

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

**RESERVED ON : 26th March, 2012.
DECIDED ON : 1st August, 2012.**

**+ Crl.L.P. 234/2011, Crl.M.A.5649/2011, Crl.M.A.5650/2011 &
Crl.M.A.5651/2011**

STATE (G.N.C.T.) OF DELHI ...Petitioner
Through : Mr.Pawan Sharma, Standing Counsel
with Mr.Harsh Prabhakar, Advocate with
SI Jasbir Singh, PS Kapashera.

versus

SAQIB REHMAN @ MASOOD & ORS. Respondents
Through : Mr.S.N.Thakur, Advocate.

**CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE S.P.GARG**

S.P.GARG, J.

Crl.M.A.5649/2011 (delay)

The delay is condoned for the reasons as mentioned in the application. The application stands disposed of.

Crl.L.P. 234/2011

1. The State has preferred the petition for leave against the judgment dated 02.02.2011 of learned Additional Sessions Judge in SC

No.24/2010 by which the Respondents were acquitted of the charges for committing the offences punishable under Sections 307/353/186/489(c)/482/120B/34 IPC, under Section 25/27 Arms Act & under Section 3/5 Explosives Act.

2. Case of the prosecution is that in June, 2005, SI Ravinder Kumar Tyagi posted in the office of Special Staff, South-West District, Delhi received a secret information that Masood and Zahid involved in terrorist activities had made their base in Delhi and were about to strike in Delhi, Gurgaon and other satellite towns. This information was recorded as DD No.6 dated 27.06.2005 in the office of the Special Staff. On 01.07.2005 at 10:30 P.M. SI Ravinder Kumar Tyagi on receipt of secret information that Masood and Zahid along with their two associates were about to come to Delhi at 12:30 A.M. from Gurgaon in a blue Tata Indica Car bearing No.HR-26-S-0440 and were in possession of heavy arms and ammunition, formed a raiding party consisting of SI Raj Kumar, ASI Charan Singh, ASI Nirakar Sharma, HC Raj Kumar, HC Ombir Singh, Ct.Surender Singh, Ct.Vinay, Ct.Dinesh Kumar, Ct.Raja Ram, Ct.Zafar Khan, Ct.Kishan, Ct.Sanjy Singh, Ct.Rohtash, Ct.Santraj and Ct.(Driver) Suresh and laid a trap at Gurgaon Delhi Road near NH-8 & Rajokri Crossing at about 11:30 P.M. It is further alleged that about 12:45 A.M. a blue colour Tata Indica Car No.HR-26S-0440 was seen coming from Gurgaon Road and when it failed to stop despite a signal, the police chased and forced it to stop near Randhawa Farm House. Accused Saqib Rehman @ Masood, sitting on the front seat of the car immediately came out and fired two rounds at the police party with a pistol. SI Ravinder Tyagi fired one round in turn from his service revolver. He and Constable

Vinay snatched the pistol from Saqib Rehman. The accused Nazir Ahmed Sofi @ Doctor, who was on the driver's seat exhorted Saquib Rehman to shoot at the police party but was overpowered by ASI Nirakar Sharma. The accused Gulam Moinuddin Dar sitting behind tried to remove pin of the handgrenade but was overpowered by Constable Surender Singh; he snatched the handgrenade from his hands. The accused Bhashir Ahmed Shah @ Basir exhorted Gulam Moinuddin Dar to hurl the handgrenade at the police but was overpowered by Head Constable Raj Kumar.

3. The pistol recovered from Saqib Rehman contained four live rounds of 7.62 bore loaded in the magazine and one live round in the pistol chamber. The police seized two cartridges fired by Saqib Rehman @ Masood. In the personal search of Nazir Ahmed Sofi, 12 live cartridges of 7.62 bore were recovered. Head Constable Raj Kumar recovered 35 bullets of AK-47 assault rifle from the right pocket of the pant of Bashir Ahmed Shahs' trouser. SI Ravinder Tyagi prepared a rukka and sent it to the P.S.Kapasahera for registering the FIR. FIR No.146/2005 was accordingly registered at PS Kapasahera at 4:33 A.M. for the aforesaid offences. SI Mahender Singh along with Ct.Surender Singh of PS Kapasahera reached the spot and conducted necessary proceedings. On search of Tata Indica vehicle, a briefcase containing an Army Combat Uniform and fake currency notes of ₹50,000/- were recovered. In the personal search of Gulam Moinuddin Dar @ Zahid, a sketch of Palam Air Force Station was recovered from his pant pocket. The I.O. arrested all the four accused and recorded their disclosure statements.

4. During investigation, it transpired that the four accused had been staying in Hotel Baba Continental, Saraswati Marg, Karol Bagh,

Delhi. A team lead by ASI Charan Singh along with the accused Saqib Rehman and Gulam Moinuddin Dar was sent to Srinagar and another team lead by SI Mahender Singh, with accused Bashir Ahmed Shah and Nazir Ahmed Sofi was sent to Patna, Bihar, for arrest of the co-accused and recovery of arms/ammunition etc. The team lead by ASI Charan Singh arrested the accused Abdul Qayoom Khan on 07.07.2005 and recovered fake currency notes of ₹5,000/- from his possession. One AK-47 Assault Rifle, 2 magazines, 130 live cartridges, 2 handgrenades and 3 UBGL grenades were recovered at the instance of the accused Saqib Rehman. Ten UBGL grenades along with one wireless set No.144057 were recovered at the instance of Gulam Moinuddin Dar. Another accused Abdul Majid Bhat was also apprehended on 11.07.2005 by ASI Charan Singh from Paharganj, New Delhi and 3 detonators were recovered from his travel bag. During the course of investigation, part of the amount allegedly received by the accused from their mentors ISI, Pakistan was recovered at the instance of the accused Saqib Rehman from bank accounts in Srinagar and Delhi. The amount of ₹4.5 lacs was deposited by accused Saqib Rehman in his father's A/c No.13043 in Jammu and Kashmir Bank, Connaught Place, Delhi, on 11.05.2005 and on 16.05.2005 a sum of ₹50,000/- was deposited in the same account. A further sum of ₹50,000/- was deposited in Account No.11052 of Mahmood-ur-Rehman, the father of Saqib Rehman in J&K Bank, Srinagar on 17.05.2005. Mahmood-ur-Rehman withdrew an amount of ₹1 lac from J&K Bank, Srinagar on 04.07.2005 after the arrest of accused Saqib Rehman. ASI Charan Singh tried to trace him but could not find him. On 19.08.2005, SI Mahender Singh along with other police staff left for Patna

and arrested the accused Birender Kumar Singh on 21.08.2005 with the help of police officers from P.S. Gandhi Maidan, Patna. Fake currency notes in the sum of ₹82,000/- were recovered at his instance from Patna. His associate Mohd.Wahid could not be apprehended for want of complete details.

5. During investigation, it was revealed that the real registration number of the Tata Indica vehicle was HR-51M-6358 and it was registered at Faridabad, Haryana, in the name of one Azad Singh Yadav. The accused Saqib Rehman@ Masood was involved in other criminal cases in J&K. After completion of the investigation, all seven accused were charge-sheeted for commission of the said offences and were brought to trial.

6. To prove its case, the prosecution examined 32 witnesses. It also tendered in evidence the FSL report Ex.P2, dated 17.01.2006 and two reports from Govt. Press, Nasik.

7. Statements of the accused were recorded under Section 313 Cr.P.C. in which they alleged that the encounter dated 02.07.2005 was a fake one. They pleaded that they were kept in illegal detention from 23.06.2005 and their signatures were taken on blank papers. The accused pleaded false implication and denied recovery of articles from their possession or at their instance. The accused Haji Gulam Moinuddin Dar examined himself as DW1. The accused also summoned and examined Sh.Rajesh Kumar Chaudhary, Sr.Manager (Legal), Zee News Limited as DW2.

8. After appreciating the evidence and considering all the facts and circumstances of the case, the Trial Court acquitted all the accused. It

came to the conclusion that the encounter alleged to have taken place in the night intervening 01.07.2005 and 02.07.2005 did not take place at all and an absolutely false encounter was projected. The story of encounter was carefully scripted in the office of the Special Staff, Delhi Police by its main author SI Ravinder Tyagi with the assistance of SI Nirakar, SI Charan Singh and SI Mahender Singh. All four officers acted in advancement of their self-interest in total disregard to the demands of their solemn duty. These four police officers whose duty was to protect and safeguard the citizens turned persecutors and tormentors. In the opinion of the court the innocent accused were framed in a false criminal case. Accordingly, the Trial Court directed the Commissioner of Police to initiate appropriate inquiry against the four police officers; SHO of police station Kapasahera was directed to register FIR against them under Section 167 IPC. Copy of the judgment was ordered to be sent to the concerned Magistrate P.S.Kapasahera with directions to treat the same as a complaint against them for committing offences punishable under Sections 166,193 and 195 IPC and to proceed with the same as per law.

9. Learned Standing Counsel for the State challenged the findings of the Trial Court and urged that the evidence adduced by the prosecution to prove its case was not appreciated in its true and proper perspective by the Trial Court. It fell into grave error in discarding the testimony of PW-1(Gurcharan Singh) who deposed that the accused Hazi Gulam Moinuddin Dar had purchased an Army Combat uniform from him for a sum of ₹600/- or 650/-. The Trial Court ignored the recovery of huge quantity of arms and ammunitions from the possession of the accused or at their instance on flimsy reasons. The disclosure statements made by the

accused were admissible under Section 27 of the Evidence Act because pursuant to it, the police recovered substantial fake currency notes. In their disclosure statements, the accused revealed 'facts' which were not known to the police earlier. They did not explain from where they had arranged huge cash, to deposit in Bank account No.13043 Jammu & Kashmir Bank, Connaught Place in the name of Mahmood Ur Rehman, (accused Saqib Rehman's father). He withdrew ₹1,00,000/- from his bank account with Jammu & Kashmir Bank, Sri Nagar on 04.07.2005, after the arrest of the accused Saqib Rehman. He further contended that the prosecution produced credible evidence to prove the stay of the four accused arrested in the encounter at Baba Continental, Saraswati Marg, Karol Bagh on 04.04.2005 and 15.04.2005. PW-2 (Ajay Tomar), owner of the hotel, identified the accused Gulam Moinuddin Dar who stayed in room No.302 on 04.04.2005. He again visited the said hotel with his associates Nazir Ahmed and Zahid on 15.04.2005 and they all stayed in room No.204. The accused did not clarify the purpose of visit and their stay in Delhi. He further contended that during the trial, the accused did not produce any evidence to substantiate their allegations of false implication and recovery of arms and ammunitions from them. The defence pleas under Section 313 Cr.P.C. were taken as gospel truth without any evidence to substantiate it. The accused did not prove detention since 16.06.2005.

10. Counsel further urged that the Trial Court was in error in observing that the secret information received by SI Ravinder Tyagi required to be intimated to CBI or RAW. The prosecution was under no legal obligation to share the source of information as to the vehicle

number, details of the car, its occupants and the nature of arms being carried by the accused. The Trial Court, urged the counsel, based its findings on conjectures and surmises. Minor discrepancies in the statements of the witnesses were quite reasonable and did not go to the root of the case to cause suspicion. The testimony of police officials is to be treated at par with independent public witnesses and in the absence of any serious infirmity or inconsistency, had to be believed. The witnesses had no ulterior motive to falsely implicate the accused. They were not acquainted with the accused prior to the occurrence. Minor flaws in the investigation are not fatal to the prosecution case. Undue weightage was given to the log books of the police vehicles which are filled by car or vehicle drivers for the purpose of taking fuel and to show that the vehicle was used for official purpose. The Trial Court failed to appreciate that FIR No.527/2003 dated 07.10.2003 under Section 406 IPC PS Pandav Nagar was registered on the statement of Ms.Sneh Lata regarding misappropriation of her Maruti Esteem Car. Surender Kumar was arrested in the said case and the Tata Indica Car involved in the present case was recovered. There was no possibility of fabrication of the disclosure statement of 2003 in the year 2005. He further urged that the Trial Court was not justified to pass adverse remarks against the police officials involved in the investigation of the case.

11. This court has considered the submissions of the counsel and have gone through the file. It is relevant to note that interference in an appeal against acquittal is somewhat circumscribed and if the view taken by the Trial Court is a plausible one, the Appellate Court stays its hands and does not interfere in the matter in the belief that it might have taken a

different view. We have examined the evidence in the light of the above principle.

12. The Trial Court found various discrepancies, contradictions and inconsistencies in the statements of the witnesses to disbelieve them. The investigating officer did not explain why independent public witnesses were not associated at the time of apprehension of the accused on the night intervening 1/2.7.2005 despite having sufficient opportunity to join them. At no stage, from the receipt of secret information till the recovery of the arms and ammunition, for no valid reasons, no independent public witness was joined in the investigation. The evidence primarily consisting of police witnesses had to be viewed with great care and caution. The investigating officer did not intimate to superior officers on 26.06.2005 or soon thereafter about the secret information. The witnesses gave inconsistent versions as to which specific superior officer directed the IO to organise a raiding party to apprehend the accused. The prosecution failed to produce the original daily diary entries (Ex.PW12/A and Ex.12/B) and did not explain its whereabouts. ACP R.P Meena, appearing as PW-22 in his examination-in-chief, deposed to being apprised about secret information and names of the accused by SI Ravinder Tyagi on 01.07.2005. It reveals that he (ACP R.P.Meena) was aware about the names of the accused; they were shown to have been arrested on the night intervening 1/2.07.1995 before the raid. Out of 15 members of the raiding party, the prosecution examined only 9 witnesses and failed to explain why other members of the raiding party were withheld. There is inconsistent version if barricades were placed at the spot or were used to slow down speed of the vehicle of the accused. The

vehicle in which the accused had travelled and the vehicle in which the police had chased the car did not suffer any damage. It casts doubt that the accused were forced to stop the vehicle at some distance. PW-15 (Ct.Zafar), PW-17 (Ct.Raja Ram), PW-21 (HC Ombir) and PW-23 (Ct.Sanjay) claimed to be the members of the raiding party, however they did not depose anything about the raid, during trial. Adverse inference is to be drawn against the prosecution on that account. PW-13 (ASI Charan Singh) did not depose if the vehicle in possession of the accused was chased and overtaken. The Trial Court found fault in the investigation and observed that vehicles i.e. Gypsy and Swaraj Mazda were never used at the time of raid as the police had claimed. Scrutinising the testimony of the witnesses and the log books of the vehicles, the Trial Court found that the vehicles travelled on 01.01.2005 and 02.07.2005 on routes other than the encounter site. The prosecution witnesses were not unanimous where and in what manner the documents were prepared or who prepared the same. The DD entries showing the arrival of SI Mahender Singh at the spot was held to be false when the accused produced a reply dated 12.03.2010 obtained by them under RTI Act from Addl. DCP, South West (Ex.DW-1/W) where it showed that SI Mahender Singh left the police station on 02.07.2010 at 6:30 AM and returned at 6:30 P.M. Site plan (Ex.Pw24/A) did not depict the correct picture. The Trial Court gave cogent reasons (in para 67, 68 & 69) to disbelieve the recovery of sketch of Palam Air Force Station. No investigation was carried out to find that the handwriting on the sketch was that of the accused Hazi Gulam Moinuddin Dar. The IO failed to explain why the Tata Indica Car allegedly seized at the spot was not searched immediately to recover the

arms and ammunition lying therein. In the earlier disclosure statement, the accused Gulam Moinuddin Dar, did not mention if he had purchased the Army Combat uniform from PW-1 (Gurcharan Singh). Only in the third disclosure statement recorded on 10.07.2005 after a week of the incident, he allegedly disclosed about the purchase of the Army Combat uniform from M/s South India Tailors, Gopi Nath Bazar, Delhi Cantt. PW-1 (Gurcharan Singh) who claimed to have sold the uniform to him for ₹ 600 or 650 admitted in the cross-examination that he did not have a regular shop and carried out his business on the pavement outside a shop whose number he failed to reveal. The Trial Court rightly discarded his version.

13. The prosecution failed to prove that the original and genuine registration of the vehicle recovered from the accused was HR-51M-6358 and it was registered in the name of Azad Singh Yadav. An FIR 527/03 under Section 406 IPC PS Pandav Nagar was registered at the behest of Mrs Sneh Lata Sukhija against S.K.Sharma for misappropriation of Maruti Esteem Car No.DL-7CC-6679. This FIR did not pertain to any Tata Indica car. In response to the query obtained under RTI Act, DCP informed that Tata Indica Car bearing registration No.HR-51M-6358 was not wanted in FIR No.527/2003. The prosecution thus failed to find out to whom the vehicle in question belonged and how it came into possession of the accused.

14. The Trial Court faulted the investigation for not making inquiries about the SIM number of the mobile phones recovered from accused (Saqib Rehman and Hazi Gulam Moinuddin Dar). The investigating officer did not explain why the call details of these mobile

phones were not collected. A press conference was held on 02.07.2005 at 11.00 A.M. in the office of Special Staff, Dhula Kuan in which all the four accused allegedly arrested on the night intervening 01.07.2005 and 02.07.2005 were shown. There are discrepancies regarding the time when the press conference took place, while belied the deposition of PW-24 that he left the spot along with the accused at 10:45 A.M. and reached Hotel Baba Continental, Saraswati Marg, Karol Bagh, Delhi. at 12:00 noon. During trial, the articles seized by seizure memos (Ex.13/A, 13/B, 13/C) were produced before the Court, however, the case property produced was altogether different and did not match. The investigating officer did not collect any evidence about stay of Gazi Ahmed Mir in whose name room No.102 in the hotel was booked. The Trial Court also found fault with the recoveries effected at Kashmir and Patna. No local police officer from the concerned area was joined in the investigation. They were not even intimated about the visit of Delhi police to the said places. Again no public witness or the family members in the house from where the recoveries were effected were associated in the investigation. The accused Birender had already been arrested by the police of P.S.Gandhi Maidan and when PW-24 (SI Mahender Singh) received intimation from SHO Siraz Khan, he went to Patna and arrested him. The fake currency notes amounting to ₹82,000/- were allegedly recovered pursuant to his disclosure statement from the house of one Avdesh Sinha. The Trial Court did not believe the recovery as no public person was joined and the seizure memo did not bear signature of SI Arun Kumar Mandal. The police did not associate the owner of the house from where the fake currency notes were recovered.

15. The Trial Court highlighted various other shortcomings and lacuna in the investigation and was constrained to pass adverse remarks against the conduct of the four police officers in the investigation of the case.

16. The Standing Counsel could not explain the vital discrepancies and contradictions highlighted in the impugned judgment. In the written submissions placed on record, the State attempted to put the burden upon the accused to prove their innocence. It is well-settled that the prosecution has to establish its case beyond reasonable doubt and it cannot derive any strength from the weakness of the defence, put up by the accused.

17. It is relevant to note that the State has filed leave to appeal against acquittal. It is well established in law that the Appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the Appellate Court may be the more probable one. In the case of *'State of Uttar Pradesh vs. Nandu Vishwakarma'*, (2009) 14 SCC 501, Supreme Court observed as under :

“23. It is a settled principle of law that when on the basis of the evidence on record two views could be taken- one in favour of the accused and the other against the accused- the one favouring the accused should always be accepted. This Court in 'Chandrappa vs. State of Karnataka', SCC 432 observed as follows :

“42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

- (2) *The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.*
- (3) *Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.*
- (4) *An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.*
- (5) *If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court".*

18. In the light of the above discussion, we are of the view that the findings recorded by the learned Trial Court acquitting the accused are not perverse and require no interference. The observations and directions made by the Trial Court in the impugned judgment in para Nos.141-145 have been taken care of in the writ petitions filed by the aggrieved police officers.

19. We find no merit in the leave to appeal petition; it is therefore dismissed. All the pending applications stand disposed of.

(S.P.GARG)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

August 01, 2012
tr/sa