

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.184 OF 2017

Parvej Khan Riyajoddin Khan
Age 40 years, Occupation Business,
R/o Room No.13, Dangalgrastha Colony,
Jalgaon ... APPELLANT
(Orig. Accused No.2)

VERSUS

The State of Maharashtra
(Copy served on the Public
Prosecutor, High Court,
Bench at Aurangabad) ... RESPONDENT

.....
Shri Joydeep Chatterji, Advocate for appellant
Shri R.D. Sanap, A.P.P. for State
.....

CRIMINAL APPEAL NO.186 OF 2017

Asif Khan @ Juned @ Abdulla Bashir Khan
Age 35 years, Originally Resident of 15,
TBS Road, Behind Shirsoli Naka, Ram Nagar,
Jalgaon, Taluka District Jalgaon and
104, Global Garden View,
Nala-sopara, District Thane,
recently imprisoned in Yerwada Jail, Pune,
Taluka and District Pune. ... APPELLANT

VERSUS

The State of Maharashtra
through M.I.D.C. Police Station,
Jalgaon, Taluka District Jalgaon
Copy to be served on
Public Prosecutor, High Court,
Bench at Aurangabad ... RESPONDENT

.....
Ms A.N. Ansari, Advocate for appellant
Shri R.D. Sanap, A.P.P. for State
.....

CORAM: R.G. AVACHAT, J.

DATED : 13th July, 2020

JUDGMENT :

Both these appeals have been directed against judgment of conviction and order of sentence dated 1/4/2017, passed by Additional Sessions Judge, Jalgaon (Trial Court) in Sessions Case No.173/2006. By the impugned judgment and order, the appellants have been convicted for the offence punishable under Section 120-B of the Indian Penal Code (IPC) and, therefore, sentenced to suffer rigorous imprisonment (R.I.) for ten years and pay a fine of Rs.10,000/- each. In default of payment of fine, they have been directed to undergo R.I. for three months.

The appellants have been acquitted of other charges, in all 10 in number. The State did not prefer appeal from acquittal.

FACTS :-

2. The then Sub-Divisional Police Officer (S.D.P.O.), M.I.D.C. Police Station, Jalgaon had lodged F.I.R. vide Crime No.103/2001. He had received a confidential information from his superior officer in Jalgaon city that persons namely Shaikh Rashid Chand, Rijwan Abdul Rashid, Shaikh Siddik Shaikh Ajij and Khalid Asad Khan, residents of Jalgaon and their other

companions were involved in serious criminal activities. They took training from terrorists group of Jammu and Kashmir in handling of sophisticated weapons, make bombs. On arrest of the aforesaid persons, it was found that they and their associates were active members of Students Islamic Movement of India (SIMI). All of them conspired to wage war against Indian State. They collected arms to translate their such intention into action. All of them indulged in activities so as to bring or attempt to bring into hatred or contempt or excite disaffection towards the Government of India. They promoted enmity between different groups on the ground of religion. On investigation of the said crime, the charge sheet was laid against in all 16 accused persons. It was the Sessions Case No.126/2002. The appellants herein were shown as wanted accused. Trial in the said Sessions Case was concluded on 19/5/2006 against 10 accused. Accused No.4 to 6, 7 and 10 therein were acquitted, while accused No.1 to 3, 5, 8 and 9 were convicted. After the decision of the said case, appellants herein were arrested and, therefore, a supplementary charge sheet was filed against them. It is the Sessions Case No.173/2006.

Record indicates that, the accused convicted in Sessions Case No.126/2002 preferred appeal. The State too preferred appeal against acquittal. Both the appeals were decided by Division Bench of this Court on 23/12/2013. The State

appeals were dismissed. The appeal from conviction were partly allowed.

3. The appellants herein were charged on 11 counts. They pleaded not guilty. To bring home the charge/s, prosecution examined P.W.1 to P.W.3 and P.W.52. Evidence of 49 witnesses examined in previous case (Sessions Case No.126/2002) was produced in this case. Learned Advocate for defence gave consent to read their evidence as it is. Only P.W.21 was summoned to give evidence.

On appreciation of the evidence in the case, the trial Court convicted the appellants as stated above.

4. Heard Mr. Joydeep Chatterji, learned Advocate for appellant in Criminal Appeal No.184/2017, Ms. A.N. Ansari, learned Advocate for appellant in Criminal Appeal No.186/2017 and Mr. R.D. Sanap, learned A.P.P. for the respondent/State.

5. Mr. Joydeep Chatterji and Ms. Ansari, learned Advocates would submit that there was no shred of evidence to connect the appellants with the offences in question. The Trial Court appears to have swayed with the judgment of conviction and sentence passed in Sessions Case No.126/2002 and confirmed by the High Court. Learned Advocates took me through the evidence in the case to make their point.

Learned A.P.P., on the other hand, supports the impugned judgment.

6. I have carefully scrutinised the evidence of all the witnesses relied upon by the prosecution to bring home the charge against the appellants. I have also gone through the impugned judgment to find that the Trial Court reproduced the evidence of all the witnesses relied upon by the prosecution and without assigning any reason, convicted the appellants. According to the Trial Court, the appellants had been absconding for long. Their abscondence itself suggests their involvement in the crime. In para No.206 of the judgment, the Trial Court observed :-

“To my mind, absconding by both the accused is a relevant fact needs to be considered in accordance with Section 8 of the Evidence Act, which can certainly be scanned under said Section. A fact can be proved by the conduct of a party and by surrounding circumstances.”

In para No.208 of the judgment, the Trial Court further observed :-

“Be that as it may, the evidence of P.W.1, P.W.3 and P.W.52, has examined in the present case coupled with evidence of previous case of the informant, P.W.48, who proved the F.I.R. and the I.O., P.W.51 with huge documentary evidence has come on record, I hold that, both accused Nos.1 and 2,

involved and hatched a conspiracy with the accused of previous case, punishable u/s 120-B of I.P.C. I must state that, I have taken entire stock of the evidence led by the prosecution and too hold that, prosecution is able to prove its case in the nature of circumstantial evidence has been discussed aforementioned. The cumulative effect of facts and evidence, if taken together, shall lead to the only irresistible conclusion that, accused are also the perpetrator of the alleged crime and chain of evidence with the circumstances has come on record are so complete and in conclusive nature, which are consistent only with the hypothesis of the guilt of the accused. Apart from this, the said view is strengthened as both have absconded for longer period, which needs to connect their conduct in the nature of guilty mind and nothing else."

The Trial Court then reproduced a Commentary with case laws given in IPC by Ratanlal Dhirajlal (28th Edition - Reprint 2001).

7. On close scrutiny of the evidence in the case, it is found to be a case of no evidence against the appellants herein.

Section 120-B of the Indian Penal Code reads as under :-

"120-B. Punishment of criminal conspiracy :-

(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such

offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both."

It is true that, there can hardly be any direct evidence of a criminal conspiracy. There is, however, nothing to indicate the appellants to have been in agreement with each other and/or with the convicts in Sessions Case No.126/2002.

8. Let us appreciate evidence of material witnesses in the case. Shaikh Supdu (P.W.1) was examined in this case and previous case as well. He is the father of absconding accused Shaikh Asif, then a student of Engineering College. It is in his evidence that, on 27/8/2000, his son Asif took Rs.10,000/- for payment of college fees. He, however, did not turn up. On enquiries made by him, he realised that his son did not pay the amount to the College. He further learnt that Asif had association with accused in Sessions Case No.126/2002. According to him, those accused and the appellants herein took his son to Kashmir, for Jihad. It is further in his evidence that, Shakil Hannan, accused in Sessions Case No.126/2002 gave threats to his life if he dared to lodge a police report. He was categorical to state that Shakil and accused No.2 Parvej had sent his son for Jihad.

His evidence, in the examination-in-chief has, however, been shattered. In his cross-examination, He admitted that his son was not a member of SIMI. Appellant Parvej never stated his whereabouts of his son. He went on to state that his son Asif was a patriot. He did not have acquaintance with the appellant Parvej. He admitted to have not stated anything incriminating against appellant Parvej in his statement under Section 164 of the Code of Criminal Procedure. He went on to admit that whatever he has stated in examination-in-chief was hear-say.

As such, the case of the prosecution that appellant Parvej was involved to send P.W.1's son to Kashmir for Jihad has not been proved. There is no any other evidence in this regard.

9. P.W.2 Anil was the investigating officer. It is in his evidence that the appellant Parvej was arrested on 23/8/2006 and on his arrest, he recorded statement of P.W.1 on 28/8/2006. The same indicates that P.W.1 even did not state to the police anything incriminating against the appellant Parvej while his statement was recorded during investigation, pursuant to which the charge sheet in Sessions Case No.126/2002 was filed.

10. P.W.3 Ruprao Deshmukh was a retired Joint Secretary of Government of Maharashtra. He was examined in proof of the

sanction accorded by the State for prosecution of the appellant and the accused in Sessions Case No.126/2002 for offence punishable under Sections 153-A, 120-B, 121, 121-A, 122, 123, 201 read with Section 34 of the IPC and Sections 4 and 5 of the Explosive Substances Act, 1908.

11. Then there is evidence of P.W.21 Shaikh Abdulla. He was a Secretary and Incharge President of Aksa Masjid, Jalgaon. During investigation, 10 applications received by him in his aforesaid capacity were taken charge of. Those applications were nothing but requests made to him for allowing to hold meetings of SIMI workers on the premises of Aksa Masjid. Two of the applications are relevant herein. Those are Exhibits 302 and 304. Those applications were referred by this witness to state that those bear signatures of the appellants herein. Admittedly, on arrest of the appellants, their specimen handwritings have not been obtained, as was done in respect of other accused. The appellants did not sign these applications in the presence of P.W.21. The witness simply claims to have acquaintance with their handwritings. Even if we accept those applications to have been proved in the case, they do not take the case of the prosecution further. Application Exh.302 is dated 29/7/1997 while Exh.304 is dated 17/12/1999 furnished by appellants on letter-head of SIMI, Jalgaon Unit. Admittedly, activities of SIMI, nay SIMI itself was banned w.e.f. 27/9/2001. It means, when the

appellants moved those two applications Exh.302 and Exh.304, it was permissible for them to hold the meetings of SIMI. There is nothing in evidence to suggest that in the meetings held pursuant to those two applications, there was any discussion, decision-cum-conspiracy to commit any illegal act as has been covered by the charge/s framed in the case.

12. In the case of **Sujit Biswas Vs. State of Assam, (2013)12 SCC 406**, Hon'ble Supreme Court observed that mere abscondence of an accused does not lead to a firm conclusion of his guilty mind and an innocent man may also abscond in order to evade arrest, as in light of such a situation, such an action may be part of the natural conduct of an accused.

13. It is reiterated that, rest of the evidence in the case does not speak anything incriminating against the appellants herein. The evidence of P.W.1 to P.W.3 and P.W.21, as has been discussed above, do not lead to conclude the appellants to have been in conspiracy with the convicts in Sessions Case No.126/2002 to wage a war against Government of India and commit other offences to achieve the object of criminal conspiracy. The appellants have been convicted by the Trial Court on the basis of the evidence discussed hereinabove, interference with the impugned judgment and order is called for.

14. In the result, the appeals succeed. Hence, I pass the following order :-

ORDER

. Criminal Appeal No.184/2017 and Criminal Appeal No.186/2017 are allowed. The judgment and order of conviction and sentence dated 1/4/2017, passed by the Additional Sessions Judge, Jalgaon in Sessions Case No.173/2006, convicting the appellants for the offence punishable under Section 120-B of the Indian Penal Code is hereby set aside. Both the appellants are acquitted of the offence punishable under Section 120-B of the Indian Penal Code.

Both the appellants have been in jail. They be set at liberty forthwith, if not required in any other case.

Fine amount, if paid, be refunded to them.

(R.G. AVACHAT)
JUDGE

fmp/-