

(2022) 11 J&K CK 0016

In the Jammu And Kashmir High Court

Case No : Criminal Appeal (D) No.9 Of 2022 (O&M)

National Investigation Agency

APPELLANT

Vs

Jaffar Hussain

RESPONDENT

Date of Decision : 09-11-2022

Acts Referred:

Constitution Of India, 1950 — Article 227
Code Of Criminal Procedure, 1973 — Section 227, 482
National Investigation Agency Act, 2008 — Section 21
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 120B, 392
Unlawful Activities (Prevention) Act, 1987 — Section 16, 18, 20, 23, 39, 40, 43(e)
Arms Act, 1959 — Section 7, 25, 30

Citation : (2022) 11 J&K CK 0016

Hon'ble Judges : Sanjeev Kumar, J;Rajesh Sekhri, J

Bench : Division Bench

Advocate : Vishal Sharma, Intikhab H. Shah

Judgement

Rajesh Sekhri, J

1. This appeal in terms of Section 21 of National Investigation Agency Act 2008 (NIA Act, for short), read with Section 482 of the Code of Criminal Procedure, 1973 (for short, Cr. P.C.), read with Article 227 of the Constitution of India, has been directed against order dated 03.03.2022, propounded by the Court of learned Special Judge, NIA (3rd Additional Sessions Judge), J&K at Jammu (hereinafter referred to as the trial court), in case RC-08/2019/NIA/JMU dated 02.11.2019, vide which, respondent has been discharged for offences under Section 120-B read with Section 392 of Ranbir Penal Code, 1989 (RPC, for brevity) read with Sections 18, 39 & 40 of the Unlawful Activities (Prevention) Act, 1987 [UA(P) Act, for short].

2. Before a closer look at the grounds urged in the memo of appeal, it shall be apt to have an over view of the facts giving rise to the case on hand.

3. The case of the appellant/prosecution in the trial court is that on 08.03.2019

at about 2030 hours, Police Station, Kishtwar received a source information that some unknown armed terrorists had barged into the rented room of HC Daleep Singh, who happened to be the Incharge of escort party of Deputy Commissioner, Kishtwar situate at Asrarabad, Kishtwar at 1930 hours and snatched his service weapon i.e. AK-47 rifle along with three magazines and 90 live cartridges at gun point and fled away. According to the investigating agency, the terrorists had committed this act in furtherance of criminal intention to revive militancy and create terror among the people of the area thereby threatening the unity, integrity and sovereignty of India. Accordingly, an FIR No. 31 of 2019 dated 08.03.2019 came to be registered by Police Station, Kishtwar for offences under Section 392 RPC, 7/25/30 of Arms Act and Sections 16/18/20/23 of UA(P) Act and investigation came into vogue.

4. Subsequently, in compliance to order No. 11011/55/2019/NIA dated 01.11.2019 issued by the Ministry of Home Affairs, Government of India, the case was assigned to NIA under the provisions of Section 6 of the NIA Act. In compliance to the afore-said order, NIA re-registered the case as RC-08/2019/NIA/JMU on 02.11.2019 for same sections and commenced the investigation. On conclusion of the investigation, NIA filed a final report against six (06) accused persons including Osama Bin Javed @ Osama @ Usma, Haroon Abbas Wani, Zahid Hussain, Tanveer Ahmed Malik, Taraq Hussain Giri and Jaffar Hussain (respondent-herein) and some other accused persons in the trial court on 22.05.2021 for the alleged commission of offence punishable under Sections 120-B & 392 RPC, 16/18/19/20/23/38/39 & 40 of UA(P) Act and 07/25/30 of Arms Act and further investigation of the case was kept open.

5. The respondent was arrested in the case on 21.03.2019 for the aforesaid offences, but released on default bail on 30.09.2019. Learned trial court, vide impugned order, after hearing the rival contentions, discharged the respondent primarily on the ground that respondent had delivered the possession of his vehicle to the categorized terrorists under threat perception and under the fear that he might be suspected to be an ally of the said terrorists.

6. The appellant has assailed the impugned order on the following question of law:

"Whether the Special Judge, NIA, (Third Additional Sessions Judge), in the facts and circumstances of the case was justified in discharging the respondent-accused?"

7. The appellant has questioned the impugned order on the predominant premise that learned trial court, despite sufficient oral and documentary evidence on record to exhibit complicity of the respondent in the commission of the crime, discharged the respondent which resulted in grave miscarriage of justice. According to the appellant, it is an admitted fact on the record that vehicle of the respondent was used in the commission of the crime and, therefore, respondent is guilty of the commission of offence under Section 18 of the UA(P) Act as there

is presumption against the respondent under Section 43(e) of the UA(P) Act. The defence raised by the respondent during investigation that he delivered the possession of the vehicle to the terrorists under threat perception, was a matter of trial. According to the appellant, the respondent-accused, despite being a Police personnel, neither lodged any complaint to nor informed the Police about the incident that his vehicle had been taken by the terrorists and on the contrary, he misled and misinformed the investigating agency that his Maruti Alto Car has been stolen from outside his house by some unknown persons as informed by his wife, whereas the location of the CDR of the mobile phone of the respondent would establish that respondent at the time of commission of offence was present in his house.

8. Having heard rival contentions of the parties, we have given our thoughtful consideration to the facts attending the present case as also the law governing the field.

9. While Mr. Vishal Sharma, learned DSGI has reiterated the grounds urged in the memo of appeal, Mr. Intikhab H. Shah, learned counsel appearing for the respondent defended the findings arrived at by learned trial Court on the ground that it is manifest on a plain reading of the prosecution case in the trial court that when terrorist Osama Bin Javed asked the respondent to put on uniform and take them to Kishtwar in his car, respondent refused to comply his direction and the said terrorist had taken Maruti Alto Car of the respondent on the request of his wife. As said terrorist Osama Bin Javed before leaving the house of the respondent had told him that his car would be left near Bhat Petrol Pump Kishtwar, wife of the respondent, namely, Safia Zaffar immediately after the episode called Sajjad Hussain, brother-in-law of the respondent, and when he was briefed about the incident, said Sajjad Hussain took all family members of the respondent in his truck to his residence and also recovered the said vehicle of the respondent from the place where it was told to be parked by the terrorist, Osama Bin Javed.

10. According to learned counsel for the respondent, these facts are sufficient to indicate that vehicle of the respondent was forcibly taken away by the terrorists at gun point and, therefore, respondent has been rightly discharged by learned trial court for want of prima facie evidence against him.

11. Before venturing to scan through the spate of allegations against the respondent and the material assembled during the investigation in support of such allegations, it shall be appropriate to understand the concept of framing of charge/discharge of accused and the guidelines deducible from judicial precedence in regard to evaluation of material for such purpose.

12. Hon'ble Supreme Court in *Niranjan Singh Karam Singh v. Jatinder Bhimaraj* and other reported in AIR 1990 SC 1962 has held that the Court while considering whether to frame charges against an accused or discharge him is required to evaluate the material and documents on record in order to find out

whether the facts emerging therefrom, taken at their face value, disclose the existence of all the ingredients constituting the alleged offences or not. For deciding whether there exist sufficient grounds for framing of charge, the enquiry is limited to find out whether the facts emerging from record and documents constitute the offence alleged against the accused. The Court may, at this stage, sift the material for such limited purpose and marshalling of evidence with a view to separate the grain from the chaff is not permissible.

13. In *State of Bihar v. Romesh Singh* reported in (1978) 1 SCR 257, Hon'ble Apex Court had observed that at the initial stage of framing of charge if there is strong suspicion arising from material assembled during investigation that leads the court to think that there is a ground for presuming that accused has committed an offence, then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. But if the evidence, which the prosecutor proposes to adduce to prove the guilt of accused, even if fully accepted before it is challenged by cross-examination or rebutted by defence evidence, does not show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial.

14. A similar view has been expressed by Hon'ble Supreme Court in *Union of India v. Prafulla Kumar* and another reported in (1979) 2 SCR 229.

15. In *Sajjan Kumar vs. CBI* reported in (2010) 3 SCC (Cri) 1371 Hon'ble Apex Court summed up the principles governing framing of charge as follows:

"(i) The Judge while considering the question of framing the charges under section 227 Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purposes of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

(iii) The Court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider whether the facts at their face value disclosed the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(iv) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

16. It is in the backdrop of these legal considerations that the case for framing of charge against the accused has to be considered. The investigating agency, in

the present case, on the basis of investigation, has minutely detailed the individual role of each accused in the commission of the crime.

17. Adverting to the case, it is an admitted fact on the record that vehicle of the respondent i.e. Maruti Alto Car bearing Registration No. JK17-5025 in the present case has been used in the commission of the crime. It appeared during investigation that two HM Militants namely, Osama Bin Javed and Haroon Abbas Wani respectively armed with AK-47 and a pistol came to the house of the respondent. While Osama Bin Javed, an acquaintance of the respondent, entered the house of the respondent, the other militant, Haroon Abbas Wani stood guard out of his house. Osama Bin Javed asked the respondent to put on uniform and take them to Kishtwar in his car but respondent expressed his unwillingness. Osama Bin Javed at the request of Safia Zafar, wife of the respondent, took keys of the car parked outside his house, left the house of respondent and told him that his car would be left near Bhat Petrol Pump of one Abdul Rashid Bhat at Berwar, Kishtwar and keys of the vehicle would be beneath the car near the front wheel. As per the investigating agency, after sometime of the incident, wife of the respondent telephonically informed Sajjad Hussain, brother-in-law of the respondent about the incident, who reached their house after about an hour and wife of the respondent requested him to carry their family members to his house for a night. The respondent along with his wife and two children left their house in the truck of said Sajjad Hussain and also to collect his Maruti Alto Car on the way.

18. However, the investigation further revealed that after reaching at DPL, Kishtwar when respondent saw a large crowd of drivers and other Police officials, he planned to divulge false information so as to divert the efforts of the police in tracing the culprits as also to save his skin. As the investigation proceeded, the respondent informed the Motor Transport Officer (MTO) and Motor Transport Clerk that he had received a call from his wife that his Maruti Alto-800 car had been stolen from outside his house. On this information, the MTO informed the then Additional Superintendent of Police about the incident and on further examination about the stolen vehicle, the respondent gave wrong registration number of his vehicle as JK17-2550 instead of its original number as JK17-5025 and when asked again, he repeated same wrong registration number of his vehicle. According to the investigating agency, it was a deliberate ploy on the part of the respondent to avoid interception of the car leading to the arrest of the terrorists. MT Clerk had also informed to the then Dy. SP/DAR, DPL, Kishtwar about the incident of vehicle theft of the respondent and once again on questioning the respondent informed him wrong registration number of his vehicle as JK17-2550 instead of original registration No. JK17-5025.

19. As the investigation progressed, as per the direction of the senior Police Officers, the respondent reported to the then Senior Superintendent of Police, Kishtwar at Police Station, Kishtwar and on being questioned by him, respondent again not only lied that his car had been stolen but again informed them about

wrong registration number of his car. It also transpired during investigation that respondent had disclosed that he had been informed by his wife that his car had been stolen from outside his house by some unknown person, whereas as per the location of CDR of the mobile number of the respondent, it was established that he was present in his house at the time when his car was taken away by the militants.

20. The sequence of events delineated in the charge sheet would show that respondent not only lied once or twice but he misinformed the authorities about the correct registration number of his vehicle repeatedly at different points of time. He told a lie to the MTO, MT Clerk, Dy. SP/DAR, DPL, Kishtwar and Additional Superintendent of Police, Kishtwar and also his senior officers including SSP, Kishtwar.

21. Mr. Intikhab Shah, learned counsel appearing for the respondent has taken us through a portion of the final report filed in the trial court to submit that since it is positive case of the appellant that respondent was not part of the original conspiracy, therefore, he cannot be held liable for the offences alleged against him. The argument of learned counsel for the respondent has been made to be rejected for the following reasons.

22. It needs a specific mention that conspiracies by their very nature, are hatched in utmost secrecy and they can be proved by the circumstantial evidence. The ingredients of the offence under Section 120-B RPC are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or an act which may not be illegal but is done by illegal means. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both. It is a matter of common experience that direct evidence to prove conspiracy is seldom available, therefore, circumstances, during and after occurrence, have to be considered to decide the complicity of an accused. The prosecution in such cases often relies on the evidence of acts of various parties to infer that they were done in reference to their common intention. Here we may gainfully refer to *Rajiv Kumar v. State of Uttar Pradesh* and another reported as (2017) 8 SCC 791. Relevant extract of the judgment, for the facility of reference, reads thus:

"44. The essential ingredients of the offence of criminal conspiracy are: (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. It is, therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy. It is extremely difficult to adduce direct evidence to prove conspiracy. Existence of conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused. In some cases, indulgence in the illegal act or legal act by illegal means may be inferred from the knowledge itself."

(Emphasis supplied)

23. A similar view has been expressed by Hon'ble Supreme Court in Harpal Singh @ Chhota v. State of Punjab reported in (AIR) 2016 SC 389.

24. Turning to the present case, the admitted position of fact on the record is that respondent was an acquaintance of accused Osama Bin Javed and it is also an admitted fact that Maruti Alto Car of the respondent has been used in the commission of the offence. According to the respondent, his vehicle was forcibly taken away by the militants under threat perception and at the gun point and therefore, he cannot be held liable, since he had not voluntarily handed over keys of his car to the militants.

25. Be that as it may, the respondent happened to be a police official and in such a situation, the respondent immediately after the episode, was expected to inform the police about the whole incident so as to facilitate the police agency to intercept his car and prevent the commission of crime. Respondent in the present case not only failed to inform the police, but also misled, misinformed and misdirected the police agency, purportedly in furtherance of intention to screen the militants. It is significant to underline that respondent not only lied to the MTO, MT clerk and Dy.SP/DAR of DPL, Kishtwar but he also projected a false story and furnished wrong information to his senior officials including Additional Superintendent of Police, Kishtwar and Senior Superintendent of Police Kishtwar and that too, on repeated questioning and at different points of time. There is no denying the fact that respondent intentionally furnished wrong information to the police and concocted a false story and his actions led the terrorists to snatch the service rifle i.e. AK-47 along with three magazines and 90 live cartridges from HC-Daleep Singh and escaped afterwards. He constantly concealed vital information from the District Police of Kishtwar and had he furnished the correct information to the police immediately after the occurrence, it would have helped the District Police in pre-empting the incident of weapon snatching or the initial investigation immediately proceeding the said incident of weapon looting.

26. It is also pertinent to mention that there is copious documentary as well as ocular evidence in the shape of statement of Sajjad Hussain Bhat, Sarjeet Singh, Gopi Nath, Firdous Ahmed and Tilak Raj to prove the complicity of the respondent.

27. Thus considered, the circumstances surrounding the afore-narrated episode are sufficient to indicate that respondent had prior knowledge about the incident of weapon snatching and as held by Hon'ble Supreme Court in Rajiv Kumar's case (Supra), the conduct of the respondent after the incident of not informing the police immediately after the occurrence gives rise to a grave suspicion that prima facie respondent connived with the militants/accused on the spot to facilitate the commission of the crime. In our opinion, learned trial Court, by reading in between the lines, has erred in assuming that respondent had disclosed incorrect registration number of his vehicle to the police authorities out

of fear only. The observation of learned trial court that respondent must have disclosed wrong registration number of his vehicle for the reason that he might be suspected to be an ally of the categorized terrorists, is totally misconceived, as learned trial court has nowhere discussed as to what prevented the respondent from furnishing accurate information about the incident to his superior officers immediately proceeding the incident.

28. Having regard to what has been observed and discussed hereinabove, we do not find ourselves in agreement with the observations recorded by learned trial court as there is sufficient prima facie documentary as well as circumstantial evidence on record to prove meeting of minds of the respondent with rest of the accused persons, therefore, respondent is liable to be charged for the offences alleged against him. Consequently, the impugned order, being illegal and perverse, is set aside. Learned trial court shall frame charge against the respondent and proceed with the trial in accordance with law.

29. Before parting, however, it is made clear that nothing observed in this judgment shall be construed as an expression of opinion on the merits of the case.

30. The record of the trial Court be returned.

31. Interim direction, if any, shall stand vacated.