

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

Cr. Appeal No.14/2012
Confirmation No.10/2012

Date of order: 27/09/2013

Mohammad Rafiq & Ors. V/s. State of J&K & ors.

Coram:

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

Appearing Counsel:

For the petitioner(s): Mr. Sunil Sethi, Sr. Advocate with
Mr. Mohsin Bhat, Advocates
For the respondent(s): Mr. Ravinder Sharma, AAG

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

1. Major Narinder Singh, Company Commander, F - COY
39 Rashtriya Rifles Grenadiers, stationed at Jagal,
Mendhar on 8th December 2006 received a source
information regarding presence of terrorists in the area
under his control. The information prompted him to
launch joint search operation with CRPF and SOG
Mendhar in general area Banola- Kaneti. While search
operation was on, the search party came to know that
one terrorist was holed up in appellants' residential
house at Kaneti. It was learnt that the appellants to help
the terrorist escape arrest, kept him locked inside an
alimirah/cupboard in the house. The information

received made Major Narinder Singh to deploy a search column at 730 hours, to the target area i.e appellant's house. The search party went into the house and found an alimirah locked. The appellants were not found in the house. However, their two daughters were present in the house. The search party asked the younger daughter namely Ms. Kiran Firdous to get keys of almirah from her mother Azmat Bi, who was stated to have gone to perform her duties in the local school. Ms. Kiran did not return and the head of the search party made a similar request to Ms. Anjum Firdous, elder daughter of appellant no. 1. Ms. Anjum also did not return with the keys. Shri Singh thereafter went to appellant's second house at Salwah met Azmat Bi wife of appellant No.1 and mother of appellant No.2 and requested her come to her house at Kaneti and help the search party to search the house and the locked almirah. Mst. Azmat Bi avoided to cooperate with the search party, leaving no option with the Company Commander but to search the almirah in absence of the owner of the house (appellant no. 1) or any of his family members. He, however, associated two Panchayat members, namely, Umer Din and Mohammad Sharief, with the search operation.

2. The almirah was broken open at 2145 hours. The moment it was broken open, the terrorist holed up inside almirah opened indiscriminate fire on the search party, resulting in death to Security Force personnel, namely, Virender Singh 2694028AGDR and a civilian – Mohammad Sharief. Shri Jung Sher Ali JC-450086X NB Sub was injured in the firing incident. The search operation continued till 1730 hours 9th December 2006. The terrorist identified as Abu Suhail alias M2 District Commander LET was also gunned down. The search party seized arms and ammunitions and other items including a mobile phone - Nokia 6600 in use of the dead terrorist.
3. The occurrence was reported by Shri Singh to Police Station Mendhar on 9th December 2006 at 1850 hours. The report lead to registration of case FIR No 177 OF 2006 U/S 302, 307, 120-B RPC 7/25 26/27 Arms Act. The investigation was entrusted to Shri Jan Mohammad PSI. The Investigating Officer visited the spot, took over dead bodies of Virender Singh, Mohammad Sharief and Abu Suhail, got post-mortem examination conducted on the dead bodies, recorded statements of all those acquainted with the facts and circumstances of the case, referred injured for medical treatment and obtained the

medical report. The Investigating Officer took over arms, ammunitions and other items already seized by the head of the search party and got photograph of the dead terrorist and appellant No.2 taken with Nokia 6600 cell phone, recovered from the scene of occurrence, developed. The material collected during investigation lead the Investigating Officer to the conclusion that while offence punishable u/ss 302, 307 RPC 7/25 26/27 Arms Act, were proved against the dead terrorist Abu Suhail alias M2, the appellants had *prima facie* committed offence punishable U/S 302, 120-B RPC.

4. SHO Police Station Mendhar presented the Charge Sheet before JMIC, Mendhar on 24.2.2007. The case was committed to Sessions Court, Poonch on 24.2.2007 itself. The appellants were on 8.9.2007 formally charged of offence punishable u/s 302, 307 read with 120-B RPC. They denied the charge and claimed to be tried. The prosecution was asked to adduce evidence to substantiate the charge. The prosecution examined as many as 14 witnesses to prove its case. The witnesses who crossed the witness box, include members of the search party namely Major Er. Rama Mohan, Major Narinder Singh, Sepoy Rotus, Grenadier Rakesh Kumar, Jung Sher Ali. The civilian namely Umer Din who was

associated with the search operation, constables Mohammad Faqir and Zubair Ahmad-witnesses to the seizure made by the Investigating Officer, Dr. Parvez Ahmad Khan who conducted post-mortem examination, Shri Pardeep Kumar a local photographer, claimed to have taken photographs of the crime scene and developed the photographs, found stored in Nokia 6600 cell phone recovered from the deceased terrorist also appeared in the witness box.

5. The appellants when confronted with the incriminatory material appearing in the prosecution evidence, stated that though they owned two houses - one at village Salwah and another at village Kaneti, they are residing in the house at Salwah while house at Kaneti is still under construction and that the terrorist was killed in the Kaneti area. They denied that any almirah in the house under construction at Kaneti, was locked. The appellants while labelling the prosecution witnesses as interested witnesses insisted that the dead bodies and other articles were seized by the Investigating Officer from Kaneti and not from the house of the appellants. The appellants examined Hasan Mohammad, Mohammad Sadiq, Anjum Firdous, Rajesh Kumar and Mohamad Ishfaq to prove that they permanently reside at Salwah, recorded in their

ration cards and that they figure in the voter lists of village Salwah and that their house at Kaneti was under construction with the walls yet to be plastered. Ms. Anjum Firdous denied to have been sent by the search party to get keys of the almirah from her mother.

6. The Trial Court on going through evidence brought on the file held prosecution to have proved “commission of offences U/S 302/307 and 120-B of RPC” against the appellants. The appellants were accordingly vide judgement dated 01.02.2012 convicted of “offences U/S 302/307 and 120-B of RPC”. The Trial Court proceeded to sentence the appellants to “rigorous imprisonment for life and a fine of Rs.25000/- for commission of offence U/S 302 read with 120-B and ten years rigours imprisonment for the offence U/S 307 RPC”. In case of default to pay the fine, the appellants are to further undergo imprisonment of six months.
7. The Trial Court judgment and order dated 1.2.2012 are called in question in the present appeal on the grounds set out therein. The judgment impugned in the appeal is said to suffer from total mis-appreciation of evidence and to have been passed unmindful of inherent contradictions and inconsistencies in the statements of witnesses. The P/W Er. Rama Mohan and Sepoy Rotus,

are said to have given date of occurrence as 18/19 December 2006 while as per the prosecution case the occurrence took place on 8/9 December, 2006. The trial court is said to have failed to appreciate that most of the P/Ws were interested witnesses and their testimony was to be gone through with due care and caution. It is further pleaded that none of the prosecution witnesses connected the appellants with the alleged occurrence and that the prosecution witnesses did not prove charge of criminal conspiracy against the appellants.

8. Ld. Sessions Judge has also submitted the matter for confirmation registered as Confirmation No.10/2012, in terms of section 374 Cr. P.C. The Confirmation No.10/2012 is taken up alongside Cr. Appeal No.14/2012 filed by the appellants.
9. We have gone through the judgment and order, assailed in the appeal as also the trial court record and have heard Ld. Counsel for the parties at length.
10. It is necessary to point out at the outset that the appellants admittedly were not present at the scene of occurrence and did not participate in the occurrence. It is nobody's case that appellants opened fire on the search party that resulted in death to Virernder Singh and Mohammad Sharief and injury to Jung Sher Ali.

They are roped in u/s 120-B RPC on the allegation that the occurrence was result of a criminal conspiracy hatched by them with the deceased terrorist, who opened fire on the search party resulting in death to Virender Singh - 2694028AGDR and a civilian - Mohammad Sharief and was killed in the cross firing. With this in mind, let us proceed to go through the evidence before the trial court to see whether the evidence brought on file justifies the conclusions drawn by the trial Court.

11. Focus of the prosecution evidence is on the actual occurrence involving search operation in general area of Banola - Kaneti commenced in wee hours of 8th December 2006, deployment of a search party to the house of the appellants at Kaneti, and a brief encounter between dead terrorist - holed up in a almirah locked from outside, and the security forces at about 10.30 P.M on 8th December 2006, that resulted in death of a security forces personnel and a civilian and injury to another security forces personnel. We, therefore, do not come across a whisper in the prosecution evidence alleging criminal conspiracy hatched by the appellants with the dead terrorist to commit offences punishable u/s 302 and 307 RPC.

12. Conspiracy is not hatched in open to the knowledge of one and all. We cannot, therefore, expect the prosecution to prove the charge of criminal conspiracy by direct evidence. The conspiracy to commit a crime is proved on the basis of circumstances surrounding the commission of an offence. The circumstances must lead to one and only one conclusion i.e an agreement between two or more persons to do an illegal act or an act which is not illegal, by illegal means, leaving no room for any other hypothesis. In the present case there was no allegation of criminal conspiracy in the First Information Report and it was no-where alleged that the appellants had hatched a criminal conspiracy with the dead terrorist to commit offences punishable under section 302, 307 RPC. The prosecution witnesses Major Er. Ram Mohan Rao has admitted not to have witnessed the occurrence and that the facts and events regarding the occurrence stated by him were narrated to him by P/W Major Narinder Singh. The prosecution witness, in any, case has not in his testimony pointed to criminal conspiracy hatched by the appellants with the dead terrorist. P/W Major Narinder Singh is the only witness to state that the appellants, “knowingly and intentionally kept the terrorist in the almirah, fully aware that search operation in the area

was going on and during search he will cause injury to the armed forces". The witness, however, has not deposed that as per the inputs received by him as Company Commander, having control over the area the appellants had hatched a criminal conspiracy with the dead terrorist to commit offence punishable u/s 302, 307 RPC. His assertion is based exclusively on his own perceptions and not any background material. None of other prosecution witnesses has uttered a word on the conspiracy angle of the matter, though they have deposed regarding the events from 7.30 AM, 8th December to the evening of 9th December, 2006.

13. The trial Court has accepted the prosecution case and held the appellants to have entered into a criminal conspiracy with the dead terrorist to commit offence punishable u/s 302, 307 RPC on the basis of following circumstances found by it to have been proved by the prosecution beyond the shadow of reasonable doubt:
 - a) That the appellants and the dead terrorist had developed close relations and appellants were thick with the dead terrorist as evidenced by the photographs developed from the gallery of the cell phone recovered from the dead terrorist.

- b) That the dead terrorist was hiding in an almirah locked from outside in the house at Kaneti, owned by the appellants.
- c) That after the security forces on receipt of the information that the terrorist was so holed up, went to the house of the appellants, they found an almirah locked from outside and were informed by two daughters of appellant No.1 that the key of the lock was with their mother and the younger daughter Ms. Kiran Firdous when sent to get the key from her mother did not return.
- d) That when Ms. Kiran Firdous did not turn up, elder daughter Anjum Firdous was sent to get keys of the lock who like her younger sister did not come back.
- e) That PW Major Narinder Singh went to the house of the appellants at Salwah in the afternoon of 08.12.2006, and requested Azmat Bi wife of appellant No. 1 and mother of appellant no. 2 to handover key of the almirah locked, who avoided to handover the key and cooperate with the Security Forces, pretending that a huge amount was locked in the almirah and keys of almirah locked where with the appellant no. 1 who had gone out of the village and would not be able to come for next two days.
- f) That the dead terrorist opened fire on the Security Forces and the civilians present in the house, when the almirah was broke open, resulting in death to Virender Singh,

Mohammad Sharief and injury to Jung Sher Ali.

14. Learned counsel for the appellants insists that the prosecution to bring home guilt to the appellants on the strength of circumstantial evidence, was to prove each and every circumstance that formed vital link in the prosecution case and thereafter establish beyond doubt that all these links when put together led to only and only conclusion that the appellants were guilty of the offences alleged against them and the evidence on record was incompatible with the innocence of the appellants. It is argued that the circumstantial evidence should be so focused on the culpability of the appellants that no other hypothesis is possible to be derived from such evidence. It is argued that neither all the links in the prosecution evidence have been proved by reliable and creditworthy evidence nor does the evidence on record connect the appellants with the alleged occurrence.
15. Learned counsel to convince that the prosecution failed to prove each and every link in the circumstantial evidence relied upon by it, emphasizes failure of the Investigating Agency to seize the lock of alimirah broke open, to establish that the almirah was locked and the failure to recover the keys of the almirah locked from the

appellant no. 1 or at his instance, though the appellant admittedly was available for custodial interrogation. The story of the conspiracy to commit murder or attempt to murder, according to learned counsel is one imagined by the Investigating Officer and without support from the prosecution witnesses. It is argued that the prosecution evidence on record does not lead to the conclusion that the dead terrorist was holed up in the almirah or the almirah was locked from outside, and therefore, the prosecution case was not free from doubt. The prosecution is also said to have failed to substantiate that the appellants had control over the building where occurrence took place or that they avoided to handover the keys of the locked almirah, in furtherance of criminal conspiracy hatched with the dead terrorist.

16. The arguments advanced by learned counsel for the appellants pointing to failure of the prosecution to prove various links in the circumstantial evidence pressed into service to bring home guilt to the appellants, are specious and without any substance as regards some of the links spelt out in para 8 above. It is true that the prosecution has failed to prove the photographs showing appellant no. 2 and the dead terrorist close to each other as PW-Pardeep Kumar has let down the prosecution.

This, however, does not have any fatal consequences for the prosecution case. Not only is the prosecution case supported by the PW-Narinder Singh and other members of the search party, but it also finds support from the testimony of PW-Umer Din. The witness is a local panchayat member and an independent witness. Even the Armed Forces Personnel cannot be said to have any ill will or malice towards the appellants and their testimony tainted with bias. PW-Umer Din has deposed that when he and his deceased colleague-Sharief-u-Din were in the late evening of 08.12.2006, taken by the Security Forces to the appellants house at Kaneti, he found almirah locked and the Army Officer making an effort to break open the almirah in the house; that soon after the almirah was broken open, there was firing that claimed life of Shri Sharief-u-Din. The statement of PW-Umer Din cannot be brushed aside, and it together with testimony of other Security Forces Personnel including PW-Narinder Singh helps the prosecution to prove different links in the prosecution evidence to the extent these relate to hiding of the dead terrorist in the locked almirah and his opening fire on the search party after the almirah was broken open, resulting in death to Varinder Singh and Shri Sharief-u-Din. Failure of the

Investigating Officer to seize the lock, has an explanation and is, therefore, of no consequence. It is important to note that after the exchange of fire and death of an Armed Forces Personnel and the civilian, the Security Forces leaving no room for any further mischief, blasted the house and it was raised to ground. It, therefore, must not have been possible for the Investigating Officer to seize the lock from the rubble. There again is no merit in the argument that the prosecution failed to prove that the appellants had control over the house in question only because the appellants have one more house at Salwah or are registered as voters in Village Salwah and had their ration card in said village. The evidence in this regard does not lead to the conclusion that the appellants who admittedly own the house at Kaneti, did not have control over it, more so, when other evidence on record belies such stand. To sum up the prosecution convincingly proved that the dead terrorist was allowed by the appellants to conceal himself in an almirah in their house at Kaneti and that the almirah was locked from outside and further that the key of the almirah was not made available to the Security Forces. This, however, does not end the matter.

17. The question that remains to be answered is as to whether the evidence on record leads to the conclusion that there was an agreement between the appellants and the dead terrorist to commit offence of murder punishable under Section 302 RPC and offence of attempt to murder punishable under Section 307 RPC. The essence of criminal conspiracy as defined in Section 120-A RPC, it has been held times without number, is an agreement between two or more persons to do an illegal act or an act which is not illegal by illegal means. While there can rarely be direct evidence to prove agreement between the parties as required in terms of 120-A RPC, the overt acts proved against the conspirators and the surrounding circumstances established on the strength of evidence satisfying set standards in a criminal trial, must lead to such an inference.
18. We are aware that conspirators plot in secret, away from public gaze and direct evidence of an agreement is not always available. The prosecution has to rely on the circumstantial evidence to prove conspiracy. However, such evidence must not only convincingly prove each and every link in conspiracy but point only and only to the criminal conspiracy alleged against the accused leaving

no room for any other inference. The evidence must be incompatible with the innocence of the accused.

19. In the present case, the prosecution evidence, helps the prosecution to prove that the appellants entered into a criminal conspiracy with the dead terrorist – to their knowledge of foreign national who unlawfully entered the country, to help him escape arrest. The evidence, however, does not lead to a further inference that the appellants and the dead terrorist hatched a criminal conspiracy to commit the offence of murder or offence of attempt to murder. The prosecution evidence does not lead to the conclusion that the conspirators knew that the Security Forces shall break open the almirah and conspired to attack the Security Forces, once the almirah in which dead terrorist remained concealed was broken open. The conspirators expected that their scheme would work and Security Forces would not be able to find out the dead terrorist. The prosecution evidence does not suggest that the conspirators anticipated Security Forces raid or the encounter between the dead terrorist and the Security Forces or any casualties in such encounter. An inference from the prosecution evidence of conspiracy to commit offence of murder or attempt to murder, would be, therefore, far fetched and not reasonably deducible

from such evidence. Conspiracy to commit offence of murder or attempt to murder is not the only inference that one can draw from the prosecution evidence. The prosecution evidence, on the other hand, leaves scope for other hypothesis like an agreement between the appellants and the dead terrorist to help him escape and avoid arrest and nothing beyond that. There is a real possibility that the appellants and their co-conspirator did not expect the matter to go, the way it went. Merely because the appellants should have or may be presumed to have expected an encounter between the dead terrorist and the Security Forces, ought not to have made the trial Court to hold that the appellants and dead terrorist had hatched a criminal conspiracy to offence of murder or attempt to commit murder. The trial Court appears to have not been itself convinced about the proof of criminal conspiracy to commit murder or attempt to murder. Para 37 of the trial Court judgment needs to be noticed in this regard:

“37. The present case is to be seen in a broader spectrum ignoring certain flaws, if at all occurred on certain aspects. We are conscious of the fact that certain witnesses to the occurrence have not supported the case of the prosecution, but that would not at all brittle the case of the prosecution, which is proved to the hilt

from other witnesses. It is the quality and not the quantity, which is to be appreciated. The prosecution is not supposed to produce all the witnesses, if it is in a position to prove the case from a particular set of evidence.”

20. So viewed, circumstantial evidence relied upon by the prosecution is not incompatible with innocence of the appellants as regards criminal conspiracy to commit offences punishable under Section 302, 307, 120 B RPC and does not only point to the commission of said offences by the appellants and no other conclusion. The prosecution evidence on record, therefore, did not enable the prosecution to prove the charge of criminal conspiracy to commit murder or attempt to murder against the appellants, beyond reasonable doubt. The trial Court in the circumstances was not right in convicting the appellants of the offence punishable under Sections 302 RPC, 307 RPC and 120-B RPC. The evidence on record, however, proved commission of offences punishable under Sections 212, 120-B RPC against the appellants.
21. For the reasons discussed, impugned judgment and order cannot stand legal scrutiny. The Criminal Appeal No. 14/2012 is allowed and the appellants' conviction for the offences punishable under Section 302 RPC, 307

RPC and 120-B RPC and the sentence of rigorous imprisonment for life and a fine of Rs.25000/- for commission of offence U/S 302 read with 120-B and ten years rigours imprisonment for the offence U/S 307 RPC is set aside. The appellants are convicted of offence punishable under Section 212, 120-B RPC and sentenced to rigorous imprisonment for three years and a fine of Rs.10,000/- each and in default of payment of fine to a further imprisonment of three months. The period, the appellants have been in custody shall be set off against the sentence awarded in accordance with Rules.

22. The Criminal Appeal no. 14/2012 and Confirmation 10/2012, are disposed of accordingly.

(Bansi Lal Bhat)
Judge

(Hasnain Massodi)
Judge

Jammu
27.09.2013
Parshant