

(2012) 12 DEL CK 0203

In the Delhi High Court

Case No : Criminal A. 1086 of 2012

National Investigation Agency

APPELLANT

Vs

Wasim Akram Mallik

RESPONDENT

Date of Decision : 03-12-2012

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 164, 227, 482
Explosive Substances Act, 1908 — Section 4
National Investigation Agency Act, 2008 — Section 21(1)
Penal Code, 1860 (IPC) — Section 120B, 121, 121A, 122, 123
Unlawful Activities (Prevention) Act, 1967 — Section 15, 16, 18, 20, 38

Citation : (2013) 198 DLT 296 : (2013) 1 JCC 136

Hon'ble Judges : Sanjiv Khanna, J; S.P. Garg, J

Bench : Division Bench

Advocate : Sidharth Luthra, ASG with Mr. Amit Kumar and Mr. Pranay Agarwal, for the Appellant; R.M. Tufail with Mr. Vishal Raj Sehijpal, for the Respondent

Final Decision : Disposed Off

Judgement

Sanjiv Khanna, J.—This order disposes of this appeal u/s 21(1) of the National Investigation Agency Act, 2008 (NIA Act, for short) read with Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C., for short) and Article 227 of the Constitution of India, filed by the National Investigation Agency. The appellant is aggrieved against the findings, recorded in the impugned order dated 4th September, 2012 that charges should not be framed u/s 121A/122/123 IPC, against Wasim Akram Malik, the respondent herein. The reasoning, given in the impugned order, for not framing the charges against the respondent reads as under:-

23. Section 227 CrPC postulates that an accused in a session case is to be discharged if the Judge considers that there is no sufficient ground for proceeding against the accused.

24. So far as the argument of Ld. Spl. PP that offences even under sections 121-A/122/123 IPC are made out is concerned, in my opinion, the same is devoid of merits. These offences require something more than the once which is available against accused (A-1) in this case. Merely because a bomb had been exploded out side the Hon"ble Delhi High Court and in the e-mail there was a reference of release of Afzal Guru, it does not mean that these three offences are made out. These offences are distinct and are of serious nature. The evidence, even at the stage of framing of charges under these sections has to be clear and commensurate with the requirement of these sections.

By the same impugned order, the learned Additional Sessions Judge has directed framing of charges under Sections 120B/440/436/302/307/325/323 IPC and Section 4 of Explosive Substance Act, 1908 and Sections 16, 18, 20, 38, 39 of Unlawful Activities (Prevention) Act, 1967. The respondent has not preferred an appeal against the impugned order, framing the aforesaid charges and, therefore, framing of charges under the said provisions are not required to be examined by us. The limited issue raised here, is whether there are sufficient grounds or evidence to frame charges against the respondent under Sections 121/121A/122 and 123 IPC. For the purpose of record, we notice that paragraph 24 of the impugned order does not mention Section 121 IPC though the charge-sheet alleges commission of the said offence. This, however, is not the ground on which we have based our decision.

2. The aforesaid relevant sections read as under:-

Section 121. Waging, or attempting to wage war, or abetting waging of war, against the Government of India

Whoever wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine.

Illustration

A joins an insurrection against the Government of India].

A has committed the offence defined in this section.

Section 121A. Conspiracy to commit offences punishable by section 121

121A. Conspiracy to commit offences punishable by section 121.-- Whoever within or without India conspires to commit any of the offences punishable by Section 121, or conspires to overawe, by means of criminal force or the show of criminal force, the Central Government or any State Government, shall be punished with imprisonment for life, or with imprisonment of either description which may extend to ten years, and shall also be liable to fine.

Explanation

To constitute a conspiracy under this section, it is not necessary that any act or

illegal omission shall take place in pursuance thereof.

122. Collecting arms, etc., with intention of waging war against the Government of India

Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Government of India, shall be punished with imprisonment for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

123. Concealing with intent to facilitate design to wage war

Whoever by any act, or by any illegal omission, conceals the existence of a design to wage war against the Government of India, intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

3. Interpreting the aforesaid provisions, the Supreme Court in Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid Vs. State of Maharashtra, , has explained that Section 121A deals with conspiracy to commit an offence punishable u/s 121 per se, as an offence punishable with imprisonment for life or period which may extend to 10 years. The explanation thereto stipulates that the offence is complete even without an act or illegal omission, pursuant to the conspiracy. The section uses the expression "the Central Government or any State Government" in contradiction to Section 121 which uses the expression "Government of India" and is applicable when an accused "wages war". (This expression "wages war" or "waging war" has been examined separately.) Section 122 deals with "collection of arms with the intention of waging war" per se and treats it as an offence whether or not the arms were actually used. This section uses expression "Government of India". Section 123 deals with "concealing with the intent to facilitate design to wage war against Government of India".

4. The expression "waging war" need not be examined afresh, in view of the lucid and authoritative pronouncements of the Supreme Court in Nazir Khan and Others Vs. State of Delhi, (commonly known as Red Fort case) and State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, (commonly known as Parliament Attack case).

5. In view of the aforesaid elucidation, we refrain and do not feel it necessary to refer to the following decisions:

(A) AIR 1931 235 (Rangoon) (Relied upon by Addl. Solicitor General on behalf of the appellant)

(B) Manabendra Nath Roy Vs. Emperor, and State of West Bengal vs. Md. Jamiluddin Nasir & Ors., Death Reference No. 2/2005 decided by High Court of

Calcutta on 5th February, 2010

(relied upon by the counsel for the respondent)

6. It is apposite to refer to legal position and interpretation of the term "waging war", as expounded in Navjog Singh's case (Supra). First, the word of caution and on the approach to be adopted, it has been observed as under:-

283. While these are the acceptable criteria of waging war, we must dissociate ourselves from the old English and Indian authorities to the extent that they lay down a too general test of attainment of an object of general public nature or a political object. We have already expressed reservations in adopting this test in its literal sense and construing it in a manner out of tune with the present day. The Court must be cautious in adopting an approach which has the effect of bringing within the fold of Section 121 all acts of lawless and violent acts resulting in destruction of public properties etc., and all acts of violent resistance to the armed personnel to achieve certain political objectives. The moment it is found that the object sought to be attained is of general public nature or has a political hue, the offensive violent acts targeted against armed forces and public officials should not be branded as acts of waging war. The expression "waging war" should not be stretched too far to hold that all the acts of disrupting public order and peace irrespective of their magnitude and repercussions could be reckoned as acts of waging war against the Government. A balanced and realistic approach is called for in construing the expression "waging war" irrespective of how it was viewed in the long past. An organized movement attended with violence and attacks against the public officials and armed forces while agitating for the repeal of an unpopular law or for preventing burdensome taxes were viewed as acts of treason in the form of levying war. We doubt whether such construction is in tune with the modern day perspectives and standards. Another aspect on which a clarification is called for is in regard to the observation made in the old decisions that "neither the number engaged nor the force employed, nor the species of weapons with which they may be armed" is really material to prove the offence of levying/waging war. This was said by Lord President Hope in *R Vs. Hardie* in 1820 and the same statement finds its echo in many other English cases and in the case of *Maganlal Radha Krishan Vs. Emperor*, AIR 1946 Nag 173 186 . But, in our view, these are not irrelevant factors. They will certainly help the Court in forming an idea whether the intention and design to wage war against the established Government exists or the offence falls short of it. For instance, the fire power or the devastating potential of the arms and explosives that may be carried by a group of persons" may be large or small, as in the present case, and the scale of violence that follows may at times become useful indicators of the nature and dimension of the action resorted to. These, coupled with the other factors, may give rise to an inference of waging war.

7. In the immediate preceding paragraph, the Supreme Court observed and laid emphasis on the *qua amino* of the accused being prosecuted:-

282. On the analysis of the various passages found in the cases and commentaries referred to above, what are the high-lights we come across? The most important is the intention or purpose behind the defiance or rising against the Government. As said by Foster, "The true criterion is quo animo did the parties assemble"? In other words the intention and purpose of the war-like operations directed against the Governmental machinery is an important criterion. If the object and purpose is to strike at the sovereign authority of the Ruler or the Government to achieve a public and general purpose in contradistinction to a private and a particular purpose, that is an important indicia of waging war. Of course, the purpose must be intended to be achieved by use of force and arms and by defiance of Government troops or armed personnel deployed to maintain public tranquility. Though the modus operandi of preparing for the offensive against the Government may be quite akin to the preparation in a regular war, it is often said that the number of force, the manner in which they are arrayed, armed or equipped is immaterial. Even a limited number of persons who carry powerful explosives and missiles without regard to their own safety can cause more devastating damage than a large group of persons armed with ordinary weapons or fire arms. Then, the other settled proposition is that there need not be the pomp and pageantry usually associated with war such as the offenders forming themselves in battle-line and arraying in a war like manner. Even a stealthy operation to overwhelm the armed or other personnel deployed by the Government and to attain a commanding position by which terms could be dictated to the Government might very well be an act of waging war.

8. In the Navjot Sandhu's case (supra), where the court was specifically concerned with terrorists act and the term "waging war", it held as under:-

275. War, terrorism and violent acts to overawe the established Government have many things in common. It is not too easy to distinguish them.....

276. It has been aptly said by Sir J.F. Stephen:

.....Unlawful assemblies, riots, insurrections, rebellions, levying of war are offences which run into each other and not capable of being marked off by perfectly definite boundaries. All of them have in common one feature, namely, that the normal tranquility of a civilized society is, in each of the cases mentioned, disturbed either by actual force or at least by the show and threat of it.

277. To this list has to be added "terrorist acts" which are so conspicuous now-a-days. Though every terrorist act does not amount to waging war, certain terrorist acts can also constitute the offence of waging war and there is no dichotomy between the two. Terrorist acts can manifest themselves into acts of war. According to the learned Senior Counsel for the State, terrorist acts prompted by an intention to strike at the sovereign authority of the State/Government, tantamount to waging war irrespective of the number involved or the force employed.

278. It is seen that the first limb of Section 3(1) of POTA-

with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever....

and the acts of waging war have overlapping features. However, the degree of animus or intent and the magnitude of the acts done or attempted to be done would assume some relevance in order to consider whether the terrorist acts give rise to a state of war. Yet, the demarcating line is by no means clear, much less transparent. It is often a difference in degree. The distinction gets thinner if a comparison is made of terrorist acts with the acts aimed at overawing the Government by means of criminal force. Conspiracy to commit the latter offence is covered by Section 121-A.

9. In Kasab's case (supra), the Supreme Court has referred to paragraphs 275 to 278 in Navjot Sandhu's case (supra) and observed that if an offence comes into definition of terrorists' act, u/s 15 of the Unlawful Activities (Prevention) Act, it would not automatically fall out of Section 121 IPC. "Terrorist act" and act of "waging war against the Government of India" may have overlapping features, but a "terrorist act" may not always be an act of "waging war" against the Government of India, and vice versa. In Kasab's case (supra), Supreme Court has held that the appellant therein was rightly convicted under Sections 121, 121A and 122 IPC, observing as under:-

543.....What matters is that the attack was aimed at India and Indians. It was by foreign nationals. People were killed for no other reason than they were Indians; in case of foreigners, they were killed because their killing on Indian soil would embarrass India. The conspiracy, in furtherance of which the attack was made, was, inter alia, to hit at India; to hit at its financial centre; to try to give rise to communal tensions and create internal strife and insurgency; to demand that India should withdraw from Kashmir; and to dictate its relations with other countries. It was in furtherance of those objectives that the attack was made, causing the loss of a large number of people and injury to an even greater number of people. Nothing could have been more in like manner and by like means as a foreign enemy would do.

10. It is in this context that the Additional Solicitor General had drawn our attention to the facts stated in paragraph 17.1 of the charge sheet and argued that the animus or the intention for the attack or the bomb blast in question, which resulted in death of 15 and injuries to 79 persons, at or near Reception Counter of Delhi High Court, cannot be read in isolation since it was in furtherance of the said cause or intention. Our attention was also drawn to the averments made in paragraph 17.10 to 17.12, 17.15 to 17.31 regarding the

background why and how the respondent got involved and became a conspirator. Paragraph 17.31 reads as under:-

17.31. Investigation has brought out that, "secession of Kashmir" was their yet another favourite topic of discussion in college esp. amongst the students from J&K. They discussed that since both Pakistan and India are nuclear powers they will never go for a full fledged war, however, a "sustained low intensity proxy war" was the only solution to destabilize "soft Indian state". Wasim always nursed an idea of attacking the Indian establishments and disintegrating this country.

11. It was also submitted that the place for bomb blast was deliberately chosen so as to attack and defy the government, which includes Judiciary, and reference was made to the e-mail dated 7th September, 2011, which was circulated through media channels immediately after bomb blast.

12. In paragraphs 538 and 539 in Kasab's case (supra) it has been observed:-

538. It is important to note here that earlier the word used in Section 121 (as well as all the other Sections referred to above) was "Queen". After the formation of the republic under the Constitution it was substituted by the expression "Government of India" by the Adaption of Laws Order of 1950. In a republic, sovereignty vests in the people of the country and the lawfully elected government is simply the representative and a manifestation of the sovereign, that is, the people. Thus, the expression "Government of India", as appearing in Section 121, must be held to mean the State or interchangeably the people of the country as the repository of the sovereignty of India which is manifested and expressed through the elected Government.

539. An illuminating discussion on the issue of "Waging war against the Government of India" is to be found in this Court's decision in Navjot Sandhu. In paragraph 272 of the judgment P. Venkatarama Reddi, J., speaking for the Court, referred to the report of the Indian Law Commission that examined the draft Penal Code in 1847 and quoted the following passage from the report:

272....."We conceive the term "wages war against the Government" naturally to import a person arraying himself in defiance of the Government in like manner and by like means as a foreign enemy would do, and it seems to us, we presume it did to the authors of the Code that any definition of the term so unambiguous would be superfluous.

13. Learned counsel for the respondent, on the other hand, submitted that the respondent was a student who was studying MBBS in Bangladesh. It was submitted that he has been falsely implicated in the case and had himself voluntarily came to India from Bangladesh, when he was required to join investigation. It was further submitted that the prosecution has not been able to establish who had actually planted the bomb and the two persons mentioned in the charge-sheet stated to be Pakistani nationals have not been arrested. The

names of the said persons have been mentioned in several other charge-sheets. In fact the said persons have not been identified. It was submitted that the security forces were directly not attacked and, therefore, there was no question of waging of war by the respondent against the Government of India.

14. We have considered the contention and find merit in what is submitted and stated by Additional Solicitor General, on behalf of National Investigation Agency. We would not like to express our detailed opinion on the allegations made, as at the present stage, we have to only determine and decide whether the charge in the aforesaid sections should be framed. The allegations made in the charge sheet have to be examined with the material and evidence relied on by the prosecution. The prosecution is still to lead evidence and prove the charges and allegations. At this stage, the criteria and the principle applicable, is to consider the record of the case and the documents submitted and if after hearing arguments, the court is of the opinion that there is ground for presuming that the accused has committed the offence, it shall frame the charge. The word "presume" means to believe or accept, upon probable evidence and to take as proved until the evidence to the contrary is forthcoming. This being the initial stage, the court has to see the material on record, the facts and whether they would be compatible with the innocence of accused or not. A strong suspicion is sufficient and the final test of guilt is not to be applied. (see *Amit Kapoor Vs. Ramesh Chander and Another*,). We have already reproduced and referred to the allegations made in the charge-sheet, and the background of the facts which, it is alleged, constitute the animus and the allegation that the bomb blast at the Delhi High Court cannot be read in isolation but have to be read along with the surrounding and in backdrop of the facts alleged. We may, in this regard, reproduced paragraphs 17.24 and 17.25 of the charge-sheet which read as under:-

17.24 Investigation revealed that accused Wasim Akram Malik (A-1) was a student of MBBS at Jalalabad Ragib-Rabeya Medical College and Hospital, Sylhet, Bangladesh. He joined MBBS in the year 2006. His younger brother namely, Janaid Akram Malik (A-5), is an active cadre of the prescribed terrorist organization Hizb-ul-Mujahideen since Nov 2010.

17.25 Investigation has brought out that while accused Wasim Akram Malik (A-1) was studying in Jammu in 2005, he became very close to one Salim Wani, a commander of terrorist group Jaish-e-Mohammed (JeM) and his Pakistani terrorist associates. He was caught in the year 2005 by the Police while roaming around with Salim Wani. However, he was released by police being a juvenile without any legal action having been taken against him. It was only after his incident that his father arranged for his admission in Bangladesh so that his son mends his ways.

15. We may note here that the prosecution has alleged conspiracy and invoked Section 120B IPC and the charges, under several sections of the IPC and Unlawful Activities (Prevention) Act, have been framed relying upon the said

sections. The Trial Court has accordingly found that there is sufficient evidence or material to prima facie show conspiracy and to frame the said charges. It will be appropriate to reproduce paragraphs 17 and 22 of the impugned order in which the Trial Court has recorded as under:-

17. Statements of PW H-6, H-7 and H-8 would show the bent of mind of A-1. Inference of his intention to commit the offences can be inferred.

----- 22. Whatever may be the reasons for the prosecution witnesses to state that accused (A1) was a member of the terrorist organization Hizb-Ul Mujahideen, the organization was declared as terrorist organization, the fact remains, that at this stage it cannot be said that there is no material to frame charges against accused (A1). I am deliberately not discussing the prosecution evidence in detail as it is likely to prejudice the case of the parties. There are statements u/s 164 CrPC of Amir Abbas Dev, the co-accused, who has been granted pardon by this court after he showed his willingness to turn approver. These two statements - dated 14.10.2011 and 2.5.2012 are also being taken into account, besides other evidence to form an opinion that there is enough material to frame charges against accused (A1).

(A-1 refers to the respondent herein.)

16. The text of the e-mail relied upon by the appellant and sent to the media soon after the bomb blast from e-mail ID: harkatuljihadi2011@gmail.com, reads as under:-

we owe the responsibility of today's blasts at high court delhi.....our demand is that Afzal Guru's death sentence should be repealed immediately else we would target major high courts & THE SUPREME COURT OF INDIA.....

17. The expression "Government of India" in Section 121 IPC and other connected provisions of the IPC is not to be read in a narrow sense. The Government of India consists of the Legislature, the Executive and the Judiciary. In Kasab's case (supra), the Supreme Court observed the said term is not reflected in narrow sense in Section 121, but it has been used in the sense to imply the Indian State, the juristic embodiment of the sovereignty of the country that derives its legitimacy from the collective will and consent of its people. It signifies the notion of sovereignty and is consistent with the Public International Law, wherein sovereignty of the territorial unit is deemed to vest in the people of the country and exercised by representative of the "Government". We may note that before us the Additional Solicitor General has filed, in sealed cover, statements of protected prosecution witnesses and our attention was specifically drawn to the statements of PWX3, PWX5, PWX14, PWX15 etc. We record and note the contention that bomb blast was not targeted to injure or to cause injury to a particular person but was kept at the reception counter of the Delhi High Court which issues passes that enables litigants and others to enter the main High Court building. The location i.e. The High Court has been highlighted. The object, purpose and animus as propounded and alleged has to be given due

weightage and cannot be discounted or rejected at this stage. In these circumstances, we do not agree with the counsel for the respondent that unless security forces are specifically targeted, Section 121 is not attracted. As noticed by the Supreme Court in Kasab's case (supra), the expression "Government of India" as appearing in Section 121, must be held to be "State" or interchangeably of the People of the country as repository of the sovereignty of India which is manifested and expressed through the elected Government. The dividing line i.e. terrorist act or waging war, in some cases, may be thin but the present case has its own peculiarities like the location where the bomb exploded, animus which has been attributed, the email etc. The facts as alleged and material/evidence relied upon and mentioned above justify framing of charges under the said sections. The question whether or not the offence in question was actually committed or not is a matter of trial and merits. It can only be determined and decided after evidence is led and examined. Regarding other contentions raised on behalf of the respondent, recorded in paragraph 13 above, we again state that these relate to the merit of the evidence which will be recorded or the pleas raised in defence and, therefore, will necessarily depend upon the statement of the witnesses. We have deliberately refrained from giving a detailed and conclusive opinion on merits etc., as it may prejudice the parties. At the present stage we are only examining the question of whether or not the charges should be framed. The opinion expressed will not be treated as determinative or final by the Trial Court when it examines the question on merits after evidence has been recorded. In view of the aforesaid position, we allow the present appeal and set aside paragraph 24 of the impugned order, discharging the respondent and holding that there is no ground or material to frame charge under Sections 121, 121A, 122 and 123 IPC. Charges under Sections 121, 121A, 122 and 123 read with Section 120B IPC, will be framed by the Trial Court. The appeal is disposed of accordingly.