
(2015) 12 J&K CK 0004

In the Jammu And Kashmir High Court

Case No : Criminal Appeal No. 50 Of 2012, MP No. 01 Of 2015, Confirm No. 16 Of 2012 and Cr. Acquittal Appeal No. 09 Of 2013

Akeel Ahmed and Others

APPELLANT

Vs

State of J&K and Others

RESPONDENT

Date of Decision : 30-12-2015

Acts Referred:

Citation : (2015) 12 J&K CK 0004

Hon'ble Judges : Hasnain Massodi and Bansi Lal Bhat, JJ.

Bench : Division Bench

Advocate : B.L. Chatta and Anil Gupta, Advocates, for the Appellant; Rakesh Khajuria, AAG, for the Respondent

Judgement

Bansi Lal Bhat, J.—This bunch of two appeals, one questioning conviction and sentence of Akeel Ahmed- appellant in Criminal Appeal No.

50/2012, recorded and awarded in terms of impugned judgment of conviction and order of sentence dated 07.05.2012 convicting Akeel Ahmed

of offence under Section 302/34 RPC and sentencing him to life imprisonment and fine of Rs. 5,000/- and the second appeal preferred by State

being Criminal Acquittal Appeal No. 09/2013 assailing acquittal of Mohd. Rashid of offence under Section 302/34 RPC, 3/5 POTA and 7/25/27

Arms Act, arise out of common judgment rendered by learned 3rd Additional Sessions Judge, Jammu in File No. 18/Challan titled State v. Akeel

Ahmed and another. Appellant Akeel Ahmed and co-accused Mohd. Rashid faced joint trial on charges under Section 302/460/34 RPC, 7/27

Arms Act and 3/5 POTA. The gravamen of charges is that both - the appellant Akeel Ahmed and co-accused Mohd. Rashid (hereinafter to be

referred to as the accused) worked with terrorists who had come from across the

border in Mangnar area of Poonch, provided information to terrorists regarding movement of security forces, led foreign terrorists Abu Tariq and Abu Hamza to the house of Baldev Raj - an Ex-serviceman and barged into the house of Baldev Raj on 31.12.2001 after sunset where one of the militants opened firing resulting in killing of Baldev Raj, Khetar Pal, Geeta Devi, Sunil Kumar and Kuldeep Kumar besides causing severe injuries to Champa Devi and Ashok Kumar. The terrorists having absconded after commission of offence, proceedings under Section 512 Cr.P.C. were set in motion against them. Accused Akeel Ahmed and Mohd. Rashid were put on trial after they pleaded not guilty to the charges framed against them under Section 302/460/34 RPC, 7/27 Arms Act and 3/5 POTA. Prosecution appears to have examined a number of witnesses at the trial to bring home guilt against the accused. In their explanation under Section 342 Cr.P.C., the accused denied the prosecution allegations emanating from its witnesses examined at the trial, also denied having made confession before PW-Kamal Saini. Accused Akeel Ahmed also denied having made any disclosure statement before Police and any consequent recovery made pursuant thereto. No evidence was, however, adduced in defense. The trial Court, on consideration of evidence brought on record by prosecution during trial found that the prosecution had failed to establish that the statement of accused Akeel Ahmed recorded under Section 32 of POTA complied with all procedural safeguards embodied therein. Thus, the confessional statements attributed to accused were not found to be of any evidentiary value. The trial Court, on appreciation of evidence found that the evidence in regard to disclosure statement attributed to accused Akeel Ahmed and recovery of AK-47 Rifle and live cartridges pursuant thereto was unreliable. It also was of the view that the recovery of weapons allegedly at the instance of accused Akeel Ahmed was shrouded with suspicion. Thus, he could not be convicted of offence under Section 3/5 POTA and 7/25/27 Arms Act. With regard to accused Mohd. Rashid, the trial Court was of the view that his mere presence in the house of deceased on the night of 31.12.2001 without any facilitating act done by him in furtherance of object of the two terrorists would not prove his involvement in the occurrence with the aid of Section 34 RPC. The Challan as against accused Mohd.

Rashid was accordingly dismissed and he was acquitted of the charges framed against him. The trial, thus, culminated in conviction and sentencing

of accused Akeel Ahmed for offence under Section 302/34 RPC as aforesaid.

2. The bunch of appeals was heard together.

3. Accused Akeel Ahmed has assailed the impugned judgment of conviction and order of sentence on the ground that the trial Court has convicted

Akeel Ahmed under the influence of emotions and not on proper appreciation of evidence. It is contended that the prosecution has failed to

establish the motive of crime. It is contended that the accused Akeel Ahmed was the neighbor of deceased and enjoyed cordial relations with

them. It is further contended that no bullets or jackets of cartridges were found embedded in the bodies of deceased persons and there was no

evidence to hold that the deceased died due to fire-arm injuries caused by firing from the guns wielded by the accused. It is contended that the

deceased were killed by the foreign militants and not by accused Akeel Ahmed. It is further contended that the trial Court has failed to properly

appreciate the evidence and despite recording its findings on material aspects in favour of accused Akeel Ahmed proceeded to convict him merely

on the basis of inferences. It is contended that the impugned judgment is perverse and cannot be sustained. Learned AAG has, while supporting

conviction of accused Akeel Ahmed for offence under Section 302/34 RPC assailed acquittal of accused Mohd. Rashid on the ground that the

important pieces of evidence have been ignored and the direct and circumstantial evidence sufficiently proved complicity of accused Mohd.

Rashid.

4. Acquittal of accused Akeel Ahmed for offence under Section 7/25/27 Arms Act and 3/5 POTA has not been assailed by the State. The State

has also failed to lay motion of special leave for filing acquittal appeal against accused Mohd. Rashid despite adjournments granted in this regard.

The acquittal appeal is liable to be dismissed on that score alone.

5. We have waded through the record of the Trial Court and also examined the impugned judgment.

6. It emerges from evidence brought on record during trial that the absconding accused Abu Tariq and Abu Hamza comprised the external

component of a terrorist outfit who were looking for soft targets from minority

community to create fear and panic and that they succeeded in their evil design of eliminating six members of family of deceased Baldev Raj. The tragic episode was enacted at Mangnar close to LOC in Poonch on the night of 31.12.2001. Accused Akeel Ahmed is said to have made the terrorists above-named aware about the military background of deceased Baldev Raj and connived in elimination of deceased. It is not in controversy that the evidence brought on record by prosecution during the trial does not disclose association of accused Akeel Ahmed with any terrorist organization operating in the State at the relevant time. Testimony of the star prosecution witness namely Champa Devi is emphatic on the point that the accused did not bear animosity against her family. If the same is accepted, there is no reason for the accused to engage in criminal conspiracy with the foreign terrorists to eliminate the deceased. Absence of motive on the part of accused would be material in such a case as the act of elimination of the deceased is attributed to foreign terrorists as a part of their strategy to create panic and terror in the minority community abutting LOC. Fathoming through the depths of evidence brought on record during trial, we are unable to find out any motive for crime traceable to the accused. The occurrence took place in the house of deceased Baldev Raj on 31.12.2001 after sunset. Six innocent people fell to the bullets of assailants. The medical experts testifying at the trial established the factum of death of Baldev Raj, Khetar Pal, Ashok Kumar, Geeta Devi and Sanjay Kumar due to extensive damage of vital organs, brain leading to cardio respiratory arrest caused by bullet injuries. The only two eye-witnesses to the tragic occurrence are PWs Champa Devi and Anju Devi. PW-Champa Devi deposed that she was present in her house when the accused along with two militants reached her house, called out all members of her family, made them to sit on a cot on the pretext of clicking their photographs and then sprayed bullets on them with their rifles. She claimed to have suffered gunshot injuries in her legs. It is in her testimony that the militants were brought to her house by the accused. She implicated accused Akeel Ahmed claiming that he too had fired from his gun but did not attribute any criminal activity to accused Mohd. Rashid except that he had gheraoed her family. The witness has been cross examined at length. It is not in dispute that the witness is herself a victim of crime. She suffered

bullet injuries on her legs and she was airlifted to Jammu for treatment. Testimony of the medical Expert - Dr. Qamar-Un-Nisa establishes that the witness had suffered fracture in her right leg on account of fire-arm injury. It is, therefore, unexpected of this witness to spare the real killers of her family members though exaggeration cannot be totally ruled out. One can understand the trauma she has gone through. She lost six members of her family including her husband. She also suffered bullet injuries resulting in her prolonged treatment. Therefore, her version in regard to authorship of crime notwithstanding, the role attributed to accused has to be appraised with a caution. She claimed that accused Akeel Ahmed too fired with his gun. The fact that she did not attribute any motive for crime against accused Akeel Ahmed and the finding recorded by trial Court that the disclosure statement attributed to accused Akeel Ahmed and recovery of AK-47 Rifle and live cartridges in pursuance thereof were not proved by any reliable evidence, such finding not having been seriously disputed, it is difficult to accept her version that accused Akeel Ahmed was wielding a gun and he actually participated in the episode of elimination of deceased by resorting to firing from an AK-47 Rifle. PW- Anju Devi is the daughter of deceased Baldev Raj and PW-Champa Devi. It is in her deposition that when the terrorists and the accused barged into her house, they inquired about army background of deceased and whether he was having a gun. Reply being in negative, they inquired about the dispute he had with one Khadim Hussain. The deceased is said to have told them that the dispute had been resolved and compromised. It is thereafter that all the deceased and others were made to sit on the cot and sprayed with bullets. She too has deposed about accused Akeel Ahmed being armed with the gun who too fired gun shots. She spoke about presence of accused Mohd. Rashid at the time of occurrence but did not attribute any role to him except that he gheraoed the deceased persons. It appears that she has improved upon her statement recorded before the Investigating Officer in so far as the role attributed to Mohd. Rashid is concerned. However, she has inculpated accused Akeel Ahmed. Admittedly, Champa Devi and her daughter Anju Devi were the only two witnesses other than the deceased and the injured present in the house at the time of occurrence. All other witnesses examined at the trial arrived on spot subsequently and none of them has witnessed the ghastly killings. They are

natural witnesses and their presence on spot is not in the region of doubt. However, in absence of any evidence on record to establish that accused

Akeel Ahmed belonged to a terrorist outfit, hatched a criminal conspiracy with the foreign terrorists to eliminate the deceased, had a motive for the

crime and received training in handling arms and ammunition, it is difficult to accept the testimonies of mother and daughter duo in regard to role

ascribed to him as a killer who used his AK-47, together with foreign militants, to execute the killings of deceased. These two witnesses appeared

to have made exaggerated claim by enlarging the role of accused Akeel Ahmed whose presence at the time of alleged occurrence is clearly made

out. However, in absence of a motive for crime and factum of prosecution having failed to establish recovery of AK-47 Rifle with live cartridges

pursuant to disclosure statement attributed to him by reliable evidence, testimonies of Champa Devi and Anju Devi cannot be accepted to hold that

accused Akeel Ahmed was a collaborator in crime of executing the killings of deceased by resorting to indiscriminate firing together with the

foreign terrorists. It is significant to notice that the confessional statement attributed to accused Akeel Ahmed has been found suffering from non-

adherence to procedural safeguards and rejected by the trial Court on that score. Such finding recorded by trial Court is based on correct

appreciation of law and same is not questioned. This finding remaining undisturbed, accused Akeel Ahmed cannot be said to have resorted to

indiscriminate firing along with the two foreign militants.

It appears that these two witnesses were influenced in ascribing a definite role to accused Akeel Ahmed on account of suspicion about his

complicity as one of the perpetrators of crime as the said accused had been to the house of deceased Baldev Raj a day before the occurrence.

Learned trial Court appears to have drawn an adverse inference from failure on the part of this accused to explain as to why he had visited the

house of deceased on the eve of occurrence. The trial Court inferred that the accused Akeel Ahmed shared common intention with the foreign

militants to organize an incident of wanton killing of members of minority community to create terror among minorities living in that area. Trial Court

concluded that though it was not proved that accused Akeel Ahmed too had joined in the actual process of killing of six innocent people, yet

recorded the finding that he had facilitated killing of deceased being aware of the terrorists objective of eliminating Police informers and civilians to create terror among general public. It is manifestly clear that the finding of guilt in respect of accused Akeel Ahmed is based on pure surmises and not legal inferences available from proved facts. In the wake of trial Court coming to definite conclusion that accused Akeel Ahmed was not proved to have joined in the actual process of killing of six innocent civilians, his role in collecting information and being present when the killings were executed would not, in absence of a criminal conspiracy, motive for crime and being in possession of prohibited arms and ammunition, amount to sharing a common intention with the terrorists and facilitating their evil design of committing mass killings. Viewed thus, accused Akeel Ahmed cannot be held to possess the requisite knowledge in terms of clause ""fourthly"" of Section 300 RPC. The finding recorded by trial Court on this material aspect of the case suffers from grave infirmity and the same cannot be supported. The impugned judgment of conviction and order of sentence deserve to be set aside. We accordingly set aside the finding of 'guilty' recorded against accused Akeel Ahmed by trial Court for offence under Section 302/34 RPC.

7. The result of the foregoing discussion is that the impugned judgment of conviction and order of sentence slapped on accused Akeel Ahmed cannot be sustained. The judgment of conviction and order of sentence are reversed. The confirmation reference is rejected. Appeal preferred by accused Akeel Ahmed is allowed and the acquittal appeal preferred by the State is dismissed.