

(2021) 08 J&K CK 0018

In the Jammu And Kashmir High Court

Case No : Civil Revision Miscellaneous Case (M) No. 133 Of 2020, Criminal Miscellaneous Cases No. 482, 494 Of 2020, Bail Application (B.A) No. 76 Of 2020

Azad Ahmed Mir

APPELLANT

Vs

Vs State (Now Union Territory) Of J&K

RESPONDENT

Date of Decision : 16-08-2021

Acts Referred:

Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 109, 120B, 302, 342, 344, 363

Armed Forces (Special Powers) Act, 1958 — Section 3

Code Of Criminal Procedure, 1898 — Section 512

Code Of Criminal Procedure, 1973 — Section 161

Citation : (2021) 08 J&K CK 0018

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : R.A.Jan, Taha Khalil,, Mohsin Qadri, Mohammad Tahseen, Z.A.Qureshi, Razia

Final Decision : Disposed Of

Judgement

Sanjeev Kumar, J

1) This quashment petition is filed by the petitioner to challenge order dated 12.12.2019 passed by the Court of 3rd Additional Sessions Judge, Srinagar

[the trial court], whereby charges under Sections 302, 344, 363 and 120-B read with Section 109 RPC have been framed against the petitioner.

The petitioner also seeks quashment of the trial commenced pursuant to the impugned charge-sheet and pending adjudication before the trial court.

Alongside this quashment petition, the petitioner has also moved an application seeking his enlargement on bail during the pendency of trial.

2) Briefly stated, the case set up by the petitioner in the quashment petition is

that on 22.05.1989 the petitioner got married to one Ms. Shakeela Parveen at Muzaffarpur (Bihar) and started living with his wife at his residence at Nigeen Hazratbal, Srinagar. In the year 1991, on mere suspicion of involvement of the petitioner in militancy related activities, the petitioner was arrested by 30th Bn BSF at Habbak. The petitioner remained in illegal captivity of BSF for almost two and half years and it was in the year 1993 he was let off by the 30th Bn BSF. During the period of his captivity with the BSF, the petitioner was made to accompany the personnel of 30th Bn BSF under the command of Deputy Commandant, Dilip Singh Rathore, which cordoned off the house of complainant for search operation. The BSF personnel were looking for one Sajjad Ahmad Bazaz, who, on being identified by the petitioner, was arrested by the BSF authorities and taken in custody. The family of Sajjad Ahmed Bazaz made frantic effort to secure his release from the custody of 30th Bn BSF. The complainant-Fiaz Ahmad Bazaz, the father of the detainee, after exhausting all ways and means of securing release of his son, ultimately lodged FIR No.44/1991 under Section 342 RPC in the Police Station, Nigeen on 27.06.1992. As is evident from the record, investigation of the aforesaid FIR was transferred to the Crime Branch, Srinagar (Kashmir). Since the whereabouts of the detainee-Sajjad Ahmad Bazaz could not be known despite efforts and he was last seen with and picked up by BSF personnel headed by Sh.Dilip Singh Rathore, Dy. Commandant, as such, case was registered against Dilip Singh Rathore, Dy. Commandant and other personnel of 30th Bn, who were accompanying him on the date of crackdown and arrest of the detainee. The investigation conducted in the matter by the Crime Branch culminated into filing of Final Police Report wherein besides Mr. Dilip Singh Rathore, Dy. Commandant, the petitioner was also roped in by the aid of Section 120-B RPC. In view of the fact that valley of Kashmir was declared as disturbed area under Section 3 of the Armed Forces (Special Powers) Act, 1958, prosecution against accused Dilip Singh Rathore and other personnel of BSF could only be instituted with the previous sanction of the central government. It appears that Government of India refused to grant sanction for prosecution of Sh. Dilip Singh Rathore, Dy. Commandant and other personnel, who picked up the detainee during search operation. This is how the petitioner claims to have been made a scapegoat.

3) It is claimed by the petitioner that though the investigating agency was well aware that the petitioner had migrated to Muzaffarpur (Bihar), where

he was gainfully employed and living with his wife, yet the prosecution was instituted against him at his back invoking Section 512 Cr.P.C. It was

somewhere in April, 2019, the petitioner was arrested in the case and lodged in Central Jail, Srinagar. On 12.12.2019, after a gap of about 14 years

since the prosecution, in the absence of petitioner, was instituted in the trial court, charge was framed against the petitioner for commission of

offences punishable under Section 302, 344, 364, 348, 201 and 120-B RPC.

4) In the aforesaid backdrop, the petitioner claims that no offence has been committed by him. Mere accompanying the Deputy Commandant, Dilip

Singh Rathore and other personnel of BSF during the search operation in which detainee Sajjad Ahmad Bazaz was arrested and thereafter he could

not be found dead or alive, cannot make the petitioner liable for his disappearance and suspected killing by the BSF personnel. It is urged that the

prime accused i.e. Dilip Singh Rathore, Dy. Commandant and other personnel of 30th Bn BSF, who had picked up the detainee in a search operation

conducted on 12.02.1992 have not been prosecuted for want of sanction from the central government. The petitioner, who was forced to accompany

the said BSF personnel cannot, by any stretch of reasoning, be implicated in the crime, which he never committed. He, therefore, prays for quashment

of the charge-sheet as also the trial, which is pending adjudication before the trial court. He has also moved an application seeking enlargement on bail

and submits that he would abide by all the terms and conditions on which he is enlarged.

5) On being put on notice, Senior Superintendent of Police, Crime Branch Kashmir has filed para-wise response. It is submitted that Sajjad Ahmad

Bazaz (the detainee), a general merchant from Hazratbal, Srinagar was picked up by BSF party headed by Dy. Commandant Dilip Singh Rathore. The

petitioner was accompanying the said BSF party as an informer. It is alleged that the whereabouts of the detainee since then are not known. The

father of the detainee along with brother of the detainee lodged a FIR on 17.06.1992 with Police Station, Nigeen after four months of occurrence when

they failed on all counts to trace out the detainee. It is submitted that pursuant to the directions of the police headquarter, investigation was taken up by

the Crime Branch, Srinagar and the same was concluded as challan under Section 302, 364, 344, 201 RPC against Dy. Commandant Dilip Singh

Rathore, BSF 30 Bn and under Section 109/120-B RPC against the petitioner. The petitioner went into hiding immediately after the occurrence and

went along with said BSF Bn, which moved to Uttar Pradesh. In order to launch prosecution against Mr. Dilip Singh Rathore, the matter was sent for

prosecution sanction, which was denied by the Ministry of Home Affairs, Govt. of India. The Crime Branch was informed that the said BSF officer

had been tried by the BSF court and found not guilty. The father of the detainee and other witnesses were also called to Pantha Chowk where they

identified the BSF Dy. Commandant, Dilip Singh Rathore, who had picked up the detainee at the instance of petitioner. The challan was ultimately

submitted to the trial court against the petitioner in his absence by proceeding under Section 512 Cr.P.C. It is submitted that statement of most of the

PWs recorded during trial, when the petitioner was proceeded under Section 512 Cr.P.C., effectively involved the petitioner with the commission of

offence. After arrest of the petitioner, he was served with the charge on 12.12.2019 and the prosecution was directed to lead evidence. It is submitted

that the statement of PW-1 has been recorded but thereafter due to Covid-19 pandemic and consequent lockdown, no further proceeding could be

conducted by the trial court.

6) Having heard learned counsel for the petitioner and learned counsel for the respondent as well as learned counsel for the complainant, I am of the

view that no case is made out for quashment of the charge-sheet.

7) As per the prosecution story, the detainee was picked up by the BSF party of 30th Bn headed by Dilip Singh Rathore, Dy. Commandant on

12.02.1992 at the instance of the petitioner. It has also come in evidence recorded during investigation and the statements of witnesses recorded

during trial that there was some previous enmity between the petitioner and the detainee with regard to some payment of money and that it was at the

instance of the petitioner, who was an informer of the security agencies, the residential house of the detainee was cordoned off on 12.02.1992 and the

detainee was picked up on the identification of the petitioner. What happened to the detainee after he was taken over by the BSF personnel is not

known to anybody. Initially a missing report was lodged by the father and

brother of the detainee but after finding no whereabouts of the detainee for about four months, a formal FIR was lodged. Keeping in view the sensitivity involved, matter came to be referred to the Crime Branch for professional investigation. It is during this investigation, it was found that the detainee was last seen with the BSF party of 30th Bn headed by Dy. Commandant, Dilip Singh Rathore and thereafter his whereabouts were not known. He was, thus, presumed to have been killed in the custody of the BSF authorities. The Crime Branch found sufficient evidence against Mr. Dilip Singh Rathore, who was found responsible for the disappearance of the detainee from custody of BSF authorities. The investigating agency also found petitioner's involvement in the crime, for, it was on his identification the detainee was picked up.

8) In view of the statements of the witnesses recorded under Section 161 Cr.P.C., which were later corroborated when the evidence was recorded during trial, it was found that due to past enmity between the petitioner and the detainee, the detainee had managed to get off and facilitated the arrest of the detainee in the hands of BSF authorities. It is because of this reason the petitioner has been charged with commission of offence under Section 120-B and 109 RPC.

9) So far as offence conspiracy is concerned, there could be no direct evidence to prove and the conspiracy can be inferred by implication. The circumstances in which the occurrence has happened do lend support to the argument of respondents that the petitioner had conspired in the matter, which ultimately led to the disappearance of the detainee from the custody of the BSF authorities. As is held by the Supreme Court in the case of K.R.Purshotham v. State of Kerala, (2005) 12 SCC 631, in most of the cases it is not possible to prove agreement between the conspirators by direct evidence but the same can be inferred from the circumstances giving rise to the conclusion and inference of an agreement between the two or more persons to commit offence. How these circumstances are required to be proved is elaborately dealt in the aforesaid citation and is an aspect, which is required to be considered and appreciated by the trial court at an appropriate stage.

10) Suffice it to say that there is sufficient material for proceeding against the petitioner for offences with which he has been charged. It is not the

case where the charges are required to be quashed and challan dismissed.

11) For the foregoing reasoning, I am not inclined to interfere with the ongoing trial against the petitioner nor do I find any legal infirmity in the charges

framed. This petition is, therefore, devoid of any merit and the same is, accordingly, dismissed along with connected application(s).

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12) The facts of the case have already been discussed hereinabove in detail. The petitioner is facing a serious charge of conspiracy and abetting

disappearance/murder of detainee Sajjad Ahmad Bazaz, who was picked up by a BSF party of 30th Bn headed by Dy. Commandant, Dilip Singh

Rathore on 12.02.1992 and later was not traced dead or alive and the investigating agency presumed him dead and has registered FIR against the

Deputy Commandant, Dilip Singh Rathore for his disappearance and killing in custody. The petitioner was also booked for conspiracy and abetment of

crime

13) The petitioner has been arraigned in the crime because of his previous enmity with the detainee and the fact that he on the fateful day was

accompanying the BSF personnel and it was only on his identification that he was picked up and later probably killed in custody by the BSF authorities.

14) Undoubtedly, charges against the petitioner are serious but this Court cannot lose sight of the fact that the prime accused in the

disappearance/killing of the detainee, namely, Dilip Singh Rathore has been let off and held not guilty by the BSF court. Government of India, too, has

declined to grant sanction for his prosecution to the Crime Branch. The main culprit, who has allegedly caused disappearance of the detainee while he

was in his captivity, has been let off and is a free man and the petitioner is facing trial.

15) In view of the aforesaid facts and circumstances, I am of the view that the petitioner, who is a married person and has children to support, need

not be kept in incarceration, more so when his presence during trial can be ensured by stringent terms and conditions. The petitioner is, thus, held

entitled to bail and is directed to be released from custody subject to furnishing of bail bond in the amount of Rs.1.00 lakh and two local sureties of the

same amount to the satisfaction of the trial court. The release of the petitioner from custody shall be subject to following conditions:-

i) That the petitioner shall not leave the Union Territory of J&K without prior permission of the trial court.

ii) That the petitioner shall not interfere or influence the prosecution witnesses in any manner and shall not come in contact with the prosecution

witnesses directly or indirectly.

iii) The petitioner shall appear before the trial court on each and every date of hearing unless he has been specifically exempted for a particular date

by the trial court.

16) Violation of any of the conditions aforesaid shall entail cancellation of bail and the trial court shall be free to consider such cancellation, if violation

of terms and conditions aforesaid is brought to its notice.

The bail application shall stand disposed of in the above terms.