produced as witness before the court on pretext that he has been won over and thus avails that the best available evidence was withheld and would lead to adverse inference that had he been produced before the court, the truth would have been surfaced.

19. There is also conflict in statements of prosecution witnesses with regard to handing over the blood stained cloths of the deceased to investigation officer. Complainant stated that they including Naveed (Constable) and Hassan Jan (SHO) reached back to home at 02.30 am and he has handed over the blood stained cloths of the deceased to Naveed at home, however, Naveed Ali (PW-6) stated that doctor has handed over him the blood stained garments and spent bullet in the hospital and on his return to hospital, he has handed over to the investigation officer there. On the other side, investigation officer (PW-3) deposed that on 20.03.2022, he was present in the police station, where constable Hasrat Ali has handed over him the blood stained garments of deceased and spent bullet, which he has taken into possession vide recovery memo, Exh.PW 3/2. This part of the statement of investigation officer is also contradictory to his time of arrival from the spot to the police station because he has alleged his return from spot to police station on 21.03.2022 at 02.00 am, whilst,

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receiving of the garments of deceased on 20.03.2022, which leads to adverse inference and apprehends that the investigation officer has not visited the spot and remained in police station and investigation proceedings was conducted by someone else. All these contradictory facts further speak volume about mode and manner of the events and create reasonable doubt about fair investigation in the instant case.

20. There is no recovery of weapon of offence from the accused nor has he confessed his guilt. There is neither eye-witness nor independent witness to the occurrence. The occurrence has allegedly taken place in joint hujra or Imam Bargah at day time and the accused was only witnessed by complainant and Mst. Nafida Jan, who are interested witnesses at one hand and have not seen the accused committing the murder of deceased. There are only two crime empties recovered from the spot, whereas, post-mortem report and pictorial available on file depicts that deceased has received four entry wounds on his body availing that four fires were made at deceased. Likewise, the post-mortem report provides four entry wounds, however, there are no corresponding exit wounds, whereas, the pictorial suggests only one entry wound and the rests as exit wounds, which post-mortem is contradictory in itself and cannot be believed on this score too.

So far motive part of the case is related, complainant did not utter a single word in his report and statement that there was any previous enmity between the deceased and accused or they were at daggers drawn. Mst. Faida Jan, however, introduced motive part for the first time in her statement revealing that few days before the occurrence, the accused and Zulfiqar have blamed deceased for the theft of cows in the village and there were rumors that deceased would be killed

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and the occurrence had happened, however, not a single independent person from the village was produced as witness of these fact before the court to prove the motive part.

- 22. It is a golden principle of criminal law justice that let all the accused be acquitted than to punish an innocent soul unless the prosecution has succeeded to prove the guilt against him beyond the shadow of reasonable doubt. In the instant case, there are many lacunae noted above, which does not attract the conscious of a prudent mind that the accused has committed the offence, hence, while extending him the benefit of doubt, the accused Sabit Ali is acquitted from the charge leveled against him. Since, he is behind the bars in Sub-Jail, Orakzai; therefore, he be released forthwith if not required to be detained in any other case.
- 23. Case properties be dealt with in accordance with law after expiry of period of appeal etc.
- 24. File consigned to record room after completion and compilation.

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CERTIFICATE

It is certified that this judgment consists of eleven (11) pages and each page is duly signed by me after necessary correction.

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