

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

*Reserved on 18.05.2023
Pronounced on 02.06.2023*

CRAA No. 15/2012

State of J and K

....Petitioner(s)/Appellant(s)

Through :- Mr. Amit Gupta, AAG.

V/s

Gulji Bhai and others

....Respondent(s)

Through :- Mr. P.N. Raina, Sr. Advocate with
Mr. J.A. Hamal, Advocate.

**Coram: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE
HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE**

JUDGMENT

Rajesh Sekhri-J

1. The present appeal has been directed against judgment dated 20.04.2011 passed by learned 2nd Additional Sessions Judge, Jammu (hereinafter referred to as, "trial Court") in case titled "*State of J&K Vs. Gulji Bhai and others*" vide which respondents have been acquitted of the charges for offences under Sections 302/307/34 RPC.

2. The case set up by the appellant-State is that in the intervening night of 16/17th of July, 1999 an army patrol party, headed by Lt. Sanjiv Dahiya was on patrol towards a forward post and when it reached at BSF bunker, the respondents, who were BSF personnels on duty at the bunker, opened fire on the patrol party, whereby three Army personnels were killed and one of them sustained bullet injuries. Initially, the incident was treated as an operational

accidental death. However, the injured- Sep. Keshav Singh when recovered revealed the actual story. He stated that he was member of the patrol party, headed by Lt. Sanjiv Dahiya, who informed the BSF Post Pargal and left towards Malabela Post. The party reached the BSF Bunker and repeatedly blinked the torch as a mode of signal, but there was no response. Lt. Sanjiv Dhahiya went up stairs and found BSF personnels sleeping. He admonished them and informed that patrol party was moving towards Malabela Post. It was alleged by the injured that on this, BSF Personnels-respondents opened indiscriminate fire upon the patrol party, thereby killing Lt Sanjiv Dahiya, NK Jai Narain Tripathi, Sep. Data Ram and he sustained bullet injuries.

3. On this statement of the injured, FIR came to be registered and investigation came into vogue. After rituals of investigation, a final report in terms of section 173 Cr. P.C. came to be filed initially before learned Munsiff, JMJC, Akhnoor who committed the same to the Court of learned Principal Sessions Judge, Jammu, wherefrom it was transferred to the Court of learned 1ST Additional Sessions Judge, Jammu. It is pertinent to mention that respondents were charge-sheeted by the said Court for the aforementioned offences on 16.11.2004. This order came to be assailed in this Court whereby the committal proceedings were quashed and case was remanded to the Committal Court and learned Magistrate was advised to report the matter to the Government in respect of trial of the case. Resultantly, the Government conveyed the Committal Court that respondents/accused be tried under the ordinary Criminal Law of the Land. Consequently, the case was again committed to the Court of learned Principal Sessions Judge, Jammu where from it was transferred to the trial Court on 04.07.2006.

4. Respondents were charge-sheeted by the trial Court on 12.10.2006 whereby they pleaded innocence and claimed trial, prompting the trial Court to ask for the prosecution evidence.

5. Prosecution has examined as many as 28 witnesses to establish guilt of the respondents. Respondents in their statements under Section 342 Cr. P.C have denied the incriminating imputations arrogated to them and opted not to enter the defence. Learned trial Court after analysing the prosecution evidence has concluded that respondents were involved in the alleged commission of offences on the basis of suspicion only, thus prosecution failed to prove the charges beyond reasonable shadow of doubt. Accordingly, respondents have been acquitted as noticed at the outset.

6. The appellant-State has questioned the impugned judgment on the conventional grounds that learned trial Court has failed to appreciate the evidence in right perspective, impugned judgment has been passed in a mechanical fashion and there was sufficient material in the shape of documentary evidence on record to sustain conviction of the respondents.

7. Having heard the rival contentions and perused the impugned judgment, we find ourselves in total agreement with the findings recorded therein.

8. While Mr. Amit Gupta, learned AAG has reiterated the grounds urged in the memo of appeal, Mr. P.N. Raina learned senior counsel appearing for the respondents has vehemently argued that there is absolutely no evidence on record connecting the respondents with the commission of offences for which they have been charged.

9. For the sake of brevity, instead of a detailed resume of the prosecution evidence, relevant extract of testimonies of the prosecution witnesses are proposed to be referred as and when required.

10. Before a closer look at the grounds urged in the memo of appeal, it seems indispensable to briefly recall the prosecution story, though at the cost of brevity.

11. It is the prosecution case that on the intervening night of 16/17th of July, 1999 an army patrol party, headed by Lt. Sanjiv Dahiya was on patrol to a forward post and when it reached at BSF bunker, patrol party was fired upon by the respondents, who happened to be BSF personnels. Lt Sanjiv Dahiya, NK Jai Narain Tripathi and Sep. Data Ram were killed in the incident, whereas Sep. Keshav Singh sustained serious bullet injuries. It is pertinent to mention that initially, incident was treated as an operational accidental death.

12. It is further case of the prosecution that the reality surfaced on the recovery of the injured Sep. Keshav Singh. The injured revealed that he was a member of the patrol party headed by Lt. Sanjiv Dahiya. Lt Sanjiv Dahiya informed the BSF Post Pargal and left towards Malabela Post. They reached the BSF Bunker and blinked the torch, as a mode of signal, but there was no response from the other side. Lt Sanjiv Dahiya went upstairs and found BSF personnels asleep. According to injured Sep. Keshav Singh, when Lt. Sanjiv Dahiya admonished the BSF personnels, who were found asleep on duty and informed them that they were moving towards the Malabela Post, respondents-BSF personnels opened indiscriminate fire upon the patrol party thereby killing three Army men and he sustained serious injuries.

13. From the prosecution story narrated above, in general, and statement of the injured PW- Keshav Singh, in particular, it is evident that PW-Keshav Singh

is star witness in the present case, on whose testimony not only the present case came to be registered against the respondents but the investigating agency was set into motion.

14. We have carefully analyzed the statement of injured PW-Keshav Singh viz-a-viz testimonies of rest of the prosecution witnesses and found that the testimonial potency of the injured is not only discrepant on material factual aspects, but it does not inspire confidence to sustain conviction of the respondents for the following reasons.

15. PW- Keshav Singh has stated that it were Capt. Sanjiv Dahiya and Sep. Ram Paul who provided passwords and information to the BSF personnels at N. S. Pura and the passwords, namely, "Lidder Nallah" and/ or "Blinking" of torch were given to him by the 2nd in Command. First of all, the 2nd in Command has neither been cited nor examined as a prosecution witness in the case. Secondly, contradicting the injured PW- Keshav Singh, PW- Ram Paul has stated that passwords were provided to BSF by Rakesh or Sanjay at N.S. Pura and again neither Rakesh or Sanjay has been cited nor examined as prosecution witness in the case. Statement of the injured PW- Keshav Singh is further contradicted by PW- Col. R.P. Singh, who claims to be the co-coordinator between Army and BSF and he specifically admitted in his cross-examination that the investigating agency never asked for the record pertaining to the passwords, signals etc and co-ordination between him and BSF. Be that as it may, statement of the injured regarding passwords "Lidder Nallah" or "Blinking" of torch has not been corroborated by any other prosecution witness. Therefore, it is manifest that statement of star witness of the case, who happens to be the only surviving injured in the alleged occurrence, stands falsified on this material count.

16. It is also statement of the injured PW- Keshav Singh that after getting injured he crawled towards the river, fell in the river and was carried by the river current to a distance of about 30-40 feet. He remained in the river for the night and when he found the Army patrol in the morning, he cried to attract its attention, on which he was picked by the Army patrol party. He further stated that he came out of the river of his own and crawled for some distance. It appears from his version that he was conscious, well-oriented and was able to speak. In such a situation, the injured was expected to narrate the occurrence to his colleagues, who lifted him from the spot that respondents had deliberately fired at the Army patrol party. However, prosecution witnesses, relating to the said patrol party, who are stated to have lifted the injured and shifted him from the spot, including PWs- Jaimal Singh, Girdhari Singh, Dharm Vir Singh and Ram Paul have not stated anything in this respect that they were informed about the occurrence by him. On the contrary, PW- Ram Paul, Swaran Singh and Jagbir Singh have stated that when they spotted the injured, PW- Keshav Singh, he was unconscious. The testimonies of the aforesaid prosecution witnesses are sufficient to expose the veracity and credibility of the statement of PW-Keshav Singh, the star witness, on whose statement, the present case came to be registered against the respondents.

17. Another significant aspect of the case pertains to contradictory versions of the prosecution witnesses regarding recovery of weapon of injured PW-Keshav Singh. All the prosecution witnesses but PW- Girdhari Singh have stated that weapon of the injured was not recovered in their presence. PW-Girdhari Singh has stated that weapon of the injured was recovered by PW Ram Paul, but PW-Ram Paul has denied the same.

18. Another staggering circumstance to shake the credibility of the prosecution case is that though PW-Keshav Singh is stated to have sustained serious bullet injuries and was hospitalized for the same, however, prosecution has failed to produce any evidence in this respect. But for the disability certificate of PW- Keshav Singh, prosecution has not produced any evidence to prove injuries on the person of the injured and the medical opinion in this respect. Failure of the prosecution on this count is sufficient to dislodge the prosecution case.

19. Be that as it may, the staff court of enquiry, before registration of the present case by the police, had already concluded that present incident had taken place due to lack of co-ordination of patrolling communication, failure between 414 Bn BSF and 5 Rajput of Army as it is the case of mistaken identity and nobody was to be blamed. The finding of the staff court of enquiry reads as below:-

“That on 17th July, 99 at about 0230 hrs. when it was raining and lightening No. 89800562 Const. Gulji Bhai, while performing duty of night sentry at Bunker PWD Ex-Malabela BOP of "D" Copy 14th BSF, spotted suspicious movement of 3 to 4 personnel approaching towards his post. Const Guiji Bhai alerted his colleagues and challenged the approaching party and finding no response from them fired from LMG held by him. Subsequently the approaching party also retaliated. As a result of cross firing between BSF, army and Pak post Pirghana Bunker which is approx. 300 yards, following personnel of 5 Rajput Bn. Sustained bullet inquiries and succumbed.

- a) Capt. Sanjeev Dahiya**
- b) Hav. Jai Narayan**
- c) NK Data Ram**
- d) And LNK Keshav Singh was injured.”**

20. From the conspectus of the entire case and a perusal of the record, it appears that the unfortunate incident in which three precious lives of Army personnels were taken away and one jawan got seriously injured, took place due

to the breakout of 'Kargil War'. In view of the emergent circumstances, forces on the Border were ordered to be vigilant and movement on the border was restricted as there were shoot at sight orders, in order to prevent the terrorists and army of the enemy country to cross over to this part of the country. Pertinently, the restrictions were not for the common people only but forces were also advised to exercise restraint to coordinate between themselves as and when they were expected to move along the border.

21. The coordination between the forces, as per the testimonies of the witnesses, was ensured with the help of passwords, those were being changed on daily basis. It has come on record that at the time of unfortunate incident, it was raining and there was thunderstorm and lightening and there was firing from across the border. Indian Army also retaliated by opening fire towards the enemy and it appears that three Army persons were killed and one sustained injuries in the cross firing, due to total lack of coordination between the Army and the BSF. Unfortunately, respondents have been roped in, merely on the basis of suspicion, otherwise, there is absolutely no evidence to establish that respondents had deliberately fired upon the Army patrol party.

22. It is by far crystallized and trite position of law that suspicion, howsoever great, cannot take place of legal proof and conviction cannot be sustained merely on the basis of surmises and conjectures. The enunciation of law on this point is traceable to the series of decisions rendered by the Apex Court. Hon'ble Supreme Court in "*Umacharan Shaw & Bros. Vs. Commissioner of Income Tax*", reported as *1959 37 ITR 271 SC* has made the following observation :-

"20. Taking into consideration the entire circumstances of the case, we are satisfied that there was no material on which the Income-tax Officer could come to the conclusion that the firm was not genuine. There are many surmises and conjectures, and the

conclusion is the result of suspicion which cannot take the place of proof in these matters.”

23. The aforesaid principle of law has been reiterated by Hon’ble Supreme Court in *“Padala Veera Reddy Vs. State of Andhra Pradesh and others”* reported as *AIR 1990 SC 79*, the relevant excerpt whereof reads as under:-

“19. There are series of decisions holding that no one can be convicted on the basis of mere suspicion, however, strong it may be. Though we feel it is not necessary to re-capitulate a 11 those decisions we will refer to a few on this point.”

20. This Court in *Palvinder Kaur v. The State of Punjab* 1953 SCR 94 has pointed out that in cases dening on circumstantial evidence courts should safeguard themselves against the danger of basing their conclusions on suspicions how so ever strong.

21. In *Chandrakant Ganpat Sovitkar and Anr. v. State of Maharashtra* , it has been observed :

It is well settled that no one can be convicted on the basis of mere suspicion, though strong it may be. It also cannot be disputed that when we take into account the conduct of an accused, his conduct must be looked at in its entirety”.

24. Identical view has been expressed by Hon’ble Supreme Court in *“Devi Lal Vs. State of Rajasthan”* reported as *(2019) 19 SCC 447* in the following words:-

“18. On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of “may be true” to the plane of “must be true” as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.”

25. Supreme Court has also made following observation in *“Sharad Birdhi Chand Sarda Vs. State of Maharashtra”* reported as *AIR 1984 SC 1622*:

“That suspicion, however great it may be, cannot take place of legal proof and that ‘fouler the crime higher the proof’.”

26. It is evident from the afore-quoted legal position that though conviction can be sustained on the basis of sole testimony of a witness, however, conviction

cannot be sustained on the basis of suspicions, conjectures or surmises. The sole testimony of the injured has not been corroborated by any prosecution witness and does not inspire confidence to sustain conviction. The prosecution evidence is otherwise found discrepant on material factual aspects. In this backdrop, there is no scope to raise hypotheses of guilt against the respondents. Therefore, we do not find any illegality, much less, perversity in the impugned judgment. Consequently, the present appeal, being devoid of merit, is dismissed and impugned judgment is upheld.

27. Record of the trial court, if any, be returned forthwith.

26. Respondents are discharged of their bail bonds.

(Rajesh Sekhri)
Judge

(Sanjav Dhar)
Judge

Jammu:
02.06.2023
Renu

Whether the order is speaking? Yes

Whether the order is reportable? Yes