

* **IN THE HIGH COURT OF DELHI AT NEW DELH I**

% Judgment delivered on : 26.03.2009

+ **CRIMINAL APPEAL NO. 607 of 2007**

STATE Appellant

- versus -

IRASHAD AHMAD MALIK & ORS. Respondents

Advocates who appeared in this case:

For the Appellants : Ms. Mukta Gupta, Standing Counsel

For the Respondents : Mr. N.D. Pancholi

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MR. JUSTICE P.K. BHASIN

1. Whether Reporters of local papers may be allowed to see the Judgment?(Yes)
2. To be referred to the Reporter or not?(Yes)
3. Whether the judgment should be reported in the digest?(Yes)

BADAR DURREZ AHMED, J (ORAL)

1. This appeal has been preferred by the State against the order dated 13.10.2005 passed by the learned Special Judge, POTA. The impugned order reads as under:-

“ Addl. PP for State.

Accused Irshad Ahmed Malik in custody with Sh. R.N. Tufail. Adv.(sic)

A copy of an order passed by the Review Committee chaired by Justice Usha Mehra on 16.8.2005 has been placed on record. The Committee has expressed the view that the invocation of POTA in this case was not justified. Therefore, in terms of Section 60(7) of POTA, the charge under POTA shall be deemed to be withdrawn. As regards the other charges under

IPC and Arms Act, the case has to proceed.
Ld. Counsel for the accused prays that the application for bail may be taken up. Put up on 22/10/2005 for arguments on bail application.”

It is apparent from the above order that the charge under Prevention of Terrorism Act, 2002 (hereinafter referred to as ‘POTA’) has been deemed to be withdrawn in view of the provisions of Section 60(7) of the said Act. The State, at the time of filing of the appeal was of the view that such a withdrawal should not be automatic and it was necessary for the public prosecutor to apply his mind to the case and move an appropriate application before the Court as was the position existing under the general provisions of Section 321 of the Code of Criminal Procedure, 1973. The State, at that point of time, was also supported in its view by a decision of the Gujarat High Court in the case of *Anusuyaben Sadashiv Jadav v. Union of India and others* and *Gurumeet Singh Bagga vs. Union of India and others* in Special Civil Application No. 1103 of 2005 and Special Civil Application No. 1105/2005 respectively. The said decision had been rendered by a Division Bench of the Gujarat High Court on 13.4.2005. The learned counsel for the appellant/State argued that the provisions of Section 321 Cr.P.C. had not been over-ridden by the provisions of POTA as amended by Act 4 of 2004. She placed reliance on the decision of the Supreme Court in *S.K. Shukla and others v. State of UP and others*: 2006 (1) SCC 314. In particular, she placed reliance on para 32 thereof. In that decision, the Supreme Court made a reference to other decisions, namely, *Sheonandan Paswan v. State of Bihar* : (1983) 1 SCC 438; *Rajender Kumar Jain v. State*:

(1980) 3 SCC 435; **R.M. Tewari v. State (NCT of Delhi)**: (1996) 2 SCC 610 and **Ayyub v. State of U.P.**: (2002) 3 SCC 510. Particular stress was laid on the decision of the Supreme Court in the case of **Sheonandan Paswan** (*supra*) which was a decision pertaining to the responsibility of a public prosecutor in a situation where a withdrawal from the case was to be considered in terms of Section 321 of the Code of Criminal Procedure 1973. After referring to the said decision, the Supreme Court in **S.K. Shukla** (*supra*) came to the conclusion that the Public Prosecutor cannot act like a post box or act on the dictates of the State Government. He had to act objectively as he was also an officer of the court. It was also pointed out that the court was also not bound by that. The courts were also free to assess whether a prima facie case was made out or not. The court, if satisfied, could reject the prayer. The implication of the said decision was that even though the Review Committee constituted under Section 60 of POTA had come to the conclusion that prima facie no case is made out, it was still incumbent upon the Public Prosecutor to apply his mind and then move an application, requesting the court to permit withdrawal of the case. In view of the said decision it also appeared that the court had power to accept or reject the application of the Public Prosecution for withdrawing from the case in the eventuality he did make such an application.

2. The same view is discernible from the decision of the Gujarat High Court which had placed reliance on the decision of the Division Bench of the Madras High Court in the case of **Government of Tamil Nadu v. Union of**

India and others being writ petition Nos. 1238 to 1240 of 2004 decided on 4.2.2004. The Madras High Court had observed that if the Review Committee comes to the conclusion that the case is fit to be withdrawn from prosecution under POTA, it can address the State Government which, in turn, has to instruct the Public Prosecutor to invoke Section 321 of Code of Criminal Procedure and that the role of the Review Committee is limited only that far and no further. It was further observed that when the role of the Review Committee ends, then it is for the Public Prosecutor to apply his mind independently according to the well settled legal principles in respect of Section 321 of Code of Criminal Procedure and ultimately it is for the Special court trying the cases to decide whether the plea of the Public Prosecutor to withdraw the prosecution, if made, is acceptable or not. Apparently the State of Tamil Nadu challenged the said decision of the Madras High Court by filing petitions of Special Leave to appeal before the Supreme Court being Nos. 868-870 of 2004 titled as **Government of Tamil Nadu v. Union of India and others** decided on 8.3.2004. While dismissing the said special leave petitions, the Supreme Court, inter alia, took the view that the High Court had correctly held that the challenge to the constitutional validity of the provisions of Section 60(4) to 60(7) could not be sustained. However the Supreme Court also held that the High Court had correctly held that the directions given by the Review Committee could only be subject to Section 321 of Criminal Procedure Code. Based on the observations of the Division Bench of the Madras High Court as well as of the Supreme Court, the Gujarat High Court in *Anusuyaben Sadashiv Jadav* (supra), inter alia,

took the following view:-

“These provisions were interpreted by Madras high Court in Government of Tamil Nadu Vs. Union of India (supra) and it was held that on receipt of the opinion of the Review Committee that no prima-facie case is made out against the accused under the 2002 Act, the State government was duty bound to instruct the Public Prosecutor to invoke Section 321 of the Code for withdrawing the prosecution. The Division Bench further held that the application filed by the Public Prosecutor is required to be decided by the Special Court by giving due consideration to the opinion of the Review Committee. This part of the judgment was expressly approved by the Supreme Court while dismissing the Special Leave Petition filed by the Government of Tamil Nadu. Though, the language of sub-section (3) of Section 2 of the Repeal Act is not identical to that of sub-section (4) read with sub-section (7) of the 2002 Act, it is substantially pari-materia to those provisions inasmuch as the opinion formed by the Review Committee on the prima-facie nature of the case for not proceeding against the accused under the 2002 Act has been given primacy and virtually made conclusive in the scheme of both the provisions. The only difference between the scheme of sub-sections (4) to (7) of Section 60 (as amended in the year 2003) and Section 2(3) of the Repeal Act is that while in the former case the Review Committee could initiate action on an application made by an aggrieved person and the direction given by it were treated binding on the Central Government etc. under sub-section (3) of Section 2 of the Repeal Act the Review Committee is required to examine all the pending cases registered under the 2002 Act for determining whether there is a prima-facie case for proceeding against the accused under the said Act. One starking similarity between the two sets of provisions is that once the Review Committee

forms an opinion that there is no prima-facie case for proceeding against the accused under the 2002 Act, the pending cases are treated as automatically withdrawn. Therefore, keeping in view the ratio of the judgment of Madras High Court which has been approved by the Supreme Court, we are inclined to agree with the learned Additional Solicitor general that the impugned provisions should be read in conjunction with Section 321 of the Code and the same do not, in any manner, encroach upon the judicial power of the State and that the opinion formed by the Review Committee on the prima-facie nature of the case under the 2002 Act has to be given due weightage by the Special Court and accepted unless there are exceptional reasons for not doing so.”

3. On the basis of the aforesaid decision, the learned counsel for the appellant/State contended that the learned Special Judge, POTA could not have passed the impugned order without the Public Prosecutor having made an application and without the Public Prosecutor having applied his mind to the question of withdrawing the case under POTA.

4. The learned counsel appearing for the respondent, however contended that the position is now somewhat different in view of the repeal of POTA as well as in view of the recent decision of the Supreme Court in **Mohmadhusen Abdulrahim Kalota Shaikh v. Union of India and Ors.:** 2008 (13) Scale 398.

5. We have examined the submissions made by the counsel for the parties

and we are inclined to agree with those made by the learned counsel for the respondent. POTA had been repealed by the Prevention of Terrorism (Repeal) Act, 2004 (Act 26 of 2004). Section 1(2) of the Repealing Act makes it clear that the said repeal would come into force on 21.9.2004. In the present case, the opinion of the Review Committee is dated 16.8.2005, that is, after the repeal of POTA by the said repealing Act 26 of 2004. Section 2(3), to the extent relevant, of the repealing Act is set out herein below:-

“ (3) Notwithstanding the repeal of Section 60 of the Principal Act, the Review Committee constituted by the Central Government under sub-section (1) of that section, whether or not an application under sub-section (4) of the Section has been made, shall review all cases registered under the principal Act as to whether there is a prima facie case for proceeding against the accused thereunder and such review shall be completed within a period of one year from the commencement of this Act and where the Review Commission is of the opinion that there is no prima facie case for proceeding against the accused, then-

(a) In cases in which cognizance has been taken by the Court, the cases shall be deemed to have been withdrawn and

(b) ”

A plain reading of the said provision clearly indicates that whether or not an application is made under Section 60 of POTA for review by the Review Committee, all cases had to be reviewed within a period of one year from the commencement of the repealing act i.e., from 21.9.2004. The provision also makes it clear that in case there is no prima facie case for proceeding against the accused then, in cases in which cognizance has been taken by the Court, the cases shall be deemed to have been withdrawn. The only question which

arises for consideration is whether, after the opinion of the Review Committee dated 16.8.2005 that no prima facie case was made out for proceeding against the accused, any formal application by the prosecutor was required and whether the Court was required to go into the merits and examine the opinion of the Review Committee before closing the case as having been withdrawn. This has now been set to rest by the recent decision of the Supreme Court in the case of *Mohmadhusen Abdulrahim Kalota Shaikh*(*supra*). The Supreme Court as per the opinion of KG Balakrishnan, CJI and R.V. Raveendran, J held as under:-

“32. We therefore hold that once the Review Committee on review under section 2(3) of the Repealing Act, expresses the opinion that there is no prima facie case for proceeding against the accused, in cases in which cognizance has been taken by the Court, such cases shall be deemed to have been withdrawn. The only role of the Public Prosecutor in the matter is to bring to the notice of the court, the direction of the Review Committee. The court on satisfying itself as to whether such an opinion was rendered, will have to record that the case stands withdrawn by virtue of section 2(3) of the Repealing Act. The court will not examine the correctness or propriety of the opinion nor exercise any supervisory jurisdiction in regard to such an opinion of the Review Committee. But we make it clear that if the opinion of the Review Committee is challenged by any aggrieved party in writ proceedings and is set aside, the Court where the proceedings were pending, will continue with the case as if there had been no such opinion.”

Though Dalveer Bhandari, J, wrote a separate opinion, it was in concurrence with the opinion of the aforesaid Hon’ble Judges. He also observed as

under:-

“45. Under Section 3 of POTA (Repeal) 2004, where no prima facie case is made out, the case “shall” be deemed withdrawn. It is important to note that POTA (Repeal) 2004 does not expressly reject section 321 of Cr.P.C. Had the Parliament used a non-obstante clause to preclude the application of section 321 of Cr.P.C. to POTA (Repeal) 2004, POTA 2002 had done in a number of provisions our analysis would have been much simpler. That said, Section 56 of POTA 2002, whose operation is saved by section 2(2)(a) of POTA (Repeal) 2004, states that POTA 2002 is to override “anything inconsistent therewith”. As noted, section 321 of Cr.P.C. is inconsistent with the POTAs, as it makes the Review Committee’s decision to withdraw contingent upon the public prosecutor and the Court.”

6. Consequently, it is clear that the only role of the Public Prosecutor, once the Review Committee has opined that no prima facie case is made out for proceeding against the accused, is to bring the same to the notice of the Court. The court is also required to satisfy itself that the opinion has in fact been rendered. The court having so satisfied itself, is required to record that the case stands withdrawn by virtue of Section 2(3) of the Repealing Act. In the present case, we find that though the order dated 13.10.2005 makes a reference to Section 60(7) of POTA, the opinion of the Review Committee was rendered only pursuant to the Repealing Act 26 of 2004. So, although only Section 60(7) is referred to in the impugned order, the review was actually under Section 2(3) of the Repealing Act. In these circumstances, as pointed out by the Supreme Court in the aforesaid

decision, the Court is not to examine the correctness or propriety of the opinion nor does it exercise any supervisory jurisdiction in regard to the opinion of the Review Committee. In this view of the matter, the order passed by the learned Special Judge cannot be faulted because it is exactly in line with the aforesaid decision of the Supreme Court in the case of *Mohmadhusen Abdulrahim Kalota Shaikh(supra)*.

7. Therefore, the present appeal is liable to be dismissed. It is ordered accordingly.

8. The dismissal of this appeal, however will have no bearing on the writ petition which has been filed by the Sate, being aggrieved by the opinion of the Review Committee which shall be heard and dealt with separately. The appeal stands dismissed.

BADAR DURREZ AHMED,J

P.K. BHASIN, J

MARCH 26, 2009
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