

State vs Mohd. Rafiq And Others on 25 February, 2022

Bench: Sanjeev Kumar, Puneet Gupta

Sr. No. 1

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Pronounced on : 25.02.2022
CRAA No.9900015/2010

State

.....Appellant(s)

Through: Mr. Suneel Malhotra, GA.
Mr. Divyanshu Malhotra, Advocate.

Vs

Mohd. Rafiq and others

..... Respondent(s)

Through: Mr. Anil Gupta, Advocate.

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE PUNEET GUPTA, JUDGE

JUDGMENT

PER PUNEET GUPTA-J,

1. Feeling aggrieved of the judgment dated 30.03.2010 passed by learned Additional Sessions Judge, Doda, acquitting all the accused/ respondents herein of the offences punishable under Sections 302/34 RPC and 20/27 Arms Act, the State has preferred the instant criminal acquittal appeal.

2. Learned State counsel has assailed the impugned judgment reiterating the grounds averred in the memo of appeal. It is stated that the judgment impugned is against the facts and law, and the learned Additional Sessions Judge has not appreciated the evidence in its right perspective. Both direct and circumstantial evidence produced by the prosecution clearly establish the involvement of accused in the commission of crime. With these submissions, learned counsel prays for allowing the appeal and setting aside of the impugned judgment.

3. Per contra, learned counsel appearing for the respondents/accused has supported the impugned judgment of the trial Court stating that the said judgment is based on proper appreciation of evidence on record and the instant acquittal appeal filed by the State deserves rejection out rightly.

4. Heard learned counsel for both the sides and gone through the impugned judgment and the evidence minutely.

5. It is pertinent to mention herein that this acquittal appeal shall survive qua respondent Nos.1 to 3 only in view of the statement of learned counsel for the respondents that respondent No.4 has died during the pendency of the appeal.

6. FIR No. 21/2005 was registered with Police Station, Gandoh on 10.06.2005 as one constable, Javed Iqbal 1476 SGCT died on spot due to gunshot as some unknown militants had opened indiscriminate firing on SOG mobile group which had gone to Tanta area for search operations from Police Station, Thathri. The incident is stated to have taken place at Shadal Top, Draman Tanta. The usual investigations took place in the matter and included preparation of site plan, seizure of articles including ten empties from the spot and recording of statement of witnesses. During investigation, it was found that the killing had been engineered by the accused persons and was not an act committed by the militants. As per investigations, the accused persons were members of mobile group and two of the accused, Mukhtar Ahmed and Mohd. Rafiq had contacted Shameem Thool through wireless set and they were called at Bhunjwan and there the conspiracy was hatched to eliminate the victim and shift the blame on militants. In pursuance to the conspiracy hatched on 06.06.2005 the accused persons took Javed Iqbal for operation, visited the house of Javed Iqbal and despite warning from the father of the deceased to his son Javed Iqbal not to have any operation with the persons as the accused Mohd. Rafiq was surrendered militant and the activities of other accused were also suspicious. The accused took Javed Iqbal with them on 08.06.2005 and on 10.06.2005 the victim was shot dead at Shadal Top, Draman Tanta using the arms and ammunition which were issued to them. On the completion of investigation, the challan was produced against the accused persons under Sections 302/34 RPC read with Sections 20/27 Arms Act. The accused Mohd. Rafiq who was initially proceeded under Section 512 Cr.P.C was also produced in the court. The charges were framed against the accused persons for the aforesaid offences who pleaded not guilty to the charges and claimed trial. The prosecution produced witnesses in support of its case. The resume of the statements of the prosecution witnesses is as under:

7. PW-1 Abdul Latief is witness to the seizure memo, receipt of dead body of deceased Javed Iqbal and identification memo exhibited as EXPW-GH, EXPW-GH-I & EXPW-GH-II respectively.

8. PW-2 Ghulam Hussain is also witness to the aforesaid seizure memos.

9. PW-3 Bhushan Kumar who was Incharge Police Camp Thathri has deposed of issuance of AK-56 and ammunition to Mohd. Rafiq and to Mukhtar Ahmed. The accused as members of mobile group had gone to conduct operation. Two AK-56 and one SLR were handed by him to police from Police Station Gandoh. The accused had deposited these articles with him. The police prepared the seizure memo of the ammunition exhibited as EXPWBK. The accused had also deposited six live cartridges of AK-56 as he was incharge of Kot and the said cartridges were also sized by the police and he was signatory to it and exhibited as EXPW/BK-1. He has further

deposed in cross-

examination that Head Constable Raj Singh was also posted with him in the police station. The entry with regard to issuance of ammunition is made in the register and on return the entry is cancelled. He had issued the weapons to the accused other than Mohd. Rafiq as he was having the weapon of his own. The weapons were used to be issued to the accused and they would return the same after conduct of operations. The movement of the group does not get recorded in the register. The weapons were issued on the instructions of SHO or the Munshi of the Police Station. The militants had attacked on about dozen occasion on the police party and encounter also used to take place resulting into the deaths of police personnel and militants. As he did not accompany the accused during operation so he cannot say as to what had happened on spot. He had also produced one SLR before ASI Abdul Rashid but it was not seized by him. PW Raj Singh was incharge of the post and on his directions the weapons were issued. No mark was placed on the live cartridges at the time of issuance or surrender of the same. The weapons remained in his possession for about ten days prior to their seizure by the police and the weapons were not sealed.

10. PW-4 Raj Singh was declared hostile as he denied the contents of the seizure memos though admitting signatures upon the same. In cross- examination he again identified the signature on the memo dated 22.06.2005 pertaining to the rifle and live cartridges but denied contents of the same and the memos are marked as EXPWRS & EXPWRS-1. The witness is lodged in Bhaderwah Jail from 07.03.2006 and accused are also lodged in the same jail and meet each other. His statement was also not recorded by the police. About 30 police personnel were posted in STF Thathri. It is in his knowledge that the accused-Rafiq had not gone for operation and had remained with him in police station Thathri.

11. PW-5 Jan Mohd. who is real brother of the deceased is only witness to the seizure memo regarding empty cartridges, seizure of clothes etc. which are duly exhibited. He was posted in the police station Gandoh during those days. He along with police personnel visited Draman Shadal Top where dead-body of Javed Iqbal was found.

12. PW-6 Mohd. Sharief is the father of deceased Javed Iqbal. As per his deposition on 05.06.2005 Mukhtar, Sadiq, and Mohd. Rafiq came to his house and on the same day all these three went for operation at Moti Bhagra and they came back on 6th evening and stayed in the house of the witness and on 7th evening they left for Tanta and stayed at Bhagra in the night. The witness has then deposed of the further movement of the accused persons though he was not witness to that part of the alleged event. He came to know of the occurrence at 6 p.m. and he along with SHO went to Karah and the dead body was brought from that place. He visited the spot on the 3rd day of occurrence from where the blood stained soil was seized and he is witness to the seizure which is exhibited as EXPW-JM. He is also witness to other seizure memos. As per the witness as the deceased was against the militants the accused Mohd. Rafiq and Mohd. Sadiq had conspired with militants and got Javed Iqbal killed. In cross-examination the witness has deposed that his son had death perception as some militants were killed in operations. The area of Tanta where his son was got killed is infected with militants. He came to know about the movement of the police and the deceased and how his son was got killed. He does not remember names of those persons except for

Jamal Din Parray who disclosed this fact. He mentioned the names of those persons to the police and explained the whole episode to the police but the police did not record it in his statement under section 161 Cr.P.C. and cannot say as to why the police had not mentioned those names in his statement. 4/5 women were also present along with Jamal Din but the police did not record the statements of those women. The operation often takes place in Tanta where the army, police and militants get killed. He did not witness the accused killing his son.

13. PW-7 Manzoor Ahmed denies of his being acquainted with the accused persons present in the court or the deceased. In the month of June/July 2005 he had driven his cattle to Shadal Top. At about 12/1 p.m he heard the firing and on hearing the same he ran towards his house due to fear and thereafter also the firing continued. Later on he came to know that one police person has been killed though he does not know as to who had killed that police person. The witness was declared hostile and on cross examination by the APP he denied the contents of the statement recorded under Section 161 Cr.P.C. wherein the mention is made of the accused taking the meal together. On cross examination by the defence the witness has deposed that the firing took place at about 1 1/2 kilometer from the place he was stationed and grazing the cattle. He did not witness as who had indulged in firing as area was militancy infected. The firing would oftenly take place.

14. PW-8 Jamal Din has denied the identity of the accused or knowledge about the occurrence. On cross-examination by the APP after being declared hostile the witness has stated that the police had visited the Shadal Top on 21.06.2005 and he informed the police that the occurrence took place at 2 p.m. on Shadal Top. Manzoor Ahmed was present at some distance from him. He had noticed four persons from distance but could not recognize them. The witness has denied the part of the statement recorded under Section 161 Cr.P.C. where the presence of the accused persons is recorded. On cross-examination by the defence has stated that he did not see any militant in the area at that time but the militants roamed at distant places. The father of the deceased never visited him. The police visited the spot after 4-5 days of the incident. No one was summoned by the police in his presence.

15. PW-9 Mohd. Amin has identified the accused present in the Court. He has deposed that it is perhaps in the year 2004 that the accused and the deceased Javed Ahmed visited his house at 10 p.m. and stayed with him and thereafter left on the next morning. He does not know where they had left for from his place. On the next day he heard that some incident had taken place at Tanta and Javed had died. He had last seen the deceased with the accused person. In cross-examination the witness has deposed that he does not remember the month and date when the accused and the deceased visited his house. He does not remember the date when the occurrence took place at Tanta. Tanta is at a distance of 15 km from his house. He is a resident of Pathri. He has no knowledge who has killed the deceased or under what circumstances or where he was killed. The police did not record his statement. He had heard that the firing had taken place between militants and STF and the deceased had died as a result of the firing.

16. PW-10 Mohd. Sikander denies that he knows the accused. He also denies his signatures on the superdnama which is marked as EXP/ WMS. In cross-examination the prosecution could not elicit any credible information from the witness.

17. PW-11 Hardayan Singh has conducted initial investigation in the case.

He prepared the seizure memos with regard to blood stained and simple earth from spot and seizure of ten empties etc. He did not record the statement of any witness. He set out for spot immediately after the registration of the case. The father of the deceased-Javed Mohd. along with other civilians was present on the spot. He remained investigating officer in the case till 19.06.2005.

18. PW-12 Suresh Kumar is witness to de-sealing of the sealed packets brought to him and sent to Chemical examiner. He did not open the packets or enquired about the material contained in the packets.

19. PW-13 Dr. Mohd. Yaqoob has conducted the post mortem of the deceased Javed Mohd. on 11.06.2005. The statement of this witness shall be referred to wherever required during discussion.

20. PW-14 Abdul Rashid Bhat has partly conducted the investigation in the case and made seizure of arms and ammunition issued to Mohd. Rafiq and others. In cross-examination the witness has deposed that he does not know whether the accused along with the deceased were members of the team as there is no mention of the same in his investigation. The deceased carried the weapon but has no knowledge about the wireless set. The occurrence took place on 10.06.2005 and he remained incharge of the investigation till 21.06.2005. He did not visit the place of occurrence. He recorded the statements of Jamal Din, Manzoor Ahmed, Bhushan Kumar, Raj Singh, part-statement of Mohd. Sharief and Shabina Begum and Mohd. Rafiq. The statements of these witnesses were not recorded prior to the recording of statements by him. As per his investigation, Jamal Din and Manzoor Ahmed were eye witnesses to the occurrence and on the basis of their statements the case was proved. The circumstantial evidence also came during the course of investigation. He had sent SLR rifle and other material to FSL for examination but he did not receive the report during the period he investigated the matter.

21. PW-15 Shabina Begum is wife of the deceased. As per the witness, her husband was police personnel. On 10.06.2005 the accused visited her house and remained there till 8 p.m. and thereafter left stating that they are going for an operation. On the next day, they returned back at 3 O'clock. She heard the accused persons whispering in hushed tone and as soon as she reached near the window the accused stop murmuring and she informed this fact to her husband. The accused Mukhtar and Rafiq were surrendered militants. She asked her husband not to trust the accused persons. She also informed her father-in-law about the conversation taken between the accused persons. Her father- in-law kept a watch on the accused persons. The accused went to the spring and also took the wireless set. Her father-in-law overheard the accused and instructed her not to allow her husband to go with the accused persons. Her husband told her that he will take the accused to the SHO Police Station Thathri on next morning. The accused told her husband that in case he does not accompany them, he will lose the job. When her husband went to urinate outside the house, the accused were talking to someone on wireless set. On asking of her husband the accused told him that the SHO Thathri has instructed them to come to Bathri bridge as some militants are to surrender there. Her husband was forcibly taken by the accused by them and while leaving the place, they bolted the door from outside and thereafter left the place at 7/8 O' clock. She got

suspicious when neither the accused nor her husband returned back. She had suspicion that the accused had killed her husband in the jungle as the accused had taken her husband forcibly. She came to know from SHO Gandoh that her husband has received bullet injury and has been taken to Doda. She later came to know that her husband has been killed. When SP visited her house and enquired from her, she informed that the accused had infact killed her husband. The accused were arrested by SP and the accused admitted before the SP that they had killed her husband as they were in league with the militants including Shamim Thool and the accused had also stated that they have received the money from said militant. On cross- examination, the witness has stated that her husband was Head of the operation group fighting against the militants and the accused were part of that group. There was no militancy in her area during that period. She does not know whether any militant was killed or had surrendered before her husband. The accused used to visit her house from 6th June to 8th June. She had informed of the involvement of the accused on the basis of suspicion. She does not know if the operation was undertaken on the directions of the SHO or not. Her husband was not conducting any operation against the militants prior to this occurrence as he was Incharge of post Bunjwah. There was no militancy in that area. She had apprehension about the killing of her husband at the hands of the accused persons as they had taken her husband forcibly. Her husband had a weapon bearing No.1476/D, wireless set as well as the ammunition. She did not visit the place where her husband had died.

22. PW-16 S.H. Bukhari is from FSL and has proved his report and marked as EXPW/SH. During cross-examination the witness has deposed that it is not mentioned in his report as who was in possession of the weapons before they were sealed. It cannot be opined as how long before the weapon was used. The firing pin of the weapon can be changed. Three AK-56 rifles were received and examined by him and the number of the weapons is mentioned in the report. He has not seen the rifles in the Court today. His statement was also not recorded by the police.

23. The prosecution did not produce any other evidence in support of its case. On the closure of prosecution evidence the statements of the accused under Section 342 Cr.P.C were recorded. The accused admitted in their respective statements of their accompanying the deceased and that they were positioned at one place and on the other side the army had taken the position and the deceased got killed in the firing engineered by the militants. The accused did not produce any witness in defense.

24. Javed Iqbal, Constable, who was allegedly accompanying the accused persons as a part of mobile group is stated to have been killed by the accused on 10.06.2005 as a result of conspiracy hatched by the accused as the victim is alleged to have been instrumental in the killing of some militants. The prosecution has produced number of witnesses in support of its case and include the witnesses who are cited as eye witnesses in the challan. The witnesses include the wife and the father of the victim in whose house the accused had gathered prior to the incident and allegedly made the victim to accompany the accused for some operation to be carried out by the mobile group. The court would initially take into consideration the statement of PW-6 Mohd. Sharief, father of the deceased and PW-15 Shabeena Begum, wife of the deceased. PW-6 Mohd. Sharief has deposed about the visit of the accused persons to his house and their going to Moti Bhagra for operation on 6th, staying in the house of the witness and leaving for Tanta on 7th evening. The witness speaks of conspiracy being

hatched by the accused persons as his son was against the militants and therefore the accused killed his son. Indeed the witness is not eye witness to the occurrence. He is stated to have been told of the occurrence by PW-Jamal Din Parray and other persons but significantly the names of those persons are not mentioned in the statement recorded of the witness under Section 161 Cr.P.C. What is made out from the statement of the witnesses is that he has only apprehension that his son has been killed by the accused because his son was against the militants. PW-15 Shabeena Begum speaks of the visit of the accused persons in her house and also staying there for some time and again leaving the house along with her husband. The witness claims to have heard the accused murmuring something though she does not say as to what she had heard of the conversation that took place between the accused persons. She also claims to have informed her father-in-law Mohd. Sharief about the conversation but Mohd. Sharief has not stated a word in his statement that he was informed by Shabeena Begum about some conversation having taken place amongst the accused persons. Her claim that her husband was instructed not to go with the accused persons by her father-in-law as he had overheard the accused persons is also not forthcoming from the statement of Mohd. Sharief. Her statement again only refers of her suspicion that the accused had killed her husband as he was forcibly taken by the accused persons along with them and her statement that the accused had bolted the door from outside is again not seconded by her father-in-law who has not whispered a word on the same. The witness states of the visit of the accused persons from 6th to 8th of June. The accused, Mukhtar and Rafiq, were surrendered militants as per the witness. It is evident from the statements of these two witnesses that they had not stated before the court in tune with each other. PW- Shabeena Begum though deposes of her having told her father-in-law about the suspicious movements in the house during their stay but the father-in-law has not mentioned a word on this aspect of the case. The accused and the victim at the most can be said to be together in the house of the witnesses up to 8th of June as per the aforesaid witnesses. The occurrence is alleged to have taken place on 10th June, 2005, that is, two days after the accused and the victim are alleged to have been seen together in the house of the aforesaid witnesses and, therefore, the theory of last seen is also not available to the prosecution because of time gap between the last seen and the occurrence which allegedly took place after two days. The finding of the trial court on this aspect of the matter cannot be faulted with.

25. Infact the theory of last seen has not much relevance in the present case as the accused in their statements under Section 342 Cr.P.C have themselves stated that they were with the victim on the day of occurrence and were together till he was killed by the militants in the firing which took place on spot between the mobile group and militants. The statement recorded under Section 342 Cr.P.C does not lead to the conclusion of the guilt of the accused persons and the statements though otherwise provide peep into the circumstances of the case and their participation or involvement in some way. At the same time, the burden upon the prosecution to prove its case beyond shadow of doubt against the accused persons does not get diluted solely on some admission made by the accused persons. The prosecution has to prove its case on its own and not to rely upon the defense which may be taken by the accused or what is stated by the accused persons in the statement recorded under Section 342 Cr.P.C.

26. The court finds it expedient to now look into the statements of two other witnesses which according to prosecution farther the case of the prosecution because of their presence during the

course of alleged occurrence. PW-7 Manzoor Ahmed and PW-8 Jamal Din are the other witnesses on whom the prosecution depended upon in order to cement its case against the accused persons. PW-7 Manzoor Ahmed has turned hostile as he has denied of the presence of the accused at Shadal Top where the occurrence is alleged to have taken place. He denies having witnessed the occurrence. PW-8 Jamal Din also denies about the identity of the accused or the occurrence. He has also been declared hostile. In cross-examination he speaks of occurrence having taken place at 2 PM on Shadal Top and presence of Manzoor Ahmed at some distance. He also refers of presence of four persons from distance but having failed to recognize them. He denies that part of the statement recorded under Section 161 Cr.P.C where the presence of the accused persons is recorded. He also denies that the father of the accused visited him though the father of the victim Mohd. Sharief speaks of PW-Jamal Din having informed him of the occurrence. The other important witness who could throw light on the occurrence is PW-9 Mohd. Amin. So far as this witness is concerned, he mentions the visit of the accused persons and the deceased Javed Ahmed to his house at 10 PM and having stayed with him and thereafter having left his place on the next morning though he does not remember the month and date when the accused and the victim together visited his house. He even denies that the police recorded his statement. He has also denied as to the place where the accused and Javed Iqbal headed for after visiting his house. Unfortunately for the prosecution the statement of this witness is not of much help to the prosecution. The statement of this witness is not helpful to the prosecution for another reason that the occurrence is stated to have taken place at a distance of 15 Kms from his house and, therefore, even recording of the presence of the accused with this witness cannot co-relate with the alleged occurrence as the same is rightly held by the learned trial court.

27. The other crucial part of the prosecution evidence pertains to the accused and the victim being part of mobile group and providing of arms and ammunition to the accused persons by the concerned police agency. PW-Bhushan Kumar is the witness who was Incharge of Police Camp, Thathri and states of issuing of AK-56 Rifle and ammunition to the accused Mohd. Rafiq and Mukhtar Ahmed and also seizure of two AK-56 Rifles and one SLR Rifle by the police as the same were handed over by him to the police and preparing of seizure memo of the ammunition exhibited as EXPW-BK. The deposit of six live cartridges of AK-56 Rifle by the accused and the seizure of the same by the police is also exhibited as EXPW-BK1. The witness has not issued any weapon to accused-Mohd. Rafiq as he was having the weapon of his own. The weapons issued used to be deposited back by the accused after the operations were conducted by them. The weapons which were issued to the accused were in possession of the witness for about ten days prior to their seizure by the police. The weapons were not sealed by the police. PW-Raj Singh, Incharge of the post, has been declared hostile as he has denied the contents of seizure memo though admitting his signatures upon them. The memos pertaining to this witness are with regard to the seizure of rifles and live cartridges and are marked as EXPW-RS and EXPW-RS1. The denial of the contents of the seizure memos by PW-Raj Singh does not, however, weaken the case of the prosecution on this aspect as the witness who was the police personnel had acknowledged his signatures on the seizure memo but without explaining as to how his signatures were obtained on a blank paper. Otherwise also, PW-Bhushan Kumar has proved both the seizure memos of which there is a denial of the contents by PW-Raj Singh, who was head constable at the relevant point of time and was also lodged in Jail in some other case.

28. The other important evidence in the chain of events is the reports of FSL.

29. PW-16 S.H.Bhukhari is from FSL. The other witness pertaining to FSL is Mushtaq Ahmed Bhat and his statement was not recorded as the counsel for the defense had no objection to read the report of the witness as issued. PW-S.H.Bhukhari has proved the report prepared by him and is exhibited as EXPW-SH. The witness has examined ten spent cartridges, three AK-56 Rifles and six live rounds of AK-56 Rifle. The opinion given by the witness is quite significant. As per the opinion of the witness, AK-56 Rifles marked as exhibits F296/2005, F297/2005 and F298/2005 all bear signs of discharge and have been found in working condition. The other opinion relates to spent cartridges and as per the same, the spent cartridges marked as exhibit F286/2005 to F295/2005 had been fired through the rifle exhibited as F296/2005. So far as the certificate dated 23.03.2006 issued by PW-Mushtaq Ahmed Bhat from FSL is concerned, the blood group on seized simple clay and blood stained clay and also on the clothes of the victim were found to have human blood though blood group could not be determined as the result was inconclusive. The report EXPW- SH from PW-S.H.Bhukhari signifies that the spent cartridges exhibited as F286/2005 to F295/2005 had been fired through the rifle which is exhibited as F296/2005 and the same is AK-56 Rifle having registered No. M1504-1 which has been issued to the accused Mohd. Rafiq SPO 1192 as per EXPW-BK and which was seized during investigation by the police. It may also be mentioned herein that EXPW-JM2 is seizure memo of ten khokhas of AK-47 which has been seized by the police. The learned trial court while dealing with the aspect of the issuance of the rifles, the seizure of arms and ammunition, the FSL report exhibited as EXPW-SH has held that as per seizure memo EXPW-JM2 ten empties of AK-47 were seized from the spot but empties of AK-56 and not AK-47 were sent for chemical examination which were opined by the chemical examiner having been fired from the weapons allegedly issued to the accused persons. The trial court has also doubted about the seizure of the weapons after ten/eleven days of deposit by the accused persons as per PW-Bhushan Kumar. This court is of the view that so far as the seizure of the weapons is concerned the same have been seized after the police came to know about the involvement of the accused persons and, therefore, there is no question of the weapons being seized immediately after the deposit of the same by the accused persons. The trial court has also taken note of the seizure of empty cartridges during discussion. The trial court has held that whereas seizure memo refers to seizure of ten empties of AK-47, the report mentions of the empties being of AK-56 and thus there is discrepancy in the prosecution case. The court does not agree with the finding of the trial court on this aspect of the matter. The seizure of ten empties of AK-47 though mentioned in JM2 and the report EXPW-SH refers to these empties having fired from AK-56 and particularly from AK-56 bearing No. M-1504-1 clinches the issue that the empties were indeed fired from this AK-56 and not from AK-47. The mentioning of the empties being of AK-47 in EXPW-JM2 may not be of much consequence as the bullets used in the AK-47 Rifle are also used in AK-56 Rifle. To that extent, the court finds that there is no contradiction as to the rifle from where the bullets were fired and of which empties were seized by the police. In fact the trial court has not gone into this aspect of the case minutely.

30. The court at this stage may take into consideration a very relevant factor and that is the post-mortem report. The post-mortem report exhibited as EXPW-DRMY reveals the injuries which had been received by the deceased-Javed Iqbal and the injuries received by the victim were having fire arm injuries on chest and abdomen which led to massive hemorrhage, shock and death. PW-Dr.

Mohd. Yaqoob has been examined by the prosecution and of course he has stated of issuance of the post-mortem report. The doctor has, however, not been able to say the distance from where the fire arm had been used nor was he shown any weapon of offence by the police. The doctor even says that no bullet was found during the course of autopsy. Importantly, again, the conduct of investigation by the police agency in the present case is very unprofessional as the investigators have not tried to gather all pieces of evidence which in ordinary course of investigation should have been pieced together. No doubt, the post-mortem of the victim has been conducted and the report has also been received from the doctor who conducted the post-mortem. The post-mortem report reveals injuries upon the victim by way of fire arms. What was important to be gathered by the investigators in the case was the nature of the bullets which caused injuries to the victim resulting into his death. It was imperative upon the prosecution to prove that the bullet injuries which were found on the body of the victim were indeed fired upon from the fire arms which were issued to the accused and used by them. This court though has held above that it is proved by the prosecution evidence that the empties used were from one of the AK-56 Rifles which were issued to the accused and also seized by the police as per the seizure memo EXPW-BK that does not prove by itself that the fire arm injury received by the victim-deceased was in fact fired upon from the rifle which was issued to one of the accused persons. The investigators of the case did not at the time of post-mortem obtain the opinion of the doctor regarding the nature of weapon and ammunition which injured the victim and led to his death, may be for the reason that the police did not suspect that the death of the victim was not due to the act of the militants. Admittedly, the investigating agency did not initially suspect the involvement of the accused herein in the alleged killing of the victim. Even in the absence of initial information that the death of the victim was due to the firing from the militants and in the absence of suspicion against the accused, the police ought to have obtained at least some opinion regarding the ammunition used by the assailants which resulted into the death of the victim. In the absence of any proof that the ammunition issued in favour of the accused was infact used against the victim and was instrumental in the death of the victim and unfortunately in addition to aforesaid aspect of the case the fact also remains that the prosecution has not been able to elicit anything positive from the two so called important eye witnesses who were brought before the witness box and the circumstantial evidence.

31. As per the prosecution case during the course of investigation it was gathered that accused Mukhtar Ahmed and Mohd. Rafiq SPOs had contacted militant Shamim Thool through wireless set and the said militant had called them at Bunjwah and there the plan was hatched to kill the said Javed Iqbal and the accused were also promised Rs.3 lac each for the murder of said Javed Iqbal, SHO Thathri and one SPO Mushtaq Ahmed. There is no evidence on the file to the conspiracy theory on the basis of which the accused were roped in the case along with the circumstantial evidence that came on record. Irrespective of the aforementioned conspiracy theory which could be one of the links in the chain of events, the prosecution could prove its case against the accused on the basis of the statements of so called eye witnesses and other evidence. The statements of other witnesses are more or less formal in nature as they pertain to seizure memos and, therefore, have no substantial bearing upon the case.

32. From the discussion made above, it can be summarized that the eye witnesses cited in the challan have not supported the prosecution case, the circumstantial evidence also does not connect

all the links which were required to be there without blemish and most importantly the misses made by the investigating agency in proving that the bullet injuries received by the victim could be from the fire arm-Rifle AK-56. The Court is of the considered view that the conclusion drawn by the trial court whereby the prosecution is said to have failed to prove its case against the accused persons beyond shadow of doubt cannot be faulted with by this court after taking into consideration all aspects of the case.

33. The Court, in the facts and circumstances of the case, does not find that the prosecution had been able to prove its case against the accused beyond shadow of doubt. The Court finds no reason to upset the findings and judgment of the trial court which is upheld. Consequently, the appeal is dismissed.

(Puneet Gupta)
Judge

(Sanjeev Kumar)
Judge

Jammu :
25.02.2022
Pawan Chopra

Whether the order is speaking? Yes/No

Whether the order is reportable? Yes/No