

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

Date of Hearing : 22nd July, 2011
Date of Decision : 8th August, 2011

+ **CRL.L.P. No.368/2010**

STATE

..... PETITIONER

Through: Ms. Richa Kapoor, APP for the State.
Versus

OBAID UL AHAD

..... RESPONDENT

Through: Mr. M.S. Khan Advocate with
Mr. Nitin Kumar, Advocate.

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? | No |
| 2. To be referred to the Reporter or not? | No |
| 3. Whether the Order should be reported in the Digest? | No |

J U D G M E N T

G.P. MITTAL, J.

CRL. M.A.15782/2010 (Under Section 5 of the Limitation Act)

1. There is a delay of 111 days in filing the petition. Learned counsel for the Respondent has no objection to the condonation of delay. The delay is accordingly condoned for the reasons as mentioned in the application.

CRL.L.P. No.368/2010

2. The State seeks leave to file an Appeal against the judgment and order dated 18.02.2010 passed by the learned Additional Sessions Judge (ASJ) whereby the Respondent Obaid-ul-Ahad was acquitted of the charges under Section 121/121-A/122/123/120-B of the Indian Penal Code (IPC) read with Section 40 of the Unlawful Activities (Prevention) Act.
3. The facts of the case can be extracted from Para 1 of the impugned judgment. These are :-

"1. On 15.6.2005 ACP Rajbir Singh of P.S. Special Cell was called by Sh. Lalit Prasad, Joint Commissioner, Import Shed, IGIA, Delhi at import shed. ACP Rajbir Singh alongwith Inspector Lalit Mohan and other staff went to Import Shed, IGIA where Sh. Lalit Prasad, Joint Commissioner, Import Shed briefed that one Mohd. Amin Khan came to clear his consignment declared as personal effects through Import Shed, Air Cargo, New Delhi which was sent by one Sajjad Sheikh (since not arrested) from Jeddah. The profile and movement of the importer Mohd. Amin Khan invoked suspicion to them and on thorough examination 40 wireless handsets, one satellite phone, 60 antennas, one solar charger and 6 sets of headphones were recovered. Since the matter was sensitive in nature, hence accused Mohd. Amin Khan was brought in the office of Special Cell for interrogation. Accused Mohd. Amin Khan was not disclosing anything and the phone calls of Sajjad were coming on the mobile of Vijay, the phone of Vijay was taken on interception immediately so that precious information is not lost. Accused Mohd. Amin Khan was directed to keep on talking to Sajjad in normal manner. He stated that the consignment was sent by Sajjad from Saudi Arabia but he was not aware of the use. After interrogation both of them were relieved from the office with notice to join inquiry on 16.6.2005. On 16.6.2005, accused Mohd. Amin came to the office of Special Cell alongwith said Vijay. In the meantime, Sajjad called up accused Amin Khan and stated that Obaid would be coming to Delhi through flight on 16.6.2005 to take consignment to Srinagar. On 16.6.2005 accused Obaid whose description was given by Sajjad to accused Mohd. Amin Khan came to the house of Amin Khan and he was also joined in the inquiry. Sajjad also talked to Obaid regarding taking the consignment to Srinagar. Accordingly, all of them were relieved from the office with notice to come on 17.6.2005. In the meantime watch was kept over their activities and phones of Vijay and Sajjad were intercepted. On 17.6.2005, Sh. Lalit Prasad, Joint Commissioner, Import Shed made a complaint to DCP Special Cell, Delhi regarding seizure of wireless handsets, satellite phones etc. which was marked to ACP Rajbir Singh for inquiry. On receipt of the complaint, prima facie case U/s. 40 of Unlawful Activities Prevention Act was registered at P.S. Special Cell and investigation was taken up by ACP Rajbir Singh. During further investigation on 17.6.2005, accused Mohd. Amin Khan and Obaid-Ul-Ahad were interrogated separately who disclosed about their involvement and stated that they are the members of banned terrorist outfit "Al-Badr". They further disclosed that they have been working for "Al-Badr" alongwith one Sajjad Hussain Sheikh and Gulam Hassan @ Bilal @ Billa (since not arrested). The consignment of satellite phone and wireless set was sent by Sajjad Hussain Sheikh from Riyadh. Both the accused persons were arrested and their disclosure statements were recorded. They disclosed that the consignment after clearance was to be taken away to Srinagar by Obaid which was to be further delivered to Bilal in Srinagar. Bilal would have taken the consignment to Tariq @ Tipu, a Pak National and the area commander of "Al-Badr" in Bandipora, Baramula, J&K. Since the consignment was meant to carry out the

terrorist activities in India with an intent to wage war against the Government of India, therefore, section 121/121A/122/123/120-B IPC was added. Since accused Sajjad was living in Riyadh, his LOC was got opened. As per the disclosure statement of accused Mohd. Amin Khan, DVD was also recovered which was taken into police possession. Amin Wani, a room mate of accused Mohd. Amin Khan also stated in his statement about the DVD given to accused Mohd. Amin Khan. The study of the mobile phone of Sajjad revealed that he was in touch with accused Amin Khan and accused Obaid alongwith one Pakistan number. The study of interception of mobile calls of Vijay also made it clear that accused Amin Khan was directed by Sajjad to get the consignment cleared from Cargo and simultaneously accused Obaid-ul-Ahad was directed to collect the consignment from accused Amin Khan and carry it to Srinagar, J&K. The transcript and recording of conversation of accused Amin and Obaid with accused Sajjad on the mobile phone of Vijay were also taken into police possession. The voice samples of both the accused persons were also obtained and taken into police possession and cassettes were sent to CFSL for expert opinion. All the accused persons entered into criminal conspiracy, collected large quantity of restrict satellite phones, solar chargers and wireless sets which were meant to be used for terrorist activities against India. After completion of investigation, charge sheet against accused Mohd. Amin Khan and Obaid-Ul-Ahad was filed and NBWs were taken against accused Sajjad Hussain Sheikh and Gulam Hassan @ Bilal (since not arrested)."

4. On Respondent's and co-accused Mohd. Amin Khan pleading not guilty to the charge, the prosecution examined 27 witnesses. The co-accused Mohd. Amin Khan was convicted by the impugned judgment primarily on the ground that he had approached the Custom department on 15.06.2005 to collect the consignment which, as stated above, was found to be consisting of articles which were to be used for terrorist activities and to wage war against the Government of India and also on the ground that the conversation between Sajjad Hussain Sheikh and co-accused Mohd. Amin Khan regarding dispatch of the consignment was proved to be in Mohd. Amin's voice.
5. The Respondent was acquitted by the Trial Court on the ground that the call records of the Respondent would show that there was a talk of just one second on the mobile number 9419061643 of the Respondent with the purported cell number of Sajjad Hussain Sheikh. It was observed that as per the call details many calls were made on the landline number of the Respondent from Sajjad Hussain Sheikh, but there was no evidence on record that the Respondent had himself answered the calls. The Trial Court observed that no satisfactory evidence was produced as to how the Respondent

was joined in the inquiry/investigation. PW-17 SI Umesh Barthwal and PW-23 Inspector Lalit Mohan were silent about the service of the notice under Section 160 Cr.P.C. on the Respondent on 16.06.2005 (when the Respondent is alleged to have reached Delhi from Srinagar). The Trial Court further held that the prosecution had failed to prove the conversation between Sajjad Hussain Sheikh and the Respondent as PW-20 Deepak Kumar Tanwar from CFSL New Delhi had declined to give any report on the ground that the questioned conversation and specimen voice of the Respondent was in Kashmiri (language) and since he was not conversant with the language, he was unable to give any opinion. The Trial Court noticed that PW-24 Dr. C.P. Singh found the conversation and the specimen voice in Hindi which was contrary to the prosecution version and thus, the report given by PW-24 Dr. C.P. Singh, another expert could not be relied upon. The Trial Court thus concluded that merely because the Respondent had arrived from Srinagar to Delhi, no inference of the Respondent's carrying the consignment to Kashmir for handing it over for terrorist activities to other persons could be drawn. Thus, the Respondent was acquitted giving him the benefit of doubt.

6. We have heard Ms. Richa Kapoor, learned counsel for the State, Mr. M.S. Khan, learned counsel for the Respondent and have carefully perused the record.
7. It is argued by the learned APP that the Trial Court has failed to appreciate the evidence of PW-17 SI Umesh Barthwal who had deposed that the Respondent made a disclosure statement that he was a part of the terrorist organization 'Al-Badr' and was to take the consignment to Srinagar. It is contended that the Trial Court disbelieved the date of Respondent's arrest without any reasonable ground. The documents proved on record clearly established that the Respondent was arrested on 17.06.2005 along with co-accused Mohd. Amin Khan. There was also recovery of a Jet Airways air ticket and a notice under Section 160 Cr.P.C. dated 16.06.2005 from the Respondent which proved that the Respondent was joined in the inquiry and that he had come from Srinagar on 16.06.2005.
8. The Trial Court disbelieved the prosecution version that the Respondent was joined for inquiry/investigation on 16.05.2005 and was later on arrested on 17.06.2005 along with co-accused Mohd. Amin Khan. The reasoning given by the Trial Court is extracted hereunder:-

“51. Now coming to the testimony of PW17 SI Umesh Barthwal and PW23 Inspector Lalit Mohan who accompanied the initial IO ACP Rajbir Singh during the investigation of the whole case. Neither from the testimony of PW17 nor from the testimony of PW 23, it is clear as to how accused Obaid-Ul-Ahad came into the picture. During the investigation of this case, according to PW17 and PW23 as well as in the report U/s 173 Cr.P.C. after thorough interrogation accused Mohd. Amin Khan and Vijay Kumar were set freed on 15.6.2005 by the police officials of Special Cell. In the report U/s. 173 Cr.P.C., it is mentioned that on 16.6.2005, accused Obaid-Ul-Ahad came to the house of accused Mohd. Amin Khan to collect the consignment and he was also joined in the inquiry. But neither PW17 nor PW23 in their statement in the court has stated that accused Obaid-Ul-Ahad was arrested from the house of accused Mohd. Amin Khan on 16.6.2005 or he was served any notice for joining the investigation on 16.6.2005. Both PW17 and PW23 have failed to explain that if any notice was served upon the accused Obaid-Ul-Ahad and he joined the investigation, then where that notice was served. Both these witnesses have not stated how accused Obaid-Ul-Ahad was arrested, where and when he was called and on what basis he was called. They both have stated in parrot like manner that he was joined in the investigation. It is hard to believe that when one of the accused was already under interrogation by the police officials of P.S. Special Cell then other accused Obaid-Ul-Ahad himself would come in P.S. Special Cell and would join the investigation. It is hard to believe and seems to be a concocted story by the prosecution. If as per the charge sheet, accused Obaid-Ul-Ahad had come to the house of accused Mohd. Amin Khan, then neither PW17 nor PW23 have deposed that he was arrested from the house of accused Mohd. Amin Khan or was served any notice there to join the investigation. This is a serious lacuna in the case of prosecution regarding accused Obaid-Ul-Ahad in this regard, the benefit of which must go to the accused Obaid-Ul-Ahad.”

9. Though, the prosecution wanted the Court to believe that on 16.06.2005 after his disembarkment at IGI Airport, the Respondent reached the house of co-accused Mohd. Amin Khan. He (the Respondent) was served with a notice under Section 160 Cr.P.C. at Mohd. Amin Khan's house to join the investigation on the same day. However, the prosecution did not produce any evidence to prove that the Respondent was found at the house of co-accused Mohd. Amin Khan or that he was served with the notice under Section 160 Cr.P.C.
10. In these circumstances, the conclusion of the Trial Court that this averment of the prosecution is without any evidence, cannot be faulted.
11. The other important piece of evidence against the Respondent was his alleged conversation with Sajjad Hussain Sheikh at Jeddah. The Trial Court found that there

was just one phone call to the cell phone number of the Respondent from the alleged mobile number of Sajjad Hussain Sheikh for one second and there was no evidence that the calls on the landline telephone installed at the Respondent's residence could not have been attended by anyone else. It was further found that the Respondent's specimen voice S2 could not be said to have matched with the questioned conversation Q2 as PW-24 did not know Kashmiri (language) and he, like PW-20, had also admitted that an expert cannot compare the disputed and admitted speech unless he is aware of the language spoken in the conversation. The discussion and the finding of the Trial Court are extracted hereunder:-

"50..... So far as the interception order dated 25.10.2006 Ex.PW22/D is concerned, then same pertains to the mobile numbers of accused Sajjad, Mohd. Amin Khan and of Vijay and this interception order was not for phone numbers of accused Obaid-Ul-Ahad. Ex.PW22/F proves on record that mobile number 9419061643 belong to accused Obaid-Ul-Ahad and the copy of bill of Bharat Sanchar Nigam Limited is duly proved on record as Ex.PW22/F. So far as Ex.PW22/G i.e. the call details of mobile phone no.9419061643 of accused Obaid-Ul-Ahad is concerned, then in the entire call detail from period 19.2.2005 to 17.6.2005, there is only once when call has been made from the mobile of accused Obaid-Ul-Ahad to mobile of accused Sajjad Sheikh on 23.5.2005. So far as the Ex.PW22/J is concerned, then it depicts the call details of international mobile no.96551145725 for the period from 4.4.2005 to 14.6.2005 as Ex.PW22/J, but most of these call details shows that generally the calls have been made on the mobile of accused Mohd. Amin Khan. So far as the calls made on the land line number of accused Obaid-Ul-Ahad is concerned, then the mobile phone can be under the personal possession of one person but if the land line is installed at the house of a person, then any member of the family can receive the same and on the basis of this only no inference can be drawn that these calls were made to accused Obaid-Ul-Ahad in the absence of any corroborative evidence. Even Ex.PW22/K only proves the calls made by Sajjad on the mobile phone of Vijay on 15.6.2005 and 16.6.2005 which further fortifies the case of prosecution and corroborates the testimony of PW Vijay Kumar wherein he has stated that his mobile phone remained with accused Mohd. Amin Khan during the days 15.6.2005 and 16.6.2005....."

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52.....So far as the accused Obaid-Ul-Ahad is concerned, then since no opinion could be given by PW20, therefore his voice sample as well as the questioned voice was sent to CFSL, Chandigarh and PW24 Dr. C.P.Singh is the witness of the same. It may be mentioned that PW24 submits that questioned

cassette starts with the sentence "Uska Ticket Kar Dena" however the transcript of the cassette which were sent to CFSL, Chandigarh does not have these words. The entire transcript dated 16.6.2005 at 21.01 hrs. which is stated to be the conversation between accused Obaid-Ul-Ahad and Sajjad and Amin Khan by the prosecution does not have these words "Uska Ticket Kar Dena". Moreover in the seizure memo as well as in the testimony of PW20, it is mentioned that the cassette containing conversation of accused Obaid-Ul-Ahad and Sajjad is in Khasmiri language but PW24 has stated that the voice conversation i.e.Q2 is in Hindi Language. Q2 which was sent to CFSL, Chandigarh, CBI, Delhi was not in Hindi or English language and, therefore no opinion could be given by the officer of CFSL, CBI, New Delhi. It was only for this reason that this cassette was sent to CFSL, Chandigarh but in his testimony PW24 submits that the voice conversation Q2 is in Hindi Language and the sample cassette S2 contained comparable words in Hindi. The transcripts of the call details of accused Mohd. Amin Khan and Sajjad for the dates 15.6.2005 and 16.6.2005 which took place about five times have been placed on record but it seems that between accused Mohd. Amin Khan and Sajjad and Obaid-Ul-Ahad there is only one transcript on record for conversation dated 16.6.2005 at 21:01 hrs. and that too also does not have those words which have been stated by PW24 in his examination in chief. Seizure memo Ex.PW6/C which is the voice sample of accused Obaid-Ul-Ahad states that it is in Kashmiri language whereas the voice sample of accused Mohd. Amin Khan Ex.PW6/B states that the voice sample is in Kashmiri as well as in Hindi language.

53. The net result of abovesaid discussion is that the prosecution has been able to prove the recorded conversations between accused Mohd. Amin Khan and Sajjad but so far as the conversation between accused Obaid-Ul-Ahad and Sajjad is concerned, then prosecution has not been able to prove the same beyond reasonable doubt as PW24 has stated that the voice in cassette Q2 is of accused Obaid-Ul-Ahad and it tallies with his sample voice in S2. PW24 has further stated that he can read, write and understand Hindi, Manipuri and English and he can also understand Punjabi and Tamil to certain extent and he cannot read, write and understand any other Indian or foreign language. He has also admitted that the opinion is only possible if voice sample and questioned voice are in one and same language but he has stated that the voice conversation in Q2 is in Hindi language which is clear contradiction not only to the testimony of PW20 but also of the prosecution case. He has also admitted that he had not mentioned the words taken from Q2 in his report for comparison with the voice sample. He has stated that "Uska Ticket Kar Dena" is the opening words of Q2 but the transcripts filed on record and sent to CFSL, Chandigarh does not have these words. Thus, so far as the voice sample is concerned, then prosecution has been able to prove that the recorded conversation between accused Mohd.

Amin Khan and Sajjad is of accused Mohd. Amin Khan but for accused Obaid-Ul-Ahad they have failed to prove the same."

12. Once PW-20 Deepak Kumar Tanwar gave the findings that he was unable to compare the questioned conversation with the specimen voice (with the Respondent's specimen voice) as the same were in Kashmiri language, the IO was under an obligation to give specific instructions to CFSL Chandigarh that the comparison of the voices must be done by an expert who is aware of the Kashmiri language. That was, however, not done and PW-24 Dr. C.P. Singh who did not understand Kashmiri undertook the task of comparison of the conversation. To save himself from embarrassment, PW-24 stated that the questioned conversation Q2 and the specimen voice were in Hindi which is contrary to the prosecution case.
13. In this view of the matter, the Trial Court rightly rejected the testimony of PW-24 Dr. C.P.Singh.
14. Of course, there is a disclosure statement Ex.PW-17/F which in term is a confessional statement alleged to have been made by the Respondent. The same, however, is not admissible in evidence, being hit by Section 25 of the Evidence Act. Thus, there is no convincing evidence to bring home the guilt of the Respondent.
15. While hearing a leave petition or an appeal against an order of acquittal the High Court is normally slow to interfere with the same. The High Court disturbs the finding of acquittal when there are very substantial and compelling reasons to do the same. The substantial and compelling reasons include where the finding of the Trial Court is perverse; or the Trial Court decision is based on an erroneous view of law, or, there is miscarriage of justice. The substantial and compelling reasons have been spelt out by the Supreme Court in *Chandrappa & Others v. State of Karnataka*, (2007) 4 SCC 415 as follows: -

"In light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. *The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.*

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

- (i) The trial court's conclusion with regard to the facts is palpably wrong;*
- (ii) The trial court's decision was based on an erroneous view of law;*
- (iii) The trial court's judgment is likely to result in "grave miscarriage of justice";*
- (iv) The entire approach of the trial court in dealing with the evidence was patently illegal;*
- (v) The trial court's judgment was manifestly unjust and unreasonable;*
- (vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the Ballistic expert, etc.*
- (vii) This list is intended to be illustrative, not exhaustive.*

2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused.

Had the well settled principles been followed by the High Court, the accused would have been set free long ago. Though the appellate court's power is wide and extensive, it must be used with great care and caution."

14. In view of the forgoing discussion, we are of the view that the Trial Court's findings are based on correct appreciation of law and facts and, therefore, do not call for any interference. The State, in the circumstances, is not entitled to the grant of leave. The leave petition is accordingly dismissed.

(G.P. MITTAL)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

AUGUST 08, 2011/vk