

IN THE COURT OF BAKHT ZADA
 ADDITIONAL SESSIONS JUDGE-I, ORAKZAI (AT BABER MELA)

SESSION CASE NO. : 03/02 OF 2021
 DATE OF ORIGINAL INSTITUTION : 27.10.2021
 DATE OF PRESENT INSTITUTION : 09.10.2024
 DATE OF DECISION : 17.12.2024

STATE THROUGH NASEEM KHAN SHO, PS GHILJO.
(COMPLAINANT)

-VERSUS-

1. KHAISTA ASGHAR S/O MIR ASGHAR,
2. RIAZ S/O UBAID KHAN,
3. MUHAMMAD ZUBAIR S/O AJMIR KHAN,
4. FAZAL MANAN S/O AWAIS KHAN,
5. MIR ASKAR S/O KHIAL AKBAR,
6. JAMAL GUL S/O NASRULLAH,
7. DAD KHAN S/O BAHADUR KHAN,
8. WAKEEL KHAN S/O HAKIM KHAN,
9. KHIAL BAHADUR S/O MENADAR,
10. BARAICH S/O ABDUL MAJEED,
11. HABIB ULLAH S/O KHIAL AFZAL,
12. ABDUL LATIF S/O MALOOK SHAH,
13. ZALIM SHAH S/O ISLAM SHAH,
14. ABDUL RAZIQ S/O SAKHI BADSHAH,
15. LAL QADIR S/O SADAT SHAH,
16. JALAT KHAN S/O MUHAMMAD AYUB,
17. MUHAMMAD SHAKEEL S/O GUL NAZIR,
18. BILAL SHAH S/O SALMAN SHAH,
19. MUHAMMAD SAJID S/O ASGHAR,
20. UMAR HAYAT S/O ZADA,
21. ISLAM BAHADUR S/O KHAN BAHADUR,
22. HASSAN BAHADUR S/O KHAN BAHADUR,
23. TAZA KHAN S/O YAQOOB KHAN,
24. KHALIL REHMAN S/O HABIB REHMAN,
25. JAMAL SHAH S/O ZARMAT SHAH,
26. AKHTARMAN SHAH S/O MADAM SHAH,
27. RASOOL BADSHAH S/O SAHIB BADSHAH,
28. LUQMAN S/O ABDUL KAMAL,
29. AZMAT GUL S/O SAHIB HUSSAIN,
30. MASTAN AKBAR S/O ABDUL KAMAL,
31. PAYO SHAH S/O DOLAT SHAH,
32. AMIN ULLAH S/O FAZAL AKBAR,
33. ZAR MUHAMMAD S/O NOOR MUHAMMAD,
34. FEROZ KHAN S/O HASSAN KHAN,
35. HASHIM GUL S/O HAIDAR GUL;
36. JAVID AKBAR S/O EID AKBAR,
37. KHAN GUL S/O RAZEEM KHAN,
38. KHAWAR KHAN S/O BAGHI SHAH,
39. MUHAMMAD RAHEEM S/O ABDUL RAHEEM,
40. MALAK MUSA KHAN S/O SHEHZAD,

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41. SALIM KHAN S/O MALIK MUSA,
42. SUNAB KHAN S/O MAZHAR KHAN,
43. SAWAB GUL S/O HUSSAIN SHAH,
44. MUHAMMAD KARIM S/O ABDUL QAYYUM,
45. KHAN SHAH S/O MALIK IMAN,
46. FIRDOS S/O KHAN GUL,
47. KHIAL AKBAR S/O GUL ASGHAR,
48. SHAFIQ KHAN S/O HAKIM KHAN,
49. IZZAT GUL S/O SAHIB HUSSAIN,
50. SAILAL SHAH S/O SULAIMAN SHAH,
51. HAZRAT KHAN S/O WAR KHAN,
52. KHAISTA MIR SHAH S/O SULTAN SHAH,
53. UMAR BADSHAH S/O HAJI BADSHAH,
54. HAFIZ ULLAH S/O SULTAN AKBAR,
55. AZMAT ULLAH S/O FEROS KHAN,
56. QASIM GUL S/O SPEEN GUL,
57. ZAR MUHAMMAD S/O SHER MUHAMMAD,
58. MUHAMMAD REHMAN S/O ABDUR REHMAN,
59. ABDUR RAZAQ S/O ZAHIR SHAH,
60. ANWAR GUL S/O ITBAR GUL,
61. MUHAMMAD UMAR S/O QUDRAT SHAH,
62. MUHAMMAD JANAN S/O SHER MUHAMMAD,
63. NASEEM GUL S/O SPEEN GUL,
64. LAL ZER SHAH S/O ZARSHAH ALL RESIDENTS OF QAUM
AKHEL, DISTRICT ORAKZAI
..... (ACCUSED FACING TRIAL)
65. TOR HAJI S/O MUHAMMAD NOOR,
66. WAHID GUL S/O KHAN WALEED,
67. WALI BADSHAH S/O GALI BADSHAH,
68. SHOAIK KHAN S/O SHERI GUL ALL RESIDENTS OF DISTRICT
ORAKZAI
..... (ABSCONDING ACCUSED)

JUDGEMENT

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The above-named accused/petitioners through their
counsel present. Learned Sr. PP for the state present.

- (2). Accused/petitioners named above are charged in
case FIR No. 06, dated 31.01.2021, registered U/S
302/324/353/436/427/148/149/34 PPC of PS Kurez
Boya, District Orakzai.

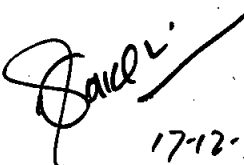
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(3). Application u/s 265-K. Cr. PC. submitted and notice already given to opposite party.

(4). Brief facts of the instant Murasila based FIR are that Naseem Khan SHO PS Ghiljo sent Murasila that some days back one Qasim Gul caste Akhel along with other persons of his caste constructed two rooms on the disputed property of Mula Patey, on which caste Mishti, Rabia Khel, Shiekhan and Dara Darh Mamozai raised objection due to which the dispute between caste Akhel and other caste converted into clash. That for resolving the said dispute today on 31.01.2021 SP investigation, Orakzai AC Lower, DSPs namely Diswar Ali, Muhammad Rahim, Umar Zaman and Mehboob Khan convened a jirga with the elders of all the five castes. First jirga was convened with the elders of caste Akhel namely Qasim Gul, Fazal Muhammad, Muhammad Rehman, Lal Zad, Haji Tahir, Abdul Razaq, Anwar, Molana Umar, Khanan, Naseem Gul, Sailal Shah, Hazrat Khan, Khaista Meer Shah, Umar Badshah, Hafiz Ullah, Azmat Ullah, Muhammad Sajid and 8/9 others. After that Jirga took place with the elders of caste Mishti namely Musa Khan, Khan Zeb Ullah, Ameen Ullah, Piyo Shah, Saleem Khan, Itbar Gul, Haji Munaf, Rasool Badshah and 7/8 other persons. Jirga with elders of caste Shiekhan, namely Haji Kareem, Shafiq Khan, Toor Haji, Mastan Akbar alias Mastak, Haji Izat Gul, Suwab Gul, Firdos, Taza Khan,


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Khalil Ur Rehman, Jaman Shah and 8/10 others, also took place. Jirga also took place with caste Dara Darh Mamozai consisted of Haji Khan Gul, Jamal Gul, Qadar Khan, Javed Tekadar, Khaista Asghar, Daud Khan, Muhammad Shakeel, Muhammad Barech, Fazal Manan, Muhammad Zubair, Wahid Gul, Riaz Khan, Mir Askar, Lal Qadar, Abdul Raziq, Wakeel Khan, Zalim Shah, Jalad Khan, Abdul Latif, Habib Ullah Khan, Jamal Bahadar and 9/10 others, while for caste Rabia Khel one Zar Muhammad, Walibat Khan, Feroz Tekadar, Akhtar Manshah, Hashim Khan, Khial Akbar, Islam Bahadar, Hassan Bahadar, Umar Hayat along with 9/10 others appeared for jirga. During interval of prayer in the jirga the people of the caste Mishti, Shiekhan, Dara Dar Mamozai and Rabia Khel along with other 200/250 persons were instigated, who attacked at the disputed rooms. The police officials present in the rooms shown resistance to restrained them, but they attacked the police and put on fire the luggage of the police and demolished the rooms. Apart from this Qasim Gul etc and other persons mentioned above brought 30/40 armed men, who started firing at the police party and people of other castes with intention to kill. The exchange of firing took place from both sides and due to the firing of caste Akhel two (2) persons of the opposite castes died and three (3) got injured. The dead bodies and injured were sent to THQ

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hospital Ghiljo under the escort of constables Abdul Raziq, Gul Nawaz and Mualam Badshah. ASHO Saleem Khan was directed to reach the hospital for preparation of injury sheets and inquest reports. The exchange of firing is still on and the above-mentioned persons of all the five castes are nominated being involved in the commission of offence. Murasila for registration of FIR is sent to the PS through constable Irshad Gul while the complainant is busy in resolving the dispute and arrest of the accused. The Murasila was converted into the above-mentioned FIR.

- (5). After receiving the copy of FIR, the Investigation officer visited the spot and prepared the site plan Ex. PW-9/1 of the occurrence at the pointation of complainant Naseem Khan SHO. Later on supplementary challan against the arrested accused was submitted on 16.02.2021 and complete challan in the instant case was submitted on 21.05.2024. Accused namely Toor Haji s/o Muhammad Noor, Wahid Gul s/o Khan Walid, Wali Badshah s/o Guli Badshah and Shoaib Khan s/o Shehri Gul are absconders while accused Muhammad Tahir, Itbar Gul, Jahanzeb and Muhammad Shafiq have been reported by the DFC is dead and statement of DFC was recorded on 23.11.2021 on basis of which proceedings against the dead accused were abated by my learned predecessor in office vide order sheet no. 09 dated 14.05.2022. Accused (1) Khaista

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Asghar (2) Muhammad Zubair (3) Fazal Manan (4) Jamal Gul (5) Wakeel Khan (6) Habib Ullah (7) Zalim Shah (8) Abdul Raziq (9) Lal Qadar (10) Jalad Khan (11) Muhammad Shakeel (12) Khaista Mir (13) Umar Badshah (14) Islam Bahadar (15) Hassan Bahadar (16) Rasool Badshah (17) Mola Umar (18) Qasim Gul (19) Fazal Muhammad (20) Piyo Shah (21) Feroz Khan (22) Hashim Gul (23) Khawar Khan (24) Muhammad Rehman (25) Lal Zar Shah (26) Seem Gul (27) Muhammad Raziq (28) Saleem Khan (29) Sunab Khan (30) Anwar Gul (31) Muhammad Janan (32) Izat Gul (33) Riaz (34) Mer Askar (35) Dad Khan (36) Khial Bahadar (37) Abdul Latif (38) Hafiz Ullah (39) Hazrat Khan (40) Bilal Shah (41) Azamt Ullah (42) Muhammad Zahid (43) Akhtar Man Shah (44) Luqman (45) Izat Gul (46) Mastan Akbar (47) Khan Gul (48) Muhamma Rehman (49) Muhamma Umar Raziq (50) Sawab Gul (51) Muhammad Karim (52) Khan Shah (53) Ferdos Khan (54) Khial Akbar and (55) Shafiq Khan appeared before the court and formality under section 265-C Cr. PC. was compiled with by supplying copies of the documents to them free of cost.

(6). While charge against the above-named present accused facing trial were framed on 14.05.2022 to which they pleaded not guilty and they claimed trial.

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(7). The prosecution produced and recorded the statements of as many as fourteen (14) PWs. The gist of their evidence is as follows;

I. PW-01, Naseeb Khan SHO PS Mishti Mela, He

was posted as SHO PS Ghiljo in the relevant days. He has submitted interim challan in the instant case on 16.02.2021 which is Ex. PW-1/1. He has submitted abated challan against accused namely Itbar Gul, Khanzeb Ullah and Muhammad Shafiq which is Ex. PW 1/2. On 21.05.2021 he has submitted complete challan against the arrested accused and challan u/s 512 Cr. PC. against the absconding accused which is Ex. PW 1/3.

II. PW-02, Muhammad Hanif Constable, PS

Ghiljo: He is marginal witness to the recovery memo vide which the investigation officer took into possession blood-stained garments of the deceased Shafiq brought by constable Gul Nawaz consisted of black shalwar Qamees and Khaki colour banyan which were packed into parcel no. 5. Similarly, constable Muslim Badshah brought the blood-stained garments of deceased Khanzeb Ullah consisted of Shalwar, Qamees Khar colour along with banyan white in colour which were sealed into parcel no. 6. Similarly, constable

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Abdul Raziq brought the blood stained garments consisted of Qamees Khar colour and banyan white colour of injured Itbar Gul and sealed the same into parcel no. 7. All the parcels were sealed by affixing seal of monogram "GJ".

III. PW-03, Usman Zada SI, PS Ghiljo: He has incorporated the contents of Murasila into the shape of FIR Ex. PA. His statement is recorded u/s 161 Cr. PC.

IV. PW-04, Constable Irshad Gul FC no. 838, PS Ghiljo: He has taken the Murasila from the place of occurrence and handed over the same to Usman Zadi SI in the PS. He is also marginal witness to the recovery memo Ex. PW 4/1 vide which the IO took into possession blood-stained earth from the place of deceased Muhammad Shafiq sealed in parcel no. 1, blood-stained pebbles from the place of deceased Jahanzeb Ullah sealed into parcel no. 2, ashes of burned articles sealed in parcel no. 3, four empties dangur bore and one empty of 303 bore and sealed the same into parcel no. 4. The recovery memo is duly signed by him.

V. PW-05, Constable Muslim Badshah No. 823: He on 31.01.2021 at about 1500 hours escorted

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the dead body of Khanzeb Ullah along with injury sheet and inquest report to the hospital for post mortem examination, which he handed over to the Doctor concerned. He also received the blood-stained garments and post mortem report from the doctor on the same day and handed over the same to investigation officer in the police station.

- VI. PW-06, Constable Gul Nawaz No. 1155: He on 31.01.2021 at about 1500 hours escorted the dead body of Muhammad Shafiq along with injury sheet and inquest report to the hospital for post mortem examination, which he handed over to the Doctor concerned. He also received the blood-stained garments and post mortem report from the doctor on the same day and handed over the same to investigation officer in the police station.

- VII. PW-07, Anwar Khan DFC: He was entrusted with warrant u/s 204 Cr. PC. against accused Maulana Umar, Toor Haji, Wahid Gul, Wali Badshah, Luqman and Shoaib of Ghiljo District, Orakzai. He reported that the accused were avoiding their lawful arrest and returned the warrants unexecuted along with report overleaf the warrant. The warrants are Ex. PW 7/1 to Ex.

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PW 7/6 while his reports overleaf the warrant are Ex. PW 7/7 to Ex. PW 7/12. He was entrusted with notice u/s 87 against accused Toor Haji, Wahid Gul, Wali Bat Shah and Shoaib for execution. Copy of the notice was affixed on the noticeboard and the second copy on the outdoor of the house of the accused and third was returned to the court with report on its overleaf. The proclamation notices u/s 87 Cr. PC are Ex. PW 7/13 to Ex. PW 7/16 while the reports are Ex. PW 7/17 to Ex. PW 7/20.

VIII. PW-08, Ihsan Ullah Head Constable presently

posted at Police Line: He is the marginal witness to the recovery memo Ex. PW 8/1 vide which the IO took into possession one motorcar white colour bearing registration no. DGE-9333/Punjab and Pick-up no. C519/Orakzai.

IX. PW-09, Bakht Munir, CIO: He is the

investigation officer of the case. He prepared site plan Ex. PW 9/1 at the pointation of complainant.

He took into possession blood-stained earth from the place of deceased Muhammad Saeed and sealed the same in parcel no. 1. (Ex. P1). He took into possession blood-stained pebbles from the place of deceased Jahanzeb Ullah and sealed the same into parcel no. 2. (Ex. P2). He also took

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into possession ashes of the burned articles and sealed the same into parcel no. 3 (Ex. P3). He took into possession four empties of dangur bore and one empty of 303 bore and sealed the same in parcel no. 4 (Ex. P4). To this effect the recovery memo already Ex. PW 4/1. He recorded statements of PWs u/s 161 Cr. PC. He took into possession the blood-stained garments of deceased Muhammad Shafiq, deceased Khanzeb Ullah and injured Itbar Gul which are sealed in parcels no. 5 to 7 (Ex. P5 to Ex. P7) respectively. Recovery memo to this effect is Ex. PW 9/2. Recovery memo in respect of the motorcar bearing DGE-9333/Punjab and pick up no. 519/Orakzai is already Ex. PW 5/1. Report in respect of discharge of accused Muhammad Saleem ASHO in case FIR no. 07, dated 02.02.2021, is Ex. PW 9/3. He produced thirty-one (31) accused before the Illaqa Magistrate vide application Ex. PW 9/4. Application for custody of accused Jalat Khan before the Judge Anti-Terrorism Court is Ex. PW 9/5. The accused were produced before Illaqa Magistrate on 08.02.2021 vide application Ex. PW 9/6. He produced Hafiz Ullah, Mahmood UI Hassan and Khan Wazir before the Judicial Magistrate for recording their statements u/s 164


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Cr. PC vide application Ex. PW 9/7. Their statements were recorded as Ex. PW 9/8 to Ex. PW9/11. Accused Akhtar Man Shah is produced for grant of physical custody before Magistrate vide application Ex. PW 9/12. Application for issuance of warrants u/s 204 against the accused Maolana Umar, Toor Haji, Wahid Gul, Walibat Khan, Luqman and Shoaib are Ex PW 9/13. Accused Qasim Gul and Sahib Zada were produced before the Magistrate for grant of physical custody vide application Ex. PW 9/14. He recorded statements of the all the PWs u/s 161 Cr. PC. other accused were produced before the court of Judicial Magistrate for grant of physical custody on 08.03.2021 vide application Ex. PW 9/15. The list of legal heirs of deceased Itbar Gul is Ex. PW 9/16. He prepared the list of legal heirs deceased Shafiq which is Ex. PW 9/17. FSL report in respect of blood-stained earth and recovered crime empties is Ex. PK, Ex. PK/1 and Ex. PK/2.


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- X. PW-10, Umar Gul HC: He was present in the disputed rooms/property at the time of occurrence. He stated that people of sections (aqwam) Misthi, Dara Dar Mamozai, Akhel and Rabia Khel attacked them in shape illegal

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assembly. They destroyed the rooms and reduced the same into ashes wherein his clothes, bedding uniform etc burnt and destroyed.

XI. PW-11, Muhammad Zahid Constable: He is also eyewitness and was present in the disputed at the time of occurrence. He repeated the same story as that of PW-12.

XII. PW-12, Sajjad SI: He stated that on 11.02.2021 the investigation officer handed over to him parcels no.1, 2, 4 to 7 along with road permit certificate Ex. PW 12/1 and Ex. PW 12/2. He took the same to FSL and received acknowledgment of the concerned on the road certificate. On return he handed over the same to investigation officer. His statement was recorded u/s 161 Cr. PC.

XIII. PW-13, Dr. Faisal Salih Medical Officer, Civil Hospital Ghiljo: He has examined deceased Itbar Gul then inured, who was unconscious due to firearm injury. He referred the injury to the DHQ Misthi after giving first aid. His Report is Ex. PW 13/1.

XIV. PW-14 Muhammad Naseem SI: He repeated the whole story as alleged in the Murasila Ex. PW 14/1 and FIR Ex. PA. He arrested the accused

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and prepared their card of arrest which are Ex.

PW 14/2 to Ex. PW 14/4.

All the above witnesses were cross examined by the learned defence counsel.

(8). ARGUMENTS:

Learned counsel for accused/petitioners argued that more than 60 accused are charged in the instant case. That there was dispute between the different sections (Aqwam) of Orakzai and it cannot be determined that who attacked the disputed property and committed murders. Neither specific role is attributed to any of the accused for burning the disputed property, nor any role for making firing is attributed to any of the accused/petitioners. He argued that there is no direct evidence against any of the accused/petitioners on the case file. That statements of fourteen PWs have been recorded and the same are of no worth to the prosecution

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for establishing their case and even if the statements of the remaining PWs are recorded, it will not produce any results in favour of prosecution. He prayed for acceptance of application.

(9). On the other hand, learned Sr. PP for the state argued that the accused are directly charged in the FIR for unlawful assembly, putting the property on fire, murder and attempt to commit murder. He argued that

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recoveries and statements of PWs recorded yet are supporting the version of prosecution and the case may be decided after recording full evidence. He prayed for dismissal of application u/s 265-K Cr. PC.

(10). After hearing arguments available record perused.

It is the case of prosecution that some days back Qasim Gul caste Akhel along with other people of his caste constructed two rooms on the disputed property situated at Mula Patey due to which the people of other castes i.e., Misthi, Rabia Khel, Shiekhan and Dara Dar Mamozai were desperate and unhappy. That the said dispute was likely to convert into clash, for resolving which Jirga of *Mashran* of the all the five castes was convened by SP investigation, AC Lower and DSPs. That during prayer break in the Jirga more than 200 people of caste Mishti, Shiekhan, Dara Dar Mamozai and Rabia Khel attacked the disputed rooms. They were restrained by the police party present in the rooms, by they were attacked upon, put on fire the luggage of the police officials and demolished the disputed rooms. On the other hand, about 30/40 people of Qasim Gul Akhel, duly armed came, attacked the police party and people of other castes by making firing with intention to kill. That exchange of fire took place between the parties and due to firing of caste Akhel two persons of rival castes were killed and three injured. The statement of complainant

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Muhammad Naseem SHO is recorded as PW-14, who repeated the same story, as alleged in the Murasila, during his examination in-chief. He stated during his cross examination that during Jirga i.e. 1330 hours to 1500 hours the occurrence took place and it is not mentioned in Murasila that who was carrying weapons, who made firing and who sit the disputed rooms on fire. PW-14 admitted that has not shown the specific point of presence of accused to the investigation officer at the time of preparation of site plan. He further explained that he cannot say that from whose firing shot the deceased and injured got hit and that the firing had taken place from both sides. The witness during his volunteer statement explained that due to firing of caste Akhel two persons got hit and expired while three got injured. Investigation officer Bakht Munir/PW-9 during his cross examination admitted that no specific person from the tribe Akhel is named in the Murasila, who was involved in firing. He admitted that he did not specifically investigate the fact that which tribe was involved in firing and accordingly to police report all the tribes were present there and made firing over the police check post. He further stated that the place of occurrence is open rivel (algada) and there are ups and down in the said algada, due to which a person cannot be visible from 100 feet. He also stated that tribe Akhel was present at the

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distance of 1348 feet from the other tribe present over there. The statement of PW-9 and PW-14/complainant who was present there at the time occurrence, shows that in fact no one have seen anything and that responsibility of making firing and hitting the deceased and injured is neither fixed by the complainant during his report nor determined by the investigation officer during his investigation. In fact the instant FIR is inspired from the FCR where the people of whole caste/tribe had have been held jointly liable for commission of an offense. In the present FIR the whole tribe of Akhel is made accused, but none of the witnesses could explain that the deaths and injuries happened due to firing of Akhel tribe rather it is established on record from the statements of PWs that the firing was made by all the tribes and the same cannot be attributed to a specific person. No recovery of any weapon has been effected from any of the accused facing trial or even from the possession the absconding accused. In such like circumstances, there is no probability of conviction of any of the accused facing trial and absconding accused, therefore, I hereby accepted the instant application u/s 265-K Cr. PC. and acquit all the accused facing trial along with absconding accused from the charges levelled against them. The accused are on bail and their sureties are discharged from the liability of their bail bonds. Case property i.e.,

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17/12/24

BAKHT ZADA

Addl. District & Sessions Judge-1,
Orakzai at Harigu

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motorcar and double cabin pick-up be returned to its lawful owners on the production of proof of legal ownership/ registration documents. Copy of this judgement be sent to SHO PS concerned for deletion of names of proclaimed offenders in the instant case from the register of POs.

- (11). Judgment announced. Case file be consigned to record room after its necessary completion and compilation.

Dated: 17.12.2024

Bakht Zada
17.12.24.

BAKHT ZADA
Additional Sessions Judge-I,
Orakzai at Baber Mela

CERTIFICATE

Certified that this judgment consists of eighteen (18) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 17.12.2024

Bakht Zada
17/12/24,

BAKHT ZADA
Additional Sessions Judge-I,
Orakzai at Baber Mela