

Mohammad Taj. Vs. State of Jandk.

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Court : Jammu and Kashmir

Decided On : Nov-16-2010

Judge : Mr. Justice Virender Singh ; Mr. Justice Mansoor Ahmad Mir, J.J.

Acts : [Arms Act, 1959](#) - Sections 4, 27; Ranbir Penal Code (RPC) - Sections 302, 120-B, 121, 122 ; [Code of Criminal Procedure \(CrPC\) ,\(Cr.P.C\) 1973](#) - Sections 173, 512, 273 ;

Appeal No. : CRA No. 55 OF 2009 AND CRREF No. 78 OF 2009.

Appellant : Mohammad Taj.

Respondent : State of Jandk.

Advocate for Def. : Mr. A. H. Qazi, Adv.

Advocate for Pet/Ap. : K. L. Pandita ; Samir Pandita, Adv.

Judgement :

1. This criminal appeal is directed against the judgment and order of conviction dated 30th of September, 2009 and order dated 1st of October, 2009, whereby accused was sentenced to death subject to confirmation of this court, on the grounds taken in the memo of appeal.

BRIEF FACTS:-

Police Station Budhal received information from reliable sources that on 9th of October, 2005 at about 7.00 pm a group of militants entered into the house of one Munshi Ram S/o Nihal Chand R/o Raj Nagar Budhal and killed five persons by slitting their throats. This report set the police in motion. FIR No. 46/2005 for the commission of offences punishable under Sections 302, 120-B, 121, 122 of Ranbir Penal Code, (hereinafter for short as RPC) and Section 4/27 Arms Act came to be registered. Mohammad Bashir, ASI, was entrusted with the investigation; he conducted the investigation and during investigation prepared site-plan of the place of occurrence, seized dead bodies of the five persons, prepared seizure memos, took photographs of the place of occurrence and of dead bodies and samples of ordinary and blood stained soil (earth) were taken from spot. The team of doctors conducted postmortem, blood samples were taken during conducting of postmortem and were sent to FSL for opinion. The dead bodies were handed over to their relations. The Investigating Officer prepared a final report in terms of Section 173 of Criminal Procedure Code (hereinafter for short as Cr.P.C) and came to the prima- facie conclusion that on 4th of October, 2005, accused Altaf Hussain met Mohammad Yaseen Alias Amir Khan, Sanghar Pathan and Shakeel Ahmad in the Guhar forests and stayed during the intervening night of 4/5th October, 2005 in the house of Mohammad Bashir S/o Saleh Mohammad R/o Mahora Gabbar. On 5th of October, 2005 Altaf got clothes of the aforesaid persons washed by Ashiq Ali S/o Hassan Mohammad and also arranged food/fruits from Mohammad Tariq S/o Mohammad Bashir. In the intervening night of 5th/ 6th October, 2005 they stayed in the house of Mohammad Iqbal S/o Raj Mohammad R/o Mahora Gabbar and at about 11. pm accused Mohammad Taj (nephew of Mohammad Iqbal) reached there. Thereafter they stayed in forest (Chakhari) in order to trace-identify the informers. In the intervening night of 9th/ 10th of October, 2005 all the five persons i.e. Altaf, Mohammad Taj and aforesaid three militants entered into the house of Munshi Ram and Sobha Ram and killed Munshi Ram, his two sons Rajender Kumar alias Kala and Hans Raj and Sobha Ram his son Suresh alias Vicky by slitting their throats. In terms of final report submitted by Investigating Officer under Section 173 Cr.P.C., three militants namely Mohammad Yaseen, Sanghara Pathan, Shakeel Ahmad were prima-facie found to be involved in the commission of offences punishable under Sections

302, 120-B, 121, 122 RPC and 4/27 Arms Act, whereas the offences punishable under Section 302/120-B of RPC were prima-facie proved against Mohammad Taj and Altaf Hussain.

2. Three militants were absconding whereas Mohammad Taj and Altaf Hussain were arrested, challan was presented before the court of Chief Judicial Magistrate, Rajouri, committed it to the court of Sessions Judge, Rajouri for trial after drawing proceedings against the said militants in terms of Section 512 Cr.P.C. Appellant and Altaf Hussain came to be chargesheeted, they denied the charges and claimed to be tried.

3. Prosecution examined PW 3 Mst. Amro Devi, PW 4 Mst. Jatti Devi, PW 5 Mst. Shanti Devi, PW 6 Babu Ram, PW 7 Krishan Lal, PW 9 Munshi Ram, PW 10 Mohammad Rafiq, PW 11 Mohammad Iqbal, PW 12 Mohammad Bashir, PW 13 Mohammad Tariq, PW 14 constable Ramesh Kumar, PW 15 Dr. Mohammad Ashraf.

4. Prosecution has failed to examine PWs 6, 8, 16, 17, 18 and 19. Accused Altaf Hussain and Mohammad Taj have not examined any witness in defence.

5. In terms of Section 273 of Cr.P.C, the trial court after hearing arguments, acquitted Altaf Hussain, while as accused Mohammad Taj came to be convicted and sentenced to death only for the commission of offence punishable under Section 302 RPC.

6. Feeling aggrieved Mohammad Taj questioned the same by the medium of this appeal. The trial court has made a reference for confirmation of the death sentence. Brief resume of evidence of the prosecution:- P.W. No. 3 Amro Devi deposed that she knows the accused present before the court. Near about nine months ago at about 7.00 p.m. she and her husband were sitting under the Tarpolene Sheet. Four persons came, out of them three were militants and fourth one was accused Mohammad Taj who was accompanying them. They asked her and her family members whether they had their meals. They replied that they had cooked the meals in the house of Sobha Ram. All of them went into the house of Sobha Ram. Accused Taj and other two militants out of three entered into the

house of Sobha Ram. One militant stayed outside the house. Militants who had gone inside the house had already taken Mushi Ram, Sobha Ram, Suresh, Rajinder Kumar and Hans Raj with them. One militant came outside the house while as accused Taj and another militant remained inside the door. The militant who came out demanded from them instrument of wood cutting. On their refusal he went inside the cowshed and brought out two sickles. She requested the militants not to kill them and were ready to leave all property. The militant who brought sickles pushed aside the witness and went inside the house. They heard noise of slitting/ cutting. She fell down unconscious and gained senses (consciousness) after some time. Thereafter those persons asked Jatti Devi and Shanti Devi to go and see inside that five persons were killed by the militants. In cross-examination she has stated that Taj was bearing mask/ veil on his face and three militants were without mask/ veil.

7. PW No. 4 Mst. Jatti Devi has deposed that she knows the accused present in the court. Occurrence took place last year prior to nine months at about 7.00 pm. They were residing in a tent because their house was damaged. Four persons came and asked them about the meals. They went to Sobha Ram s house, out of these four persons three were having arms and accused Taj was bearing mask on his head and face. Militants took four persons namely Hans Raj, Rajinder Kumar, Sobha Ram and Munshi Ram inside the room. Accused Mohammad Taj called Rajinder Kumar. They bolted the room from inside. One militant asked them and the children to remain near the kitchen. They tied the hands of the aforesaid five persons one of the militants came outside and asked for axe and sickles and brought out two sickles from the cowshed. They were gheored by one militant and other three militants slit the throats of aforesaid five persons. Taj was also in the group of those three militants who murdered the aforesaid five persons. Accused Taj was bearing mask on his head and face. However, she easily identified him by his voice. PW No. 5 Shanti Devi:- has deposed that she knows the accused present in the court. Prior to one and a half year at about 7.00 pm she was cooking meals when four persons entered into their house, one of them was Taj. She does not know the other three persons. Accused Altaf was not present on spot. They were all armed. They forcibly entered into their house and took her husband and son, Munshi Ram, Hans Raj, Rajinder Kumar inside the room and

they closed the room. One person who was having long hair came outside and took a sickle with him and killed all those persons who were taken inside. Thereafter accused locked them in another room. In cross examination she has deposed that accused were not bearing veils. They have not seen who was murdered by whom.

8. PW No. 7 Krishan Lal:- has deposed that he came on spot after deceased were murdered by slitting of throat. He admitted the contents of seizure memos of dead bodies, samples of soil, clothes of deceased as true and correct and exhibited as EXPW7 to EXPW7/Q. He has not admitted the contents of seizure memo relating to seizure of clothes of accused Mohammad Taj. He admitted the seizure of one sickle-EXPW7/10. In cross examination he has deposed that he was not present in the house on the date of occurrence and does not know who murdered the deceased. PW 9 Munshi Ram is not witness to occurrence. However, he deposed that he came on spot next day. Sickle was seized on spot in his presence, admitted the signatures on EXPW7/A, EXPW7/L to EXPW7/P.

9. PW 10 Mohammad Rafiq: has deposed that he is a chowkidar of village Rajnagar Budhal. Last year in the month of October, militants murdered 10 people belonging to the family of Munshi Ram and Kartar Singh. Police came on spot and seized the dead bodies. Weapon of offence i.e. one sickle having wooden handle was seized, EXPW7/10 was prepared. He identified the sickle shown to him in the open court and came to be marked as R. In cross examination he has deposed that documents i.e. seizure memos prepared were blank and his signatures were taken in one go in Police Station. Being chowkidar of village he has knowledge that militants are involved in the killings of the said persons and not the accused present in the court. PW 11 Mohammad Iqbal:- has deposed that he has no knowledge about the occurrence and came to be declared hostile. PP was permitted to cross-examine him. On cross examination he has deposed that in the intervening night of 5/6th October, 2005 he was present in his house. It is wrong that in next morning three militants including accused Altaf entered into his house and demanded meals by threatening.

10. PW No. 12 Mohammad Bashir:- has deposed that he has no knowledge about the occurrence and came to be declared hostile. PP was permitted to cross-examine him. On cross-examination PP was not in a position to extract any incriminating material against the accused. Virtually he has deposed nothing against the accused. PW No. 13 Mohammad Tariq:- has deposed that he has no knowledge about the occurrence, the witness was declared hostile and PP was permitted to cross-examine him. During cross-examination he has deposed nothing against the accused. PW No. 14 Constable Ramesh Kumar:- has deposed that he is not knowing the accused present in the court. In the month of October, 2005 he was posted at Police Station Budhal, he took the sealed packets as per the directions of the Investigating Officer to FSL Jammu.

11. PW No. 15 Dr. Mohammad Ashraf:- has deposed as under:-

That on 10.10.2005 I conducted the post mortem on the dead body of Munshi Ram S/o Nihal Chand R/o Rajnagar Mohra Dhar, Budhal, Rajouri at 1 PM identified by Babu Ram S/o Karam Chand R/o Rajnagar and Munshi Ram S/o Karam Chand R/o Rajnagar Budhal brought by ASI Mohammad Bashir P/s Budhal. On examination and during autopsy, I found the following injuries:

1. Big incised wound over anterior aspect of neck just below the hyoid bone with injuries over Oesophagus, trachea and both sides of large vessels and vagus nervous. In my opinion after conducting the autopsy of the deceased the case of death is irreversible hemorrhage shock due to injuries. The postmortem report on the file is in my hand writing and bears my seal and signature. The contents are correct. It is exhibited as EXPW-15/1.

On the same day, I also conducted the postmortem on the dead body of Rajinder Kumar son of Munshi Ram R/o Rajnagar Mohra Dhar, Budhal Rajouri identified by Babu Ram S/o Karam Chand R/o Rajnagar Budhal and Munshi Ram S/o Karam Chand, Rajnagar Budhal, brought by ASI Mohammad Bashir P/s Budhal.

On examination and during autopsy, the following injuries were found:-

1. Big incised wound over anterior aspect of neck just below the hyoid bone with injuries over Oesophagus, trachea ands both sides of large vessels and vagus nervous. In my opinion after conducting the autopsy of the deceased the cause of death is irreversible hemorrhage shock due to injuries. The postmortem report on the file is in my hand writing and bears my seal and signature. The contents are correct. It is exhibited as EXPW-15/2.

On the same day, I conducted the postmortem of Hans Raj S/o Munshi Ram R/o Rajnagar Mohra Dhar Budhal, Rajouri, identified by Babu Ram S/o Karam Chand, R/o Rajnagar Budhal and Munshi Ram S/o Karam Chand R/o Rajnagar Budhal, brought by ASI Mohammad Bashir P/s Budhal.

On examination and during autopsy, I found the following injuries:

1. Big incised wound over anterior aspect of neck just below the hyoid bone with injuries over Oesophagus, trachea ands both sides of large vessels and vagus nervous. In my opinion after conducting the autopsy of the deceased the cause of death is irreversible hemorrhage shock due to injuries. The certificate placed on the file is in my hand writing and bears my seal and signature. The contents are correct. It is exhibited as EXPW-15/3.

On the same day, I also conducted the postmortem of Suba Ram S/o Karam Chand R/o Rajnagar Mohra Dhar, Budhal, Rajouri, identified by Babu Ram S/o Karam Chand R/o Rajnagar, Budhal and Munshi Ram S/o Karam Chand R/o Rajnagar, Budhal, brought by ASI Mohammad Bashir P/S Budhal. On examination and during autopsy I have found the following injuries:

1. Big incised wound over anterior aspect of neck just below the hyoid bone with injuries over Oesophagus, trachea ands both sides of large vessels and vagus nervous. In my opinion after conducting the autopsy of the deceased the cause of death is irreversible hemorrhage shock due to injuries. The postmortem report on the file is in my hand writing and bears my seal and signature. The contents are correct. It is exhibited as EXPW-15/4.

On the same day, I have also conducted the autopsy of Suresh Kumar S/o Soba Ram R/o Rajnagar Mohra Dhar, Budhal, Rajouri, identified by Babu Ram S/o Karam Chand R/o Rajnagar, Budhal and Munshi Ram S/o Karam Chand R/o Rajnagar, Budhal, brought by ASI Mohammad Bashir P/S Budhal. On examination and during autopsy I found the following injuries:

1. Big incised wound over anterior aspect of neck just below the hyoid bone with injuries over Oesophagus, trachea and both sides of large vessels and vagus nervous. In my opinion after conducting the autopsy of the deceased the cause of death is irreversible hemorrhage shock due to injuries. The postmortem report on the file is in my hand writing and bears my seal and signature. The contents are correct. It is exhibited as EXPW-15/5.

On cross examination, no question was put to the witness by the Ld counsel for accused, although opportunity was granted.

Prosecution has not examined PWs 6, 8, 16, 17, 18 and 19 who are important and material witnesses.

Neither the names of FSL experts are figuring in the witness calendar nor examined by the prosecution as witness(es).

According to the prosecution story appellant Mohammad Taj and Altaf Hussain had hatched a conspiracy with other three accused-three militants and Investigating Officer found them involved in the commission of offence punishable under Section 302 read with 120-B, RPC. Accused Altaf Hussain came to be acquitted and State has not questioned the same, thus the acquittal of Altaf Hussain has attained finality. In this background the question is whether the conviction recorded and sentence awarded is legally tenable?

We are of the considered view that the entire case of the prosecution is shrouded in doubts and the very foundation of the case i.e hatching of criminal conspiracy by Mohammad Taj and Altaf Hussain has not been proved by the prosecution for the following reasons:-

CRIMINAL CONSPIRACY:-

The statements of PWs 3, 4, 5 and 10 are relevant. None of them have said about hatching of conspiracy. Neither there is direct evidence nor circumstantial evidence on the file. The story of the prosecution is that accused Altaf Hussain accompanied three militants at the first instance i.e. on 4th and 5th of October and thereafter on 5th and 6th of October, accused Mohammad Taj met them, but failed to prove. PW Mohammad Rafiq has deposed that only militants were involved in the commission of offences and not the accused Mohammad Taj and Altaf Hussain present in the court. Altaf Hussain accused stands acquitted and appellant has not been convicted by the trial court for the commission of offence punishable under Section 120-B RPC and the State has not questioned the same. It is apt to reproduce para 57 of the judgment in case Musheer Khan vs State of Madhya Pradesh, 2010 AIR SCW 996.

57. As a result of acquittal of A-1, A-2, A-3 and A-6, the conspiracy theory of the prosecution in this case fails. A substantial part of the prosecution case has not been accepted on valid grounds either by the High Court or by this Court. Thus, a very vital part of the prosecution case is finally knocked off. As the prosecution fails to prove its case of conspiracy, the motive angle behind the alleged crime committed by A-4 and A-5 disappears. The prosecution case is that A-4 and A-5 are hired criminals and were engaged on payment by A-1, A-2, A-3 and A-6 for killing the deceased. The acquittal of A-1, A-2, A-3 and A-6 which is upheld by this Court casts a serious doubt on the entire prosecution and its case against A-4 and A-5 suffers a serious setback.

Even otherwise prosecution has failed to bring charge of conspiracy home to appellant Mohammad Taj. Apex Court in the cases titled as B. H. Narasimha Rao versus Government of Andhra Pradesh reported as AIR 1996 SC 64 Para 4, Hardeo Singh versus State of Bihar and others reported as AIR 2000 SC 2245, Para 10, State of Kerala versus P. Sugathan and another reported as AIR 2000 SC 3323 Para 17, Saju versus State of Kerala reported as AIR 2001 SC 175 Para 16, Hira Lal Hari Lal Bhagwati versus C.B.I. New Delhi reported as AIR 2003 SC 2545, Para 37, Ram Narain Poply versus Central Bureau of Investigation reported as AIR 2003 SC, 2748 Paras 345 and 349 has laid down the test. It is apt to reproduce Para 345 of AIR 2003 SC 2748 herein:-

345. No doubt in the case of conspiracy there cannot be any direct evidence. The ingredients of offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.

It is also profitable to reproduce Para 10 of AIR 2000 SC 2245 :- 10. . As a matter of fact some connecting link or connecting factor somewhere would be enough for framing of charge since framing of charge and to establish the charge of conspiracy cannot possibly be placed at par: To establish the charge of conspiracy, there is required cogent evidence of meeting of two minds in the matter of commission of an offence-in the absence of which the charge cannot be sustained- .

(Para 37 of AIR 2003 SC 2545)

CONTRADICTIONS:-

The Investigating Officer came to the conclusion that Altaf Hussain and Mohammad Taj were not directly involved in the commission of offence punishable under Section 302 RPC but were involved with the aid of Section 120-B RPC and accordingly submitted the final report in terms of Section 173 Cr.P.C. But despite of that trial court has convicted the appellant Mohammad Taj for the commission of offence punishable under Section 302 RPC holding that direct evidence was available. Amro Devi, Jatti Devi and Shanti Devi, PWs 3, 4 and 5 respectively are the only eye witnesses and their evidence is contradictory on material particulars. Amro Devi and Jatti Devi have deposed that Mohammad Taj was bearing mask/ veil on his head and face while as three militants were not bearing mask/ veil. Shanti Devi has deposed that all the accused were without masks; now whom to believe? Whether the statement of PW Shanti Devi is correct or PW Amro Devi is

correct. PW Shanti Devi has specifically stated that accused Altaf Hussain was not present on spot. PW Jatti Devi and Amro Devi have said nothing on this count; PW 10 Mohammad Rafiq has deposed that Mohammad Taj and Altaf Hussain were not involved in the commission of offence and even he was not declared hostile by the prosecution. His statement gets corroboration by the acquittal of Altaf Hussain and cannot be brushed aside in the given circumstances. The Apex Court in the cases titled Harkirat Singh versus State of Punjab reported as AIR 1997 SC 3231 Para 3, Kalyan and others versus State of U.P. 2001 Cr.L.J 4677 Para 19, Krishna Mochi and others versus State of Bihar AIR 2002 SC 1965, Para 94, State of U.P. versus Bhagwant and others AIR 2003 SC 2293 Para 7, State of Madhya Pradesh versus Chamru @ Bhagwandas etc. etc. 2007 AIR SCW 4260 Para 10 has laid down tests. It is apt to reproduce Para 3 of AIR 1997 SC 3231 herein:- 3. Having regard to the facts that except the evidence of the two eye-witnesses there is no other legal evidence to connect the appellant with the offences for which he has been found guilty and that in view of the material contradictions the evidence of the two eye-witnesses cannot be safely relied upon the appellant is entitled to the benefit of doubt. We, therefore, allow this appeal and set aside the order of conviction and sentence recorded against the appellant. The appellant, who is on bail, is discharged from his bail bonds.

WEAPON OF OFFENCE.

The case of the prosecution is that accused used weapon of offence i.e. sickle while as PWs 3, 4 and 5 have deposed that two sickles were taken by one militant from the cowshed and used for the commission of offence. If the statements of the said witnesses are to be believed then the prosecution story is not correct and true.

The question is who used the seized weapon and what about second sickle? There is evidence on the file that three militants and appellant (whose identity has not been established) were on spot out of the three, one militant came out, took two sickles and used the same. None of the witnesses have said that Taj was a militant. There is no evidence on the file that Taj has used the sickle(s). All these doubts would have been cleared by the Investigating Officer who has not been

examined. The fingerprints of Mohammad Taj have also not been taken in order to ascertain whether he has used the seized sickle. The seized sickle has not been put to doctor in order to prove that the injuries sustained by the deceased were caused by the said sickle. Even that question has not been put to the doctor. Prosecution has neither arrayed the expert of FSL in the witness calendar as a witness nor has been produced before the court in order to prove that the seized sickle was the same which was produced before the court and was having the blood stains. Virtually the prosecution has failed to prove the FSL report. It is apt to reproduce relevant portion of Para 7 and 8 of the Apex Court judgment reported as AIR 2002 SC 2707 titled Mathura Yadav alias Mathura Mahato and others versus State of Bihar:-

7. We notice that the Courts below have implicitly accepted the evidence of PWs, 1, 2, 4 and 5 without properly considering the deficiencies and the contradictions in their evidence. Of course, in regard to the nature of the attack, the injuries suffered by the deceased and the individual overt act of the accused person, there is a possibility of some discrepancy which should not in the normal course affect the prosecution case. It is also relevant to notice the fact that the seizure of the blood-stained mud and grass is not established beyond reasonable doubt and there has been no recovery of any weapon from the accused ..

8. In the above doubtful circumstances, we consider it unsafe to place reliance on the evidence produced by the prosecution to hold the appellants guilty for offence charged against them.

NEW STORY

Keeping in view the discussion made hereinabove the witnesses have put a new story different than the one given in the final report. Thus appellant is entitled to benefit of doubt. It is apt to reproduce Para 175 of the Apex Court judgment reported as AIR 2003 SC 2748 titled as Ram Narain Poply versus Central Bureau of Investigation:-

I would also state that it is not properly understood by the prosecuting agency that by introducing or adding a new story in a criminal prosecution, in most of the

cases, it adversely affects or destroys the prosecution case. Not only it creates doubts with regard to that part of the prosecution version but on occasions casts doubt about the motive. Result is under our criminal jurisprudence, benefit of doubt may go to the accused.

IDENTITY OF THE ACCUSED

The prosecution has failed to prove the identity of Mohammad Taj. As discussed hereinabove one version is that he was wearing veil but other is he was not wearing veil. Amro Devi has not disclosed that how she identified appellant despite wearing mask. Mst. Jatti has said that she identified him by voice. The statements of PWs 3, 4 and 5 are contradictory on material particulars; they are interested and close relatives of deceased. Their evidence is to be scrutinized very carefully and cautiously. The Apex Court in case titled State of Bihar versus Brahmdeo Prasad & Ors reported as AIR 1980 SLJ SC 9 has held that if the identity of the accused is doubtful, accused is entitled to acquittal.

In the given circumstances the identification parade was a must which has not been conducted. PW Rafiq has categorically said that Altaf Hussain and Mohammad Taj were not there. Thus it can be safely held that identity of Mohammad Taj has not been established.

MATERIAL WITNESSES WITHHELD

The prosecution has withheld the material prosecution witnesses i.e. PWs 6, 8, 16, 17, 18 and 19. PW 6 Babu Ram is a witness of circumstances, seizure memo and Fard Superdnama; PW 8 Jagan Nath is a witness of circumstances and seizure of dead bodies; PW 16 is a Naib Tehsildar, in his presence the seized pockets were resealed; PW 17 Mohammad Bashir is the Investigating Officer, who is a star witness; PW 18 Shri Veer Singh is the SHO who has recorded satisfaction that the investigation conducted by the Investigating officer was to his satisfaction; PW 19 Kewal Krishan, Inspector, has prepared the Final report in terms of Section 173 Cr.P.C. In the given circumstances adverse inference is to be drawn against the prosecution. Apex Court has laid down the same principle in cases titled Bahadur Naik versus State of Bihar reported as AIR 2000, SC 1582, Para 2, and Raj

Kishore Jha versus State of Bihar and others, AIR 2003, SC 4665 Para 11. It is apt to reproduce said Paras herein:-

2. The appellant has not been able to shake the credibility of the eye- witness. No material contradiction in the case of the prosecution has been shown to us. Under facts and circumstances, the non-examination of the Investigating Officer as a witness is of no consequence. It has not been shown what prejudice has been caused to the appellant by such non- examination.

(AIR 2003 SC 4664 Para 11)

Mere non-examination of Investigating Officer does not in every case cause prejudice to the accused or affects the creditability of the prosecution version. In Ram Dev and another v. State of U.P (1995 Supp (1) SCC 547), it was noted that non-examination of the Investigating Officer does not in any way create any dent in the prosecution case much less affect the credibility of otherwise trustworthy testimony of the eye-witnesses. It was, however, indicated that it is always desirable for the prosecution to examine the Investigating Officer. In the present case after examination-in- chief and partial cross-examination, the Investigating Officer had died. Therefore, this cannot be a case which can be stated to have caused any prejudice to the accused on account of Investigating Officer s non-examination. The prosecution cannot be attributed with any lapse or ulterior motives in such circumstances. In Behari Prasad and others, v. State of Bihar (1996 (2) SCC 317) it was held that case of prejudice likely to the suffered mostly depends upon facts of each case and no universal straight- jacket formula should be laid down that non-examination of Investigating Officer per se vitiates the criminal trial. The said view has been found echoed in Ambika Prasad and another v. State (Delhi Administration) (200 (2) SCC 646), Bahadur Naik v. State of Bihar (2000 (9) SCC 153) and Ram Gulam Chaudhury and others v. State of Bihar (JT 2001 (8) SC 110). Having glance of the above discussion we are of the view that non examination of all material witnesses particularly the Investigating Officer, has seriously caused prejudice to the appellant. The prosecution story is that three militants have committed offence punishable under Section 302, 120-B, 121, 122 of RPC and 4/27 of Arms Act, while as accused Altaf Hussain and Mohammad Taj

have committed offence punishable under Section 302 and 120-B of RPC. Accused Altaf Hussain has been acquitted by the trial court as discussed hereinabove but Mohammad Taj has been convicted though prosecution has failed to prove charge for the commission of offence punishable under Section 302, 120-B RPC. There is nothing on the file to show, as discussed hereinabove, that Mohammad Taj has used the seized weapon and killed any person. Witnesses have deposed that they have not seen who was murdered by whom. Then how appellant came to be convicted is not forthcoming.

In the given circumstances we would have directed retrial of the case, but handicap is the clean acquittal of Altaf Hussain, accused and acquittal of the appellant for the commission of offence punishable under Section 120-B RPC which has attained finality as discussed hereinabove. Apex court in case reported as AIR 1989 131 Para 10, observed as under:-

10. Lastly, we are constrained to observe that the High Court has not examined the merits of the case at all. If it had done so, it could not have come to the conclusion that there was any material defect or omission in the framing of the charges or giving the particulars thereof or any failure of justice was occasioned thereby. It failed to appreciate that in an appeal by the respondents under S. 374(2) of the Code, the order of acquittal passed by the learned Additional Sessions Judge as against the 26 other accused could not be interfered with. The High Court also failed to appreciate that there cannot be a piecemeal trial. The retrial directed by the High Court must necessarily revise the prosecution and must result in a trial de novo against the 42 accused. The 26 other accused acquitted by the learned Additional Sessions Judge were not impleaded as parties to the appeals before the High Court. In the absence of an appeal preferred by the State Government against their acquittal, the High Court could not under S. 386(b) on an appeal by the respondents against their conviction alter the acquittal nor can there be a splitting up of the trial. See *State of Karnataka v. Narsa Reddy*, (1987) 4 SCC 170: (AIR 1987 SC 2104).

The Apex Court has laid down the same principle in case reported as AIR 1962, SC 240 Para 9.

Having glance of the above discussion, we are of the considered view that the prosecution has failed to bring home guilt of appellant-accused Mohammad Taj beyond any shadow of reasonable doubt and also has failed to prove his identity. Therefore, this appeal succeeds and is accordingly allowed. Impugned orders of conviction and sentence are set-aside and accused Mohammad Taj is acquitted of the charges while giving him the benefit of doubt.

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