
(1999) 10 J&K CK 0004
In the Jammu And Kashmir High Court
Case No : Acquittal Appeal No. 01\1980

State of J & K

APPELLANT

Vs

Hassan Rather

RESPONDENT

Date of Decision : 21-10-1999

Acts Referred:

Jammu and Kashmir Consumer Protection Act, 1987 — Section 164
Jammu and Kashmir Evidence Act, 1977 — Section 18, 27, 3

Citation : (2000) SriLJ 50 : (2000) 1 SriLJ 50

Hon'ble Judges : Bhawani Singh, C.J and Syed Bashir-Ud-Din, J

Bench : Division Bench

Judgement

Syed BashirUdDin, Judge.

1. Respondentaccused. Hassan Rather, was tried in Sessions case file No. 4 of 1976 for offences under Section 302. 376/202 R.P.C. and

acquitted of the charges by judgment and order dated 24111979 of District and Sessions Judge. Anantnag. Against this judgment and order of

acquittal, instant appeal is filed by the State of Jaminu and Kashmir.

2. The prosecution case is:

The accused and the deceased Fatah, were neighbours residing in village Chhamb Guild Syedapora. Tehsil Kulgam of District Anantnag. On

21111975. when Fatah and her younger brother alone were in the house, accused came and wanted ladder of the deceased's household. He

promised Fatah fire wood in case ladder is made available to him. The accused got the ladder and thereafter during later period of the day. he

asked Fatah, if she wanted fire wood then she should accompany him to forest, locally known as ""Frasnar Jungle"". Fatah, after keeping information

of her accompanying the accused for the purpose, with her brother, for her mother, who had been out to attend some marriage function in another village. viz. Gund. left for the jungle with accused. When the two reached a remote spot in the jungle, the accused against the will of Fatah, sexually assaulted and raped her. Fatah started weeping. He walked some little distance behind her. On realising that Fatah was at the edge of steep slope with rough and uneven surface (Chhamb). the accused forcefully pushed her from behind Her head struck against the hard surface of the Chhamb and she rolled down the precipice. Accused managed to reach the foot of the slope. He got hold of Fatah's head in his hands and repeatedly dashed it against hard surface, till she died. To conceal the body he carried her a little away and left her there till he got spade from his house and dug up a trench in which he laid Fatah's body and filled it with the soil. He concealed her basket in adjacent jungle Thereafter, he returned to the village. The exact location of the aforementioned alleged acts is depicted in the site plan ExP 19/2 on record. After Fatah's mother returned to villagers on the very day. i.e. 21111975. she made earnest inquiries about her daughter. She informed her 'Dewar' (husband's brother. Abdul Gani Rather . DW 1). They and other villagers made inquiries but failed to locate Fatah. PW 1. lodged report with police station Kulgam on 26111975. The police is also alleged to have joined search for her. Nothing was known about her till 07121975. On 08121975. the SHO Police Station Kulgam, reached parties village and while he was busy questioning different people. PW2 Prithvi Nath. appeared on spot and took Amma Rather PW3, aside. At the instance of Amma Rather. Prithvi Nath informed the SHO and others present on spot that the accused had come and confessed to him that accused had killed Fatah and that the witness should find ways and means to save him from the cultches of police, even if some money was required to be spent for the purpose. The SHO send for the accused. He was brought in custody. The accused in presence of the gathering confessed the commission of crime and made disclosure statement (ExP2/Ex 2/2). pursuant to which the dead body of Fatah, wicker basket (Puj) and spade (Beelcha) were recovered and seized memo's Ex PW/ ExPW 2/3. ExP4/ExPW 2/6 and Ex P8/ExPW 2/9 were prepared. Site plan ExPW 19/2 and seizure memos of soil collected from spade EXP9/EXPW 14/3 and soil and other material gathered from the site where

Fatah was hurried (EXPW 15/3) were prepared. Memos of part of the accused (ExPIO/ExPw 1/1) and garments of deceased Fatah (ExPM

14/ExPW 2/8 and ExPM 15/ExPWDEDEP) were also prepared. The post Mortum of dead body was conducted and autopsy report obtained.

The reports of Chemical Analyst and Seriologist were also obtained. The statements of witnesses under section 161 Cr.P.C and of accused under

section 164 Cr.P.C were recorded. The investigating ended up in sending accused for trial. After the challan was received by the committal

Magistrate the accused was committed and sent for trial before the District and Sessions Judge. Anantnag. The accused pleaded not guilty and the

trial in the session Court culminated in the acquittal of the accused.

3. The Judgment and order of acquittal are assailed on the ground that the trial Judge has not properly appreciated the evidence. The evidence has

not been properly scanned and analysed. The court has wrongly doubted extra judicial confession of the accused and drawn erroneous conclusion

from circumstantial evidence. The prosecution case is proved by circumstantial evidence conclusively as corroborated by expert evidence,

confession of accused and ante and post crime conduct of the accused, yet the trial court has for no reasons acquitted the accused.

4. The defence counsel in his submissions while controverting and refuting the main plank of prosecution arguments, submits that all relevant

circumstances and facts of this case have been properly examined, analysed and appreciated. Reasons have been given to disbelieve the voluntary

character of the confession and other circumstances appearing on record. The accused has been rightly acquitted, as the prosecution has failed to

prove case against him. beyond reasonable doubt.

5. It emerges to be noted that there is no eye witness to the occurrence. The case is based on preand post crime conduct of the accused, his extra

judicial confession, motive for crime, expert opinion, recovery of dead body, garments, spade, wicker basket etc. and retracted statement of

accused recorded under Section 164 Cr.P.C. Basically the case is based on circumstantial evidence and the confession of the accused.

6. Before coming to the facts, circumstances and features, on analysis and appreciation of evidence, of this case, it would be apt to note the

admitted legal position regarding the burdon of proof in criminal cases and the

norm and standard of proof required in a case based on circumstantial evidence.

7. In *Dr.N.G. Dastane Vs. Mrs.S. Dastane*.(AIR 1975 SC 1534). it is observed that in criminal trials higher standard of proof commonly identified

with the phrase ""beyond reasonable doubt"" is required. The courts insist on this higher standard of proof as freedom and liberty of subject is

involved in a criminal case. The same principle is found in *Sawal Dass Vs. State of Bihar*. (AIR 1974 SC 778).

8. In *Sharad Birdhi Chand Vs. Sarda* (AIR 1984 SC: 1624 the court has observed:""....that the cardinal principle of criminal jurisprudence is that a

case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction....

9. In *State of U.P Vs. Krishna Gupta* (AIR 1988 SC: 2154 (2160). the court in the context of proof beyond reasonable doubt, the standard of

norm laid in a criminal case observed :

.....To constitute reasonable doubt it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of

the accused person arising from the evidence or from the lack of it, as opposed to mervague apprehension. A reasonable doubt is not an

imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and commonsense. It must grow out of the evidence in the case.

The concepts of probability, and the degrees of it. cannot obviously be expressed in terms of units to be mathematically enumerated as to how

many of such units constitute proof beyond reasonable doubt....

10. In *Hanumant S.R. Dass Vs. State of M.P* (AIR 1952 SC:342) the following five "" Golden principles "" are ruled to constitute the basis for proof

of case based on circumstantial evidence:

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused; that is to say. they should not be explainable on

any other hypothesis except that the accused is guilty, (iii) the circumstances should be of a conclusive nature and tendency, (iv) they should

exclude even possible hypothesis except the one to be pro\ ed. and (v) there must be a chain of evidence so complete as not to leave any

reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

The above norms and standard of proof required to sustain conviction on criminal charge based on circumstantial evidence has been reiterated in

Arvid (a\ Papu Vs. State (Dehli Administration JT 1999 (3) SC: 544.

11. In Dhananjay Chatterjee Vs. State of West Bengal (AIR 1994 SCC (Cri) 358 (366). the Apex Court observed:

....It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the

more serious the crime, the greater should be the care taken to scrutinise the evidence lest suspicion takes the place of proof.

12. Having noted the law on the question of discharge of burden of proof and norms and standard of proof required in criminal cases generally and

in cases based on circumstantial evidence, it is contextually appropriate to take note of observation in AIR 1984 SC: 1622 that suspicion however

strong cannot take place of legal proof and that the "fouler the crime higher the proof.

13. In Jaga Singh Vs. State of Punjab. (AIR 1995 SC: 135) this rule is reiterated as "suspicion cannot be substitute for proof".

14. Now advertent to the question of examination and appreciation of evidence of this case, the whole matter can be approached under the

following heads:

(i) Conduct and preparation.

(ii) Motive.

(iii) ExtraJudicial Confession.

(iv) Confession recorded u/s 164 Cr.P.C

(v) Expert opinion and Evidence.

(i) Conduct and Preparation:

The specific incriminating allegations against accused are that on 21/11/1975. he in his neighbourhood went to the house of Late Wahab Rather,

father of Fatah, when Fatah's mother was not at home. He demanded Ladder From Fatah. Initially Fatah was hesitant to give him Ladder, but on

assurance that he will give her firewood a little later from jungle, she gave him

the ladder. The accused after a while asked her to follow him to collect the firewood some distance away. She followed him but kept a word with her younger brother Mohd Ahsan Rather PW 10, for her mother

that she had gone with accused to collect the firewood. She was last seen with accused by PW 5 Abdullah Rather, PW 7 Ramzan Rather and PW

9 Hassan Rather. On examining the statement of these witnesses and analysing their evidence, we find, the alleged incriminating circumstances are

not there. The statement of these witnesses, are not supporting prosecution case on this count.

15. PW 10 Mohd Ahsan Rather, the younger brother of the deceased Fatah while under crossexamination has totally fumbled. He is giving clear

impression of having no idea of accused having asked Fatah to give him ladder and in exchange having promised her firewood a little later and her

having followed him to collect firewood.

16. PW 9, Hassan Rather, cannot be also relied on. The trial judge's recorded demeanours of this witness being 'insane/idiot', leaves hardly

anything of the witnesses for evaluation.

17. PW 5, Abdullah Rather, has stated without specifying the date, time or the day that while he was in his orchard, he found accused proceedings

to his own orchard which is some distance away from this witness's orchard, as accused often stays during night and day, in this orchard. He also

noted that about four furlongs behind him, Fatah was also going on the same route. He did not talk with either of them.

18. PW 7, Ramzan Rather, has not given any better statement. He states that one day, again without specifying the day, date, time, hour, month,

season etc., accused passed by the village path at a time when he was standing near the shop of one Mohammad Yousuf. The witness nowhere

states that Fatah was also with the accused or that she was following the accused. In fact, this witness has not at all spoken about his having

allegedly seen Fatah with the accused.

19. PW 1, Gain Rather, a close relation of deceased Fatah, who lodged report after six days with Police Station Kulgam, did not mention the

alleged fact that Fatah was last seen with the accused when they walked towards Jungle, on his promise to give her firewood, notwithstanding this

witness testified before court that he was aware of this circumstance, as the

younger brother of Fatah and other witnesses referred above, had told

PW, Amma Rather, Ghulam Rasool and P W 5 Abdullah Rather, that the accused took Fatah along in Jungle and that Fatah gave ladder to

accused. The non mention of these alleged facts in F.I.R. with Police also casts shadow on the veracity of the prosecution case on this count.

Seen thus, there is no satisfactory and credible evidence to reveal that Fatah was last seen in the company of the accused or that the former

followed the latter to Jungle to collect fireweed. No incriminating facts and circumstances emerge on record against accused on this score.

20. PW 12 and PW 13, Aziz Bhat and Moma Wani, have both stated that the accused was with them in a Bara to village Taripora. The accused's

conduct and behaviour was normal. They did not find anything abnormal in his conduct. The accused took meals with other Baras, stayed for the

night in the house of the Bride and returned to the village next day. Since disappearance of Fatah was talked about in the village, he also joined

other villagers to search for Fatah.

21. PW 1, Mst. Zaina, mother of deceased states that she inquired from the accused, who expressed surprise on disappearance of Fatah and

showed ignorance about her whereabouts. He with other villagers joined to search for her.

22. The statement of PW 16, Mehda Rather, that in forest when he asked the accused that they should proceed in a certain direction where from

the dead body of Fatah was later found, the accused did not agree to this suggestion, is quite insignificant, in as much as much cannot be read out

of this statement, firstly it is not per se incriminatory and secondly as per this witness's own admission he did not disclose this fact to any one, till

police recorded his statement couple of days after the occurrence.

It is in the evidence of deceased's mother PW 1, Zaina and her brother Gulla Rather (PW 8) that the accused is their close neighbour with whom

they had warm and cordial relation. They shared each other's moments of sorrow and joy. It was only after the accused was arrested and charged

for murder of Fatah that their relations with accused broke down.

23. Seen thus through the record, even after the alleged commission of crime on 21/11/1975, or soon thereafter, the conduct or the behaviour of the

accused had not undergone any change. Nothing incriminating or abnormal was

noted in the behaviour of the accused. Nothing emerges on record

to show any preparation was made by accused targetted at crime in question. Incriminating pre or post crime conduct is also conspicuous by its

absence. (ii) Motive :

24. It is alleged that there is motive for this crime. The allegation is that previous to the occurrence in question Gulla Rather alias Gulla Chera PW

8, elder brother of deceased Fatah, molested accused's daughter Gulshanah and the accused in revenge wanted to kill Gulla Rather, but when he

failed to do so, he raped and killed his sister Fatah. This aspect needs to be examined.

25. Deceased's mother Zaina, PW 11, has deposed that the accused complained against her son Gulla Rather that he had teased and outraged

modesty of his daughter Gulshan Akhtar, though her son at no point of time teased or outraged modesty of his daughter. She has also admitted in

crossexamination that despite this little problem, the two families were living happily as neighbours sharing each others moments of joy and grief.

The two families had social relations and used to come and go to each other. The accused joined the family like other villagers to search for Fatah.

Like all other concerned, he also showed his ignorance about the whereabouts of Fatah. She personally inquired from him if Fatah had

accompanied him to Forest. He denied that she ever accompanied him to Jungle.

26. PW 8 deceased's brother Gulla Rather, has not deposed to the motive in his examination in chief, but in crossexamination has deposed that the

accused's daughter Gulshan Akhtar used to block the water to irrigate his Sagzar and for this reason he snubbed and slapped her, of which she

made a hue and cry. He neither molested nor outraged her modesty. Despite this problem, the two house holders and neighbours lived amicably

and maintained social relations. Neither accused nor his wife ever complained against him. He also did not complain about the matter. The accused

was with him in Punjab where they worked as labourers. On one occasion accused placed a heavy load on his shoulders. It may have been with

intention to harm him. He suspected bonafides of the accused. During the time when occurrence took place, he had gone to Punjab to work as a

labourer. The accused in his statement under section 342 Cr.P.C. has denied that PW 8 ever teased or outraged modesty of his daughter. He also

denied that he had any grudge against this man or his family. Investigating Officer has not deposed to this aspect of the matter. In fact motive for the crime has not been at all investigated by the Investigating agency.

27. On scanning and perusing record, we find, if motive for killing Fatah is accused's alleged grudge of her brother having molested and teased his daughter Gulshan Akhtar, the same is not substantiated by any evidence. At the best it is just an obsession with the mother and brother of the deceased. Suspicion, however, strong cannot take place of proof.

(iii) Extra Judicial Confession

28. In *Kishore Chand Vs. State of Himachal Pradesh* (AIR 1990 SC 2140). The Apex Court in the context of appreciation of extra judicial

confession as piece of evidence and its evidential value observed :

...An unambiguous extrajudicial confession possesses a high probative value/force as it emanates from the person who committed the crime and is

admissible in evidence provided it is free from suspicion and suggestion of its falsity. But in the process of the proof of the alleged confession the

court has to be satisfied that it is a voluntary one and does not appear to be the result of inducement, threat or promise envisaged under Section 24

of the Evidence Act or was brought about in suspicious circumstances to circumvent Sections 25 and 26 of the Evidence Act. Therefore, the Court

has to look into the surrounding circumstances and to find whether the extrajudicial confession is not inspired by any improper or collateral

consideration or circumvention of the law suggesting that it may not be true one. for this purpose the Court must scrutinise all the relevant facts,

such as the person to whom the confession is made, the time and place of making it the circumstances in which it was made and finally the actual

words used by the accused. Extrajudicial confession if found to be voluntary can be relied upon by the Court along with other evidence on record.

Therefore, even the extrajudicial confession will also have to be proved like any other fact. The value of the evidence as to the confession depends

upon the veracity of the witness to whom it is made and the circumstances in which it came to be made and the actual words used by the accused.

Some times it may not be possible to the witness to reproduce the actual words in which the confession was made. For that reason the law insists

on recording the statement by a Judicial Magistrate after administering all

necessary warnings to the accused that it would be used as evidence against them...

29. In *Heramba Brahma Vs. State of Assam*. (AIR 1982 SC 1595) Apex Court on the question of appreciation and evaluation of extra judicial

confession and its credibility, when such confession was made to an under trial in jail in a decoity case has observed :

..The evidence of extrajudicial confession without examining the credentials of the witness; without ascertaining the words used: without referring

to the decision of Supreme Court wherein it is succinctly stated that extra judicial confession to afford a piece of reliable evidence must pass the

test of reproduction of exact words, the reason or motive for confession and person selected in whom confidence is reposed... is unworthy of

credit and cannot form a piece of corroborative evidence..

30. The occurrence as per the prosecution story resulting in kidnapping, rape and murder of Fatah is alleged to have taken place on 21/11/1975.

The missing report was lodged by Gani Rather (PW 1). a relation of the deceased on 26/11/1975. The police party headed by Mohammad

Mansoor Ahmad. SubInspector, Incharge Police Station Kulgam. reached the deceased/complaint's village (Chhanib Gund) on 08/12/1975. It is

stated that while this Police Officer was inquiring about the matter in the village. Prithvi Nath of Gasi Raina PW 2. appeared on spot. He took

Gulla Rather PW 3. aside and conveyed him that the accused had come to him in the morning and informed him that he caused homicidal death of

Fatah and buried her dead body in 'Fressnar Jungles. Ghulani Ahmad Rather asked him to state before the villagers what he told him. They both

went to villagers. Prithvi Nath over again made the statement before the villagers in presence of the SHO. The SHO despatched police constable

and chowkidar to apprehend and bring the accused. The accused was apprehended and produced before the gathering. The accused is said to

have confessed before the gathering that he has killed Fatah. The Investigating Officer recorded accused's statement ""ExPW 2/2"" Vide 'ExPw 2/2'

accused is said to have confessed that he killed Fatah and buried her at Fressnar. He has also concealed her Puj (Wicker basket) in Jungle. He

can also point out the spot in his. house, where he has kept spade, which he used to dig the trench to burn Fatah. After this statement, he led the

police party and villagers to the spot, depicted as MarkL and 6. in site plan Exp.19/2. for recovery of dead body and Wicker basket (puj). The

dead body and "'Puj' were recovered and memos Exp2/3 and ExpW 2/6 respectively were prepared. This important aspect of the prosecution

case needs indepth examination in the light of evidence led and the facts and circumstances which appear on record.

31. The court is required to examine the matter from the stand point if the confession is voluntary and free or result of some inducement or

promise. Besides, the surrounding circumstances are also to be looked into to judge the voluntary character of confession. It is also to be seen that

confession ma\ not be inspired or impelled be considerations to circumvent the law. Obviously for the purpose, we will have to find out the person

of Prithvi Nath. PW2 to whom the confession is made, the time and place of confession and the circumstances in which it was made before the

villagers. The reason/motive for confession and person selected to confide in will have also to be seenititised.

32. Prithvi Nalh PW2. picked and confided in by accused for confession has deposed that he has seen visiting the police station for last over two

decades in order to settle the police cases of locals. It is in his evidence that the accused who is known to him as a labourer with whom he has no

relation or equation, came to him and told him that Fatah got killed by his hands, he is prepared to spend money if the witness (PW2) gels the

matte hushed up with police station personnel. There is nothing on record to show that the accused disclosed any reason or motive to PW2 for

having killed Fatah. It is also in evidence of Prithvi Nath himself that the accused did not divulge the details of the incident or occurrence leading to

death of Fatah nor he enquired anything from the accused on this count. The conduct of this witness from his deposition appears somewhat

unusual, in so far the witness has not even asked single word from accused, even after learning from and hearing him having killed Fatah Besides

the witness as per his own deposition, is a broker in getting the criminal cases settled between different people and between people and police.

The history and antecedents of this witness arc doubtful and his credibility stock is very low. The record does not show any special relationship

between accused and the witness which could have impelled the former to confide in him and make confession of crime. The related aspect of the

statement of the witness that he went to police station Kulgam first but as he found that the SHO was on spot, he came to the spot and conveyed

the accused's confession in the first instance to the SHO and then to the villagers is equally suspicious and hard to believe.

33. Investigating Officer. Malik Mansoor Ahmad PW2x has in his deposition before the court, stated that he had learnt from reliable source that

the accused was the offender. who murdered Fatah and for this reason, he had sent a docket to Police Station for registering the case and on the

docket the case was registered, as FIR 81/75 at Police Station Kulgam on 08121975. After the case was so registered, he started the

investigation, it was during the investigation that Prclhvi Nath came on spot and told him that the accused has confessed to him the murder of

Fatah. He asked him to say so before the gathering. It is further stated by him that thereafter he sent the constable and chowkidar to arrest the

accused who was arrested and brought there. The accused made the statement in Kashmiri which the SHO recorded in Kashmiri language. The

translated version of the statement is : ""I killed Fatah. Her dead body I have hurried under the soil which spot I can show. Puj has been concealed

nearby under branches of the trees known as 'Poosh' which I can identify. Spade used to dig the trench for burning Fatah is kept by him behind

wooden box lying in second floor of his residential house which he can show"". This statement has to be tested in respect of its content, recoveries,

and truthfulness. Among other PW3 and PW5 have in unequivocal terms stated that soon after this disclosure, when accused led them for

recovery, they found that the Chowkidar, Numberdar and Police Constables were already on spot to guard it. This statement runs parallel to the

statement of other witness including that of PW+ Mohd Yousuf Wani, that when accused led and took them to the spot, they found none there.

Neither the police nor the Chowkidar nor any other person was present on spot.

34. PW5. Abdullah Rather, has gone to the extent to say that the police knew much before the confession and statement of accused. the site of

occurrence and the place, where Fatah was buried and it was for that reason that the police constables and Chowkidar were guarding the spot.

The Chowkidar PW20. Ahmad Bhat, has also corroborated this statement when he says that he and the constables were guarding the spot from

where Fatah's dead body was recovered under the directions of the Thanedar. PW23. From the statement of PW23. it is more than clear that he

knew much before the alleged confession and disclosure of location of dead body by the accused, where the dead body was on spot. It is also in

evidence on record that the factum of fresh grave having been spotted in 'Frestnar Jungle', on spot by two village children, Hamid and Hassan was

making rounds in the village much before the confession and disclosure of accused. One of these boys and Prithvi Nath in whom the accused is

stated to have confined for confession, were also with the police, though Prithvi Nath has denied that he accompanied police to the spot.

35. In these circumstances, the said extra judicial confession and recovery of the dead body and other articles appear doubtful. The confession as

a fact and other connected circumstances are not established by the evidence of the quality and to the extent warranted by law. Meager and weak

type of evidence has been led by the prosecution, which even so is full of suspicion. The confession, if any. appears to be induced by promise to

husluip the case. The Investigating Officer does not seem telling the whole truth. He has resorted to telling half truths and truth with admixture of

falsehood.

36. In Hardeo Vs. Crown. (AIR (38) 1951 Ajmeer 95) where the extra judicial confession of the accused was made to one of the prosecution

witness and the evidence led was that the accused confessed his guilt to the witness in presence of the other villagers and admitted having

committed murder, the court observed:

But since this confessional statement was made subsequent to the appearance of the police in the village and after they had taken up the

investigation of the case, such a statement is of little value as it is possible that it was induced by fear or other considerations. It cannot therefore be

called a free and voluntary statement. In fact Mangal Singh's deposition in the committing Magistrate's Court shows that the extrajudicial confession

of the accused was made in the presence of the police Thanedar. The learned Sessions Judge was therefore quite justified in eliminating from

consideration the extra judicial statement as it was of no value whatsoever.

37. Having thus examined and scruitnised the extra judicial confession and the recoveries alleged to be made thereto, we find it not only to have

been brought about in suspicious circumstances but also the confession itself is not appearing to be true. The motive for the confession and the reason for choosing PW2 as right person in whom confidence is reposed, are wanting. Therefore, the factum of the alleged extrajudicial confession, is not corroborated on this count as well.

(iv). Confession recorded u/s 164 Cr. P.C.

38. The statement of the accused has been recorded under Section 164 of Criminal Procedure Code in which he has confessed the guilt. This

statement Ex PW 19/3 of accused has been recorded during investigation on 23121975. by Munsif Judicial Magistrate Dooru. In this statement,

accused has confessed the guilt. Mr. G.R. Boda. Judicial Magistrate. PW21. has deposed in respect of Ex PW 19/3 on 25081977. The accused

on 22091977 in his statement recorded under section 342 Cr. P.C. before the trial court, has retracted from this confessional statement. He has

stated that he has not made any confessional statement before the Magistrate. He was in police custody for three weeks and the police was

torturing him and taking him to different courts. He did not know what was written by the Magistrate.

39. From the statement of the Magistrate, it is seen that the accused continued in the custody of the Investigating Agency of Police Station Kulgam

from 08121975. till he was produced in the court for recording his confessional statement. Though the Magistrate has recorded that he gave the

accused to judicial custody for the night so that he has time to reflect and tender statement free of any duress, coercion, inducement or any other

extraneous consideration. But the question is whether order of Magistrate's in sending accused to judicial custody for the night, could make any

difference, when the accused was in a three week prolonged custody of the investigating agency and that there is no judicial lockup at Doom. The

accused was to be taken to Anantnag, a distance of about 20 to 25 K. Mtrs for being lodged in lockup. The investigating agency took him to

Anantnag and again brought him next day before the Magistrate from Anantnag. It is also in the statement of the Magistrate that the police

personnel were present in the court room, when he recorded accused's statement. Admittedly, the prosecuting officer and PP. were present in the

court room when statement of the accused was being recorded. It is also in the

statement of Magistrate that he did not inquire about the reason or motive for the statement. It is also in his evidence that he did not inquire about the duration of custody of the accused with the police. He has also acknowledged that he did not enquired from the accused if his statement was voluntary or outcome of any force or inducement or anything of the sort. It is also in his statement that the accused was brought in custody on Malik Manzoor Ahmad Investigating Officer.

40. In *Nathu Vs. State of UttarPradesh*.

(AIR 1956 SC 56), the Apex Court in the context of retracted confession observed :

It appears to us that the prolonged custody immediately preceding the making of the confession is sufficient, unless it is properly explained, to

stamp Exhibit P15. as involuntary.

In the facts and circumstances emerging from record in the context of discussion made herein above, while dealing with extra judicial confession of

the accused, it cannot be said that the statement of accused under Section 164 Cr. P.C. confessing the guilt (resiled later at the first available

opportunity) is even corroborated in general terms by other circumstances on record. The retraction or prevarication from the earliest statement in

the light of crossexamination of recording Magistrate and accused's statement under Section 342 Cr. P.C. does not appear wholly without basis.

41. in *Subramania Goundan Vs. State of Madras*, (AIR 1958 SC 66). His Lordship Govinda Menon, J. speaking for the court observed :

....The view taken by this court on more occasions than one is that as a matter of prudence and caution which has sanctified itself into a rule of

law, a retracted confession cannot be made solely the basis of conviction unless the same is corroborated..

...In the case of the person confessing who has resied from his statement, general corroboration is sufficient while an accomplice's evidence should

be corroborated in material particulars. In addition the court must feel that the reasons given for the retraction in the case of a confession are

untrue.

In *Vaishnu Dutt Vs. Dr. Krishna Kumar*. (AIR 1953 Hyderabad 144). after referring to the observations of Privy Council in the case of *Harold*

White Vs. The King. (AIR 1945 PC 181). it is observed:

...In order to render a confession admissible it must be voluntary. It is the duty of every court to enquire carefully into all the circumstances that led

to the making of the confession. When considering about confession one of the most important factors which should be taken into consideration is

the length of time during which the accused was in police custody before making the confession. No doubt no hard and fast rule can be laid in this

regard but the court will have to judge for itself from the intrinsic evidence of the confession and the surrounding circumstances, as to whether such

confession should be relied upon.

(v). Expert opinion and evidence:

42. The autopsy report Ex Pw 17/1 and the reply to the queries Ex PM 13/EX PW 17/1. have been deposed to by Dr. M.N. Ramabal (PW 17).

From the deposition of this witness, it is found that the opinion as to cause of death is ""due to compression of the brain as a result of subdural

haematoma"". Further the head injury resulting in death in this case, is opined ""inflicted by blunt weapon"". It is also in the evidence of the witness

that hymen of Fatah was torn. In terms of the opinion recorded on Ex Pw 17/2. the rape is opined to have been committed. However, in cross

examination this witness has stated that there was no abrasion, wound or cut on any part of the private parts of the girl. The torn hymen can

appear, by means other than, rape or sexual course. It is also in the evidence of the witness that no swap or anything of the sort was taken for

examination. Nothing was sent to laboratory for test(s). When the evidence of the witness is read as a whole, we do not find the witness has given

any reason or basis for his opinion of intercourse having taken place in this case. What the witness has stated is a general statement without specific

reference to the facts situation and circumstances of this case. It is also in the evidence of this witness that the injuries on the head of the deceased

could be inflicted by a fall or nib against hard surface. The witness has not found any injuries on the neck or any other part of the body of the

deceased excepting those referred to above, on the skull.

43. From the statement of the witness, rape is not established. The opinion of the Doctor does not close or forestall the other possibilities of

causing subdural hae morrhage or death of Fatah. In fact the statement of the witness is open ended. Whatever little Expert and Medical evidence

is available it could be used to corroborate substantive evidence, but as already found in this case, there is no such evidence available. Therefore,

the Post Mortem report per se does not lead us anywhere.

44. The report of J&K Forensic Science Laboratory, Jammu (dated 22/1/76) reveals that the garments and clothes seized from the dead body of

Fatah. Ex PW 680, 681 and 682, were not stained and nothing incriminating against accused was found on these exhibits. The trouser (Khaki

Shahvar) of the accused. Ex PB 678, contains some blood stains and as per the report of the Serologist and Chemical Examiner of Government of

India, Calcutta, one of the stains on the Shahvar Ex PB 678 "is stained human blood". The hair strands seized from deceased Ex PB 670 to 678

bore similarity with the hair strands seized from the accused Ex PB 683 to 698. Besides, soil (in lump form and in wet condition) with some grass

or vegetation seized from the spot and the spade (Khud and Beelcha) Ex PB 1/89 and B1/90, were also found similar.

45. On examination of the report of F.S.L. and the Serologist, in the context and mould of other evidence on record, it is seen that part of evidence

of the experts does not corroborate the account of the oral narration by accused, in his retracted confession and the prosecution theory. The trial

judge has examined the actual mode and manner of the incident of alleged rape and homicidal death of Fatah in the light of the statement recorded

under section 164 Cr. P.C. of the accused and the deposition of the recording Magistrate thereto and has come to the conclusion that the

seizure of hair strands by the deceased is not possible. In case prosecution case is taken as it is, then the accused pushed Fatah down on a very

hard surface with full force and by the time she reached the foot of the slope, her head having dashed against the surface, she had become

unconscious and the accused caught hold of her head in this unconscious state and went on to strike it against the surface, till she died. Then where

was opportunity for her to have caught accused hair by her right hand, latter discovered by police, more so when her right hand was inside her

pheran during this period. The question of her hand having reached the hair of the accused and the hair being found in her hand, appears quite

unnatural. Theory of similarity of hair appears staged. Alleged recovery of hair of accused from her hand and as also samples provided by

the investigation/prosecution agency, seem tailored. Again similarity between soil seized from khud and Beelcha. appears a stage managed

evidence in so far as the soil which was collected from Bailcha seized at least after three weeks, could not be imagined in lump form and in

wetcondition in so far as tire 'Beelcha' was kept in a dry place in the house by the accused. The similarity theory which has been managed by the

prosecution agency, is obviously untrue. The similarity in soil with grass and vegetation in the two Ex PB 189 and B 190. cannot advance the

prosecution case as the soil with vegetation and grass was collected from area(s) which bore like soil, vegetation and grass (Forest area). The

Chemical Examiner's report can be used for purpose of corroboration. but as. already observed, as there is no substantive evidence, therefore, this

evidence is on weak wicket end. cannot be of any help in this case.

46. Thus, on analysing and appreciating evidence on record, we find that the circumstances from which the conclusion of guilt of the accused have

to be drawn has not been established by legal and cogent evidence. The motive, preparation previous and subsequent conduct of accused

putforth by way of incriminating circumstances, have not been substantiated. The extra judicial confession of the accused is not also proved by any

credible and cogent evidence. The judicial confession of the accused (recorded under section 164 Cr. P.C.) is not shown as true, voluntary and

free from impregnable suspicion. Expert opinion and evidence besides being inconclusive and open ended, does not advance the prosecution case

am further. The circumstance of recovery of dead body allegedly in consequence of information given by the accused, is not proved by satis

factory and clinching evidence. In fact, the very recovery of the dead body as squell to information provided by accused, is not at all proved. The

circumstances are not conclusive in nature. There are missing links in the chain of circumstances. Prosecution has failed to discharge its burden of

proof of guilt of the accused beyond reasonable doubt. Both the charges of rape and culpable homicide amounting to murder have not been

proved against the accused. There is no evidence to sustain these charges.

47. In result, we record, the judgment dated 24111979 of acquittal of accused handed by the trial court of District and Sessions Judge. Anantnag

merits to be sustained. The acquittal appeal of State against the judgment has

no merit and is accordingly dismissed. Bonds executed by accused
and the surety(s) shall stand discharged. Inform the trial court of the decision.
Remit the record