
(2022) 09 J&K CK 0056

Jammu And Kashmir High Court (Srinagar Bench)

Case No: Criminal Appeal No.41 Of 2014, Criminal Miscellaneous No. 393 Of 2022, Criminal Reference (Life Imprisonment) No. 05 Of 202

Farooq Ahmad

APPELLANT

Vs

State Of Jammu &
Kashmir

RESPONDENT

Date of Decision: Sept. 26, 2022

Acts Referred:

- Jammu And Kashmir State Ranbir Penal Code, 1989 - Section 121A, 302, 304, 304II, 460
- Arms Act, 1959 - Section 7, 27
- Code Of Criminal Procedure, 1973 - Section 161, 164

Hon'ble Judges: Ali Mohammad Magrey, J; Md. Akram Chowdhary, J

Bench: Division Bench

Advocate: S.T.Hussain, Nida Nazir, Asifa Padroo, Rekha Wangnoo

Final Decision: Dismissed/Disposed Of

Judgement

Md. Akram Chowdhary, J

1. Appellant-Farooq Ahmad was convicted for the commission of offence punishable under Section 302 RPC for committing murder of one Abdul

Qayoom S/O Ghulam Rasool Sheikh R/O Saringal, Tehsil Bhaderwah on 14.11.2002 in the wee hours, by the court of learned Sessions Judge

Bhaderwah vide judgment dated 08.07.2014 and was sentenced to rigorous imprisonment for life and fine of Rs.5000/-, and in case of default of

payment of fine he was ordered to undergo further simple imprisonment of two months.

2. The First Information Report (FIR) was received at the Police Station Bhaderwah at 7.00 AM on 14.11.2002, from reliable source that some

unknown terrorists armed with weapons entered the house of one Abdul Qayoom at Sartingal Bhaderwah and fired indiscriminately killing him on

spot. On the basis of this report a case was registered vide FIR No.126/2002 for the commission of offences punishable under Sections 302/460/121-

A RPC and 7/27 Arms Act and the investigation was entrusted to ASI Anzer Ahmed. After investigation of the case, the charge-sheet was laid for

the aforementioned offences on 20.09.2003 before the court against Farooq Ahmad, Mohd. Ashraf and Mohd. Sidiq in their absence and was

consigned to records vide order dated 11.11.2003. The proceedings were, however, revived on 08.07.2009 when one of the accused Farooq Ahmad

was apprehended and produced before the court, whereas, the other two accused were reported to have been killed in an encounter with the security

forces.

3. The appellant-accused Farooq Ahmad was charge-sheeted for the commission of offences punishable under Sections 302/460 RPC and 7/27 Arms

Act on 10.08.2009 by the trial court, who denied the charge and prosecution was directed to lead evidence. The prosecution, in order to prove its case

to bring home the charge against the appellant-accused, examined 11 witnesses out of 16 cited prosecution witnesses.

4. The incriminating evidence led by the prosecution against the appellant-accused was explained to him on 06.04.2012, who on his examination, stated

that he had been falsely implicated by PWs-Parveza Begum, Shabina Akhter and Ghulam Rasool on the basis of enmity and expressed his ignorance

with regard to the statements of other prosecution witnesses. He examined in his defence, Liyaqat Ali, Om Prakash and Feroz Din, as defence

witnesses.

5. The trial court, after hearing arguments and appreciating the evidence led by the both sides, held that the appellant-accused was not guilty for the

commission of any other offence of which he was charged, except under Section 302 RPC and sentenced him to life imprisonment, besides fine, vide

judgment/order dated 23.07.2014 passed by the court of Principal Sessions Judge Bhaderwah in case File No.16/Sessions (for short "Impugned

judgment/order").

6. The trial court made the Reference for confirmation of the sentence and the appellant also filed the Appeal against the impugned judgment/order

dated 08.07.2014 passed by the Sessions Court Bhaderwah. The Appeal was admitted to hearing on 23.07.2014. The Reference and Appeal had been

entertained in Jammu Wing of this Court, however, on motion laid by the appellant-accused, Hon'ble The Chief Justice vide order dated

14.05.2016 passed in Cr.TA No.43/2015 ordered transfer of this matter from Jammu wing to Srinagar wing of this Court. This is how the matter is

before this Bench.

7. The appellant, through the medium of the instant Appeal, has challenged the impugned judgment/order passed by the trial court on the grounds that

the witness namely Shabina Akhter, minor daughter of the deceased, a 3rd standard student, has deposed that at the time of the occurrence the

accused was not accompanied by anyone and the father of the witness was cleaning the "bukhari" in the "Varanda" and she was the first

to see the accused, however, she had denied a part of her statement recorded under Section 161 Cr.PC to the extent where she has stated that the

person who fired on her father was an unknown person and her mother was crying and naming the appellant- accused; that the material witness

namely Ghulam Rasool, father of the deceased, had stated that though he didn't live with the deceased yet has gone to his house a day before the

occurrence, the deceased at the time of occurrence was igniting "bukhari". He had further stated that he revealed about the occurrence to the

wife of the deceased who was cooking meals in the kitchen and she was not privy to the occurrence at all; that another witness namely Parveza, wife

of the deceased, has deposed in her statement that she was cooking meals and her daughter Shabina told her about the presence of the accused

which, however, is contradicting the statement of said Shabina. Parveza has further stated that the accused was accompanied by 5-7 people whom

she could not identify because of darkness, which again is contrary to the statements of Ghulam Rasool and Shabina Akhter; that the above discussed

witnesses were harbouring enmity towards the accused for the reason that they believed that the accused had killed four brothers of the deceased for

which no FIR was ever lodged; that all the material witnesses were well tutored who made drastic improvements in their statements recorded under

Section 164 Cr.PC; that the Investigating Officer in his statement has denied recording of statement of the wife of the deceased on the same day,

whereas, she has stated that her statement was recorded on the day of occurrence. The I.O has further stated in his statement that neither Ghulam

Rasool was present on the date of occurrence in the house of the deceased nor Shabina Akhter named the accused before the I.O. He further goes

on to say that the wife of the deceased has stated that the accused was accompanied by 2 persons, which again contradicts the statement of Parveza

(wife of the deceased); that the statement of I.O in its entirety and the improvements made by the so called witnesses in the statement recorded under

Section 164 Cr.PC shatter the whole edifice of the prosecution case; that most of the witnesses in one voice have stated that the wife of the deceased

was having illicit relations with one Abdullah, whom after the death of the deceased she married. Besides this, out of nine brothers of the deceased,

four were militants and in such circumstances the possibility of the deceased to have been killed by someone else cannot be prudently ruled out; that

the trial court has totally failed to appreciate the evidence and imposed the sentence without fully going into the merits of the evidence adduced.

8. Brief facts giving rise in filing the instant appeal are that on 14.11.2002, an information was received from reliable sources that some unknown

terrorists armed with weapons entered the house of one Abdul Qayoom at Saringal Bhaderwah and fired indiscriminately killing him on spot.

Aforesaid FIR came to be registered and investigation was initiated and was entrusted to PW-15 Anzer Ahmed. Site-plan was prepared, four empty

cartridges from spot were also seized, dead body was also recovered and after postmortem was handed over to the legal heirs of the deceased. A

Ã¢â€BukhariÃ¢â€,¢ and a steel plate with marks of bullets were also seized. The seized empty cartridges and clothes were got re-sealed through

Magistrate and sent to FSL for forensic examination. Statements of witnesses were also recorded. The investigation concluded finding Farooq Ahmed

(appellant herein) S/O Abdul Rashid R/O Basti Tehsil Bhaderwah, Mohd. Ashraf S/O Jan Mohammad R/O Sarikhi Bhaderwah and Mohd. Sadiq S/O

Ahmed Bhat R/O Thathala Bhaderwah, guilty for the commission of offences punishable under Sections 302/460/121-A RPC and 7/27 Arms Act.

9. Mr. Hussain, learned Senior counsel appearing for the appellant-accused, with all vehemence at his command, argued that the trial court judgment

is against the facts and law, as it has utterly failed to appreciate the evidence on record and the judgment is based on conjectures and surmises,

ignoring the contradictions in the statements of the prosecution witnesses particularly eye-witnesses. He has further argued that the appellant-accused

accepts the evidence on record, however, on the basis of this evidence the conviction under Section 302 RPC cannot be recorded. He has assailed the

impugned judgment, firstly, on the point that the trial court on one hand has recorded that the offence under Section 7/27 Arms Act is not proved,

whereas, on the other hand learned Judge has recorded that the appellant-accused has committed offence punishable under Section 302 RPC by use

of a fire arm. He has argued that neither the weapon of offence was recovered nor the seized cartridge/empties had been sent to any ballistic expert

so as to formulate the opinion as to which weapon had been used in the commission of the offence. He has also argued that the medical expert cannot

be the competent witnesses to say that the injury has been caused by a bullet. Secondly, he has argued that since there were three accused and

without there being charge of criminal conspiracy or abetment how one of the accused can be convicted, when the other accused had also

participated in the same commission of offence. Thirdly, he argued that in view of the indiscriminate firing by all the accused including the appellant

herein, it cannot be said that the appellant "accused had intention to kill the deceased. The accused who were terrorists may have fired to terrorize

but there is no evidence so as to bring home the charge that they had intention to kill deceased or knowledge with regard to result of his act of firing to

kill a person. He has finally argued that the appeal filed by the appellant "accused be allowed and the impugned judgment and order, recorded by the

trial court, be set aside, there being no clinching evidence to prove the offence punishable under Section 302 RPC. He further argued that in case the

court is of the opinion that there is sufficient evidence to constitute the offence, the maximum which can be held is that the appellant-accused was

liable to be convicted under Section 304 RPC instead of Section 302 RPC.

10. Ms. Padroo, learned AAG, appearing on behalf of the respondent, however, supported the impugned judgment. She contended that the appellant-

accused has been convicted for heinous offence of murder, and that the trial court, after passing lucid judgment, has recorded conviction of the

appellant-accused. She further contended that non-recovery of incriminating material from the accused cannot be a ground to exonerate the appellant

of the charges when the eye-witnesses, examined by the prosecution, are found to be trustworthy. She prayed that the appeal may be dismissed and

the impugned judgment/order be upheld.

11. The precise charge against the appellant "accused is that on 14.11.2002 at 5.00 AM he along-with other terrorists namely Mohd Ashraf S/O Jan

Mohammad and Mohd Sidiq S/O Ahmed Bhat entered into the house of one Abdul Qayoom (deceased) at Saringal Bhaderwah and fired at him with

prohibited arms/ammunition as a result of which deceased Abdul Qayoom died on spot and the accused escaped. The prosecution has cited Parveza

Begum wife of the deceased, Shabina, daughter of the deceased and Ghulam Rasool Sheikh, father of the deceased, as eye witnesses in the case,

whereas, Akhter Hussain, Nazir Ahmad and Mohd. Iqbal were stated as circumstantial witnesses and others were formal witnesses, besides, medical

and ballistic experts and I.O.

12. PW-3 Parveza Begum, PW-4 Shabina and PW-5 Gh. Rasool Sheikh, who had been cited as eye witnesses to the occurrence, had deposed, while

being examined by the trial court, that on 14.11.2002 at about 5.00 AM they were awake in connection with morning feast (Sehri). The deceased was

igniting $\tilde{\text{A}}\text{c}\hat{\text{a}},\text{--}\tilde{\text{E}}\text{c}\hat{\text{a}},\text{--}\hat{\text{a}},\text{c}$ in the $\tilde{\text{A}}\text{c}\hat{\text{a}},\text{--}\tilde{\text{E}}\text{c}\hat{\text{a}},\text{--}\hat{\text{a}},\text{c}$ when the appellant-accused fired at the deceased killing him on spot. PW-Ghulam Rasool Sheikh had

deposed that before his son was shot at, his daughter-in-law had asked him as to who were on the door. PW-Parveza stated that she was in kitchen

and her daughter raised alarm that Farooq is on the door. She as well as his daughter ran towards the room and in the meanwhile the appellant-

accused fired at the deceased. The appellant $\tilde{\text{A}}\text{c}\hat{\text{a}},\text{--}$ accused was accompanied by 5/7 persons at the time of occurrence whom they could not identify

because of darkness. The appellant-accused who was the resident of Basti, was not related to her but was known to her prior to occurrence. She had

no concern with Abdullah resident of Tanta. PW-Shabina stated that her father was busy with the $\tilde{\text{A}}\text{c}\hat{\text{a}},\text{--}\tilde{\text{E}}\text{c}\hat{\text{a}},\text{--}\hat{\text{a}},\text{c}$ in $\tilde{\text{A}}\text{c}\hat{\text{a}},\text{--}\tilde{\text{E}}\text{c}\hat{\text{a}},\text{--}\hat{\text{a}},\text{c}$ and came inside

the room and the appellant-accused followed him armed with a gun. She had told her father that Farooq was standing near the door and in the

meantime appellant-accused fired a shot from his gun killing her father on spot and fled away. At the time of occurrence there was electric light inside

the house.

13. Besides eye witnesses, prosecution had examined PW-Dr. Davinder Mohan also, who had conducted autopsy of the deceased on 14.11.2002,

deposed that on conducting the postmortem of the deceased he had found 1.00 cm circular wound with inverted margins below the right eye; bleeding

and clotted blood was around the wound on entrance; 6.00 cm circular wound with averted lacerated margins posteriorly behind left auricle over

mastoid bone with clotted blood at the exit of the wound; that the death had taken place within 12 hours and in his opinion the deceased had died due

to cranial injury leading to cardio respiratory failure and admitted his postmortem report Ext. PW-DM. He further deposed that the death had been

caused due to bullet injury; the injury caused by the bullet was single and there was no rigor mortis at the time of autopsy.

14. Ballistic expert PW-S.H.Bukhari has also been examined by the prosecution, who on his deposition stated that he had examined four spent

cartridges sent to him in a sealed packet by SDPO Baderwah and found that these spent cartridges were of AK rifle. He admitted the

contents of his certificate Ext. PW-SH, as correct. The spent cartridges exhibited by him as F-223/03 to F-226/03 had been fired through AK rifle.

15. The other scientific expert PW-Mool Raj, to whom blood stained trouser had been sent for examination, marked as B-356/04, opined that the same

was not sufficient for detecting of the blood group.

16. PW-Anzar Ahmed, I.O, deposed that he had investigated the case and on the basis of the statements of eye-witnesses and the other evidence

collected, which corroborated the statements of eye-witnesses, concluded the investigation against all the accused and laid the charge-sheet in the

court of law.

17. The trial court has relied upon the statements of eye-witnesses and rightly so, as the evidence of eye-witnesses cannot be discarded merely on the

ground that they are relatives of the deceased, as in a normal course close relatives of the deceased are not likely to implicate a person falsely in the

incident leading to the death of the relative unless there are very strong and cogent reasons to accept such criticism.

18. The eye-witnesses, in the case on hand, were the father, wife and daughter of the deceased and it is not acceptable that such a close relation

would falsely implicate an innocent person to cover-up the real culprit. Relationship is not a factor to affect the credibility of the witnesses as the

relative would not conceal the actual culprit and make the allegations against an innocent person. Foundation has to be laid if the plea of false

implication is made. In those cases, the court has to adopt careful approach and analyze the evidence to find out whether it is cogent and credible. The

trial court has, thus, rightly rejected the plea that the witnesses being the close relatives and consequently are partisan witnesses and should not be

relied upon.

19. The appellant, through his counsel, has admitted the evidence led by the prosecution and the learned senior counsel has argued that on the basis of

the evidence which has been accepted by the trial court, the offence under Section 302 RPC cannot be made out for the reason that the appellant,

though being charged for having committed offence punishable under Section 7/27 Arms Act, was acquitted of the same and once the trial court

reaches to the conclusion that the prohibited fire arm was not used, how the charge of murder can be proved, which is alleged to have been

committed.

20. The Apex Court in a case titled Gurcharan Singh Vs. State of Punjab reported as (1963) 3 SCR 585 that it is possible to imagine cases where the

direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by postmortem notes are so clearly consistent with the

direct evidence that the examination of a ballistic expert may not be regarded as essential. The evidence of the ballistic expert is of corroborative

nature when there is no satisfactory direct evidence. The examination of ballistic expert is essential for the proof of the prosecution case, must

naturally depend upon the circumstances of each case. The same view has been taken by the Apex Court in a case titled State of Punjab Vs. Jugraj

Singh & Ors. reported as 2002 (1) Supreme 629 that the creditworthiness of the case is not demolished in absence of sending weapon of offence,

guns, to ballistic expert for examination of his expert opinion. In the present case, the weapon used in the commission of offence had not been

recovered till the charge-sheet was made, as all the accused including appellant were members of the terrorist organization and the appellant could not

be apprehended till 2009 and by that time the other accused had been killed in some encounter with the security forces.

21. Learned counsel for the appellant has relied upon the judgment of the Hon'ble Apex Court in a case titled Daya Nand Vs. State of Haryana

reported as AIR 2008 SC 1823, whereby it has been held that the solitary injury with a gun shot fired by the accused hitting the deceased on waist

would not constitute the offence of murder and the accused is liable to be convicted under Section 304 Part-II.

22. This case is distinguishable, having regard to the fact situation of the present case in view of the fact that the injury in that case was on waist of

the deceased whereas, in the case on hand, it was on the vital body part i.e., bullet pierces from under the right eye and exits posteriorly, which could

be sufficient to cause death of the deceased. The medical expert deposed that the cause of death was cranial injury. The contention of learned

counsel for the appellant that the accused being the member of the terrorist group would have fired shots to terrorize the victim and the prosecution

has failed to prove his intention to kill the deceased. This plea of the learned counsel is misplaced in view of the fact that the appellant had fired with a

prohibited weapon i.e., AK-47 and that too on the vital body part of the deceased and from this it can rightly be inferred that the appellant-accused

had intention to eliminate the deceased.

23. For the sake of arguments, even if, the contention of the learned counsel for the appellant is accepted that the intention was not proved by the

prosecution, however, the appellant-accused was in knowledge that such injury, which he was going to cause to the deceased, could be sufficient for

his death. It is not only the intention but also the knowledge which can constitute the offence of murder. To constitute the offence of murder, the

prosecution is under obligation to establish quite objectively that a bodily injury is present; that the nature of such injury must be proved and it must be

proved that there was an intention to inflict that particular bodily injury, that is to say it was not accidental or unintentional or that some other kind of

injury was intended. Lastly, it has to be proved that the injury of the type just described made up of the three elements set out above is sufficient to

cause death in the ordinary course of nature and this part of the enquiry is purely objective and inferential and has nothing to do with the intention of

the offender.

24. The contention, on behalf of the appellant that the offence of murder is not constituted, in absence of the intention of the appellant to kill the

deceased and at the most offence punishable under Section 304 RPC (culpable homicide not amounting to murder) may be constituted, is not tenable.

The intention of an accused has to be inferred from the attending circumstances, such as, how and in what manner offence was committed. Shooting

with an AK rifle having target of the face / head of the deceased and the bullet entering from under the eye with exit on the posterior of the

head of deceased, with no stretch of imagination can be said to be without intention to kill or without having knowledge that the bullet injuries caused

on vital parts of the body may not cause death of the deceased.

25. The other contention of learned senior counsel for the appellant that the Test Identification Parade of the accused was not conducted and in this

regard relied upon the case titled *Rajesh @ Sarkari & Anr. Vs. State of Haryana* reported as 2021 Cri. L.J. 206, whereby the Supreme Court had

held that the Test Identification Parade assumes importance and in such case the accused person is entitled to benefit of doubt. This case is also

distinguishable in view of the fact that the accused, who had committed offence, was known to all the witnesses and they had identified him at the

very outset, and it was not the case of unknown identity that the Test Identification Parade was required to be conducted.

26. The main argument of learned senior counsel for the appellant that the weapon of offence was not recovered, as such, the offence under Section

7/27 Arms Act was not proved. Therefore, this plea is required to be analyzed as to whether on the basis of the prosecution evidence, offence of

murder can be said to be proved. The Hon'ble Supreme Court in a case titled Umar Mohammad & Ors. Vs. State of Rajasthan reported as

(2007) 14 SCC 711, held in an identical case, where the weapon of offence was not recovered, that in any event non-recovery of incriminating

material from the accused cannot be a ground to exonerate him of the charges when the eye-witnesses examined by the prosecution are found to be

trustworthy. The Hon'ble Apex Court in another case titled Krishna Mochi & Ors. Vs. State of Bihar reported as 2002 Cri .L.J 2645, also held

that recovery of no incriminating material from the accused cannot alone be taken as a ground to exonerate them from the charges, more-so when

their participation in the crime is unfolded in ocular account of the occurrence given by the witnesses, whose evidence has been found to be

unimpeachable.

27. Non-recovery of the use of prohibited weapon, in the case on hand, can be explained in a way that the offence was committed by the appellant-

Farooq Ahmed on 14.11.2002 when he was an active militant and it was only in the year 2009, after filing of the charge-sheet, that the prosecution

succeeded to apprehend him and produced him in the court of law. The seized empty cartridges were examined by the Ballistic expert PW-

S.H.Bukhari, who had given his opinion that the same were of AK-47 rifle.

28. In our considered opinion, there is unimpeachable ocular prosecution evidence about the culpability of the appellant/accused and the medical expert

proved the nature of injuries, non-recovery of weapon cannot be a deciding factor to disbelieve the substratum with regard to main offence of murder

in the prosecution case. In the case on hand, as there is clear eye-witnesses' account of the incident and deposition of none of the three eye-

witnesses could be shaken during their cross-examination and they had stuck to their recollection of the facts relating to the incident. Mere fact that

the weapon of assault or a bullet was not recovered, cannot demolish the prosecution case. We are fortified with a judgment of Hon'ble Apex

Court titled Prabhash Kumar Singh Vs. The State of Bihar reported as (2019) 9 SCC 262, to take this view where it was held that mere fact that non-

recovery of the weapon of assault and a bullet could not demolish the prosecution case. Moreover, the offence punishable under Section 7/27 Arms

Act, being an independent substantive offence, for want of cogent evidence in that behalf has been found not proved by the trial court, but that does

not mean that the charge of murder, despite there being sterling and unimpeachable direct ocular evidence, cannot be proved. Therefore, this plea

taken by learned senior counsel for the appellant is not tenable and is liable to be rejected.

29. Another plea of learned senior counsel for the appellant that the medical expert was not competent witness to say that the injury was caused by a

bullet, is also not tenable, as it is the medical expert, who being an expert in his field can describe the injury and its possible cause.

30. Another limb of the argument of learned senior counsel for the appellant that there being no charge of criminal conspiracy or abetment when

admittedly there were many accused persons at the time of commission of offence, the appellant-accused cannot be convicted in absence of such a

charge. Though some of the eye-witnesses stated that there were some more persons when the appellant-accused committed the murder of the

deceased but they had not entered the house where the offence was committed and it was only the appellant-accused who had committed the

offence. Moreover, two more persons, who had been arrayed as accused in the case by the prosecution, had died before the appellant was produced

before the court of law to face trial. Appellant was the main offender, who was charged to have committed the murder and the other accused persons

who were stated to have accompanied him at the time of commission of the murder, had died before framing of charge. In-fact the charge of

abetment or criminal conspiracy was against other accused and not the appellant. Therefore, there was no need to charge the appellant-accused, a

main perpetrator of the crime, to be charged for the offences of criminal conspiracy or abetment. This plea of the appellant is also found without any merit and substance.

31. Having regard to the afore-stated reasons, we are of the considered opinion that the trial court has rightly connected the appellant-accused with

the commission of offence, of which he was charged under Section 302 RPC and acquitted him of other charges particularly the offence under

Section 7/27 Arms Act in view of the fact that the weapon of offence was not recovered. The trial court, after marshalling the evidence brought on

record and apt appreciation, has passed a very reasoned judgment and the appellant-accused has failed to point out anything that could be fatal to the

prosecution case. In our opinion the impugned judgment / order do not call for any interference while exercising appellate jurisdiction.

32. For the discussion made hereinabove and foregoing reasons, the appeal on hand is found without any merit and substance, and is liable to be

rejected. Accordingly, appeal is dismissed along-with connected application(s), if any. Impugned judgment / order passed by the trial court is upheld.

Crl Ref(L) No. 05/2022

33. For the reasons assigned for disposal of the appeal, the Reference made by the trial court is accepted and the punishment of life imprisonment

awarded to the appellant-convict under Section 302 RPC, is confirmed.

34. Reference is, answered, accordingly.

35. Trial court record along-with a copy of this judgment be sent down, for follow up action, in execution of sentence.