

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

Date of decision: 23.01.2012

- + **CRL.A. 229/2011, Crl. M. (Bail) 295/2011 & Crl. M.A. 6722/2011**
TARIQ MEHMOOD & ANR Appellants
Through : Sh. N.D. Pancholi and Sh. Kahorngam
Zimik, Advocates along with the appellants in person.
- + **CRL.A. 281/2011, Crl. M. (Bail) 367/2011 & Crl. M. (Bail) 70/2012**
MOHD MUFTI ASRAR Appellant
Through : Ms. Sima Gulati and Sh. Sugam Puri,
Advocates along with appellant in person.
- + **CRL.A. 307/2011, Crl. M.A. 2831/2011**
ARSHAD KHAN @ ASLAM KHAN @ MASAB Appellant
Through : Proxy counsel (appearance not given) for
Sh. M.S. Khan, Advocate along with the appellant.
- + **CRL.A. 986/2011, Crl. M. (Bail) 1388/2011**
GHULAM MOHD DAR Appellant
Through : Sh. Vishal Gosain, Advocate along with the
appellant.
versus
STATE Respondent
Through : Sh. Dayan Krishnan, ASC, for the State
along with Sh. Nikhil. A. Menon.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT

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1. The present order will dispose of four appeals – Crl. A. 229/2011 – *Tariq Mehmood & Anr. v. State*; Crl. A. 307/2011 – *Arshad Khan v. State*;

Crl. A. 281/2011 – *Mufti Mohd. Asrar v. State* and Crl. A. 986/2011 – *Ghulam Mohd. Dar v. State*.

2. All the appellants – Tariq Mehmood and Ishaq Ahmed (in Crl. A. 229/2011), Arshad Khan; Mufti Mohd. Asrar and Ghulam Mohd. Dar were tried together with several other accused. By common judgment and order dated 24.12.2010 and 15.01.2011 of Ms. Pinki, learned ASJ/Designated Court, Saket, New Delhi (which have been challenged in the present appeals), these accused/appellants were convicted for committing various offences. These appeals were heard on several dates. During the course of hearing, the appellant's counsel submitted that having regard to the nature of evidence and the fact that the principal accused Abdul Majeed was held guilty and awarded 10 years sentence for the offence of criminal conspiracy under Section 120-B IPC, (which was the maximum punishment to him), was reduced to 8 years Rigorous Imprisonment by this Court, in a previous order and that the same was to run concurrently with the sentences for the other offences, it was urged that having regard to the allegations leveled against these appellants, Tariq Mehmood and Ishaq Ahmed (in Crl. A. 229/2011), Arshad Khan; Mufti Mohd. Asrar and Ghulam Mohd. Dar, and the findings of the Trial Court, they would not be contesting or pressing for setting-aside of the conviction. The appellants were also present; they were present pursuant to production warrants issued by the Court. They concurred with the statements made on their behalf by the counsel.

3. The prosecution case was that the principal accused Abdul Majeed, in conspiracy with several others, had plotted committing various subversive and terrorist acts in India. These included possibility of kidnapping several

highly-placed individuals, and also getting some terrorists, who were lodged in Indian jails, released in bargain. The role attributed to Abdul Majeed was a prominent one; he is alleged to have purchased a plot with a view to stay in India to provide hideout to the others, some of whom were from Pakistan and also to mastermind operations and provide logistic support.

4. Although the present appellants and the other accused, i.e. Abdul Majeed, Mohd. Amran and Mohd. Ashraf were named in the same First Information Report (FIR), and also arraigned (charged) along with these appellants, in view of the fact that some of them pleaded guilty, the order of conviction and sentence was passed much earlier. In the case of Abdul Majeed and Mohd. Amran, the conviction was on 30.09.2003. Mohd. Ashraf's conviction was on 18.09.2003. These orders were made by the learned Designated Judge (POTA). The relevant sentences awarded by the learned Designated Judge(POTA) on 15.10.2003 were noticed by the Trial Court in the impugned judgment, in the form of a chart. The same is extracted below:

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<i>Sr. No.</i>	<i>Name of Accused</i>	<i>Convicted U/S</i>	<i>Sentence Awarded</i>
1.	Abdul Majeed Mohd. Amran Mohd. Ashraf	3 (3) of POTA	Eight Years RI with fine of Rs. 15,000/- each. ID one year RI.
2.	Abdul Majeed Mohd. Amran Mohd. Ashraf	3 (5) of POTA	Five Years RI with fine of Rs. 25,000/- each. ID one year RI.
3.	Abdul Majeed Mohd. Amran Mohd. Ashraf	20 of POTA	Five Years RI with fine of Rs. 10,000/- each. ID six months

			<i>RI.</i>
4.	<i>Abdul Majeed</i>	<i>3 (6) of POTA</i>	<i>Five Years RI with fine of Rs. 5,000/-. ID one year RI.</i>
5.	<i>Abdul Majeed</i>	<i>4(b) & 5 of Explosive Substances Act R/w 5 of POTA</i>	<i>Ten Years RI with fine of Rs. 25,000/-. ID one year RI.</i>
6.	<i>Abdul Majeed</i>	<i>22(2) & 22(3) of POTA</i>	<i>Seven Years RI with fine of Rs. 10,000/-. ID six months RI.</i>
7.	<i>Abdul Majeed Mohd. Amran Mohd. Ashraf</i>	<i>25 of Arms Act R/w 5 of POTA</i>	<i>Five Years RI with fine of Rs. 5,000/- each. ID three months RI.</i>
8.	<i>Abdul Majeed Mohd. Amran Mohd. Ashraf</i>	<i>120B IPC</i>	<i>Ten Years RI with fine of Rs. 25,000/- each. ID one year RI.</i>
9.	<i>Abdul Majeed Mohd. Amran Mohd. Ashraf</i>	<i>121A IPC</i>	<i>Eight Years Imprisonment (RI) with fine of Rs. 25,000/- each. ID one year RI.</i>
10.	<i>Abdul Majeed Mohd. Amran Mohd. Ashraf</i>	<i>122 IPC</i>	<i>Eight Years RI with fine of Rs. 25,000/- each. ID one year RI.</i>
11.	<i>Mohd. Amran</i>	<i>307 IPC</i>	<i>Five Years RI with fine of Rs. 5,000/-. ID three months RI.</i>
12.	<i>Mohd. Ashraf</i>	<i>465 IPC</i>	<i>Two Years RI with fine of Rs. 5,000/-. ID three months RI.</i>
13.	<i>Mohd. Ashraf</i>	<i>471 IPC</i>	<i>Two Years RI with fine of Rs. 5,000/-. ID three months RI.</i>
14.	<i>Abdul Majeed Mohd. Amran Mohd. Ashraf</i>	<i>14 Foreigners Act</i>	<i>Two Years RI with fine of Rs. 10,000/- each. ID six months</i>

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5. The Court also noticed the modification on quantum of sentence awarded against Abdul Majeed, Mohd. Amran and Mohd. Ashraf by this Court in various appeals by each one of the same accused, in CrI. A. 239/2004, CrI. A. 774/2003 and CrI. A. 775/2003. The relevant part of the impugned judgment in that regard reads as follows:

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**C.8 MODIFICATION OF QUANTUM OF SENTENCE
AWARDED UNDER SECTION 120B OF INDIAN PENAL
CODE**

*C.8(a) Vide order dated 26.05.2009 passed by Hon’ble Mr. Justice Pradeep Nandrajog and Hon’ble Ms. Justice Indermeet Kaur, Judges, Delhi High Court in Criminal Appeal No. 239/04, the order on sentence in respect of accused **Mohd. Ashraf** was modified.*

*C.8(b) Vide order dated 26.10.2009 passed by Hon’ble Mr. Justice Pradeep Nandrajog and Hon’ble Mr. Justice Suresh Kait, Judges, Delhi High Court in Criminal Appeal No. 774/03, the order on sentence in respect of accused **Mohd. Amran** was modified.*

*C.8(c) Vide order dated 18.01.2010 passed by Hon’ble Mr. Justice Pradeep Nandrajog and Hon’ble Mr. Justice Suresh Kait, Judges, Delhi High Court in Criminal Appeal No. 775/03, the order on sentence in respect of accused **Abdul Majeed** was modified.*

C. 8(d) The sentences awarded vide order dated 15.10.2003 passed by Sh. S.N. Dhingra, learned Designated

Judge POTA (as his lordship then was) which is on page 467 to 468 Part-IB has been modified only in respect of quantum of sentence imposed for the offence punishable under Section 120B Indian Penal Code as follows:

Sr. No.	Name of Accused	Under Section	Modified Sentence
1.	Abdul Majeed	120 B IPC	Eight Years RI with fine of Rs. 25,000/-. ID one year RI.
2.	Mohd. Amran	120 B IPC	Eight Years RI with fine of Rs. 25,000/-. ID one year RI.
3.	Mohd. Ashraf	120 B IPC	Eight Years RI with fine of Rs. 25,000/-. ID one year RI.

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6. In the present case, the order of conviction and sentence appearing in the Trial Court’s judgment, in para 22 reads as follows:

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22. *The convicts continues to pose a serious threat to society and are likely to do so for the future. Therefore, they are being awarded the sentence as mentioned herein below:-*

Sr. No.	Name of the Convicts	Convicted U/S	Sentence Awarded
1.	Tariq Mehmood @ Naeem Ishaq Ahmad @ Dilshad Mufti Mohd. Asrar Arshad Khan Ghulam Mohd. Dar Ghulam Qadir Bhat	3(3) POTA	Imprisonment for life and fine in sum of Rs. 15,000/- and in default of payment of fine RI for one year for each convict.
2.	Mufti Mohd. Asrar	3(4) POTA	Ten years RI and fine in sum of Rs. 10,000/- and in default of payment of fine RI for eight months.
3.	Tariq Mehmood @ Naeem Ishaq Ahmad @ Dilshad Mufti Mohd. Asrar Arshad Khan Ghulam Mohd. Dar Ghulam Qadir Bhat	3(5) POTA	Twelve years RI and fine in sum of Rs. 12,000/- and in default of payment of fine RI for fourteen months for each convict.
4.	Ghulam Mohd. Dar Ghulam Qadir Bhat	3(6) POTA	Twelve years RI and fine in sum of Rs. 12,000/- and in default of payment of fine RI for fourteen months for each convict.
5.	Tariq Mehmood @ Naeem Ishaq Ahmad @ Dilshad Mufti Mohd. Asrar Arshad Khan	20 POTA	Ten years RI and fine in sum of Rs. 10,000/- and in default of payment of fine RI for eight months

	<i>Ghulam Mohd. Dar Ghulam Qadir Bhat</i>		<i>for each convict.</i>
6.	<i>Ghulam Mohd. Dar Ghulam Qadir Bhat</i>	<i>22(2) & 22(3) POTA</i>	<i>Ten years RI and fine in sum of Rs. 10,000/- and in default of payment of fine RI for eight months for each convict.</i>
7.	<i>Tariq Mehmood @ Naeem Ishaq Ahmad @ Dilshad</i>	<i>25 of Arms Act r/w 5 of POTA</i>	<i>Five years RI and fine in sum of Rs. 5,000/- and in default of payment of fine RI for four months for each convict.</i>
8.	<i>Tariq Mehmood @ Naeem Ishaq Ahmad @ Dilshad Mufti Mohd. Asrar Arshad Khan Ghulam Mohd. Dar Ghulam Qadir Bhat</i>	<i>120 B IPC</i>	<i>Ten years RI and fine in sum of Rs. 10,000/- and in default of payment of fine RI for eight months for each convict.</i>
9.	<i>Tariq Mehmood @ Naeem Ishaq Ahmad @ Dilshad Mufti Mohd. Asrar Arshad Khan Ghulam Mohd. Dar Ghulam Qadir Bhat</i>	<i>121A IPC</i>	<i>Ten years RI and fine in sum of Rs. 10,000/- and in default of payment of fine RI for eight months for each convict.</i>
10.	<i>Tariq Mehmood @ Naeem Ishaq Ahmad @ Dilshad Mufti Mohd. Asrar Arshad Khan</i>	<i>122 IPC</i>	<i>Ten years RI and fine in sum of Rs. 10,000/- and in default of payment of fine RI for eight months</i>

	<i>Ghulam Mohd. Dar Ghulam Qadir Bhat</i>		<i>for each convict.</i>
11.	<i>Tariq Mehmood @ Naeem</i>	<i>474 IPC</i>	<i>Five years RI and fine in sum of Rs. 5,000/- and in default of payment of fine RI for four months.</i>
12.	<i>Tariq Mehmood @ Naeem Ishaq Ahmad @ Dilshad Arshad Khan</i>	<i>14 of Foreign ers Act</i>	<i>Two years RI and fine in sum of Rs. 10,000/- and in default of payment of fine RI for six months for each convict.</i>

7. It is argued by learned counsel that the previous orders of the Court so far as it dealt with the other appeals of Abdul Majeed, Mohd. Amran and Mohd. Ashraf is concerned, it consistently accepted the plea for reduction of sentence. The appellant's counsel relied upon the orders made by this Court in that regard. One of those is reported as *Mohd. Amran @ Naved v. State* 164 (2009) DLT 262. The relevant part of the said order reads as follows:

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.....It is urged that the appellant has expressed remorse for his conduct and at the first instance has pleaded guilty. Thus, it is urged that the mitigating circumstance i.e. the expression of remorse by the appellant has to be taken into account and sentence tempered accordingly. It is urged that for the commission of the substantive offences in respect whereof the charge of conspiracy was framed, the sentence imposed is of 8 years rigorous imprisonment and thus it does not stand to reason as to why for the charge of conspiracy relating to the said substantive offences, the sentence imposed should be 10 years RI.

8. *It is urged that as per the Code of Criminal Procedure, if the fines are not paid, the relatable period of incarceration to be undergone has to be undergone by the appellant and that in relation to payment of fine, the sentences cannot run concurrently. It is urged that the sum total of the fine imposed upon the appellant is in the sum of Rs.1,45,000/- and if the same is not paid, the imprisonment required to be undergone would be 6 years and 6 months.*

9. *Learned Counsel for the State urges that the offence of conspiracy is a substantive offence and therefore the learned Trial Judge justify in imposing the sentence of Rigorous Imprisonment for 10 years pertaining to the offence of conspiracy. Learned Counsel urges that keeping in view the magnitude of the offence for which the appellant was charged of, namely to enter into conspiracy to commit terrorist acts directed at the President of India and the noted cricketer Sachin Tendulkar, sentences imposed are adequate. Learned Counsel urges that the scourge of terrorism which has created a fear psychosis in the society needs to be put down with a heavy hand. Learned Counsel urges that the society's cry for justice in the form of appropriate sentence has to be respected because the crime of terrorism shocks the conscience of the society.*

10. *Having considered the rival submissions, we but note that prima facie it seems discriminatory and inappropriate to impose a lesser sentence for a crime which has manifested itself in the form of commission of the crime vis-a-vis the conspiracy to commit the crime and impose a higher sentence for the substantive offence of conspiracy.*

11. *We agree with the submissions made by the learned counsel for the state that for offences relatable to terrorism, no leniency in the imposition of sentence has to be shown, more so, when the crime is committed by foreign national who trespasses*

into the territory of the Union of India and attempts to over awe the very existence of the State.

12. Thus, we do not find any infirmity in the impugned order in so far the fines have been imposed and in default, further imprisonment for respective period has been directed to be undergone.

13. But, we find a hiatus with respect to the substantive sentence of rigorous imprisonment for 10 years imposed for the charge punishable under Section 120B IPC for the reason for the charge of conspiracy the relatable offences have resulted in a conviction for a maximum period of 8 years.

14. We accordingly take corrective action. The appeal stands disposed of modifying the order of sentence dated 15.10.2003, but limited to the sentence imposed for the offence punishable under Section 120B IPC. We direct that for the offence punishable under Section 120B IPC, the appellant shall undergo rigorous imprisonment for 8 years and pay a fine in sum of Rs.25,000/-, in default of payment of fine would undergo rigorous imprisonment for one year.

15. The appeal stands disposed of as aforesaid.....

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8. It is urged by the learned Addl. Standing Counsel, Sh. Dayan Krishnan that the plea urged on behalf of the appellants merits consideration. He does not dispute that the material which persuaded the Trial Court in this case to convict the accused in this case points to a far lesser role by the appellants than that of Abdul Majeed, the mastermind and the principal conspirator, who was sentenced to a maximum of 8 years Rigorous Imprisonment.

9. We have carefully considered the evidence in the course of hearings these last few days. We are also independently of the opinion that the depositions and materials placed on record, which persuaded the Trial Court to convict the present appellants do not reveal their role of such nature as was alleged against Abdul Majeed. In view of the plea made on their behalf by counsel as well as by each one of them (which has been recorded separately in their appeals, that they would not challenge the conviction and would be contended if the sentences are reduced in the same manner as was awarded to the other three accused, whose appeals were disposed of by this Court), we are of the opinion that such relief is warranted. Here, it would be necessary to recollect the judgment of the Supreme Court in *Harbans Singh v. State of U.P.* 1982 (2) SCC 101 and *Akhil Ali Jehangir Ali Sayyed v. State of Maharashtra* 2003 (2) SCC 708, which was noticed in a recent judgment, reported as *Ajmer Singh v. State of Haryana* 2010 (3) SCC 746. Such parity in sentencing is called for. The need to maintain a consistent sentencing policy in the given facts of a case, if joint responsibility is attributed, was emphasized in *R. v. Christie*, 2004 ABCA 287, by the Alberta Court of Appeal in Canada, in the following terms:

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"40. Parity is a principle which must be taken into account in any sentence, and particularly where the offence was a joint venture. There will, of course, be cases where the circumstances of the co-accused are sufficiently different to warrant significantly different sentences, such as where one co-accused has a lengthy related criminal record or played a much greater role in the commission of the offence."

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"43. What we must strive for is an approach to sentencing whereby sentences for similar offences committed by similar offenders in similar circumstances are understandable when viewed together, particularly in cases involving joint ventures."

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10. In the subsequent judgment of Alberta Court of Appeal in *Wahby v. R.* 2004 WASCA 308, it was stated as follows:

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(6) "In considering the application of the principle, all the circumstances of the case are to be taken into account; those concerned with the commission of the offence and those which are personal to the offender before the court and the co-offender. Where there are differences, as almost inevitably there will be, true parity will be produced by different sentences, each proportionate to the criminal culpability of each offender, bearing in mind, as is often said but is worth repeating, that sentencing is not and should not be a process involving a search for mathematical precision, but is an act of discretion informed by the proper application of sentencing principles to the particular case. Inevitably there will be a range of appropriately proportionate sentences which may be passed for the offence before the court."

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11. The parity principle was explained by the Australian High Court in *Postiglione v. R.* (1997) 189 CLR 295: 94A Crim R 397, in the following terms:

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"The parity principle upon which the argument in this Court was mainly based is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. If so, the notion of equal justice is not violated

...

Discrepancy or disparity is not simply a question of the imposition of different sentences for the same offence. Rather, it is a question of due proportion between those sentences, that being a matter to be determined having regard to the different circumstances of the co-offenders in question and their different degrees of criminality."

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"..... the concept simply is that, when two or more co-offenders are to be sentenced, any significant disparity in their sentences should be capable of a rational explanation."

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12. Having regard to the overall conspectus of the facts in the present appeals, we are of the opinion that since none of the appellants was in fact convicted for offences punishable under the Explosive Substances Act, (unlike Abdul Majeed), who was so sentenced, and having regard to the nature of allegations against each of them, we are of the opinion that their cases deserve application of principle of parity. Consequently, even while leaving their conviction undisturbed (of all, except Ghulam Mohd. Dar), the sentences are reduced to 8 years Rigorous Imprisonment in respect of POTA and IPC offences, except in the case of Tariq Mehmood, Ishaq Ahmed, whose sentences in addition under Sections 25 of the Arms Act read with

Section 5 of POTA and Section 474 IPC, of 5 years Rigorous Imprisonment with fine are left undisturbed. Their sentences under POTA and IPC, however, are reduced to 8 years Rigorous Imprisonment with fine. The sentence of fine in respect of all the Appellants, too, is modified; each of them is sentenced to pay ₹ 25,000/- in aggregate, failing which to undergo simple imprisonment for six months.

13. The allegations against Ghulam Mohd. Dar was of his assisting in the financing operations; the prosecution sought to prove the case against him by relying upon the bank transactions in the form of deposit of amounts in his bank accounts by Abdul Majeed. No other allegations were leveled or proved against him. We also notice that the prosecution did not make any effort to trace the amounts transferred to various accounts in Jammu and Kashmir (J&K) and whether they were in fact used for subversive purposes. Having regard to these aspects, we are of the opinion that since he has chosen not to challenge the conviction, this is an appropriate case to reduce the sentence to 6 years Rigorous Imprisonment which we are told he has undergone. The appeal is allowed to such extent. The directions with regard to fine in his case would be the same as indicated in the previous paragraph, i.e. ₹ 25,000/- or in default, to undergo simple imprisonment for six months. All the appellants will be at liberty to deposit the fine with the concerned Jail Superintendent, as per rules.

14. The appeals are allowed in the above terms; the appellants Mufti Mohd. Asrar and Ghulam Mohd. Dar shall be released unless they are required in any other case. The appellants, Tariq Mehmood, Ishaq Ahmed

and Arshad Khan shall be sent for conclusion of trial in Kolkata in respect of another offence, pending before the competent Court.

15. The appeals are disposed of in the above terms; order Dasti; a copy of the order shall be sent to the Jail Superintendent for appropriate action.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

JANUARY 23, 2012