

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

Crl LP(D) No.1/2021

CrlM No.146/2021

CrlM No.147/2021

Union Territory of J&K through Police Station
R S Pura, Jammu

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

Through :- Mr. Amit Gupta, AAG.

V/s

1. Puran Chand S/o Dharam Chand R/o
W. No.6, Tehsil Bishnah, District Jammu

....Respondent(s)

2. Kamal Kumar S/o Kishore Kumar R/o
W. No.6, Tehsil Bishnah, District Jammu

Through :- Mr. Rohit Sharma, Advocate.

CONF No.8/2017

State

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

Through :- Mr. Amit Gupta, AAG.

V/s

Sunil Kumar S/o Bodh Raj R/O Ward
No.9, Tehsil R S Pura, District Jammu

....Respondent(s)

Through :- Mr. Rohit Sharma, Advocate.

CRA No.23/2017

Sunil Kumar S/o Bodh Raj R/O Ward No.9,
Tehsil R S Pura, District Jammu
A/P Central Jail, Kot Bhalwal, Jammu

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

Through :- Mr. Rohit Sharma, Advocate.

V/s

State of J&K through its Advocate General

....Respondent(s)

Through :- Mr. Amit Gupta, AAG.

**Coram: HON'BLE MR. JUSTICE ATUL SREEDHARAN, JUDGE
HON'BLE MR. JUSTICE MOHAN LAL, JUDGE**

JUDGMENT (ORAL)

28.08.2023

ATUL SREEDHARAN,J

1. This order would dispose of the two appeals mentioned hereinabove.
2. CRA No.23/2017 has been filed by Sunil Kumar, who has been convicted for offences under Section 302 RPC. The State has filed an application being Crl LP(D) No.1/2021 seeking leave of this court to file appeal against the acquittal of the co-accused persons Puran Chand and Kamal Kumar and also an application being CrlM No.146/2021 seeking condonation of delay in filing the State appeal against the acquitted respondents.
3. For the reasons stated in the applications, we condone the delay and grant leave.
4. The present appeals arise from the order dated 24.08.2017 passed by the court of the learned 2nd Additional Sessions Judge Jammu in File No.40/95-Sessions arising from FIR No.177/2008, registered at P/S R S Pura for offences under Sections 302/34 RPC.
5. As regards the appeal filed by the State against the acquittal of the respondents 1 and 2 (Puran Chand and Kamal Kumar), the case of the prosecution is that on 02.12.2008, the complainant Rajinder Singh presented a written report in P/S R S Pura that he along with his real brother Naresh Kumar (hereinafter referred as 'deceased') had been to Sharma Palace Banquet Hall in Dablehar, in the marriage ceremony of one Rajinder S/O Gurdayal Saini. At about 9.30 pm, he along with his brother had gone to a Chat Stall within the premises where there was an altercation between the convicted accused Sunil Kumar and the deceased Naresh on excessive salt and dirty utensils being used in the preparation of Chat. The others at the marriage had interceded and given a quietus to the issue at that particular point of time. However, later when the

deceased was returning at 10.30 pm in the night, the convicted accused Sunil Kumar along with the acquitted persons Puran Chand and Kamal Kumar are stated to have come to the scene of occurrence and the acquitted accused Puran Chand and Kamal Kumar are stated to have held the hands of the deceased while the convicted accused Sunil Kumar stabbed the deceased from the back with a Kirch.

6. Learned counsel for the appellant Sunil Kumar has stated that the conviction of Sunil Kumar is not supported by facts disclosed by the prosecution. In this regard, he has stated that the incident took place on a dark night and the prosecution has failed to prove the source of light and that the name of the accused Sunil Kumar has been taken even though prosecution has not been able to prove that he was earlier known to the witnesses.

7. As regards Puran Chand and Kamal Kumar, learned counsel for the State has submitted that their acquittal was improper as the witnesses have identified them in the test identification parade in the police station in the presence of the Executive Magistrate.

8. We have gone through the detailed order passed by the learned Trial Court. As far as the evidence against the convicted accused Sunil Kumar is concerned, the three witnesses Sham Lal, Rajinder Singh and Kuldeep Singh are most consistent in their statements. The contention of the learned counsel for the convicted accused Sunil Kumar that the statement under Section 164-A CrPC of all the three witnesses was recorded on 11.12.2008 after a delay of almost 9 days, and therefore, the scope for embellishments and improvements cannot be ruled out. However, on the other hand, as the learned counsel for the Union Territory has submitted that the FIR itself discloses the name of Sunil Kumar as

the accused along with the parentage and his residence which clearly goes to raise a presumption of fact that the accused was directly known to Rajinder Singh, the brother of the deceased from earlier. He further in support of his contention has drawn the attention of the court to the statement of Rajinder Singh which has been translated in English by the learned trial court in its order, wherein Rajinder Singh has stated that he had known the convicted accused Sunil Kumar even before the incident itself. The cross examination reveals that no question have been put to the witness Rajinder Singh in order to shake the statement that the convicted accused was known to the witness Rajinder Singh from before the incident itself. Therefore, the presumption of fact remains that Rajinder Singh knew the convicted accused Sunil Kumar from before as the incident is dated 01.12.2008 and the FIR has been registered on the next morning on 02.12.2008 at around 7 am in which Sunil Kumar has specifically been named, as we have already stated hereinabove.

9. As regards the acquitted accused Puran Chand and Kamal Kumar are concerned, their names are conspicuous by their absence in the FIR. They have subsequently been added in Section 164A statement of the three witnesses that there were others who had participated in the offence on 01.12.2008 and besides that they have been identified in the test identification parade which has been carried out on 05.12.2008. The trial court is of the view that there was sufficient scope for additions in the versions of the said witnesses else, at least the FIR would have reflected that there were other persons in addition to Sunil Kumar who have participated in the offence.

10. However, as the FIR does not state at all that there was involvement of other persons other than Sunil Kumar and has solely named and attributed the

entire incident only to Sunil Kumar. The learned trial court has rightly doubted the presence of the acquitted accused Puran Chand and Kamal Kumar. Under the circumstances, we do not have to enter into further deliberations and give further explanation as to why we feel that the appeal preferred by the UT against the acquitted accused Puran Chand and Kamal Kumar is unsustainable in the eyes of law as the findings of the learned Trial Court against them are not perverse and are based upon reasonable appreciation of the evidence. **Therefore, the appeal by the UT against the acquitted accused Puran Chand and Kamal Kumar stands dismissed.**

11. As regards the convict Sunil Kumar, we feel that the reasons given by the trial court are more than reasonable and are appropriate, firstly we concur with the trial court that the convicted accused Sunil Kumar was known to Rajinder Singh from before itself as he has been named in the FIR. Besides, no questions have been put by the defense in the course of cross examining Rajinder Singh that he did not know Sunil Kumar from before the incident. Therefore, the identification of Sunil Kumar at the earliest on 02.12.2008 itself, as the perpetrator of the offence, is a reasonable presumption.

12. As regards the lighting condition at the scene of occurrence, it is undisputed that it was a dark night on the date of occurrence. The trial court has relied upon the statement of Rajinder Singh who stated that there was sufficient light in the area in which he has been able to identify the convicted accused Sunil Kumar as the perpetrator of the said offence. No questions have been put by the defense in cross examination in order to shake or dispel the statement of Rajinder Singh. The absence of the source of light in the site plan is not fatal to this case as we feel that the police has bent over backwards in ensuring that the

investigation is defective. In this regard, it is also necessary to refer to the statement of the doctor who carried out the post mortem who, after seeing the knife used in the offence, has denied that this was the weapon that was shown to him while taking his opinion that the said weapon could have caused the injuries due to which the deceased died. Likewise, is the statement of the FSL expert who has also denied that the weapon which was sent was originally sent to him at the time of the FSL examination is not the same that was shown to him in court. The conduct of the investigating agency is strongly derided by us as it has bent over backwards to ensure that the appellant Sunil Kumar gets an acquittal. However, the bad investigation notwithstanding the statement of witnesses corroborate each other and are sufficient enough to inspire the confidence of the court. As far as the conviction of Sunil Kumar is concerned, the facts leading to the event stands proved by the prosecution and the manner in which the death occurred also stand proved by the prosecution. However, the question is whether the offence should be one under Section 302 RPC or under Section 304 Part 2 CrPC.

13. In this case, it was not the situation that Sunil Kumar did not have the opportunity of stabbing the deceased on the chest whereby his intention would have absolutely be clear that he wanted to cause the death of Naresh Kumar. However, Naresh Kumar has been stabbed from behind and the blade of the knife had gone through and perforated the lung on account of which deceased died due to hemorrhaging.

14. We find that this was a case where the appellant Sunil Kumar had sufficient knowledge that the act he was committing was dangerous and may have caused death. Since it was a single stab injury and that too on the back, we

are unable to come to the conclusion that his sole intention was only to cause the death of Naresh Kumar.

15. Under the circumstances, the appeal of Sunil Kumar is partly allowed to the extent that the conviction is modified from Section 302 RPC from which he is acquitted but we find him guilty and convict him for the offence under Section 304 Part 2 RPC.

16. It is also not disputed that the appellant Sunil Kumar has already completed more than 10 years of his sentence as has been stated by learned counsel for the appellant. Under the circumstances, while holding him guilty for the offence under Section 304 Part 2 RPC, we reduce his punishment to the period already undergone by him. He shall be set forthwith at liberty, if not wanted in any other case. The fine is also increased by ₹10,000/- which shall be paid to the next of kin of the deceased within thirty days from the date of this order.

17. With the above, appeals are disposed of.

18. **CONF No.8/2017** is answered accordingly.

(Mohan Lal)
Judge

(Atul Sreedharan)
Judge

Jammu:
28.08.2023
Raj Kumar