

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

CRAA No.21/2009

Date on which case reserved: 07.03.2019.

Date of order: 29.03.2019

State of Jammu & Kashmir

vs.

Dharminder Kumar and another.

**Coram:**

**HON'BLE THE CHIEF JUSTICE**

**HON'BLE MR. JUSTICE TASHI RABSTAN, JUDGE**

**Appearance:**

For the petitioner/appellant (s) : Mr. K. D. S. Kotwal, Dy.AG.

For the Respondent(s) : Mrs S. Kour, Sr. Advocate, with  
Mr Mohd Aleem Wani, Advocate.

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|-----|------------------------------------------------------|--------|
| i)  | Whether approved for reporting in Law journals etc.: | Yes/No |
| ii) | Whether approved for publication in press:           | Yes/No |

**Gita Mittal,CJ**

1. By way of the instant appeal under Section 378 Code of Criminal Procedure, the State of Jammu & Kashmir has laid a challenge to the judgment dated 24.01.2009 passed by the Principal Sessions Judge, Samba, in the case titled State v. Dharminder Kumar and another, under Sections 302/109 Ranbir Penal Code and 4/25 Arms Act, arising out of FIR No.38/2005 Police Station Bari Brahmna.

2. The record of the case was called for.

3. I have heard, Mr K.D.S. Kotwal, learned Dy.AG, for the appellant and Mrs Surinder Kour, learned counsel for the accused/ respondents, who have also carefully taken us through the records of the case.

4. Briefly put, it was the case of the prosecution that one Rano Devi was married to Sham Lal for 11 or 12 years before the 25<sup>th</sup> May, 2005. It was the second marriage of both Sham Lal and Rano Devi. From his first marriage, Sham Lal was blessed with three children including Dharminder Kumar, while Rano Devi had one son, namely, Ashok Kumar, from her first marriage. At the time of marriage of Sham Lal and Rano Devi, it was agreed between the parties that Sham Lal shall give half of portion of his property to his step-son, Ashok Kumar. However, for the last 4 to 5 years (prior to May, 2005), a dispute arose between the parties over the share of Ashok Kumar resulting in strained relations between Sham Lal and his wife, Rano Devi. It has been alleged by the prosecution that Sham Lal beat Rano Devi a number of times and even turned her out of his house. A compromise was arrived at between them at the instance of elders of Beradari, when it was agreed that Sham Lal shall pay Rs.500/- per month to his wife Rano Devi and also provide her a room at Panj Pura Kaulad, Mohra Katli, Tehsil Samba. It was also the prosecution case that Sham Lal told his children that the deceased Rano Devi was pestering him about the share in the land and that she had to be eliminated.

5. In this background, it was alleged that on 25<sup>th</sup> May, 2005, Sham Lal incited his son Dharminder Kumar to eliminate the deceased. It was the prosecution case that Sham Lal himself went to his duty and in absence of Sham Lal, Dharminder Kumar attacked his step-mother, Rano Devi, with a sword and inflicted fatal injuries on her person. Ashok Kumar S/o Rano Devi and Rachpal Chand, brother

of Rano Devi, arrived on spot and on seeing them Dharminder Kumar fled from the spot.

6. An oral report in this regard was lodged by brother in law of Rano Devi, on 25<sup>th</sup> May, 2005 at Police Station Bari Brahmna. Based thereon, FIR No.38/2005 came to be registered by the said Police Station.

7. In the course of investigation, the Investigating Officer prepared a site plan and took samples of soil as well as blood stained clay from the spot.

8. A postmortem was conducted on the body of the deceased by Dr Bachan Lal-PW14 on 26<sup>th</sup> May, 2005. The postmortem report records that all the injuries on the person of the deceased were ante mortem in nature. The postmortem report was proved as exhibit Ex.PW.BL. In the opinion of the Dr. Bachan Lal, the death of the deceased Rano Devi, occurred due to Haemorrhage and shock as a result of injury No.5 caused by a sharp edged weapon.

9. It is also alleged that Dharminder Kumar made a disclosure statement and pursuant thereto the recovery of the weapon of offence was effected.

10. During investigation, the sword was shown to Dr Bachan Lal, for his opinion, who opined that injuries in question could be caused by a weapon 3 or 4 inches shorter or longer. He has further stated that weapon of offence was shown to him on 15.07.2005 after the autopsy. The doctor has further stated that weapon was blood stained but it was not sealed at the time it was shown to him. The trial court has noted that the recovery memo of the sword which was proved on record

as exhibit Ex.PW-RC/1 recorded that the weapon was sealed in the presence of Rachpal Chand.

11. On investigation, a challan under Section 173 Criminal Procedure Code was filed in the court against the Dharminder Kumar as accused no.1 and Sham Lal as accused no.2 (respondent Nos. 1 and 2 herein).

12. By an order dated 20<sup>th</sup> September, 2005, the trial court framed charges against the accused for the commission of offences punishable under Section 302 RPC and 4/25 Arms Act against Dharminder Kumar and under Section 302 read with Section 109 of the Ranbir Penal Code against Sham Lal.

13. The respondents pleaded not guilty and claimed trial. During trial, the prosecution examined 13 witnesses in support of the charges. The trial court thereafter recorded the statement of respondents under Section 342 Cr.P.C. The accused persons denied all the incriminating circumstance in the evidence put to them and claimed that they had been falsely implicated in the case. Sham Lal categorically stated that he was on duty and was not even present on spot. He also stated that he had never agreed to give any share in the property to Ashok Kumar—son of the deceased and he had never any dispute with Rano Devi with regard to the land. Accused Dharminder Kumar denied having made any disclosure statement or any recovery effected.

14. After a careful consideration of the prosecution evidence in its entirety, by the judgment dated 24<sup>th</sup> January, 2009, the Principal Sessions Judge, Samba, held that prosecution had failed to make out a case against the respondents beyond

reasonable doubt and by the judgment dated 24<sup>th</sup> January, 2009, acquitted them from commission of the offences for which they had been charged. This judgment has been challenged by the prosecution before this Court by way of the present appeal.

15. We have given our considered thought to the submissions made by both sides and examined the evidence in its entirety. We discuss hereafter the challenge placed by the prosecution and the different aspects of the evidence lead by the prosecution hereafter.

*Whether the witnesses support the case of the prosecution?.*

16. The prosecution had examined Nand Lal-PW1 to prove the complaint which was lodged with the police. In the witness box, this witness claimed that he saw the deceased dead on spot and he did not have any idea as to how she died. The witness denied lodging any report and stated that his signatures were obtained on a report after the arrest of the accused persons. He however denied knowledge about the contents of the report. This witness was declared hostile and cross examined by the prosecution. In his cross examination he stated that Ashok Kumar, the son of the deceased, from his first marriage used to reside at his maternal grand parent's house (parental house of deceased). Nand Lal was categorical that Rano Devi and Dharminder Kumar had cordial relations. He learnt that Rano Devi had been killed but did not know how she was killed and that he did not know the contents of the report. Though he identified his signatures on the seizure memos but he denied that the police had seized any of

the articles mentioned therein in his presence. According to the witness, his signatures were procured by the police on papers when he went to the police station to deliver food.

17. As noted above, the prosecution projected Ashok Kumar (son of the deceased Rano Devi) and her brother Gopal Das as eye witnesses to the occurrence. However, neither Ashok Kumar nor Gopal Das have supported the prosecution case. Ashok Kumar—PW2 stated that he was residing in his maternal grand parent's house at Makwal which was situated at a long distance from the house of the accused and that he was not present at the spot when the occurrence took place. Rather the witness testified that he had to board two passenger vehicles to reach the place where the occurrence took place.

18. In his examination in chief, Gopal Das—PW4 did suggest a dispute over the property share, mal-treatment of Rano Devi by Sham Lal and that the accused persons killed the deceased on 25.05.2005. He however stated that son in law of Sham Lal informed him about the incident. In cross examination, he admitted that the Public Prosecutor had read over his statement to him in the Court. He clarified that he was present in his home at 7 PM when Geeta Devi informed him about the occurrence. He even denied having made any statement at the police station.

Thus, none the witnesses (PW 2 and PW 4) examined as eye witnesses have supported the prosecution case. No other evidence was lead by the prosecution to connect the respondents to the occurrence.

19. The testimony of other witnesses is on issues unconnected to the occurrence and is concerned with the steps taken by the police during investigation. The evidence in its entirety does not support the prosecution case that relations between Sham Lal and Rano Devi were strain.

20. On the contrary, several witnesses including Naro Ram-PW6, Hakim Din-PW7, have stated that the relations between the accused Sham Lal and deceased Rano Devi were cordial. Bihari Lal-PW-5 has stated that Sham Lal was behaving properly with Rano Devi for the last 10 to 11 years but there were allegations of mal treatment after 1 and 1 ½ years and makes a reference to a dispute regarding which Panchyat meeting was held.

21. Even if it can be held that there was some dispute between Rano Devi on one hand and Sham Lal on the other hand, the prosecution still had to establish by clinching evidence that she was killed by Dharminder Kumar at the instance of Sham Lal as alleged by the prosecution.

22. Interestingly, to prove the investigation, prosecution examined Kuldeep Raj ASI-PW15 who in his cross examination stated that the complainant did not lodge any complaint against the accused and that he had arrested the accused persons at 3 PM on 26.05.2005. He also admitted that there was no eye witness except Nand Lal in the case.

23. It was the case of the prosecution that after his arrest, Dharminder Kumar made a disclosure statement resulting in recovery of the sword propounded as weapon of offence at his instance. To establish these facts, prosecution examined

Rachpal Chand—PW3. This witness was related to the deceased who was his sister. He attributed a disclosure statement to Dharminder Kumar as having been prepared on the third day after the occurrence and led the Investigating Officer to recover the weapon of offence which was kept under the bushes underneath the electric pole. Durga Das, however, in his testimony makes no reference to any disclosure statement by Dharminder Kumar.

24. It is in evidence that upon its recovery, the sword was sealed. However, the opinion of the doctor on the allegedly 'recovered' sword was proved on record as exhibit Ex.PW.BL/II, wherein it is stated that the weapon was blood stained and not sealed. Thus, the evidence on record establishes that a sword, which was not sealed, was produced before Dr Bachan Lal almost two months after the occurrence on 15<sup>th</sup> July, 2005. Even if the recovery could be believed, the prosecution had failed to establish that the sword produced before the doctor was the same sword. The seal had been tampered and the prosecution was unable to connect the recovery of sword to the occurrence.

25. The trial court has discussed the evidence lead by the prosecution threadbare on this issue. It has been noted that so far as the disclosure statement is concerned, when produced in the court the disclosure statement stands witnessed by Ashok Kumar son of the deceased as well as her brother Rachpal Chand. When examined as a witness, however, Ashok Kumar does not make any reference to a disclosure statement. He also does not make any reference to any recovery having been effected at the instance of Dharminder Kumar.

26. Ashok Kumar was not declared hostile by the prosecution and he has neither supported making of the disclosure nor the recovery of any weapon.

27. The recovery of the sword is also rendered suspect by the fact that it was recovered on the third day of occurrence, that too from an open place near the place of occurrence as noted by the trial court on page 11 of the judgment. The trial court has referred to judicial pronouncement reported in **Cr.L.J. 2008 1046 titled Mani v. State of Tamil Nadu**, wherein the court held thus:

*“Belated recovery from an open place near the place of occurrence cannot be relied upon. On this count, I am fortified by the view taken in Cr.L.J, 2008 1046 titled Mani v. State of Tamil Nadu wherein it has been held:*

*“....It need not be stated that where the discovery of the relevant articles have been made from the open ground though under the bush, that too after more than 10 days of the incident, such discovery would be without any credence. It does not stand to any reasons that the convened investigating officer did not even bother to look hither and thither when the dead body was found.*

*.....The discovery is a weak kind of evidence and cannot be wholly relied upon and conviction in such a serious matter cannot be based upon the discovery.”*

28. Clearly the belated recovery of a weapon having been effected from an open place accessible to all, near place of occurrence three days thereafter, cannot be relied upon. The Investigating Officer is expected to have inspected the entire area when he conducted the investigation after the occurrence. The finding of the

trial court that the recovery of the weapon remains uncorroborated by any positive and convincing evidence and cannot be relied upon as a circumstance in support of guilt of the accused persons is clearly unassailable.

29. It has been noted by the trial court that the prosecution has placed heavy reliance on the fact that the body of the deceased was recovered from the house of the accused persons. It is the case of the prosecution that the deceased was the wife of Sham Lal the respondent no.2 and was residing with him and the dead body of the deceased was recovered from her matrimonial home. It is not the case of the prosecution that their relations were strained or that the deceased was not cohabiting with her husband. It is also not the prosecution case that the respondents were in exclusive possession of the house to the exclusion of the deceased. The deceased was the wife of Sham Lal and step-mother of Dharminder Kumar, who was residing in the same house. In this background, there is nothing suspicious in that her dead body being recovered from her matrimonial home. Therefore, the learned trial court has rightly found that the factum that dead body of the deceased being recovered from the said house was an insignificant circumstance.

#### Motive

30. The Trial Court has also found that the prosecution has failed to establish any intention or motive on the part of the accused persons as sufficient to incite them to kill the deceased. Nothing is pointed out to us which would enable this Court to take a contrary view.

31. It is an admitted case of the prosecution that respondent no.2 was not even present at the site of occurrence when it took place.

32. On a consideration of the totality of the circumstances and the evidence lead by the prosecution, we are of the view that prosecution has miserably failed to make out a case of culpability and guilt of the accused in the commission of offences for which they had been charged.

33. For all these reasons, the present appeal must fail.

The appeal is accordingly, dismissed.

**(Tashi Rabstan)**

**Judge**

**(Gita Mittal)**

**Chief Justice**

**Jammu**

29.03.2019

Abdul Qayoom, PS

Judgment is pronounced by me in terms of Rule 138(4) of the Jammu and Kashmir High Court Rules, 1999.

**(Gita Mittal)**

**Chief Justice**

**Jammu.**

29.03.2019