

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ Crl. Appeal No. 1618/2013

% Reserved on: 3rd February, 2015
Date of Decision: 12th May, 2015

STATE OF NCT OF DELHI ...Appellant
Through Ms. Aashaa Tiwari, APP

Versus

MOHD. HASSAN @ ABU QASIM & ORS. ...Respondents
Through Mr. N.D. Pancholi, Advocate for
Respondent No. 1.
Mr. M.S. Khan & Mr. Akram Khan,
Advocates for respondent No. 2.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

SANJIV KHANNA, J.

The Government of NCT of Delhi in this appeal questions and challenges acquittal of Mohd. Hassan @ Abu Qasim and Shafaquat Iqbal, from charges under Sections 121/121A/122/123/120B of the Indian Penal Code, 1860 (IPC, for short), Sections 4 and 5 of the Explosive Substances Act, 1908, Sections 17, 18, 20 and 23 of the Unlawful Activities (Prevention) Act, 1967 in FIR No.28/2007, Police Station Special Cell, Lodhi Colony, New Delhi. The appeal does not dispute the acquittal of Shabbir Ahmed in terms of the amended memo of parties and amended petition filed on or about 8th July, 2013.

2. The impugned judgment convicts respondent No.1 Mohd. Hassan, a citizen of Pakistan, under Section 14 of the Foreigners Act. By order dated 5th October, 2012, Mohd. Hassan stands sentenced to

undergo rigorous imprisonment of 5 years, pay fine of Rs.1,000/- and in default to undergo simple imprisonment for one month. The said conviction and the order of sentence have not been challenged by the respondent No.1, Mohd Hassan.

3. The impugned judgment while acquitting the respondents from the aforesaid charges, primarily relying upon evidence of two witnesses Mani Ram (PW3) and Hari Singh (PW7), guards posted at Delhi Haat, INA, who did not identify respondent Nos.1 and 2. The contention of the appellant State is that Mani Ram (PW3) and Hari Singh (PW7) were declared hostile on the question of identity but they were not hostile on the question of recovery. The identity and presence of the two respondents has been deposed to by the police witnesses namely Insp. Pawan Kumar (PW1), ASI Anil Tyagi (PW10), Insp. Kailash Singh Bisht (PW11), Insp. Ramesh Lamba (PW12) and ACP Sanjeev Kumar Yadav (PW14). The appellant calls into question several other findings in the impugned judgment. It is asserted that the trial court has speciously raised doubts without good and sound reasons about storage of explosive in the *malkhana*; registration of the FIR; failure of the prosecution to ensure that public witnesses were associated with the arrest and personal search; and the exact time when ACP Sanjeev Kumar Yadav (PW14) had taken over the investigation. At best, these are mere conjectures or insignificant contradictions and discrepancies. It was not necessary or required for the raiding team to call officers from P.S. Sarojini Nagar or the Bomb Disposal Squad. Nor was it necessary to obtain finger-prints on the recovered material. This is not mandated in law or a statutory requirement. The recoveries were effected on 26th April, 2007 and as

per records, the exhibits, were sent to CFSL on 16th May, 2007, i.e. after 21 days. Trial court has wrongly assumed that there was delay of 81 days in sending the case property to the CFSL for expert opinion. Further, the trial court has reached an erroneous finding that the prosecution has failed to establish and link the respondents with Lashkar-e-Tayyaba (LeT, for short) without noticing the fact that one Abu Amar who was active in Bhadarwah, Distt. Doda, Jammu was killed in an encounter and, thus, any investigation on the said aspect was impossible. There was no discrepancy or failure to record DD entry when the investigation was started in the present case.

4. In order to appreciate the contentions, we would like to begin with the prosecution version in brief. In December, 2006, secret information was received that LeT had directed one Amar resident of Pakistan who was their Operational Chief Commander in Jammu and Kashmir to carry out *fedayeen* attack in Delhi on the occasion of 150th celebration of the first Indian War of Independence. Subsequently, on 26th April, 2007, information was received that one Iqbal, resident of Jammu and Kashmir would deliver a consignment of arms, ammunition and explosives to a Pakistani *fedayeen* in Delhi at the entry gate of Delhi Haat, near INA at 6.30 PM. This information was recorded in the Daily Diary and the case discussed with senior officers. A raiding team reached the bus stop near INA market at around 5.15 PM. At about 6.45 PM, two persons came from the direction of Safdarjung Tomb. One of them, with the black-coloured shoulder bag, was identified by the informer as Iqbal. The second person also had a hand bag. The two sat down on the boundary wall in front of the ticket counter of Delhi Haat and after 5 minutes, a third

person joined them. They started talking. Respondent No.2, Iqbal opened his bag and took out a parcel and revealed its contents. Immediately, Insp. Mohan Chand Sharma swung into action and overpowered them. Two persons who had come from the Safdarjung Tomb side were identified as respondent No.2, i.e. Shafaquat Iqbal, s/o of Abdul Gani, r/o Mohalla Kahi Bhadawah, Distt. Doda, J&K; and, Shabbir Ahmed (acquitted). The third person, i.e. the respondent No.1, was identified as Mohd. Hassan, s/o Mohd. Hussain, r/o Mohalla Mojhiwala, PS & PO Cheliawala, Distt. Mandi, Bhawaldeen, Punjab, Pakistan. At that stage, two public persons Mani Ram (PW3) and Hari Singh (PW7) came forward and joined investigation. It is alleged that RDX explosive, three electric detonators, one timer, two hand grenades and Rs.25,000/- in currency notes were recovered and seized vide memo, Ex.PW3/A.

5. It is clear from the aforesaid narration of facts that the entire incident on 26th April, 2007 can be divided into three parts; (i) when the police team or the raiding party snooped at about 6.30/6.45 PM at the entry gate of Delhi Haat, near AIIMS Hospital and detained respondent Nos.1 and 2 along with Shabbir Ahmed (acquitted); (ii) when Mani Ram (PW3) and Hari Singh (PW7), the two public witnesses joined the investigation; (iii) subsequent investigation including sending of samples to FSL, etc.

Pre-raid DD Entries

6. Insp. Kailash Singh Bisht (PW11) in his deposition has referred to secret information received in the first week of April, 2007, but this was the pre-cursor and failure of the prosecution to place on record the relevant DD entry of first week of April, 2007, is not material and

relevant. DD entry No.9 (Ex.PW11/A) recorded on 26th April, 2007, by Insp. Kailash Singh Bisht (PW11), refers to information received from an informer regarding a clandestine meeting at Delhi Haat at 6.30 PM on the same day. DD Entry No.9, marked Ex.PW11/A stands proved and exhibited. We do not agree with the contention of the respondents that DD entry No.10 (Ex.PW11/B) which records departure of raiding party nullifies the prosecution case or contradicts DD entry No.9 (Ex.PW11/A), as it does not refer or mention about the secret informer. The said contention of the respondents according to us, does not carry weight and does not dent prosecution version that a raid was organized on 26th April, 2007 at 5.15 PM at Delhi Haat, near INA. Even public witnesses Mani Ram (PW3) and Hari Singh (PW7) have deposed about the presence of the police raiding team in front of Delhi Haat at about 6.30 PM on 26th April, 2007.

Deposition of Mani Ram (PW-3) and Hari Singh (PW-7), and discrepancies

7. Mani Ram (PW3) testified that on 26th April, 2007 at about 7.00 PM, he was posted as a security guard at Delhi Haat, when he heard “*Pakro Pakro*” (Catch Catch). He along with Hari Singh (PW7) had proceeded to the front gate. The police had apprehended three persons and he came to know that they were terrorists. Two bags had been recovered from them. From one of the bags, *dhoop* sticks were recovered. On the wrappers, ‘*Devi Darshan Shudh Herbal Dhoop*’ was written with photograph of Durga. From one of the packets, detonators and from another packet one timer was recovered. Two hand grenades were also recovered. From a polythene packet, 2 kilograms of RDX in form of black powder was recovered.

Rs.25,000/- were found and seized. The recovered articles were sealed with the seal of KSB. The seizure memo was proved as Ex.PW3/A. The seal was given to him and was returned by him at the Special Cell, Lodhi Colony on 5th May, 2007. He identified the blue colour polythene (Ex.P1) as the same from which RDX was recovered; the wrappers of *Devi Darshan Shudh Herbal Dhoop* (Ex.P2); and 9 sticks of black colour wrapped in white paper (Ex.P3). He also identified the carton with the words *Om Nameh Shivay* and picture of Lord Shiva as Ex.P4, including 11 small packets of *dhoop* which were collectively marked as Ex.P5. He added that the small packets were lying scattered when he saw them. Currency notes collectively marked Ex.P7 were shown to him. He identified the timer which was taken out from a parcel with the seal of 'FRA FSL Delhi' as Ex.P8 and RDX samples which were taken out from the sealed parcel with the seal of 'FRA FSL' as Ex.P9 and Ex.P10.

8. Statement of Hari Singh (PW7) is similar. 2-3 persons were caught and the entire Delhi Haat was vacated and the gates closed. Three detonators, one timer, Rs.25,000/- as currency notes were recovered in addition to cardboard box with the picture of *Shivji* having 12 packets of *agarbatti*. On checking the *dhoop* sticks were found but from one of the packets three detonators and from another one timer was recovered. From the other carton, nine sticks were taken out. Two bombs were lying there, but did not know from where they were recovered. Papers written were signed by him. He identified his signatures on the seizure memo (Ex.PW3/A). He identified the currency notes (Ex.P7), the timer (Ex.P8), *putti* like substance stated to be RDX (Ex.P9); three bags as Exs.P11 to P13.

9. However, what is material and relied upon by the trial court and emphasized before us by the counsel for the respondents is the failure of Mani Ram (PW3) and Hari Singh (PW7) to identify respondent Nos.1 and 2 and Shabbir Ahmed (acquitted) as the persons who were detained and from whom the recoveries were made. Mani Ram (PW3), in his examination-in-chief, has asseverated that he could not identify the persons who were apprehended, as they were muffled. However, one of them was being described as Mohd. Hassan. In his cross-examination, PW3 had accepted that he had remained at the spot from 7 PM to 11 PM. Till then the persons apprehended had remained there and were sitting. The statement that faces of the persons apprehended were muffled throughout was reiterated in the cross-examination. Mani Ram (PW3) in his cross-examination by the public prosecutor has denied that he had stated that blue-coloured polythene was recovered from respondent No.1 Mohd. Hassan and incriminating articles were found. He denied that two hand grenades and Rs.25,000/- were recovered from the bag of respondent No.2, Shafaquat Iqbal. He knew that two grenades and Rs.25,000/- were recovered but did not know from whose bag recovery was made.

10. Hari Singh (PW7) in *ibidem* deposed that he had not seen faces of the persons apprehended because their faces were covered. He could not identify the respondents. But he accepted that he police was calling one person as Mohd. Hassan. He was cross-examined by the public prosecutor but reiterated his position that he could not identify the apprehended persons because their faces were covered. Hari Singh (PW7) in his cross-examination by the public prosecutor denied the suggestion that blue-colour polythene was recovered from

respondent No. 1 and from the polythene two card boards boxes with *Devi Darshan Shudh Herbal Dhoop* with picture of *Mata Durga* were recovered and from possession of respondent No.2 Shafaquat Iqbal, a bag was recovered and on checking two hand grenades and Rs.25,000/- were found. He deposed that police had stated that they had apprehended terrorists and had asked them to join investigation. PW7 accepted that he had remained at the spot with the police from 7 PM to 9 or 10 PM.

11. On the question of recovery etc. we are inclined to accept the version of Mani Ram (PW3) and Hari Singh (PW7). It is noticeable that they reached the exact spot, after the police team had swung into action and apprehended the alleged suspects. Mani Ram (PW3) and Hari Singh (PW7) were not present and are not eye witnesses to what had transpired or happened before or when the persons were apprehended. What is material and can be inferred from the deposition of Mani Ram (PW3) and Hari Singh (PW7) is the fact that the police officers had claimed that recoveries were made and were lying/available. These recoveries had already been made by the police raiding team, by the time Mani Ram (PW3) and Hari Singh (PW7) became involved in investigation and had participated as public witnesses. It is not the prosecution case or deposition of Mani Ram (PW3) and Hari Singh (PW7) that they were earlier taken into confidence or were aware of the covert undercover operation or that they had earlier interacted with any member of the raiding team. They had joined the investigation subsequently. However, failure of Mani Ram (PW3) and Hari Singh (PW7) in identifying respondent Nos.1 and 2 and Shabbir Ahmed (acquitted) is a significant and important

aspect. Question arises whether this failure falsifies and conclusively dents the substratum of the prosecution case?

Deposition of Police Officers

12. In order to decide and give to our findings and conclusion, it will now be appropriate to refer to the testimony of police witnesses. Insp. Pawan Kumar (PW1) has referred to the police raiding team which was formed and had gone to Delhi Haat, near INA market at about 5.15 PM. At about 7 PM, two persons came from the side of Safdarjung tomb and sat on the sitting pavement inside Delhi Haat. Meanwhile, another person also came and sat with them. They started talking. Thereupon, the raiding team led by Insp. Chander Mohan Sharma, pounced and detained respondent Nos.1 and 2 and Shabbir Ahmed (acquitted). On checking their bags, 2 kg RDX, detonators, one timer and live hand grenades and Rs.25,000/- were recovered which were seized and sealed with the seal of KSP. Subsequently, respondent Nos.1 and 2 and Shabbir Ahmed (acquitted) were brought to the office of Special Cell, Lodhi Colony and their disclosure statements Exs.PW1/A, B and C, respectively were recorded. In his cross-examination, PW1 has stated that RDX was of black colour and was wrapped in white tracing paper. Hand grenades were possibly of green colour, the detonators were of silver colour and of same size. Insp. Pawan Kumar (PW1) had gone with ACP Sanjiv Kumar Yadav (PW14) to Patna with respondent No.1 but no recoveries or further leads could be obtained.

13. ASI Anil Tyagi (PW10) has similarly deposed that two persons with carry bags on their shoulders came from the side of Humayun Tomb and sat on a wall in front of the ticket counter of Delhi Haat and

a third boy joined them. He has, however, elaborated that the third boy who had come was handed over a parcel by one of the boys who were sitting. Thereupon, Insp. Chander Mohan gave signal to the raiding party to apprehend the boys. The boys who had come from the Humayun Tomb side were identified as Shafaquat Iqbal (Respondent No.2) and Shabbir Ahmed (acquitted). From the bag of Mohd. Hassan (Respondent No.1), two card board boxes were recovered. One cardboard box had the words *Devi Darshan Herbal Dhoop* and the other box had the words *Om Namey Shivay*, written on them. From one box, 9 sticks were recovered and from second box 12 small boxes were recovered. Later on, it was learnt/revealed that the nine sticks were RDX. Out of 12 small boxes, 11 boxes contained RDX and from the 12th box, a detonator and a timer were recovered. RDX weighed about 2 kg. Two samples of ten grams each were taken out and were seized and marked S1 and S2. The parcel of remaining RDX was marked Ex. A. The parcels were sealed with the seal of KSP. From the bag of Shafaquat Iqbal (Respondent No.2), two hand grenade and currency notes of Rs.500/- totaling Rs.25,000/- were recovered. Hand grenades and cash were seized in a separate parcel and with the seal of KSP. From the bag of Shabbir Ahmed (acquitted), only clothes were recovered. The CFSL Form was prepared and filled up by ASI Anil Tyagi (PW10) and he had taken the seized material, CFSL Form, etc. to the Police Station Special Cell, Lodhi Colony. ASI Anil Tyagi (PW10) was cross-examined by the public prosecutor and in his cross-examination, he accepted that in the second box there were 11 boxes of *dhoop-batti* sticks and RDX was not recovered from the said packets. From the 12th packet, one timer and three detonators were recovered. He identified the blue

colour polythene as Ex.P1, wrappers of *dhoop* with picture of *Durga Mata* as Ex.P2, white paper in which nine sticks were wrapped as Ex.P3, the second box as Ex.P4, 11 small packets of *Dhoop* (Exs.P5/1 to 11) and the box from which three detonators and one timer was recovered as Ex.P6 and the currency notes as Ex.P7 (1 to 50). He identified the samples of RDX as Exs.P9 and P10, and the bags which were recovered from respondent Nos.1 and 2 and Shabbir Ahmed (acquitted) as Exs.P11, P12 and P13. However, he could not say whether samples of RDX were taken from each sticks or from some of the sticks.

14. Insp. Kailsh Singh Bisht's (PW11) version is almost the same and he has deposed that Shafaquat Iqbal (respondent No.2) had taken out a parcel from his bag and handed over the same to Mohd. Hassan (Respondent No.1) before they were apprehended. On checking the blue-coloured polythene given by Shafaquat Iqbal (Respondent No.2) to Mohd. Hassan (Respondent No.1), it was found to contain 2 boxes with the words '*Devi Darshan Shudh Herbal Dhoop*', and '*Om Nameh Shivay*' written on them. In the first box, nine sticks of RDX explosive were recovered wrapped in white tracing paper on which PE3A was written. In the second card box, 12 small boxes were found. 11 boxes had *dhoop* sticks and one box had three detonators wrapped in cotton and one timer device. The RDX explosive weighed 2 kg. and two samples of 10 grams each were taken out. The samples were marked S1 and S2 and were sealed. Two hand grenades with 'ARGES HGR 7/97' and 'ARGES HGR 84' written on them, were recovered from the shoulder bag of Shafaquat Iqbal (Respondent No.2) in the blue-coloured polythene. Rs.25,000/- in denomination of

Rs.500/- were also recovered from the same bag. PW11, however, could not remember whether any railway ticket was recovered and had stated that proceedings were completed at 1.40 AM on 27th April, 2007.

15. Insp. Ramesh Lamba (PW12)'s deposition is similar and he has also elucidated on how parcels were given by Shafaquat Iqbal (Respondent No.2) to Mohd. Hassan (Respondent No.1); recovery of RDX from card board box; Mani Ram (PW3) and Hari Singh (PW7) having joined; recovery of *dhoop* sticks from 11 boxes and three detonators and one timer from 12th box; the RDX weighed 2 kg and two samples of 10 grams each were taken; recoveries of two hand grenades with the markings 'ARGES HGR 84' and 'ARGES HGR 7/97'; and the recovery of Rs.25,000/- from Shafaquat Iqbal (Respondent No.2), etc. He has deposed about the arrest of Mohd. Hassan (respondent No.1) and Shafaquat Iqbal (respondent No.2) and Shabbir Ahmed (acquitted) vide Exs.PW12/A, B and C, and personal search memo (Exs.PW12/E, F, G). However, the signatures of public witnesses were not taken on the arrest memo, personal search memo and recovery of the railway ticket.

16. It may be relevant to note that the arrest memo of Mohd. Hassan (Ex.PW12/B) is dated 27th April, 2007 at 12.30 AM; that of Shafaquat Iqbal (Ex.PW12/C) is dated 27th April, 2007 at 12.40 AM, and that of Shabbir Ahmed (acquitted) is also dated 27th April, 2007 is timed 12.55 AM. The place of arrest is mentioned as compound of Delhi Haat, Laxmi Bai Nagar, New Delhi. The arrest memo is witnessed by Insp. Ramesh Lamba (PW12) only and no other person.

Mani Ram (PW-3) and Hari Singh (PW-7) are not witnesses to the arrest memos, Exs.PW12/A, B and C.

17. ACP Sanjeev Kumar Yadav (PW14) had taken over the investigation after the raiding team had apprehended the respondent Nos.1 and 2. ACP Sanjeev Kumar Yadav (PW14) claims that at 7.30 PM he was informed on telephone by Insp. Chander Mohan Sharma that they had apprehended three persons at Delhi Haat with arms and explosives. He reached the said spot and was briefed. At 11.05 PM, Insp. Kailash Singh Bisht (PW11) had got the rukka, CFSL form was filled up, case property etc. seized. The site plan was prepared. PW14 had interrogated the persons apprehended and he had also examined Mani Ram (PW3) and Hari Singh (PW7) and recorded their statements under Section 161 Cr.P.C. He had arrested the respondent Nos.1 and 2 and Shabbir Ahmed (acquitted) vide arrest memos Exs.PW12/A, B and C, conducted personal search which resulted in recovery of railway ticket from Patna to Delhi (Ex.PX). On 1st May, 2007, SI Pawan Kumar and SI Rajender Sehrawat had accompanied respondent No.1 to Patna, Bihar but the persons named Raj and Vinod could not be apprehended. They came back on 3rd May, 2007. On 16th May, 2007, Insp. Chander Mohan Sharma was sent to Jammu & Kashmir for search of Abbu Amaar and on 18th July, 2007, Insp. Chander Mohan Sharma informed ACP Sanjeev Kumar Yadav (PW14) that Abbu Amaar has already been killed in a joint operation. We shall be subsequently also referring to his statement but it is important to note that in the cross-examination, Sanjeev Kumar Yadav (PW14) has accepted that it was not mentioned or recorded anywhere that respondent Nos.1 and 2 and Shabbir Ahmed (acquitted) were ever

kept muffled at the spot till completion of proceedings and this fact was not mentioned anywhere in the records. He also accepted as correct that during interrogation, respondent Nos.1 and 2 did not reveal the place/location they had to visit or the place that they had stayed and no evidence or material collected to establish existence and identity of Raj and Vinod. Sanjiv Kumar Yadav (PW14) had taken over investigation on at about 11.05 PM. He reiterated that he had recorded statements of Mani Ram (PW3) and Hari Singh (PW7), at the spot itself. ACP Sanjeev Kumar Yadav's (PW14) testimony confounds and increases doubt and reason why Mani Ram (PW3) and Hari Singh (PW7) did not recognize respondent Nos.1 and 2, and why did they assert that the three persons apprehended had their faces covered or muffled.

Identity of the Respondents

18. Testimonies of Mani Ram (PW-3) and Hari Singh (PW-7) create a doubt whether the persons apprehended were respondents Nos.1 and 2 and Shabbir Ahmed (acquitted) or some other persons. They did not identify and recognize the respondents. Mani Ram (PW3) and Hari Singh (PW7) are categorical that the faces of the apprehended persons were covered and muffled. But this is not deposed to and stated by any of the members of the raiding team. Moreover, Mani Ram (PW3) and Hari Singh (PW7) had remained at the spot from 7 to 10/11 PM. In these circumstances, there is merit in the contention of the respondent Nos.1 and 2 that the failure of Mani Ram (PW3) and Hari Singh (PW7) to identify the respondents does substantially undermine and blunt the prosecution case. We do not see any cause or reason for Mani Ram (PW-3) and Hari Singh (PW-7)

to depose falsely. This finding is also relevant as we have held that incriminating material had been recovered/found, before Mani Ram (PW3) and Hari Singh (PW7) had the occasion to join investigation. They had not seen what had actually happened/transpired, before the three persons were apprehended. However, Mani Ram (PW3) and Hari Singh (PW7) have both stated and mentioned that one of the persons apprehended was being called and described as Mohd. Hassan, i.e. respondent No.1.

Statements under Section 313, CrPC

19. Learned counsel appearing for the State has drawn our attention to the statement of Mohd. Hassan, recorded under Section 313 Criminal Procedure Code, 1973 (Cr.P.C., for short). In the said statement, in response to questions No. 5, 9, 15 and 34, respondent No. 1, Mohd. Hassan had stated as under:

“Q.5. It is further in evidence against you that the team alongwith informer went from special cell in five private four wheeler and four two wheeler at 5 pm. DD entry was recorded in this regard which is Ex. PW11/D. Seven-eight public persons were asked at Arvindo Marg but they refused to join the raiding party. Raiding party was again briefed by inspector Mohan Chand Sharma. The members of the raiding party were deployed around the entry/exit gate of Delhi Haat. Inspector Kailash Bisht alongwith inspector Mohan Chand Sharma took position near ticket counter of Delhi Haat. At about 6.45 pm two persons came from the site of Safdarjung Tomb. One of them was carrying shoulder bag on his right shoulder and was identified by informer as Iqbal. Accordingly, the team was alerted. The other accompanying person was also carrying a shoulder bag on his right shoulder. Iqbal and his companion kept walking and sit at the boundary wall of Delhi Haat in front of ticket counter. After 10 minutes, a person came alone who was having a shoulder bag on his right shoulder and came to the said Iqbal and started talking. What have you to say?

A. It is incorrect. I was in the custody of the special cell about ten days before 26.4.2007. I was taken alongwith the raiding party and a drama of my arrest was stage managed at the spot.

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Q9. It is further in evidence against you that the samples were put in a cloth pulanda and marked as S1 and S2. The recovered detonators were wrapped in a cotton and put in a plastic container and a cloth pulanda was prepared and marked as "B". The recovered timer was also kept in a plastic container and a cloth pulanda was prepared and same was marked as "T". The small card box in which the timer and detonators devices were concealed with Dhoop Bati sticks was also kept in a cloth pulanda and marked as "C". The remaining 11 small card board boxes were kept back in the card board boxes and cloth pulanda was prepared and marked as "D". What have you to say?

A. It is incorrect.

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15. It is further in evidence against you that the case property which was seized by the police was produced in the court and same is exhibited. Blue colour polythene is Ex.P1, wrappers of Devi Dharshan Sudh Harbal Dhoop on which the picture of Durga Mata is printed is Ex.P2, nine sticks of black colour is Ex.P3 (1to 9), a box of paper on which Om Namah Shivay and picture of Lord Shiva is printed is Ex.P4, eleven small packets of Dhoop is Ex.P5 (1to 11), packet of Dhoopbatti is Ex.P6, fifty currency notes is Ex.P7 (to 50), timer is Ex.P8, Sample S2 is Ex.P9, Sample S1 is Ex.P10, bag on which REEBOK is written is Ex.P11, another bag on which word Sports inscribed is Ex.P12 and the carry bag is Ex.P13. What have you to say?

A. It is incorrect. No recovery was effected from me.

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Q.34. Do you want to say anything else in your defence?

A. I was doing business of crockery and cosmetics alongwith my father in Pakistan. I had come to Nepal for business purposes in order to procure cosmetics items. I had

come to Kathmandu on 15.4.2007 and I was going to hotel from the airport. When I reached at the gate of the Ravi Hotel, I was stopped by five Indian Intelligence Officials and was pushed in a car and taken to a place in Kathmandu. I was kept for one day in illegal custody in Kathmandu and was brought to New Delhi in a vehicle. During the journey, I was blind folded. After coming to Delhi I was kept till 26.4.2007 in a flat and I do not know the location of that flat. Thereafter the drama of my arrest was stage managed at the spot. There was no recovery from me. No disclosure statement was made by me. I was forced to sign on many papers including blank papers. Police has fabricated the above case against me. My family is in great trouble due to recent flood in my area in Pakistan and our business has been destroyed. I am also suffering from migraine problem. My name, my father's name and address has been wrongly recorded by the police and I had already submitted an application in this regard in this court at the earliest stage. I am innocent.”

Respondent No. 1 had also denied any connection with the railway ticket (this aspect has to be referred separately) and had claimed that police had planted a false case.

20. Section 313 Cr.P.C. is imperative as it enables an accused to explain and meet any incriminating circumstances proved by the prosecution and is a provision intended to benefit the accused. It seeks to comply with the most salutary and fundamental principle of natural justice, i.e. *audi alteram partem*. Thus, statements under Section 313 Cr.P.C., which are made without oath being administered, assume significance to the extent that the accused may cast some incredulity on the prosecution version. The said provision has to be read along with Article 20(3) of the Constitution, which declares that no person accused of any offence shall be compelled to be a witness against himself (see observations of the Supreme Court in ***Nagraj versus State Represented by Inspector of Police, Salem Town, Tamil Nadu***, CrI. A. No.1311/2006, decided on 10th March, 2015). Article

20(3) and the right of silence was earlier examined by the Supreme Court in *Selvi and Others versus State of Karnataka*, (2010) 7 SCC 263. After referring to the historical origin of the right against self-incrimination and the decisions of the Supreme Court of India and U.S. Supreme Court on the said subject, *Selvi and Others* (supra) lucidly sets out limitation of the said right, when reference was made to the derivative use, transactional use and Section 27 of the Evidence Act, 1872. The dragnet of Article 20 clause 3 is not so wide to make a mockery of the examination of the suspect, necessitous in the search of truth. The bounds of constitutional proscription and permission are defined to exclude statements, which have material bearing on the criminality on the maker, but by itself would not exclude the said or the other integral circumstances (See *Nandini Satpathy versus P.L. Dani*, (1978) 2 SCC 424). Referring to Section 313 Cr.P.C. and proviso (b) to Section 315(1) Cr.P.C., 180th Report of the Law Commission of India (May, 2002) and the changed position with the enactment of the Code of Criminal Procedure in 1973, it was observed in *Selvi and Others* (supra) that accused is a competent witness, but he cannot be compelled to answer a question that could expose him to incrimination and an adverse inference cannot be drawn from refusal to do so. Reference can also be made to the judgment of the Supreme Court in *Bable versus State of Chhatisgarh*, (2010) 11 SCC 181 wherein the accused had given explanation in his statement under Section 313 Cr.P.C., which the Court examined in the light of the evidence produced on record. It was recorded that the accused had the option to remain silent, but in the said case had opted to give answers and had offered an explanation when the facts proved by the prosecution were put to him. A detailed discussion on the said issue is

to be found in *Raj Kumar Singh versus State of Rajasthan*, (2013) 5 SCC 722 wherein it was highlighted that the purpose of examining an accused is to meet the requirements of principle of natural justice and this permits an accused to furnish some explanation as regard the incriminating circumstances associated with him. The Court must take notice of such explanation. However, while examining the explanation given by the accused in his statement under Section 313 Cr.P.C., the Judge must be conscious that the accused has been given freedom to remain silent, which includes right of complete denial. It was accordingly held as under:-

“41. In view of the above, the law on the issue can be summarised to the effect that statement under Section 313 CrPC is recorded to meet the requirement of the principles of natural justice as it requires that an accused may be given an opportunity to furnish explanation of the incriminating material which had come against him in the trial. However, his statement cannot be made a basis for his conviction. His answers to the questions put to him under Section 313 CrPC cannot be used to fill up the gaps left by the prosecution witnesses in their depositions. Thus, the statement of the accused is not a substantive piece of evidence and therefore, it can be used only for appreciating the evidence led by the prosecution, though it cannot be a substitute for the evidence of the prosecution. In case the prosecution evidence is not found sufficient to sustain conviction of the accused, the inculpatory part of his statement cannot be made the sole basis of his conviction. The statement under Section 313 CrPC is not recorded after administering oath to the accused. Therefore, it cannot be treated as an evidence within the meaning of Section 3 of the Evidence Act, though the accused has a right if he chooses to be a witness, and once he makes that option, he can be administered oath and examined as a witness in defence as required under Section 315 CrPC. An adverse inference can be taken against the accused only and only if the incriminating material stood fully established and the accused is not able to furnish any explanation for the same. However, the accused has a right to remain silent as he cannot be forced to become a witness against himself.”

In the same judgment reference was made to an earlier decision of the Supreme Court in *Mohan Singh versus Prem Singh and Another*, (2002) 10 SCC 236 where in paragraph 30 the position of law has been succinctly put as under:-

“30. The statement of the accused under Section 313 CrPC is not a substantive piece of evidence. It can be used for appreciating evidence led by the prosecution to accept or reject it. It is, however, not a substitute for the evidence of the prosecution. As held in the case of *Nishi Kant* [(1969) 1 SCC 347] by this Court, if the exculpatory part of his statement is found to be false and the evidence led by the prosecution is reliable, the inculpatory part of his statement can be taken aid of to lend assurance to the evidence of the prosecution. If the prosecution evidence does not inspire confidence to sustain the conviction of the accused, the inculpatory part of his statement under Section 313 CrPC cannot be made the sole basis of his conviction.”

Respondent No.1 is a Foreign National

21. Learned counsel for the appellant State has rightly urged that respondent No.1 is a resident of Pakistan. This is an undisputed and unchallenged position. He was found to be present in India and was arrested. Statement of respondent No.1 that he had gone to Kathmandu, Nepal in connection with ‘crookery’ business and was lifted by the Intelligence officers or police officers of India from Kathmandu is unacceptable and is far-fetched. There is no evidence or material to establish the said alibi. Respondent No.1 after his arrest was produced in the Court on 27th April, 2007. In fact, respondent No.1 moved an application claiming that his true and correct name is Mohd. Munir @ Hussain @ Qasim, s/o of Mohd. Afzal, r/o Village & Post Office Khurd, Distt. Jhelum, Punjab, Pakistan. Respondent No.2 does not deny his identity, parentage and residence. He, however, claims that he along with Shabbir Ahmed (acquitted) was picked up

on 21st April, 2007 from Jammu and kept in illegal detention for 5 days inspite of lack of evidence to show his involvement. He had got married 5 months back and was the sole bread-earner of the family. On the said aspects, we also find no evidence or material to accept the bald statement of respondent No.2 is available. But this is not sufficient to implicate and convict the respondent No.2.

22. The respondent No.1 was arrested on 26th April, 2007 and also produced before the court on 27th April, 2007. On the question of presence of respondent No.1 in Delhi and his movement in India, the prosecution has rightly relied upon railway ticket Ex.PX, which supports the prosecution version of his train journey from Patna Junction to New Delhi Station, by Super Fast Express. The said ticket was purchased on 25th April, 2007 at 1650 hours. The said ticket as per the testimony of ACP Sanjeev Kumar Yadav (PW14) and Insp. Ramesh Lamba (PW12) was recovered from respondent No.1. The railway ticket was also proved by Umesh Kumar Sinha (PW13) who has stated that this ticket was issued from counter No.11 on 25th April, 2007 in the 1600 to 2400 hours' shift.

The two hand grenades and the electric detonators

23. There is one more difficulty in the prosecution evidence. As noticed above, as per the prosecution case, two hand grenades were recovered. As per the deposition of Insp. Kailash Singh Bisht (PW11) and Insp. Ramesh Lamba (PW12), the said grenades had the marking 'ARGES HGR 7/97' and 'ARGES HGR 84'. The hand grenades were never produced in the court and as per the deposition of ACP Sanjeev Kumar Yadav (PW14), they were destroyed by National Security Guards, Manesar, as per report received. Regarding deposit of seized

material, ASI Paramjeet Singh (PW9) has deposed that on 27th April, 2007, he was posted at Special Cell, Lodhi Colony. He had received 9 parcels from ACP Sanjeev Kumar Yadav (PW14) with the seal of KSB and CFSL form with the seizure memos. On 16th July, 2005, four sealed parcels were sent to CFSL, Lodhi Road through ASI Shahjahan (PW2) vide R/C No.51/21/07 along with CFSL form and related documents. On 4th June, 2007, HC Krishna Ram had handed over four parcels with the seal of CFSL, Lodhi Road to PW9 and the same were registered against Sl. No.975. ASI Paramjeet Singh (PW9) testified that on 1st September, 2007, one sealed parcel with the seal of KSB mark F was sent to BD unit, NSG Samalkha through ASI Shahjahan vide R/C No.99/21/07. On the same date, another sealed parcel with the seal of SSO II “BALL”, CFSL, Lodhi Road was sent to BD Unit NSG, Samalkha through ASI Shahjahan vide R/C No.100/21/07. The articles through R/C Nos.99/21/07 and 100/21/07 were sent pursuant to the order of the court of Ms. Seema Maini, CMM (Ex.PW9/E) and, thereafter, he had received destruction order (Ex.PW9/F) of detonators/hand grenades from NSG, Samalkha. In his cross-examination, PW9 accepted that he could not state whether detonators could explode or not. He accepted that there was a special space to keep and store detonators and hand grenades and prevent them from exploding. ASI Shahjahan had appeared as PW2. However, in his deposition, he has only referred to deposit of the exhibits vide R/C No.51/21/07 with the CFSL form, with the CFSL office, CBI, CGO Complex, Lodhi Colony. He had stated that four samples including marks S1, S2 were sent. He has not deposed about R/C Nos.99/21/07 and 100/21/07. On the said aspect ASI Shahjahan (PW2) is silent.

24. Ex.PW9/F is a letter dated 23rd August, 2007 written by Headquarters NSG to Force Headquarters, NSG Manesar regarding defusing/destruction of detonators and hand grenades with a request to DCP, Special Cell to arrange for transportation to the BD Unit, NSG Samalakha. Similarly, the application moved before the court for defusing and destruction of hand grenade and detonators (Ex. PW9/E) refers to both detonators and hand grenades. The said application, it is apparent, was moved on 13th June, 2007 and on the same day, the CMM, without notice to the accused, i.e. respondent Nos.1 and 2, passed an order stating “since investigation qua the detonators recovered from the accused is complete, Director, NSG is directed to get the three electronic detonators and the two hand grenades defused or destroyed as per law and the mechanism prevailing.” It was the responsibility and the obligation of the prosecution, even if there was destruction or diffusion of the hand grenades to produce necessary evidence, be it in form of testimonies of the officers who had carried out the destruction or diffusion exercise, or by way of documents to prove and establish that the hand grenades recovered and seized were destroyed. There is complete absence and failure of the prosecution to lead evidence on the said aspect. Why the said lapse had taken place is also not stated or sought to be explained.

25. The destruction certificate of the commanding Officer, Disposal Unit, NSG is available on trial court record at page 919. The same is dated 1st September, 2007. However, the same is not proved and marked exhibit. The destruction certificate does not mention markings on the hand grenades. It mentions presence of ASI Shahjahan (PW2) and also “has his signature”. But ASI Shahjahan

(PW2) in his court deposition has not deposed about the destruction certificate, his presence or signature.

26. The detonators in the present case were electric and not chemical detonators. It is not understood why destruction of the electric detonators were sought. Electric detonators it is not established were self-igniting. Chemical detonators on the other hand require careful handling and storage for they can contain explosive substances. There is no evidence to show that the electric detonators had chemicals.

27. While recording the statements of the respondent Nos.1 and 2 under Section 313 Cr.P.C., the destruction report which was never proved and marked or given exhibit number, were given Exhibit No.PW16/F (see question No.29). The report was also referred to in question No.26. As per the trial court records, the last witness examined by the prosecution was ACP Sanjiv Kumar Yadav (PW-14). The destruction report has not been given mark Exhibit No.PW16/F. It is difficult for us to appreciate and understand how and in what context question No.29 refers to Exhibit No.PW16/F and makes reference to the destruction report of hand grenades. In fact, as per the destruction report, the detonators were not destroyed.

CFSL Report

28. The detonators had been earlier sent for CFSL examination and CFSL report was received. As per the said report 3 detonators were live ones. On physio-chemical examination presence of high explosive based on RDX was found in parcel S1 and S2 i.e. two samples. The chemical composition, percentage, working, etc. of the

RDX has not been elaborated and discussed. It is also apparent that CFSL report was not tendered in evidence though the same is admissible under Section 293 Cr.P.C. A Division Bench of the Delhi High Court in *Dharam Pal versus State*, (2011) 125 DRJ 417, has held that in view of Section 293 Cr.P.C. the said report need not be proved by summoning the author thereof, but that does not mean that nobody should tender the same in evidence and the same should have been exhibited by deposing that the object/material was sent for examination and the report in question was obtained during investigation in the case in question. However, in the present case we find that in the written arguments submitted by the respondents, reference is made to this report dated 31st May, 2007 made under Section 293 Cr.P.C. Nevertheless, the report was never formally tendered in evidence. A forensic report of such nature is *per se* admissible, but the court has a right to summon the expert. The accused can also ask for summoning of the expert or any other person to rebut and demolish a report. Thus, the question would still arise whether this report should be accepted and read in evidence without examination of the scientific expert in a case like the present one. The said report is signed by the Senior Scientific Officer, CFSL, CBI, New Delhi and records that parcels, S1 and S2 and electronic timer can form components of an improvised explosive device and, therefore, constitutes an explosive as defined in the Explosive Substances Act, 1908. We have already referred to absence of working details, particulars etc. in the CFSL report. Impugned judgment does not refer to the CFSL report and has not examined the question of oral deposition of the chemical examiner. The charges against the respondents are grave and if proved can entail imprisonment for life.

When we refer to the facts of the present case, the gravity, and fractured evidence, we have hesitation and reluctance in accepting the CFSL report, without oral examination of the Senior Scientific Officer.

Other Contentions

29. In addition to the aforesaid, counsel for the respondent Nos.1 and 2 have highlighted the following lapses and flaws in the prosecution case;

(1) Prosecution failed to ascertain the place where respondent No. 1 had stayed in Patna, Bihar and to identify the so called Vinod and Raj. The last aspect we feel may not be material as the disclosure statement is inadmissible. However, the prosecution, it is apparent, has not been able to make break through on the *modus operandi* and the connections/associates of the respondent No. 1 who had helped him travel in India and reach Delhi;

(2) There is no evidence or material to show that respondent No.2 Shafaquat Iqbal and Shabbir Ahmed (acquitted) had stayed in Delhi and were in touch with any of the third person. This argument could again highlights the failure of the prosecution in collating leads on the alleged *modus operandi* of respondent No.2 and others;

(3) ASI Anil Tyagi (PW10) has stated that he did not remember whether the samples were taken from each stick. Insp. Kailash Singh Bisht (PW11) stated that samples were not taken from each stick. Similar statement was made by Insp. Ramesh Lamba (PW12). Thus, we do not know whether all the sticks had RDX or not.

Conclusion

30. In view of the aforesaid discussion, the evidence which has been proved beyond doubt relates to the presence of respondent No.1, a Pakistani national in Delhi and presence of respondent No.2, an Indian national in Delhi. In spite of failure of Mani Ram (PW3) and Hari Singh (PW7) to identify respondent Nos.1 and 2, we are inclined to accept that respondent No.1 was present at Delhi Haat at the time in question. This fact is admitted by respondent No.1 in his statement under Section 313 Cr.P.C. However, his contention is that he was taken to the said spot. Mani Ram (PW3) and Hari Singh (PW7) have also stated that the name of Mohd. Hassan, respondent No.1 was being called out or stated at the spot. However, Mani Ram (PW3) and Hari Singh (PW7) have not stated that name of Shafaquat Iqbal (the respondent No.2) was being called out or he was present. In the absence of identification of respondent No.2 by Mani Ram (PW3) and Hari Singh (PW7) who have not even mentioned his name, we are inclined to give benefit of doubt as to the presence of respondent No.2 at the Delhi Haat. Pertinently, as per the prosecution version, respondent No.2 Shafaquat Iqbal had passed and handed over two packets to the respondent No.1, Mohd. Hassan. Thus, the assertions against the two respondents are fused and fraternized. Together they form the core of the prosecution version. We have, for reasons set out above including depositions of Mani Ram (PW3) and Hari Singh (PW7), expressed grave doubts and inability to accept the prosecution version on the respondent No.2's presence. In these circumstances, the alleged recovery from respondent No.1, Mohd. Hassan is itself debatable and doubtful for he had, as per the prosecution version, received the material from the respondent No.2. Noticeably, the third

person, namely, Shabbir Ahmed, who as per the prosecution was present and had walked together with the respondent No.2, Shafaquat Iqbal is not arrayed as a respondent in the present appeal. In view of the amended memo of parties and the amended petition, the State did not prefer leave to appeal against the acquittal of Shabbir Ahmed. Lastly, we have observed and referred to why we feel that the court deposition of the scientific expert was required. Hesitation and unsureness on account of inconsistencies, incompatibilities and voids, would justify an alert and cautious approach before the CFSL report is made the primary edifice. We do not see any reason why after eight years, the said exercise should be undertaken by way of recording additional evidence or by setting aside the trial court judgment, with a direction for re-trial. The incident in question as alleged relates to the year 2007. We have referred to other discrepancies and failures on part of the prosecution in the present case.

31. We also do not accept for lack of evidence and proof, the prosecution version with regard to recovery of the two hand grenades from the bag of respondent No.2 for the reasons set out above. Regarding recovery of Rs.25,000/-; the recovery purportedly from the respondent No.2 would not prove and establish any offence by itself. Further, we have not accepted and believed the prosecution version of presence of the respondent No. 2 at Delhi Haat.

32. In the present case, the prosecution suffers from various gaps and lacunae which remain unexplained and consequently cause doubt and debate about recoveries made and to what extent the respondent Nos.1 and 2 were actually involved.

33. In view of the aforesaid discussion, we feel that the trial court had rightly granted benefit of doubt and acquitted the respondent Nos.1 and 2 from the charges under Sections 121/121A/122/123/120B IPC; Sections 4 and 5 of the Explosive Substances Act, 1908; and, provisions of the Unlawful Activities (Prevention) Act, 1967. As noticed above, appellant No.1, Mohd. Hassan has not questioned his conviction and sentence under Section 14 of the Foreigners Act, 1946. The said conviction and sentence remains unaffected.

34. The appeal is accordingly dismissed. Trial court record will be sent back.

(SANJIV KHANNA)
JUDGE

(ASHUTOSH KUMAR)
JUDGE

May 12th, 2015
Kkb/VKR