

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

CRA No. 9900015/2004

Reserved on: 25.04.2024

Pronounced on: 03.05.2024

- 1 Bhajan Singh son of Tullah Ram resident of Bheed, Balod Tehsil and District Kathua (dead)
- 2 Rakesh Singh son of Bhagwan Singh resident of Plassi Tehsil Basohli

...appellants

Through: - Mr. Adarsh Sharma Advocate.

Vs.

State of Jammu and Kashmir

...Respondents

Through: - Mr. Dewakar Sharma Dy.AG

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1 The present appeal is directed against judgment dated 18.08.2004 passed by the learned Sessions Judge, Kathua ['the trial Court' for short] whereby the appellants have been convicted of offences under sections 307/326 RPC. Challenge has also been thrown to order dated 20.08.2004 whereby in proof of offence under Section 307 RPC, the appellants have been sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs.100/-, whereas, in proof of offence under Section 326 RPC, they have been sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.500/-.

2 It appears that the charge-sheet was laid against the appellants herein before the trial Court alleging therein that on 19.12.1995 at about 9.30 pm, the appellants, who were armed with a Toka, attacked injured PW Gulzar Ahmed while he was proceeding from PDD office, Basohli towards his residence at Chogan, Basohli, as a result of which, the injured PW Gulzar Ahmad received grievous injuries on his head, face and other parts of the body. According to the prosecution case, the assailants launched the aforesaid attack upon the injured with an intention to commit his murder. PW Gulzar Ahmed was found in an injured condition lying on the road near Power House and the police shifted him to the Hospital at Basohli. FIR No. 94/95 for offences under Sections 307/326 RPC and 4/25 Arms Act was registered and the investigation was set into motion.

3 During investigation of the case, statement of the injured was recorded by the Investigating Officer/SHO, Police Station, Basohli. He was subjected to medical examination and the statements of other witnesses under Section 161 CrPC were also recorded. The weapon of offence viz. 'Toka' was recovered on the basis of the disclosure statement made by the appellant Bhajan Singh and after investigation of the case, offences under Section 307/326 RPC and 4/25 Arms Act were found established against the appellants. Accordingly, the charge sheet was laid before the trial Court.

4 Vide order dated 01.07.1996, charges for offences under Sections 307/326 RPC and 4/25 Arms Act were framed against the appellants and their plea was recorded. The appellants denied the

charges and claimed to be tried. In order to prove its case, the prosecution examined ten out of thirteen witnesses, cited in the challan. The injured PW Gulzar Ahmad is stated to have died a natural death during trial of the case, as such, his statement could not be recorded, whereas the Investigating Officer Ashok Kumar, Sub-Inspector did not step into the witness box. Similarly, the statement of PW Mushtaq Ahmed, witness to the seizure of clothes of the injured has also not been examined by the prosecution.

5 After completion of the prosecution evidence, statements of the appellants under Section 342 CrPC were recorded in which they denied the occurrence and claimed that the prosecution witnesses have deposed falsehood. They further stated that PW Maqsood Ahmaed, the eye witness to the occurrence is the relative of injured PW Gulzar Ahmed, who was residing in the house of PW Maqsood Ahmed and because of this reason he has deposed falsehood. The appellants claimed that they are innocent. The statement of one witness DW Mela Ram was recorded in defence.

6 The learned trial Court, after appreciating the evidence on record, placed heavy reliance upon the statement of eye witness PW Maqsood Ahmed and the medical evidence and concluded that the appellants are the authors of the crime. Accordingly, they have been convicted of offences under Sections 307/326 RPC. The charge for offence under Section 4/25 Arms Act could not be established against the appellants.

7 The appellants have challenged the impugned judgment of conviction and order of sentence on the ground that the learned trial Court has not appreciated the evidence in proper perspective. It has been contended that the prosecution has not proved beyond reasonable doubt the ingredients of the offences of which the appellants were charged as there are many lacunae in the prosecution evidence. It has been further contended that there is evidence on record to show that the injured was heavily drunk and, as such, injuries present on his person could have been caused by a fall on a sharp edged stone, but this aspect of the matter has not been properly appreciated by the trial Court. It has been further contended that as per the prosecution case, the occurrence is alleged to have taken place at about 9.30 pm and the only witness, who claims to have seen the occurrence, has witnessed it from a distance of 100-150 yards, therefore, it would not have been possible for him to either identify the assailants or to give the details of the occurrence. Thus, the statement of the said eye witness is unworthy of credit.

8 I have heard learned counsel for the parties and I have also gone through the trial Court record, the impugned judgment and the evidence available on record.

9 Before proceeding to determine the merits of the grounds of challenge raised by learned counsel for the appellants, it would be pertinent to mention here that during the pendency of this appeal appellant No.1 Bhajan Singh passed away. Therefore, the appeal to the extent of appellant No.1 has abated and the proceedings as against him stand terminated.

10 That takes us to the merits of the grounds of challenge raised by learned counsel for the appellants. The allegations against the appellants are that on 19.12.1995 at about 9.30 pm while PW Gulzar Ahmad was crossing the bridge near Power House, he was subjected to murderous assault by the appellants who were armed with a 'Toka'. The best witness in such circumstances would have been the injured who has survived the attack. However, the injured has died during the pendency of the trial not because of the injuries sustained by him, but because of natural reasons. Therefore, his statement could not be recorded. That leaves us with the eye-witness account of occurrence as narrated by PW Maqsood Ahmed and the corroborative evidence in the shape of medical evidence as well as the recovery of weapon of offence on the basis disclosure statement made by the appellant Bhajan Singh. We have also the testimony of other witnesses of the prosecution including the testimony of the police officials who reached the spot immediately after the incident and shifted the injured to the Hospital.

11 So far as the evidence relating to proof of disclosure statement alleged to have been made by the appellant Bhajan Singh and the consequent recovery of weapon of offence viz. 'Toka' is concerned, the same has been found to be unworthy of credit by the trial Court. It has been concluded by the trial Court that, on the basis of statements of PWs Mohd Ramzan Dar and Pawan Kumar Constables, the disclosure statement alleged to have been made by the appellant Bhajan Singh has not been proved. The said conclusion of the trial Court is based on correct appreciation of the statements of these witnesses.

12 PW Mohd Ramzan has, in his cross examination, stated that he was told about the disclosure statement of the appellant Bhajan Singh by the SHO concerned meaning thereby that the disclosure statement was not made by the appellant in his presence. Similarly, PW pwan Kumar has also stated that the disclosure statement was not made by appellant Bhajan Singh in his presence. Regarding recovery of weapon of offence, these two witnesses have stated that the site of recovery is located on a thoroughfare from where the vehicular traffic as well as the people pass through. Therefore, the trial Court has rightly concluded that neither the disclosure statement, nor the recovery of weapon of offence pursuant thereto has been proved in the instant case.

13 PW Kartar Singh has stated that he saw PW Gulzar Ahmed lying in an injured condition near the road. He is stated to have asked the injured as to who had inflicted injuries upon him, but the injured did not respond, where-after, he along with PWs Bishan Singh and Ragubir Singh informed the police on telephone. According to him, the police came on spot within 5 to 7 minutes and the injured was taken to the hospital. PW Raghubir Singh has turned hostile. Although he admitted that he saw the injured lying on spot, but he stated that he was not having any injuries on his body, but he was heavily drunk. PW Bishan Singh has also corroborated the statement of PW Kartar Singh and stated that PW Gulzar Ahmed was lying on spot and after informing the police, the injured was taken by the police in a Jeep to the hospital. PW Maan Singh confirmed the fact that the injured was lying near the road

and he was taken to the Hospital upon receipt of information. PW Shanti Swaroop, Head Constable has also given his statement on similar lines.

14 From the aforesaid evidence on record, it is clear that PW Gulzar Ahmad was found on spot of occurrence in an injured condition and he was taken to the Hospital by the police. The finding of the trial Court in this regard is also based upon proper appreciation of evidence.

15 That takes us to the medical evidence, that is, available on record in the shape of statement of Dr. Vinod Kumar Sharma and the injury certificate EXPW-VK which has been authored by him. As per this certificate, PW Gulzar Ahmad is shown to have received grievous injuries on his forehead, right parietal region, left parietal occipital region, anterior portion of nose, deep wound extending from right cheek towards the angle of right mandible, wounds extending from mouth towards the mandible and wound over the back of right arm just near the right wrist joint. As per the statement of Dr. Vinod Kumar, all these injuries are possible by a sharp edged weapon. The Doctor in his cross-examination has stated that the injured had consumed alcohol at the time of examination and that the injuries sustained by the injured could also be possible by a fall on sharp edged stone.

16 There is also the statement of Dr. K.K. Sethi Radiologist who has proved the certificate EXPW-KK. As per this certificate, the petitioner is stated to have suffered fracture of parietal bone of skull. The witness has stated that such type of injury could be possible by striking against a hard object with great force.

17 Before appreciating the medical evidence on record, it would be apt to refer to the statement of eye witness PW Maqsood Ahmed as well. According to the said witness, on the day of occurrence, he had gone to Plassi to purchase sheep and goats and when he reached near Power House Basohli, he heard some noise. He further stated that he saw PW Gulzar Ahmed whom he already knew, crying and he also saw the accused passing through near the Power House. He further stated that he saw PW Gulzar Ahmed beneath the bridge lying in an injured condition. He went on to state that he saw the appellants beating up PW Gulzar Ahmed and that they were carrying Toka and Drati. He went away from the spot and narrated the story to his family members and thereafter came back on spot, but found that PW Gulzar Ahmed had been taken to Hospital by the police.

18 In his cross examination, he stated that he had boarded the Bus at Plassi at 4 pm and at 4.30 pm, he had reached Farnad where he got down from the Bus. After purchasing goats/sheep from Farnad, he proceeded to Basohli on foot. He went on to state that he reached the spot of occurrence at about 9.30 pm and he saw the occurrence from a distance of 100-150 yards. He further stated that light of the Power House was on but it was dim. He stated that the distance of site of occurrence from the power house is about 50 yards. He also stated that the accused after beating up Gulzar Ahmed threw him down the bridge. He could not see as to which accused was carrying which weapon. He did not make any statement to the police

19 From the statement of PW Maqsood Ahmed, two facts clearly come to the fore. One, that his presence on spot is not natural or in other words, he is a 'chance witness' and second, he has seen the occurrence from a distance of 100-150 yards and the source of light was very dim. It is to be borne in mind that the occurrence has taken place in the darkness of night at 9.30 pm in the month of December.

20 As already noted, PW Maqsood Ahmed is a chance witness as he is stated to have been present on spot as a matter of chance. He is not a resident of the area which is in the immediate vicinity of the place of occurrence. In other words, he is not expected to be present in the said place. The evidence of a chance witness requires a very cautious and close scrutiny and a chance witness has to adequately explain his presence at the place of occurrence before reliance can be placed upon his testimony (See: **Satbir vs Surat Singh and ors, (1997) 4 192, Harjinder Singh vs State of Punjab, AIR 2004 SC 3962 and Sarvesh Narayan Shukla vs. Daroga Singh, (2007) 13 SCC 360**). The conduct of a chance witness subsequent to the incident has also to be taken into consideration, particularly as to whether he has informed any one else in the vicinity about the incident. In this regard, I am supported by the ratio laid down by the Supreme Court in the case of **Thangaiya vs State of Tamil Nadu (2005) 9 SCC 650**.

21 Now coming to the statement of PW Maqsood Ahmed who admittedly is a chance witness, according to him, he along with sheep and goats was proceeding through the spot of occurrence at the relevant time. The learned trial Court while placing reliance upon the statement

of said witness has observed that normally the people dealing in sale and purchase of goats/sheep carry their herd during the night so as to avoid traffic on the road and, as such, the conduct of PW Maqsood Ahmed is natural and his testimony is reliable. The learned trial Court has termed the conduct of PW Maqsood Ahmed in not rescuing the injured and instead proceeding towards his home and thereafter coming back to spot as 'natural' on the basis of explanation that he wanted to first take care of his sheep and goats and that he did not want to intermeddle in someone else's affairs.

22 I am afraid the reasoning given by the learned trial Court for terming the conduct of PW Maqsood Ahmed as 'natural' is not based on sound logic and natural course of events. It has come in the statement of PW Maqsood Ahmed that the injured PW Gulzar Ahmed was residing at one point of time in his house. Both the appellants have, in their statements under Section 342 CrPC, taken a defence that PW Maqsood Ahmed is related to the injured and in this regard, they have examined DW Mela Ram who has also testified to this fact. Therefore, there is evidence on record to show that the injured and PW Maqsood Ahmed were related to each other. In such circumstances, the conduct of PW Maqsood Ahmed in leaving the injured on spot in a serious condition and proceeding to his home is absolutely unnatural. Normal human conduct is that a person would not leave his/her relative in an injured condition and proceed ahead unmindful of the condition of the injured. In a rural society where the people are closely knit to each other and they share each other's pain and sufferings, such conduct on the part

of a relative is highly improbable. Thus, the conduct of PW Maqsood Ahmed in leaving the injured, who happens to be his relative, on spot and proceeding ahead towards his home, makes his statement unworthy of credit.

23 In addition to this, there is nothing on record to show that PW Maqsood Ahmed has either narrated the occurrence to any civil person or to the police. The fact that he did not narrate the occurrence to anyone not even to police, though the injured was his relative, makes his conduct unnatural.

24 Apart from this, PW Maqsood Ahmed has himself admitted that he saw the occurrence from a distance of 100-150 yards in dim light at about 9/9.30 pm at night. In such circumstances, it was highly improbable for the said witness to actually see the occurrence and identify the assailants.

25 All the aforesaid factors have not been taken into consideration by the learned trial Court, while appreciating the statement of PW Maqsood Ahmed, as a result of which, the learned trial Court has drawn its conclusions on the basis of highly unreliable testimony of PW Maqsood Ahmed.

26 That takes us to the medical evidence on record. From the said evidence, it is established that the injured did suffer grievous injuries most of which were possible by a sharp edged weapon. The injured has also received fracture on his head which as per the medical evidence, is possible by striking against a hard object. While

appreciating the medical evidence, it is to be noted that there is sufficient evidence on record to show that the injured was drunk at the time of the incident. Dr. PW Vinod Kumar has stated that the injured Gulzar Ahmad had consumed alcohol at the time of his examination. PW Bishan Singh has also stated that the injured was smelling of alcohol. It has also come in the evidence on record that the injured was found beneath the bridge. As per the medical evidence, the injuries suffered by PW Gulzar Ahmad were possible by a fall on sharp edged stones. Thus, the possibility that due to drunken condition, PW Gulzar Ahmad had received the injuries on account of fall from the bridge on sharp edged stones cannot be ruled out. Thus, it is not a case where the injuries present on the body of PW Gulzar Ahmad cannot be explained otherwise than presuming the same to be result of an assault, but, it is a case where the injuries present on his body could have either been caused by an assault or there was also a possibility that he may have sustained these injuries by a fall from the bridge upon stones on account of his drunken condition. So, merely on the basis of medical evidence which shows that PW Gulzar Ahmed had suffered injuries, it cannot be conclusively held that the said injuries were a result of assault.

27 As per the prosecution case, the statement of the injured was recorded by the SHO PW Ashok Kumar in the Hospital wherein he nominated the appellants as assailants, however, the said SHO has not come into the witness box to depose anything in this regard. It was incumbent upon the SHO to step into the witness box and prove the statement of the injured recorded by him, particularly because during the

trial of the case, the injured had passed away. Because the SHO ,who is stated to have recorded the statement of the injured, did not appear as a witness for prosecution, this circumstance which had assumed significance due to death of the injured could not be established.

28 Apart from the above, the prosecution has not led any evidence to prove the motive for the crime. Generally, the proof of motive recedes into background in cases where the prosecution case rests upon an eye-witness account of the occurrence. This is so, because if the Court upon appreciation of deposition of eye witnesses comes to a conclusion that the version given by them is credible, absence of evidence to prove the motive is rendered inconsequential, but that does not mean that proof of motive even in a case which rests on an eyewitness account does not lend strength to the prosecution case. Proof of motive in such situation certainly helps the prosecution and supports the eye witnesses.

29 In the present case, the prosecution has not been able to prove the motive for the alleged crime. As per the story projected by the prosecution, there was litigation between the appellants/accused and the injured and this led to the alleged crime, but no evidence has been led to prove that there was any litigation between the parties and, in fact, none of the prosecution witnesses has stated anything about the relations between the accused and the injured.

30 In the absence of proof of motive and having regard to the evidentiary value of the statement of PW Maqsood Ahmed as has been discussed hereinabove, it is extremely hazardous to base the conviction

of the appellants/accused on the solitary statement of PW Maqsood Ahmed. The learned trial Court has landed itself into grave error by placing reliance upon the sole testimony of PW Maqsood Ahmed, whose statement, as already discussed, is unworthy of credit.

31 For the foregoing reasons, the impugned judgment of conviction and order of sentence passed by the learned trial Court is unsustainable in law. The appeal is, accordingly, allowed and the impugned judgment of conviction and order of sentence is set aside. The appellants are acquitted of the charges and their bail and surety bonds are discharged.

The trial court record along with a copy of this judgment be sent back.

(Sanjay Dhar)
Judge

JAMMU
03.05.2024
Sanjeev '

Whether order is reportable: Yes