

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

CRAA No.61/2012

Reserved on: 01.06.2023.

Pronounced on:07.06.2023.

State (now UT) of J&K

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

Through :- Mr. Pawan Dev Singh, Dy. AG.

V/s

Bashir Ahmed & Ors.

....Respondent(s)

Through :- Mr. M. K. Raina, Advocate.

CORAM: HON'BLE MR. JUSTICE MA CHOWDHARY, JUDGE

JUDGMENT

1. Appellant-State has preferred this criminal acquittal appeal against the judgment dated 07.12.2011 ('impugned judgment') passed by learned 3rd Additional Sessions Judge, Jammu ('Trial Court') in case No. 88/2006 titled 'State v. Bashir Ahmed & Ors', arising out of FIR No. 169/2004 registered at Police Station Pacca Danga, Jammu for the commission of offences punishable under sections 120-B/121/121-A/122/153A RPC read with Sections 4/5 Explosive Substances Act and 7/25 Arms Act asserting therein that the respondents who were proved to have committed offences of which they were charged, had been acquitted illegally.

2. The impugned judgment whereby respondents were acquitted of the charges framed against them has been assailed on the grounds that the respondents who were active members of a militant organization namely Lashkar-e-Taiba, at the behest of Pakistan's Inter Services Intelligence (ISI) Agency were bent upon to create unrest in the State of Jammu & Kashmir and

had been indulging in the acts of sabotage and terrorist activities to dislodge the State of Jammu & Kashmir and Central Governments; that the prosecution had proved the case against the respondents that they had been found sitting and engaged in making of a conspiracy at Manda forests on 28.08.2004 and during search two chinese grenades were recovered from respondent Mohd. Bashir, one pistol from Mohd. Shafi, one live hand grenade from Javed Ahmed, one chinese grenade from Abdul Rehman, two Chinese grenades from Abdul Rashid besides one letter written in Urdu by District Commander of Lashkar-e-Taiba and a letter pad of the said organization were recovered from their possession; that the impugned judgment is contrary to law, against the facts of the case and passed in a mechanical manner without appreciating the circumstantial evidence as well as the other evidence on record despite there being sufficient evidence to connect the respondents with the commission of the offences. As such, the judgment on all these counts was bad in the eyes of law and liable to be set-aside. It was prayed to allow the appeal, set-aside the impugned judgment and respondents be convicted and sentenced in accordance with law.

3. Learned Dy. AG for the appellant, while reiterating the grounds raised in the memorandum of appeal assailing the impugned judgment, has further argued that the trial court has decided the case in a mechanical manner without appreciating the evidence brought on record by the prosecution in its right perspective and that with the acquittal of the respondents, there has been miscarriage of justice which is required to be corrected by this court while exercising the appellate jurisdiction. It was prayed that the appeal be allowed and the respondents be convicted of the offences of which they were charged and sentenced with exemplary and deterrent punishment.

4. Learned counsel for the respondents, on the other hand, argued that the prosecution had miserably failed to bring home the charge against the respondents and the trial court had decided the case by passing a very reasoned judgment as the prosecution had failed to connect the accused with the commission of the offences of which they were charged. He further argued that neither seizure of the arms/explosive material was proved, nor that material was produced before the court and that the prosecution witnesses had also failed to identify any of the accused in the court while being examined. Therefore, in absence of proof of the seizure memo with regard to recovery and seizure of the weapon and the explosive material, from the possession of the accused/respondents and they also not having been identified by any of the witnesses of the prosecution, during trial were sufficient grounds to record acquittal of the respondents. He has further argued that initially the FIR was registered by the police for many of the offences including waging of war, besides the offences punishable under Explosive Substances Act and Arms Act. However, the chargesheet was laid against them after investigation for the commission of offences punishable under sections 4/5 Explosive Substances Act, 212 RPC, and 7/25 Arms Act only for which they were charge-sheeted by the trial court. He further argued that the respondents who were innocent villagers of a remote area of Mahor had been implicated falsely by the police and a story had been projected that weapon and explosives had been recovered from their possession, which was not correct; and that the prosecution despite the trial of the respondents for over a period of five years failed to prove its case resulting into acquittal of the respondents. He further argued that the trial court has passed a very reasoned judgment based on evidence and appreciation of law on

the subject and the impugned judgment does not call for any interference by this court while exercising appellate jurisdiction. He finally prayed that the appeal be dismissed and the impugned judgment be upheld.

5. Heard and considered.

6. Before appreciating the rival submissions made by the learned counsel for both the sides, it will be relevant to mention the factual matrix of the case. On 28.08.2004 an information was received by the Incharge Police Station Pacca Danga from reliable source that the respondents herein as active members of a militant organization of Lashkar-e-Taiba are bent upon to create unrest in the State of J&K and had been indulging in acts of sabotage and terrorist activities to dislodge the State Government and Central Government; and that they are in the nearby forest of Manda Jammu conspiring to accomplish their nefarious designs.

7. On the basis of the aforestated information, a case was registered vide FIR No. 169/2004 for the commission of offences punishable under sections 121, 121-A, 122, 120-B, 153 A RPC, 4/5 Explosive Substances Act and 7/25 Arms Act at Pacca Danga Police Station and the police party with and without uniform was constituted, which raided Manda forest where the accused were found sitting and engaged amongst themselves in a conspiracy who were rounded up on being intercepted. During their search, weapons were recovered viz. two Chinese grenades from Mohd. Bashir, one pistol from Mohd. Shafi, one live hand grenade from Javed Ahmed, one Chinese grenade from Abdul Rehman, two Chinese hand grenades from Abdul Rashid, besides a letter from District Commander of Lashker-e-Taiba and a letter pad of the said organization were recovered and seized.

8. During investigation, accused were found to have committed offences punishable under sections 212 RPC, 4/5 Explosive Substances Act and 7/25 Arms Act and a charge sheet was laid for the aforementioned offences against them. All the accused were stated to have been charge sheeted by the trial court vide order dated 12.09.2005 who pleading innocence, denied the charge and claimed trial.

9. Prosecution in order to prove its case to bring home the charge against the accused examined ASI Omkar Nath, Mohd. Farid, Ganpat Rai, Mohd. Farooq, Kala Khan, Sanjay Khan, Sukhdev Singh out of witnesses cited in the column of witnesses as prosecution witnesses, the other witnesses including IO despite several opportunities were not produced for examination. The Trial Court examined all the respondents in terms of Section 342 CrPC who stated false implication and again denied the accusations, however, they did not lead any evidence. The Trial Court on conclusion of trial vide impugned order acquitted all the accused of the charges of which they were charge sheeted holding that the prosecution had failed to establish charge beyond reasonable doubt.

10. Prosecution had cited as many as 15 witnesses who are all police officials. Out of the prosecution witnesses cited, just seven witnesses were examined whose evidence was appreciated by the Trial Court. The Trial Court has not believed the prosecution story that all the six respondents were sitting at Manda on the benches erected alongside morning walk path, who admittedly did not open fire on the police personnel despite one of them alleged to have in possession of a pistol, besides others carrying hand grenades who also did not aim grenade on the police party. The trial court also did not find the prosecution story reliable as initially the prosecution had registered the FIR for the

commission of many heinous offences against the accused who were residents of Tehsil Mahor but later those heinous offences were dropped.

11. The Trial Court has also come to the conclusion on the basis of the evidence that the recovery of seizure of the pistol and the grenades was not proved. The Trial Court has also observed that the place of occurrence being at Manda just behind the Ashoka Hotel but no independent witness was associated by the investigating agency to prove the arrest of the accused and recoveries of the weapon viz. pistol and grenades from them. The Trial Court has held that in view of absence of proof with regard to possession, the offences punishable under section 25 of the Arms Act was not attracted as there was no convincing evidence in this behalf. Same view was taken with regard to the offence punishable under sections 4/5 Explosive Substances Act as the grenades were also not found to have been recovered from the possession of the respondents on a reliable evidence.

12. Prosecution examined ASI Omkar Nath, HC Mohd. Farid, Sg. Ct. Ganpat Rai, PSI Md. Farooq, Ct. Kala Khan, Ct. Sanjay Kumar, Ct. Driver Sukhdev Singh and Ct. Photographer Sanjay Kumar, who are all police men as prosecution witnesses. PW-ASI Omkar Nath stated that under the supervision of Inspector Arun Jamwal SHO, a police party had proceeded towards Manda forest in civil whereas SDPO SP City North with police escort from Panthirthi Police Post proceeded towards Manda forest, where accused were apprehended; that two grenades were recovered from accused Bashir Ahmed, Mohd. Qayoom, Gh. Rasool each whereas one grenade was recovered from Abdul Rehman and Javed each besides accused Mohd. Shafi was found carrying one pistol, the letter pads with inscriptions of Lashkar-e-Taiba had been recovered from Ghulam Rasool

and Mohd. Qayoom. He admitted the contents of Ext. PW-OS1, Ext.PW-MF1, Ext. PWMF2, Ext. PWMF3, and Ext.PWMF-4 as correct. The police had received information at 3.30 PM and on reaching on spot accused were found to have carved out a space for them and were found sitting; that on seeing police party they tried to flee but were apprehended. He further deposed that he had caught hold of accused Bashir Ahmed, however, he could not identify him in the court. Hand grenade had been recovered from the pockets of the accused; that he further deposed that though Manda remains flooded with morning and evening walkers but on that day no civilian had been there for evening walk. No weapon was sealed. He failed to identify any of the accused who had not attacked the police party.

13. PW-Mohd. Farooq stated that on Manda forest area being raided by the police party, the accused were seen sitting there, who were overpowered, as the accused who were six in numbers had been gheraoed by police men from all sides and during their search eight Chinese hand grenades, one pistol with magazine and literature of Laskhar-e-Taiba were recovered from their possession. The accused had been found in the Manda forest sitting on cemented chairs.

14. PW Kala Khan stated that he was informed by a police party of Police Post Panjthirthe that some militants are roaming in Manda area. He alongwith other police men who were in civies as well as in uniform went on spot. The Manda area was cordoned off by the police men and behind Ashoka Hotel intercepted the accused. He however added he had not gone on spot and cannot say as to which type of weapons were recovered from each of them. He had been told by other police men that they had recovered weapons from the accused. PW

Ct. Sanjay Kumar stated that he was PSO to SHO Arun Jamwal who on 28.04.2004 had received the information from reliable source, that five police men in civies went to Manda Sairgah and found accused sitting on the benches, engrossed in conversation; they were held by the police and shifted to SHO; that Bashir Ahmed and Abdul Rehman were found having in their possession two hand grenades besides letter pad, whereas Javed Ahmed was found with a pistol; he further deposed that when he had reached on spot, the police party had already recovered the seized material from the accused. He further stated that the accused had been apprehended from one side of Nagrota road when they were sitting on benches; he refused to identify Javed, Mushtaq and Bashir as accused. PW Sukhdev Singh refused to identify any of the accused as he had found at the Police Station having their faces covered. PW Sanjay Kumar had stated that the accused had been found sitting on concrete benches erected alongside the walk path for the walkers in Manda forest area.

15. In view of the aforestated evidence brought on record by the prosecution, there is no conclusive and corroborative evidence in view of statements of the different prosecution witnesses as they have differed with each other in material aspects; as some of the prosecution witnesses stated that the accused were found sitting on the concrete chairs/benches on the pathway maintained in Wildlife Sanctuary Manda for the evening/morning walkers in the area whereas one of them deposed that they were found on one side of the road leading to Nagrota. Some of the witnesses have stated that the accused were found just behind Ashoka Hotel.

16. No independent witness has been associated to prove the arrest of the accused or recovery of the weapons/explosives from their possession, though

accused were found in a public place just behind a prominent hotel of Jammu. Even if there was no person available from the public, the staff of the hotel could have been associated at the time of seizure of the weapon and explosive material from the accused.

17. The story of the prosecution otherwise seems to be unreliable in view of the fact that the seven persons allegedly involved in terrorist activities and as alleged by the police to be members of Laskhar-e-Taiba a dreaded organization were sitting like ducks at a public place in Wildlife Sanctuary at Manda waiting for the police to be arrested without any reaction and despite availability of the weapon/explosives they had not used them to retaliate while being arrested by the police.

18. The police had initially registered the case for the commission of the offences against the State invoking the sedition charges, however, later before filing of the chargesheet those offences were dropped and the chargesheet was laid against the accused for the commission of offences punishable under Arms Act and Explosive Substances Act only. Since most of the prosecution witnesses have failed to identify any of the accused in the court while being examined and the recovery from the possession of the accused of the pistol and the grenades was also doubtful and no independent witness despite availability, was associated with the process of recovery and seizure, the trial court by a very reasoned judgment has held that the prosecution had failed to prove the case to bring home the charge against any of the accused.

19. The Apex Court in a case reported as *AIR 1997 SC 2417* has held that before conducting a search, the concerned police officer is required to call upon some independent and respectable people of the locality to witness the search

and that in the given case, it may so happen that no such person is available or even if available is not willing to be a party to such a search, later on turn hostile, and that in any of these eventualities, the evidence of the police officer who conducted the search cannot be disbelieved solely on the ground that no independent and respectable witness was examined to prove the search, but if it is found that no attempt was even made by the concerned police officer to join with him some persons of the locality who were admittedly available to witness that recovery, it would affect the weight of the evidence of the police officer though not its admissibility. This had been held by the Apex Court in a case where arms and ammunition had allegedly been recovered from the appellants and seized material had not been packeted and sealed. The Apex Court again in a case titled *Amarjit Singh v. State of Punjab*, reported as **1995 Supp (3) SCC 217** held that non-sealing of the revolver at the spot is a serious infirmity because the possibility of tampering with the weapon cannot be ruled out as in that case there was no evidence to indicate as to with whom the revolver was after its seizure by the police officer till it was sent to the Arms Expert for testing through constable.

20. Prosecution, in the case on hand, has not only failed to produce on record any statement/certificate from any ballistic expert or any expert from FSL to prove that the seized grenades and the pistol had been sent for ballistic examination by the experts. This is also a serious infirmity to be taken into consideration, as in such a situation, the offences of which the accused were alleged to have committed cannot be said to have been proved. The weapon and explosives, claimed to have been recovered from the accused/respondents, were neither marked on spot, nor sealed, not sent to any Ballistic Expert to examine whether weapon was in working condition or the explosives were live. In

absence of these factors, it cannot be said that weapons/explosives were seized and recovered.

21. For the foregoing reasons and the observations made hereinabove, it is held that prosecution had failed to prove its case beyond reasonable doubt to bring home the charge against the accused for the commission of any of the offences of which the accused had been charged. The impugned judgment, being reasoned on sound legal grounds, does not require any interference by this court while deciding the matter invoking the appellate jurisdiction. The trial court has accepted the view which could be taken on the basis of the evidence led by the prosecution. The impugned judgment is, thus, upheld. As a result, the acquittal appeal is dismissed.

22. Trial court record, alongwith copy of this judgment, shall be sent down for information.

Jammu:
07.06.2023.
Raj Kumar

(MA CHOWDHARY)
JUDGE

Whether the order is speaking: Yes
Whether the order is reportable: Yes