

# State Of J&K vs Shakeel Ahmaed & Anr on 7 October, 2022

**Author: Rajnesh Oswal**

**Bench: Rajnesh Oswal**

HIGH COURT OF JAMMU & KASHMIR AND LADAKH  
AT JAMMU

Reserved on : 29.09.2022  
Pronounced on: 07.10.2022

CRAA No. 10/2017

State of J&K

.....Appellant(s)/Petitioner(s)

Through: Mr. R. S Jamwal, AAG.

Vs

Shakeel Ahmaed & Anr.

..... Respondent(s)

Through: Mr. Sanjay Sharma, Advocate

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE  
HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE  
JUDGMENT

(Per Oswal-J)

1. The appellant has impugned the judgment dated 31.10.2014 passed by the court of learned Principal Sessions Judge, Rajouri (hereinafter to be referred as the trial court) in case titled "State of J&K Vs. Shakeel Ahmed & Anr." whereby the respondents have been acquitted of the charges for commission of offences under Section 302,201,34 RPC on the ground that the learned trial court has not rightly appreciated the evidence and the prosecution has established the guilt of the respondents beyond any reasonable shadow of doubt.

2. Mr. Mr. R. S Jamwal, learned AAG vehemently argued that there is sufficient evidence on record in the form of the statement of PW-Nazia Kouser who has categorically deposed about the complicity of the respondents in the commission of offence, but the learned trial court has not properly considered her statement and has acquitted the respondents erroneously.

3. On the other hand, Mr. Sanjay Sharma, learned counsel for the respondents argued that the statement of PW Nazia Kouser is not reliable as she had remained in custody of Police and during custody she was tortured and then she made that statement.

4. Heard and perused the record.

5. The prosecution story as it emerges from the charge sheet is that on 17/09/2002, Chowkidar Talib

Hussain S/o Hassan R/o Malhoot, Thanamandi, Rajouri lodged an oral report with the police station Thanamandi that corpse of Babu Hussain s/o Kala Khan R/o Malhoot, age 25 years is lying on the bank of river and some marks of injury are also found on his head and face. It appears that some persons after murdering him left the dead body there. On receipt of this information, FIR No. 66/2002 under section 304 RPC was registered. After the seizure of the dead body, post-mortem was got conducted and clothes of the deceased were also seized. Statements of witnesses were also recorded and suspicious persons were called in the Police Station for interrogation. Sr. Superintendent of Police, Rajouri constituted a Special Investigating Team, headed by the Dy.S.P operation and investigation was handed over to him. During investigation, one lady namely Nazia Kouser daughter of Noor Hussain R/o Rakiban, whose marriage was settled with the deceased last year, was also called for the purpose of investigation and during the course of the investigation, she disclosed that one year ago, she had developed illicit relations with one Shakeel Ahmed, due to which she got pregnant and in this connection, her parents filed a written application with police Station Rajouri in this regard. FIR No. 89 of 2002 under section 376 RPC was registered and after conducting the medical examination of Nazia Kouser, the lady doctor opined that she was having pregnancy of 24 to 26 weeks. As the real accused had threatened Nazia Kouser that if she disclosed the real facts to anybody, she would be beheaded by them or by militants and she was also lured by the respondent Shakeel that he would marry her due to which he did not disclose the real facts to anybody. On the assurance of the police, she revealed the names of respondents. They were called in the police station and interrogated. They admitted their guilt and the Police recovered the stones and one knife from the place of occurrence on their Nishandehi. Seizure memo was prepared and the statements of the witnesses were recorded under section 161 and 164 Cr.P.C. From the investigation, it came to fore that in the month of last Ramzan of 2001, there was a proposal of engagement of Nazia Kouser with Babu Hussain and articles for the said engagement were also purchased. In the meanwhile, respondent Shakeel, who was neighbour of Noor Hussain, finding Nazia Kouser alone, tried to develop illicit relations with her but on her refusal, he promised to marry her and also threatened if she would not marry him, he would kidnap her and take her to Mumbai. She got trapped in the false promise of the accused and made sexual relations with him. Accused also told her that he would make Babu Hussain agree for her marriage with him. In the month of Jeth 2002, in the marriage of daughter of one Mirza Jamil, the mother and sisters of Nazia Kouser also participated and the respondents were also present in the said marriage. The mother and sister of Nazia came back to home in the night but she stayed there and in the night, when Nazia was coming back to her house, the accused Shakeel who was waiting for her also accompanied her and in the way, when he was having sex with her, the other accused Mahfouz also came there and on seeing them, he threatened them to disclose that to their parents. On their request, accused Mahfouz agreed to remain silent but insisted Nazia to have sexual relations with him also. Both the accused after finding her alone at home, came there and Shakeel compelled her to fulfil the lust of accused Mahfouz, which was objected to by her on the ground that on one hand accused Shakeel was asking that he would marry her and on the other hand, he was forcing her to make sexual relations with Mahfouz. However, on the assurance and after promise by accused Shakeel that he would marry her at any cost and further that Mahfouz was not a stranger but his brother-in-law, Mahfouz also committed rape with her. Thereafter, it became routine for both the accused to visit her house and commit rape with her. When due to illicit relations with the accused, she became pregnant she told accused Shakeel about this. At this Shakeel assured her that as she had got pregnant from him, so he

would marry her and asked her not to marry Babu Hussain at any condition and he would compel Babu Hussain not to marry her and if he would not agree, they would murder him. In the year 2002, 4/5 days before Assembly Election, when Nazia was washing clothes at the bank of river in front of house, both the accused while fishing in the river, came there and told her that they had asked Babu Hussain not to marry her but he had not agreed, so they would murder him on the day of election or 1-2 days before or after the election and she would not disclose the secret to anyone. On Election Day at 3/4 o'clock in the evening, she saw both the accused along with Babu Hussain coming towards river. The next day, at 8.00 in the morning, when she was alone at her home, accused Shakeel visited her and told her that Mahfouz had murdered Babu Hussain and asked her not to disclose this to any person otherwise she would also meet the same fate. On the next day, when Nazia had gone to her field to fetch vegetables, both the accused who were hiding there came towards her and told that an open FIR has been registered in police station Darhal. Police would call people and if she was called, then she should not disclose the secret to police. Due to fear of the accused and militants, she did not reveal the secret to the police and also did not disclose the names of the accused regarding her pregnancy but later disclosed the names of accused to her father regarding pregnancy. The father of the accused had obtained thumb impression of father of Babu Hussain on a blank affidavit to use it as defence evidence as and when need arise. Accused after killing Babu Hussain threw his towel and footwear in the river to destroy the evidence. They after killing the deceased threw his dead body in the river so that it may be washed away in the river. After her statement, the offences under section 201, 34 RPC were also added. After the conclusion of the investigation, the charge sheet was laid before JMIC Thanamandi on 22/02/2003 and was later on committed to the trial court. The trial court by its order dated 28/05/2003, framed the charge against the respondents for commission of offences under sections 302, 201, 34 RPC. The accused did not plead guilty and as such the prosecution was directed to lead evidence. The prosecution examined 21 witnesses. The learned trial Court after hearing the parties acquitted the respondents in terms of the judgement dated 31.10.2014.

6. As per the case projected by the prosecution, the whole of the prosecution case is based upon circumstantial evidence as there is no eye witness to the occurrence. When the case is based upon the circumstantial evidence then the prosecution must prove all the incriminating circumstances beyond reasonable doubt and the established circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. The most important witness in this case is PW Nazia Kouser and she had stated that her engagement was fixed with Babu Hussain and for engagement, articles were also given by Kala Khan, father of Babu Hussain. Her father and brothers used to remain outside in connection with their work and she used to remain alone in her house. Accused Shakeel, who resided near her house, used to visit her house and insisted her for making sexual relations. She refused and also abused him. Upon that, accused Shakeel threatened to kill her and her mother, if she did not agree for sexual relations. She tried to persuade him that her engagement had been fixed with Babu Hussain but accused Shakeel replied that he would kill Babu Hussain as well as her also. He asked her to continue illicit relations with him and he used to commit rape with her by advancing threats. There was marriage of daughter of her neighbour namely Mirza Jameel. She along with her mother and sister went to the marriage. As her mother got ill, so she along with her younger daughter came back but she remained in the marriage. Later she also came back to her house but she was not aware that the accused Shakeel was

also following her and on the way near her house accused Shakeel after threatening her, committed rape. It was moonlight and accused Mahfouz was also coming behind them. Thereafter conversation took place between accused Shakeel and Mahfouz on phone. Accused Mehfoz also came there and he threatened that he will tell her mother. Upon that, she and accused Shakeel requested Mahfouz not to disclose about that. Then accused Mahfouz stated that if she agrees for having sexual relations with him, then he would not disclose that to anybody. She told accused Shakeel that she would not make such relation with Mahfouz because her engagement had been fixed with Babu Hussain but accused Shakeel told her that he would marry her and if she marries Babu Hussain, he would eliminate her and Babu Hussain. Accused Mahfouz did not commit anything with her on that day and they came back to their respective homes. Next day, accused Mahfouz came to her house and compelled her for having sexual relations with him. She ran away. After 2-3 days, both the accused Shakeel and Mahfouz came to her house. She asked Shakeel as to how she can agree for having sex with Mahfouz and on that day Mahfouz committed rape with her. Accused Shakeel was also there. Thereafter both the accused used to visit her house after every 3 rd day and would commit rape with her. She got pregnant and she told accused Shakeel about her pregnancy and accused Shakeel replied that she as well as child both belongs to him. Thereafter when she had gone towards river for washing clothes, both the accused who were fishing there, came to her and told her that Babu Hussain was not agreeing to break the engagement with her, so on the election day or next day, they would kill him. She told them that Babu Hussain was innocent and why was he be killed. Accused threatened her that if she disclosed this fact to anybody then they would also kill her as well as other members of the family. She went to her house and due to fear did not meet anybody. On the Election Day, both accused went to the river along with Babu Hussain. As her mother was ill and her parents had gone to Rajouri and she was alone at her home, at 8.00 in the morning Shakeel came to her home and told that they had killed Babu Hussain. On being asked the reason for the murder, the accused threatened her that if she disclosed about that to anybody, they would also kill her. Accused also told her that they had thrown the dead body of Babu Hussain in the river. Accused came to her house and told about the registration of an open FIR and again threatened not to disclose this fact, if the police arrests her. Thereafter next day she along with her parents, brother and sisters were taken to police station by the police. She due to threats advanced by the accused did not give any statement before the police. Police interrogated all members of a family and thereafter released them. On the way Shakeel met her and asked her to keep quiet and not to disclose to anybody. On the encouragement of the Dy.S.P that if she had any fear/threats from anybody, security would be provided to her, she disclosed to Dy.S.P that she was having pregnancy of 7 months and narrated the whole matter to Dy.S.P. The accused were arrested and police allowed her to go home. In cross-examination she stated that she did not state before the police that after leaving the study, she used to graze cattle and sheep. Kala Khan wanted to engage her with his son Babu Hussain. However, neither she nor her mother was ready for this engagement but her father wanted to engage her with Babu Hussain for marriage but she did not agree for this. This fact has been wrongly mentioned by the police in her statement. Her statement recorded by the police under section 161 Cr.P.C. that her father forcibly wanted to marry her with Babu and she remained without food for 2 days and nights, is wrong. She never made such a statement. In her statement under section 161 Cr.P.C. it is not mentioned that on the Election Day, she saw accused persons accompanied with Babu Hussain going towards river. After 2/3 days of death of Babu Hussain, she along with the family members were brought in police station Darhal and they remained there for one month and

police used to bring food for them and her father used to make payment for the same. During investigation, she had deposed nothing before SHO, Police Station Darhal. After remaining one month in Police Station, Darhal, they had gone to their house and thereafter again after 20 days, they were brought to Police Station, Rajouri. Her brother-in-law was a surrendered militant. He was posted as SPO in police station Darhal. Her child born due to illicit relation is about nine months old. Accused Shakeel had sexual relations with her for the first time at her home. Her sister namely Naseem had seen her making love with accused Shakeel. She scolded her for such an act and she slapped her sister. She had baby bump. Her family came to know about pregnancy in the police Station Rajouri when the investigation was going on against family members. Dy.S.P enquired her about the pregnancy and on his assurance she narrated the whole story to him. Prior to that, she had narrated the matter to accused Shakeel and except him, she had not disclosed the same to anyone. When accused Mahfouz had relations with her, she was not pregnant. Accused committed intercourse with her after visiting her home. She and her family members remained in custody in police station Darhal for one month. After 20 days she along with the family members was kept in police Station Rajouri for more than 2 months. She had neither disclosed about the sexual relations nor accompanying of Babu Hussain with the accused persons in police station Darhal. In police Station Rajouri, when she was tortured by Dy.S.P. After 4/5 days of arrest, she disclosed Dy.S.P about pregnancy.

7. PW Talib Hussain has proved the oral report lodged by him and in the cross-examination he has stated that he does not know as to why and when the accused were arrested.

8. PW Kala Khan, who is the father of the deceased, stated that conversation regarding the marriage of his son with Nazir Kouser but Nazir Kouser and her mother had denied this offer and thereafter the conversation did not proceed further. Parents of Nazir wanted to arrange her marriage with someone else. Accused Mahfouz disclosed before the police that he and other accused along with deceased were sitting at the place and were talking, then a stone struck on the head of the deceased from back side due to which deceased fell down. Accused Mahfouz had shown a stone weighing 4/5 kg that was seized by Police. Police also obtained his thumb impression over the paper in connection with the seizure of the stone after summoning him in the police station. He was shown the stones but the same were not identified by him. None of the accused had made any statement regarding any knife or dagger. In cross-examination, he stated that negotiations for marriage between Nazia Kouser and his son had ended 7-8 months prior to death of his son.

9. PW Mohammed Anwar was a witness to the disclosure statements of both the accused and also to the recoveries allegedly made pursuant thereto. He has not supported the prosecution and was declared hostile and even during cross-examination no incriminating material could be extracted by the learned Public Prosecutor.

10. PW Noor Hussain is the father of Nazia Kouser and has stated that he had heard that accused had committed rape with his daughter. However, the same was not disclosed by his daughter or son. When Nazia became pregnant, then he took her to SHO Police Station, Darhal. On enquiry by SHO Police Station, Darhal, she disclosed that accused had forcibly committed rape with her and they also threatened her not to disclose their names to anybody. During cross-examination he stated that

he along with his family members were arrested in police line Rajouri for four months and when accused confessed, they were released. Accused confessed about rape and murder. He along with his family members was arrested by the police in connection with murder of Babu Hussain. They were tortured by the police for 4 months as police suspected that they had committed the murder. Nazia herself was against her engagement with Babu Hussain. Nazia was under pressure from accused persons. Nazia was clever and arrogant and used to do as per her choice. She never cared for her parents.

11. PW Sadaqat Hussain is the brother of Nazia Kouser. He was a minor but stated that accused had killed Babu Hussain and accused told Nazia that they had killed Babu Hussain. In cross-examination stated that he never made any statement before the police that Nazia told them that accused had told her that they had killed Babu Hussain.

12. PW Naseem Akhter, is the sister of Nazia and stated about the commission of rape of Nazia by the accused Shakeel. In cross examination stated that police arrested her parents, sister and her brother and they were kept in Police Station. Police interrogated them and due to interrogation and pressure of the Police, all of them had deposed against accused.

13. PW Mansha Begum is the mother of Nazia. She stated that accused had committed rape with her daughter and falsely implicated her in the murder of a person who was killed by the accused. They had to arrange the marriage of her daughter with Babu Hussain and marriage was to be solemnised after some time. Accused lured Nazia and used to say that they would abduct her. When Babu Hussain died, accused used to say that they would kill them in the same manner as they killed Babu Hussain. In cross examination stated that she, her daughter Nazia, her husband and son remained in custody for four months where they were tortured by the police. During these four months, it was not known as to who killed Babu Hussain. Police suspected them for the murder of Babu Hussain. They were released from the custody when they deposed against accused persons.

14. PW Razia Kouser is the sister of Nazia Kouser and was minor. She has deposed about the accused coming to her house and sitting with her sister for 4 to 5 hours. She was compelled to remain outside and was threatened that if she disclosed about their relations with Nazia to anybody, they would kill her. Her sister was a victim. A baby was born to her sister without marriage. Her marriage was to be solemnised with Babu Hussain, however, Babu Hussain was killed by someone. She does not know, who killed Babu Hussain.

15. This Court does not find any necessity to reproduce the statements of the other witnesses as PW Altaf Hussain has turned hostile. PW Mohd. Wazir, PW Abdul Hamid and PW Mohd. Ashraf have not deposed anything against the respondents. PW Manzoor Hussain and PW Tariq Hussain (Patwari) are the formal witnesses. PW Mohd Qasim has proved the report, that is regarding the commission of rape by the accused with Nazia.

16. PW Dr. Savita proved the pregnancy of Nazia Kouser. PW Dr. Kabir Azam conducted the post-mortem of the deceased and stated that the injuries could be caused by knife and stones shown to him.

17. PWs Randeep Kumar, PW Inder Singh Jasrotia, PW Nazir Hussain and PW Mohd, Bashir have conducted the investigation from time to time.

18. As already noted above, the prosecution story mainly rests upon the statement of PW Nazia Kouser but from her statement as well as statements made by her parents, brother and sisters it is evident that she, her parents and brother were arrested by the Police and tortured while they were in Police custody. It has come in evidence that they were released only after the accused confessed to the guilt and the witnesses made statements against the accused. The accused stand acquitted in the FIR No.89/2002 u/s 376 RPC as observed by the trial court in the judgement impugned. The statement of Nazia Kouser does not inspire confidence and it would not be safe to place reliance upon her statement, particularly when she was in police custody for few months. The statement recorded during the course of investigation under section 164 Cr.P.C does not seem to be voluntary and even the statement made by her in the court cannot be relied upon without any independent corroboration. PW Nazia Kouser has demonstrated the motive behind the murder of Babu Hussain as the refusal by Babu Hussain to refuse engagement with her but at the same time PW Kala Khan, who is father of Babu Hussain has specifically stated that the conversation of marriage between Babu Hussain and Nazia Kouser came to an end 7-8 months prior to death of Babu Hussain. The statement of the father of the deceased clearly destroys the motive behind the alleged murder of Babu Hussain by the respondents.

19. It is also the prosecution case that accused Shakeel made a disclosure statement on 05.01.2003 with regard to the hiding of knife at the bank of river in the stones and further accused Mahfouz made a disclosure statement with regard to throwing of the stones at Raki Ban. The prosecution further claims to have recovered the knife and stones pursuant to the abovementioned disclosure statements. PW Kala Khan and PW Mohd Anwar have been cited as witnesses to the disclosure memos and the memos of recovery. Both these witnesses have not supported the prosecution version with regard to the disclosure statements made by the accused and the consequent recoveries effected thereupon. This circumstance too has not been proved by the prosecution.

20. We have examined the judgement passed by the learned trial Court and the learned trial Court has noted down the infirmities in the prosecution case in the judgement impugned and thereafter has come to conclusion that the prosecution has not been able to prove chain of circumstances/events beyond reasonable doubt. This Court is of the considered opinion that the conclusion arrived at by the learned trial Court cannot be said to be impossible or not plausible one. The judgement passed by the learned trial Court is well reasoned and we do not find that the conclusion drawn by the learned trial Court is contrary to the evidence led by the prosecution.

21. For what said and discussed above, we do not find any reason to show indulgence and accordingly dismiss the present appeal being devoid of merits.

22. Record of the trial court be sent back.

(RAJESH SEKHRI) (RAJNESH OSWAL)

JUDGE

JUDGE

JAMMU

07.10.2022

Karam Chand/Secy.

Whether the order is speaking:

Yes/No

Whether the order is reportable:

Yes/No