SUPREME COURT OF INDIA

Farooq @ Karattaa Farooq

Vs.

State of Kerala

Crl.A.No.656-57 of 2001

(M.B. Shah and B.N. Agrawal JJ.)

09.04.2002

JUDGMENT

B.N.Agrawal, J.

1. Criminal Appeal Nos. 656-57 of 2001 are by four appellants, namely, Farooq @ Karattaa Farooq (accused No. 1), Sathar (accused No. 2), Ayoob @ Blood Ayoob (accused No. 7) and Hashim (accused No. 8) against their convictions and sentences whereas Criminal Appeal Nos. 1049-50 of 2001 are by the State against the order of acquittal passed by the High Court whereby Manaf (accused No. 3) and Sulaiman (accused No. 9) have been acquitted by the High Court. Appellants of Criminal Appeal Nos. 656-57 of 2001 and respondents in Criminal Appeal Nos. 1049-50 of 2001 were charge sheeted accused persons along with accused Anildas, Sajeer and Rafeek whose trial was separated as they were absconders. Nine accused persons were tried and the trial court acquitted three accused persons, namely, Suja (accused No. 4), Shanavas (accused No. 5) and Lalkhan (accused No. 6) whereas convicted the remaining six accused persons under Section 302 of the Indian Penal Code (hereinafter referred to as the 'Penal Code') read with section 34 of the Penal Code. Accused Nos. 1 and 2 were awarded death penalty and the records were submitted to the High Court for confirmation of sentence of death whereas other four accused persons were awarded imprisonment for life. All the aforesaid accused persons excluding accused No. 3-Manaf were further convicted under Section 302/120-B of the Penal Code and sentenced to imprisonment for life. Accused No. 3-Manaf was, however, convicted under Section 302/109 of the Penal Code and sentenced to undergo imprisonment for life. All the accused persons were also convicted under Section 307 read with Section 34 of the Penal Code and sentenced to undergo imprisonment for life. They were then convicted under Section 324 read with Section 34 of the Penal Code but no separate sentence was awarded against any of them. Each of the accused was also convicted under Sections 3 and 5 of the Explosive Substances Act and sentenced to undergo imprisonment for life and rigorous imprisonment for a period of 10 years respectively. The sentences were, however, ordered to run concurrently. On appeal being preferred, convictions and sentences awarded against accused Nos. 1,2, 7 and 8 have been confirmed by the High Court whereas accused Nos. 3 and 9 have been acquitted.

2. Prosecution case, in short, is that the deceased Kabir was an under trial prisoner at the Sub Jail, Thiruvananthapuram which is situated at Attakulangara, Thiruvanathapuram. On 16th July, 1998 at 1.50 p.m. deceased Kabir and PW 9 Vinil Kumar, another under trial prisoner, were taken to the Court of Judicial Magistrate First Class, Attingal accompanied by two police constables, PWs 15 and 16. They were acquitted by the Magistrate's Court in that particular case but since many other cases were pending against them they were taken back to the Sub Jail. Both the deceased Kabir and PW 9 were handcuffed together using a single handcuff. On their way back to the Sub Jail with police escort, when they reached near the Western gate of the Sub Jail which is situated at the eastern side of the Attakulangara-Manacaud Public road, accused Anildas @ Ani @ Jeerakam Ani (absconding accused) took an explosive substance from the plastic bag kept by him and handed over to Sathar (accused No. 2) who hurled the explosive substance on the back of the head of the deceased Kabir causing a severe and strong explosion thereby the back portion of the head of the deceased was blown out into shreds and smithereens and in a trice, Kabir died instantaneously. PW 9 who was the co-prisoner and handcuffed along with the deceased, PW 15 and PW 16 - policemen who were on escort duty and Sudheer Kumar (PW 12) who was a pedestrian sustained very serious injuries and deformities in the explosion. During that time, Manaf (accused No. 3) kept motor cycle belonging to Lalkhan (accused No. 6) ready for riding at the place in front of Buhari Hotel being conducted by R.Naushad (PW 10) which is situated some distance away towards north west of the place of occurrence. Sathar (accused No. 2) after hurling the explosive substance on deceased Kabir and the consequent explosion, ran across the road towards the said motor cycle, with chopper in his hand and alighted on the pillion of the said motor cycle. Farooq (accused No. 1) was waiting and standing with Ayoob (accused No. 7), Hashim (accused No. 8) and Rafeek (absconding accused) with car bearing registration No. KRV-3106 belonging to the said Rafeek near Madanthampuran Temple situated adjacent to the shop of P.W.2 which is situated towards north west of the scene of occurrence, with mobile phone for giving timely instructions and guidance for the successful completion of the operation of the assassination. Just after the explosion, Farooq (accused No. 1), Ayoob (accused no. 7) and Hashim (accused No. 8) and accused Rafeek readily kept all the four doors of the car opened for enabling the smooth entry of Anildas (absconding accused) into the car. The said accused Anildas ran towards the said car and got into it. Farooq (accused No. 1), Ayoob (accused no. 7), Hashim (accused No. 8) and accused Rafeek also got in the car and closed the doors. At the very same time, Suja (accused No. 4) and Shanavas (accused No. 5) were also waiting with another motor cycle belonging to Suja (accused No. 4) towards north to the scene of occurrence for giving guidance and timely instructions to Sathar (accused No. 2) and accused Anildas for carrying out the operation. Manaf (accused No. 3) with Sathar (accused No. 2) sitting at the rear seat of Motor Cycle, raised it and rode it in an alarming speed towards the car which was facing towards Sreevaraham location near the temple. Suja (accused No. 4) and Shanavas (accused No. 5) also in great speed, sped the Motor Cycle towards the car. All the aforesaid accused persons sped away from the scene in the said car and the motor cycle together after exchanging signs and had signals amongst them regarding the successful completion of the assassination. Sajeer (absconding accused) used another mobile phone with him for giving timely information to Farooq (accused No. 1) regarding the movement of the deceased etc. and that Lalkhan (accused No. 6) knowingly entrusted his motor cycle for carrying out the operation.

It was alleged by the prosecution that Sulaiman (accused No. 9) had previous enmity towards the deceased Kabir and he wanted to do away with Kabir at any cost and hence he hired the services of Farooq (accused No. 1) and his associates. According to the prosecution the incident which resulted in the death of Kabir was as a result of criminal conspiracy hatched up by all the aforesaid accused persons. Stating the aforesaid facts, a first information report was lodged, and the police after registering the case, investigated the same and on completion thereof, submitted charge-sheet. Thereupon, the learned Magistrate took cognizance and committed the accused persons to the court of Session to face trial.

3. Defence of the accused persons was that they were innocent, had no complicity with the crime and were falsely implicated in the case. During trial, the prosecution examined 79 witnesses in all and 117 documents were exhibited on its behalf. The defence, however, did not examine any witness in the case on hand. Upon the conclusion of trial, the trial Court convicted the accused persons as stated above and upon appeal being preferred, convictions and sentences of some of the accused have been confirmed whereas two of them have been acquitted as stated above. Hence, these appeals by special leave both on behalf of the accused against the order of their convictions as well as on behalf of the State against the order of acquittal recorded by the High Court.

4. Shri U.R.Lalit, learned senior counsel appearing on behalf of the appellants in Criminal Appeal No. 656-57 of 2001 did not assail the impugned judgments on the factum of the occurrence but challenged the same in relation to their participation in the crime. Learned counsel in the alternative submitted that, in any view of the matter, it was not a case where the extreme penalty of death was called for as the same did not fall within the category of rarest of rare cases. On the other hand, learned counsel appearing on behalf of the State submitted that the High Court was quite justified in upholding the convictions and sentences awarded against the appellants. In support of Criminal Appeal Nos. 1049-50 of 2001 preferred by the State, Shri K.R. Sasiprabhu, learned counsel appearing on its behalf submitted that the High Court was not justified in recording acquittal of Manaf (accused No. 3) and Sulaiman (accused No. 9). Shri Sushil Kumar, learned senior counsel appearing on behalf of the respondents in these appeals submitted that the High Court was quite justified in recording acquittal of the aforesaid two accused persons and the judgment of acquittal does not suffer from any infirmity much less perversity. Therefore, in relation to factum of the occurrence, neither learned counsel appearing on behalf of the accused persons could assail the judgment nor we find any infirmity in the well reasoned judgment rendered by the High Court upholding the very detailed judgment passed by the trial court.

5. Thus, in Criminal Appeal Nos. 656-57 of 2001, we are called upon to examine evidence showing complicity of the four appellants with the crime and consider their cases individually. Appellant Farooq (accused No. 1) is said to have been identified by prosecution witnesses, namely, S. Ramachandran Nair (PW 2), S.Anil Kumar (PW 5) and N. Madhusoodhanan (PW 14). PW 2 claimed to be an eye witness of the alleged occurrence. In examination-in-chief, he claimed to have identified this appellant but in cross-examination, the witness had no option but to admit that he could not tell name of this appellant to the police which disclosed to him name of this appellant. It shows that the so called

identification of this appellant by the witness is farce and cannot be relied upon. PW 5 claimed to be the eye witness of the occurrence as he had gone to the lottery shop belonging to PW 2 to check the lottery result as he had taken a lottery ticket. He claimed to have witnessed the occurrence from a distance of 25 feet only and knew this appellant from much before and identified him by name. The evidence of this witness was assailed on two grounds, firstly, that though, he went to the lottery shop of PW 2 and met him but PW 2 in his evidence is silent about the presence of this witness in his shop at the time of the alleged occurrence. This is a mere omission and the same itself cannot affect the veracity of the witness if his evidence is otherwise found to be credible. Secondly, it has been submitted that the witness did not tell anything about the incident even to his wife. In our view, non disclosure of this fact by the witness to anybody cannot alone be a ground to discredit his evidence especially when the offence had been committed in a broad day light at the jail gate when the victim was in judicial custody, people were panicky and, therefore, if a witness could not dare to disclose the factum to anybody, the same cannot show that his conduct was unnatural. This witness has consistently supported the prosecution case in all material particulars and there is no reason to discard his evidence. PW 14 also claimed to be the eye witness of the alleged occurrence. According to him, he did not know the accused from before but he identified him in Court. This witness had gone to the watch shop for taking his watch which was given for repair and when he was in front of the shop, he found four persons came in a car including this appellant and they were looking towards the Sub Jail. After the incident, it was said that this appellant got into the back seat of the car. The witness has stated during the course of cross-examination that he did not know the appellant from before but the police called him at the police station and got this appellant identified inasmuch as disclosed name of the appellant before this witness. This being the position, no reliance can be placed upon evidence of the witness on the question of participation of this appellant. Thus, so far as appellant No. 1 is concerned, it is not possible to place reliance upon the evidence of PWs 2 and 14 on the question of participation of this appellant but the evidence of PW 5 is unimpeachable.

6. Now, we consider the evidence against appellant Sathar (accused No. 2) who is said to have been identified by G.Chandrasekharan Nair (PW 7) and K.Sajilal (PW 13) and out of whom, PW 7 claimed to be the eye witness of the occurrence. He claimed that one person of short stature who had a plastic kit in his hands and took a bundle from inside the said kit and made over the same to the tall person meaning thereby this appellant who is said to have hurled bomb at the prisoner Kabir who was in judicial custody which hit him and he succumbed to the injuries. It has been further stated that after hurling the bomb, this appellant was found fleeing with a chopper in his hands. It appears that this witness has introduced the story for the first time in Session Court that a person of short stature had made over explosive substances to this appellant describing him as a tall person as he did not make any such statement before the police as it appears from the evidence of the investigating officer V.B.Ramesh Kumar(PW 79). In Court, when the chopper was shown to the witness, first he denied the chopper to be the same one which was carried by this appellant but later on he admitted the same to be the chopper which was carried by this appellant. The witness has admitted that during investigation, when he went to the police station two weeks after the incident, the police showed him the chopper which was in the hands of this appellant. These

facts make the evidence of this witness on the question of participation of this appellant highly doubtful especially when undisputedly this accused was not known to the witness from before. PW 13 stated that he had a shop and had gone for purchasing bananas and after purchasing, when he was returning in an auto rickshaw and passing through the place of occurrence in front of the Sub Jail, there was sound of explosion and he found that this appellant was running away with a chopper in his hands. The witness specifically admitted that he knew this appellant since last five to six years and he was found running with a chopper and mounted on the back seat of motor cycle parked in front of Buhari hotel immediately after the incident. It has been submitted that the driver of the auto rickshaw who was the most competent person to prove the presence of this witness at the place of alleged occurrence has not been examined. In the case on hand, we find that this witness has supported the prosecution case consistently in all material particulars and nothing could be pointed out to create doubt regarding veracity of his evidence, therefore, merely because driver of the auto rickshaw was not examined, his evidence cannot be thrown out . Thus, so far as the appellant No.2 Sathar is concerned, it is not possible to place reliance of evidence of PW 7 but so far PW 13 is concerned, his evidence is free from any doubt.

7. Lastly, we proceed to consider the case of appellants Ayoob (accused No. 7) and Hashim (accused No. 8) who are said to have been identified by S. Ramachandran Nair (PW 2), S.Anil Kumar (PW 5) and N. Madhusoodhanan (PW 14). These two appellants were not known to any of these witnesses. PW 2 claimed to have identified them but during cross-examination, he specifically admitted that the police told him the names of these appellants at the police station. PW 5 stated in his evidence that when he went to the police station to give his statement, these appellants were shown to him. PW 14 in his examination-in-chief, though claimed to have identified these appellants but during the course of re-examination, he admitted that these accused persons were shown to him and the police got them identified at the police station. Thus, so far as appellant Nos. 7 and 8 are concerned, in our view, it is not possible to place reliance upon the evidence of any of three witnesses and there being no other evidence to show their complicity with the crime, it is not possible to uphold their convictions.

8. Next question which is to be considered is as to whether the High Court was justified in upholding the death penalty imposed against appellant Farooq and appellant Sathar. Reference in this connection may be made to the Constitution Bench decision of this Court in the case of *Bachan Singh v. State of Punjab*[1], as well as, following the same, three Judge Bench decision of this Court in *Machhi Singh & Ors. v. State of Punjab*[2], wherein various circumstances have been enumerated and it was laid down that if the case squarely falls within its ambit, only in that eventuality, death penalty can be awarded. It was observed that in rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise retaining death penalty, such a penalty can be inflicted. In the facts and circumstances of the present case, it is not possible to come to the conclusion that the present case would fall within the category of rarest of rare one. Therefore, we are clearly of the opinion that in the fitness of things, extreme penalty of death was not called for and the same is fit to be commuted to life imprisonment.

9. So far as appeals preferred by the State against the acquittal of Manaf (accused No. 3) and Sulaiman (accused No. 9) who are respondents in Criminal Appeal Nos. 1049-50 of 2001 are concerned, learned counsel appearing on behalf of the State could not point out any infirmity in the impugned judgment of the High Court much less to show that the order of acquittal was perverse one. We are of the opinion that the High Court was quite justified in recording acquittal of these two accused persons and the view taken by it appears to be quite reasonable one and the same does not suffer from any infirmity much less perversity. Therefore, it is not possible to interfere with the same.

10. In the result, Criminal Appeal Nos. 656-57 of 2001 are allowed in part so far as it relate to appellants Farooq and Sathar and while upholding convictions and sentences of imprisonment awarded against them the sentence of death penalty is commuted to imprisonment for life. We direct that all the sentences awarded against these appellants shall run concurrently. Appeals of appellants Ayoob and Hashim are allowed, their convictions and sentences are set aside and they are acquitted of all the charges. These appellants who are in custody are directed to be released forthwith, if not required in connection with any other case. Criminal Appeal Nos. 1049-50 of 2001 fail and the same are, accordingly, dismissed.

[1]*AIR 1980 SC 898*
[2]*1983 (3) SCC 470*