

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Case No. CRAA No. 14/2006

C/w

CRA No. 09/2006

Reserved on: - 11.12.2025

Pronounced on: - 24.12.2025

Uploaded on: - 24.12.2025

*Whether the operative part or full
judgment is pronounced: Full*

1. CRAA No.14/2006

State of J&K through Senior Superintendent of Police Anantnag Appellant(s)

Through: - Mr. Mohsin Qadri, Sr. AAG with
Ms. Nowbahar Khan, AC

V/s

Zulfikar Ahmad Shah Respondent(s)
S/o Abdul Majid Shah
R/o Ashajipora, Anantnag

Through: - Mr. Mian Tufail, Advocate

2. CRA No. 09/2006

.... Appellant(s)

Zulfikar Ahmad Shah
S/o Abdul Majid Shah
R/o Ashajipora, Anantnag

Through: - Mr. Mian Tufail, Advocate

V/s

**State of J&K through Senior Superintendent of
Police Anantnag**

.... Respondent(s)

Through: - Mr. Mohsin Qadri, Sr. AAG with
Ms. Nowbahar Khan, AC

**CORAM: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE SANJAY PARIHAR, JUDGE**

JUDGMENT

Per: - Sanjay Parihar-J

01. The aforesaid two appeals arise out of the judgment dated 04.10.2006 passed by the Sessions Judge, Anantnag (hereinafter referred to as “the trial Court”) in FIR No. 135/2003. Vide the impugned judgment, the respondent, who was facing trial for offences punishable under Sections 364 and 302 of the Ranbir Penal Code (RPC), was convicted for the offence under Section 364 RPC and sentenced to rigorous imprisonment for five years along with a fine of ₹10,000/-, with a further sentence of two months’ imprisonment in default of payment of fine. However, he was acquitted of the charge under Section 302 RPC.

02. Aggrieved by the sentence imposed upon him for the offence under Section 364 RPC, the respondent-accused has preferred Criminal Appeal No. 09/2006. On the other hand, the prosecution has filed Criminal Acquittal Appeal No. 14/2006 challenging the acquittal of the respondent for the offence under Section 302 RPC. Since both the appeals emanate from a common judgment, they were clubbed together and are being disposed of by this common judgment.

03. Briefly stated, the facts leading to the present appeals, are that on 25.03.2003, Police Station Anantnag received information that the dead body of one Irfan Majid Sheikh was lying in village Lalan and that he had been killed by unknown gunmen. On receipt of this information, FIR No. 135/2003 came to be registered under Section 302 RPC read with Sections 7/25 of the Indian Arms Act. During the course of

investigation, it surfaced that the offence had allegedly been committed by the respondent, Zulfikar Ahmad Shah, with the active assistance of Zahoor Ahmad Thoker, a known terrorist operating in the area. The investigation further revealed that the respondent had kidnapped the deceased from his residence, boarded him in an auto-rickshaw, and forcibly carried him towards Janglat Mandi and thereafter to village Munghall, where the said terrorist was already present. It was alleged that the respondent handed over the deceased to the said terrorist and returned thereafter. Subsequently, the deceased was allegedly eliminated by the terrorist. The factum of abduction and killing was allegedly kept secret, and during the intervening night of 24/25 March 2003, the blood-soaked dead body of the deceased was recovered.

04. Upon completion of investigation, the respondent was charge-sheeted for offences under Sections 109, 120-B and 364 RPC, whereas Zahoor Ahmad Thoker was found to have committed offences punishable under Sections 302 and 364 RPC read with Sections 7/25 of the Indian Arms Act. Since the said terrorist was subsequently eliminated, only the respondent was put to trial. The trial Court framed charges against the respondent under Sections 364, 302 and 109 RPC, to which he pleaded not guilty. After completion of evidence, the trial Court convicted the respondent only for the offence under Section 364 RPC and acquitted him of the charges under Sections 302 and 109 RPC.

05. In the acquittal appeal, the State has assailed the judgment on the ground that the prosecution evidence was not properly appreciated by the trial Court. It is contended that the prosecution had successfully proved that the respondent abducted the deceased with the intention of handing him over to a terrorist, after which the deceased was killed and his blood-stained body recovered. While the homicidal death of the deceased stood established, the trial Court, according to the prosecution, erred in acquitting the respondent of the offence under Section 302 RPC and failed to appreciate the motive and the chain of circumstances pointing towards his complicity

in the murder. Conversely, in the conviction appeal, the respondent has challenged his conviction for offence u/s 364 RPC on the premise that the prosecution failed to establish any conspiracy or abetment on his part. It is argued that there is no evidence to suggest that the respondent handed over the deceased to the terrorist Zahoor Ahmad Thoker. It is contended that this very aspect was accepted by the trial Court while acquitting him of the charge under Section 302 RPC, yet it erroneously proceeded to convict him under Section 364 RPC.

06. It is further submitted that key prosecution witnesses, namely PW Samiullah Reshi, PW Sheraz Ahmad Thoker and PW Janbaz Ahmad Thoker, were declared hostile and did not support the prosecution case. Similarly, PW Bilal Ahmad Dar and PW Rafiq Ahmad Zagoo denied any knowledge of the occurrence. The remaining witnesses were either formal witnesses or witnesses to the recovery and handing over of the dead body. PW Sajad Ahmad Sheikh, PW Sheikh Mohammad Ashraf and PW Basharat Ahmad Sheikh, though related, were not eyewitnesses and are interested witnesses. The theory of “last seen together,” relied upon by the trial Court to convict the respondent under Section 364 RPC, is stated to be unsupported by cogent evidence. On these grounds, it is urged that the conviction of the respondent under Section 364 RPC is unsustainable and liable to be set aside.

07. For a holistic appreciation of the prosecution case, it is necessary to briefly notice the evidence adduced during the trial. **PW Samiullah Reshi** was declared hostile. During his cross-examination, he stated that the deceased was well acquainted with the accused and that both of them used to roam together. **PW Sheraz Ahmad Thoker** was also declared hostile. He stated that on one occasion he had seen the accused travelling in his auto-rickshaw along with a girl, whom he dropped at village Mughal. He further stated that on the way, near the Monghall bridge, some gunmen intercepted the auto-rickshaw and asked the occupants to alight, whereafter they were searched. He, however, could not identify those gunmen as they were veiled. He expressed ignorance as to whether, after being dropped at Monghall village, the

accused returned or not. He also stated that he was taken into police custody along with Janbaz Ahmad Thoker and was released after a few days. **PW Janbaz Ahmad Thoker**, who was working as a baker, was also declared hostile. He denied any knowledge of the occurrence, though he admitted that he had heard that the dead body was found in village Lalan. He further stated that he had never seen Shahid Afghani.

08. PW Mohammad Ashraf stated that he knew the accused and had come to know that the deceased was taken by the accused on foot towards Janglat Mandi. When the deceased did not return, he went in search of him and deputed Sajad Ahmad Reshi to the house of the accused, from where he was informed that even the accused was not present at his home. He further stated that he later came to know that the accused had persuaded the deceased to go towards Janglat Mandi, from where he was taken in an auto-rickshaw via Monghall village, where militants were allegedly waiting and who later killed the deceased. He also stated that blood-stained clothes were recovered and that Basharat Ahmad Sheikh had informed him that the deceased had gone with the accused and militants of Harkat-ul-Mujahideen operating in Monghall village.

09. PW Rafiq Ahmad Zagoo denied any knowledge of the occurrence. He stated that on being asked, he had carried the accused and the deceased Irfan Majid in his auto-rickshaw to Ashajipora and then to Monghall village, where both of them alighted. According to him, no one was present there to receive them and he returned to Anantnag. On the following day, he came to know that the deceased had been killed. He further alleged that he was taken into police custody and tortured during interrogation. He maintained that he had merely dropped the accused and the deceased at a particular location and was unaware of what transpired thereafter. **PW Sajad Ahmad Sheikh** stated that he saw the deceased and the accused going together towards the auto stand and thereafter towards Anantnag. On the next day, when the dead body of the deceased was recovered, he went to the house of the accused to

enquire about the non-return of the deceased and found that the accused was also not present there.

10. PW Basharat Ahmad Sheikh stated that he had seen the accused and the deceased walking together. On being asked, the deceased told him that he was going towards Janglat Mandi. Subsequently, he came to know that the deceased had been killed. He further stated that the documents relating to the seizure of the dead body were prepared in his presence. **PW Zulfikar Ahmad Wagay** stated that he saw the accused and the deceased in an auto-rickshaw at Janglat Mandi and also witnessed them grappling with each other. Thereafter, he did not know where they went. On the next day, he came to know about the death of the deceased.

11. PW Khalid Hussain stated that he had seen the deceased near the auto stand being pushed into an auto-rickshaw and made to sit by the accused, which then proceeded towards Ashajipora. He, however, did not pay much attention at that time. On the following day, he came to know that the deceased had been killed. He admitted that he narrated these facts to the police for the first time after about one month of the occurrence.

12. PW Abdul Rashid, Inspector, stated that he had investigated the case and recorded the statements of witnesses. He stated that the accused was arrested and later released on bail. As per the investigation, it was found that the respondent had taken the deceased from his home to Janglat Mandi, forcibly made him sit in an auto-rickshaw, carried him to Monghall village, and handed him over to terrorists who were waiting there. He further stated that the dead body of the deceased was later recovered, which led to the registration of the case under Section 302 RPC. He admitted that the accused was not arrested till 7th May and that till 29th April he had not recorded the statements of any witnesses under Section 161 Cr. PC. This, in nutshell, constitutes the evidence led by the prosecution before the trial Court.

13. In his statement under Section 342 Cr.PC, the respondent stated that it was the day of Nauroz and that he had gone to visit his sister at Monghall village for which he had hired an auto-rickshaw driven by Rafiq Ahmad Zagoo. According to him, the deceased, of his own volition, boarded the same auto-rickshaw after informing him that he too was going to Monghall village. Both of them alighted at Monghall village. He further stated that he was unaware of what happened to the deceased thereafter and claimed that the case against him was false.

Heard learned counsel for the parties, perused the record.

14. Learned counsel for the appellant-State has contended that once the trial Court returned a finding that the deceased was taken away by the respondent-accused and handed over to the terrorists, a complete link stood established showing that the abduction was with the intention to commit murder. It was argued that the subsequent recovery of the blood-soaked body of the deceased constituted clinching evidence of the respondent's culpability for the offence under Section 302 RPC, for which he ought to have been convicted.

15. *Per contra*, learned counsel for the respondent-accused, while taking us, through the memorandum of conviction appeal, has submitted that even the offence under Section 364 RPC was not proved against the respondent. It was argued that once the prosecution failed to establish the foundational facts necessary for an offence under Section 364 RPC, the entire edifice of the prosecution case collapses, rendering the appeal against acquittal wholly misconceived.

16. At the outset, the prosecution sought to establish that the accused and the deceased were on friendly terms and that it was the accused who persuaded the deceased to board an auto-rickshaw and dropped him at a particular place, from where he was taken by terrorists and subsequently killed. Heavy reliance in this regard has been placed upon the testimonies of PW Sheraz Ahmad Thoker, PW Sheikh Mohammad Ashraf and PW Rafiq Ahmad Zagoo. Upon careful examination of the evidence, it is evident that PW Sheikh Mohammad Ashraf, the brother of the deceased, has not stated anywhere that he personally saw the deceased being taken away by the accused. His testimony is entirely hearsay, as he merely claims to have been informed that the accused had taken the deceased on foot towards Janglat Mandi. His statement does not disclose any instance of last seen together based on his personal knowledge.

17. PW- Sheraz Ahmad Thoker admittedly had no acquaintance with the deceased and was declared hostile. In his examination-in-chief, he denied that the deceased ever boarded his auto-rickshaw along with the accused. Though in cross-examination he narrated an incident involving the accused travelling with a woman named Fehmeda and being intercepted by masked terrorists, he categorically denied that the deceased was ever present in his vehicle. Consequently, his testimony does not advance the prosecution case regarding the deceased being last seen in the company of the accused. PW Rafiq Ahmad Zagoo stated that both the accused and the deceased boarded his auto-rickshaw and asked him to drop them at Ashajipora and thereafter at Rahu to Monghall village,

where both of them alighted. He clearly stated that thereafter he had no knowledge of what transpired. Thus, even this witness does not state that the accused was last seen with the deceased at or near the place of occurrence.

18. The trial Court appears to have relied primarily upon the testimony of PW Rafiq Ahmad Zagoo to hold that the deceased was last seen in the company of the accused and that the accused failed to account for what happened thereafter, thereby invoking Section 106 of the Evidence Act. The legal position with respect to the application of Section 106 of the Evidence Act is well settled. The provision applies only where the prosecution has first established certain incriminating facts and the remaining facts lie exclusively within the special knowledge of the accused.

19. The Hon'ble Supreme Court in *State of Rajasthan v. Kashi Ram*, (2006) 12 SCC 254, has held that Section 106 does not shift the burden of proof from the prosecution to the accused but merely provides that when facts are within the special knowledge of the accused, his failure to explain them may furnish an additional link in the chain of circumstances. However, such an inference can be drawn only when the prosecution has otherwise proved the case beyond reasonable doubt. In the present case, the theory of last seen together itself is shrouded in doubt. In his statement under Section 342 CrPC, the accused has not feigned ignorance but has offered an explanation that both he and the deceased travelled together in an auto-rickshaw up to Monghall village, where the deceased alighted,

and that thereafter he had no knowledge of what happened to him. This explanation has not been shown by the prosecution to be false or improbable.

20. The Hon'ble Supreme Court in its recent pronouncement reported as **2025 INSC 1466** has reiterated that evidence of last seen together is a weak piece of circumstantial evidence and cannot, by itself, form the basis of conviction unless the time gap between last seen and death is so small as to rule out the possibility of any other person intervening. Even then, the prosecution must establish a complete and unbroken chain of circumstances.

21. Applying the aforesaid legal principles to the facts of the present case, it is evident that no motive has been attributed to the accused, nor has any evidence been led to demonstrate what benefit, if any, would have accrued to him by abducting the deceased and handing him over to militants. Mere prior acquaintance between the accused and the deceased is insufficient to draw an inference of abduction or conspiracy. Once the prosecution failed to establish the essential ingredients of Section 364 RPC, and in view of the plausible explanation tendered by the accused, the invocation of Section 106 of the Evidence Act was wholly unjustified. The trial Court, on one hand, ruled out the existence of any conspiracy between the accused and the militants, yet on the other hand proceeded to convict the accused for the offence under Section 364 RPC. Such a conclusion is self-contradictory and unsupported by evidence.

22. There is no material on record to show the presence of the accused at or near the place of occurrence, nor is there any evidence as to the time when the deceased was allegedly dropped by the accused. Most of the prosecution witnesses have turned hostile and except for PW Rafiq Ahmad Zagoo, there is no substantive evidence connecting the accused with the alleged abduction. Even his testimony does not establish forcible or deceitful taking of the deceased. In the absence of any clinching evidence demonstrating that the accused abducted the deceased with the knowledge or intention that he would be killed, the conviction under Section 364 RPC cannot be sustained. Once the prosecution fails to prove the offence under Section 364 RPC, the question of holding the accused guilty for the offence under Section 302 RPC does not arise at all. For the aforesaid reasons, we hold that the conviction of the appellant-accused Zulfikar Ahmad Shah under Section 364 RPC is perverse and unsustainable in law. Accordingly, Criminal Appeal No. 09/2006 filed by the accused is allowed and the conviction and sentence recorded against him are set aside. Consequently, the acquittal appeal filed by the prosecution challenging the respondent's acquittal under Section 302 RPC does not survive and is dismissed.

(Sanjay Parihar)
Judge

(Sanjeev Kumar)
Judge

SRINAGAR

24.12.2025

“Mohammad Yasin Dar”

Whether the order is speaking: Yes/No

Whether the order is reportable: Yes/No