

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

% *Date of Decision: 7th September, 2009*

+ **Death Sentence Ref.1/2004**

In re:

STATE Petitioner
Through: Mr. M.N.Dudeja, Advocate

AND

MAQSOOD AHMED @ ASHRAF
ABBU MUJAHID Respondent
Through: Mr. Bhupesh Narula, Advocate

CRL.A.506/2004

MAQSOOD AHMED @ ASHRAF
ABBU MUJAHID Appellant
Through: Mr. Bhupesh Narula, Advocate

Versus

STATERespondent
Through: Mr. M.N.Dudeja, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J.(Oral)

1. Vide judgment and order dated 18.5.2004 the appellant has been convicted for the offence punishable under Section 302 read with Section 120B IPC; Section 25 and 27 of

the Arms Act and Section 4 of the Explosives Substance Act. It has been held that the prosecution has successfully proved that the appellant, a national of Pakistan, committed a terrorist act, in that intruded into the Central Reserve Police Force Camp at village Jharoda Kalan on 18.10.2001 at 11:00 PM and shot dead Const.Nitin Puttewar. Benefit of doubt has been given to the co-accused Mohd.Abdula Mir, a resident of Jammu & Kashmir, holding that no evidence incriminating Mohd.Abdula Mir had emerged.

2. Vide order on sentence dated 21.5.2004 the sentence of death has been imposed upon the appellant for the offence punishable under Section 302/120B IPC as also for the offence punishable under Section 27/120B IPC. For the offence punishable under Section 4 of the Explosives Substance Act, sentence imposed is to undergo RI for 20 years.

3. As per the prosecution, on 18.10.2001 at 11:00 PM Const.L.H.Fernandes PW-2 heard a noise which was a mixture of screams and gun fire. He was sleeping then. He awoke from his slumber and came out of the barrack and flashed his torch. The beam of the torch illuminated the face of the appellant who was fleeing and the appellant retaliated by firing at Const.L.H.Farnandes, who survived due to the grace of God. Soon thereafter Const.Nitin Puttewar was found grievously

injured and died on the way to the hospital. FIR 552/2001 for the offence under Section 307/302/120B IPC was registered on the statement Ex.PW-2/A of Const.L.H.Farnandes. The police was informed. Empty cartridges were recovered from the spot. The dead body of the Const.Nitin Puttewar was sent to the mortuary. As per post-mortem report he had died on receiving gun shots.

4. On 20.10.2001 information was received at PS Najafgarh which was noted vide DD No.14A, Ex.PW-29/A that an assault rifle with ammunition was seen in the field of Gopi Ram on Surakhpur road. SI Gianander went to the spot and recovered one assault rifle AK-57 and two magazines containing 56 live cartridges in the magazines and one live cartridge in the chamber of the assault rifle. FIR No.556/2001 was registered on said information.

5. On 27.10.2001 Prem Prakash was tilling his fields and his tractor got stuck and pulled out a bag from which magazines and hand bombs were recovered. Said information was received at PS Najafgarh and recorded vide DD No.18A, Ex.PW-34/A. SI Rajesh Kumar recovered 4 hand grenades and 5 magazines containing 144 bullets. The third FIR i.e. FIR No.572/2001 pertaining to said recovery was registered at PS Najafgarh.

6. No breakthrough could be achieved by the police at Najafgarh.

7. On 25.3.2002 the special task force of UP police at Lucknow received secret information that a truck driver named Abdula was transporting militants from the State of Jammu and Kashmir to different destinations in India and the word Abdula was written in yellow colour on the windowpanes of his truck and that the truck would be coming to the fruit and vegetable market at Azad Pur or Sanjay Gandhi Transport Nagar in Delhi. Insp.S.P.Gupta checked truck No.JK 01A 7095 on 27.3.2002 at Sanjay Gandhi Transport Nagar and found the word Abdula written in yellow colour on the front side glass. He apprehended Mohd.Abdula Mir who confessed transporting terrorist of Lashkar-e-Toiba from Kashmir to Delhi and vice versa and that on 18.10.2001 he had transported 3 terrorists; namely, Abu Hussain, Abu Maaz and the appellant to Delhi. The three had fired at the C.R.P.F. Camp the same day i.e. on 18.10.2001 and that he took them back to Sri Nagar the next day.

8. The appellant was apprehended by the police of PS Ghazipur UP on 26.3.2002 and purportedly made a confessional statement Ex.PW-30/A recorded under Section 32 POTA by S.S.P. Lucknow Sh.B.B.Bakshi admitting to have fired and killed a constable of C.R.P.F. at Jharoda Kalan on

18.10.2001. This information was passed on to the police at Delhi. Insp.Paras Nath of Delhi Police went to UP on 15.4.2002 and after taking permission from the Court of the concerned Magistrate in UP took custody of the appellant and formally arrested him. The appellant was produced for test identification on 21.5.2002, but he refused on the ground that his face was shown to the witness i.e. Const.L.H.Farnandes.

9. Needless to state the prosecution hinged its case on proof of 3 facts. Firstly the testimony of Const.L.H.Farnandes PW-2. Secondly the proof of the fact that the appellant refused to participate in the Test Identification Proceedings and lastly that the appellant was a foreign national and was found in India without any travel documents and could not explain the reason for his presence in India.

10. Const.L.H.Farnandes PW-2 deposed; we propose to note the relevant parts of his testimony by extracting the same, as under:-

“On 18.10.2001 I was working at C.R.P.F Camp Jharoda Kalan. At about 11:00 PM on that day I was sleeping in the camp. I woke up from my sleep from the cries of some persons. I immediately got up and took torch and came out of the camp and ran towards the cries. In the torch light I saw one person running away, I shouted as to who was he (kon hai kon hai). On this he fired at me. But the bullet did not hit me. I heard the sound of firing. The man was running towards barrack towards the wall side of the camp. I tried to chase him but he succeeded in running away..... I found his foot marks. I then tried to

see as to what had happened and I found that one of our constable recruits Nitin Puttewar was lying dead near the wall.”

11. On being cross examined Const.L.H.Farnandes stated:-

“It is correct that I had rushed towards the sound of cries which must have been made by Nitin Puttewar but when I was running towards the sound of cries I saw accused Ashraf running towards the wall..... The accused had fired from a distance of 10-12 yards on me..... I switched off my torch after I was fired as to disguise my location. The firing on me was done by accused immediately when I cried kon hai kon hai. When I saw accused had run away and escaped from the wall I again lightened the torch..... It is wrong to say that I could not see the face of the assailant because when I put torch light on him I saw only his back. Vol. I saw his face as he fired on me.

Q. I put it to you only back of a person could be seen if torch light is thrown from the place where you were allegedly standing and you could not have seen the face?

A. When I threw torch light the accused had crossed the torch light and when I asked kon hai kon hai he turned towards him and fired at me. Then I saw him.”

(NOTE: The word him underlined in the answer above is an obvious typing error and should read “me”)

12. There is admittedly no other evidence brought on record against the appellant save and except the admitted fact that the appellant refused to participate in the Test Identification Proceeding alleging that he was shown to the witness. It is also an admitted fact that the appellant who

examined himself as DW-4 stated that he was a resident of District Mianwali Pakistan and claimed to have strayed into India at the Narwal Border. The appellant admitted that his village was about 350 kms from the border.

13. Discussing the testimony of PW-2 and whether at all PW-2, who admitted that when he saw the appellant the appellant was running away from him i.e. saw him from the back, could have recognized the appellant, who as per PW-2 turned back to fire at him and hence gave a glimpse of his face, the learned Trial Judge, in para 39 has held as under:-

“39. The Ld. defence counsel has raised copious objection merely for the sake of cavil. It must be borne in mind that the army or police of any country consists of strong, laborious, healthy and agile persons. Many of them have photographic memory for faces, tenacious memories and whose memory are not conveniently short. Constabulary is accustomed to watch and identify the faces in dark with the help of torches. It had nimble mind. It is trained like this. PW-2 stated that he had seen the face of the accused for a sufficient period. In his deposition, he stated that in the torch light he saw that one person was running away. In his cross-examination, he stated that he had come out of the barrack after lightening of the torch. He deposed that the accused had fired at a distance of about 10/12 yards from him. He stated that he had switched off the torch after he was fired at, in order to disguise his location. He deposed that the firing was done by the accused immediately, when he had cried “KON HAI KON HAI”. He deposed that when he saw that the accused had run away, he scaled the wall, then he again lightened the torch. To a court question put by my Id predecessor, he made the following reply. Both the court question and his reply are reproduced here under:-

Q. I put it to you only back of a person could be seen if torch light is thrown from the place where you were allegedly standing and you could not have seen the face?

A. When I threw torch light the accused had crossed the torch light and when I asked kon hai kon hai he turned towards him and fired at me. Then I saw him."

14. The confessional statement Ex.PW-30/A purportedly made by the appellant before the S.S.P. Lucknow was proved by merely tendering a certified copy of the same and through the testimony of Arbind Chaturvedi Deputy Superintendent of Police Lucknow who stated that he scribed the statement.

15. The learned Trial Judge has not relied upon the said statement and in para 49 of the impugned decision has made a passing reference to the same as under:-

"49. The accused made confessional statement in a case pending in U.P. The facts of the confessional statement in another case may not be in consonance with the facts of this case. However, a bare look on the above said confessional statement goes to show that the accused has admitted his complicity in this case. On the one hand, the Id defence counsel vehemently argued that the said confession cannot be read in this case and is inadmissible in evidence because it was not proved in accordance with law, on the other hand he raised this incongruous argument."

16. We are afraid, the reasons given by the learned Trial Judge in para 39 of the impugned decision are nothing but the ipxi dixit of the learned Trial Judge who appears to be coloured by the fact that the appellant is a national of

Pakistan. There are more than one compelling reasons not to accept the identification of the appellant by Const.L.H.Farnandes. Firstly, in his statement Ex.PW-2/A Const.L.H.Farnandes has not even vaguely described the features of the man he saw as claimed by him. Secondly, as stated by Const.L.H.Farnandes he was sleeping when he heard a noise. The site plan Ex.PW-12/A shows no light whatsoever in the area where the incident took place. The time of the firing is 11:00 PM i.e. a time when it is pitch dark. As per Const.L.H.Farnandes when he came out of his barrack he saw the back of the appellant who was fleeing in the opposite direction towards a gap in the wall. As per Const.L.H.Farnandes he switched off his torch when the appellant turned back and fired at him as Const.L.H.Farnandes wanted to hide his location. This means that when the beam of the torch of Const.L.H.Farnandes fell on the appellant he immediately turned and fired one shot towards the direction of Const.L.H.Farnandes, who in turn, to hide his location, switched off the torch. We have used the expression 'fired one bullet' for the reason the rough site plan shows one bullet mark on the wall of the building behind the spot where Const.L.H.Farnandes was stationed.

17. Const.L.H.Farnandes could not have had, but a split second glance of the appellant, as per the testimony of

Const.L.H.Farnandes and thus it is next to impossible for Const.L.H.Farnandes to remember the facial features of the appellant.

18. The learned Trial Judge has strained backward to accept the testimony of Const.L.H.Farnandes. The reasoning of the learned Trial Judge is most uninspiring.

19. The offence was no ordinary offence. A man had intruded into the C.R.P.F. Camp and fired. It was a sensational event and in all probability was expected to be flashed in the newspapers the next day. It would have been a challenge for the police to effect a breakthrough. Had Const.L.H.Farnandes seen the assailant reasonably well, one would have expected an attempt to be made to draw the sketch of the assailant. None was done. This also shows that Const.L.H.Farnandes just did not remember the features of the assailant; obviously he could not as he had but a split second glance of the assailant whom he saw from the rear when the assailant was in the process of fleeing.

20. As per the Const.L.H.Farnandes he saw foot marks leading towards the gap in the wall and therefrom gathered that the assassin had fled through the breach in the open wall. It remains a mystery as to why the police did not lift the foot prints with the help of plaster mould.

21. The three FIRs which are the subject matter of the instant appeal do not pertain to offences under POTA and hence the confessional statement of the appellant i.e. Ex.PW-30/A has rightly not been relied upon by the learned Trial Judge. But, we see no reason why the learned Trial Judge has made an insidious reference thereto in para 49 of the impugned decision.

22. We are thus left with only two incriminating circumstances against the appellant. The first, of the appellant being a Pakistani national and has told a lie that he has strayed into India and the second of the appellant refusing to participate in the Test Identification Proceedings.

23. The reason given by the appellant to refuse participating in the Test Identification Proceedings appears to be reasonable for the reason he was apprehended on 26.3.2002. The police at Delhi obtained permission of the Court at Lucknow to have his custody on 15.4.2002. The appellant was brought to Delhi and an application for Test Identification Proceedings being conducted was filed on 3.5.2002. We would have appreciated if the police at Delhi had sought immediate Test Identification Proceedings to be held as the prolonged police custody of the appellant gave ample opportunity to the police to show the appellant to the witness. We note that the Test Identification Proceedings

scheduled for 15.5.2002 did not take place. The proceedings ultimately took place very belatedly on 21.5.2002.

24. Be that as it may, identification during Test Identification Proceedings is a relevant evidence lending assurance to a Court of an accused being correctly identified by a witness and refusal to participate in the same without any justifiable cause is an incriminating piece of evidence, but a conviction in a criminal trial cannot be sustained merely on an accused refusing to participate in the Test Identification Proceedings and telling a lie of the circumstances under which he came to India. In our opinion the twin circumstances of the appellant refusing to participate in a Test Identification Proceedings, even on an unjustifiable ground and his being a Pakistani national whose presence in India was without any valid travel documents are insufficient evidence to conclude against his guilt.

25. The appeal filed by the appellant and the death reference made to this Court stand disposed of by acquitting the appellant of the charges framed against him.

PRADEEP NANDRAJOG, J.

INDERMEET KAUR, J.

**September 07, 2009
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