

(2018) 11 J&K CK 0037
In the Jammu And Kashmir High Court
Case No : Criminal Appeal No. 29 Of 2007

Nisar Ahmed @APPELLANT@Hash State Of Jammu & Kashmir

Date of Decision : 22-11-2018

Acts Referred:

Arms Act, 1959 — Section 7, 25, 26, 27
Explosive Substances Act, 2012 — Section 4, 5
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 120B, 212
Code Of Criminal Procedure, 1973 — Section 154, 154(1), 155, 156, 157, 157(1),
162, 169, 170, 173, 173(2), 173(3), 173(8), 342
Terrorist And Disruptive Activities (Prevention) Act, 1987 — Section 5
Evidence Act, 1872 — Section 27
Indian Penal Code, 1860 — Section 302, 307, 326

Citation : (2018) 11 J&K CK 0037

Hon'ble Judges : Sanjay Kumar Gupta, J

Bench : Single Bench

Advocate : A. K. Shan, C. M. Koul

Final Decision : Allowed

Judgement

1. This Criminal Appeal is preferred by the appellant-Nisar Ahmed, who has been convicted/sentenced by the learned Sessions Judge, Jammu, vide impugned judgment of conviction/order of sentence dated 18.10.2007/24.10.2007 respectively whereby he has been convicted and sentenced to undergo imprisonment for a term of 7 years and to pay fine of Rs.5000/- in proof of offence under section 7/25 Arms Act and for a term of 5 years and fine of Rs.5000/- in proof of offence under section 5 Explosive Substances Act. In default of payment of fine he has to undergo further imprisonment for a period of 3 months each. Both the sentences were ordered to run concurrently.

It is pertinent to mention here that the learned trial Court vide impugned judgment of conviction/order of sentence has convicted/sentenced accused Nisar Ahmed-A1 (the appellant herein) and Waqar Shah-A3; while acquitting accused-Parveen Akhter A-2 for want of evidence vide its order dated 26.10.2006. The instant appeal is only on behalf of accused-Nisar Ahmed (the appellant herein).

2. Learned counsel for the appellant has challenged the impugned judgment of conviction/order of sentence stating that the same is against law and facts of the case. The prosecution in order to prove its case had produced as many as 12 witnesses but none has stated with regard to contentions as projected in the Police Challan that the appellant gave protection to the Pakistani militants. The evidence produced by the prosecution although tried to connect the appellant with the bag alleged to have been recovered from the Baandi (cattle shed) of the appellant, but it is proved in the search and seizure made by them was against the mandatory provisions of law and the same was seized in the presence of the police witnesses only when admittedly the civilians were available, which were not called by the investigating officer that he also admitted in his cross-examination. The prosecution has failed to prove that the alleged Baandi belonged to the appellant. The independent prosecution witnesses produced by the prosecution have specifically stated in their statements that there exists no baandi of the appellant but the trial Judge has not said anything with regard to it. That the prosecution has miserably failed to prove that the alleged seized ammunition although recovery is denied, was in live condition as the same was not sent to the expert for its opinion and there is no evidence as to whether the ammunition so seized can be used or that was explosive. That the seizure made by the prosecution at the spot was against the mandatory provisions with regard to seizure and was ever produced for its seal before any judicial Magistrate or Gazetted Officer. The prosecution has stated that the bag was seized and was brought at JIC Center at Jammu but it has miserably failed to show that the said seized ammunition was ever defused and if defused, where it was done. That even the prosecution has failed to prove that the bag so seized was in actual possession of the appellant as the prosecution has not identified the spot from any Patwari or any revenue authority with regard to actual physical possession of the alleged Baandi. Reliance on the statement of Waqar Shah cannot be read against the appellant. That even otherwise the sanction obtained by the prosecution for production of challan was defective and was cyclostyle copy, which was not proved. The so called sanction letter is not bearing the seal of the sanctioning authority hence it had no evidentiary value. It is further stated that the trial Judge has not appreciated the law properly with regard to alleged recovery made. The trial Judge has also not properly appreciated the evidence in right perspective while passing the impugned judgment/order of sentence. It is also contended by learned counsel for the appellant, that the appellant was arrested on 01.04.1996 and the police challan was produced before the Court on 07.03.2000, hence by compounding the period the appellant remained in custody the conviction period is covered so he was released from the jail by Jail Authority on 24.10.2007. The foremost argument of counsel for appellant is that there was no expert report of FSL that arms and ammunition recovered were in working condition.

3. On the basis of afore mentioned submissions, learned counsel for the appellant has prayed that the instant appeal be allowed and the impugned

judgment/order of sentence be set aside. In support of his contention, learned counsel for the appellant has placed reliance on the judgments rendered by Apex Court as well as this Court in cases titled Abdulla Pochamma Vs. State of Andhra Pradesh reported in 1989 (Sup2) SCR 152 (Criminal Appeal No.294 of 1988 D/d. 28.3.1989); Jaspal Singh Vs. State of Punjab reported in AIR 1999 SC 1548; Maqbool Hussain & Ors. Vs. State of J&K & Ors. reported in 2007 (1) JKJ 226; Sat Pal & Ors. Vs. State & Ors. reported in 2009 (2) JKJ 703; and Abdul Rashid Vs. State & Ors. reported in 2011 Cr.LJ (J&K) 1280.

4. Per contra, learned State counsel has supported the impugned judgment of conviction/order of sentence stating that the same having been passed after appreciating the evidence available on record by the learned trial Court and no other view is possible than the once already taken by it.

5. Heard learned counsel for both side and gone through the impugned judgment of conviction/order of sentence minutely.

6. Facts giving rise to filing of this appeal briefly stated are that two accused, Nissar Ahmed A-1 and Waqar Shah A-3 have been tried for offences under Sections 3 Enemy Agent Ordinance, 7/25 Arms Act and 4/5 Explosive Substances Act also along with them one Parveen Akhter A-2 was prosecuted but she has been acquitted for want of evidence vide order dated 26.10.2006 by the trial Court. As per the prosecution case, A-3, who is a Pakistani, was arrested in FIR No.41/96 of Police Station, Mendhar. During investigation at Joint Interrogation Center (JIC), Jammu he on 30.03.1996 made a disclosure statement that he has kept with A-I arms/ammunition, namely, plastic grenades-14 Nos. pistols-3 Nos., pistol rounds-111 Nos., AK 56 rounds-500 Nos., remote control-8 Nos., wireless sets-2 Nos., detonators-16 Nos. along with fuse wire, silencer-1 No., dagger-2 Nos., letter pads of Jammu Kashmir Muslim Liberation Army and Harkat-ul-Ansar, seals-8 Nos., posters in Urdu language, Organization Cards 1 bundle and Cells battery 8 dozens. Lekh Raj Wazir PW-10, the then SHO JIC, Jammu recorded the disclosure statement. Following the said disclosure a police team headed by Balwant Roy Choudhary Dy SP in charge JIC PW-1 took A-3 to the house of A-I at village Samote within the jurisdiction of Police Station, Surankote on 1.4.1996 and arrested A-1. A-1 made a disclosure statement that he has kept the arms/ammunition given to him by A-3 under hay in his Baandi (cattle shed). The Dy SP recorded the disclosure statement and effected recovery on the basis of information provided by A-1. The Dy SP then issued docket to SHO Police Station, Surankote, for registration of FIR. The SHO Police Station, Surankote, registered FIR No.27/1996 under Sections 3 Enemy Agent Ordinance, 3/25 Arms Act, 4/5 Explosive Substance Act, 212 and 120-B RPC and submitted its copy to the Dy SP. The Dy. SP entrusted investigation to Rattan Chand Shan, ASI PW-12. He took possession of and seized all the memos pertaining to FIR 27/96. Recorded statements of the witnesses and arrested A-3 in F.I.R 27/96. Upon investigation it was found that A-1 and his wife A-2 had been providing shelter to and harboring Pak militants in their house. A-1 had been storing in his house and

providing the militants arms and explosives. A-3 along with other militants had taken shelter in his house. S.H.O. Police Station Surankote therefore preferred charge sheet against the accused persons. Accused persons denied the charges framed by the Court on 17.09.2001 and claimed to be tried. Prosecution examined 12 witnesses, namely, Ralwant Roy Choudhary PW-1, Talib Husain SI JKP PW-3, Darbara Singh Head Constable PW-4, Abdul Rebman SI PW-5, Sh. Abdul Rehman ASI PW-6, Lekh Raj Wazir PW-7, Mohd Latief PW-8, Abdul Hamid PW-9, Mohd. Yaqoob PW-10, Saghir Ali PW-11, Raltan Chand Sharma PW-12 & Bhag Ram Choudhary PW-13. Statements of the accused were recorded under Section 342 Cr.P.C. wherein they denied the incriminating evidence appearing against them and did not lead any evidence. Court after conclusion of trial passed the judgment of conviction and sentenced the appellant accordingly.

7. Law is clear that this court has full power to re-appreciate the evidence and law produced before court below on which conviction has been based. The brief resumes of prosecution witnesses read as under:-

Balwant Roy Choudhary PW-1, the then Dy SP In charge JIC, Jammu has stated that in March 1996 accused Waqar Shah was sent to the Joint Interrogation Center (JIC), Jammu for interrogation in FIR No.41/1996 under Sec. 3 E.A.O. of police station Mendhar. He made a disclosure statement before the SHO JIC on 30.3.1996. On this information he accompanied with the SHO Police Station, Surankote and Sub Inspector Talib Hussain took him to the house of accused Nissar Ahmed at Surankote and on the basis of identification made by accused Waqar Shah arrested accused Nissar. During the questioning accused Nissar made a disclosure statement that accused Waqar Shah had stayed at his house and had entrusted him a gunny bag containing arms and ammunition, which he has concealed under hay in his Baandi (cattle shed). He recorded the disclosure statement of accused Nissar in presence of the witnesses. The disclosure statement was proved by the witness as EXPW-BR. Further he stated that on the basis of the disclosure and identification made by accused Nissar the gunny bag containing arms and ammunition was recovered from under the hay in the Baandi. The arms/ammunition comprises of two wireless sets and grenades etc, which were recorded in the seizure memo. The witness proved the seizure memo EXPW-BR/1. Further stated that he prepared the sketch map of the place of recovery which he proved as EXPW-BR/2. He stated further that after recovery he sent a docket to SHO Police Station Surankote for registration of the FIR, which he proved as EXPW-BR/3.

In cross-examination by the counsel for accused No. 1 and 2 he admitted that he had not associated any civil witness with the disclosure statement and recovery memo. However, he stated that none comes forward at the time when arms etc were seized as none wants to face the militants. The entire documentation was completed within quarter to an hour but none from Mohalla came till completion of the proceedings. The Baandi in the ground floor belongs to the person who occupies the first floor. He had not verified the documents to ascertain as whom

the house and the Baandi belonged to. He did not seal the arms. He had brought along with him and kept in Malkhana of Interrogation Center the recovered material. He cannot say how long it remained in the JIC. An entry in this regard was made in the Roznamcha, however, the copy of Roznamcha is not on the file. Counsel for the accused No. 3 did not cross examine the witness.

Talib Hussain SI JKP PW-3, the then Additional SHO P/S Surankote, has stated that on 1.4.1996 a team from JIC Jammu led by Balwant Roy Choudhary Dy SP had brought accused Waqar Shah. He was deputed with them as local police officer. After that accused Nissar Ahmed made a disclosure statement that he has concealed arms and ammunition given to him by accused Waqar Shah kept in a gunny bag under hay inside a room of his house. The Dy SP prepared the disclosure statement EXPW-BR, which bears his signatures also. Accused Nissar then took them inside his house and brought out the arms and ammunition from under the hay. The witness has proved the contents of and his signature on the seizure memo EXPW-BR/I and also identified the recovered arms and ammunition in the court.

In cross-examination by the counsel for accused No.1 and 2 he stated that the SHO had deputed him verbally with the team though he had made an entry in the Roznamcha. No civilian was present at the time of disclosure or at the place of recovery. The Dy SP did not summon any civilian in his presence. Dy SP had tried to summon the civilians from the surrounding houses but none was found. Even though he did not investigate this case yet he had satisfied himself that the house belongs to accused Nissar. Dy SP had brought the material first to the police station. The material was not sealed. In cross-examination by the counsel for accused No.3 he stated that JIC team had come in midnight and disclosure statement was made on next morning.

Darbara Singh Head Constable PW4 stated that in 1996 he was posted as SOC in Interrogation Center Jammu. SHO Lekh Raj Wazir was questioning accused Waqar Shah on 30.03.1996. Accused disclosed in his presence that he has concealed 14 grenades, 111 live rounds of pistol, 500 rounds of AK 56 rifle, 3 pistols, 8 remote controls, 2 wireless sets, 16 detonators, letter pads of Muslim Liberation Army and Harkat-ul-Insar, 8 seals, silencer and 98 pencil cells in a gunny bag under hay in the house of accused Nissar which he can get recovered. The SHO recorded the disclosure statement EXPW-LR, which was signed by him also. The Dy SP then took accused in a police vehicle to Police Station, Mendhar. He also went along from Police Station Mendhar the Dy SP went to the house of accused Nissar along with a team of CRP personnel where accused Waqar brought out a gunny bag containing arms from under the hay in the Baandi of the house. The Dy SP made inventory of the material found in the gunny bag in the recovery memo. He (witness) also signed the seizure memo EXPW-BR/1. Besides above statement the witness also proved the contents of seizure memo dated 1.4.1996 stating that these documents were seized in FIR No. 27/1996. Seizure memo has been marked as EXPW-DS. The witness also identified the

seized material in the court.

In cross-examination by the counsel for accused No.1 and 2 he stated that accused Waqar Shah had identified the house of accused Nissar and no more verification was done. None from Mohalla was called on spot. Recovered material was seized but not sealed.

In cross-examination by the counsel for the accused No. 3 he stated that accused Waqar Shah had made the disclosure statement at noon at JIC, Jammu. About 7-8 CRP personnel and 4-5 police personnel from Police Station Mendhar were taken along. House of accused Nissar is located at a distance of 2 kilometer from the Police Station Mendhar. They started from Police Station at around evening and reached house of Nissar within 20/25 minutes.

Abdul Rehman SI PW-5 has stated that on 30.03.1996 when he was posted as Sub Inspector at JIC, Jammu, accused Waqar Shah was sent to JIC for interrogation in FIR No.41/1996 of Police Station, Mendhar. He (witness) was also a member of team No.1 that interrogated accused. SHO JIC Sh. Lekh Raj interrogated accused in his presence. Accused had disclosed that he has kept with accused Nissar a resident of Surankote a gunny bag containing 14 hand grenades, 16 detonators, 3 pistols, 2 wireless sets, 111 rounds of pistol, 500 rounds of AK 56 rifles, 8 dozens pencil cells and posters of J&K Liberation Army and letterheads of Harkat-ul-Insar and 8 seals which he can get recovered. SHO had then recorded the disclosure statement EXPW-LR. The witness proved the contents of and his signature on the disclosure statement. In cross-examination he has stated that besides him and the SHO, Darbara Singh and Darshan Chand were also present at the time of the disclosure statement. Disclosure statement was made at afternoon.

Sh. Abdul Rehman ASI PW-6 stated that on 1.4.1996 he was posted as Head Constable in JIC, Jammu. Accused Waqar Shah was arrested in FIR No.41/1996 of Police Station, Mendhar. Upon interrogation on 30.03.1996 accused Waqar Shah disclosed that he has kept arms and ammunition with his associate Nissar Ahmed code name Guizar S/o Mohd Shabir Manhas resident of Surankot. On 31.3.1996 he along with Rattan Chand ASI, Darbara Singh SGC, Babu Ram HC and Rattan Lal SGC had left for Surankote along with Balwant Roy Choudhary Dy SP In-charge JIC. On 1.4.1996 they reached the house of accused Nissar Ahmed as identified by accused Waqar Shah. On the basis of the identification by accused Nissar Ahmed one gunny bag containing arms and ammunition was brought out from under the hay in his cattle shed. He does not remember as to whether prior thereto accused Nissar made a disclosure statement. (Hereafter the witness has given the description of the recovered arms and ammunition). Further he stated that seizure memo EXPW-BR/1 was prepared and he identified his signature on it. Further stated that prior to the recovery accused Nissar had made a disclosure statement saying that he has concealed the said material under hay in his cattle shed. The witness also proved his signature on the disclosure statement EXPW-BR. Further stated that Dy SP had send a docket to

SHO Police Station, Surankote and on its basis FIR No. 27/1996 was registered with Police Station, Surankote. Investigator had then seized the disclosure statement and the recovery memos vide seizure memo EXPW-DS that too was signed by him. The witness also identified the seized material in the court.

In cross-examination by the counsel for accused No.3 he denied that accused Waqar Shah was tortured before he made the disclosure statement. The disclosure statement was made in the room of Dy SP. He was taken to Surankote on 31.3.1996 and they reached Surankote at 11/12 in the night. Accused Nissar was arrested at about 6 in the morning.

In cross-examination by the counsel for accused No.1 and 2 stated that none from the surrounding houses had come in the house of accused Nissar. None dare so in the militancy. Accused Nissar has said that Baandi belongs to him. Patwari wasn't called. The Baandi adjoins the house. It is not correct that raid was made in the midnight.

Lekh Raj Wazir PW-7 has stated that on 30.03.1996 he was posted as SHO JIC, Jammu. Accused Waqar Shah who was arrested in FIR No.41/1996 of Police Station, Mendhar was sent for interrogation. He had interrogated the accused. Accused had made a disclosure and he reduced, whatever stated by the accused, into writing. The witness proved the disclosure statement as Exhibit PW-LR. However, he could not give full detail of the disclosure statement made by the accused contending that matter is too old. In cross examination by the counsel for accused No. 3 he stated that accused had made the disclosure statement on 30.03.1996 in the room of the investigating officer in the first floor. He was brought in the interrogation center three days before the making of the disclosure statement. He denied that accused was tortured before he made the statement or was not given food. The witness was not cross-examined by the counsel for accused No. 1 and 2.

Mohd Latief PW-8 has stated that accused Nissar Ahmed is Chowkidar of Education Department and resident of village Samote. Accused and his wife reside together though he cannot say whether they reside with father of accused or not. He has stated that father of accused Nissar is alive. House belongs to his father. He does not remember whether accused has constructed his own house or not.

Abdul Hamid PW-9 stated that accused Nissar and his wife Parveen reside in the same house at village Samote. Accused Nissar is a peon in Education Department. In cross examination he has stated that police had called him the day next after the recovery. He did not enter the house from which recovery was effected. House of accused is 100 yards away from the house of his father. There is no Baandi in the house of accused Nissar.

Mohd Yaqoob PW-10 has stated that accused Nissar is his neighbor. He and his wife reside in the same house together. In cross-examination he stated that he used to go to the house of the accused on and off. House comprises of 3 rooms

but has no Baandi. Accused resides about 300 yards away from the house of their father.

Saghir Ali PW-11 has stated that on 1.4.1996 he was posted as Head Constable at Police Station, Surankote. FIR No.27/1996 was registered on the basis of docket EXPW-BR/3. The FIR is in his hand and bears his signature. FIR has been marked as EXPW-SA. In cross-examination he stated that the docket was not accompanied with any arms/ammunition.

Rattan Chand Sharma PW-12 has stated that in 1996 he was posted as ASI in JIC, Jammu. Initially investigation of the case was conducted by him. He had accompanied Dy SP Balwant Roy Choudhary to Surankote in connection with investigation of FIR No.41/1996. He had seized from Dy SP Balwant Roy Choudhary vide seizure memo EX.DS one disclosure statement of accused Waqar Shah, one disclosure statement of accused Nissar Ahmed, recovery memo as regards arms/ammunition and sketch map of the place of occurrence on 1.4.1996.

Bhag Ram Choudhary PW-13 has stated that in 1996 he was posted as SHO Police Station, Surankote. On 1.4.1996 a police team from JIC, Jammu headed by Dy SP Balwant Roy Choudhary had come to police station Surankote. He had accompanied the team for search of the house of accused Nissar. Arms and ammunition were recovered from accused Nissar from the Baandi of his house. Dy SP prepared a docket for registration of the FIR, which he (witness) endorsed to the Police Station for registration of the FIR. Investigation was entrusted to JIC. The witness has proved the endorsement on the docket as EXPW-BR. Further stated that he does not remember the detail of material seized, as he is not witness to the disclosure. Later investigation was entrusted to him. He arrested accused Parveen Akhter wife of Nissar Ahmed and send her to Mini JIC Poonch. After investigation he found commission of offence under Section 212 RPC by accused No. 2 and under Sections 4/5 E.S.A., 3 E.A.O., 7/25/26/27 Arms Act and 120-B & 212 RPC against others. In cross-examination by the counsel for accused No.1 and 2 he stated that search of the house was conducted by JIC personnel and not by him. No civilian, Patwari or Girdawar was called in his presence. JIC personnel had identified the house of Nissar. Since he was posted there so he knew that Baandi belongs to Nissar. He did not get the house of accused identified from revenue authorities from 1.4.96 to 16.4.1996.

Lekh Raj Wazir PW-7, the then SHO Police Station, Joint Interrogation Center (JIC), Jammu, has by his testimony proved as exhibit PW-LR the disclosure statement of accused Waqar Shah A-3 made by him in JIC on 30.03.1996. Abdul Rehman Sub Inspector PW-5 and Darbara Singh Head Constable PW-4, who at the relevant time were posted in the JIC and are marginal witnesses to the disclosure statement Exhibit PW-LR, have supported PW-7. Likewise, with some insignificant variations here and there Balwant Roy Choudhary PW-1, the then Dy SP in charge JIC and Abdul Rebman ASI PW-6 then posted as Head Constable in JIC have unanimously stated that after disclosure statement of accused A-3 on

30.03.1996, police team headed by the Dy SP had taken the accused to the house of accused Nissar Ahmed A-1, at Surankote. Their evidence is supported by evidence of Talib Hussam Sub Inspector PW-3 the then additional SHO Police Station, Surankote and Bhag Ram Choudhary PW-13 the then SHO Police Station Surankote. However, it is in place here to refer to the contradiction in the testimony of Darbara Singh PW-4 in the sense that according to him accused Waqar Shah was taken to Police Station, Mendhar and from the Police Station to the house of accused Nissar Ahmed that falls at a distance of 2 kilometer from the Police Station.

8. From bare perusal of statements of these witnesses, it is evident that, if oral statements carry value, then one can say there is enough material, but there are certain well known cardinal principles of law, which trial courts have to follow while convicting the accused under Arms Act as well Explosive substance Act.

9. In present case accused/appellant has been convicted for possession of prohibited arms as well possession of explosive substance. Admittedly, there is no expert /FSL evidence as to whether these items were in working conditions or whether these were actually arms and explosive materials as per Arms Act and Explosive Substance Act. PW Balwant Chowdhary has also stated that, arms and explosive were not sealed. Court below has relied upon AIR 1999 SC 321 in case title Jarnail Singh Vs. State of Punjab, wherein it is held that conviction cannot be assailed on point that recovered arms & ammunition were not sent to expert for examination and for lack of expert evidence.

10. Further, in AIR 1999 SC 1548 in case titled Jaspal Singh v State of Punjab, it is held as under:-

"1. The Appellant has been convicted under Section 25 of the Arms Act and Section 5 of the TADA Act as he was found in possession of one DBBL gun .12 bore and five live cartridges on 17/18.3.1992. The trial court relying upon the evidence of ASI Balbir Singh and P.W. 4 - Man Singh - who were the members of the Police party held that it was proved by the prosecution that the appellant was in possession of those articles. The trial court further held that as the gun was found loaded; it can be presumed that it was in working order. Taking this view, it convicted the appellant, as stated above.

2. Admittedly, no evidence was led by the prosecution to prove that the gun was in working condition and that the cartridges which were found from the person of the appellant were live cartridges. Neither ASI - Balbir Singh had stated so nor any report from an expert was obtained to establish that the gun was in working condition and that five cartridge were live. What was found in the gun were two empties and not live cartridges and, therefore, it was not proper to presume that it was in working condition. In absence of any evidence to that effect, the conviction of the appellant under both these aforesaid Section cannot be upheld. We, therefore, allow this appeal, set aside the judgment and order passed by the Additional Judge, Designated Court, Sangrur, in Special Sessions Case No. 55/92

and acquit the appellant. He is ordered to be released forthwith if his presence is not required in jail in connection with some other case."

11. Similarly, this court in 2011 Cr.L.J (J&K) 1280 in case titled Abdul Rashid Vs. State, it is held as under:-

"21. Conviction under section 7/25 Arms Act merits to be set-aside for the following reasons:

22. The investigation officer has admitted that he neither sealed the arms and ammunition nor sent to FSL for analysis. Thus conviction cannot be recorded. We are forfeited by a case titled as Jasbir Singh v State of Punjab reported in AIR 1998 SC 1660 . It apt to reproduce as under:-

What is contended by the learned counsel for the- appellant is that the prosecution evidence itself shows that the pistol and the cartridges alleged to have been recovered from the appellant did not have any number or some distinctive mark on them and after their seizure by the police they were not sealed. Thus the identity of the weapon and the cartridges seized and the weapon and cartridges produced before the court was not established by the prosecution. Having gone through the evidence, we find that the contention raised on behalf of the appellant is correct and, therefore, deserves to be accepted. The pistol and the cartridges did not have any mark or any number on them and after seizing the same police had not thought it fit to wrap them and apply a seal over them. No explanation in that behalf was given by the prosecution witnesses. This aspect was not considered by the trial court. As the identity of the incriminating articles has not been established by the prosecution, we allow this appeal, set aside the conviction of the appellant both under Section 5 of the TADA Act and 25 of the Arms Act and acquit him of all the charges leveled against him."

12. In present case, EXPWBR i.e. the disclosure statement of appellant/accused does not bear his signature; so this statement is also not in conformity with section 27 of Evidence Act. Any recovery if any affected on the basis of disclosure statement of accused, which is not in conformity with section 27 of Evidence Act, has no value in the eyes of law and cannot based for conviction.

13. In Sarwan Singh Rattan Singh Vs. State of Punjab, reported in AIR 1957 SC 637, it was held by the Apex Court that in criminal cases mere suspicion, however, strong, cannot take the place of proof. The Court must also take into consideration that an accused is presumed to be innocent till charges against him are proved beyond reasonable doubt. It was held:

"Considered as a whole, the prosecution story may be true; but between 'may be true' and 'must be true', there is inevitably a long distance to travel and the whole of this distance must be covered by legal, reliable and unimpeachable evidence before an accused can be convicted."

14. Moreover, in Kali Ram vs. State of Himachal Pradesh, AIR 1973 SC 2773, the

Apex Court had observed as follows:-

"Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt. Of course, the doubt regarding the guilt of the accused should be reasonable : it is not the doubt of a mind which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that it is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by resort to surmises, conjectures or fanciful considerations. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex-facie trustworthy on grounds which are fanciful or in the nature of conjectures.

The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record. Indeed, the courts have hardly any other yardstick or material to adjudge the guilt of the person arraigned as accused. Reference is sometimes made to the clash of public interest and that of the individual accused. The conflict in this respect, in our opinion, is more apparent than real.

It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society. All this highlights the importance of ensuring as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether."

15. In *Mousam Singh Roy & Ors. v. State of West Bengal*, (2003) 12 SCC 377 it was held:

"27. Before we conclude we must place on record the fact that we are not unaware of the degree of agony and frustration that may be caused to the society in general and the families of the victims in particular, by the fact that a heinous crime like this goes unpunished, but then the law does not permit the

courts to punish the accused on the basis of moral conviction or on suspicion alone. The burden of proof in a criminal trial never shifts, and it is always the burden of the prosecution to prove its case beyond reasonable doubt on the basis of acceptable evidence."

It was further observed:

"....It is also a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof, since a higher degree of assurance is required to convict the accused."

16. Next as is evident from the facts of the case, Waqar Shah- accused, who was a Pakistani, was arrested in FIR No.41/96 of Police Station, Mendhar. During investigation at Joint Interrogation Center (JIC), Jammu he on 30.03.1996 made a disclosure statement EXPW-LR that he has kept with Nissar Ahmed - appellant herein, arms/ammunition, namely, plastic grenades-14 Nos. pistols-3 Nos., pistol rounds-111 Nos., AK 56 rounds-500 Nos., remote control-8 Nos., wireless sets-2 Nos., detonators-16 Nos. along with fuse wire, silencer-1 No., dagger-2 Nos., letter pads of Jammu Kashmir Muslim Liberation Army and Harkat-ul-Ansar, seals-8 Nos., posters in Urdu language, Organization Cards 1 bundle and Cells battery 8 dozens. Lekh Raj Wazir PW10, the then SHO JIC, Jammu recorded the disclosure statement. Following the said disclosure a police team headed by Balwant Roy Choudhary Dy SP in charge JIC PW-1 took A-3 to the house of appellant at village Samote within the jurisdiction of Police Station, Surankote on 1.4.1996 and arrested appellant.

As per prosecution, accused/appellant made a disclosure statement (EXPWBR) that he has kept the arms/ammunition given to him by Waqar Shah accused under hay in his Baandi (cattle shed). The Dy. SP recorded the disclosure statement and effected recovery on the basis of information provided by Nissar Shah. The Dy.SP then issued docket to SHO Police Station, Surankote, for registration of FIR. The SHO Police Station, Surankote, registered FIR No.27/1996 under Sections 3 Enemy Agent Ordinance, 3/25 Arms Act, 4/5 Explosive Substance Act, 212 and 120-B RPC. As per law there was no need to lodge second FIR, because recoveries have been effected on the basis of disclosure statement of accused Waqar Shah in FIR No. 41/96 of Police Station, Mendhar. Two FIRs cannot be lodged for same offence against same accused.

17. As per counsel for appellant, a wrong procedure has been adopted by investigating agency, thereby registering second FIR during the investigation of previous FIR. As per procedure laid down in Cr.P.C., Sections 154, 155, 156, 157, 162, 169, 170 and 173 of Cr.P.C. only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 Cr.P.C. Thus, there can be no second F.I.R. and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a

cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the F.I.R. in the station house diary, the officer in charge of a Police Station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 of the Cr.P.C.

18. In "T.T. Antony Vs. State of Kerala", reported in 2001 AIR (SC) 2637, it is held as under:-.

"As points (i) and (ii) are interconnected, it will be convenient to deal with them together. Inasmuch as the germane question relates to registration of an F.I.R., we may usefully refer to Section 154 of the Code of Criminal Procedure, 1973 (Cr.P.C.) which reads as under :

"154. Information in cognizable cases. -

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence. Sub-section (1) of Section 154 of Cr.P.C. contains four mandates to an officer in-charge of a police station. The first enjoins that every information relating to commission of a cognizable offence if given orally shall be reduced to writing and the second directs that it be read over to the informant; the third requires that every such information whether given in writing or reduced to writing shall be signed by the informant and the fourth is that the substance of such information shall be entered in the station house diary. It will be apt to note here a further directive contained in sub-section (1) of Section 157 of Cr.P.C. which provides that immediately on receipt of the information the officer in charge of the Police Station shall send a report of every cognizable offence to a Magistrate empowered to take cognizance of the offence and then proceed to investigate or depute his subordinate officer to investigate the facts and circumstances of the

case. Sub-section (2) entitles the informant to receive a copy of the information, as recorded under sub-section (1), free of cost. Sub-section (3) says that in the event of an officer in charge of a police station refusing to record the information as postulated under sub-section (1), a person aggrieved thereby may send the substance of such information in writing and by post to the Superintendent of Police concerned who is given an option either to investigate the case himself or direct the investigation to be made by a police officer subordinate to him, in the manner provided by Cr.P.C., if he is satisfied that the information discloses the commission of a cognizable offence. The police officer to whom investigation is entrusted by the Superintendent of Police has all the powers of an officer in charge of the police station in relation to that offence. An information given under sub-section (1) of Section 154 of Cr.P.C. is commonly known as First Information Report (F.I.R.) though this term is not used in the Code. It is a very important document. And as its nick name suggests it is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets the criminal law into motion and marks the commencement of the investigation which ends up with the formation of opinion under Section 169 or 170 of Cr.P.C., as the case may be, and forwarding of a police report under Section 173 of Cr.P.C. It is quite possible and it happens not infrequently that more informations than one are given to a police officer in charge of a police station in respect of the same incident involving one or more than one cognizable offences. In such a case he need not enter every one of them in the station house diary and this is implied in Section 154 of Cr.P.C. Apart from a vague information by a phone call or a cryptic telegram, the information first entered in the station house diary, kept for this purpose, by a police officer in charge of a police station is the First Information Report - F.I.R. postulated by Section 154 of Cr.P.C. All other informations made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the First Information Report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling under Section 162 of Cr.P.C. No such information/statement can properly be treated as an F.I.R. and entered in the station house diary again, as it would in effect be a second FIR and the same cannot be in conformity with the scheme of the Cr.P.C. Take a case where an FIR mentions cognizable offence under Section 307 or 326 I.P.C. and the investigating agency learns during the investigation or receives a fresh information that the victim died, no fresh FIR under Section 302 I.P.C. need be registered which will be irregular; in such a case alteration of the provision of law in the first FIR is the proper course to adopt. Let us consider a different situation in which H having killed W, his wife, informs the police that she is killed by an unknown person or knowing that W is killed by his mother or sister, H owns up the responsibility and during investigation the truth is detected; it does not require filing of fresh FIR against H - the real offender-who can be arraigned in the report under Section 173(2) or 173(8) of Cr.P.C., as the case may be. It is of course permissible for the investigating officer to send up a report to the

concerned Magistrate even earlier that investigation is being directed against the person suspected to be the accused. The scheme of the Cr.P.C. is that an officer in charge of a Police Station has to commence investigation as provided in Section 156 or 157 of Cr.P.C. on the basis of entry of the First Information Report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of evidence collected he has to form opinion under Section 169 or 170 of Cr.P.C., as the case may be, and forward his report to the concerned Magistrate under Section 173(2) of Cr.P.C. However, even after filing such a report if he comes into possession of further information or material, he need not register a fresh FIR, he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 Cr.P.C. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 of Cr.P.C. only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 Cr.P.C. Thus there can be no second F.I.R. and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the F.I.R. in the station house diary, the officer in charge of a Police Station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 of the Cr.P.C."

19. The courts while appreciating the evidence in criminal cases have to see the degree of proof is maximum than that of civil case. The evidence produced by prosecution should be legally admissible. If there comes the slightest doubt regarding the involvement of accused in commission of crime as alleged by prosecution, the Court should not go on convicting the accused.

20. In arriving at conclusion about guilt of accused charged with heinous crime, the court has to judge the evidence by yardsticks of probabilities. The law does not permit the court to punish the accused on basis of moral conviction or suspicion. The burden of proof never shift, it is always on prosecution.

21. Thus, following the well known cardinal principles of law in appreciating the facts in the instant case, I am of the considered opinion that prosecution has not proved its case beyond reasonable doubts. Hence appeal is accepted; conviction and sentence passed by court below are set aside. Accused/appellant is discharged from his bail bonds.