

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

+ **CRL.A. 486/2010 & CrI.M.B. 648/2012**

%

Reserved on: 16th January, 2013
Decided on: 23rd April, 2013

MOHD AMIN KHAN

..... Appellant

Through Mr. M.M. Khan, Adv.

versus

STATE

..... Respondent

Through Mr. Mukesh Gupta, APP with
Inspector Umesh Barthwal, PS Spl.
Cell.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal, the Appellant challenges the judgment dated 18th February, 2010 whereby he has been convicted for offences under Section 120B read with Section 122 IPC, Section 122 read with Section 120B IPC and Section 40 Unlawful Activities (Prevention) Act, (in short UAP Act) and the order on sentence dated 25th February, 2010 whereby he has been directed to undergo rigorous imprisonment for a period of 10 years and a fine of Rs. 10,000/- under Section 122 IPC read with Section 120B IPC; and 5 years and a fine of 10,000/- under Section 120B read with Section 122 IPC and 10 years rigorous imprisonment with Rs. 10,000/- as fine under Section 40 of the UAP Act.

2. Learned counsel for the Appellant contends that there are material contradictions and improvements in the testimony of the witnesses. Further besides PW2 Inspector Naresh Kumar, there is no witness to the allegedly recovered articles as the same were neither recovered in the presence of PW1 Lalit Prasad and the panch witnesses. The panch witnesses PW3 and PW7 Ram Pal and Anurag Tiwari who were not present for the proceedings merely signed the same. PW3 and PW7 have categorically stated that they were not present when the recovery took place on the 15th June, 2005 and signed the panchnama prepared on 17th June, 2005 when the pullandas were not opened. Even PW4 Vijay Kumar was not the witness of recovery as he stated that when the alleged consignment was checked/ opened he was sent to bring the tape for measurement. Even PW2 Inspector Naresh Kumar admits that there was no other official of his Department present when he checked the goods concerning the Appellant. It has not been proved that the alleged recovered articles were kept in safe custody from 15th June, 2005 to 17th June, 2005 when the panchnama was prepared. Reliance is placed on *Mousam Singha Roy and Ors. Vs. State of West Bengal 2003 (3) JCC 1358 (SC)* wherein since the recovery was not witnessed by the panch witnesses, it was held that the evidence was insufficient to prove the recovery. The entire case of the prosecution is based on the fact that the Appellant spoke to Sajjad. The said Sajjad has neither been arrested nor charge-sheeted. Further neither the mobile phone has been proved to be belonging to Sajjad Sheikh nor has voice in the alleged conversation been analyzed by an expert. Thus, there is no material to prove that the Appellant was talking to Sajjad Sheikh. Further prosecution has failed to prove that the signature on the alleged airway bills exhibited as PW-21/A was of the co-accused Sajjad

Sheikh who sent the alleged consignment, as no witness has deposed about being familiar with the signatures of Sajjad Sheikh nor have the same been sent to hand-writing expert along with admitted signatures of Sajjad Sheikh. There is no material on record to prove the charge of waging war against the Government of India. Hence, the conviction under Section 122 read with Section 120B IPC is not warranted. Further, since the co-accused Ubaid-Ul-Ahad has been acquitted, there is no material on record to prove the charge under Section 120B IPC. By allegedly collecting the consignment containing a satellite phone which is a prohibited item, the Appellant cannot be said to be the financier or was delivering goods to terrorist organizations. The sanction has not been granted as per the procedure laid down and it is hence defective. Reliance is placed on *Inspector of Police A.P. Vs. K. Narasimhachary 2005 (3) JCC 1840 (SC)*. The first information report was received belatedly by the learned Metropolitan Magistrate on 28th June, 2005. The Appellant was kept in illegal custody from 15th June, 2005 to 17th June, 2005 which fact has been corroborated by the statement of PW5, the landlord of the Appellant who stated that the Appellant resided in his house only up to 15th June, 2005.

3. Learned APP on the other hand contends that the Appellant was caught red-handed while clearing the consignment sent by one Sajjad Sheikh vide airway bill No. 57959016 from Jeddah as personal effects and on checking the said consignment it was found containing one Thuraya Hughes satellite phone with charger along with 60 antennas, one local charger, one belt, 6 sets of air-phones and 40 hand-sets of make I-COM –head-phones. The Appellant was accompanied by PW4 Vijay Kumar who has fully

supported the prosecution case. On the telephone of Vijay Kumar which was used by the Appellant for conversing with Sajjad Sheikh interception was done on 15th June, 2005 and 16th June, 2005 which showed the involvement of the two, in these nefarious activities. The permission for interception was duly obtained from the competent authority. The detention receipt was prepared and was duly signed by the panch witnesses PW3 & PW7. PW2 has proved that the articles recovered were kept in safe custody and there was no tampering with it. Though no direct conversation speaks about terrorism, however it is evident that the Appellant and the co-accused Sajjad Sheikh had sent this consignment including the satellite phone for terrorist activities. In the statement under Section 313 Cr.P.C. the Appellant states that the consignment belonged to Vijay, however when Vijay was examined in the Court, no suggestion was given to PW4 Vijay Kumar that articles belonged to him. Thus, the plea taken in the statement under Section 313 has not been put to the witness. Further the statement of Appellant was recorded under Section 108 of the Customs Act and the conviction can be safely based on the said statement. PW4 has categorically stated that on 29th December, 2004 the Appellant lost the mobile phone and Sajjad was calling on his mobile to talk to the Appellant. PW20, the forensic science expert has tallied tape-recorded conversation with the specimen voice to be that of the Appellant. Even if PW6 Sheikh Rashid who had prepared the transcript had turned hostile, there is evidence of PW17 Umesh Barthwal who stated that PW6 Sheikh Rashid translated the conversation and prepared the transcript. The airway bill sent by Sajjad Sheikh is in the name of Appellant which fact has been admitted by the Appellant in his statement under Section 313 Cr.P.C. In view of the fact that the receipt of the consignment and

possession of satellite phone by the Appellant has been proved beyond reasonable doubt, the onus shifted on the Appellant under Section 106 Evidence Act to explain that the same was not for terrorist activity which onus the Appellant has failed to discharge. The sanction has been duly proved by PW11 Shri V.B. Saxena. Hence the Appeal be dismissed.

4. I have heard learned counsel for the parties. Briefly the case of the prosecution is that on 15th June, 2005 the Appellant went to the Import Shed, Air Cargo along with PW4 Vijay Kumar for receiving the consignment received by airway bill No. 57959016 issued by Saudi Arabian Airlines from Jeddah in the name of Appellant Mohd. Amin Khan sent by one Mr. Sajjad Sheikh for personal effects only and not for sale. Since suspicion arose on the articles, PW2 Inspector Naresh Kumar insisted on opening the same. On opening the big wooden box it was found to contain 2 woolen carpets, 3 cushions (pillows), 3 pieces of co-axial cable rammed around a small wooden box. When the small wooden box was also insisted to be opened, the Appellant hesitated and thus the matter was reported to PW1 the Joint Commissioner Customs Shri Lalit Prasad who directed thorough examination. On opening the small wooden box it was found containing one hand-set make Thuraya Hughes charger, one handset satellite phone make Thuraya Huge with charger and case, 60 antennas, one blue colour charger built, 6 sets of air head phones and 40 hand-sets of make I-com and model IC-V8 made in Japan without battery. Since the satellite phone was a prohibited article, the articles were detained vide detention receipt. PW2 recorded the statement of Appellant under Section 108 of the Customs Act and thereafter PW1 the Joint Commissioner informed the Special Cell of the

Delhi Police and handed over the Appellant to them when they came to the Customs Office. The detained articles were seized vide panchnama Ex.PW3/A on 17th June, 2005 in the presence of PW3 Ram Pal Singh and PW7 Anurag Tiwari. During this period, the Appellant was using the telephone of Vijay Kumar PW4 which was kept on interception. During the said period the Appellant spoke to one Sajjad Sheikh which conversations were intercepted. Since the intercepted conversations were partly in Hindi and partly in Kashmiri language, the same were got translated from PW6 Sheikh Rashid who has though turned hostile. The specimen voice sample of the Appellant was obtained and the same was sent to CFSL expert PW20 Deepak Kumar Tanwar who examined the specimen voice sample and parts of the questioned voice and gave the report Ex.PW20/A.

5. A perusal of the testimony of PW3 and PW7 the panch witnesses Ram Pal Singh and Anurag Tiwari shows that they were not witnesses to the recovery on 15th June, 2005 but only witnessed the preparation of panchnama on 17th June, 2005. The witnesses have categorically deposed that pullandas were not opened on 17th June, 2005. Hence the PW3 and PW4 having not witnessed the recovery, no reliance can be placed on their testimonies. Further PW1 Lalit Prasad has also stated that at the time of recovery he was not present. PW4 Vijay Kumar who had accompanied the Appellant has stated that in June 2005 the Appellant told him that his goods were about to come from outside the country for which he told him that an import license would be required. The Appellant stated that they were personal belongings and on 18th June, 2005 PW4 received a telephone from the Appellant at his house. The Appellant stated that his mobile phone had

lost and he gave the mobile number of one Mr. Sajjad, a friend of the Appellant who was stated to be running his business in Jeddah. The Appellant requested PW4 to arrange the paper of the goods which he had to receive from Jeddah. PW4 received a fresh copy of the airway bill of the goods and informed the Appellant that the Appellant had to collect the goods himself being personal effect items. On 15th June, 2005 PW4 went to Import Cargo of IGI Airport with the Appellant and met the concerned officers. The Appellant received the delivery order of the goods in the presence of PW4 on which personal effects in relation to goods was mentioned. Thereafter they went to the Customs house and reached in the Import Cargo. The inspector opened the box of the Appellant and it contained carpets, cushion covers, one small box covered with the cables and on opening the small box by the Customs officer, the said Inspector directed PW4 to bring tape for measurement. PW4 brought the tape from the market and it was found that some mobile phone and rods etc., were recovered from the said small box. Thereafter the Police officials of Special Cell took both the Appellant and PW4 and questioned them. They were freed at about 1.00 AM in the night and were asked to come back on the next date. Further enquiries were made and they were again freed in the night. When on 17th June, 2005, they again reached the office of the Special Cell, the statement of PW4 was recorded. In the meantime the mobile phone of PW4 remained with the Appellant on 15th June, 2005 and 16th June, 2005 when he received calls from Sajjad.

6. A satellite phone is a prohibited article. Further the consignment was for personal effects. Though besides PW2 none was present at the time of alleged recovery, however the same does not discredit the testimony of PW2.

More so because in the statement under Section 313 Cr.P.C. the explanation offered by the Appellant was that he along with PW4 Vijay Kumar went to the office of Joint Commissioner Import Shed, Air Cargo Complex, New Delhi on 15th June, 2005 as Vijay was directed by Sajjad Hussain Sheikh to collect the consignment and handover the same to known Kashmiri who would deliver the consignment to his family member in Kashmir. According to the Appellant he simply accompanied Vijay to Import Shed, Air Cargo Complex as Vijay Kumar is his friend. According to the Appellant, Vijay Kumar requested the Appellant to get cleared the consignment from Customs authorities and then deliver to him for sending the same to the family members of Sajjad Sheikh. According to the Appellant the consignment was not opened in his presence and since the same was in broken condition and there was no incriminating or restricted article, Vijay Kumar did not accept the broken consignment and there was a hot talk between the Customs Inspector Naresh Kumar and the Appellant when Vijay was let off and the Appellant was falsely implicated. It may be noted that no such suggestion has been given by the Appellant to PW4 in his cross-examination. Further even PW2 was not given any such suggestion in the cross-examination and thus this defence put up by the Appellant is unsubstantiated. Further the airway bill PW21/A is in the name of the Appellant as the receiver and not in the name of Vijay Kumar. The reliance of the learned counsel for the Appellant on *Mousam Singha Roy & Ors.* (supra) is misconceived. It may be noted that PW3 and PW7 are not hostile witnesses and they have supported the prosecution to the extent that they were present when the panchnama was drawn. They could not have stated about the proceedings of 15th June, 2005 as they were not present. Further in the present case, the

recovery of satellite phone along with the other articles by PW2 was in the normal course of transaction by PW2 as while clearing the consignment on checking he found the same to be suspicious and thus asked the Appellant to open it. Non-joining of independent witnesses at that stage would not affect the otherwise reliable and creditable testimony of PW2.

7. As regards the compliance of the necessary provisions of Rule 419A of the Indian Telegraph Rules is concerned, it may be noted that the necessary permission was sought from the competent authority i.e. the Secretary Home by the Joint Commissioner of Police and an ex-post facto approval was granted which has been duly proved by PW25 Shri Peter Bara. I do not find any merit in the contention of the learned counsel that since neither the phone number of Sajjad nor his voice samples have been taken the alleged interception is meaningless. In the present case the voice sample of the Appellant was taken which tallied with the voice in the tape-recorded conversation, the report whereof is exhibited as PW25/A. Thus, whether the Appellant was talking to Sajjad or someone else is immaterial, and the fact of the matter is that the Appellant was the one who was talking on the telephone. There is no infirmity pointed out in the recording of the telephone conversation or the sealing of the intercepted conversation thereafter. The only issue in view of the fact that PW6 Sheikh Rashid the interpreter having turned hostile is whether the intercepted conversation becomes null and void. The role of the interpreter was only to translate the parts of the language spoken in Kashmiri. The conversation is partly in Hindi and partly in Kashmiri. PW20 while tallying the voice of the Appellant with the intercepted conversation has selected few passages. A

perusal of the report Ex.PW20/A shows that nothing has been brought out on record to show that the same was for the purposes of terrorism. The only inference that can be drawn was that satellite phone was sent in a scandalous manner as an item of personal effect and the same was received at IGI, Delhi. Having proved the receipt of the satellite phone by the Appellant it is for him to prove that the same was for a lawful purpose and Section 106 of the Evidence Act casts the said burden on him. As noted earlier the Appellant had accepted that he went along with Vijay Kumar to receive the articles, the airways bill is in the name of the Appellant and thus 106 Evidence Act shifts the burden on the Appellant to discharge the said onus. In *State of Rajasthan Vs. Kashi Ram AIR 2007 SC 144* it was held:

“23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can

consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in *Re. Naina Mohd.* AIR 1960 Mad 218.

24. There is considerable force in the argument of counsel for the State that in the facts of this case as well it should be held that the respondent having been seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge. Since, the respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provides the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt.

8. Thus, Section 106 Evidence Act even if invoked would provide an additional link in the chain of evidences. However, the aspect to be examined is whether this additional link of drawing an adverse inference against the Appellant raised a presumption that the satellite phone received was for terrorist activity. A satellite phone is a device which can be used for the purposes of speaking to someone who is also in possession of satellite phone. They are used primarily to avoid interception of conversation. It is thus evident that the conversation which was intended by the use of satellite phone was not in the normal course of business.

9. An act by a person who provides money or other property and intends that it should be used or has reasonable cause to suspect that it might be used for the purposes of terrorism, would fall within the ambit of Section 40 of the UAP Act. Section 40 of the UAP Act reads as under:

“40. Offence of raising fund for a terrorist organization.-

(1) A person commits the offence of raising fund for a terrorist organisation, who, with intention to further the activity of a terrorist organisation,-

(a) invites another person to provide money or other property, and intends that it should be used, or has reasonable cause to suspect that it might be used, for the purposes of terrorism; or

(b) receives money or other property, and intends that it should be used, or has reasonable cause to suspect that it might be used, for the purposes of terrorism; or

(c) provides money or other property, and knows, or has reasonable cause to suspect, that it would or might be used for the purposes of terrorism.

Explanation.-For the purposes of this sub-section, a reference to provide money or other property includes of its being given, lent or otherwise made available, whether or not for consideration.

(2) A person, who commits the offence of raising fund for a terrorist organisation under sub-section (1), shall be punishable with imprisonment for a term not exceeding fourteen years, or with fine, or with both.”

10. Thus in the present case, firstly the Appellant has failed to furnish any explanation under Section 106 of the Evidence Act. Secondly even if accepting the conversation being general, the satellite phone was intended to be transferred to someone else and was not meant for the use by the Appellant. While supplying an instrument of this nature for onward transmission to a third party, it cannot be said that the Appellant did not have any reasonable cause to suspect that it might be used for the purposes of terrorism. Since the requisite knowledge that there was a reasonable cause to suspect was attributable to the Appellant.

11. In *State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors.* AIR 1992 SC 604 it was held:

“43. The expression "reason to suspect" as occurring in Section 157(1) is not qualified as in Section 41(a) and (g) of the Code, wherein the expression, "reasonable suspicion" is used. therefore, it has become imperative to find out the meaning of the words "reason to suspect" which words are apparently clear, plain and unambiguous. Considering the context and the object of the procedural provision in question, we are of the view that only the plain meaning rule is to be adopted so as to avoid any hardship or absurdity resulting therefrom and the words are used and also to be understood only in common parlance. We may, in this behalf, refer to a decision of the Privy Council in *Pakala Narayanaswami v. Emperor* wherein Lord Atkin said as follows:

When the meaning of the words is plain, it is not the duty of Courts to busy themselves with supposed intentions.... It, therefore, appears inadmissible to consider the advantages or disadvantages of applying the plain meaning whether in the interests of the prosecution or accused.

44. The word 'Suspect' is lexically defined in Webster's Third International Dictionary as follows:

Suspect-to look up at, suspect; the act of suspecting or the condition of being suspected... to have doubts of; be dubious or suspicions about; (2) to imagine (one) to be guilty or culpable on slight evidence or without proof... (3) to imagine to be or be true, likely or probable: have a suspicion, intimation or inkling of.

45. In *Corpus Juris Secundum* (Vol. 83) at page 923 the meaning of the word 'Suspect' is given thus:

The term 'suspect', which is not technical, is defined as meaning to imagine to exist; have some, although insufficient, grounds for inferring; also to have a vague notion of the existence of, without adequate proof;

mistrust; surmise. It has been distinguished from 'believe.'”

12. While dealing with the distinction between ‘reasonable ground to believe’ and ‘reasonable cause to suspect’, in the *New Swadeshi Mills of Ahmedabad Ltd. Vs. S.K. Ratan & Ors. (1968) 9 GLR 364* it was held:

“6. The section, while prescribing the conditions uses the words "has reasonable grounds for believing". Those words are words of significance because they indicate the nature and character of the grounds for the belief which a police officer must entertain before he takes the other steps necessary for him to take before he could institute a search in the property belonging to another. Those grounds of his belief have to be recorded by the police officer in writing and what he has recorded, he has to intimate to the nearest Magistrate. If what has been recorded or sent to the Magistrate does not constitute what has been stated in the section as reasonable ground for believing, that would undoubtedly be an infirmity which would have an important bearing in considering whether the search instituted by the police officer could or could not be considered to be a valid search. In the first place, the word "to believe" must be distinguished from the word "to suspect". "To believe" a fact is to regard that fact as true; whereas "to suspect" would imply a readiness to believe but without sufficient data. It would introduce to some extent, an element of imagination or conjecture. The words "reasonable grounds for believing" included three concepts by the use of the three words (1) reasonable, (2) grounds; and (3) believing. The use of the word 'grounds' indicates the existence of a basis or a foundation for justification and by the addition of the word 'reasonable' it further implies that the basis must be such as would be rational or agreeable to reason. The word "to believe" cannot be, as we have seen above, equated with the word 'to suspect'. The whole sentence "reasonable grounds for believing" considered together with the true meaning of the words that constitute the

sentence would mean: (1) that the conclusion arrived at should not be a mere suspicion, but must be such as is regarded as true by the person making it (2) that such a conclusion or belief must have a basis and a foundation; and (3) that such a basis which may be described as grounds must be reasonable.”

13. The ingredients of Section 40 UAP Act are thus proved beyond reasonable doubt by the prosecution. However, the necessary ingredients for an offence under Section 122 IPC are collection of men, arms or ammunition or otherwise, preparation to wage war with the intention of either waging or being prepared to wage war against the Government of India. In the present case there is no material on record to show that the Appellant had collected the satellite phone though for an illegal purpose but for waging war or preparation to wage war. For an offence under Section 122 IPC the onus lies on the prosecution to prove the intention beyond reasonable doubt, and not merely reasonable cause to suspect, which the prosecution in the present case has failed to discharge.

14. Thus, the Appellant is acquitted of the charges under Section 120B read with 122 IPC and 122 IPC read with Section 120B IPC. However his conviction and order on sentence for offence under Section 40 of the UAP Act is upheld. Appeal and application are disposed of.

(MUKTA GUPTA)

APRIL 23, 2013
‘ga’