

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

**Case No. 10/2 PPC of 2020**

Date of Institution 13-02-2020  
 Date of Decision 14-10-2020

**The State** (through SHO Muhammad Shafiq)

**Vs**

1. **Ashab Ali** s/o Khushtab Ali
2. **Feroz Ali** s/o Aleem Askar  
 (both belonging to caste Bar Muhammaddkhel, tapa Aalatkhel; r/o village Khando, Orakzai)

**(Accused)**


- FIR No. 03
  - Dated: 14-01-2020
  - U/Ss.: 302/311/34 of PPC & 15 KP-AA
  - Registered in: P.S. Lower Orakzai
- 
- DPP Umar Niaz Khan and APP Syed Amir Shah, for State
  - Javid Muhammad and Jabir Hussain Advocates, for defense

**JUDGMENT:**

1. The accused named above, who are nephew and maternal uncle inter se, are charged for the murders, in furtherance of common intention of them both, of Bakhtaj Begum and Tasawar Ali. The murders were allegedly committed on the pretext of honor. Accused Feroz Ali is also charged for possession of one Kalashnikov having 05 live rounds without permit, which is alleged to be the weapon of offence.
2. The allegation, as made in FIR, is that complainant, SHO Muhammad Shafiq (PW-5), was on patrol of area when he received information that on the previous night, i.e. 13-01-2020 at 2000 hrs., accused Ashab Ali had killed his sister Bakhtaj Begum inside his house, due to her alleged illegitimate relationship with one Tasawar

Ali, on pretext of honour. That similarly accused Feroz Ali, a maternal uncle of deceased Bakhtaj Begum, had killed Tasawar Ali s/o Daud Ali, on account of keeping illegitimate relationship with deceased Bakhtaj Begum. That on receiving this information the SHO, along with a police party - including Constables Najeeb Ullah, Saeed and Shakil (all 03 abandoned PWs), immediately went to village Khando and found the 02 dead bodies. That on local inquiry it was revealed to him that indeed these 02 persons had been murdered with firearm due to illegitimate relationship. The 'death-documents' of deceased Bakhtaj Begum were prepared and her dead body was sent to KDA Hospital Kohat, under escort of Constable Raimeen Ali (abandoned PW); similarly, 'death-documents' of deceased Tassawar Ali were prepared and this dead body was sent to Civil Hospital Mishti Mela, under escort of Constable Najeeb Ullah (abandoned PW). The SHO, after satisfaction regarding commission of offence, prepared a murasila and sent it to PS, through Constable Salim (abandoned PW), for registration of FIR and for further entrustment of case to investigation staff.

3. During investigation both the accused were arrested. They allegedly made judicial confession. On completion of investigation challan was submitted against both the accused and the same was sent to this court for trial.

  
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4. Both the accused were summoned from jail to answer the charge. Joint charge was framed against both; they pleaded not guilty and claimed trial. The accused engaged legal counsel for defense.
5. In order to prove the charge against them, the prosecution has produced 07 PWs during this trial.
6. The gist of prosecution evidence is as follows:

**PW-1** is Dr. Hira Ijaz, who had conducted post-mortem examination (Ex. PM) of deceased Bakhtaj Begum. She reported 05 entry wounds and 05 corresponding exit wounds. The cause of death was reported by her as injury to vital organs like brain, heart and lungs, excessive blood loss and cardiopulmonary arrest. She also obtained vaginal, perineal and rectal swabs for toxicology (sic) report. She verified her endorsement on injury sheet (Ex. PM/1).

**PW-2** is Dr. Sajjad Akbar, who had conducted post-mortem examination (report is Ex. PM/2) of the deceased Tassarwar Ali. He reported 05 entry wounds and 04 exit wounds. The cause of death was reported by him as damage to vital organs due to firearm injury which led to profuse bleeding, shock and cardiopulmonary arrest. He also obtained swabs from meatus, glans and genitalia. He verified his answers on injury sheet (Ex. PM/3).

**PW-3** is Aftab Ahmad, ASI, who reduced the contents of murasila in FIR register (copy of FIR Ex. PA), and handed over these documents to Investigation Officer Shal Muhammad (PW-7).

**PW-4** is Muhammad Imtiaz, Judicial Magistrate, who had recorded judicial confessions of both the accused. Certificates, questionnaires and confessional statements exhibited as Ex. PW-4/1 to Ex. PW-4/6.

**PW-5** is Muhammad Shafiq SI, who was serving as SHO of PS Lower Orakzai (Kalaya); he is complainant of the case. He deposed in respect of the matters as had already been mentioned by him in murasila (Ex. PA/1). He further deposed in respect of spot visit of the IO and preparation of site plan. He exhibited the injury sheets and inquest reports of the 02 deceased as Ex. PW-5/1 to Ex. PW-5/4. He finally submitted the challan against both the accused in the office of DPP, Orakzai.

**PW-6** is Shal Muhammad SI; the Investigating Officer of the case. He conducted the following proceedings:

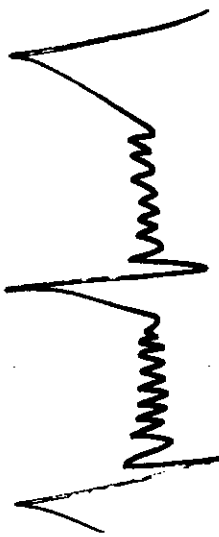
- He was present in the PS, on 14-01-2020, when the Muharrir handed over to him the copy of FIR and the murasila. He immediately went to the spot in village Khando.
- He went to the spot of deceased Bakhtaj Begum and prepared site plan on pointation of complainant SHO (Ex. PB). He also recovered 03 empties of 7.62 bore from near the place attributed to the accused Ashab Ali and sealed the same in parcel no.1. The recovery memo in this respect was exhibited as Ex. PW-6/1 and the parcel as Ex. P-1.
- Thereafter, he went to the spot of deceased Tassawar Ali; from where he recovered 03 empties of 7.6 bore and sealed these empties in parcel no. 2. The recovery memo in this respect was exhibited as Ex. PW-6/2 and the parcel as Ex. P-2. He prepared site plan of this spot, of deceased Tassawar Ali, on pointation of complainant SHO (Ex. PC). He stated

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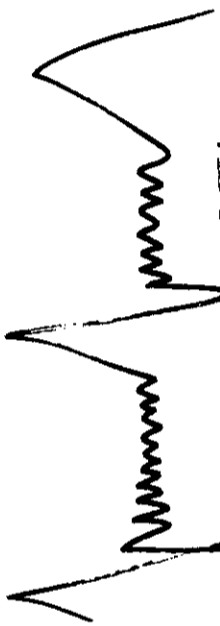
that no blood was recovered from any of these spots due to snowfall.

- He returned to the PS and recorded statements of witnesses of the above-mentioned recovery memos.
- In the PS Constable Raimeen Ali (abandoned PW) produced before him last worn cloths etc. of deceased Bakhtaj Begum which were sealed by him in parcel no. 3 (Ex. P3). Two cotton swabs in 02 phials, obtained by doctor from the dead body of Bakhtaj Begum, were also produced which were sealed by him in parcel no. 4. The recovery memo in respect of last worn clothes and these phials was exhibited as Ex. PW-6/3.
- Thereafter, Constable Najeeb Ullah (abandoned PW) produced before him in the PS last worn clothes of deceased Tassarwar Ali, which were sealed by him in parcel no. 5 (Ex. P-4). This Constable also produced 02 phials of swab taken from the body of deceased Tassarwar Ali, which were sealed by the IO in parcel no. 6. One parchment of cloth, cut from the last worn clothes of deceased Tassarwar Ali, was also produced and sealed in parcel no. 7. The recovery memo in respect of these last worn clothes, phials and parchment was exhibited as Ex. PW-6/4.
- He recorded the statements of concerned witnesses, u/s 161 CrPC.
- On 15-01-2020, he arrested accused Ashab Ali and issued his card of arrest (Ex. PW-6/5). On 16-01-2020, he produced

  
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accused Ashab Ali, before JM and obtained further custody for 02-days. Custody application exhibited as Ex. PW-6/6.

- Accused Ashab Ali made confession before him and he took him to the spot of deceased Bakhtaj Begum for pointation. He added the details obtained through this pointation in the site plan Ex. PC.
- While returning from this spot he arrested accused Feroz Ali, along with one Kalashnikov having 05 live rounds. The card of arrest exhibited as Ex. PW-6/7. The Kalashnikov was sealed in parcel no. 8 and exhibited during trial as Ex. P-5. The recovery memo was also prepared and exhibited as Ex. PW-6/8. Section 15 KP-AA was added in the case through a memo (Ex. PW-6/9). The recovery sketch in respect of recovery of Kalashnikov etc. was prepared by him and exhibited as Ex. PW-6/10.
- Both the accused then made confessions and also pointed out places of occurrence before him, in respect of which he prepared pointation memo - exhibited as Ex. PW-6/11. He further made additions, in red ink, in Ex. PB, after pointation made by accused Ashab Ali.
- He returned to the PS along with the both accused and interrogated them further, wherein they both confessed to their guilt.
- On 17-01-2020, he produced both the accused before Judicial Magistrate (PW-4) for recording of judicial confessions (vide application is Ex. PW-6/12).

  
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- After recording of judicial confessions, he took the both the accused and lodged them in Baber Mela Jail.
- Prepared the lists of legal heirs of both the deceased (Ex. PW-6/13 and Ex. PW-6/14).
- Sent the parcel of last worn clothes of the deceased, phials of swabs, the Kalashnikov and empties to FSL, Peshawar; vide applications, copies of which exhibited as Ex. PW-6/15 and Ex. PW-6/16 and road certificates exhibited as Ex. PW-6/17 and Ex. PW-6/18.
- The parcels of swab were returned from FSL with some objections, which were re-sent to FSL, Peshawar (vide road certificate Ex. PW-6/19 and application Ex. PW-6/20).
- The FSL report were received by him and placed on file as Ex. PZ/1, Ex. PZ/2 and Ex. PZ/3).
- On completion of investigation he handed over the file to SHO.

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PW-7 is Constable Muhammad Zahid, who was associated with the Investigating Officer (PW-6); he is marginal witness of all the recovery memos of instant case.

7. The defense counsels were given opportunity to cross examine these PWs.
8. On close of prosecution evidence, separate statements of both the accused were recorded; they both denied the charges and the prosecution evidence. However, none wished to get himself examined on oath or to produce any evidence in defense. Thereafter, the prosecution and the defense counsels were heard,

and record perused. My findings, in light of the evidence brought on record and the arguments of the parties, are as follows.

9. Admittedly, no one has come forward to furnish ocular account of the murders, thus it may be said that the case before court is one of unseen-occurrence. The two pieces of evidences, brought on record by the investigation agency and the prosecution, are the judicial confessions of both the accused (which were retracted by them at the time of answering to the formal charge) and the recovery of crime weapon (Kalashnikov) from one of the accused.

10. As far as the recovery of crime weapon from accused Feroz Ali and empties from the spot is concerned; the FSL report (Ex. PZ/1) is in positive. However, the crime empties were allegedly recovered from the spot on 14-01-2020, while the Kalashnikov, with 05 live rounds, was allegedly recovered on 16-01-2020. None of these recoveries were produced before the Judicial Magistrate and the same were sent to FSL together on 20-01-2020. The delay in sending of these recoveries and the doubtful custody of these item, from the date of recovery till sending of the same to FSL, has made this a doubtful and unreliable piece of evidence. The same must therefore be discarded from consideration, on this ground alone; and on other grounds also, to be discussed below.

11. Coming to the retracted confessions of accused facing trial, recorded by Judicial Magistrate (PW-4), it must be stated at the outset that conviction cannot be based on such retracted confessions alone; and the prosecution is obliged to bring on record corroborative pieces of evidence for satisfaction of court, in



furtherance of basic principles of justice which require evidence beyond shadow of any reasonable doubt, especially in cases entailing capital punishment.

12. The Judicial Magistrate (PW-4) stated in his examination-in-chief that sufficient time was given to both the accused before recording of their confessional statements, u/s 164/364 CrPC. However, during cross-examination the JM changed his stance and stated that both the accused did not wish for any time to be given to them; and that they voluntarily waived of their right to time to think. This fact is also reflected in answers to question no. 11 and 13 of both questionnaires. The JM further admitted that he had not mentioned the parentage and residential addresses of the accused on the confessional statements, and also that NIC numbers of none of the accused were brought on record of proceedings of confessional statements. According to JM, he did not mention any mark of identification of any of the accused in record and that he only orally satisfied himself about the identity of the accused. In his examination-in-chief the JM stated that after recording of confessions, the accused were handed over to Naib Courts (namely Azaz Ahmad, M. Qasim and Hajid Rehman) for being taken to Sub-Jail and the original record of confessional statements was handed to the IO. The IO (PW-6), on the other hand, stated (in his examination-in-chief) that after recording of confessions he took both the accused and lodged them in jail. Interestingly, in answer to question no. 14, accused Feroz Ali stated that he was making confession only because he was the nominated accused of case. It

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is also on record that accused Ashab Ali was produced, before the same JM, one day prior to recording of his judicial confession; and on that previous occasion no confession was made by that accused. Had there been a voluntary confession, there would have been no reason for further police custody.

13. The lacunas, as pointed out above, in the proceedings regarding recording of judicial confessions, have cast sufficient doubt regarding the voluntariness of the retracted confessions. These retracted confessions thus cannot be made a sole ground for conviction in the case, having been procured through doubtful proceedings and in an unwarranted manner.

14. Although not really emphasized by the prosecution, but there presumably was circumstantial evidence against the accused facing trial, especially accused Ashab Ali – who was a brother of deceased Bakhtaj Begum and the murder of that lady was allegedly committed inside the house of this accused. It is a settled principle of law that circumstantial evidence, in order to be acceptable, must establish such a perfect chain that that there remains no other probability except that of guilt of accused.

15. In the present case the report was made, by complainant SHO to the PS, thirteen hours after the alleged occurrence; and FIR was registered after a further delay of one hour. The place of occurrence was mentioned as house of accused Ashab Ali. The complainant SHO (PW-5) stated that he remained at the spot, till arrival of IO (PW-6) at 11:00 am. The SHO also stated that he found the dead body of Bakhtaj Bibi in a room of the house of accused Ashab Ali

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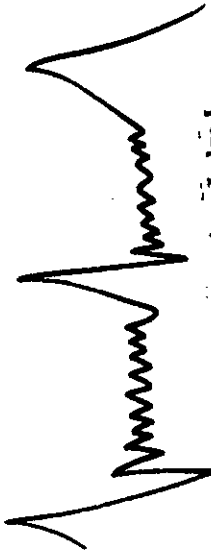
and the dead body of Tasawar Hussain in the lawn of hujra of that house. He further stated that the dead bodies had remained on the spot of murder till his arrival (i.e. for 13 hours); that blood was lying on spots of both dead bodies and also that he saw 03 empties near both bodies. However, the IO (PW-6) contradicts this version and stated that no blood was available on any of the spots. The IO admitted that he did not verify the ownership of the hujra where dead body of deceased Tasawar Hussain was found. Constable M. Zahid (PW-7) made the situation further confusing by stating that the spot of death of deceased Tasawar was a thoroughfare, about half a kilometer away from the spot of death of Bakhtaj Begum. PW-7 further stated that the SHO (PW-5) was not present at the time of spot-inspections and the pointation of respective spots was made by inmates of the house and by some relatives of deceased Tasawar Ali. The IO (PW-6) and marginal witness of recoveries (PW-7) both admitted that people relating to both the deceased were present on the spot; however, none was associated with the recovery and discovery proceedings.

16. The contradictory evidence as highlighted in the previous paragraph has made the spots of both deaths really doubtful. It would be ludicrous to believe that blood from spots had been removed by inmates through washing or washed away with snow and rain; but that the 06 empties remained there till arrival of IO. The complainant SHO (PW-5) stated that he had seen the blood and empties on the spot (reported by him as house of accused Ashab Ali) and that he remained there till arrival of IO; however, the

evidence brought on record suggests that there were two spots situated half a kilometer apart and that no blood was available at any of these spots. Thus, the complainant SHO has made himself a witness unreliable, and his statement must be discarded, in toto, on this account only. The pieces of circumstantial evidence in present case are all individually broken, and these can in no way be linked together to make out a clear chain of evidence connecting accused with the offence - and at the same time excluding all other probabilities to the contrary.

17. The circumstances of arrest of accused Feroz Ali are also doubtful and are not appealable to a prudent mind. It was stated by the relevant PWs that the accused was spotted by the IO from a vehicle, while the accused was walking by the road – still carrying the murder weapon, 02 days after the registration of FIR. The dubious recovery of empties from the spots, then the recovery of Kalashnikov from one accused, and then sending of these articles together to FSL Peshawar for obtaining a positive report in respect of these recoveries, clearly show that the recoveries were planted in order to fabricate evidence through clueless investigation.

18. The motive in the present case was alleged as honor killing. It is sad but nevertheless it is true that ocular account in such cases is hard to come by, as the society as a whole upholds the falsely inculcated notions of honour and the social opinion is in favour of the offender who commits murder in name of the honour. However, this scenario would not cast a burden on court of law to start convicting people brought before it as accused in such cases. The burden in such a

  
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scenario would lie heavily on investigation and prosecution to bring on record sufficient evidence, circumstantial and forensic, which would enable the court to satisfy its mind regarding culpability of accused on trial.

19. The crux of above discussion is that no substantial evidence, in shape of ocular account, is available against the accused. The judicial confessions brought on record are not reliable; moreover, retracted evidence can only be used as corroborative piece of evidence and not as substantial evidence. In the present case all pieces of evidence are doubtful; and one doubtful piece of evidence cannot be taken to corroborate another doubtful piece of evidence. The exact spots, times, mode and manner of the occurrence have all remained doubtful. The formal witnesses produced by prosecution have all made contradictory statements in respect of material aspects of case.

20. 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 accused. Not many, but a single reasonable doubt is enough for acquittal of accused in such cases. The prosecution evidence in present case is doubtful in many respects; the benefit of each doubt must be extended to the accused.

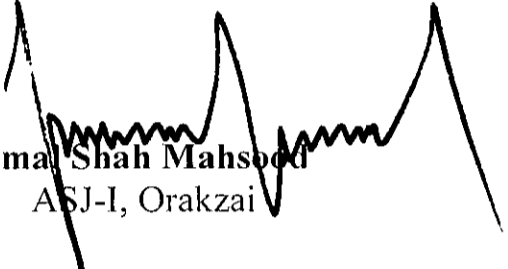
21. Resultantly, both the accused facing trial, Ashab Ali and Feroz Ali, are **acquitted** of the charge leveled against them in the present case, u/ss. 302/311/34 PPC & 15 KPAA. Both the accused are in custody; release warrants of both the accused prepared and sent to sub-jail,

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Baber Mela Hangu. The accused shall be released from custody, if not required in any other case. Judgment announced in open court.

22. The case property shall be kept intact till period of appeal/revision; thereafter, these may be dealt with/disposed of in accordance with law.
23. Let a copy of this judgment be sent to the office of DPP Orakzai, in terms of section 373 CrPC.
24. This file be consigned to the record room after its proper completion and compilation.

**Announced**  
**14-10-2020**

  
**Jamal Shah Mahsood**  
ASJ-I, Orakzai

**CERTIFICATE**

It is hereby certified that above order/judgment consists of 14 pages, and each page has been signed.

  
**Jamal Shah Mahsood**  
ASJ-I, Orakzai