

State Of J&K vs Mohd Afzal Khan And Ors on 18 November, 2022

Author: Rajnesh Oswal

Bench: Rajnesh Oswal

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on : 26.09.2022
Pronounced on : 18 .11.2022

CRAA No. 180/2013
c/w
CRR No.48/2013

State of J&K

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

Through: Mr. Ranjit Singh Jamwal, AAG
(CRAA No. 180/2013)
Mr. Sunil Sethi, Sr. Advocate with
Mr. Mohsin Bhatt, Adv.
(CRR No. 48/2013)

Vs

Mohd Afzal Khan and ors.

..... Respondent(s)

Through: Mr. P. N. Raina, Sr. Advocate with
Mr. J. A. Hamal, Advocate

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

JUDGMENT

Per Oswal-J

1. The judgment of acquittal dated 16.08.2013 recorded by the Court of learned Sessions Judge, Rajouri (hereinafter to be referred as the trial court) in file No. 46/Ch. titled, „State vs. Mohd Afzal Khan and Others” acquitting the respondents for commission of offences under Sections 302/147/341/34 RPC in FIR No. 367/2010 of Police Station, Rajouri, has been impugned by the State of J&K (Now, Union territory of Jammu and Kashmir), as also by the complainant in Acquittal Appeal and Criminal Revision respectively.

2. The judgment has been impugned by the appellant as well as the petitioner on the ground inter alia that the learned trial court has wrongly appreciated the evidence and despite the fact that the prosecution had proved its case against the respondents beyond any reasonable doubt, but still the

learned trial court acquitted the respondents.

3. Briefly stated, the prosecution case is that FIR No. 367/2010 for commission of offences under Sections 302/34/149/148 RPC was registered by the Police Station, Rajouri on a written application filed by the complainant-Mohd Arif on 05.10.2010, wherein it was stated that Mohd Afzal Khan, Mohd Saleem Khan, Manzoor Khan, Mohd Shakoor, Amjad Khan, Majid Khan, Sahil Khan, Sameer Khan, Nanha Shah and Sanam Shah were having rivalry with him on account of land dispute since long and also due to socio-politico reasons. Yesterday, his brother Ali Aksar was elected as President of the students union and he was being taken by the college students in procession on motorcycles. The accused persons blocked the road near the house of accused-Mohd Afzal Khan in order to kill him, but they could not succeed due to the presence of large number of students. On 05.10.2010, at about 6.30 pm, the accused persons hatched a conspiracy to kill his brother and intercepted his brother near Bawli (water spring) near Gurudwara, when he and his cousin namely, Mohd Sajid were returning home on a motorcycle. All the accused, started beating Ali Askar with lathis, kicks and fist blows. He along with Mohd Ilyas was going to his house and on noticing them, the accused left Ali Askar and ran away. Ali Aksar was taken to hospital in an unconscious condition, where the doctors declared him brought dead.

4. After registration of the FIR, investigation was entrusted to Jan Mohd, Inspector, who after completion of the investigation established offences under sections 302/34/147/341 RPC against the accused persons and laid the charge-sheet before Learned Chief Judicial Magistrate and the same was committed to the trial court. The charge under section 302/34/147/341 RPC came to be framed against the respondents. Since the respondents did not plead guilty, the prosecution was directed to lead evidence. Out of total 32 witnesses cited by the prosecution, 25 witnesses were examined. Few witnesses were left over by the prosecution. The trial court after hearing both the parties, acquitted the respondents vide impugned judgment.

5. Mr. Ranjit Singh Jamwal, learned A.A.G appearing on behalf of the appellant vehemently argued that all the three eyewitnesses have categorically supported the prosecution version but despite that the learned trial court has acquitted the respondents by wrongly appreciating the evidence. Mr. Sunil Sethi, learned senior counsel for the petitioner/complainant, besides reiterating the submissions made by Mr. Ranjit Singh Jamwal, learned A.A.G, has laid much stress on the medical evidence to the effect that the deceased had suffered cervical spine injury, that was the cause of death and the medical evidence corroborates the ocular evidence led by the prosecution.

6. On the other hand, Mr. P. N. Raina, learned senior counsel for the respondents argued that all the eye witnesses have made improvements in their statements before the learned trial court and have made depositions in a manner that was never the prosecution case as per the allegations levelled in the charge-sheet. He argued that the medical evidence is also not supporting the prosecution case. He further stated that the trial court has rightly acquitted the respondents by noting various infirmities in the prosecution case, besides observing that there was un-explained delay in recording the statements of the prosecution witnesses.

7. Heard and perused the record.

8. As this court is dealing with the appeal against the judgment of the acquittal recorded by the trial court, it is apt to examine the scope of interference with judgment of acquittal. In *N. Vijayakumar v. State of T.N.*, (2021) 3 SCC 687, Apex Court has held as under:

"20. Mainly it is contended by Shri Nagamuthu, learned Senior Counsel appearing for the appellant that the view taken by the trial court is a "possible view", having regard to the evidence on record. It is submitted that the trial court has recorded cogent and valid reasons in support of its findings for acquittal. Under Section 378 CrPC, no differentiation is made between an appeal against acquittal and the appeal against conviction. By considering the long line of earlier cases this Court in the judgment in *Chandrappa v. State of Karnataka* [*Chandrappa v. State of Karnataka*, (2007) 4 SCC 415] has laid down the general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal. Para 42 of the judgment which is relevant reads as under:

42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court. (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

21. Further in the judgment in Murugesan [Murugesan v. State, (2012) 10 SCC] relied on by the learned Senior Counsel for the appellant, this Court has considered the powers of the High Court in an appeal against acquittal recorded by the trial court. In the said judgment, it is categorically held by this Court that only in cases where conclusion recorded by the trial court is not a possible view, then only the High Court can interfere and reverse the acquittal to that of conviction. In the said judgment, distinction from that of "possible view" to "erroneous view" or "wrong view" is explained.

In clear terms, this Court has held that if the view taken by the trial court is a "possible view", the High Court not to reverse the acquittal to that of the conviction."

9. Before proceeding further, it is appropriate to have a brief resume of the relevant portion of the evidence led by the parties.

10. PW-2 Mohd Arif stated that on 4th October, 2010, Ali Aksar, who was his brother, was elected as a President of the students union. This irked the accused persons. The accused persons and Sahil Khan obstructed the way of the deceased by laying grass and wood on the road. The deceased was being taken by the students in a procession to his house. The accused could not cause any harm to him due to presence of a number of students but extended threats to the deceased. The accused belong to other caste and they were nurturing grudge as they (witness) belong to lower caste. Next day i.e. 05.10.2010 at about 6.30 p.m. when he along with Mohd Ilyas was going home on a motorcycle and reached near water spring (Bawli), they heard a noise. He saw Sajid running briskly saying that Ali Aksar has been killed. He left his motorcycle there and went with Sajid. He saw accused Afzal Khan and Mohd Majid twisting the neck of Ali Aksar. Accused Amjad Khan, Nanha Shah and Sameer Khan were beating the deceased with kicks and fist blows on his chest and testicles. Accused-Sanam Shah was holding the deceased by his arms. Accused Saleem Khan, Mansoor Khan and Sohail Khan were standing nearby, to prevent him from escaping and scuffled with him. He raised hue and cry. The accused persons ran away saying that they had finished the deceased. Ali Aksar was taken to hospital in a Magic Auto, where the doctors declared him brought dead. A written report of the occurrence was lodged with the Police „EXPW-MA . His statement was also recorded by the Police. In cross-examination, he stated that the accused, Afzal Khan, Sanam Shah and Nanha Shah are residents of village Dhani Dhar. None of the accused persons is a student in PG College Rajouri. He and PW Ilyas had participated in the marriage of accused Amjad Khan. He identified the photographs attached with the file. The house of accused Afzal Khan is situated at a distance of about three kilometres from the place of occurrence. The houses of other accused are situated at a distance of about 5/6 kms. from the place of occurrence. There is no shop or residential house in half kilometre area from the place of occurrence. The water Bawli is at a distance of about 50 feet from the place of occurrence and Gurudwara is situated at a distance of about 100 feet from the Bawli. There is no Army picket near the place of occurrence. His statement was recorded by S.I, Jaan Mohd after eight/ten days of the occurrence and the report of occurrence was written by Mohd Azam. It is wrong that after the occurrence, he was served notice thrice by the Police to give evidence but he did not co-operate with the Police. After three days of the occurrence, the Police came to him for recording his statement but he told them to take his statement later as he

was in mourning. He also asked the Police to get his statement recorded before a Magistrate. It is wrong that he waited for the post-mortem report, due to which delay occurred in recording his statement by the Police. It has not been mentioned in his statement recorded under Section 161 Cr. PC that accused has enmity with him as he belonged to a lower caste. He has no personal knowledge about the occurrence having taken place on 04.10.2010. It has neither been mentioned in the application nor in his statement recorded under Section 161 Cr.P.C. that when he was going on motorcycle, PW Mohd Sajid came running and was saying that Ali Aksar has been killed. It has also not mentioned in his statement recorded under Section 161 Cr.P.C. that accused Afzal Khan stated that they have finished the deceased and then they ran away. Accused Afzal Khan and Majid Khan were twisting the neck of the deceased by standing behind him. Deceased was about 6 feet of height and his height was more than that of the accused. He along with two other witnesses, tried to rescue the deceased from the accused and he also suffered bruises during the scuffle and his shirt was also torn. It has not been mentioned in EXPW-MA that he scuffled with the accused persons on spot. It is also not mentioned in the EXPW-MA that accused Afzal Khan and Majid Khan strangled the deceased by twisting his neck. There is a water spring (Bawli) and a water stream near the place of occurrence. There is another water spring (Bawli) at a distance of 300 yards from the place of occurrence. Accused Mohd Saleem was standing at a distance of about 50 feet from the place of occurrence.

11. PW-3 Mohd Iliyas stated on 05.10.2010, at about 6:30 pm, he along with PW Mohd Arif was going to his house at Danni Dhar on a motorcycle and when they reached near 'Bawli' they heard noise. They stopped the motorcycle and ran in the direction of noise. Accused Afzal Khan and Majid Khan were strangulating the deceased by twisting his neck. Accused Amjad, Sameer Khan and Wasim Shah were inflicting kicks and fist blows on the chest of the deceased. Accused Sanam Shah was holding the deceased by his arms. Accused Saleem Khan, Shakoor Khan, Manzoor Khan and Sahil Khan were also present on spot. He tried to rescue the deceased but accused Sahil Khan scuffled with him. He raised hue and cry and the accused ran away. Deceased was taken to hospital in an unconscious condition in a Magic Auto and the doctors declared him as brought dead. His statement was also recorded under Section 164-A, Cr. PC. He admitted the correctness of his statement. In cross-examination, he stated that the deceased was his cousin. Accused, Afzal Khan is a Patwari. There are differences between his father and Afzal Khan regarding land dispute. It is wrong that a day before occurrence, 60 to 70 people on motorcycles went to the house of the deceased. He has no money transaction with accused Afzal Khan. It is wrong that on 05.10.2010, he paid Rs. 1000/- to accused Afzal Khan on account of balance amount payable to him and it is also wrong that the accused Afzal Khan paid an amount of Rs.29,000/- to him through cheque on 29.04.2010 as cost of a computer. He admits maintaining the Account No.24701 with J&K Bank, Branch Gujjar Mandi. They had been participating in the marriages of the accused persons despite having strained relationship. His mobile phone number is 8803528327. He stopped his motorcycle after hearing the noise of accused and the deceased. There is a boundary wall of the Army near the place of occurrence having barbed wire fencing. The accused were holding the deceased in a standing position. The accused were inflicting fist blows on the head and kicks on the chest of the deceased. It is wrong that on the day of occurrence, he was at Nagrota between 3:55 pm to 7:32 pm. It is also wrong that he did not get his statement recorded till 15.10.2010, as he was waiting for the post-mortem report of the deceased and further that the Police approached him twice for recording

his statement but he refused. The father of the deceased was suffering from typhoid and was taken to Jammu hospital for treatment by him. PW-Mohd Arif and PW-Mohd Sajid also accompanied him to Jammu. Except accused Sahil Khan, none of other accused had scuffle with him, but it is not mentioned in the statement recorded under Section 164-A Cr. PC. The occurrence had not started in his presence. He along with accused PW-Mohd Arif and PW-Majid Khan tried to rescue the deceased from the accused persons. The deceased was in standing position when the accused persons were inflicting kicks and fist blows on him by jumping.

12. PW-4 Mohd Sajid Ali stated that on 05.10.2010 at about 5.00 pm, he along with Ali Aksar came to Rajouri on a motorcycle. At about 5:30 pm, when they were returning home on a motorcycle and reached near a water spring (Bawli), the accused persons, namely, Afzal Khan, Amjad Khan, Majid Khan, Sahil Khan, Sameer Khan, Wasim Shah, Sanam Shah, Saleem Khan, Manzoor and Shakoor were already standing there, they stopped them. Accused Afzal Khan started hurling abuses. Accused Afzal Khan, Amjad Khan, Sahil Khan, Sameer Khan, Wasim Shah, Sanam Shah and Saleem Khan attacked them. Majid Khan pelted a stone on deceased, which hit on his head and all the seven accused started beating the deceased. He raised hue and cry and asked the accused to leave the deceased but accused threatened him that in case he raised hue and cry, they would kill him also. He ran for help and saw Mohd Ilyas and Mohd Arif coming on a motorcycle. He told them that accused were beating the deceased to kill him. He along with Mohd Ilyas and Arif Khan again reached on spot and saw that Afzal Khan and Majid Khan were twisting the neck of Ali Aksar and throttling him. Accused Amjad Khan, Sameer Khan and Wasim Shah were inflicting fist and kick blows on the chest of the deceased. Accused Sanam Shah was holding the deceased by his both arms. Accused Sahil Khan attacked Mohd Ilyas and a scuffle took place between them. Accused ran away saying that they have finished the deceased. He along with others took Ali Aksar on foot to a nearby Magic Auto and carried him to hospital, where the doctors declared him dead. A day before the occurrence, accused had intercepted the deceased by placing obstructions on the road and extended threats to him. In cross-examination, he stated that the deceased was his cousin. PW Ilyas is his real brother and PW-Mohd Arif is his cousin. He has no knowledge about any of the accused being student of the college. A day before the occurrence, accused extended threats to the deceased in his presence. Accused Saleem Khan, Shakoor Khan and Manzoor Khan were standing at a distance of about 30/40 feet from the place of occurrence. Accused were having stones in their hands. Accused were not carrying any weapon, like 'Lathi' etc. Afzal Khan was holding the head of the deceased from behind, whereas other accused was holding the neck of the deceased from front side. The deceased was of 6 feet height. In his statement recorded under Section 164-A Cr. PC, it has not been mentioned that the accused inflicted kick blows on the chest of the deceased. Since the father of PW Mohd Arif was suffering from ailment so he was taken to Jammu for treatment and that accused were extending threats to him, as such, his statement was recorded after few days of the occurrence. In his statement recorded under Section 161 Cr. PC, it has not been mentioned that accused Sahil Khan attacked PW- Mohd Alliyas. From 05.10.2010 to 15.10.2010, the police did not approach him for recording his statement. He approached the Police after three days of the occurrence for getting his statement recorded before a Magistrate. It is also wrong that after getting the post-mortem report of deceased on 15.10.2010, a false version of using stones has been concocted. He does not know at what time Mohd Arif lodged the report of occurrence with the Police.

13. PW-6 Arif Iqbal and PW-11 Abdul Sattar were declared hostile and despite cross-examination, no incriminatory material could be extracted from these witnesses against the respondents by the learned Public Prosecutor.

14. PW-7 Amjad Khan stated that on 04.10.2010 at about 6 pm, the road was blocked by accused Maid Khan, Sahil Khan, Afzal Khan, Amjad Khan, Sameer Shah and Wasim Shah. All the accused were holding lathies in their hand and they were extending threats to Ali Aksar. In cross-examination, he stated that his house is situated at a distance of one and half kms. from the house of accused Mohd Afzal Khan. The blockade on the road was not placed by the accused in his presence.

15. PW-8 Mohd Ajaz stated that on 04.10.2010, the deceased was elected as a President of the students union. He along with many other students took out procession for taking Ali Aksar to his house. Accused Afzal Khan, Amjad Khan, Majid Khan, Nanha Shah, Sanam Shah and Samer Khan were standing on road with lathies. They attacked Ali Aksar and as they outnumbered the accused, so no harm could be caused to Ali Aksar. In cross-examination, he stated that the deceased was his neighbour and cousin. His statement was recorded under section 161 Cr.PC. He has not mentioned in his statement that the deceased was attacked by the accused persons.

16. PW-9 Qamar Zaman was also examined by the prosecution. He proved the instance of 4th October, 2010 and stated that the road was blocked by Afzal Khan, Majid Khan, Sahil Khan, Sameer Khan, Nanha Shah and Sanam Shah by placing grass and wooden pieces. The accused only extended threats to the deceased. In cross-examination, he stated that nobody enquired from the accused the reasons for extending threats to the deceased. He was at the tail end of the procession, as such, he cannot say who was extending threats to the deceased.

17. PW-12 Shahid Azam stated that on 04.10.2010, he found the grass and wood lying on the road. The accused Afzal Khan, Majid Khan and Sanam Shah came there carrying lathies in their hands. About 25/30 persons on motorcycles came there. The deceased was also on the motorcycle. The accused also extended threats to the deceased. In cross examination, he stated that no altercation took place between the accused and the members of the rally. Deceased was his cousin. His statement was recorded by the Police after ten days.

18. PW-13 Mohd Mushtaq proved the seizure memo of the dead body of the deceased. The deceased was his real brother and stated that there is no dispute regarding land between him and accused Mohd Afzal.

19. PW-14 Mohd Younus has also proved the seizure memo of the dead body of the deceased and PW-16 Mohd Zubair was the witness to seizure memo of motorcycle, receipt of dead body and seizure memo of clothes. Similarly, PW-18 Mohd Said was the witness to seizure memo of clothes of the deceased, motorcycle and receipt of the dead body.

20. PW-17 Bal Krishan prepared a C.D. of the dead body of the deceased and PW-18 Mohd Jameel Constable was the witness to the seizure memo of the C.D. and video cassette. PW-19 Ghulam

Rasool is also a witness to seizure memo of C.D. and video cassette. PW-20 Mohd Gafoor is a witness to superadnama of motorcycle. PW-24 Mohd Azeem is witness to receipt of the dead body of the deceased.

21. PW-21 Manzoor Amin, who is a Patwari, prepared copy of khasra girdhawri and the site plan. In cross-examination, he stated that the place of occurrence was identified by the Police, which was about 350 feet away from Bawli. There is a fencing of barbed wire at a distance of 4/5 feet from the place of occurrence.

22. PW-22 Pritam Singh is a photographer and has taken photographs of the dead body.

23. PW-26 Dr. Raj Kumar, Assistant Surgeon, District Hospital Rajouri stated that on 5th October, 2010 at 7.20 PM, Majid Khan was examined with alleged history of fall. The treatment was given to him in Emergency District Hospital, Rajouri and he was advised to be kept under observation for 24 hours in Emergency but the patient was „LAMA at 7:30 pm on 05.10.2010 as per the record of Causality resister. The term "LAMA" mentioned in the certificate is used when a patient escapes from emergency without his formal discharge from the Hospital by concerned authority. In cross-examination he stated that the term „LAMA" is a medical term and the injury found on person of the deceased over the scalp region was simple in nature for which the patient was given stitches. The injury found on the patient was simple in nature and could be possible by a fall and such fall could be possible by force also. He also informed the Police immediately and in fact, the Police gave him one docket to examine and treat the patient. When questioned by the court, he stated that this was not a MLC case.

24. PW-28 Dr. Zakir Hussain stated that on 06.10.2010 he along with two other members of Board of doctors conducted the autopsy of Ali Aksar and on conducting the autopsy, five external injuries were found on the body of the deceased. As per the opinion of the board, the deceased had died of head injury and upper cervical spine injury and the time since death was 16 hours. In cross-examination, he stated that both the injuries mentioned in the opinion are singly and collectively sufficient to cause instantaneous death in the ordinary course of nature. The injury No. 1 measured about 2.5 cm over right side of neck and 5cm below the right ear transversely placed and same is on the vital part of body i.e. cervical spine area. Injury No. 1 was sufficient to cause death. He did not find any finger impression on the neck, however, there were abrasions present on the neck. No fracture was observed because of head injury. The cervical spine was also noticed as damaged and the blood vessels were not damaged. No fracture was noticed on cervical vertebrae. The head injury was most significant injury but the other injury was also equally significant to cause death. He cannot say as to whether head injury was internal from external hematoma. These types of injuries could be possible by fall from greater height but not when a person falls while in standing position.

25. PW-31 Jaan Mohd stated that he conducted the investigation in the FIR and the said FIR bears his signatures. He investigated the place of occurrence and also took the dead body of the deceased into his possession. The clothes of the deceased were also seized by him. He recorded the statement of the witnesses under Section 161 Cr.P.C and also seized the C.D. Post-mortem and FSL report were

also obtained. The statements of the witnesses were also recorded under section 164-A Cr.P.C. He proved the offences against the accused under section 302/ 34/147 and 341 RPC but offences under section 148 and 149 RPC were not proved.

During cross-examination, he stated that he had kept the witnesses with regard to the occurrence of 04.10.2010, but he had not investigated as to how many persons participated in the procession on 04.10.2010. He had not inquired from the people about this occurrence. He came to know about the occurrence on 05.10.2010 at 08 PM from the application of the complainant and except this, no information was received. He had not investigated as to who kept grass and wood on the road on 04.10.2010. He recorded the statement of the complainant on 14.10.2010 and on 15.10.2010, statements of PWs Mohd. Ilyas, Mohd. Sajid were recorded before Magistrate. Statements of PWs Asif Iqbal, Amjad Khan, Mohd. Eijaz, Qamar Zaman, Eijaz Iqbal, Abdul Sattar and Shahid Azeem were recorded on 16.10.2010. No one deposed before him that the accused after conspiring committed the act. FIR was lodged by eye-witness, namely, Mohd. Arif. In the FIR, the use of stone has not been mentioned and also there is no mention that neck of the deceased was twisted. In the FIR, it is mentioned that the deceased was hit by fists, kicks and lathies. In the FIR, it is also mentioned that when he and his companion were seen by the accused, they left him and ran away. All the accused were identified by him and Mohd. Ilyas.

26. PW-32 Deepak Jasrotia, Inspector has recorded satisfaction with regard to the investigation of the case and filed the challan against the accused persons.

27. The respondents have also led evidence in defence and examined four witnesses.

28. DW Jabar Khan stated that on 05.10.2010, when he was passing through Bawli, he saw that 10/20 students of 18 to 20 years were fighting with each other and the deceased was lying on the barbed wire. He was taken to hospital in Van by Nanah Bhat.

29. DW Nanah Bhat has stated that he was going in his Van and Jabar Khan told him to take deceased in his Van but as there was no space in his Van, deceased was taken to hospital in Magic Van that was already parked there.

30. DW-Ravinder Dhar, Senior Executive Aircel, has proved that SIM No. 8803528327 has been issued in the name of PW-Mohd Ilyas. He stated that on 5.10.2010 five calls were recorded in the record and the location of the calls was recorded through Palma Tower, which include incoming calls and outgoing calls between 7.12 pm to 7.31 pm.

31. DW Ravi Kumar proved the transaction of encashment of cheque of Rs. 29000/- by Mohd Ilyas witness that was delivered by Mohd Afzal.

32. Bearing in mind the scope of interference with the judgment of acquittal in an appeal, now we would examine the validity of the judgment impugned in the light of evidence led by the parties. The prosecution in order to prove its case has placed reliance upon the evidence of three eye witnesses, namely, PW Mohd Arif, PW Mohd Sajid Ali and Mohd Ilyas. These three witnesses have deposed

about the occurrence and all these three witnesses are related witnesses, as such, due care and caution is required while evaluating their testimonies (See Bhaskarrao & Ors vs. State of Maharashtra 2018AIR(SC)2222, Md. Jabbar Ali vs. State of Assam MANU/SC/1351/2022). In the instant case, an FIR was registered on the written complaint of PW-MohdArif and in the FIR, the manner in which the deceased was assaulted has been specifically mentioned that all the accused persons were beating Ali Aksar with lathies, kicks and fist blows. No doubt, the FIR need not be an encyclopaedia but at the same time when the manner of the occurrence in detail has been stated by the maker of FIR and he deposes in court, in a manner different to the version stated in FIR, the said discrepancy cannot be ignored and it casts doubt upon the reliability of the said witness (See Md. Rustam vs. State of Bihar 2002(10)SCC273 and Amrisha Rana vs. State of Himachal Pradesh 2018 AIR(SC)4604. PW-Mohd Arif in his deposition before the Court has nowhere stated that the accused were armed with lathies, though he has stated that the accused were beating the deceased with kicks and fist blows. In EXPW-MA, it has not been mentioned by PW-Mohd Arif that accused Afzal Khan and Majid Khan strangled the deceased by twisting his neck. More so, in the FIR, it has been mentioned that when he along with Mohd Ilyas reached on spot, the accused persons left Ali Aksar and ran away, which is contrary to his deposition made in the court, in which he has stated that he saw the accused Mohd Afzal and Mohd Majid twisting the neck of the deceased-Ali Aksar. Investigating Officer-Jaan Mohd. has stated that there is no evidence that the death of the deceased was caused by twisting of neck.

33. PW Mohd Ilyas has also made a statement as an eye witness and stated that while he along with Mohd Arif was going to house at Dhanni Dhar and reached near Bawli, they heard noise and stopped the vehicle and ran towards the direction of noise, where they found the accused Afzal Khan and Majid Khan strangulating the deceased by twisting his neck. This statement is contrary to the statement of PW Mohd Arif who stated that PW-Sajid Ali came towards them saying that Ali Aksar has been killed. It also requires to be noted that the PW Mohd Ilyas's statement that he has no transaction with Afzal Khan, is belied by the statement of DW-Ravi Kumar, an official of the J&K Bank, who proved the transaction of encashment of cheque for an amount of Rs.29,000/- by Mohd Ilyas issued by Mohd Afzal. PW Ilyas has nowhere deposed about the presence of PW Mohd Sajid Ali on spot.

34. As per the version of Mohd Sajid Ali, cousin of the complainant and brother of Mohd Ilyas, he was already with deceased when the accused intercepted them. He ran for the help and saw Mohd Arif and Mohd Ilyas coming on a motorcycle and told them that the accused were beating the deceased in order to kill him. He has further stated that he along with Mohd Arif and Mohd Ilyas reached on spot and found that Afzal Khan and Majid Khan were twisting the neck of Aksar Ali thereby throttling him. He also stated that the accused were having stones in their hands and they were not carrying any weapon like lathies. In cross-examination, he has admitted that he was not beaten by the accused and further as he got afraid of the accused, so he could not run away from the place of occurrence. This runs contrary to his deposition made in chief examination, wherein he has stated that he ran for help and saw Mohd Arif and Mohd Ilyas coming on a motorcycle. More so, his real brother, PW Mohd Ilyas has nowhere stated that Mohd Sajid Ali came running towards them and rather he has stated that after hearing the noise, he and Mohd Arif, went to the deceased. Statement of PW Mohd. Sajid Ali that accused Majid Khan hit the deceased with stone, is belied by

the statement of Investigating Officer, Jaan Mohd., who has categorically stated that he did not seize the stones as there was no evidence that the stones were used by the accused. All these three witnesses are related and interested witnesses and their evidence is required to be examined with care and caution and in view of the infirmities/improvements/contradictions, it would not be safe to place reliance upon the statements of these three witnesses.

35. The medical evidence also is not conclusive in nature as it has been stated by the PW Doctor-Zakir Hussain that the deceased died of head injury and upper cervical spine injury. No opinion has been sought by Investigating Officer as to whether cervical spine injury could be caused by twisting of neck and rightly so when the Investigating Officer has stated that there was no evidence that the death of the deceased was caused due to twisting of neck. So far as head injury is concerned, PW- Dr. Zakir Hussain has stated that he cannot say whether head injury was internal from external hematoma.

36. We have examined the judgment passed by learned trial court. The learned trial court has meticulously examined the evidence and has come to the conclusion that the prosecution case is not free from reasonable doubt. We do not find that the conclusion reached at by the learned trial court is perverse and merely other opinion is also possible on the same set of evidence led by the prosecution, can hardly be a ground for interfering with the judgment of acquittal recorded by the trial court. The learned trial court has considered the various infirmities in the prosecution case such as material contradictions as well as improvements made by the witnesses in their depositions before the court, delay in recording statements of witnesses during investigation and also the inconclusive medical opinion, while acquitting the respondents.

37. In view of what has been said and discussed above, we do not find any reason to interfere with the judgment of acquittal dated 16.08.2013 recorded by the trial court. The appeal is, as such, dismissed. Consequently, the criminal revision shall also bear the same fate.

38. Record of the trial court be sent back.

(RAJESH SEKHRI)
JUDGE

(RAJNESH OSWAL)
JUDGE

Jammu
18.11.2022
Karam Chand/Secy.

Whether the order is speaking:	Yes/No.
Whether the order is reportable:	Yes/No.