

**State Vs. Abdul Rashid and ors.**

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**Court :** Jammu and Kashmir

**Decided On :** Apr-16-2001

**Reported in :** 2002CriLJ3118

**Judge :** R.C. Gandhi and; O.P. Sharma, JJ.

**Acts :** Indian Arms Act - Sections 4 and 27; ;Ranbir Penal Code (IPC) - Sections 34, 302, 307 323, 326 and 341; ;Evidence Act - Section 27; ;Code of Criminal Procedure (CrPC) - Sections 161 and 417; ;Indian Penal Code (IPC) - Sections 34, 307 and 341

**Appeal No. :** Acq. Appeal No. 3 of 1999

**Appellant :** State

**Respondent :** Abdul Rashid and ors.

**Advocate for Def. :** S.C. Subash, Adv.

**Advocate for Pet/Ap. :** A. Kapoor, A.A.G.

**Disposition :** Appeal allowed

**Judgement :**

1. This appeal by the State is against the order of acquittal dated 31 -8-1990 passed by the Additional Sessions Judge, Ramban. The accused-respondents were tried for the offence of murder and attempt to murder allegedly committed by

them on 9-1-1992 when all the three are said to have assaulted the deceased Farooq Ahmad and his brother PW Rafiq Ahmad. The occurrence having taken place within the jurisdiction of P/S Banihal. Both the victims of the assault were removed to Government Hospital, Banihal immediately after the occurrence. Doctor Abdul Majid, the then Block Medical Officer, Banihal referred the deceased Farooq Ahmad to SMGS Hospital, Jammu for treatment on the same date. However, before he was shifted to Jammu, his statement was recorded by the police in the Hospital on the basis of which case Under Section 307/341 read with Section 34, IPC was registered against all the three accused.

2. The facts disclosed in the FIR are that the deceased along with his brother PW Rafiq Ahmad was attacked by the accused persons in village Maligam. While the deceased was stabbed by a sharp edged weapon his brother PW Rafiq Ahmad was also attacked with a sharp edged weapon. Assailants fled from the place of occurrence when some persons intervened. However, the persons who allegedly intervened are not named in the FIR.

3. Since the deceased was referred to SMGS Hospital, he was treated there for the stab wounds which were stitched by Dr. S. L. Kachroo. He was admitted in SMGS Hospital, Jammu on 19-1-1992 and discharged on 24-1-1992. He died on 17-3-1992. The prosecution case is that he died of the stab wounds inflicted by the accused which did not heal despite treatment. Charges Under Section 302/307/326/341/323/34 RPC and 4/27 Indian Arms Act were framed on 13-2-1996 to which accused pleaded not guilty. The trial court being of the opinion that the prosecution has failed to prove charge against the accused beyond reasonable doubt, acquitted them and hence this appeal Under Section 417 of the Code of Criminal Procedure.

4. The contention of Mr. Amrish Kapoor learned Addl. Advocate General is that the order of acquittal is bad because the trial Court has wrongly rejected the evidence of PW Rafiq Ahmad who was accompanying the deceased at the time of assault. His presence on spot, it is argued has been proved by the injuries found on his person and also from the fact that both were together treated in the Government Hospital, Banihal by Dr. Abdul Majid before he referred the deceased to SMGS

Hospital, Jammu for specialised treatment. Statement of PW Rafiq Ahmad according to the learned Advocate is also corroborated by the first information report and the injury statement duly proved by the expert evidence of Dr. Abdul Majid and others which lends assurance to the prosecution story. The counsel for the accused on the other hand argued that the prosecution having relied on the direct evidence of as many as 5 witnesses, out of whom three resiled, it would be highly dangerous to rely on the statement of PW Rafiq Ahmad, brother of the deceased whose testimony stands contradicted by PW Abdul Rashid. It will also be unsafe to convict the respondents by placing reliance on the statement of this witness who being real brother of the deceased is a related witness because the evidence of PW Abdul Rashid has been rightly rejected by the trial Court because his presence on spot was doubtful.

5. The FIR mentions the place of occurrence, names of assailants and the weapon used. What is missing in the report is the names of the witnesses. It also states that the deceased and his brother Rafiq Ahmad both were admitted in the Hospital at the time statement of the former was recorded.

6. Though author of the FIR is dead, but if it is proved that the occurrence has taken place in the manner and at the place stated therein, it will lend assurance to the credibility of the witnesses. Since PW Rafiq Ahmad has survived the injuries, therefore, he is an important witness being the injured. His statement is that while they were proceeding towards the house of their sister, all the three accused suddenly pounced upon them. While two of them namely, Rashid and Sharief were armed with sharp edged weapons the 3rd was having a rubber pipe. While the first two accused assaulted them with sharp edged weapons the 3rd hit the deceased on the head with the rubber pipe which had iron shod from one end. Their cries attracted neighbours namely Abdul Rashid, Sharief Ahmad and Ghulam Nabi. When the assailants saw these persons coming they took to their heel. Since both of them were bleeding from the injuries, they were immediately taken to Government Hospital, Banihal. Block Medical Officer, Banihal according to the witness referred the deceased to Jammu because his condition was serious while he remained admitted in the Hospital for three days. The deceased was brought back from Jammu, but he did not recover completely and died after

sometime. The witness has been cross-examined at length, but without shaking his credibility. Rather the questions put to him in the cross-examination are not directed to shake his credibility, but only to ascertain information as to whether the shirts he and the deceased were wearing were also cut when knife injuries were inflicted. He was also asked about his presence on spot at the time police went there. According to him the knife could only enter body only after cutting the shirts they were wearing. He denied his presence on spot at the time of police inspection because he was admitted in the Hospital. On the other hand his statement finds corroboration from the facts stated in the FIR. It is also corroborated by the medical opinion regarding the nature of, injuries. Dr. Abdul Majid who examined the witness and the deceased has stated that he found the following injuries on the person of PW Mohd Rafiq:--

1. An incised wound on left temporal region in an oblique direction which was bleeding injuries were clean cut and gaping, it was 2' x skin deep.
2. An incised wound above left carried in above downward direction 1' long skin deep.
3. An incised wound about less than an inch on upper dorsal region 1' and skin deep oblique and bleeding.
4. Small abrasions irregular on dorsum of hands.
7. So three out of four injuries are by the sharp edged weapon.
8. Similarly the deceased had a stab injury on abdomen with a tear in the greater curvature of stomach. He was referred to SMGS Hospital, Jammu for treatment. Dr. S. L. Kachroo who treated the deceased in the surgical ward of Government Medical College, Jammu stated that the patient was discharged on 24-1-1992 after treating the injuries. Stab wound is always possible by a sharp edged weapon and this corroborates the statement of PW Rafiq Ahmad as also the FIR. Despite this overwhelming evidence, the statement of this witness has been rejected by the trial Court firstly because he has been contradicted by PW Abdul Rashid who named only first two accused as the assailants and 2ndly, PWs Ghulam Nabi and

Sharief have resiled from their statements recorded Under Section 161, Cr.P.C. thereby denying the prosecution version of the occurrence. Thirdly, the trial Court found that neither disclosure statement leading to the recovery of weapon of offence nor recovery of weapon of offence was proved and fourthly, if the seizure of the weapon of offence is not proved, the entire prosecution story must collapse. The trial Court also found that death in this case might have been due to medical negligence in treating the injuries and not because of the injuries because of the time gap between the date of assault and the date of death. Acquittal also appeared to be influenced by the fact that PW Rafiq Ahmad being closely related to the deceased may not be telling the truth. In the opinion of the trial Court, the evidence of Mohd. Rafiq has to be accepted with greater degree of care and caution because of their previous enmity and relationship. Having gone through the statement of this witness, we are of the opinion that the trial Court has unnecessarily condemned the witness by rejecting his evidence. Since he was injured along with the deceased, therefore, his presence on spot cannot be disputed. The fact that both of them were admitted in the Hospital where he was treated from 19-1-1992 to 22-1-1992 by Dr. Abdul Majid before being discharged affords ample corroboration to his statement. Since three out of four injuries found on his person are by sharp edged weapon, this further proves that what is stated in the FIR is correct because these three injuries were by a sharp edged weapon. Like the evidence of the assault if corroborated by the medical opinion does not require further corroboration because his , presence on spot cannot be disputed. Since the witness was also injured and moved to the Hospital along with the deceased, therefore, his presence on spot is established and his evidence cannot be rejected merely because he is brother of the deceased.

9. So if the statement of the injured is corroborated by the medical opinion and this earlier version of the occurrence ordinarily in his testimony should be accepted unless there is something inherently abhorrent in his statement which makes it unacceptable. We have not found any infirmity in the statement of this witness. The learned trial Court has tested the statement of this witness with the statement of Abdul Rashid who has named only first two A-1 and A-2 as the assailants by excluding the presence of A-3. It is unfortunate that the prosecution did not cross-examine this witness insofar as he denied the presence of A-3 though his

statement in the Court was contrary to his statement recorded Under Section 161, Cr. P.C. but this could not be a ground to reject the statement of PW Rafiq Ahmad. Moreover, it at best could be a ground to reject the evidence of in PW Abdul Rashid either partially or entirely, but not the evidence of the victim of assault. The evidence of this witness could be rejected because he is not named in the FIR. It could also be rejected because of the contradiction, but the trial Court could have also accepted his statement so far as it corroborates the assault causing injuries to the deceased and Rafiq Ahmad with sharp edged weapon and rejected the rest holding to be influenced or being a perjury. The trial Court has thus failed in its duty to apply the principle of sifting chaff out of grain. The grain in the statement of PW Abdul Rashid is that A-1 and A-2 assaulted the deceased and PW Rafiq Ahmad with sharp edged weapon while chaff is an attempt to exclude the presence of A-3, but even if whole of his statement is excluded, the prosecution case would not suffer because PW Mohd Rafiq is victim of the assault and his statements finds cor-roboration from the FIR as well as medical evidence. We further find that the investigation of the case was quite fair which lends further assurance to the finding which we propose to record.

10. It was next argued that it would be unsafe to record conviction of the accused on the solitary statement of Rafiq Ahmad who is not only a related witness, but also interested witness. This contention has to be rejected because the witness has no reason to screen the real culprit by involving the accused. Moreover, the evidence of a related witness cannot be equated with the evidence of an interested witness. Rejecting a similar argument their lordships in *State of Rajasthan v. Smt. Kalki* AIR 1961 SC 1390 : (1981 Cri LJ 1012) holding as under (para 5A):--

'Related' is not equivalent to 'interested'. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye-witness in the circumstances of a case cannot be said to be interested.

11. The same principle has been reiterated in *Anvaruddin v. Shakoor* (1990) 3 SCC 266 : (1990 Cri LJ 1269) which reads (para 8 of Cri LJ):--

It is well settled law that evidence of witnesses to the occurrence cannot be thrown overboard merely because they are interested and partisan witnesses. All that the law demands is that their evidence should be scrutinized with great care and caution to safeguard against the normal temptation to falsely implicate others. The trial Court had adopted that approach in evaluating the evidence of the eye-witnesses. On a critical examination of their evidence it concluded that their evidence stood corroborated by medical evidence, in that, it disclosed that All Mohammad had received as many as 18 injuries (13 incised wounds, 2 gunshot wounds, 2 abrasions and one contusion) whereas the deceased Siraju had sustained five injuries (four incised wounds and a swelling). The evidence of PW. 1 also stood corroborated by the evidence of PW 6 Zafaruddin who wrote the FIR Ex. Ka 3 at the behest of PW. 1. The contents of the FIR also corroborate the testimony of PW. 1. The find of blood, etc. from the scene of occurrence noted in the Panchnama proved through PW. 7 Om Prakash also lends cor-roboration to their testimony. It was, therefore, contended that the High Court failed to come to grips with the evidence and approached the matter in a perfunctory manner.

12. So this applies to the facts of this case and the statement of PW Rafiq Ahmed has been rejected by the trial Court without there being any basis. The approach of the trial Court in evaluating the evidence of this witness is not in accord with the law. His statement should have been accepted without any reservation.

13. This brings us to the question of recovery and disclosure statement with regard to the weapon of offence. We are not impressed by the reasoning advanced by the trial Court to reject the evidence of these witnesses without giving any reason as to why the statement of PW. Swami Raj Sharma ASI who had investigated the case. His statement that the accused Mohd. Sharief had made a disclosure statement with regard to the dagger which was recovered at his instance cannot be ignored. The question is why he should be disbelieved when he had no interest in getting the accused convicted by a false charge. However, even if the recovery of dagger and sword is ignored, the conclusion cannot be different because it is

not a case where occurrence has not been witnessed and recovery of weapon of offence is the only circumstance to connect the accused with the crime. Unfortunately for the assailants, one of the victims of their assault has survived the injuries inflicted upon him. He has identified the weapon of offence used by them. The fact that he and deceased his brother were assaulted with a sharp edged weapon such as a dagger a fact supported by medical opinion is sufficient to hold the accused guilty of the charge of causing voluntary hurt by using dangerous weapon even if the particular weapon is not identified. To sustain a conviction it is not necessary in all cases to trace the weapon of the crime. When direct evidence is available recovery of weapon of offence has only corroborative value. However, when there is no discrepancy between the direct evidence and the medical opinion with regard to the use of weapons. Any discrepancy about the identity of the particular weapon is insignificant as long as it is established that such an injury could be caused by the weapon mentioned by the victim of the assault. The definite case of the prosecution is that injuries were inflicted by a dagger and a dagger and sword have been recovered. Both are sharp edged weapons. It is in the opinion of Doctor that these injuries were possible by these weapons. So even if recovery is not proved though in our opinion it is proved that would not materially affect the prosecution case because PW Rafiq Ahmad is alive to say what weapon was used and Doctor has confirmed his statement. Same is corroborated by the FIR also. So any discrepancy has to be ignored. We may however, say that even if the marginal witnesses failed to support the recovery, there must be some grounds to reject the statement of investigating Police Officer who recorded these statements in the course of investigation. His statement cannot be rejected because the presumption that every public servant is presumed to act fairly is as much applicable to a police officer as to any other public servant. This has been laid down by the Supreme Court in *Girdhari Lal Gupta v. D. N. Mehta* 1971 Cri LJ 1 : (AIR 1971 SC 28 which reads:--

19. Mr. Bhattacharya, who followed Mr. Chagla for the appellants contends that a serious question of law is involved, the question being that if an investigating officer conducts a search his evidence cannot be relied on unless it is corroborated. It is a novel proposition and he has not been able to cite any authority or principle in support of it. It all depends on the facts in each case.

14. This was reiterated in *State of Kerala v. M. M. Mathew* AIR 1976 SC 1571 : (1978 Cri LJ 1690) holding as under (para 3):--

It is true that Courts of law have to judge the evidence before them by applying the well recognised test of basic human probabilities and that some of the observations made by the Sessions Judge especially one to the effect that 'the evidence of officers constituting the inspecting party is highly interested because they want that the accused are convicted' cannot be accepted as it runs counter to the well recognised principle that prima-facie public servants must be presumed to act honestly and conscientiously and their evidence has to be assessed on its intrinsic worth and cannot be discarded merely on the ground that being public servants they are interested in the success of their case.

15. The High Court of Rajasthan as in *Parag v. State of Rajasthan* 1981 Cri LJ 1244 relying on number of judgments of the Supreme Court has held as under:--

17. Human impulse is to speak the truth. The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not judicial approach to distrust and suspect a police officer without good grounds therefor. Merely because a police officer can be said to be interested in the success of the case, if his statement is trustworthy, it will not come in the way of acceptance of his statement by the Court.

16. So the statement of PW Swami Raj Sharma that accused made disclosure statement and led to the discovery of the weapon of offence cannot be rejected simply because PW Nidhan Singh has resiled from it. This statement of the accused is admissible in evidence Under Section 27 of the Evidence Act because pursuant to this the weapon of offence was recovered.

17. This takes us to the question of offence committed by the accused persons. It is an admitted fact that PW Rafiq Ahmad had sustained only simple injuries which were caused by sharp edged weapon. The deceased Farooq Ahmad, however, had a stab wound which according to Doctor Abdul Majid was dangerous to life. He was operated in Govt. Medical College Jammu by Doctor S. L. Kachroo. There is nothing in the statement of Dr. Kachroo as to whether the injury was imminently

dangerous to life or not. As per post-mortem finding, the deceased died on 17-3-1992. The Doctor Abdul Wahid Wali who conducted the autopsy opined that the deceased had died due to shock leading the Cardio-respiratory arrest as a result of peritonitis which was caused by the perforation of the stomach. When his statement is read with the statement of Doctor S.L. Kachroo, lecturer in the Department of Surgery, Medical College, Jammu, the deceased had a stab injury of Abdomen and had tear in the greater curvature of stomach on the interior surface. This tear according to the Doctor was 2 cm long. So the injury was certainly grievous one caused by a sharp edged weapon. The finding of the trial Court is that the deceased did not die of the injury but because of medical negligence. We are, inclined to agree with this because the deceased had not been treated properly after his discharge from the hospital on 24-1-1992. Since he belongs to the remote village of Tehsil Banihal, he should not have been discharged till the bone had healed. The fact that he reported on 27-1-1992 for further advice shows that he had not left Jammu even after discharge. Nonetheless, it cannot be said that the injury was sufficient in the ordinary course of nature to cause death. It also cannot be held that the assailants had the knowledge that the injuries would prove fatal. Delay of nearly two months between the date of occurrence and the date of death further persuade us to hold that the deceased had died either because of his own negligence or the reason could be medical illiteracy or lack of awareness because he used to go to a Medical Assistant in a village dispensary for getting the bone treated which was not proper approach. In any case he has died because of the perforation of the wound which was stitched by Doctor S.L. Kachroo. This was a grievous hurt caused by means of an instrument used for stabbing or cutting and since the dagger or the sword when used as a weapon of offence is likely to cause death, therefore, the accused are guilty of causing voluntarily grievous hurt by use of a dangerous weapon. They are, therefore, guilty of an offence punishable Under Section 326 read with Section 34, RPC. We accordingly allow this appeal, set aside the order of acquittal and convict the accused for the aforesaid offence. However, since they have remained in custody for nearly 5 years, we accordingly sentence them to imprisonment for five years which they have already undergone during the trial. We make the order accordingly.

