

Smt. Shankri Devi Age 62 Years vs Union Territory Of J&K Through Sho on 12 June, 2023

Author: Mohan Lal

Bench: Mohan Lal

Sr. No. 3

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

RP No. 03/2023
CM No. 313/2023
Reserved on : 17.05.2023
Pronounced on : 12.06.2023

1. Smt. Shankri Devi age 62 years,Petitioner(s)
W/o Sh. Hari Ram,
R/o Village Malikote Tehsil Chassana,
District Reasi.
2. Miss Shano Devi @ Chasma Devi age
24years D/o Sh. Hari Ram,
R/o Village Malikote Tehsil Chassana,
District Reasi.

Through :- Sh. O.P.Thakur, Sr. Advocate with
Sh. R. K. S. Thakur, Advocate.

V/s

Union Territory of J&K through SHORespondent(s)
Police Station Chassana.

Through :- Sh. Suraj Singh, GA
CORAM: HON'BLE MR. JUSTICE MOHAN LAL, JUDGE

JUDGMENT

1. Petitioners have preferred instant petition for review/recalling of the judgment and order dated 28.11.2022 passed by this Court in bail application No. 76/2020 titled Smt. Shankri Devi and Anr. Vs. Union Territory of Jammu and Kashmir through Police Station Chassana, whereby, the bail application of the petitioners has been rejected.

2. Being aggrieved of and dissatisfied with the impugned judgment/order dated 28.11.2022, petitioners have sought it's review on the following grounds.

(i) that there are material errors which have crept in the judgment and order which are apparent on the face of record, the most important submissions which were not only pleaded but also argued by the counsel for the petitioners as well as the copies of the judgments relied by the petitioners were placed on record but the same could not

be considered;

(ii) that this Court has recorded a finding that only 5 witnesses have been examined, whereas fact of the matter is that when the aforesaid judgment and order dated 28.11.2022 was passed as many as 13 witnesses were already examined by the trial court, witness No. 12 was partly examined, witnesses 1 to 13 were examined even when the bail application was heard by this court on 28.10.2022, this court summoned the scanned record of the trial court and at that time as many as 9 witnesses were already examined, the statements were available on record, this court recorded a finding that PW Javeed Ahmad witness to seizure of dupatta is yet to be examined but the fact of the matter is that the said witness PW8 Javeed Ahmad was already examined on 27.03.2012 and his statement was available on the scanned record;

(iii) that the counsel for the petitioners argued that as many as 14 witnesses have been examined, in the bail application it was pleaded that the petitioners were females and were entitled to grant of bail in terms of proviso to Section 437 CrPC, not only petitioners placed on record three judgments of this Court along with bail application as annexed VII, VIII & IX and even in the said judgments it was held that even in non-bailable offences in terms of the proviso to Section 498 CrPC (J&K) which correspondence to Section 437 (central) the females were entitled to grant of bail, counsel for the petitioners submitted his first arguments in reference to the said provision, however, due to mistake and oversight the aforesaid material submission could not be considered by this court;

(iv) that as many as 13 witnesses have already been examined there is no possibility of even influencing any witnesses, for participating in the first death anniversaries of deceased Sita Devi the trial Court had granted parole on 10 days but the accused petitioners surrendered before the trial court on due date and even in the circumstances there is no possibility of jumping of the petitioners on bail;

(v) that the witnesses who are yet to be examined are PW 14 Patwari who has prepared the site plan, PW15 & PW16 who submitted FSL reports, PW18 who conducted part investigation, PW19 who completed the investigation and PW20 who produced the challan; further when the scanned record was summoned by this Court as many as 9 witnesses i.e PWs, 1, 2, 3, 5, 6, 7, 8, 10 & 11 were examined and their statements were on record, material witnesses have already been examined, only official witnesses required to be examined, PW Doctor Vikas Bhan has been partly examined;

(vi) that this Court recorded a finding in the impugned judgment and order that the material witnesses are yet to be examined by the prosecution and there is possibility that if the petitioners were enlarged on bail they might influence all the witnesses as well as the material witnesses;

(vii) that PW1 Bhikam Singh in his statement recorded by police on the basis of which the FIR was registered before the trial court has stated that he had not seen the occurrence and the said allegations were made by him under pressure of PW2 & 3; PW3 Ratan Singh eyewitness whose statement has been recorded by police on 03.05.2021 after 9 days from the occurrence has stated that he had not seen the occurrence himself, none of the material witnesses have stated that Mangal Singh accused has hit the deceased with bat even the doctor has stated that there was no external and internal injury to the person of deceased, these material facts and evidence were available on record but could not be considered;

(viii) that the material witnesses have failed to prove the charges against accused including the petitioners, case is based on false and fabricated facts, the occurrence is of intervening night of 13/14th of April 2021, the inquest proceedings were initiated under Section 174 CrPC, petitioners and co-accused have been involved on 22.04.2021 after 9 days, the PW1 who has subsequently turn hostile has made allegation that he had seen accused beating and hitting the accused with bat but in his statement he has stated that on the next date i.e 14.04.2021 he had gone to the house of the accused and participated in the post death ceremonies of deceased;

(ix) PW-2 Kaka Ram (father of deceased Sita Devi) was not eye witness but before the Magistrate he has stated that he was informed about the alleged occurrence but his son Ratan Singh in his statement has stated that till 03.05.2021 when his statement was recorded before the Magistrate he had not disclosed this fact to any person; PW Kaka Ram has stated before the trial Court that on 14.04.2021 he had gone to the house of accused and participated in the post death ceremonies, police and public was there but he did not disclose about the occurrence to police and public, all these facts are clearly and conclusively prove that occurrence has been fabricated after 9 days and FIR registered on 22.04.2021; as far as PW 17 Dr. Vikas is concerned, his statement is not believable as the medical report has been written by Dr. Rajiv Salaria and opinion given by Dr. Vikas, as a matter of fact, Dr. Rajiv Salaria has conducted post mortem at Malikote who is an Ayurvedic doctor and not MBBS and because of this reason he was not cited as prosecution witness.

3. Sh. O.P. Thakur learned counsel for petitioners while recapitulating the grounds urged in the memo of review petition, has sought review of impugned judgment/order dated 28.11.2022 by canvassing arguments, that on the basis of statement made by complainant PW 1 Bhikam Singh (uncle of deceased) FIR no. 10/2021 was lodged on 22.04.2021 after a delay of 9 days of occurrence on 14.04.2021 when on the said date Bhikam Singh had gone to the house of the petitioners and participated in the post death ceremonies and rituals of deceased Sita Devi and after 19 days statement of PW-3 Ratan Singh (brother of deceased) was recorded on 03.05.2021 before learned Judicial Magistrate Mahore, the said factual position was not considered by the Court in the earlier bail application, therefore the review petition is legally competent and maintainable. It is argued that the regular bail of the petitioners was filed before the trial Court of Principal Sessions Judge Reasi on 23.08.2021 which was rejected on 22.02.2022, thereafter, petitioners filed bail application

before this Court, during the pendency of the bail application this court summoned scanned record and when the record was summoned as many as 9 prosecution witnesses i.e. PWs 1, 2, 3, 5, 6, 7, 8, 10, & 11 were examined by the trial Court and their statements were available on record, arguments in the bail application were heard on 28.10.2022 and by that time 4 more prosecution witnesses i.e. PWs-4 Ashok Singh, PW-13 Jarnail Singh, PW-9 Inder Singh and PW-12 Baldev Singh were examined, and when the arguments were heard and the bail application was reserved for orders as many as 13 prosecution witnesses were already examined by the trial Court, but this Court failed to consider the evidence of remaining 8 witnesses, therefore the review petition is maintainable. It is moreso argued that there are only 2 alleged eye witnesses in the case namely PW-1 Bhikam Singh (Complainant) and PW-3 Ratan Singh (brother of deceased), PW-1 Bhikam Singh has turned hostile whereas PW-3 Ratan Singh has stated that he along with his father and other family members had gone to the house of petitioners but did not lodge any complaint to police nor he disclosed anything against accused to any person, his statement was recorded under Section 164 CrPC on 03.05.2021 and till then he did not disclose about the alleged occurrence to anybody, he further stated that he had not seen anybody beating the deceased, had PW Ratan Singh actually seen the occurrence he would have disclosed this fact to all the family members on the same day or the next day as well as to the people who gathered on spot where police was very much present, he got his statement recorded after 19 days of occurrence which is sufficient to prove that false case has been concocted against the petitioners. It is argued that the counsel for petitioners submitted that the petitioners being ladies were also entitled to grant of bail in terms of proviso to Section 437(1) CrPC, besides this, it was argued that 13 witnesses including material witnesses were examined, even then the application was rejected and it appears that due to oversight the submissions for grant of bail to the petitioners in terms of Section 437 CrPC have not been considered, due to oversight this Court referred in the bail order that PW-8 Javeed Ahmad SPO witness to seizure of weapon of offence has not been examined, however, the fact was that the said witness was examined on 17.03.2022 and his statement was on record, this court was under impression that only 5 witnesses were examined on 28.10.2022 when the bail application was reserved for orders, but the fact is that 13 witnesses including the material witnesses were already examined and there was no possibility of influencing the witnesses, rest of the prosecution witnesses were official witnesses, PW-17 Dr. Vikas Bharti was examined on 10.09.2022 in regard the post mortem report of deceased however, Dr. Vikas Bharti has made factually incorrect statement before the Court that he conducted the post mortem as he admitted that the post mortem is in the hands of Dr. Rajiv Salaria, Dr. Vikas Bharti has wrongly written in post mortem report that death was due to throttling, bare perusal of his statement in cross-examination would lead to conclusion that case is of suicide. To support his arguments, learned counsel for the petitioners has relied upon (i) M. M. Thomas-Appellant Versus. State of Kerala and Another [(2000) 1 Supreme Court Cases 666], (ii) Rajender Singh-appellant Versus. Lt. Governor, Andaman & Nicobar Islands & Ors-respondents (AIR 2006 SC 75), (iii) Minu Kumari and Anr-Appellants Versus. State of Bihar and Ors.-Respondents (AIR 2006 SC 1937), (iv) APPCR No. 60/2018 in CRMC No. 58/2014 (Munish Bhatia & anr. Vs. State of J&K and anr., date of order 19.11.2018), (v) Girija Koul-Appellant Versus State & Ors- Respondent [2010 Supreme (J&K) 537] and (vi) Fata-Appellant Versus State-Respondent [1998 Supreme (J&K) 185].

4. Sh. Suraj Singh learned GA for respondent has vehemently argued and sought dismissal of review petition by portraying arguments, that a reasoned order has been passed by this Court on

28.11.2022 whereby the bail application of the petitioners has been rejected, this Court has taken all aspects of the matter into consideration including as to whether the evidence tendered by the prosecution witnesses during trial can be appreciated in the bail application, there is no error apparent on the face of the record which would seek indulgence of this Court to review its own order. It is argued that the scope of review is so limited that there could be no appreciation regarding the veracity/reliability and admissibility of the evidence led by the prosecution before the trial court, this court has taken into consideration the parameters for grant or refusal of bail in the bail application, even if the evidence of the leftover witnesses which by oversight by the Court is taken into consideration, no ground is made by the petitioners to review the reasoned impugned order passed by this Court.

5. I have heard learned counsel for the petitioners and learned GA for respondent. I have perused the evidence so far led by the prosecution, gone through the judgments relied upon by learned counsel for the petitioners, bestowed my thoughtful consideration to the material aspects in the case and gone through the relevant law on the subject matter carefully. Section 362 of the Code of Criminal Procedure deals with the provision of Criminal Review. For the sake of brevity Section 362 CrPC is reproduced as under: -

362. Court not to alter judgment—Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.

Threadbare reading of the Section 362 CrPC clearly depicts, that no Court shall alter or review its judgment or final order disposing of a case except to correct a clerical or arithmetical error. The Section is general in its application and the words "no court" include all the Courts and apply in respect of all the judgments, whether of the trial Courts or of the appellate Courts. It is pertinent to mention here, that this Court while dealing with the bail application in terms of Section 439 CrPC in case titled Shankri Devi and Ors. Vs. UT of J&K through Police Station Chassana bearing FIR no. 10/2021 for commission of offences punishable under Section 302/34 IPC finally disposed of the said bail application by impugned order dated 28.11.2022 whereby the bail application of petitioners/accused was rejected and dismissed.

6. Impugned bail order dated 28.11.2022 has been assailed by the petitioners/accused before this Court in instant review petition precisely on the grounds, that at the time of passing of the impugned order dated 28.11.2022 this Court observed that only 5 witnesses viz PW1 Bhikam Singh, PW2 Kaka Ram, PW3 Ratan Singh, PW5 Kesar Singh and PW17 Dr. Vikas Bhan were recorded by the trial Court out of total 20 listed witnesses in the charge sheet, whereas at the time of passing of the impugned order as many as 9 witnesses viz PWs 1, 2, 3, 5, 6, 7, 8, 10 & 11 were examined, and till date 4 more witnesses viz; PW4 Ashok Kumar PW9 Inder Singh, PW12 Baldev Singh and PW13 Jarnail Singh who were examined by the prosecution were not taken into consideration, therefore, at the time of passing of the impugned order an error apparent on the face of record has erupted whereby the review petition is maintainable. Learned counsel for the petitioners further urged that at the time of passing of the impugned order, 2 judgments i.e. Girija Koul Vs. State & Ors reported in

2010 Supreme (J&K) 537 and Fata Vs. State reported in 1998 Supreme (J&K) 185 were not considered by this court and a clerical mistake/error has been erupted in the impugned order and judgment which requires review.

7. The prosecution story sans unnecessary details in brief is, that petitioners/accused during intervening night of 13th /14th.4.2021 with co accused Anoop Singh caught hold of deceased Sita Devi while another co- accused Mangal Singh hit deceased Sita Devi with bat due to which she fell down and died. Be it noted, that vide impugned order dated 28.11.2022 the bail application of the petitioners/accused was rejected and at that time the evidence of only 5 prosecution witnesses recorded by the trial Court viz; PW1 Bhikam Singh (eye witness), PW2 Kaka Ram (eye witness), PW3 Ratan Singh (eye witness), PW5 Kesar Singh (witness to seizure of dead body) and PW17 Dr. Vikas Bharti (MO, and witness to post mortem report) were taken into consideration. Even if at the time of passing of impugned order dated 28.11.2022 the evidence of remaining 8 witnesses viz; PW4 Ashok Singh (witness to seizure of dead body), PW6 HC Bhag Ram no. 602/RSI (witness to superdari and seizure of ring), PW7 SPO Pawan Singh no. 37/RSI (witness to superdari and seizure of ring), PW8 SPO Javeed Ahmad no. 327/RSI (witness to seizure of weapon of offence dupatta), PW9 Inder Singh (witness to seizure of koko mobile phone), PW10 Kali Devi (circumstantial witness), PW11 Shallo Devi (circumstantial witness), & PW12 Baldev Singh (circumstantial witness) recorded by the trial Court on 20.10.2022, 26.04.2022, 04.04.2022, 17.03.2022, 13.05.2022, 27.04.2022, 04.04.2022, & 13.05.2022 respectively was available before this Court, and even if the same was not considered due to oversight, none of these witnesses have resiled from the prosecution version and turned hostile so as to carve out a case for bail in favour of the petitioners/accused.

8. In M. M. Thomas-Appellant Versus. State of Kerala and Another [(2000) 1 Supreme Court Cases 666], relied by learned counsel for the petitioners, Hon'ble Supreme Court held that under Article 215 of the Constitution of India the High Court as a court of record has inherent powers to correct its own record if any apparent error is noticed and plenary powers of High court would also include power of review. In Rajender Singh-appellant Versus. Lt. Governor, Andaman & Nicobar Islands & Ors- respondents (AIR 2006 SC 75) the High Court even under the Code of Civil Procedure under Order 47 Rule 1 has the power of review of its own order. In light of ratios of the judgments (supra) there is no dispute to the legal position regarding the powers of review of the High Court. In Minu Kumari and Anr-Appellants Versus State of Bihar and Ors.-Respondents (AIR 2006 SC 1937), Hon'ble Supreme Court dealt with the provisions of Section 482 CrPC in regard to inherent powers of the High Court to prevent the abuse of process of Court and secure the ends of justice. Ratio of judgment (supra) is distinguishable from the facts of the case in hand. In APPCR No. 60/2018 in CRMC No. 58/2014 (Munish Bhatia & anr. Vs. State of J&K and anr., date of order 19.11.2018) also relied by learned counsel for petitioners/accused, in a case bearing FIR no. 02/2014 registered under Section 5(1)(D) of J&K Prevention of Corruption Act 2006 and Section 120-B RPC, during the course of proceedings before the Court petitioner sought to place on record certain documents and one of the documents dated 02.03.2017 was in regard to vigilance organization whereby the investigation of the case was closed against the accused, a co-ordinate Bench of this Court in an application for re-hearing allowed the application for placing on record such document in question. In Girija Koul- Appellant Versus State & Ors-Respondent [2010 Supreme (J&K) 537] & Fata-Appellant Versus State-Respondent [1998 Supreme (J&K) 185] further relied by learned

counsel for petitioners/accused, it has been argued by learned counsel, that bails in murder cases were granted to lady accused in terms of the proviso to Sub-Section 1 of Section 497 CrPC, and in the earlier impugned bail order dated 28.11.2022 these case laws were not taken into consideration by this Court which is an error apparent on the face of the record carving out a case for review in the petition in hand, therefore, on the same analogy petitioners/accused be granted bails. I have thoroughly scanned the facts of case laws and have gone through the ratios of the judgments (supra). In Girija Koul's case (supra) co-ordinate bench of this Court granted bail to lady accused in murder case under Section 302/498-A, RPC in FIR no. 106 of 2010 in terms of proviso to sub-Section 1 of Section 497 CrPC on the ground that trial court had already extended concession of bail in favour of other lady accused Mst. Raj Rani for the reasons that she was women of 82 years of age, and the petitioner was also placed in a similar position as she was married few months prior to occurrence and by her late marriage her future prospectus would get destroyed. In Fata's case (supra) a co-ordinate Bench of this Court granted bail to the lady accused who remained custody for 2/3 years on the ground that all the prosecution witness were examined. Ratios of the judgments of "Girja Koul's case" and "Fata's case" (supra) do not lay down an invariable rule/principle of law that in every murder case the ladies accused are to be mandatorily granted bails. Be it noted, that every case depends upon its own facts and circumstances and no rule/principle of law can be laid down that all the ladies accused involved in heinous and grave offences such as murder cases are mandatorily required to be granted bails. The arguments propounded by learned counsel for petitioners/accused and the ratios of the judgments (supra) relied upon by him, in the facts of case in hand, being distinguishable, legally unsustainable, are repelled, rejected and discarded.

9. It is pertinent to reiterate here, that till date, as many as 14 prosecution witnesses out of listed 20 witnesses have been recorded by the trial court. The most material witnesses of the prosecution to my considered view are PW1 Bhikam Singh (eye witness), PW2 Kaka Ram (eye witness), PW3 Ratan Singh (eye witness), PW-8 Javeed Ahmad SPO (witness to seizure of weapon of offence) and PW17 Dr. Vikas Bhan (witness to post mortem report). Except the evidence of PW 8 SPO Javeed Ahmd who is witness to seizure of weapon of offence viz; dupatta, this Court has already rendered a finding in regard to the evidence of PWs 1, 2, 3 & 17 namely, Bhikam Singh, Kaka Ram, Ratan Singh, & Dr. Vikas Bharti. PW8 SPO Javeed Ahmad has not turned hostile and has admitted the contents of seizure memo of weapon of offence. Hon'ble Supreme Court in a case titled Satish Jaggi Vs. State of Chhattisgarh [2007 (11) SCC 195] has held, that at the stage of granting of bail the Court can only go into the question of prima-facie case established for grant of bail and it cannot go into the question of the credibility and reliability of witnesses examined by the prosecution, the question of credibility and reliability of prosecution witnesses can only be tested during the trial. In another case reported in 2021 Legal Eagle 551 (Mohammad Ibrahim Dar Vs. Union Territory of J&K) whose reference has already been made in the impugned order, a co- ordinate bench of this Court while rejecting bail application of accused facing trial for murder case under Section 302 RPC has held, that there could not be observations and finding on the credibility and evidentiary value of the prosecution witnesses at the state of considering the application for grant of bail. Hon'ble Supreme Court of India while cancelling bail granted to murder accused under Section 302 IPC held, that as per settled legal position, the gravity and seriousness of offences is a relevant consideration for the purpose of bail (vide 2022 Legal Eagle 1042, Nitu Kumar Vs. Gulveer and Anr.) In one more case titled (Gandharb Singh Vs. State [2009(II) SLJ 681] co-ordinate bench of this Court in a case of murder under

Section 302 RPC while rejecting bail has held, that the accused can be granted bail only if the evidence on record overwhelmingly points towards non-involvement of the accused in the case and even when two views are possible the Court must ordinarily refrain from exercising its power under Section 498 CrPC while granting bail. This court vide impugned order dated 28.11.2022 while taking into consideration the evidence of 5 prosecution witnesses rejected the bail application of the petitioners/accused on merits taking into account the para-meters laid down for grant or refusal of bail in non-bailable offence [vide Kalyan Chandra Sarkar V Rajesh Rajan @ Pappu Yadav and Anr. (2004) 7 SCC 528]. Even taking into consideration the evidence of other 9 witnesses recorded so far, I am of the considered view, that no clerical or arithmetical error has crept in the impugned order dated 28.11.2022 whereby the bail application of the petitioner/accused was earlier rejected, calling upon this court to review the said impugned bail order dated 28.11.2022.

10. Viewed thus, I do not find any merit in the review application, the same being merit less, legally unsustainable, is disallowed, rejected and dismissed. However, trial Court uninfluenced by the observations made by this Court in the earlier bail application or in the instant review petition, is at liberty to pass any fresh orders in the bail application if moved afresh by the petitioners/accused before it.

11. Disposed off accordingly.

MOHAN LAL JUDGE SRINAGAR 12.06.2023 Isaq Whether the order is speaking? Yes/No Whether the order is reportable? Yes/No