

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

**Case:-Cr. Appeal No. 48/2011 c/w Confirm. No.
17/2011**

Date of Decision:14.05.2013

Lokesh Sharma, age 34 years Vs. **State** through
S/o Om Parkash Advocate General
R/o Gangyal, Jammu
At present Central Jail
Kote Bhalwal, Jammu.

Coram:

**Hon'ble Mr. Justice Virender Singh
Hon'ble Mr. Justice Bansi Lal Bhat**

Appearing counsel:

For the Appellant(s) : Mr.Rajneesh Oswal, Advocate.
For the Respondent(s) : Mrs. Z. S. Watali, Dy. AG.

- i) Whether approved for reporting in Press/Journal/Media : Yes/No

ii) Whether to be reported in Digest/Journal : Yes

Per Virender J.

1. At the very outset, it needs to be mentioned here that the instant appeal has been taken by us out of turn over other criminal appeals for the reason that the appellant of this case is languishing in jail for the last about 13 years, out of which, more than 11 years have been consumed by the Trial Court.
2. **One Lokesh Sharma** alias Pappu S/o Om

Parkash R/o Gangyal, District Jammu (hereinafter to be referred to as '**accused**') stands convicted vide impugned judgment/order dated 18.11.2011 & 21.11.2011 respectively of learned Principal Sessions Judge, Jammu for the offences punishable under section 302 RPC and Sections 4/25 Arms Act for allegedly committing the murder of one **Jagar Kumar @ Ujagar Ram S/o Bua Datta R/o Shanker Colony Gangyal** (for short '**deceased**') with a **Kirch** (sharp-edge weapon) on 14.08.1999 at about 10 P.M. in Shanker Colony Gangyal falling with the jurisdiction of Police Station Gangyal. The sentence slapped upon him is life imprisonment under section 302 RPC and a fine of Rs. 10,000/-. Even under the Arms Act also, the learned trial Court has sentenced him for the same dose. This apparently appears to be an irregularity committed by the learned trial Court. Being aggrieved of the judgment of conviction and sentence, he has knocked the

door of this Court through **Criminal Appeal No. 48 of 2011**. The Learned Session Judge has also sent the entire record to this Court for confirmation of the sentence in terms of Section 374 Criminal Procedure Code (State Code). Hence, **Cr. Reference No. 17/2011**.

Brief facts:-

3. **PW Rano Devi** is the wife of the deceased and the first informant of the occurrence as well. She, on 15.08.1999 at 01.30 A.M. (Morning hours), went to Police Post along with the deceased (who at that time was in an injured condition) and verbally reported about the incident to the police, which was reduced into **Report No.30.** It is alleged therein that the accused, who is residing in Shanker Colony, Gangyal, which is adjacent to her house, was having an old enmity with her husband and that on 14.8.1999 her husband who was running a Rehri of Potato Cutlet (Aloo-Ticky) near power house Industrial Area, Gangyal, as usual closed his shop and came back home.

Thereafter, in order to purchase certain vegetables, he went to the market. It is then alleged that as soon as he went out of the house, she (Rano Devi) heard hue and cry of her husband, upon which, she along with her son reached the spot at a very fast speed and saw that the accused, who was armed with '**Kirch**' in his hand, attacked her husband in his stomach one after another, as a result thereof, he fell on the ground in a pool of blood. She then states that after hearing hue and cry, other persons had also reached the spot and thereafter accused ran away. On the aforesaid allegations, the concerned police lodged the report under section 307 RPC and Section 4/25 Arms Act. Injured, was referred to Govt. Medical College, Jammu for treatment. The copy of the report lodged was sent separately to Police Station Gangyal, Jammu through Chaman Lal SGCT No. 633 for registration of formal FIR.

4. **PW Bahadur Singh ASI** took up the

investigation of the case, went to GMC Hospital, Jammu where the attending doctor to injured-Jagar Kumar declared him unfit to make a statement. ASI Bahadur Singh then went to the place of occurrence, prepared site plan, seized blood-stained earth and completed other required formalities including recording of statement of certain witnesses. On the same day i.e. 15.8.1999 Jagar Kumar succumbed to the injuries in the hospital at 10.15 A.M., as such, the offence was altered to Section 302 RPC from Section 307 RPC.

5. **PW Dr. Sunil Gupta** conducted post mortem of the deceased at about 5.05 P.M on 15.08.1999 itself. The dead body was identified by PWs Krishan and Darshan Lal.
6. **PW Pervez Ahmed** SHO Police Station Gangyal also partly investigated the present case. He arrested the accused on 23.08.1999, who in custody of the police, made disclosure statement with regard to concealment of Kirch used by him in the occurrence which he had

kept at a particular place, pursuant thereto, he got the same recovered. It was sent to FSL. This witness has also recorded the statement of certain witnesses during investigation.

7. All the articles which were sent to the Scientific Officer (FSL) Jammu, were found to be stained with human blood, which belonged to blood group (A) except certain articles of which the Scientific Officer could not determine the origin and the group of the blood, the material being in disintegrated.
8. During investigation, the police also recorded statement of **Rinku**, son of the deceased, **Om Parkash**-brother-in-law of the deceased and **Darshan Lal** another brother-in-law of the deceased. These witnesses, as per the prosecution case, happened to be the eye witnesses to the occurrence.
9. It would be worthwhile to mention here that Rinku, son of the deceased, has been given up by the prosecution as unnecessary whereas aforesaid Om Parkash and Darshan Lal, the

two brothers-in-law of the deceased, died their natural death before they could step in the witness box. So primarily prosecution case is hinging upon the evidence of Rano Devi, wife of the deceased. Even the trial Court has also entered into discussion vis-à-vis her evidence only and Mr. Rajnesh Oswal, learned counsel for the accused, has also laid his entire stress in dislodging the prosecution case on this count alone describing it to be very weak for the purpose of holding the accused guilty. Thus, our main focus will be on the evidence of Rano Devi only. We, therefore, do not feel the necessity of reproducing the entire evidence in our judgment so as to make it heavy/weighty unnecessarily but at the same time we would be cautious enough so that no material evidence is left by us in our exercise of re-appreciating the prosecution case, the appeal being continuation of trial.

10. Before we enter into a detailed discussion referring to the submissions advanced by Mr.

Oswal, learned counsel for the accused and Mrs. Watali, learned Dy. AG for the State, it would be useful to note the injuries of the deceased as observed by the Doctor of Autopsy. Those are:-

1. Incised wound 2.5 x1cm x1cm on left side of chest, 16 cm from midline and 23 cm from top of left shoulder.
 2. stitched wound 2.5 cm in length over left side of abdomen 20 cm from midline and 29 cm from top of left shoulder.
 3. incised wound 2x1x1 cm over left side of abdomen, 08 cm from midline and 39 cm from left collar bone.
 4. incised wound 1.5x1x1cm over left side of abdomen, 14cm from midline and 43 cm from left collar bone.
 5. stitched wound transversely placed 2.5. cm in length over right side of abdomen, 1 cm from midline and 4 cm above pubic bone.
 6. stitched would 6 cm in length transversely placed on right side of abdomen, 1 cm from midline and 39 cm from top of Rt. Clavical.
11. In the opinion of Doctor of Autopsy, the cause of death in this case is haemorrhagic shock as a result of injury to spleen and other viscera.

The time which had elapsed between death and post mortem is noticed as 5 hours. The post mortem report is exhibited as EXPW-SK.

Submissions by either side:-

12. Mr. Oswal, learned counsel for the appellant, has utilized his entire energy in dislodging the evidence of Rani Devi wife of the deceased dubbing her as totally unreliable witness, who, according to him, is not an eye witness to the occurrence at all and subsequently imported. He fairly submitted that no doubt the conviction can be based on the evidence of sole eye witness provided it is trustworthy. But according to him, in the case at hand, not only the evidence of Rano Devi is unreliable, it is not getting any corroboration from any other source as well, inasmuch as the son of the deceased, who was also projected as an eye witness to the occurrence, has been given up by the prosecution, whereas the other two witnesses namely Om Parkash and Darshan Lal, brothers-in-law of the deceased, who

otherwise happened to be the chance witnesses, incidentally being present in the house, could not step into the witness box to unfold the prosecution case, may be because of their natural death. Mr. Oswal, thus, submitted that the evidence of Rano Devi should turn out be of a very high quality and calibre so as to call her a ‘sterling witness’ for holding conviction.

13. Mr. Oswal, at the very outset, submitted that the fundamental flaw in the prosecution case is that neither the initial statement of Rano Devi, which was recorded in Report No.30 in the Police Post has been proved by the prosecution nor the formal FIR registered on the basis of the said report and that this basic flaw in itself would be enough to reject the prosecution case out rightly.

14. Mr. Oswal then submitted that besides the aforesaid flaw, even the evidence of Rano Devi is unbelievable on many counts. He submitted that what ever she has stated in the Court, it

is contrary to the Site Plan prepared by the Police as she has shown the place of occurrence at a distance of 200-300 yards from her house, which is near the house of one Kuldeep Raj, whereas in the Site Plan prepared by the Investigating Officer, there is no mention of house of Kuldeep Raj. Therefore, it can be comfortably said that the situs of occurrence as stated by Rano Devi is altogether different from the one as shown by the investigating agency and this goes to show that Rano Devi, in fact, was not an eye witness to the occurrence.

15. Mr. Oswal, in order to strengthen his arguments, further launched an attack on the conduct of Rano Devi calling it as unnatural conduct. He submitted that it would not appeal that after the occurrence, she would leave her husband at home and go to the Police Station to lodge the report and when asked by the police, she came back and then went to the police station with her husband.

He submitted that it appears to be most unnatural that her husband after receiving serious injuries that too in the vital part of his body would be left unattended by Rano Devi or for that matter by Om Parkash and Darshan Lal, the brothers-in-law of the deceased, or even Rinku-the son of the deceased and would go to the Police Station first of all. Rather this goes to show that, in fact, Rano Devi had not seen the occurrence and was subsequently brought forward to be a witness to the occurrence being the most interested witness.

16. Learned counsel further submitted that even otherwise whatever is stated by Rano Devi is contradicted by PW Bahadur Singh ASI, who had initially investigated the case as he, in his examination in chief, has stated that injured was taken to the hospital by his heirs before his reaching the spot and from there he along with other police personnel had reached Govt. Medical College & Hospital, Jammu, whereas Rano Devi when stepped into the witness box

has given altogether a different story. Learned counsel has drawn the attention of the Court to the examination in chief of Rano Devi and has also taken us through the evidence of ASI Bahadur Singh.

17. Mr. Oswal then submitted that Rano Devi is very categoric in stating in her statement in the Court that when they raised an alarm, accused left the spot and he had thrown the Kirch (weapon of offence) at the spot, whereas according to Pervez Ahmad SI, the accused on 23.08.1999, while in custody, made a disclosure statement with regard to the concealment of the Kirch and thereafter got the same recovered. Learned counsel submitted that the recovery of weapon of offence as shown by the prosecution, thus, falls on the ground and this material flaw also dents the prosecution case.
18. Pointing out the aforesaid flaws in the prosecution case, Mr. Oswal contended that the evidence of Rano Devi, the sole eye witness

to the occurrence, is not of very high quality to believe it without any tinge of doubt. Therefore, it would not be safe to hold conviction of the accused on this weak piece of evidence.

19. In support of his submissions, Mr. Oswal has relied upon the following judgments:-

- i) **'Rai Sandeep alias Deepu Vs. State (NCT of Delhi)' reported in (2012) 8 Supreme Court Cases page 21;**
- ii) **'Lallu Manjhi and another Vs. State of Jharkhand' reported in AIR 2003 Supreme Court page 854; and**
- iii) **'Hasan Murtza Vs. State of Haryana' reported in (2002) 3 Supreme Court Cases page 1.**

20. Per contra, Mrs. Watali, learned Dy. Advocate General, submits that no doubt the evidence of Rano Devi is not getting support from any independent source, the two witnesses being dead before they could be examined and Rinku son of the deceased given up by the

prosecution, but Rano Devi happens to be most natural witness, who in no time, reached the spot after hearing the hue and cry in the Gali and thereafter saw the accused inflicting injury on the deceased. Mrs. Watali then submitted that there was motive in the bosom of the accused viz., to commit this offence, whereas there is no motive for Rano Devi to falsely implicate the accused in this case and leave the real culprit. She then submitted that no doubt certain contradictions have crept-in in the evidence of Rano Devi, but this do not make her evidence untrustworthy and if the evidence of this sole witness is tested on the touchstone of human probability, it does not leave any room of doubt which would make the prosecution case doubtful on any count. Mrs. Watali, thus, prays for dismissal of the instant appeal.

Our Discussion:-

21. After having considered the rival contentions of either side and rescanning the prosecution

evidence minutely, we are of the considered view that the prosecution has been able to prove its case against the accused beyond any shadow of doubt, the reasons for arriving at that conclusion are detailed herein below.

22. No doubt, in the case at hand, neither the initial Report No.30 dated 15.08.1999 registered at the instance of PW Rano Devi, was got proved when she stepped into the witness box nor the formal FIR which was got registered on the basis of the said Report No.30 is proved when PW Parvez Ahmed SHO Police Station Gangyal stepped into the witness box, but this appears to be a lapse on the part of the prosecution during the trial. Nevertheless, it would not affect the testimony of eye witness given in the Court which has to be assessed on the basis of its own merits. FIR is not the **be all** and **end all** of the prosecution case. It is an intimation of the occurrence asking the police to swing into action. What we have noticed is that when

Rano Devi stepped into the witness box, she categorically stated that she told the whole incident to the police. She, however, does not say that it was recorded by the police or her signatures or thumb impression was obtained. However, in the cross-examination from the side of defence, on a specific question put to her, she made it very clear that on the day of occurrence itself, her statement was recorded by the police and beside this, no other statement was recorded. Therefore, the argument advanced by Mr. Oswal, learned counsel for the accused, taking it as a fundamental defect in the prosecution case, perhaps, cannot be accepted by us.

23. Being that the fact position, what is now required to be appreciated is whether the evidence of Rano Devi, the sole eye witness to the occurrence, is reliable and stands the test of credibility beyond any shadow of doubt so as to hold the conviction of the accused or not. Mr. Oswal, no doubt, made an attempt to

demolish her evidence pointing out certain flaws in it, but in our considered view, those are not so vital so as to dislodge the prosecution case in toto.

24. It goes without saying that no one else can be more close to the deceased than Rano Devi, his wife. What is to be appreciated is as to whether this related witness is a natural witness or not. Therefore, Court should examine the evidence of a related witness with greater care and caution than the evidence of a third party disinterested or unrelated witness. This is all what is expected and required in appreciating the evidence of related or interested witness.
25. In '**Dalip Singh Vs. State of Punjab**' reported in **AIR 1953 SC 304**, the Hon'ble Apex Court observed, without any generalization, that a related witness would ordinarily speak the truth, but in the case of an enmity there may be a tendency to drag in an innocent person as an accused. It is then observed that each case has to be considered on its own facts. It was

observed:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tenancy to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

26. How the evidence of related witness should be

looked into was considered by Hon'ble Supreme Court in '**Darya Singh Vs. State of Punjab**' reported in **AIR 1965 SC 328** and it was observed that a related or interested witness may not be hostile to the assailant, but if he is, then his evidence must be examined very carefully and all the infirmities taken into account. It was observed that where the witness shares the hostility of the victim against the assailant, it would be unlikely that he would not name the real assailant but would substitute the real assailant with the 'enemy' of the victim. It was further observed:-

"It may be relevant to remember that though the witness is hostile to the assailant, it is not likely that he would deliberately omit to name the real assailant and substitute in his place the name of the enemy of the family out of malice. The desire to punish the victim would be so powerful in his mind that he would unhesitatingly name the real assailant and would not think of substituting in his place the enemy of

the family though he was not concerned with the assault. It is not improbable that in giving evidence, such a witness may name the real assailant and may add other persons out of malice and enmity and that is a factor which has to be borne in mind in appreciating the evidence of interested witnesses. On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars.”

27. It is, thus, clear that merely because the witness happens to be related to the deceased, that cannot be a ground to discard his evidence. In other words, the relationship is not a factor to affect the credibility of a witness but the Court has to scrutinize the evidence of such witness meticulously with a little care.
28. We are conscious of the fact that in the present case, two brothers-in-law of the deceased died their natural death before they

could step into the witness box and the son of the deceased also given up by the prosecution and at the same time the prosecution case is not getting any corroboration from any independent witness. Therefore, we have ensured that the evidence of Rano Devi passes through the **fine toothed comb** of appreciation.

29. So far as motive is concerned, Rano Devi has simply stated that the accused had to pay some money to her husband and he made a demand 2-3 times from the accused, upon which the accused said that he would not return his money and he (deceased) could do whatever he wanted. She then narrates the story with regard to the occurrence. She does not talk of all the injuries received by her husband in her presence and confines to only 2-3 injuries, which the accused had inflicted with 'Kirch' (weapon of offence) in the stomach of the deceased within her sight. She is very categoric in saying that when she reached the

spot after hearing hue and cry, her husband was lying down. She further stated that when she asked the accused as to what he was doing, he said that it is the time for them all to mourn. In vernacular, it is said '**tum ab sab ro lo'**. Immediately after the occurrence, whatever she thought was proper, she did and brought her husband back home where her son gave water to him and thereafter she took him in Auto to the Police Station. We do find certain contradictions in this regard when one looks at the evidence of PW Bahadur Singh ASI, but that would not change the basic fabric of the prosecution case. The fact of the matter is that Rano Devi along with her son had taken the deceased to the Police first of all, from where he was taken to Government Medical College & Hospital Jammu, where he was attended by doctor and by the time ASI Bahadur Singh reached the hospital after sending report No.30 for registration of the formal FIR, the injured was not in a position to

make any statement. This is how a case was initially registered under Section 307 RPC read with Section 4/25 Arms Act and the formal FIR registered which reached the hands of the Illaqa Magistrate on 16.08.1999. It is after the death of the husband of Rano Devi, Section 302 RPC was added.

30. Although Mr. Oswal has made a strenuous attempt to project the conduct of Rano Devi as unnatural, but in our considered view, the entire part played by her being the wife of the deceased is most natural. Different persons react to a situation differently and Rano Devi has reacted to a situation in a particular manner. There is nothing unnatural in it. When we appreciate her evidence keeping in mind that there could not be any motive in her bosom to falsely implicate the accused in this case, her evidence becomes more and more trustworthy.
31. Much has been said by Mr. Oswal with regard to discrepancy crept-in with regard to the

exact place of occurrence when the evidence of Rano Devi and the Investigating Officer is read together. But in our considered view, that would not make any difference as the situs of occurrence is not changed. No doubt, in her evidence, Rano Devi has said that her house is situated at the back side of Kuldeep Raj's house and there are 30-40 slums (Juggies) situated near Kuldeep Raj's house where labourers are residing and that there is a path between slums and Kuldeep Raj's house, which leads towards her house. She has also stated that a lane is situated near the place of occurrence, which is general road and people keep going on that road. But this cannot be said to be a discrepancy vis-à-vis the place of occurrence, simply on the pretext that house of Kuleep Raj or even Sansar Chand, who reside near the place of occurrence, is not shown in the Site Plan. This at the most can be said to be lapse on the part of investigating officer, which in any case, would not discredit

the evidence of Rano Devi, the most natural witness to the occurrence. Such type of lapse by the prosecution agency cannot be termed as an uprooting factor of prosecution case, otherwise this would result into miscarriage of justice.

32. We are conscious of the fact that the present occurrence is of night hours, that too after 10 p.m. as the deceased had closed his Rehri at 10 p.m. on the date of occurrence and then came to his house from where he was sent by Rano Devi to bring some vegetable. In her cross examination, a specific question was put by defence to her with regard to the availability of light at the time of occurrence, to which, she replied that it was moonlit night at that time. Therefore, in our considered view, it could not be a case of disputed identity of the accused at all. We are also conscious of the fact that Rano Devi, in her cross-examination, has categorically stated that when she and her son raised alarm after her husband was assaulted,

accused threw the Kirch (weapon of offence) at the spot, whereas the recovery of the weapon of offence is ultimately shown to have been effected from the accused pursuant to his disclosure statement on 23.08.1999. But this fact would also not compel us to see the evidence of Rano Devi with a pinch of salt. Recovery of weapon, even if turns out to be doubtful, it will be inconsequential, once Rano Devi is found to be most trust worthy witness to the occurrence, who, in our considered view, is the true witness to the occurrence.

33. It needs to be mentioned here that the judgments relied upon by Mr. Oswal, in support of his submissions do not put the accused to an advantageous position.
34. In **Rai Sandeep**'s case (*supra*), the Hon'ble Supreme Court while appreciating the evidence in a case of gang rape where a totally conflicting version of the prosecutrix from what was stated in complaint and what was deposed before trial Court, held that the prosecution

case is not proved. It is in those circumstances, their Lordships summarized the characteristics of a ‘sterling witness’. In the case at hand, as stated above, we do not find any such contradiction for dislodging the evidence of Rano Devi. Even a suggestion has not been put to her that she had not seen the occurrence at all and was deposing falsely in the Court.

35. In **Lallu Manjhi**’s case (*supra*), the Hon’ble Supreme Court while referring to a case titled **Vadivelu Thevar Vs. State of Madras**’ reported in **AIR 1957 SC 614** wherein the Apex Court has classified the oral testimony of a witness into three categories, namely (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable, has ultimately allowed the appeal by acquitting the accused, bringing the evidence of star witness of that very case in category (iii) wherein the Court has to look into for corroboration before acting upon the testimony

of a sole witness. In the case at hand, that is not the fact situation, as in our considered view the evidence of Rano Devi falls in the category '**wholly reliable**'.

36. Similarly, in **Hasan Murtza**'s case (*supra*), the prosecution has failed to cite any person residing near the place of occurrence and that the evidence of sole witness was not found to be satisfactory. It is in that situation, the Apex Court did not place reliance on the evidence of sole witness (PW-4 of that case) and acquitted the accused by allowing the appeal. The case at hand is entirely distinguishable from **Hasan Murtza**'s case (*supra*) on facts.
37. As a sequel to what is discussed hereinabove, we are of the considered view that the evidence of Rano Devi is of very high quality and calibre so as to hold that she has been able to unfold the factum of occurrence, the involvement of the accused in committing the murder of her husband on the fateful day beyond any shadow of doubt.

38. The net result is that finding no merit in the appeal at hand, the same deserves to be dismissed by upholding the conviction and sentence slapped upon the accused vide impugned judgment. **Ordered accordingly.**

39. Confirmation No.17/2011 is also answered accordingly by confirming the sentence imposed upon the accused.

40. Registrar Judicial of this Court to convey the judgment to the trial Court so that the sentence imposed upon the accused is executed in terms of Section 374 Cr.P.C. The accused shall also be informed about the outcome of the appeal through the Jail Superintendent concerned without any delay.

(Bansi Lal Bhat) (Virender Singh)
14.05.2013 Judge Judge
Jammu

This judgment is pronounced by me today in terms of Rule 138(4) of the Jammu & Kashmir High Court Rules, 1999.

(Bansi Lal Bhat)
Judge