S. No.
Supp Cause List

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

CRAA No. 60/2012

Reserved on: 06.06.2023
Pronounced on:01.08.2023

State of J&K …Petitioner(s)

Through: Mr. Dewakar Sharma, Dy.AG.

Vs.

Shalinder Singh and Ors. ...Respondent(s)

Through: Mr Sudesh Sharma, Advocate.

CORAM:

HON'BLE MR JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR JUSTICE JAVED IQBAL WANI, JUDGE

JUDGEMENT

Per Javed Iqbal, J.

1. The instant criminal acquittal appeal has been filed by the erstwhile State of Jammu and Kashmir (now the Union Territory of Jammu & Kashmir) against the judgment dated 25.02.2012 (hereinafter for short the impugned judgment) passed by the learned Additional Sessions Judge, Udhampur, (hereinafter for short the trial Court) in file No. 05/Sessions in case titled as "*State Vs. Shalinder Singh and Ors."* arising out of FIR No. 309/2008 of Police Station Udhampur for offences under Sections 302/120-B/212 RPC, 3/25 & 4/25 Arms Act, acquitting the accused respondents herein facing trial while directing warrants issued against the absconding accused persons to remain in force.

2. **Brief Facts**

- Upon completion of the investigation in FIR No 309/2008 supra the prosecution presented challan for commission of offences under Sections 302, 120-B, 212 RPC and 3/25 and 4/25 of the Arms Act against 10 accused persons before the court of Chief

Judicial Magistrate Udhampur on 17.03.2009. The Chief Judicial Magistrate Udhampur vide order dated 17.03.2009 committed the said challan for trial to the learned Principal Sessions Judge Udhampur who transferred the same to the learned Additional Sessions Judge Udhampur (hereinafter for short 'the trial Court') for trial.

- Challan was presented in presence of the respondents and one Mohd Shabir Ahmad who was also an accused and the other accused persons who were absconding at the time of presentation of challan and were proceeded against under Section 512 CrPC and a general arrest of warrant was issued against them and in execution of such warrant accused Onkar Singh was arrested whereas other accused persons were absconding till the conclusion of the trial. Particulars of all the accused persons and the offences for which they were charged for brevity and convenience are provided hereunder: -

  (i) Shalinder Singh, (A1) charged under Sections 302/120-B RPC read with Section 3/25 of the Arms Act.

  (ii) Pawam Kumar (A2) charged under Sections 302/120-B RPC read with Section 3/25 of the Arms Act.

  (iii) Som Raj (A3) charged under Sectins 302/212 RPC read with Sections 4/25 of the Arms Act.

  (iv) Mohd Shabir, (A4) charged under Section 302/212 RPC.

  (v) Onkar Singh, (A5) charged under Sections 302/120-B RPC.

- The accused persons namely Mohd Shabir Ahmad, Onkar Singh A4 and A5 were acquitted under Sections 273 Cr.PC on 17.04.2012 by the trial Court.

3. **Case Setup by the Prosecution**

- As per the challan, on 30.12.2008 at about 1:00 pm outside shop of PW Jang Bahadur, opposite ICCI Bank Udhampur, the accused A1 to A3 giving effect to the criminal conspiracy hatched by all the accused persons attacked one Varinder Singh @ Vicky

(hereinafter for short the deceased) with deadly weapons causing serious injury and thereafter fled away and the said injured Vicky passed away while being shifted to the hospital. The accused persons A1 & A2 attacked the deceased with country made pistols whereas, accused A3 attacked the deceased with a Toka.

- During the course of investigation the police arrested 5 accused persons collected evidence, recovered weapons of offences on the basis of disclosure statement made by the accused person and upon conclusion of the investigation presented the challan against the accused persons.
- The charges under relevant sections came to be framed on 04.06.2009 by the trial Court to which accused A1 to A3 pleaded not guilty and claimed to be tried.
- In order to bring home the charges against the accused A1 to A3, the prosecution besides examining 55 witnesses cited in the challan, examined two more witnesses who were permitted to be called and examined by the trial Court under Section 540 CrPC.

4. The instant criminal acquittal appeal has been filed against the impugned judgment on multiple grounds and in order to advert to the said grounds, in the first instance the prosecution evidence led before the trial court would be adverted to here under:

The prosecution had cited 5 witnesses namely Ishwinder Sharma, Jang Bahadur, Bikramjit Singh, Nipun Sharma and Anil Dev Singh as eye witnesses. PW Ishwinder Sharma and Jang Bahadur are respectively owners of the tea stall outside which the alleged occurrence on 30.12.2008 took place when the deceased was allegedly attacked by the accused persons.

PW Bikramjit Singh, Nipun Sharma and Anil Dev Singh were allegedly at the time of occurrence with the deceased at the time of occurrence. Except PW Jang Bahadur whose statement was recorded under Section 161 CrPC by the investigating officer, the statement of other witnesses were got recorded under Section 164-A CrPC by the investigating officer during the course of investigation.

(i) **PW Ishwinder Singh,** denied having seen accused however, admitted to have made statement under Section 164-A CrPC under threat of police alleging to have been threatened of his implication in the case if he did not make the desirable statement.

(ii) **PW Jang Bahadur Singh,** during the course of examination was declared hostile and was subjected to cross examination by the prosecution, however nothing concrete could be extracted from him by the prosecution as he denied to have been knowing the accused or else had the knowledge of the occurrence.

(iii)**PW Bikramjit Singh,** denied that the accused persons attacked the deceased and had further deposed that he did not see anybody running from the spot and though he admitted to have made a statement under Section 164-A CrPC, yet deposed that such statement was made by him under threat of implication in the case by the police made by the police. He even did not identify the accused persons or stated anything against them.

(iv)**PW Nipun Sharma,** nowhere stated that accused persons fired upon the deceased. He even did not identify the accused persons and he too though admitted the contents of the statement made under Section 164-A CrPC, yet stated that the same was made by him under threat of his implication in the case extended by the police and that he made the said statement as told by the police.

(v) **PW Anil Dev Singh,** stated to be friend of the deceased deposed that on the date of occurrence he had come to Udhampur from Jammu, had breakfast with the deceased in his house and thereafter went to tea stall with the deceased and there from went to withdraw money from nearby ATM and upon his return there from saw the deceased in injured condition and was shifted to Udhampur hospital. He stated that he did not see anybody firing upon the deceased. He too admitted to have made the statement under Section 164-A CrPC under the influence and threat of implication in the case extended by the police.

As is seen from the testimonies of the aforesaid prosecution witnesses cited as eye witnesses none have supported

the prosecution case and in fact 4 of the said witnesses have categorically stated that they have been threatened with false implication in the case by the police if they did not make the statement as desired by the police.

5. Having scanned and analyzed the evidence of the eye witnesses supra led by the prosecution in the matter admittedly having not supported the prosecution case, it thus, became imperative to examine and analyze the circumstantial evidence available on record, however, before proceeding to advert to the same it would be appropriate to examine the law on the subject of circumstantial evidence.

In law in a case based on circumstantial evidence there has to be a complete and unbreakable chain of events to prove the guilt of the accused. Where a series of circumstances are dependent on one another, they are to be read as one ingredient as a whole and not separately as it is not possible for a Court to truncate and break the chain of circumstances as the very concept of proof of circumstantial evidence would be defeated, in that event and where the circumstantial evidence consist of chain of continued circumstances linked with one another, the Court has to take cumulative evidence of the prosecution before acquitting or convicting the accused.

The Apex Court recently in case titled as **"Mohd. Naushad Vs. State" (Govt of NCT of Delhi) reported in 2023 SCC Online SC 784"** dealt with the law relating to the circumstantial evidence at length and noticed and observed in paras 92 to 95 as under;

> *92. A Constitution Bench of this Court in M.G. Agarwal v. State of Maharashtra (1963) 2 SCR 405 (5-Judge Bench) has observed as under:*
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> > *"…It is a well-established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. There is no doubt or dispute about this*

position. But in applying this principle, it is necessary to distinguish between facts which may be called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the court has to judge the evidence in the ordinary way, and in the appreciation of evidence in respect of the proof of these basic or primary facts there is no scope for the application of the doctrine of benefit of doubt. The court considers the evidence and decides whether that evidence proves a particular fact or not. When it is held that a certain fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not, and in dealing with this aspect of the problem, the doctrine of benefit of doubt would apply and an inference of guilt can be drawn only if the proved fact is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. It is in the light of this legal position that the evidence in the present case has to be appreciated."

93. Further, on the point of as to whether the accused persons can be convicted or not on the basis of circumstantial evidence is now evidently clear and we need not dilate on the issue any further, save and except refer to the five golden principles curled out by this Court in Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116 (3-Judge Bench) which must be fulfilled before a case against an accused can be said to be fully established on circumstantial evidence:

"(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability, the act must have been done by the accused."

94. [See also: Major Puran v. The State of Punjab AIR 1953 SC 459 (2 -Judge bench); Deonandan v. State of Bihar, AIR 1955 SC 801 (3-Judge bench); E.G. Barsay v. State of Bombay AIR 1961 SC 1762 (2-Judge Bench); Bhagwan Swarup v. State of Maharashtra AIR 1965 SC 652 (3-Judge Bench); Yash Pal Mittal v. State of Punjab (1977) 4 SCC 540 (3-Judge Bench); Firozuddin Basheeruddin & Ors. v. State of Kerala, (2001) 7 SCC 596 (2-Judge Bench); Ram Singh (supra)].

95. On this point, the judgment of this Court in Mohd. Arif v. State (NCT of Delhi), (2011) 13 SCC 621, (2-Judge Bench), is also of relevance, wherein it has been observed:

> *"190. There can be no dispute that in a case entirely dependent on the circumstantial evidence, the responsibility of the prosecution is more as compared to the case where the ocular testimony or the direct evidence, as the case may be, is available. The Court, before relying on the circumstantial evidence and convicting the accused thereby has to satisfy itself completely that there is no other inference consistent with the innocence of the accused possible nor is there any plausible explanation. The Court must, therefore, make up its mind about the inferences to be drawn from each proved circumstance and should also consider the cumulative effect thereof. In doing this, the Court has to satisfy its conscience that it is not proceeding on the imaginary inferences or its prejudices and that there could be no other inference possible excepting the guilt on the part of the accused.*
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> *191. …. At times, there may be only a few circumstances available to reach a conclusion of the guilt on the part of the accused and at times, even if there are large numbers of circumstances proved, they may not be enough to reach the conclusion of guilt on the part of the accused. It is the quality of each individual circumstance*

that is material and that would essentially depend upon the quality of evidence. Fanciful imagination in such cases has no place. Clear and irrefutable logic would be an essential factor in arriving at the verdict of guilt on the basis of the proven circumstances." (emphasis supplied)

Keeping in mind the aforesaid principles and position of law qua the subject of circumstantial evidence and reverting back to the case in hand the prosecution has made an attempt to bring home the guilt of the accused persons on the following circumstances:

(a) The disclosure statement of the accused/s leading to recovery of offences of weapons.
(b) Resemblance of finger prints on the weapon/s with the specimen finger prints of the accused/s
(c) Fleeing of the accused from Udhampur to Bhardewah in Alto Car bearing registration No. JK03A-4461 immediately on the next date of occurrence.
(d) Identification of the accused in test identification test period.
(e) Call details of the cell phones of the accused/s to prove the conspiracy hatched by the accused to commit the offences.

Circumstance (a)

The instant circumstance relied upon by the prosecution is the recovery of the weapons of offences on the basis of the confession made to the police officer. Section 27 of the Evidence Act 1872 being an exception to the general rule that no confession made to the police officer is admissible as evidence against the accused, provides that when any fact is deposed as discovered in consequence of information received from the person accused of any offence, in the custody of a police officer, so much of such information, whether amounts to a confession or not, as relates distinctly to the fact thereby may be proved.

Thus, the sine-qua-non for attracting the provisions of Section 27 of the Evidence Act is that the confession must have been made to the police officer while being in police custody.

Coming back to the testimonies of the prosecution witnesses produced to prove this circumstances, it can be seen that the very arrest of the accused A1 is under cloud as in the statement made by PW Ravel

Singh Choudhary, he had stated that he had deputed PW Jasbir Singh SI to arrest A1 however, PW Jasbir Singh has denied to have arrested accused A1. Furthermore the PWs Adnan Bashir and Jasbir Singh SI who were witnesses of disclosure statement with respect to all the accused persons have stated in their respective statements that none of the accused persons made disclosure in their presence and that none of the accused persons confessed to have concealed the weapons of offence. Even the independent witness to the disclosure statements and recoveries have turned hostile and not supported the prosecution case.

Even if the said disclosure statement are presumed to have been made by the accused A1 and A3, yet the same does not attract the provisions of Section 27 of the Evidence Act to be used to be proved the guilt of the accused as the statement claimed to have been made by the said accused persons led to recovery of a simple fact and not a fact in issue. What is also worth noticing is that PW Jasbir Singh SI who supported the prosecution version stated that after the disclosure statement, the accused A1 was taken to the place of recovery from District Police Lines Udhampur and brought back to Police Lines thereafter the other accused persons were taken one by one having nowhere stated that all the accused persons were taken together to the housing colony where temporary police camp was created and from there the accused persons were taken one by one to the place of recovery as stated by the PW Raval Singh Choudhary being the author of disclosure as well as the recovery and seizure memos. This position further makes the recovery of weapons doubtful. Besides the said glaring contradiction statement of PW Mohd Arif Choudhary, incharge FSL team Udhampur is also relevant who had stated that in the month of January 2008 one day he was called at about 12 noon by the SHO Police Station Udhampur where from the SHO took the accused persons to the place of recovery. This belies the statement of investigating Officer that the accused persons made the disclosure statement in District Police Lines Udhamnpur and were taken to the place of recovery there from only. The said witness identified A1, A2 and A5 whereas from A5 no recovery was effected. The witnesses did not identify the A3 in the Court and as per him nothing

was recovered from the accused A3 whereas as per police report a Toka was recovered from him. Thus the prosecution has failed to prove the first circumstances supra.

Circumstance (b)

Prosecution has relied on the recovery of one revolver and one Toka from the scene of occurrence and the police lifted finger prints from the revolver and the said finger prints were sealed in a packet and marked as 'A' and were reported to have submerged unfit for examination. The finger prints lifted from double barrel improvised pistols allegedly recovered at the instance of accused A1 and also reported to have submerged and unfit for examination. The police did not seal the Toka recovered from the seen of occurrence nor lifted any fingerprints from the said Toka. The fingerprints lifted from the single barrel improvised pistol recovered at the instance of the accused A2 and fingerprints lifted from Toka allegedly recovered from accused A3 are reported to be identical with specimen right thumb impression of the accused A2 and A3 respectively. However the trial Court has rightly refused to rely upon the same to convict the accused in absence of corroboration and in view of doubtful recovery of weapons, while placing reliance upon the judgments of the Apex Court reported in [1995 supp (3) SCC 217] and 1996 (11) SCC 685].

Circumstance (c)

PW Nazakat Ali who allegedly transported the accused from Udhampur to Bhaderwah in Alto Car bearing registration No. JK03-4461 has deposed before the trial Court that the accused persons in the Court are not known to him and that he has seen them for the first time in the Court. PW Sunny Duggal, a Constable in IRP 10th Bn, and posted with accused Mohd Maqsood (absconding) alleged to have provided shelter to the accused did not identify the accused to be the same persons who visited Bhardewah. Thus the movement of accused persons from Udhampur to Bhardwah on 31.12.2008 in the Car in question has not been proved by the prosecution.

Circumstance (d)

Substantive evidence of the witness is his evidence in the Court but when the said accused person is not previously known to the witnesses concerned then identification of the accused by the witness soon after his arrest is of great importance. Since in the instant case the eye witnesses cited by the prosecution allegedly knew the accused persons, therefore, there was no need for the prosecution to have taken recourse to the test identification parade. Moreover the identification of the accused persons during the identification parade has not been proved beyond doubt as PW Sunny Duggal, a police personnel has deposed that the PSOs of SHO showed them three boys disclosing their names and told him to identify these three persons. PW Nipun Sharma, Ashwinder Sharma, Anil Dev Singh and Mohd Saleem being other witnesses of test identification parade have admittedly turned hostile and have deposed that under the influence of police they put their signatures on the memos of test identification parade. The Investigating Officer has also failed to state as to who were the persons associated with the test identification parade. The Magistrate in whose presence the parade was conducted has nowhere stated as to who were the witnesses to the said parade who identified accused persons in his presence. In these circumstances, the trial Court has rightly held that it would not be safe to rely upon the test identification parade conducted by the police.

Circumstance (e)

Before discussing the prosecution evidence led to prove the above circumstances, it would be appropriate and advantageous to refer hereunder to paras 99 and 101 of the judgment of the Apex Court passed in **Mohd Naushad's** case supra being relevant herein:

> *99. Conspiracy being a major charge, we take note of the legal position on the point of conspiracy between accused persons, we place reliance on the judgment of this Court in Kehar Singh & Ors. v. State (Delhi Administration), (1988) 3 SCC 609 (3-Judge Bench), wherein this Court observed:*
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> > *"271. Before considering the other matters against Balbir Singh, it will be useful to consider the concept of*

criminal conspiracy under Sections 120-A and 120-B of IPC. These provisions have brought the Law of Conspiracy in India in line with the English law by making the overt act unessential when the conspiracy is to commit any punishable offence. The English law on this matter is well settled. The following passage from Russell on Crime (12th Edn., Vol. I, p. 202) may be usefully noted:

> *"The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se, enough."*

274. It will be thus seen that the most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may not be done in pursuance of agreement, but the very agreement is an offence and is punishable. Reference to Sections 120-A and 120-B IPC would make these aspects clear beyond doubt. Entering into an agreement by two or more persons to do an illegal act or legal act by illegal means is the very quintessence of the offence of conspiracy.

101. Lastly, In Esher Singh v. State of A.P., (2004) 11 SCC 585, (2-Judge Bench), this Court observed:

> *"The circumstances in a case, when taken together on their face value, should indicate the meeting of minds between the conspirators for the intended object of committing an illegal act or an act which is not illegal, by illegal means. A few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy. It has to be shown that all means adopted and illegal acts done were in furtherance of the object of conspiracy hatched. The circumstances relied on for the purposes of drawing an inference should be prior in point of time than the*

actual commission of the offence in furtherance of the alleged conspiracy.

6. Reverting Back to the case in hand in general and the circumstances supra in particular, it is not in dispute that all the witnesses cited by the prosecution namely PW Kuldeep Kumar S/o Girdhari Lal, Kuldeep Kumar S/o Krishan Chand and Umar Jan turned hostile and nothing could be extracted from their cross examination by the prosecution, thus there being no evidence of conspiracy, more so, when the prosecution failed to even show as to which cell phones being used by the accused persons before and after occurrence and whether there was any contact between the accused persons inter-se it could safely be said that the prosecution failed to bring home the guilt.

7. One more important aspect of the case is **motive**. In case based on circumstantial evidence motive assumes great importance. In absence of a motive, it would be difficult to complete the chain of events in order to prove the guilt of accused. PW Natha Singh father of the deceased has categorically stated that accused persons had no enmity with the deceased however, enmity has been attributed to the absconding accused persons who are yet to face the trial. A reference in this regard to the judgment of the Division Bench of this Court passed in case titled as **"Pramod Kumar Vs. state of J&K, reported in 2006 (2) JKJ 218"** would be relevant and appropriate wherein at paragraph 19 following came to be observed and held:-

19. It is a case of circumstantial evidence It is proved that there was no notice of committing the murder. In a case of circumstantial evidence where no sufficient motive for murder is proved, as the case herein that the prosecution has not proved any motive for the murder, the ?Apex Court in case titled State (Delhi Admn.) Vs. Gulzarilal, reported in AIR 1979 S.C 1382, while dealing such a case of circumstantial evidence observed as under:

"…the entire prosecution case rests on purely circumstantial, evidence, and on the question of motive, both the trial Court and the High Court have clearly held that no sufficient motive for the murder had been proved. WE might also mention that incases where the case of the prosecution rests purely on

circumstantial evidence, motive undoubtedly plays an important part in order to tilt the scale against the accused. It is also well settled that the accused can be convicted on circumstantial evidence only if every other reasonable hypothesis of guilt is completely excluded and the circumstances are wholly inconsistent with the innocence of the accused. In the instant case, the prosecution has clearly fallen short of proving this fact as rightly found by the High court"

8. Thus, what can be seen from the prosecution evidence read with law governing the field is that the prosecution failed to form a complete chain, so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused persons and none else.

9. The prosecution has not been able to lead evidence of definite character to bring home the case, the respondents had been implicated in and that the trial Court had no option other than recording acquittal of the respondents. On the conspectus of evidence and material on record, we are of the firm opinion that the judgement of acquittal impugned in the instant appeal recorded by the trial Court is perfectly legal and valid and thus does not call for any interference. Otherwise also the jurisdiction of the appellate court hearing an acquittal appeal is well circumscribed and where on evaluation of evidence and material on record, two views are possible, the view which favours the accused has to be preferred.

10. Having regard to the aforesaid position, we hold that the appellant has failed to make out a case for interference in the judgement of acquittal recorded by trial court. The appeal therefore is found to be without any merit and is accordingly dismissed.

(JAVED IQBAL WANI)
JUDGE

(SANJEEV KUMAR)
JUDGE

SRINAGAR
01.08.2023
Ishaq

Whether approved for reporting Yes