

HIGH COURT OF JAMMU & KASHMIR
AT JAMMU

Cr. Appeal No.79/2013, MP No.03/2015

c/w

Confirm No.27/2013

Date of Decision: 17.02.2017

Mohammad Iqbal

vs.

State of J&K

Coram:

Hon'ble Mr. Justice Mohammad Yaqoob Mir, Judge
Hon'ble Mr. Justice B S Walia, Judge

Appearing counsel:

For the petitioner/appellant(s) : Mr. P N Raina, Sr. Advocate with
Mr. J A Hamal, Advocate.

For the respondents : Mrs. Seema Shekhar, Sr. AAG.

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| 1) Whether to be reported in
Press, Media | : | Optional |
| 2) Whether to be reported in
Digest/ Law Journal | : | Yes |
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Per-Yaqoob, J:

1. By medium of this Criminal Appeal, Judgment and order both dated 30.11.2013 passed by learned Sessions Judge Bhandarwah recording conviction and awarding sentence, are assailed.
2. For confirmation of sentence of life imprisonment, reference in terms of Section 374 CrPC (State Code) has been made, same is registered as Confirm No.27/2013.
3. Learned counsel for the appellant at the very outset argued that there may be little scope for denying the occurrence but alleged act committed by the appellant does not fall within the ambit of Section 300 RPC punishable under

Section 302 RPC. The act committed at the most may fall within the ambit of Section 326 RPC and even if the extreme view is taken, it may attract applicability of Section 304 Part-II RPC.

4. Learned Senior Additional Advocate General argued that the natural witnesses to the occurrence examined have given a vivid account as to what happened on spot. A gruesome murder has been committed in a most brutal manner, that too with all calculations. By no stretch of imagination the act committed can be said not to fall within the ambit of Section 300 RPC punishable under Section 302 RPC. The learned trial Court has passed a well reasoned judgment.
5. The prosecution case as unfolded reveals that on 29.06.2002 deceased Saidulla Paray and other persons were sitting in a hotel (a shop run under the style of Muslim Hotel) owned by Jameel Ahmed, in the meanwhile at about 12.45 PM, appellant (accused) entered, sat on a table, started writing letter, then quietly moved out and went to an adjacent Butcher shop of Haq Nawaz, picked up the Butcher's knife ("Toka" as referred to in the judgement impugned) from the Butcher's block ("wooden bar" as referred to in the judgement impugned), came back running

and entered into the hotel. The Butcher Haq Nawaz chased him but while entering into the hotel gave two forceful blows with the butcher's knife one on the head and another on the face of the deceased, then left Butcher's knife there and ran away. He was again chased by Haq Nawaz (Butcher), while running towards old bus stand, Haq Nawaz raised voice, with the aid of CRPF personnel stationed there, accused was caught hold of and taken to the police station. The persons who were sitting in the hotel took the deceased to the SDH Doda. Police registered the case as FIR No.82/2002 P/S Doda, filled up the Injury memo. In the SDH Doda, doctors noticing seriousness of the injuries and the condition of the deceased referred him to Sher-i-Kashmir Institute of Medical Science (SKIMS), Soura Srinagar for treatment. The deceased remained there under treatment till 16/17th July, 2002 and it is in the intervening night of 16/17th July, 2002 he succumbed to the injuries. Dead body was brought back to SDH Doda. CMO constituted team of doctors for conducting the post-mortem who after conducting the post-mortem prepared the post-mortem report. Initially case was registered for commission of offence punishable under Section 307 RPC and 4/27 Arms Act, and

then altered to 302 RPC.

6. The investigation of the case on its completion culminated in filing the charge sheet (challan). On conclusion of trial, the accused has been convicted under Section 302 RPC and 4/25 Arms Act and sentenced to life imprisonment and fine of rupees five thousand (Rs.5,000/-) under Section 302 RPC. In default of payment of fine to undergo further simple imprisonment of two months whereas under Section 4/25 Arms Act has been sentenced to undergo rigorous imprisonment for a period of one year and to pay fine of Rupees one thousand (Rs.1,000/-). In default of payment of fine to undergo further simple imprisonment for fifteen days.
7. During Trial, prosecution in support of the case has produced 11 out of 14 prosecution witnesses. PW-5 was given up by the PP whereas PWs- 11 and 14 were not produced.
8. After closure of the prosecution evidence, the accused has been examined in terms of Section 342 CrPC. The incriminating circumstances have been put to him. He has denied complicity in the crime and claimed to be innocent. After hearing the PP as well as defence counsel, learned trial Court vide order dated 20.11.2012 opined that it is not a case of no evidence. The accused is

required to enter upon the defence, as such had asked him to enter upon defence. The accused in defence appears to have submitted a list of six witnesses, four were given up as is clear from the statement of the defence counsel recorded by the trial Court on 21.06.2013 and only two were produced and examined.

9. Out of listed six natural witnesses to the occurrence, five have been examined whereas one-Abdul Rashid listed witness No.5 was given up as having been allegedly won over by the defence.
10. Five independent natural witnesses to the occurrence PW-1 Haq Nawaz, PW-2 Jameel Ahmed, PW-3 Shanker Lal, PW-4 Sher Mohd and PW-6 Samunder Khan have in natural sequence of the events clearly deposed and supported the prosecution case by stating, as to how the accused brutally attacked the deceased with Butcher's knife. The testimony of these witnesses in any manner has not been impeached. It is in view of the unimpeachable character of the testimony of these witnesses to the occurrence, learned counsel for the appellant submitted that the alleged occurrence may not be denied but act allegedly committed by the appellant does not fall within the ambit of Section 300 RPC

punishable under Section 302 RPC.

11. Regarding seizure of various articles after reading the evidence, no exception could be taken against it by the learned counsel for the appellant. In view of the clear stand of the counsel for the appellant it shall be unnecessary to load this judgment with the details of depositions of the witnesses, but in the context of the contention that the act committed will not amount to murder, few depositions of the five witnesses to the occurrence shall be advantageous to be quoted:

- (a) PW- Haq Nawaz during cross examination of the counsel for the defence has stated that accused inflicted two blows and ran away like lightening leaving the butcher's knife (Toka) in the shop used as hotel. The persons who were sitting in the hotel ran after the accused and that the accused when caught hold of, said leave him, he will cut the injured into pieces.

- (b) PW-2 Jameel Ahmed owner of the Hotel where occurrence occurred has stated that Shanker Lal, Samunder Khan, Sher Mohd Khan, Abdul Rashid and

Saidulla Paray were in the shop (used as hotel). Accused present in the Court also came at 1.45 PM and sat there. The deceased asked the accused to have meals who in reply said he will write a letter then accused wrote a letter and went out from the shop (hotel) and came back and gave blow on the head of the Saidulla Paray (deceased) Deputy Sarpanch. Accused ran away towards old bus stand. The deceased suffered deep serious injuries on the head. On the cross-examination by the counsel for the defence has stated right from the beginning he knew the deceased. Further stated that accused gave the two blows to the deceased. One from front side and one from the ear side. Injured (deceased) remained in the hospital for 17 days.

(c) PW-3 Shanker Lal and PW-4 Sher Mohd Khan during cross examination stated that accused inflicted two blows on the head of the deceased.

12. The deceased having been attacked by the accused and two forceful blows one given on the head and another on the face of the deceased

with the Butcher's knife are fully proved. The death which occurred at SKIMS Srinagar is also proved regarding which no exception is taken, therefore the only question which survives for consideration is as to whether the act committed by the appellant amounts to murder punishable under Section 302 RPC.

13. Learned counsel for the appellant buttressing his submission that the act committed does not fall within the ambit of Section 300 RPC punishable under Section 302 RPC referred to the injuries as reflected in the post-mortem report which are as under;

“The external and internal injuries as have been recorded are:

1. Stitched wound on right side of head extending from right side of the eye going up and back through the forehead and right parietal region of the head up to the level of occiput. The upper part of the wound (on the head) is wide with underlying brain matter visible.
2. Another stitched wound on left side of the face parallel to and in front of the left ear extending from the angle of the Jaw to the left temple. The wound is healed.
3. An area of 4" x 4" on the right side of the

head (with the stitched wound passing through its middle) is without the skull bone. The brain matter in this area is palpable through the scalp.

The opinion as to cause of death recorded in the post-mortem report ExPW-AL is as under:

“The cause of death is an injury to the head caused by the forceful impact of some sharp edged weapon giving rise to fracture of right parietal bone and laceration of the underlying brain matter. Time since death is 12 to 24 hours.”

14. Three doctors, namely, Dr. Zia Showkat, Dr. Shagufta and Dr. Anayat Ullah Lone of SDH, Doda conducted the post-mortem are listed witnesses No. 10, 11 and 12. No.10 Dr. Zia and No.12 Dr. Anayat ullah lone have been produced and examined who have proved the post-mortem report and opinion recorded therein.

PW Dr. Anayat in his statement has qualified that **in the ordinary course the injury was sufficient to cause death.**

Dr. Zia Showkat in cross examination has stated that injuries were already stitched, therefore cannot say whether the injuries were smooth or irregular or oblique. Depth of wound is not mentioned. Head injuries are always irregular

if caused by sharp edged weapon. The direction of the wound has been mentioned in the post-mortem report.

15. The learned counsel for the appellant argued that when after occurrence on 29.06.2002 injured (deceased) was taken to SDH Doda and then on same day referred to SKIMS Srinagar, it has not been made clear nor it has appeared in evidence as to whether any treatment was given to the injured in the SDH Doda, nor any cause is shown as to why he was referred to SKIMS, Srinagar.
16. It is true that when the injured was taken to SDH Doda and referred to Srinagar, no document or doctor's evidence has been brought on record as to what happened at that time in SDH Doda. However the investigating officer PW-13 Shri Mohan Pal in his statement has made it clear that when the doctors noticed the position of the injuries and the condition of the deceased very serious, they referred him to the SKIMS Srinagar.
17. The learned counsel further argued that as to how the patient was treated at SKIMS Srinagar is not known nor any medical record maintained in the SKIMS Srinagar vis-a-vis the deceased has been produced which would have given clear idea as to whether death occurred only because of

injuries suffered by the deceased. This argument of the learned counsel pales into insignificance because when five prosecution witnesses to the occurrence who were the natural witnesses whose testimony is beyond any doubt and unerringly clarify and support as to how the accused attacked the deceased and clearly showing that two forceful blows with Butcher's knife were inflicted one on the head of the deceased and the other on the side of the head on face and it is also made clear that the accused entered into the hotel located adjacent to the Butcher's shop found the deceased there, started writing a letter and then left out only to get the Butcher's knife to attack the deceased shows with all calculations he attacked the deceased. The intention to eliminate the deceased cannot be doubted. The letter which the accused wrote while sitting in the hotel has been seized, proved and exhibited as ExPW-JA/V which is addressed to one Mohd. Tariq simply conveying not to worry about him if he will not come back home for few days. The said letter was recovered from the pocket of the accused. It is also inferable there from that the accused had just diverted the attention of the deceased, then went out and picked up the butcher's knife lying on the

butcher's block in the adjacent butcher shop owned by Haq Nawaz and said Haq Nawaz while noticing that the accused had picked up Butcher's knife, ran after him but while entering into the hotel, the accused attacked the deceased. Said PW Haq Nawaz never knew the accused before. It is only on the date of occurrence when accused committed the crime, he came to know about his identity.

18. The accused has attacked the deceased and has given two forceful blows with Butcher's knife on the vital part of the body i.e. head and face and caused the injuries as referred to above. When such types of injuries are caused with all calculations, can it still be said that such injuries could not cause death in the ordinary course. The answer has to be that with all calculations vital part of the body was attacked only with the intention of killing the deceased. The injuries in the ordinary course were sufficient to cause death of the deceased is clearly stated by PW Dr. Anayat Ullah Lone. He has stated that in the opinion of the doctors including him the cause of death is an injury to head caused by forceful impact of some sharp-edged weapon and laceration of underlying brain matter, in the ordinary course this injury was sufficient to cause

death.

19. It cannot be inferred from the facts and circumstances of the case that it was not within the knowledge of the accused that head is the vital part of the body and two forceful blows with Butcher's knife on such vital part will not cause death.
20. Learned counsel for the appellant relied on a judgment rendered in the case of **Virsa Singh vs. State of Punjab, 1958 SC 465**. Para 12 and 13 of the judgment are advantageous to be quoted:

"12. To put it shortly, the prosecution must prove the following facts before it can bring a case under [s. 300, 3rdly](#) " ;

First, it must establish, quite objectively, that a bodily injury is present ;

Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

13. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under [s.](#)

[300, 3rdly](#). It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional.”

21. “Law has to be applied in the background of the peculiar facts and the evidence of the case. Applying the law as has been laid down by the Hon’ble Apex Court to the fact circumstances of the instant case, beyond any shadow of doubt it can safely be concluded that the accused while giving two forceful blows with Butcher’s knife on the vital part of the deceased. By one blow on the head causing injuries and the brain matter palpably became visible. What more is needed for holding that the injury was enough to cause death which otherwise is also proved by the medical evidence.
22. Learned counsel while relying on the judgment titled **State of J&K vs. Hazara Singh and another** rendered by Hon’ble Apex Court reported in **1980**

(Supp) SCC 641, tried to project that the injury inflicted will fall within the ambit of Section 326 RPC. The law has to be applied as already observed hereinabove, in the background of the peculiar facts and the evidence of the case. When the direct evidence of unimpeachable character of the witnesses who with their own eyes have seen the actual occurrence and thereafter have given the true account of the position as prevailed coupled with the fact of giving two forceful blows with the Butcher's knife one on the head and the other on side of head on face, then keeping in view the nature of the injuries as recorded and reflected in the post-mortem report coupled with the opinion of the doctors and supportively proved by doctor Anayat Ullah Lone and Dr. Zia Showkat, there remains no scope to say that the accused has not committed murder punishable under Section 302 RPC.

23. Learned Additional Advocate General was right in projecting that small negligence on the part of the investigating officer, in not, citing the witness of SDH, Doda about the position as prevailed on 30.06.2002 when the deceased in injured condition was admitted in the hospital then immediately shifted to SKIMS Srinagar and then also in not collecting the record of the SKIMS

Srinagar, by stating that medical record would simply show as to what type of treatment was administered to the injured (deceased), all that pales into insignificance in view of direct evidence of unimpeachable character. In support, she relied on the judgment rendered by the Hon'ble Apex court in the case of **Dayal Singh and Ors vs. State of Uttarchal, 2012 C.R.I. L.J. 4323**. Paras 13, 28 and 30 are advantageous to be quoted:

“13. We have already discussed above that the presence of PW2, PW4 and PW5 at the place of occurrence was in the normal course of business and cannot be doubted. Their statements are reliable, cogent and consistent with the story of the prosecution. Merely because PW3 and PW6 have failed to perform their duties in accordance with the requirements of law, and there has been some defect in the investigation, it will not be to the benefit of the accused persons to the extent that they would be entitled to an order of acquittal on this ground. Reference in this regard can usefully be made to the case of [C. Muniappan v. State of Tamil Nadu](#) {AIR 2010 SC 3718 : (2010) 9 SCC 567}.

28. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not sub-served. For truly attaining this object of a 'fair trial', the Court should leave no stone unturned to do justice and protect the interest of the society as well.

30. Where the eye witness account is found credible and

trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by examining the terms of science, so that the court, although not an expert, may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert opinion is accepted, it is not the opinion of the medical officer but that of the Court. {Plz. [See Madan Gopal Kakad v. Naval Dubey & Anr.](#) [(1992) 2 SCR 921 : (1992) 3 SCC 204]}.”

24. Law as laid down hereinabove squarely covers the case on hand. After bestowing our thoughtful consideration, the facts, law and on appreciation of the evidence adduced by both sides, we are of the considered opinion that the appellant with all calculations had intended to eliminate the deceased. Ruthlessly he has brutally given two forceful blows with butcher's knife one on the head of the deceased and the other on the side of head on face whereby deceased suffered serious injuries as noticed hereinabove and finally succumbed to the injuries.
25. Humanity feels ashamed when a human being murders another human being. To give vent to enmity and to bury humanity cannot be acceptable to civilized society.
26. A young man (deceased) just thirty-five years old has been deprived of so many summers of his life. Alas! Gone are the days when people hearing

about murder of a human being would feel that the sky has turned red.

27. For the facts, circumstances, the law as stated hereinabove and for the reasons and facts recorded by the learned trial Court, we do not find any illegality, infirmity or perversity in the judgment. Learned trial Court has on proper appreciation of evidence and proper application of law passed well reasoned judgment which does not call for any interference. Impugned judgment and order as such is upheld. Appeal dismissed. Sentence of life imprisonment is confirmed, reference for confirmation accordingly accepted.

Copy of the judgment along with Trial Court record be sent to the Trial Court.

(B S Walia) (Mohammad Yaqoob Mir)
Judge Judge

Jammu
17.02.2017
Raj Kumar