

(2009) 12 MAD CK 0141

In the Madras High Court

Case No : Criminal Revision Case No. 1149 of 2008

K. Vellingiri (PW 94) and Others

APPELLANT

Vs

Abdul Nazer Mahdani (A14) and Others

RESPONDENT

Date of Decision : 18-12-2009

Acts Referred:

Arms Act, 1959 — Section 25(1)A, 3
Criminal Procedure Code, 1973 (CrPC) — Section 235(1), 313, 397, 401
Evidence Act, 1872 — Section 27
Explosive Substances Act, 1908 — Section 3, 4, 6
Penal Code, 1860 (IPC) — Section 109, 120B, 148, 153, 153(1)

Citation : (2009) 12 MAD CK 0141

Hon'ble Judges : Prabha Sridevan, J;M. Sathyanarayanan, J

Bench : Division Bench

Advocate : B. Rabu Manohar, for the Appellant; V. Gopinath for R. 1 to R. 7 and P. Kumaresan, Public Prosecutor for R. 8, for the Respondent

Judgement

1. This Revision is preferred by P.W.94-K.Vellingiri, P.W.98-S.Vezhavendan, P.W.211- A. Balasubramanian, P.W.214- A. Muthusamy, P.W.97- K. Kuppusamy, against the acquittal of A14-Abdul Nazer Mahdani, A122-Nowsath, A123- Sardar @ Saithan, A136- A.T. Mohamed Asraf, A137- M.V. Subair, A148- Sivakumar @ Abdul Hameed @ Kuttubudeen, A165 - Sivakumar @ Akkoji @ Abdullah, passed by the learned Sessions Judge for Exclusive Trial for Bomb Blast Cases, Coimbatore in S.C. No. 2 of 2000 dated 1.8.2007.

2. The incident pertains to Coimbatore serial bomb blasts which took place in the evening hours of 14.2.1998 in Coimbatore city.

3. The facts had already been narrated in the appeals in Crl. A. No. 1111 of 2007 etc., batch and hence, it is not necessary to re-state the said facts once again.

4. The following charges were framed by the Sessions Court for Exclusive Trial for Bomb Blast Cases, Coimbatore, against the above said accused who are arrayed as Respondents 1 to 7 in this Revision:

(i) Against A14-Abdul Nazar Madhani:

Charge No. 1 - u/s 120B IPC

Charge No. 5 - u/s 6 r/w 4(b) of the Explosive Substances Act 1908.

Charge No. 11- u/s 6 r/w 4(b) of the Explosive Substances Act 1908.

Charge No. 12 - u/s 6 r/w 3 of the Explosive Substances Act 1908.

Charge No. 14 - u/s 153(a)(1) of IPC.

(ii) A122- Nowsath:

Charge No. 1-U/s 120B IPC

Charge No. 14 - u/s 153(a)(1) of IPC

Charge No. 18 - u/s 148 of IPC

Charge No. 19 - u/s 307 of IPC

Charge No. 20 - u/s 3 of Explosive Substances Act 1908.

(iii) A123-Sardar:

Charge No. 1-U/s 120B IPC

Charge No. 14 - u/s 153(a)(1) of IPC

Charge No. 18 - u/s 148 of IPC

Charge No. 19 - u/s 307 of IPC

Charge No. 20 - u/s 3 of Explosive Substances Act 1908.

(iv) A136- A.T. Mohamed Asaraf:

Charge No. 1-U/s 120B IPC

Charge No. 198 - u/s 109 r/w 212 of IPC

(v) A137- M.V. Subair:

Charge No. 1-U/s 120B IPC

Charge No. 197 - u/s 212 of IPC.

(vi) A141-Army Raju:

Charge No. 1- u/s 120B IPC

Charge No. 5 - u/s 6 r/w 4(b) of the Explosive Substances Act 1908.

Charge No. 11- u/s 6 r/w 4(b) of the Explosive Substances Act 1908.

Charge No. 12 - u/s 6 r/w 3 of the Explosive Substances Act 1908.

(vii) A148- Sivakumar @ Abdul Hameed:

Charge No. 1-U/s 120B IPC

Charge No. 10-U/s u/s 6 r/w 4(b) of the Explosive Substances Act 1908.

Charge No. 14 - u/s 153(a)(1) of IPC

(viii) A165- Sivakulmar @ Akoji:

Charge No. 1-U/s 120B IPC

Charge No. 14 - u/s 153(a)(1) of IPC

Charge No. 151- u/s 148 of IPC.

Charge No. 152- u/s 307 of IPC.

Charge No. 154- u/s 3 of Explosive Substances Act 1908.

5. According to prosecution, A14 had telephonically discussed with A1- S.A. Basha-Founder President of Al-umma (a banned organisation) about the retaliatory action to be taken due to the killing of 18 Muslims in the months of November/December 1997, at Coimbatore. In pursuance to the conspiracy, A14 was involved in procuring of Explosives, arms and ammunitions. A part of the said consignment was seized during the course of investigation and in pursuant to the arrest of Accused No. 2-Mohamed Ansari - General Secretary of the above said organisation and other Accused on 11.10.1998 at Rajamundhiri, Andhra Pradesh.

6. In pursuance of the conspiracy, A14 met A3-Tajudeen several times at Kerala and through him, he despatched High Grade Explosives which had been procured through A141- K. Raju @ Army Raju - a deserter from Assam Rifles, Nagaland. The said explosives are Plastic Explosive Kirkee type.

7. According to prosecution, the bomb manufactured by using the said explosive was concealed by Aman @ Amanullah (A21), who has to act as a human bomb in the public meeting to be held on 14.2.1998 at Coimbatore in which the BJP leader L.K. Advani to address, on the eve of election.

8. The prosecution further alleged that during the course of investigation, it has been revealed that the payment for the procurement of said explosives was sent by means of Demand Draft drawn at Chennai in the name of A145-Samudeen. A14 was arrested at Kozhikodu on 13.9.1998 by the Kerala Police in connection with Kozhikodu Kaspas Police Station Crime No. 103/1992 for the alleged commission of the offence u/s 153(a) and (b) of IPC and also in another case in Crime No. 62/1998 registered by Kozhikodu Police Station for the alleged commission of the offence u/s 120B, 212 of IPC and u/s 3 read with 25(1)A of the Arms Act. A14 was produced before the jurisdictional Magistrate Court at Coimbatore in pursuant to a Prisoner Transfer Warrant (P.T. Warrant) in connection with a case in Crime No. 151/1998 registered by B1-Bazaar Police Station. Thereafter, A14 was detained under National Security Act and it was subsequently revoked by the Central Government.

9. In so far as the Accused No. 122 and 123 are concerned, apart from they were charged u/s 120B of IPC., also charged for promotion of hatred ill-feelings and enmity between Muslims and Hindu community and developed feeling of insecurity among Hindu Religion at Coimbatore and other places. The said accused was also charged for the commission of offence u/s 148 of IPC. Further, according to the prosecution, on 14.2.1998 at around 3.30 P.M. at Thirumal Street, Coimbatore, they along with other accused had formed themselves into an unlawful assembly and were in possession of control of explosive substances and pipe bombs with an intention to endanger life or cause serious injury to the property. They were also charged u/s 307 of IPC. As they caused explosion of pipe bombs and hence they were charged u/s 307 of the IPC and Section 3 of the Explosive Substances Act, 1908.

10. Accused No. A-136 and A137 were charged as conspirators and also for the commission of Harboursing some of the accused and therefore, u/s 109 r/w 212 of IPC.

11. A-141-Raju @ Army Raju apart from charges for conspiracy was also charged for the commission of the offences under Explosive Substances Act as he procured and supplied of PEX Explosive to A14. But, in this revision, his acquittal is not challenged.

12. A-148 was charged for the commission of the offence u/s 120B of the IPC and Explosive Substances Act on the ground that he obtained the lease of the house in which manufacture of bombs was carried out. He was also charged u/s 153(a)(1) of IPC for having promoted hatred and ill-feelings between the members of two communities.

13. A-165 was charged for the commission of the offence for the conspiracy and promotion of ill-feelings between the members of two communities, being the member of unlawful assembly and also u/s 307 of IPC for having attempted to explode pipe bombs, petrol bombs, country bombs and caused destruction of properties by exploding pipe bombs, petrol bombs and country bombs.

14. The trial Court on a consideration of oral, documentary evidences and Material Objects, found that the charges against the above accused have not been proved by the prosecution beyond reasonable doubt and acquitted them u/s 235(1) of Cr.P.C. and some of the witnesses aggrieved by the same, had preferred this Revision.

15. Heard the submissions of Mr. B. Rabu Manohar, learned Counsel appearing for the Revision Petitioners and Mr. V. Gopinath, learned Counsel appearing for the first Respondent/A14 and Mr. P. Kumaresan, learned Public Prosecutor, appearing for the State.

16. It is the submission of the learned Counsel appearing for the Revision Petitioner that ingredients of the offence for which the above said accused were charged, have been proved by the prosecution beyond reasonable doubt and the

trial Court has not properly appreciated the same.

17. It is further submitted that the trial Court has committed a grave error in acquitting them by taking into consideration the trivial discrepancies. It is the further submission of the learned Counsel appearing for the Revision Petitioners that the testimonies of the witnesses had inspired confidence and they are cogent and in corroboration with the testimonies of other witnesses and the trial Court has ignored the same and erred in acquitting them.

18. Per contra, the learned senior counsel appearing for the first Respondent/A14 would contend that the prosecution has miserably failed to adduce any evidence to the effect that Accused No. 14 was associated with Al-umma and he sought to be implicated solely on the confession of Accused No. 3 which is inadmissible even against the said accused. It is further submitted by the learned senior counsel appearing for the first Respondent/A14 that there is absolutely no material or evidence to show that A14 introduced A41 to A3.

19. It is the further submission of the learned senior counsel appearing for the first Respondent/A14 that since the incriminating materials said to be made against A14 were put in a form of consolidated question, it resulted in grave prejudice to the said accused in answering the questions put to him u/s 313 of Cr.P.C.

20. Lastly, it was submitted by the learned senior counsel appearing for the first Respondent/A14 the scope of Revisional jurisdiction u/s 397 and 401 of Cr.P.C. is very limited and this Court cannot re-appreciate the evidence unless it is shown that perverse findings had been recorded by the trial Court. But the trial Court has appreciated the oral and documentary evidences put forth by the prosecution against A14 and other accused in proper perspective manner and acquitted first Respondent/A14 and Respondents 2 to 7. That apart, none of the above said accused was enlarged on bail and they have incarcerated throughout trial and at this distant point of time, it is not fair and reasonable to reverse the findings of acquittal and remand the matter once again to the trial Court for retrial.

21. The learned Public Prosecutor appearing for the 8th Respondent/State would submit that on a consideration of judgment of the trial Court, it was felt by the prosecution that there are no tenable grounds available to the State for preferring an appeal against the order of acquittal against the Respondents 2 to 7 and therefore, no appeal was filed.

22. This Court has carefully considered the submissions made by the learned Counsel appearing for the Revision Petitioners, learned senior counsel appearing for the first Respondent/A14 and the learned Public Prosecutor.

23. Though Revision against acquittal was preferred in respect of A14, A122, A123, A136, A137, A148 and A165, the learned Counsel appearing for the Revision Petitioners mainly concentrated upon the order of acquittal passed in favour of A14.

24. Accused No. 14 was charged for the alleged commission of offence u/s 120B of IPC (Charge No. 1), Section 6 r/w 4(b) of the Explosive Substances Act, 1908 (Charge No. 5), Charge Nos. 11 and 12 for the same offence and Charge No. 14 for the alleged commission of offence u/s 153(a)(1) of IPC.

25. The charge of conspiracy against Accused No. 14 was sought to be established by the prosecution on the basis of the phone calls between A1 who was at Chennai and A14 who was at Kerala. The calls were of a duration of 15,135 and 14 seconds respectively and admittedly, the conversation between the two accused have not been recorded and merely because there was a telephonic contact between A1 and A14 it cannot be said that A14 talked about the conspiracy to procure, manufacture, plant and explode bombs in Coimbatore city.

26. The essential ingredients of the offence of conspiracy is the agreement to commit an offence and if it is for accomplishment of an act which by itself constitutes an offence, then in such event, no overt act is necessary to be proved by the prosecution because in such a situation, criminal conspiracy is established by proving such an agreement. Where the conspiracy alleged is with regard to the commission of a serious offence, then in that event, mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about the conviction u/s 120B of IPC and the proof of any overt act by the accused or by any one of them could not be necessary. Thus, the essential ingredients being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established, the act would fall within the provision of Section 120B of IPC.

27. In *Kehar Singh and Others Vs. State (Delhi Administration)*, , it has been held that:

275. Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the court must enquire whether the two persons are independently pursuing the same end or they have come together in the pursuit of the unlawful object. The former does not render them conspirators, but the later does. It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient.

28. In *Ajay Agarwal Vs. Union of India and others*, , it has been held that:

8. ...It is not necessary that each conspirator must know all the details of the scheme nor be a participant at every stage. It is necessary that they should

agree for design or object of the conspiracy. Conspiracy is conceived as having three elements: (1) agreement; (2) between two or more persons by whom the agreement is effected; and (3) a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aim is to be accomplished. It is immaterial whether this is found in the ultimate objects. The common law definition of "criminal conspiracy" was stated first by Lord Denman in Jones case that an indictment for conspiracy must "charge a conspiracy to do an unlawful act by unlawful means" and was elaborated by Willies, J. on behalf of the judges while referring the question to the House of Lords in Mulcahy v. R. and House of Lords in unanimous decision reiterated in Quinn v. Leatham.

A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful; and punishable if for a criminal object, or for the use of criminal means.

29. In so far as this case is concerned, the prosecution relies upon circumstantial evidence. Except the above said phone calls there is absolutely no material produced by the prosecution to prove that A1 and A14 had conspired and that A14 was in contact with A1 for the purpose of procurement of explosive materials from A41-Army Raju.

30. The prosecution placed reliance upon the diaries seized from the house of Accused No. 14. It is to be pointed at this juncture that none of the witnesses speak about the entries in the said diary and absolutely no proof to show A14 maintained diary and the entries were made by him. The prosecution took the said diary as an incriminating material against A14. However, with regard to the said diaries, no questions were put to A14 u/s 313 of Cr.P.C. Therefore, mere seizure of Ex. P1602 - diary from the house of A14 will not establish the case of the prosecution that A14 was in contact with Accused No. 1.

31. P.W. 1087 - was examined by the prosecution with regard to the above said three calls made from Phone No. 34086 and he produced printout details of the above said phone- Exs. P1085 to 1088. In the cross-examination, the said witness has deposed that there is no evidence to show who has made and received the calls and the said calls were made during the month of December 1997. The prosecution has also failed to establish that A14 introduced A41 to A3 and A3 was in contact with A14. The trial Court on a careful consideration and appreciation of the evidences, found that the charge of conspiracy against A14 has not been proved and we find no sound reason to interfere with the said findings.

32. Charges No. 5, 11 and 12 pertain to the commission of the offence under

Explosive Substances Act, 1908. Charges 5, 11 and 12 proceed on the footing that in pursuance to the conspiracy and in the course of same transaction and execution of the same, A1 to A4, A7 to A12, A14, A17, A106, A107, A108, A119, A132, A141, A146 and A152 delivered variety of bombs to several unidentified persons with an intention to endanger human life and cause injury and also for destruction of property. Individual instances of bomb explosion in front of Poombukar Handicrafts Centre in Town Hall Road, Guruvayoorappan Automobile Workshop, and Kuniyamuthur also mentioned. As already held above, in the absence of the proof of conspiracy between A14 and A1 with regard to the procurement of PEX type of explosive from A141 and using it for the manufacture of the bombs, this Court is not in a position to sustain the said charges against A14. The prosecution has also failed to establish that the unused/defused bombs were manufactured by using PEX type of explosives and some of the accused said to have manufactured, transported and planting of bombs were convicted and their appeals are dealt with separately. Admittedly, A14 was arrested at Kerala in connection with two cases registered by Kozhikodu Police Station and on P.T. Warrant, he was produced before the Judicial Magistrate, Coimbatore and was in judicial custody. It was not the case of the prosecution that A14 was present at Coimbatore during bomb blast. Since the prosecution has failed to prove Charges No. 5, 11 and 12 against A14, beyond any reasonable doubt, the trial Court has rightly acquitted A14 on all those charges and we find no tenable grounds to interfere with the said findings.

33. A14 was also charged for the alleged commission of the offence u/s 153(a) (1) of the IPC. The said charge pertains to the brainwashing of Muslim youths and trained them to indulge in violence against the police officials, which resulted in the promotion of hatred ill-feel in the Muslim community. The allegation made against A14 was that he effected publication of a magazine in Malayalam language in the State of Kerala during the month of January, 1998 and the said act has been done to disrupt communal harmony. It was found that A14 was only Honorary Editor of the above said magazine which effected publication and admittedly no case has been filed against the Editor and Managing Director of the said magazine. The trial Court on perusal of the said publication found that any call has been made to any one to protest or instigate any one to do any overt act which banned, to disrupt communal harmony. The trial Court has also found that the effect of the said publication made by A14 at Kerala has not resulted in unrest or communal disharmony either in the State of Kerala and Tamil Nadu and more particularly at Coimbatore. Therefore, the trial Court has found that Accused No. 14 has not committed any offence under Charge No. 14. Hence, the trial Court has acquitted A14 of the alleged commission of offence u/s 153(a)(1) of IPC (Charge No. 14). No grounds had been made out by the Revision Petitioners to interfere with the said findings recorded by the trial Court.

34. The Revision Petitioners sought to establish guilt on the part of the A14 through the confession of A3. According to A3, he has stayed in a hotel at Ernakulam on 9.12.1997 and in the register maintained by the lodge, he put his

name as Akbar Ali. It is to be pointed out at this juncture that custody of A3 was taken by means of a Transit Warrant and according to P.W.1288, A3 voluntarily gave a confession on 26.12.1998. Admittedly, no recovery was effected in pursuant to the said confession. However, in the said confession, A3 implicated A14 and A141. It is a settled position of law that the confession of the co-accused is not substantive piece of evidence and it is a very weak piece of evidence. The confession of the accused cannot be relied upon except for the purpose of any recovery effected in terms of Section 27 of the Evidence Act. Admittedly, no recovery was effected in pursuant to the confession of A3.

35. No corroboration on material particulars is available on the confession of A3 in so far as Accused No. 14 and A141 are concerned. No doubt, the serial bomb blasts at Coimbatore were of grave in nature and heinous offence. However, a suspicion or surmise is not enough to convict the accused unless the prosecution proves their guilt beyond any reasonable doubt.

36. This Court on an independent application of mind with the materials relied upon by the Revision Petitioners, is of the view that the case of the prosecution as against A14 and other acquitted accused bristles with infirmities and inconsistencies. The Revisional powers of this Court are discretionary and are exercised to meet the ends of justice. The following are some of the grounds which would justify this Court in interfering with the finding of acquittal in Revision:

- (a) Where the trial Court has no jurisdiction to try the case, but has still acquitted the accused, or
- (b) Where the trial Court has wrongly shut out the evidence which the prosecution wished to produce, or
- (c) Where the appeal Court has wrongly held evidence which was admitted by the trial Court to be inadmissible, or
- (d) Where the material evidence has been overlooked either by the trial Court or by the appeal Court, or
- (e) Where the acquittal is based on a compounding of the offence, which is invalid under the law.

37. It is a settled position of law that the differing perception over evaluation of evidence is not a ground for interference in case of revision against acquittal. There must be some defect of procedure or perversity of grave magnitude resulting in miscarriage of justice and unless and until, any legal infirmity in which procedure or in the conduct of trial or patent illegality is pointed out, the revisional Court will not interfere with the finding of acquittal recorded by the trial Court.

38. It is also a settled position of law that the revisional Court does not function as a Court of appeal and cannot reappraise the evidence.

39. Even though, this Court, on appreciation of evidence is entitled to reach a conclusion different from the trial Court, that by itself would be no justification for exercise of the revisional jurisdiction u/s 401 of the Cr.P.C.

40. In the case of invocation of revisional jurisdiction by a private party like in this case, an order of acquittal ought not to be interfered lightly and the revisional jurisdiction could be exercised only in exceptional cases where the interest of the public justice require interference for the correction of manifest illegality or the prevention of a gross miscarriage of justice.

41. This Court on a careful consideration and appreciation of oral and documentary evidences is of the considered opinion that the trial Court has considered the entire evidence in proper perspective and by sound reasons, has recorded a finding of acquittal against A14 and others. As already said above, this Revision was mainly urged with regard to the order of acquittal of A14 and no submissions were made in respect of other accused who were acquitted by the trial Court.

42. This Court finds no error or illegality or infirmity in the order of acquittal passed by the trial Court. Therefore, the revision is dismissed confirming the order of acquittal passed by the trial Court.