

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

Cr. Appeal no. 31/2010
c/w
Confirm No. 13/2010

Date of order: 23/12/2013

Atta Mohammad

V.

State of J&K

Coram:

**Hon'ble Mr. Justice Hasnain Massodi, Judge
Hon'ble Mr. Justice Bansi Lal Bhat, Judge**

Appearing Counsel:

For the petitioner(s)	:	Mr. D. K. Khajuria and Mr. Anuj Mahajan, Advocates
For the respondent(s)	:	Mrs. Seema Shekhar, AAG.

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| 1. Whether to be reported in
Press/Journal/Media | : | Yes |
| 2. Whether to be reported in
Digest/Journal | : | Yes |

Per Massodi, J

1. Shri Atta Mohammad S/o Sh. Nizam Din R/o Lohai, Tehsil Billawar – appellant herein, was arrested by Police Station Billawar sometime in 1st week of November, 2003 in connection with case FIR no. 84/2003 under Sections 376/363 RPC. During his custodial interrogation, appellant allegedly admitted to have been a member of militants outfit Hizbul Muzahideen and to have alongwith other militants, namely, Mohd. Mushtaq *alias* Bittoo, Mohd. Hussain, *alias* Junaid, Aijaz Anjum *alias* Hyder and Mohd. Abbas *alias* Qasid in May, 2003 kidnapped one Kamlesh Kumar *alias* Kamloo from a forest in Bani area and later done him to death and buried dead body

near the hideout set up by him and other militants in the forest. Sub Inspector, Kishor Lal, Incharge Police Station Billawar on 08.11.2003 recorded his statement and addressed a docket through Jagat Singh Constable 185 to SHO Police Station Bani informing him about the disclosure statement made by the appellant. Alongwith the docket, disclosure statement of appellant recorded in presence of Bhagat Ram S/o Makoru R/o Madhon and Chet Ram S/o Mangu R/o Dungal was also forwarded to SHO Police Station, Billawar.

2. The receipt of the docket and the disclosure statement prompted Police Station, Bani to register case FIR no. 37 of 2003 under Sections 302/34/147/148 RPC. The investigation was taken over by SHO Police Station, Bani. The Investigating Officer took over custody of the appellant from Police Station, Billawar recovered the dead body of Kamlesh *alias* Kamloo S/o Makoru R/o Madhon from the forest allegedly at the instance of the appellant and after recording statements of witness and taking other connected steps, concluded investigation as proved against the appellant and three other accused, namely, Mohd. Mushtaq *alias* Bittoo, Mohd Hussain *alias* Junaid and another accused with code name Arshid. However, Mohd. Mushtaq, Mohd. Hussain and code

name Arshid could not be traced during investigation and were shown as absconding. The chargesheet was presented before Judicial Magistrate First Class, Bani in presence of appellant and in absence of other accused. The case was committed to the Court of Sessions on 31.01.2004.

3. The case set up by the prosecution in the charge sheet was that the appellant and other militants were members of outfit of Hizbul Muzahideen and operating in Bani forest; that Shri Kamlesh Kumar *alias* Kamloo S/o Makoru R/o Madhon Billawar on 12.05.2003 went to Village Dungal to purchase corn (maize); that after making the purchase he on his way back to his village decided to pluck leafy vegetables (Krode) from the local forest and while doing so reached Mand Nallah; that the group of militants who had set up a hideout in the forest spotted the deceased and taking him to be an informer of Security Forces caught hold of him, strangled him to death and thereafter buried his dead body in a *Khud* near their hideout. Two of the militants involved in the occurrence, namely, Aijaz Anjum *alias* Hyder and Mohd. Abbas *alias* Qasid were latter killed in an encounter on 08.11.2003. The other three militants, namely, Mohd. Mushtaq *alias* Bittoo, Mohd. Hussain *alias* Junaid and

unknown militant *alias* Arshid were stated to be still active but not traceable. It was alleged that the dead body of the deceased was recovered at the instance of the appellant from the local forest in presence of prosecution witnesses and subjected to postmortem examination. Prosecution claimed to have collected sufficient material during investigation, connecting the appellant and his accomplices with the crime. The trial Court proceeded under Section 512 Cr.PC against the accused except the appellant.

4. The appellant was formally charged of the offence punishable under Sections 302, 201, 147, 34 RPC on 06.08.2004. The appellant denied the charge and asked for a regular trial. The other two accused, namely, Mohd. Mushtaq *alias* Bittoo and Mohd. Hussain *alias* Junaid (accused 2 & 3) were produced before the trial Court on 17.05.2006. They were formally charged of the offences punishable under Sections 302/201/147 RPC on 20.07.2006. They pleaded not guilty. However, the accused opted not to cross examine the witnesses who had appeared in the witness box in their absence and were already cross examined by the counsel for the present appellant (accused no. 1).

5. Prosecution examined as many as 14 witnesses to substantiate its case. The witnesses examined, included PWs Gambhir – brother of the deceased, Khemraj, Radhey Sham, Dhani Ram and Jia Lal all residents of Village Madhon Billawar, to prove that the deceased had left his village on 12.05.2003 for Village Dungal and did not return to his village and later the dead body of the deceased was recovered at the instance of the appellant. Other prosecution witnesses who crossed the witness box were Gias-u-din, Naib Tehsildar (Executive Magistrate) to prove the disclosure statement and the recovery memo relating to dead body of the deceased. Dr. Radha Krishan who accompanied the Investigating Officer and his team to the place of the recovery of the dead body and conducted postmortem examination. PW Davinder Singh who on 09.11.2003 was posted as SHO, Police Station, Bani and received a docket from Police Station, Billawar registered case FIR no. 37/2003 under Sections 302/34/147/148 RPC and took over investigation and PW Liaquat Ali, local Patwari who visited the place of the recovery of the dead body and prepared the site plan.

6. The circumstances appearing in the prosecution evidence were put to the appellant and other two accused and they given an opportunity to offer their explanations.

The appellant in his statement refuted veracity of the prosecution evidence and labelled the prosecution evidence as a bundle of lies concocted at the instance of the Investigating Officer. The other two accused insisted that there was no evidence against them and they were falsely implicated in the case. The appellant and other accused did not adduce any evidence in their defence.

7. The trial Court on going through the prosecution evidence and hearing learned Public Prosecutor and the defence counsel held the prosecution to have proved its case beyond reasonable doubt against the appellant. The prosecution evidence was, however, held not to connect other two accused, namely, Mohd. Mushtaq *alias* Bittoo and Mohd. Hussain *alias* Junaid with the alleged occurrence. The trial Court accordingly convicted the appellant of the offence punishable under Section 302 RPC and acquitted other two accused of all the charges. The trial Court judgment dated 29.11.2010 was followed by the order dated 30.11.2010 whereby the appellant was sentenced to imprisonment for life and a fine of Rs.1,00,000/-, half of which was to go to the next of the kins of the deceased.

8. The appellant questions the trial Court judgment dated 29.11.2010 and the order dated 30.11.2010 in

Criminal Appeal on hand, on the grounds urged in the memo of appeal. Learned Sessions Judge, Kathua has also submitted record for confirmation in terms of Section 374 Code of Criminal Procedure. The Criminal Appeal and Confirmation are, therefore, taken up together for consideration.

9. The grounds urged in the appeal are of routine type as come across in an appeal questioning conviction and sentence. It is pleaded that the judgment and sentence impugned suffer from mis-appreciation of evidence. Learned Trial Judge is said to have relied on evidence that did not inspire confidence and ought to have been rejected. The trial Judge is also said to have ignored serious contradictions in the prosecution evidence and placed reliance on the disclosure statement, unmindful of mandate of Section 27 Evidence Act.

10. We have gone through the judgment and sentence called in question in the Criminal Appeal on hand. We have also gone through the trial Court record and have heard learned counsel for the parties at length.

11. The prosecution at the time it filed the chargesheet, proposed to rely on testimony of 13 witnesses, listed in Column 5 of the chargesheet and expected to cross the witness box, to bring home guilt to the accused. All the

witnesses with the only exception of Shri Amit Kumar, Dy.SP, CRPF B/12 Battalion appeared in the witness box. The prosecution to substantiate its case proposed to prove following links that according to it connected the appellant and his accomplices with the murder of Kamlesh Kumar *alias* Kamloo S/o Makoru R/o Madhon Billawar:

- i) that the deceased left his village on 12.05.2003 for Village Dungal to purchase corn.
- ii) that the deceased went missing and a missing report was lodged at Police Station, Bani on 20.05.2003.
- iii) that the appellant while in Police custody in case FIR no. 84/2003 under Sections 376/363 RPC, at Police Station, Billawar made a disclosure statement and volunteered to help the police to recover dead body of the deceased.
- iv) that the deceased made a statement in presence of the prosecution witness during investigation of case FIR no. 37/2003 under Sections 302/34/147, 148 RPC, Police Station Bani and thereafter led the Police to the place

where dead body was buried under the heap of soil, leaves and bushes and the dead body was recovered at his instance.

v) that the dead body on postmortem examination and the examination made by X-ray experts was found to be that of a middle aged man and clothes and shoes found on the dead body were identified by the prosecution witnesses to have been on deceased at the time he left his residence on 12.05.2003 for Village Dungal.

12. PW Gambhir – brother of the deceased deposed before the trial Court that the deceased left for Dungal to purchase Corn and did not return; that a missing report was lodged at Police Station, Malhar. The witness finds support from other prosecution witnesses who hail from Madhon. The witnesses include Khemraj S/o Sripat R/o Dungal, Radhey Sham S/o Achroo R/o Dungal – Local Chowkidar, Chet Ram S/o Bhima R/o Dungal, Jeet Ram S/o Mangtu R/o Madhon, Bhakt Ram S/o Makoru – Brother of the deceased, Dhani Ram S/o Jagdev R/o Dungal – a relation of the deceased and Jia Lal S/o Skaro R/o Madhon. The statements made by the witnesses also find support from the EXPW4-BR – the missing report lodged at Police Station, Malhar on 20.05.2003 by PW

Bhagat Ram S/o Makoru Ram R/o Madhon – brother of the deceased.

13. The first disclosure statement made by the appellant before the Incharge, Police Station, Billawar on 08.11.2003 is duly proved by PWs Chet Ram and Bharat Ram. The second disclosure statement, recorded by SHO Police Station, Bani on 10.11.2003, after the appellant was handed over by Police Station, Billawar to Police Station, Bani, seemingly, due to abundant cautioned – EXPW8-RS, has also been duly proved by the PWs Radhey Sahm, Bhagat Ram & Chet Ram. It is important to note that the place of burial of the dead body was disclosed by the appellant in EXPW6-CR recorded by Police Station Billawar as somewhere in Madh Nallah Forest and not specifically identified. It, therefore, does not strip the subsequent disclosure statement i.e. EXPW8-RS of its evidentiary value. Had the disclosure statement EXPW6-CR identified the exact place where dead body was buried with sufficient precision, one would argue that as such a place was already known to the Investigating Officer, there was no need to record a second disclosure statement and such a statement was of no evidentiary value. However, as already pointed out the exact place was not and would not have been sufficiently

identified in the disclosure statement, the disclosure statement having been duly proved or is of immense evidentiary value.

14. The Investigating Officer alive to the imperatives of fairness and transparency in investigation decided to take local Executive Magistrate and Medical Doctor with him after disclosure statement of the appellant was recorded and the appellant volunteered to take the Investigating Officer to the spot where the dead body was buried.

15. The prosecution witnesses including PWs Gias-u-Din, Executive Magistrate, Chet Ram, Radhey Sham and Khemraj have claimed to have been present when the appellant pointed to the place where dead body was buried and that the dead body was recovered at his instance. The recovery memo EXPW3-GD has been duly proved by the witnesses present on spot. It in addition to signatures of witnesses bears seal and signature of Shri Gias-u-din, Executive Magistrate 1st Class, Bani. The operation to recover the dead body of the deceased was not carried out in a hush - hush manner or clandestinely so as to raise suspicion about its authenticity. It, on the other hand, was carried out with the aid and assistance of the Central Reserve Police Force and local police as the

place where dead body was buried was disclosed by the appellant to be in a forest infested with militants. Apart from reliability of testimony of the witnesses who were present at the time of recovery of the dead body, the mode and manner in which the dead body was recovered at the instance of the appellant, make disclosure and recovery memo pursuant to such disclosure, free from any doubt.

16. The dead body was identified as that of Kamlesh Kumar *alias* Kamloo S/o Makoru R/o Madhon by his brother Shri Bhagat Ram S/o Makoru R/o Madhon in presence of Gambhir S/o Makoru R/o Madhon also brother of the deceased Chet Ram S/o Bima – Sarpanch Village Dungal and Khemraj S/o Sripat – Lambardar Village Dungal. All these witnesses have crossed the witness box. The clothes and shoes found on the dead body have been identified as that put on by Kamlesh Kumar *alias* Kamloo at the time he left his residence. EXPW5-T/I recorded on 10.11.2003 stands duly proved by all the witnesses to the memo.

17. The prosecution witnesses to different events during investigation and to the events there before, have appeared in the witness box and faced cross examination. They have withstood the cross examination

and their evidence has remained un-impeached and unshaken. Their testimony appears truthful and natural, cogent and convincing. The discrepancies and contradictions in the description of clothes and other aspects are minor in character and, therefore, instead of allowed to be magnified out of proportion are to be taken as indicative of veracity of the prosecution witnesses. Such small discrepancies and contradictions are bound to appear when the witnesses' are called upon to narrate the events that took place much before they stand in the witness box.

18. The trial Court against the above backdrop had before it cogent, convincing and creditworthy evidence - both ocular and documentary in shape of testimony of as many as 13 witnesses and EXPW4-BR, EXPW6-CR, EXPW8-RS, EXPW5-T, EXPW13 -GD, EXPW-RS/3 - EXPW5 -T/I, EXPW15-AL/5, to help the prosecution prove its case against the appellant. The trial Court in view of overwhelming prosecution evidence in support of the prosecution case, was left without any option but to record conviction against the appellant. The trial Court has made a thorough and threadbare discussion of evidence brought before it and on testing the evidence on the anvil of case law governing appreciation of evidence

in case like one before the trial Court, rightly held the prosecution to have proved its case against the appellant beyond reasonable doubt.

19. We for the reasons discussed do not find a case made out for taking a view different from one taken by the trial Court. We, therefore, find no merit in the appeal.

20. The appeal is, accordingly, dismissed and the trial Court judgment dated 29.11.2010 and order dated 30.11.2010 are upheld.

21. The conviction and sentence are confirmed and Confirmation no. 13/2010 disposed of accordingly.

(Bansi Lal Bhat)
Judge

(Hasnain Massodi)
Judge

Jammu
23.12.2013
Parshant