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IN THE COURT OF JAMAL SHAH MAHSOOD,
ADDITIONAL SESSIONS JUDGE-I, ORAKZAI

Case No. 1/2 PPC of 2019

Date of Original Institution before APA, Orakzai 13-01-2018
Date of Transfer to this Court 01-04-2019
Date of Decision 04-12-2019

The State

Vs

**Muhammad Shafiq s/o Phool Mehdi; r/o Bar Muhammadkhel, Tapa
Khwaidakhel, Trangi Kalaya, Orakzai (Accused)**

- Case (F)IR No. 92/APA/L
 - Dated: 13-01-2018
 - U/s: 302/324 PPC
 - Assistant Political Agent Lower Orakzai
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- APP Syed Aamir Shah for State
 - Haseeb Ullah Khan Advocate, for complainant
 - Abid Ali Advocate, for accused
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JUDGMENT:

1. The accused, Muhammad Shafiq, is charged for murder of Nisar Ali with firearm: and for attempting at the lives of Shazima Bibi & Sumaira Bibi with firearm and grenade, whereby, these ladies also sustained injuries.
2. The present case allegedly occurred on 13-01-2018, when Orakzai Agency was part of FATA region. At that time Frontier Crime Regulations, 1901 was the applicable law, and the Political Agent (PA) and Assistant Political Agent (APA) had the jurisdiction to decide criminal cases through special procedure under FCR. After 25th Constitutional Amendment,

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the PA and APA lost jurisdiction and the case was transferred to this court, through order of Peshawar High Court, Peshawar. Before transfer, the present case remained pending before APA/ADM/AC, Lower Orakzai for about one year (from 13-01-2018 to 10-01-2019); however, no substantial proceedings u/s 11 of FCR were made in the case. Under section 11 of FCR, the Political Agent was required to register the criminal case and the accused was required to be produced before the APA within 24 hours of his arrest. The Political Agent was then to make an order in writing for referring the question of guilt or innocence of accused to a Council of Elders (CoE), which Council was required to hold necessary inquiry and hearing of the parties and witnesses. This CoE was required to be constituted within 10 days of arrest of accused and it was required to submit its findings within 90 days. However, none of these proceedings were conducted by the APA/ADM/AC during the period of 01 year, in which the case remained pending before that office/court.

Additional District & Sessions Judge-I
Orakzai

3. After transfer of case to this Court, the accused and the complainant were summoned. There were no proper documents in the case (i.e. FIR, police report, statement of witnesses or inspection note/s recorded by IO in respect of the place of occurrence and recoveries). In fact, there was no investigation conducted in the case at all. The prosecution was directed to submit list of its witnesses by this Court and all necessary

documents which the prosecution wanted to produce were allowed during trial.

4. The facts of the occurrence, according to the Information Report No. 92/APA/L, dated: 13-01-2018 (sent by APA Lower Orakzai to PA Orakzai) - Ex. PW 7/1, are that on that day, at 10:00 am, Nisar Ali had died and his daughter-in-law (Shazima Bibi, PW-2) had sustained bullet injuries as a result of firing by Muhammad Shafiq (accused) at village Charbagh. The motive was recorded as domestic skirmishes between the parties and it was noted that the accused had been arrested and put behind bars at Kalaya Headquarter. The accused was subsequently released on bail.

5. On taking cognizance of the case by this court, charge was framed against the accused on 04-07-2019, in line with the allegations available on record. The accused pleaded not guilty and claimed trial (after close of prosecution evidence, alteration and addition was made to this charge). The prosecution was directed to submit list of witnesses, which was placed on file. Seven (07) PWs were produced during trial by the prosecution and the defense was given opportunity to cross-examine these PWs.

6. The gist of prosecution evidence is as follows:

- **PW-1** is Shamim Ali, the complainant. He narrated the events of the occurrence as alleged eyewitness and other related proceedings of the case.

- PW-2 is Ms. Shazima, an injured. She narrated the events of the occurrence as an alleged eyewitness.
 - PW-3 is Sumaira Bibi, an injured. She also narrated the events of the occurrence as an alleged eyewitness.
 - PW-4 is Shahab Uddin, who was Political Tehsildar during the days of occurrence. He deposed in respect of the arrest of the accused and a statement made by accused before him, on 14-01-2018.
 - PW-5 is Dr. Zahir Hussain, who was posted as Medical Officer at THQ Kalaya during the days of occurrence. He provided first aid to the injured (PW-2 and PW-3), medical record of which was produced as Ex. PW 1/2 (page 11 and 13). No postmortem was conducted on the dead body of deceased; however, outdoor patient ticket was prepared by this doctor, and produced as Ex. PW 1/2 (page 12). This doctor also examined Shazima Bibi (PW-2) subsequently in his private clinic and advised x-ray and blood test (Ex. PW 1/2 pages 3, 7, 14 and 15).
 - PW-6 is constable Asnad Ali, who was serving in Orakzai Levies during the days of occurrence. He had visited the spot after the occurrence and seen blood there.
 - PW-7 is Noman Ali Shah, who was serving as APA Lower Orakzai during the days of occurrence. On receipt of information about the occurrence, he sent this information to PA through letter No. 92/APA/L (Ex. PW-7/1).
7. On close of prosecution evidence, the charge was altered and addition was made in the same, as attempt at the life of second

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female (Sumaira Bibi, PW-3), use of grenade and charge head for injuries were required to be added in the formal charge previously framed. Thereafter, statement of accused was recorded. He denied the prosecution evidence; however, he did not wish to produce any evidence in defense or to get himself examined on oath. Thereafter, the prosecution and counsels for the parties were heard and the evidence and record of the case was perused. My findings on the conclusion of trial are as follows.

Additional District Sessions Judge
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8. As stated above, the present case remained pending before APA/ADM/AC for one year and was registered before extension of normal law to this area; therefore, there is no proper FIR or investigation in the case. The documents available on record have not been prepared under the relevant provisions of FCR. In these circumstances, the depositions of alleged eyewitnesses are of primary importance for prosecution.

9. PW-1, the alleged eyewitness and complainant of the case Shamim Ali, during his examination in chief stated that he had made an application, dated 01-03-2018, to APA Lower Orakzai (Ex. PW 1/1). In this application, Shamim Ali had stated that he was not present on the spot at the time of occurrence; however, during his statement before this court as PW-1, he stated that he was present at the spot at the time of occurrence. This contradiction has made him a suspicious witness and his evidence is required to be scrutinized minutely.

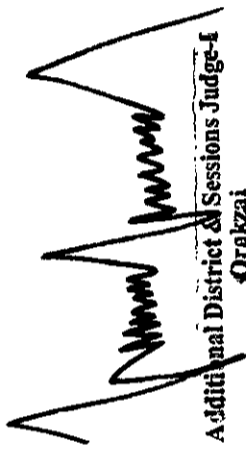
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10. Complainant Shamim made his first written petition in this case on 01-03-2018, i.e. after about 50 days of the occurrence. In this petition, he made new allegations in respect of use of hand grenade, injuries to 02 females (instead of one as mentioned in information report), the loss of a child in womb of one of the injured females and the presence of other unknown person/s with the accused at the time of occurrence.

11. As far as the use of hand grenade or firearm is concerned, no recovery of any empty or pin of hand grenade has been made from the spot; no firearm was recovered from the accused and neither the alleged firearm was described by the complainant party. The medical record is silent in respect of injuries caused by grenade and only firearm and gunshot are mentioned therein. The first information report mentions injuries to 01 female only (wife of Shamim Ali i.e. Shazima Bibi – PW-2), while subsequently, in Ex. PW 1/1, it was alleged that 02 females were injured and a child in womb was also lost due to injury to one of the female, without identifying that female. During evidence in court none of the PWs alleged the loss of child in womb. The complainant introduced one Irteza, a cousin of present accused, in his examination in chief; however, no role was attributed to the said Irteza. No injury was sustained by the complainant despite the allegation of firing and throwing of hand grenade. All these contradictions and improvements in the statement of complainant (PW-1) makes him an unreliable witness and his evidence must be discarded on this account.

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12. PW-2 and PW-3, the alleged injured eyewitnesses, were not interrogated or examined by the Political authorities and no previous statement of these 02 witnesses is available on record, for the purpose of confrontation and contradiction. These PWs alleged that deceased Nisar Ali, father-in-law of one and uncle of the other, was leaving his house for polio duty in the morning; that an altercation took place between deceased Nisar Ali and accused Shafiq outside their house, on hearing the noise of which they came out. PW-2 stated that accused Shafiq started firing which caused injuries to her father-in-law (deceased Nisar Ali) and to herself; while PW-3 stated that the firing of accused caused injuries to the deceased only. The incident took place on 13-01-2018, while the alleged injured PWs (PW-2 and PW-3) made their first statements in respect of the incident on 03-10-2019, before this court. This delay of about 20 months in recording of statements of these PWs in itself has diminished the worth of their statements. These 02 PWs could not give clear evidence in respect of the exact time or spot of occurrence and the nature and location of injuries sustained in the occurrence. The introduction of one Irteza, as accomplice of accused facing trial, also seems to be a dishonest introduction during trial. In his application Ex. PW 1/ 1, the complainant had specifically mentioned that he was not present at the spot at the time of occurrence and that he did not know the name of the other person present with accused. This application was filed after 50 days of occurrence. The accused


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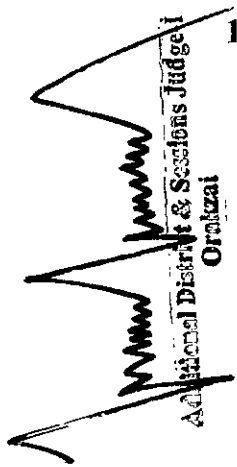
and complainant party are close relatives; it is impossible that the complainant party would not have known the name of Irteza, who is their relative, even after 50 days of occurrence. Thus, PW-2 and PW-3 are also found to be not truthful witnesses, and sole reliance cannot be made on them for the purpose of awarding conviction.

13. The complainant PW-1 stated in his examination in chief that after merger of FATA in KP province, he had filed application for re-investigation before DPO Orakzai. However, the report in re-investigation was not produced by prosecution, neither any witness produced in respect of the same.

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14. A statement of accused was recorded by Political Tehsildar (PW-4), on 14-01-2018 (next day of occurrence), and exhibited as Ex. PW 4/1. This can be declared as the only statement recorded by an alleged eyewitness of the occurrence, from the prosecution point of view. The accused in this statement narrated a different story about occurrence. The prosecution denied any previous motive behind the occurrence; however, the accused in this statement Ex. PW 4/1 admitted that there were domestic disputes between the parties; that the deceased and his two sons, along with females of their house, had attacked his house; that a son of accused was standing on the top of roof from where he made firing; that he also started firing and he came to know that his maternal uncle Nisar Ali died due to firing and that the wife of Shamim Ali was also injured. This statement of accused cannot be outrightly rejected as the same

was recorded in presence of official of erstwhile Political Administration. This statement would suggest that the complainant and eyewitnesses produced in present trail have suppressed material facts from this court; the mode and manner of occurrence has not been truly deposed about. Thus, the prosecution witnesses have become doubtful on this ground as well.


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15. The ocular account of prosecution, as discussed above, is doubtful and suspicious. The other formal witnesses of the case have not deposed about any material aspect of the case. In fact, the procedure as laid down in FCR, 1901 was not adopted before transfer of case to this court, which resulted in loss of important evidence. In absence of strong and reliable ocular account, the other corroborating evidence loses its worth and the same is not worth consideration.

16. In criminal cases prompt lodging of report and recording of statements of alleged eyewitnesses lends credence to the evidence given during trial and rules out the possibility of deliberation and consultation on part of the prosecution witnesses. In present case an undue delay has occurred in the registering of the FIR from the information given by complainant. The information report – Ex. PW 7/1 does not mention the name of informant and is based on hearsay. Moreover, the lapses on part of officials of erstwhile Political Administration and absence of any formal or informal

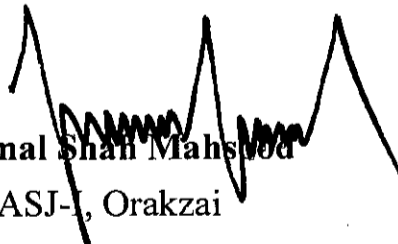
investigation has resulted in much confusion and loss of material evidence in the case.

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17. In cases entailing capital punishment the evidence is required to be scrutinized minutely and strictly. The prosecution is required to produce evidence of prime quality, in order to bring home the charge against the accused. Not many, but a single reasonable doubt is enough for acquittal of accused. Having found the prosecution evidence doubtful in many respects, the benefit of doubt must be extended the accused. Resultantly, the accused facing trial, Muhammad Shafiq, is acquitted of the charge leveled against him in the instant case. He is on bail; he is set at liberty and his sureties are discharged from the liability of bail bonds.
18. Let a copy of this judgment be sent to the office of DPP Orakzai, in terms of section 373 CrPC: and this file be consigned to the record room after its proper completion and compilation.


Announced

04-12-2018


Jamal Shah Mahsood
ASJ-I, Orakzai

CERTIFICATE

It is hereby certified that above order/judgment consists of 10 pages, and each page has been signed.


Jamal Shah Mahsood
ASJ-I, Orakzai