

(2009) 08 DEL CK 0062

In the Delhi High Court

Case No : Criminal App. No. 47 of 2007

Sayed Abu Nasir

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 17-08-2009

Acts Referred:

Arms Act, 1959 — Section 25(1)
Criminal Procedure Code, 1973 (CrPC) — Section 313, 315, 391
Explosive Substances Act, 1908 — Section 3, 4, 4B
Foreigners Act, 1946 — Section 14, 3(1), 3(A)
Penal Code, 1860 (IPC) — Section 120B, 121, 121A, 122, 123
Task Force Act, 1967 — Section 10(3), 10(3)(B), 12

Citation : (2010) 6 RCR(Criminal) 2274

Hon'ble Judges : Mool Chand Garg, J

Bench : Single Bench

Advocate : Asit Kumar Roy, for the Appellant; Navin Sharma, APP, for the Respondent

Final Decision : Dismissed

Judgement

Mool Chand Garg, J.—This appeal has been filed by the appellant against his conviction by the Addl. Sessions Judge Delhi in Sessions Case No. 156/2 arising out of FIR No. 41/99 which was registered at P.S. New Delhi Railway Station u/s 121/121-A/122/123 IPC r/w Section 120-B IPC, u/s 3 & 4 of the Explosive Substances Act, and Section 14 of the Foreigners Act.

2. By the impugned judgment, the appellant was convicted only u/s 4(b) of the Explosive Substances Act, while he was acquitted of all other charges. The sentence of 7 years awarded to him has already been undergone by him.

3. The appellant has filed the present appeal by alleging that he has been falsely implicated in this case and that he was brought to Delhi by the Police officials of Crime Branch.

4. In his appeal, it has been alleged by the appellant that he was not involved in

this case but has been falsely implicated by the Police officials of Crime Branch who brought him from Hyderabad sometime on 28/29.12.2006 and thereafter, falsely implicated him in this case. It is submitted that at the time of his arrest he was already in Police custody and therefore, the possibility of recovery of any explosive substance from him does not arise. It is, thus, submitted that the registration of the case against him and his conviction including award of sentence was unjustified.

5. Briefly stating, the case of the prosecution is that:

i. On 07.01.1999 a secret informer met Inspector Ishwar Singh of Anti Extortion Cell, Crime Branch, R.K. Puram and informed him that one I.S.I. agent would be going to receive consignment of explosives from his associates at about 6.00 PM at New Delhi, Railway Station, Pahar Ganj side. Accordingly, a raiding party was constituted and the accused/appellant Sayed Abu Nasir was apprehended at New Delhi Railway Station on the same day when he was found in possession with 2 kg RDX and 5 detonators. In view of that, the appellant was arrested and was sent for trial after the completion of investigation.

ii. Various charges were framed against him as stated above. After the evidence of the prosecution was recorded, the incriminating evidence was put to the appellant u/s 313 Cr.P.C. when he denied his involvement in this case.

iii. In his defence, the appellant appeared as DW-2 and his statement was recorded u/s 315 Cr.P.C. He has claimed that he was innocent and had been falsely implicated in this case. He stated that he was forcibly picked up by Special Branch, Kolkata Police on 16.12.98 and that news in this regard was published on 18.12.98 in the "Asian Age" and "Dainik Vartman" and on 19.12.98 in "Azad Hind", Kolkata and "Sanmarg". He further claimed that on 18.12.98 itself he was interrogated by two American Embassy officials in the office of ACP (SCO), Kolkatta. He further stated that on 19.12.98 Special Branch, Kolkata Police handed him over to S.I.B. who illegally detained him till 23.12.98 when he was handed over to ACP Shri P. Sitaram Reddy of Crime Branch, Hyderabad who brought him to Hyderabad. Accused claimed that he was illegally detained in Hyderabad for six days and was arrested in case FIR No. 155/98. He further stated that that on 29/30.12.98 SI Pyare Lal, HC Chander Pal Singh and Ct. Mahesh of Delhi Police brought him from Hyderabad to Delhi. He claimed that then he was taken to the office of Crime Branch, R.K. Puram where he was kept in illegal detention till 07.01.1999 and then falsely implicated in the present case. He claimed that nothing was recovered from him and the recovery of explosives had been planted upon him by the Police. Accused claimed that he wanted to lead defence evidence.

6. However, his defence has not been accepted by the Trial Court. Rather, the trial Court has convicted him u/s 4(b) of the Explosives Act while acquitting him of all other charges. In this regard, the trial court has made the following observations:

33. During course of his examination in Chief, DW-2 accused Abu Nasir claimed that towards end of 1998 he along with other members of his family had gone to District Medhnapur in West Bengal to house of his grandfather. He claimed that he was a native of Bangladesh and had come to India on basis of valid legal documents. It was claimed that on 16.12.98 he was picked up from Kolkata by the Kolkata Police and the said fact was published in Azad Hind and Sanmarg, copies of which were placed on record as Mark DW-2/DA & DB. Similar facts were also claimed to have been published in Asian Age and Dainik Vartaman. Accused claimed that he was interrogated by the Kolkata Police and also by officials of American Embassy who had come from Delhi. He claimed that on 21.12.98 he was taken by ACP Shri P. Sita Ram Reddy of Hyderabad Police to Hyderabad. He claimed that he had been taken to office of Crime Branch, Hyderabad where he was kept for about 4-6 days. He further stated that on the last day of his detention in Hyderabad, ACP P. Sita Ram took him to his office and informed the accused that he had to be taken to Delhi and would be set free after interrogation in Delhi. As per accused, SI Pyare Lal, HC Chanderpal and Ct. Mahesh of Delhi Police met him in Hyderabad on 29/30.12.98 and brought him to Delhi. He claimed that he was taken to Crime Branch Office, R.K. Puram where he was detained till 7.1.99. He claimed that he was taken to Siliguri where he was formally arrested in case FIR No. 515/98 P.S. Siliguri. Certified copy of FIR of that case was placed on record as Mark DW-2/DC and photocopy of remand application as Mark DW-2/DD. He claimed that other connected documents were already on judicial record as Ex.DX, DX-1 & DX-2. As per the accused, he was taken by Kolkata Police to Kolkata from Siliguri and in October/November 1999, he was brought back to Delhi and produced in court where he received charge-sheet of the present case. He claimed that he came to know about the other accused persons involved in this case only after receipt of copy of charge-sheet. Photocopy of newspaper reporting published in Dainik Jagran was placed on record as Mark DW-2/DE and copies of bail orders passed by Ld. Court concerned of Kolkata and Siliguri as Mark DW-2/DF-1 and DF-2. Accused claimed that he had not made any disclosure statement in this case and that his signatures had been forcibly taken by the Police on many blank papers and written documents, contents of which were never read over to him. He claimed that nothing was recovered from his possession or at his instance and that he was innocent and had been falsely implicated in the present case. Photocopies of newspaper cuttings of newspaper Vartaman dated 18.12.98, 19.12.98, 20.12.98, 23.12.98 and 18.1.99 were placed on record as Mark DW-2/DG1-5. Accused also filed English translation of those documents.

33A. During course of cross examination by Ld. APP for State, accused denied the suggestion that whatever he had stated during course of his examination in chief had been so stated by him to save himself in this case. He denied the suggestion that the case of the prosecution was the correct version or that he had deposed falsely. He admitted that he was never formally arrested in any case by the Hyderabad Police prior to the present case but claimed that he had been

apprehended by the Hyderabad Police. He denied the suggestion that he was never arrested by Hyderabad police in CR No. 155/98. However, he claimed that he had been arrested in that case but the documents regarding his arrest had been destroyed by the Police and he was never shown to have been formally arrested in the said case. Ld. APP for State had sought permission to place on record attested English translation of the newspaper cuttings filed by the accused. Same were got prepared with assistance of Shr B. Chakraborty from Rama Krishna Mission and placed on record. Accused denied the suggestion that the English translation of documents filed by him on record were not true and correct translation. He denied the suggestion that he was apprehended by Delhi Police from the Railway Station on 7.1.99. He denied the suggestion that case of the prosecution was true and correct or that the defence taken by him was false.

7. The learned Additional Sessions Judge also observed:

52. Now we deal with the so-called main accused i.e. Abu Nasir. He has been termed by this Court as the main accused because as per allegations of the prosecution, 2 kg RDX and 5 detonators had been recovered from his possession on 7.1.99 at New Delhi Railway Station and it was case of the prosecution that accused had collected the said explosive substances with an intention to wage war against Government of India and create unrest in the society by way of bomb blasts.

53. Accused Abu Nasir had put up a defence that he had in fact been apprehended by police from Kolkata on 16.12.98 and thereafter on 21.12.98 he was taken by Hyderabad police to Hyderabad and subsequently on 29/30.12.98 he had been handed over to Delhi Police officials who brought him from Hyderabad to Delhi and after detaining him in Crime Branch Office at R.K. Puram till 7.1.99. falsely implicate them in the present case. Accused Abu Nasir had examined himself on oath as DW-2 and during course of his examination in chief had reiterated his aforesaid defence. He had also placed on record some newspaper cuttings and documents in respect of judicial proceedings conducted in Siliguri Court and other courts of law. It has been observed in C. Dinakar Vs. State of Karnataka and Others, that cases are to be decided only on the basis of evidence and the material placed before the court and not on basis of discussions or information as appeared in the Press. Even otherwise, it has been observed in a catena of judicial pronouncements that no cognizance can be taken of newspaper reports by courts of law. That being the position, defence of accused Abu Nasir as appears from the newspaper publications relied upon by him (copies of which were filed on record) although seems attractive. Same cannot be looked into as it is not based on legally admissible evidence. Copies of court proceedings relied upon by accused Abu Nasir also do not come to his rescue as in none of those proceedings it has been specifically observed by the Court that accused Abu Nasir was in custody of Kolkata police or Hyderabad Police at any time prior to 7.1.99. Admittedly, accused Abu Nasir had not produced any documentary evidence which could show his apprehension by the Kolkata Police on 16.12.98 or

his being handed over by the Kolkata Police to Hyderabad Police on 21.12.98 or his subsequent entrustment to Delhi Police officials on 29/30.12.98. Only suggestions to that effect has been made by the accused to the various Police officials examined during course of trial and the suggestions made cannot be said to have any evidential value It was so observed in State v. Mohd. Misir Ali and Bachittar Singh v. State (Supra).

54. It had also been submitted on behalf of accused that during course of his cross-examination, the facts stated by him had not been specifically rebutted by the prosecution. On a close perusal of cross examination of DW-2 by Ld. APP for State it appears that the said submission made has to be referred to be rejected. A specific suggestion had been made to the accused by Ld. APP for State to the effect that whatever he had stated during course of his examination in chief was incorrect and had been so stated by him to save himself in this case.

55. During course of cross examination by Ld. APP for State accused Abu Nasir had specifically admitted that he was never formally arrested in any case by the Hyderabad Police prior to the present case. As was submitted during course of arguments by Ld. APP for State accused Abu Nasir had not placed on record any legally admissible evidence/ document to show his apprehension or arrest by the Kolkata Police or the Hyderabad Police or his being handed over to Delhi Police by Hyderabad Police. Nothing has been brought on record on behalf of the accused to show that in fact he had ever lodged any complaint regarding his illegal apprehension or wrongful confinement, to any officer whatsoever, prior to his arrest in the present case. Keeping in view all the aforesaid facts and circumstances mentioned herein above, this Court is of considered opinion that accused has failed even to probablise his defence.

56. Defence taken by accused Abu Nasir regarding his having been handed over to custody of Delhi Police officials on 29/30.12.98 had not been so put by him to the prosecution witnesses, wherein suggestion was made to the effect that he was handed over to custody of Delhi Police officials on 27/28.102.98. Moreover, accused has not summoned and examined duty records of police officials who allegedly had brought him from Hyderabad to Delhi and has also not summoned and examined any records of the Railway department in that regard.

8. The Additional Sessions Judge counter-checked the version of the prosecution in view of his defence in para 57 of the judgment and observed:

57. Let us now check case of the prosecution as has been alleged against the accused. It had been alleged, as already mentioned, that on 7.1.99 accused Abu Nasir was apprehended at New Delhi Railway Station and was found in unlawful possession of 2 kg RDX and 5 detonators. Nothing more has been brought on record by the prosecution in this regard in support of its allegation against accused intending to wage war against Government of India. It was observed in Nazir Khan and Others Vs. State of Delhi, that mere collection of men, arms and ammunition does not amount to waging war. Except for allegation that accused

Abu Nasir was allegedly found in possession of RDX and detonators, nothing more has been brought on record by the prosecution and there is no other legally admissible evidence on record regarding the accused Abu Nasir having waged or having intended to wage war against Government of India or regarding his having conspired to do so along with other co-accused. The only material on which reliance had been placed by the prosecution in this regard were the disclosure statements made by the accused persons while they were in police custody. Obviously, the said disclosure statements are inadmissible in evidence and cannot be looked into by this Court.

9. The Additional Sessions Judge has taken note of the evidence which has been led by the prosecution to prove the allegations against the appellant. The witnesses examined by the prosecution comprise at least six witnesses of the raiding party which was constituted to apprehend the appellant on the basis of secret information. Those witnesses have supported the case of the prosecution and nothing has been brought in their cross-examination that it was a case of false prosecution or implication by the officials of Crime Branch and that the involvement of the appellant in the present case was false. It is a matter of record that the appellant did move an application in this regard before the learned Additional Sessions Judge but did not press the same and the same has been dismissed as withdrawn in terms of his statement recorded on 24.07.2004.

10. The appellant also admitted that he was never formally arrested in any case at Kolkata or Hyderabad. No doubt, the appellant tried to plead his defence before this Court again and made an application to summon the records from Kolkata as well as from Hyderabad.

11. A perusal of the record received from Kolkata as well as from Hyderabad goes to show that the appellant was not involved either in case registered at Kolkata or in Hyderabad before he was arrested in this case. A perusal of the record received from Hyderabad goes to show that in the concerned FIR No. 155/1998 referred to by the appellant, he was not an accused.

12. Before this Court, the appellant was represented by a Counsel appointed by him, namely, Shri Asit Kumar Roy, who has filed written submissions to substantiate that on the relevant date the appellant was in Police custody. It has been submitted that:

1. That on 16.12.1998 the appellant was arrested by Kolkata Police and he was in the Police custody for 5 days. No FIR was registered, as the appellant was not the said "Abu Nasir" who was a notorious criminal and wanted in several criminal cases. (As there was no FIR and/or the appellant was not produced before any Court, the appellant is unable to produce any FIR or Court order as documentary evidence to prove the same except some applications written by I.O. and copy of few News published in the famous Bengali daily News Papers regularly.

2. That on 21.12.1998 (the 5th day of arrest) Assistant Commissioner of Police, P. Sitaram Reddy, Central Crime Section of Hyderabad Police came to Kolkata and

arrested the appellant for interrogation in case No. 155/1998 u/s 121/121A/120B read with 14 Foreigners Act. The detail of documentary evidence are as under:

i. Page 963, Letter to DCP by I.O. dt. 14.01.1999 (3rd Para). Exhibit ?DX dt. 07.08.2004 which is to read as under:

It is learnt during enquiry that said Sayed Abu Nasir, an active agent of "Inter Services Intelligent (I.S.I.) of Pakistan, was recent arrested by Hyderabad Police vide C.R. No. 155/98 u/s 121A/122/153(A)/420/471 IPC, 25(1) I.A. Act, 3 E.S. Act, Section 10(3)(b), 12 of Task Force Act 1967, Section 3(A) and 14 Foreigners Act, 1949, R.W. 120B IPC of Central Crime Section of Hyderabad, used to visit the office of "Masoom Travels of 6A Karim Bux Lane, Cal.-16, frequently, sometimes alone and sometimes with Kashmiris, Bangladeshi and Pakistan Nationals.

ii. Page-979, Order dt. 12.01.1999 Exhibit DX-2 dt. 24.07.2004. which is to read as under:

Seen the prayer of I.O. who prayers for issuing production warrant against accused Syed Abu Nasir at present detained in J.C. Hyderabad Jail under the disposal of C.M.M. Hyderabad in C/W Central Crime Station Hyderabad case No. 155/1998 u/s 121/121A/122/153/420/471 IPC r/w 25(1) Arms Act/3 ES Act/12 of I.T. Act/3(1), 14 of F.A./120B IPC/

Prayer is considered and allowed issued PW against the accused persons to 11.02.1999 for production.

iii. Page ? 985, Inner Page No. 2 (First Para) Order dt. 08.01.1999 Exhibit DX-1 dt. 24.07.2004. The relevant portion of the said order which is to read as under:

...Sayed Abu Nasir an ISI Agent already arrested in Hyderabad case CR No. 155/98 u/s 121A/122/143A, 420/471 IPC 25(1) Arms Act 3 E.S. Act. Section 10(3)(B), 12 of Task Force Act 1967, Section 3(A) & 14 Foreigners Act on 21.12.98 from Calcutta and also some incriminating documents were seized today (08.01.19) from 6A Karim Bux Lane, Calcutta, Investigation into the case is proceeding.

iv. Page 955 DW-2/DD Letter of I.O. to SDJM Silliguri dt. 08.01.1999 (inner page No. 2) which is to read as under:

During remand period all the above noted acd. Persons were properly interrogated as Pakistan search were made but nothing was incriminating to seized in the case. In course of interrogation the accd. Noted in sl. No. 12 and sl 13 stated that Syed Abu Naser @ Safique Ali @ S.A. Khan @ Alope of Kayaniz Para. P.S. Saidpur, Dist. Nilphamari, Bangladesh is know to them. Sayed Abu Naser arrested at Hyderabad Centre Crime Station in C/W Case No. 155/98 u/s 121/121A/122/153A/420/471 IPC R/W 14 Foreigners Act. (illegible) on Said Syed Abu Naser visited their home at Siliguri.

v. That on 31.12.1998 S.I. Bimal Kumar Ghosh filed application before the Court

of SDJM, Siliguri seeking 10 days police custody remand, wherein, he admitted that the appellant was in the custody of Hyderabad Police. The relevant paragraph from mark DW-2/DC is to read as under:

The names of the accused person have come to light to statement of the accused arrested in C/W case No. C.R. No. 15/98 u/s 121/121A/122/153A/420/471 IPC R/W 25(1) Indian Arms Act and R/W 14 Foreigners Act of Central Crime Station, Hyderabad.

vi. That before the Trial Court vide order sheet dt. 07.08.2004, the FIR No. 29/1999 of P.S. Kolkata, FIR No. 515/1998 of P.S. Siliguri and FIR No. 155/98 of P.S. CCS Hyderabad has been exhibited as DX, DX-1, DX-2. (Trial Court file page No. 57)

vii. The News paper documents regarding arrest of the Appellant by Kolkata Police and thereafter, the arrest by Hyderabad Police and thereafter, the arrest of the Appellant by Delhi Police has been mentioned, which are marked as DG-1 to DG-5.

3. The appellant was under the custody of Hyderabad Police up to 28-29th December 1998. (The Appellant could not arranged any document in this regard as he was in the custody of Delhi Police and thereafter he was send to Judicial custody.

4. That on 28/29.12.1998 S.I. Pyarey Lal, H.C. Chander Pal, constable Mahesh from Delhi Police went to Hyderabad and took the appellant to Delhi by Andhra Pradesh Express (AC-IIInd Class) in the name of interrogation in a FIR No. 41/1999 i.e. in the present case and involved the appellant in this false case alleging that on 07.01.1999, the appellant was caught red handed with 2 kg. of RDX and 5 detonators at New Delhi Railway Station. In fact, at that date and time the accused/appellant was in the Police custody at R.K. Puram Crime Branch. He was in the police custody for 10 days before sending in the judicial custody.

5. That the appellant has been acquitted from the Court of SDJM, Siliguri.

6. That no case is pending against the appellant in Hyderabad.

7. That the appellant also acquitted in the present case from all other charges/offences except u/s 4B of the Explosive Substances Act vide para 66, 67 of the impugned order.

8. That the appellant applied for summoning the judicial record qua these two cases of Hydrabad and Siliguri and order has been passed in his favour on dt. 10.12.2007 by this Hon"ble Court, but the trial Court file of Hyderabad has not been reached to this Hon"ble Court still date.

9. That the appellant took his defence inter-alia saying that he was in police custody during the period of alleged occurrence in his statement u/s 313 Cr.P.C. specially page No. 20, 21 which may be considered as bonafide.

10. That the appellant examined himself as DW-2, wherein, all above documents are exhibited and marked. The said statement of the appellant (DW-2) be considered in the present appeal as genuine.

13. It has also been submitted by learned Counsel for the appellant that even otherwise the story of the prosecution is not believable inasmuch as:

11. That there are some other grounds to believe that the appellant was not caught red handed with RDX or Detonator in the railway station as alleged due to following grounds:

(a) No railway ticket was recovered, whereas the appellant alleged to be caught in the Railway Station before the exit gate. One cannot through valid ticket due to fear of Ticket Collector in Exit Gate.

(b) As per informer Appellant was in Delhi 7-8 days prior to 7.1.99.

(c) No official from Bomb Disposal Squad was present despite information of 2 kg RDX and detonators which can explode in the busy Railway Platform.

(d) There is no Public witness found by I.O. in the Railway Platform.

(e) There is no proof, information or any link with the prosecution to prove that the appellant was travelled by train or stayed any hotel/room/place before 7.1.09 or any link with Pakistan and/or he was not in the police custody.

14. The Learned APP in response to the submissions made on behalf of the appellant has submitted that in the present case all the documents relied upon by the appellant, in the written arguments, nowhere points out that the appellant was in judicial custody in Hyderabad or that from Hyderabad he was brought to Delhi by the local Police, as has been contended by him. It is also submitted that at one stage the appellant moved an application before the Sessions Court for producing some defence witnesses but for reasons best known to him he has not proceeded with the said application and rather withdrew the same. This is apparent from an application moved by the appellant before this Court on 10.12.2007. The contents of the said application filed u/s 391 Cr.P.C. are abundantly clear in this regard. I have also scrutinized each and every document referred to by the appellant in his written submission but I do not find that those documents goes to establish that the appellant was brought from Hyderabad to Delhi as alleged or that at the relevant time he was in judicial custody or in Police custody in Hyderabad in connection with any other case.

15. It is also not understandable as to why the appellant would permit himself to remain in judicial custody for a period of more than 7 years in case he has concrete evidence available with him or available on the judicial record, which could establish that the custody of the appellant was taken by the Police officials of Delhi in the manner as it is pointed out by the appellant.

16. It is surprising that despite allegations made by the appellant that he was falsely implicated in this case, he has not made any complaint in this regard

either by himself or through any of his relations. The complaint by him could have been done even from the jail itself. The trial of the case has been proceeded from the date of the registration of FIR which is dated 07.01.1999 till the judgment delivered by the Addl. Sessions Judge convicting the appellant on 18.10.2006 which means that the trial of the case has taken about 7 years, yet the record sought to be relied upon by the appellant to show that he was brought from Hyderabad was not summoned at the relevant time. As stated above, the record which has been now received on the basis of an application moved by the appellant does not show that the appellant was involved in any case in Hyderabad or in Kolkata.

17. Thus, I do not find any substance in the story of the appellant to prove his innocence. The judgment delivered by the Addl. Sessions Judge is a well reasoned judgment based upon the evidence as discussed above. Accordingly, the same is upheld. Since the appellant has already undergone the sentence awarded to him, no further orders are required to be passed in this regard. Hence, the appeal filed by the appellant is dismissed. Copy of the judgment be sent to the appellant who is in judicial custody in some other case in Kolkata by the Registrar General of this Court for his information.