HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

Criminal Appeal No. 52/2009
Confirmation No. 18/2009

Date of Decision: 07-10-2010

Abdul Rashid v. State & Ors.

Coram:-

Hon'ble Mr. Justice Mansoor Ahmad Mir, Judge
Hon'ble Mr. Justice Sunil Hali, Judge

Appearing Counsel:-

For the Appellant(s) : M/s. B.L.Chatta & Mr. Anil Gupta Advocates
For the Respondents : Mr. B.R.Chandan, Dy. A.G

WHETHER APPROVED FOR REPORTING: YES.

Per Mansoor, J.

This Criminal Appeal is directed against the orders of conviction and sentence dated 3rd of September' 2009 and 4th of September' 2009, whereby the appellant came to be convicted for commission of offences punishable under Sections 302/307/121 Ranbir Penal Code (for short '**RPC**') and Section 7/25 (IA) & Section 7/27 (3) of Arms Act, 1959 and sentenced to death for commission of offence under Section 302 R.P.C subject to confirmation by this Court and has to undergo imprisonment for a period of seven years and a fine of Rs. 10,000/- for commission of offence under Section 307 R.P.C and imprisonment for a period of five years and a fine of Rs. 5000/- under Section 7/25 Arms Act.

All the sentences of imprisonment were ordered to run concurrently.

Reference came to be made by the trial Court in terms of the mandate of Code of Criminal Procedure (for short Cr.P.C) for confirmation of death sentence, came to be diarized as Confirmation No. 18/2009.

This judgment will govern the appeal as well confirmation petition.

BRIEF FACTS:

On 6th of March' 2008 at about 8.30 p.m the police of Police Post Arnas received information from reliable sources that a grenade has been hurled and blasted in the house of one Mohd. Mushtaq PW-2, Special Police Officer (for short S.P.O), Village Defence Committee member (for short V.D.C), resulting into death of Habibullah, Nagina and Nazia, father and daughters of PW-2 Mohd. Mushtaq. Fatima, Rafiqa Begum, Zuna Bano and Ghulam Mohammad, mother, wife, daughter and son of PW-2 sustained grievous injuries. Report came to be entered into Roznamcha-daily diary and a docket was sent to Police Station, Mahore for registration of case. Accordingly FIR No. 16 of 2008 came to be registered and police was set in motion. PW-

18 Mr. Sunil Kumar Sharma, Sub Inspector, was entrusted with the investigation of the case, who during the course of investigation prepared the site plan, shifted the injured to the hospital, obtained photographs of the dead bodies, got post mortem conducted and delivered the dead bodies to their relatives for performing their last rites. During search, splinters and liver of the grenade were recovered from the place of occurrence, which were seized. The samples of soil/blood stained soil were collected and sent to Forensic Science Laboratory for examination. Appellant-accused was arrested and according to prosecution story, he made a disclosure statement, which led to recovery of five Chinese made grenades. The grenade pin was also recovered from the possession of appellant-accused during his personal search. The Investigating Officer, after conducting the investigation, came to the conclusion that PW-2 Mohd. Mushtaq was S.P.O/V.D.C member and appellant-accused was a supporter of militants belonging to H.M Organization. Appellant-accused along with accused no. 2 Muneer Hussain alias Mansoor and one Mushtaq Ahmed @ Babar on 6th of March' 2010 at 7.30 p.m went to the house of PW-2 Mohd. Mushtaq, who was inside his house along with his family, dogs started barking, PW-2 came out and

saw appellant-accused standing in the compound, who told PW-2 that he had gone to Arnas and was on his way to home but since it was dark he requested PW-2 to manage some light enabling him to reach his home. PW-2 asked him to stay with him for a night but the appellant-accused refused. PW-2 and appellant-accused went inside the house. Muneer Hussain alias Mansoor, accused no.2 and other militants laid cordon outside the house of PW-2 Mohd Mushtaq. Appellant-accused hurled a grenade inside the house of PW-2 Mohd. Mushtaq and came out of the house. Grenade blast took place inside the house and two daughters, father of PW-2 died on the spot, whereas mother, wife, daughter and son of PW-2 were seriously injured. The Investigating Officer also came to the conclusion that appellant-accused along with accused no.2-Muneer Hussain alias Mansoor & Mushtaq Ahmed alias Babar had hatched a conspiracy. One of the accused Mushtaq Ahmed alias Babar was killed in an encounter and accused no.2-Muneer Hussain alias Mansoor was absconding. The trial Court framed charges against appellant-accused Abdul Rashid, who pleaded not guilty and claimed to be tried. The prosecution examined 18 witnesses out of 19 witnesses listed in its calendar. The appellant has not examined any witness in defence.

BRIEF RESUME OF EVIDENCE:-

1. **PW-2 MOHD MUSHTAQ** has stated that on 6th of March' 2008, he was having dinner with his family at 7.30 p.m. On hearing dogs barking he came out of his house and saw appellant-accused standing in his compound near the water tank. On asking, he requested for arrangement of light. He went inside the house along with the appellant and told his wife that wood is required for arrangement of light for appellant-accused. In the meantime, appellant-accused hurled a grenade inside the house, which exploded and his father, two daughters lost their lives and five others got injured. He tried to open the door but could not, so he came out through the window and found the appellant-accused and two others running away.

2. **PW-3 RAFIQA BEGUM** has deposed that she was inside the house along with family members at the time of occurrence. Dogs started barking, her husband Mohd Mushtaq went to check out. Her husband called her that appellant-Abdul Rashid wanted some light. Her husband and Abdul Rashid came inside the house. Appellant-accused remained standing at the door and her

husband told her that he wanted to make some arrangement for appellant-accused. In the meantime, appellant-accused hurled something inside her house. Her husband asked appellant-accused as to what he had thrown inside the house but he went out and bolted the door from outside. There was a blast inside the room and two of her daughters and father-in-law died. Thereafter she could not see anything because she was unconscious and after 3/4 days in the hospital at Jammu, she became conscious. Splinters were removed from the belly of her son Ghulam Mohd. Her legs were broken and she was not in a position to move.

3. **PW-3 ZUNA AKHTER** has stated that on 6th of March' 2008 at about 7.30 p.m dogs started barking outside the house. Her parents went outside. Appellant-accused asked her father to make some arrangement for light, so that he could go to his home. Her father told him to stay for a night or at least have meals, but he did not agree and insisted for some light. Her father came inside the house and told his wife that he wanted to make some arrangement of light for the appellant-

accused and required some wood. Appellant-accused remained standing at the door. He hurled a grenade, went out and closed the door from outside. The grenade exploded. She fell unconscious and regained her consciousness after 2/3 days and came to know that two of her sisters and grand father had died and five other persons have sustained injuries.

4. **PW-5 GHULAM FATIMA** has deposed on the same lines as deposed by Zuna Akhter.

5. **PW-6 MOHD MUNSHI** has deposed that he lives just adjacent to the house of PW-2 Mohd Mushtaq. He heard the sound of blast inside the house of PW-2 on 6th of March' 2008 at 7.30 p.m. He came out of the house and had a gun. On asking, PW-2 told him that appellant-accused Rashid hurled a grenade inside his house and killed his entire family. He and other witnesses went to the house of PW-2. They saw appellant-accused running away along with two more persons, who could not be identified. PW-2 was lying outside his house. In cross examination he has stated that the splinters of the grenade were scattered on the floor.

6. **PW-7 SADAR DIN** has stated that on 6th of March' 2008 at 7.30 p.m there was a blast inside the house of PW-2. He rushed and on his way, he met PW Mushtaq Ali and Mohd Mushtaq and found accused no.1 & two other persons running away. He and other V.D.C members fired 2/3 shots on appellant-accused, who also returned the fire.

7. **PW-8 MUSHTAQ ALI** has stated that on 6th of March' 2008 he heard the sound of a blast, which took place inside the house of PW-2. He went towards the house of PW-2 and in the way he met PWs Saddar Din and Munshi. They saw appellant-accused along with two other persons running away who could not be identified. Father and two daughters of PW-2 were dead inside the house. Mother, wife, daughter and son of PW-2 were injured. In cross examination deposed that grenade was not hurled in his presence.

8. **PW-9 MANZOOR AHMED** deposed that he reached on the spot after the blast. He and PW Bal Krishan accompanied the police as guides to arrest the appellant-accused, who was arrested at Chiroggali from the house of his uncle. A grenade

pin was recovered from the purse of the accused. He was taken to police station, Arnas. He made a disclosure statement in their presence and five grenades were recovered at the instance of appellant-accused. The witness admitted the arrest memo of appellant-accused EXT-P10/1, search memo EXT-P10/2, disclosure statement of accused no.1 EXT-10/3 and recovery memo EXT-P10/4.

9. **PW-10 BAL KRISHAN** has deposed on the same lines as deposed by PW-9 Manzoor Ahmed.

10. **PW-11 ABDUL HAMID** has deposed that there was a blast in the house of PW-2 Mohd Mushtaq, which was caused by appellant-accused. He found PW-2 lying outside his house. Police came on the spot at 11 p.m and injured were shifted to Kanthan.

11. **PW-12 SHOUKAT ALI** stated that two empty cartridges were recovered by the police near the house of PW-2. The witness admitted the contents of seizure memo EXT-P12 as true and correct.

12. **PW-13 GHULAM RASOOL** has stated that he reached at the place of occurrence after one hour

and saw three dead bodies and five others injured. He was declared hostile.

13. **PW-14 MOHD FAROOQ** has deposed that in the intervening night of 6th & 7th of March' 2008 he heard the noise in the locality and people were talking that the house of Habib Ullah was attacked. He has deposed that some splinters and a grenade pin were recovered from the room where the blast took place.

14. **PW-15 RAM KRISHAN** has deposed that he had issued the revenue extracts and admitted the contents of the document EXT-P15/1 to EXT-P15/3 to be correct.

15. **PW-16 ASHWINI KUMAR** has deposed that he was a member of the Board of doctors constituted for conducting the post mortem and admitted the post mortem reports EXT-P 16, EXT-P 16/I and EXT-P 16/II as correct. He has also examined the injured Zuna Akhter, Mohd Mushtaq, Ghulam Ahmed and Ghulam Fatima and admitted the injury certificates EXT-P16/IV to EXT-P 16/VII to be correct. He has stated that the injured had multiple splinter injuries on their person.

16. **PW-17 DR. MOHD SHABIR** has deposed that he was one of the doctors of the Medical Board constituted for conducting the post mortem of the deceased. He admitted the autopsy reports EXT-P16, EXT-P16/1 and EXT-P16/II to be correct. In cross examination deposed that the viscera was not collected and no permission was granted by the CMO to conduct autopsies of the deceased.

17. **PW-18 SUNIL KUMAR SHARMA** is the Investigating officer, has deposed that he received information at about 8.30 p.m that appellant-accused with the assistance of other militants had thrown a grenade in the house of one Mohd Mushtaq, PW-2, whose father and two daughters died on the spot. The report was entered in the Roznamcha-daily diary and a docket was sent for registration of case. He along with police party rushed to the place of occurrence and reached there at about 11.30 p.m. The injured were shifted to hospital. Nothing could be done because it was late night. He went on spot, prepared sketch memo, seized grenade lever and some splinters. Post mortem was got conducted and appellant-accused was arrested from Chiroggali. Purse,

grenade pin and identity card were recovered from the possession of the appellant-accused. Two empty cartridges of AK-47 were recovered around the scene of occurrence. Accused made the disclosure statement on 10th of March' 2008, came to be recorded and at the instance of the appellant-accused grenades came to be recovered. In cross examination deposed that he is not a ballistic expert. He had neither sealed the grenades nor sent the same to F.S.L. Liver and splinters recovered was that of grenade.

Prosecution has not examined PW-19 Mohd. Aslam Bhat PW.

The statement of appellant-accused came to be recorded under section 342 Code of Criminal Procedure (for short Cr.P.C) and was asked to enter upon defence. He has not led any evidence in his defence. Trial Court, after hearing the learned counsel for the parties, convicted the appellant-accused for the commission of offences punishable under Sections 302/307/121 R.P.C and Section 7/25 (IA) and Section 7/27 of Arms Act, 1959, came to be acquitted for the commission of offences punishable under Section 3/4/5 of Explosive Substances Act and under Section 120-B R.P.C The

prosecution has not questioned the judgment, thus the acquittal of the appellant-accused for the commission of offences punishable under Section 120-B R.P.C and Sections 3/4/5 of Explosive Substances Act has attained finality.

The question now arises for consideration is, whether there is sufficient evidence to bring home the guilt of the accused for commission of offences punishable under Sections 302/307 R.P.C?

As discussed hereinabove, all the eye witnesses have deposed that PW-2 Mohd Mushtaq and his family members were sitting inside the house, heard noise of barking of dogs, came out of the house and saw the appellant-accused with other persons standing in their compound. PW-2 Mohd Mushtaq asked Abdul Rashid as to why he was standing outside the house, have meals and stay for a night. But he replied that he had to go to his home. It was pitch dark so he needed some light. PW-2 and appellant-accused went inside the house and PW-2 asked his wife that he required wood for arranging light for the appellant-accused. Some other witnesses have stated that accused went inside the house whereas some have stated that he remained standing at the door of the house. All the witnesses have deposed that

appellant-accused hurled the grenade in the house, thereafter went outside and explosion took place in the house. Mohd Mushtaq PW-2 tried to come out but the door was bolted from outside and then he came out from the window.

The question is how Mohd Mushtaq PW-2 came out through the window after sustaining grievous injuries in the grenade blast when all the witnesses have deposed that he was in a critical condition and was lying in the compound outside the house, is a circumstance against the prosecution.

Learned counsel for the appellant-accused argued that PW-2 was a member of village defence committee. It was possible that the blast was caused by some kind of explosive kept in his house but to avoid the liability, appellant-accused has been roped in. In order to substantiate his argument, he has seriously argued that how PW-2 Mohd Mushtaq, came out through the window when he was critically injured and was not in a position to move. But the fact of matter is that as per the direct evidence available, as discussed hereinabove, it is established that the appellant-accused has hurled a grenade, which caused explosion inside the house of PW-2, causing death of three persons and critically

injuring five others.

The timing recorded in the post-mortem reports EXT-P16, EXT-P16/1 and EXT-P16/II is 1.40 p.m on 7th of March' 2008, which is impossible because it is not possible to conduct post mortem of three dead bodies at one time. It is also recorded in the post mortem reports EXT-P16, EXT-P16/1 and EXT-P16/II that were no external injuries on the bodies of the deceased.

The splinters seized at the site of occurrence, as alleged, have neither been sealed at the relevant point of time, nor sent to F.S.L for opinion. The said splinters have not been produced before the doctor-expert in order to establish that the splinters were of the grenade which was thrown by the appellant-accused. The prosecution has not put these splinters before the expert to seek opinion as to whether these splinters were the cause of death or have caused grievous injuries.

The basic foundation of the case is that the accused hatched a conspiracy in order to wage war and to kill PW-2 Mohd Mushtaq and his family members, is not proved by the prosecution.

In the given circumstances whether the conviction

recorded under Section 302 R.P.C merits to be upheld.

All the witnesses have deposed, as discussed above, that appellant-accused hurled a grenade, which exploded resulting into the death of three people and also caused grievous injuries to five others.

When there is direct evidence, the faulty investigation or discrepancies here and there cannot be made a ground for acquitting the accused, but may be a circumstance while awarding the sentence. Apex Court in case titled as ***Dhanaj Singh alias Shera and others V. State of Punjab, reported in AIR 2004 SC 1920*** has held that faulty investigation cannot be made a ground for throwing away the case of prosecution when there is direct evidence available.

Thus, we are of the considered view that prosecution has proved that appellant-accused caused death of three people and grievous injuries to five others. Accordingly, the finding returned by the trial Court is upheld.

Now coming to conviction under Section 307 R.P.C. There is sufficient evidence on the file which proves beyond reasonable doubt that the injured have sustained grievous injuries and that their survival is a

miracle. Thus, the appellant-accused came to be rightly convicted for the commission of offence punishable under Section 307 R.P.C

Prosecution has failed to prove the charge of conspiracy, thus, the trial Court has rightly acquitted the accused for the commission of offence punishable under Section 120-B R.P.C thus the basic foundation of the case fails.

There is nothing on the file suggesting the fact that the appellant- accused has waged war in order to hold him guilty for the commission of offence punishable under Section 121 RPC. The charge against the appellant-accused was that he has hatched a conspiracy to wage war. The said charge has not been proved, accused stands acquitted and that has attained finality. Thus, conviction under Section 121 R.P.C merits to be set aside and same is accordingly set aside.

Conviction under Section 7/25 Arms Act, 1959 merits to be set aside for the following reasons:

The investigating officer has admitted that he has neither sealed the arms and ammunition nor sent to F.S.L for analysis. Thus, conviction cannot be recorded. We are fortified by a case titled as ***Jasbir Singh V.***

State of Punjab reported in ***AIR 1998 SC 1660***. It is apt to reproduce para no.3 of the said judgment herein:-

> ***"3. What is contended by the learned counsel for the appellant is that the prosecution evidence itself shows that the pistol and the cartridges alleged to have been recovered from the appellant did not have any number or some distinctive mark on them and after their seizure by the police they were not sealed. Thus the identify of the weapon and the cartridges seized and the weapon and cartridges produced before the Court was not established by the prosecution. Having gone through the evidence, we find that the contention raised on behalf of the appellant is correct and, therefore, deserves to be accepted. The pistol and the cartridges did not have any mark or any number on them and after seizing the same police had not thought it fit to wrap them and apply a seal cover them. No explanation in that behalf was given by the prosecution witnesses. This aspect was not considered by the trial Court. As the identity of the incriminating articles has not been established by the prosecution, we allow this appeal, set aside the conviction of the appellant both under Section 5 of TADA Act and 25 of the Arms Act and acquit him of all the charges leveled against him."***

We, thus, hold that prosecution has failed to prove the commission offence punishable under Sections 7/25 Arms Act, 1959 as such, the conviction for the commission of the aforesaid offences is set aside.

Now, the question arises whether the case in hand falls within the ambit of rarest of rare cases and whether the death sentence awarded by the trial Court can sustain?

Prosecution has failed to prove that the accused

has hatched a conspiracy or has waged a war. There is nothing on the file suggesting the fact that the accused was involved in any militancy related activity or has done any act which would be considered that the conduct of the accused was or is dangerous. But, there is evidence on the file, which proves that the relations between the appellant-accused and deceased family were cordial.

Apex Court in a case titled as ***Swamy Shraddananda alias Murali Manohar Mishra Vs. State of Karnataka, reported as AIR 2007 SCW 4513*** has laid down as to which case falls within the definition of rarest of rare cases. It is apt to reproduce para no. 97 & 99 of the said judgment herein:

> ***"97. Keeping the abovementioned other characteristics of the crime, we now delve into whether this instance can be categorized as a "rarest of rare" murder. The question is whether murder of wife for the purpose of usurping property is a rarest of rare crime statistically. It is not to say that rarest of rare doctrine only has a statistical dimension i.e. incidence of particular type of murder in a given sample; rarest of rare benchmark can also be used in the context of other parameters such a brutality, planning, society's reaction et al. Facets relating to nature of the crime have already been explained in terms of the few parameters mentioned just now. Therefore we attend to the incidence aspect. It cannot be conclusively said that murder of wife for usurping property is a particularly rarest of rare incident. It could, of course, be a rare incident.***
>
> ***99. In fact, Appellant should not have been heard at that stage. The stage of***

> ***hearing an accused under Section 235 (2) of the Code is after the judgment of conviction is pronounced and not prior thereto. Appellant herein made a confession before the High Court. The High Court took the same into consideration in the main judgment which could not be done. He had been brought before the High Court only for purpose of fulfilling the requirement of sub-section (2) of Section 235 of the Code of Criminal Procedure. His statement was taken during midst of hearing. He knew the implications thereof. Despite the same, he made a categorical statement that he was responsible for burying the dead body. He gave an explanation, which might not have found favour with the High Court, but the fact that he had made a confession at least accepting a part of the offence could not have been ignored at least for the purpose of imposition of punishment. He is more than 64 years' old. He is in custody for a period of 16 years. The death sentence was awarded to him by the trial court in terms of its judgment dated 20.05.2005. In a situation of this nature, we are of the opinion that imposition of a life imprisonment for commission of the crime under Section 302 shall serve the ends of justice."***

Apex Court in another case titled as ***Subhash Ramkumar Bind @ Vakil and another V. State of Maharashtra,*** reported in ***AIR 2003 SC 269,*** in para 26, of the said judgment has held as under:-

> ***"26. Ours being a civilised society- a tooth for a tooth and an eye for an eye ought not to be the criterion and as such the question of there being acting under any haste in regard to the capital punishment would not arise: Rather our jurisprudence speaks of the factum of the law Courts being slow in that direction and it is in that perspective a reasonable proportion has to be maintained between the heinousness of the crime and the punishment. While it is true punishment disproportionately severe ought not to be passed but that does not even clothe the law Courts, however, with an option to award the sentence which would be manifestly inadequate having due regard to the***

> ***nature of offence since an inadequate sentence would not subserve the cause of justice to the society. In the contextual facts, we do not find the brutality of such a nature so as to exercise the discretion of passing an order of capital punishment- undoubtedly brutality is involved but that brutality by itself will not bring it within the ambit of the rarest of the rare cases. On the wake of the aforesaid and having regard to the nature of the offence and the methodology adopted, we are convinced that the punishment awarded to the appellants herein is in excess of the requirement of the situation and as such while recording out concurrence with the finding as recorded by the High Court in the judgment impugned, as regards the guilt of the accused under Section 302 read with Section 34 of the Indian Penal Code, we are inclined to modify the sentence of death to that of life imprisonment under Section 302 read with Section 34 of the Indian Penal Code as against the appellants herein, and it is ordered accordingly. Except however, as above, this appeal fails and is dismissed."***

Keeping in view the law laid down by the Apex Court coupled with the facts and circumstances of the case, as discussed hereinabove, we are of the considered view that the case in hand does not fall within the category of rarest of rare cases.

In the given circumstances, appellant-accused is sentenced to life imprisonment for the commission of offence punishable under Section 302 R.P.C. Sentence awarded for the commission of offences under Section 307 R.P.C and 7/27(3) Arms Act are maintained and shall run concurrently.

Accordingly, the impugned orders of conviction and sentence are modified and reference is answered.

Disposed of.

Send down the record.

(SUNIL HALI)
JUDGE

(MANSOOR AHMAD MIR)
JUDGE

Jammu:
07-10-2010
Sanjay