

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

Date of Hearing: 30th May, 2011
Date of Decision: 11th July, 2011

+ **CRL. L.P. No.208/2011**

STATE

...

PETITIONER

Through: Mr. Vikas Pahwa, Additional Standing
Counsel with Mr. Tarun Verma, Advocate.

Versus

IRSHAD AHMED MALIK

...

RESPONDENT

Through: Nemo.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G.P.MITTAL

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| 1. Whether reporters of local papers may be allowed to see the Order? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Order should be reported in the Digest? | Yes |

J U D G M E N T

G.P. MITTAL, J.

1. The State seeks leave to file an Appeal against the judgment dated 08.11.2011 passed by the learned Sessions Judge in Sessions Case No.04/2009 whereby Irshad Ahmed Malik (the Respondent) was acquitted of the charges under Section 25 of the Arms Act and under Sections 121/121A/122/123/120B Indian Penal Code (IPC).
2. In brief, the case of the prosecution is that in the first week of March, 2004 a secret information was received through Central Intelligence Agency that one Kahsmiri youth Irshad Ahmed belonging to the militant outfit Lashkar-e-Taiba (LeT) has been visiting Delhi for collecting funds for his terrorist organization through Hawala. He was trying to establish his base in Delhi. The information was developed. Ultimately, on 27.03.2004 at about 3:00 P.M. specific information was received in the office of Special Cell that the Respondent would

come and stay in 'Rajdhani Guest House', Bhogal and that he was carrying some weapons with him.

3. At about 3:45 P.M. a police party consisting of 14 members including Inspector Hirdey Bhushan, SI Umesh Barthwal, SI Anil Kumar and the secret informer started from the office of Special Cell, Lodhi Colony and reached Mathura Road, Jungpura, Bhogal at 4:00 P.M. A public witness Ajab Singh, who happened to be present around was requested to join the raiding party. At about 7:15 P.M. on the signal of secret informer, the Respondent was apprehended. A .30 bore pistol ('Star' mark), loaded with eight rounds was recovered from the right dub of the Respondent's *Pant*. A sum of ₹ 2.75 lacs was recovered when the black colour bag carried by him on his shoulder was searched.
4. SI Arvind Kumar was summoned to the spot by the Inspector Lalit Mohan to carry out the investigation. He reached the spot and conducted the formalities of preparation of sketch, seizure memo etc. A rukka was sent to the Police Station Special Cell through Head Constable Dinesh and FIR (Ex.PW-6/A) was recorded at about 9:30 P.M.
5. The Respondent was brought to the Special Cell office at Lodhi Colony. On interrogation he made a disclosure statement Ex.PW-1/F giving various details of his activities being a member of Lashkar-e-Taiba. He disclosed that one AK47 rifle, a *Fidayeen* belt with two hand grenades, a wireless set and four magazines (AK47 rifle) had been concealed by him near river Tavi at Jammu and one AK47 rifle has been given to Master Ali and that he could get these arms recovered from there. On the basis of the disclosure statement given by the Respondent, the offences under The Prevention of Terrorism Act, 2002 (POTA) were added and further investigation was taken up by ACP Rajbir Singh.
6. According to the prosecution, the police party consisting of ACP Rajbir Singh and other police officials visited Jammu. The AK47 rifle and other ammunition could not be recovered either from the bank of river Tavi (Jammu) or from the house of Master Ali. It is alleged that a second statement was made by the Respondent on 01.04.2004 that, he had removed the ammunition from the bank of river Tavi in

January and had brought the same to Delhi. The Respondent disclosed that an AK rifle and two magazines had been concealed by him at the back of Humayun Tomb. He informed the police that he could get the same recovered.

7. In pursuance of the second disclosure statement, the police party visited Humayun Tomb and joined Udai Bhan Tiwari as a witness to the recovery to be effected at the instance of the Respondent. The Respondent led the police party to the place behind Humayun Tomb, Nizamuddin and got recovered one AK56 rifle and two loaded magazines containing 30 live cartridges each contained in a plastic *Katta* (bag). The arms and ammunition recovered were sealed with the seal of LMH and seized by memo Ex.PW-1/H.
8. By order dated 13.10.2005 the charge under various sections of POTA was deemed to be withdrawn as the review committee constituted under Section 60 of POTA had expressed the view that invocation of POTA in the case was not justified. A Criminal Appeal No.607 of 2007 preferred by the State against the order dated 13.10.2005 was dismissed by a Division Bench of this Court by order dated 26.03.2009.
9. Thus, the trial of the Respondent for the offence punishable under Section 25 of the Arms Act, 1959 and Sections 120A/122/123 IPC proceeded.
10. In order to establish its case, the prosecution examined 15 witnesses.
11. By impugned order, the Trial Court held that a public witness Ajab Singh, who was a chance witness, was joined by the police in the raiding party. Particulars of the said public witness were insufficient; as his full address and complete particulars mentioned in the case were given as Ajab Singh, son of Bhagmal, resident of Kotla Mubarakpur. PW-11 SI Umesh Barthwal stated that the seal after use was handed over to this witness; the IO was silent as to when the seal was returned. Trial Court thus, opined that joining of a chance witness with insufficient particulars (and then report that the witness could not be examined as he was dead) was suspicious. It was held that PW-7 HC Dinesh Kumar was silent about joining of any public witness in the raiding party, rather he stated that some

persons were asked by the IO to join as witnesses but none came forward. No question was put by the prosecution about presence of the public person Ajab Singh to this witness. The Trial Court opined that nobody from the Rajdhani Guest House (where the Respondent was to stay) was joined or even questioned later on. The Trial Court held that in the circumstances it was unsafe to rely upon the testimony of the official witnesses.

12. It was found that no investigation was carried out with regard to the source of ₹ 2.75 lakhs obtained by the Respondent from some person at Chandni Chowk, Delhi and thus the detailed explanation given by the Respondent regarding his arrest and source of the money recovered was believable.
13. The Trial Court further found the recovery of an AK56 rifle and other ammunition in pursuance of the second disclosure statement Ex.PW-1/G on 01.04.2004 from the back of Humayun Tomb was not believable as there was no occasion for the Respondent to make the second disclosure statement.\
14. We have heard Mr. Vikas Pahwa, learned APP for the State and have perused the record.
15. It is argued by learned APP that at the time of first recovery a public person Ajab Singh was joined as a witness but could not be examined because of his death during trial and the recovery of AK56 rifle and 60 cartridges was witnessed by an independent person PW-3 Uday Bhan Tiwari and, therefore, the Trial Court was not justified in discarding the testimonies of the official witnesses. It is urged that the case was fully established against the Respondent and order of the Trial Court is liable to be reversed.
16. As per prosecution version the Police (Special Cell of Delhi Police) had a secret information regarding arrival of the Respondent, who was a terrorist belonging to Lashkar-e-Taiba. The information was developed and it was gathered that the Respondent would come to stay at Rajdhani Guest House, Bhogal on 27.03.2004. The Police party reached Bhogal at about 3:45 PM. Admittedly, no attempt was made by the Police to join any independent witness from the locality, a passersby

Ajab Singh was joined (who was eventually not examined on the ground that he had died). It has to be borne in mind that public witness Ajab Singh was joined in a serious case of recovery of arms from a suspected terrorist. Eventually the said public witness was to be examined as a witness in the Court. It is not borne out from the record that Ajab Singh was such a prominent person in the area of Kotla Mubarakpur that he could be traced with the particulars Ajab Singh son of Bhagmal resident of Kotla Mubarakpur. In fact ASI Ram Kumar (Process Server of Special Cell) made a report dated 21.07.2006 that the summons for appearance of Ajab Singh could not be served because of want of complete address. Thus, it is not known as to who was this Ajab Singh and how the IO/ Police Officers of Special Cell were in contact with him. Joining such kind of a chance witness, projecting him as an independent witness by itself was suspicious. The Trial Court also disbelieved the presence of the public witness as PW-7 HC Dinesh Kumar did not say a word regarding presence of any public witness. He deposed that *“IO had asked the persons present near the gate of Sahi Hospital to join the raiding party but they refused. They did not disclose their names and addresses to the IO. I do not know if any action was taken against them by the IO. I do not remember if any employee of MCD office near by was called to the spot to join the raiding party”*. Thus, it could be inferred from the testimony of PW-7 that no public witness was ready to join the raiding party in spite of the efforts made by the IO and none was joined.

17. According to the prosecution version the Respondent was arrested in a serious offence of being a member of Lashkar-e-Taiba and there was recovery of a sophisticated weapon from him. A sum of ₹ 2.75 lakhs was also recovered, which according to him was collected from some person in Chandni Chowk. The Trial Court disbelieved the prosecution version that the amount was collected by Hawala as the Police preferred not to investigate the source of the sum of ₹ 2.75 lakhs.
18. It is very interesting to note that the Respondent would not disclose the name and address of the source of the amount of ₹ 2.75 lakhs, which was collected by him from Chandni Chowk but would disclose that he had concealed an AK47 rifle and

other ammunition at the bank of river Tavi in Jammu. It is quite strange that according to the prosecution version this disclosure statement was retracted by the Respondent who allegedly changed stand and gave a second disclosure statement that the AK rifle and ammunition was transported to Delhi in January, 2004. It may be noticed that AK47 rifle as mentioned in the first disclosure statement became a simple AK rifle and ultimately there was recovery of an AK56 rifle. The investigating agency thus shifted the stand of Respondent as per its own convenience to involve him in a serious case like waging war against the Government of India. The Trial Court, therefore, rightly disbelieved the recovery of AK56 and other ammunition in pursuance of the second disclosure statement and consequently acquitted him of the offences under the Arms Act as also for the offences under Sections 121A, 122 & 123 IPC.

19. The law does not allow the State to file an Appeal against an order of acquittal under Section 378(3) Cr.P.C.; the State has to seek leave to file an Appeal. Though while hearing an Appeal against the acquittal the powers of the Appellate Court are not limited; it has the same powers as while hearing an Appeal against an order of conviction and can thus re-appreciate evidence. Yet, it has to be borne in mind that the presumption of innocence, which is attached to every accused, unless proven guilty, is strengthened and re-enforced by an order of acquittal. Thus, the Court interferes with an order of acquittal where the finding of the Trial Court is perverse or there is gross mis-application of law or there are compelling and substantial reasons.
20. The Supreme Court in ***Syed Peda Aowlia v. The Public Prosecutor, High Court of A.P., Hyderabad***, (2008) 11 SCC 394, summed up the law after referring to various earlier decisions as under:-

“5. There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount

*consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. See **Bhagwan Singh and Ors. v. State of Madhya Pradesh**, (2002) 4 SCC 85. The principle to be followed by appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference.”*

21. We do not find any ground to interfere with the order of acquittal. The leave petition is without any merit and the same is accordingly dismissed.

(G.P. MITTAL)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

JULY 11, 2011

vk/hs