

(2010) 02 BOM CK 0083

In the Bombay High Court

Case No : Criminal Revision Application No. 14 of 2007

State of Maharashtra

APPELLANT

Vs

Sheikh Ilias Sheikh Yusuf and Others

RESPONDENT

Date of Decision : 16-02-2010

Acts Referred:

Constitution of India, 1950 — Article 20, 20(2)
Criminal Procedure Code, 1973 (CrPC) — Section 221, 221(1), 221(2), 300, 300(1)
Explosive Substances Act, 1908 — Section 4, 5
Penal Code, 1860 (IPC) — Section 120B, 121, 121A, 122, 123

Citation : (2010) CriLJ 4038 : (2011) 6 RCR(Criminal) 258

Hon'ble Judges : A.B. Chaudhari, J

Bench : Single Bench

Advocate : S.S. Doifode and A.S. Sonare, apps, for the Appellant; A.M. Rizwy, for the Respondent

Final Decision : Dismissed

Judgement

A.B. Chaudhari, J.—The State of Maharashtra, Police Station Officer, Police Station Kotwali, Nagpur being aggrieved by the common order dated 5.12.2006, below Exh.160 in Session Trial No. 84/2002 and below Exh.75 in Session Trial No. 85/2002, passed by the 2nd Ad-hoc Additional Sessions Judge, Nagpur has challenged the impugned order, by which those two applications were allowed in respect of accused Nos. 3, 5, 6, 8, 9, 10 and 11 in those trials and consequently, they were discharged.

2. It is the case of the prosecution that accused persons who are resident of Jalgaon hatched conspiracy in M.I.D.C. area of Jalgaon by holding meetings to take revenge against Indian Government and Hindus and had made aggressive speeches and publication in order to promote hatred between Hindu and Muslim community. They also enrolled young persons as members of SIMI with a view to send them after providing training in arms and preparation of bombs in various parts of India with a view to cause bomb blasts for waging war against India in Doda, and Kashmir and several other places so also to cause bomb blasts at

Nagpur. According to the prosecution, all the accused persons in these two session trials having conspired accordingly prepared bombs at Jalgaon and handed them over to accused No. 1 - Sk. Rijwan Sk. Rashid and accused No. 2 - Khalid Alidkhan Ajamalkhan for planting those bombs at Nagpur to create explosion in public places. According to the prosecution, thus, all the accused persons No. 1 to 11 conspired together, prepared bombs at Jalgaon and the same were transported to Nagpur through accused No. 1 - Sk. Rijwan Sk. Rashid and accused No. 2 - Khalid Alidkhan Ajamalkhan for planting in Nagpur and therefore, all these accused persons were guilty of the charges under Sections 153B, 121 121-A 122, 123 r/w 34 of the Indian Penal Code and u/s 4 and 5 of the Explosive Substances Act, 1908 as per the chargesheet filed in the Court at Nagpur in the above two session trials in respect of two offences, which according to the prosecution have taken place on 20.5.2001 and 24.5.2001.

3. It is not in dispute that one bomb was planted at Naik road while the other was planted in Badkas Chowk, Nagpur. The bomb planted at Naik road was discovered on 20.5.2001, while the other one was discovered on 24.5.2001 and that is why two separate offences were registered and two chargesheets were filed accordingly and two session trials were registered in Nagpur Court.

4. Since the offences regarding conspiracy and waging war against the State, preparation of bombs took place at Jalgaon and chargesheet was filed in the Sessions Court at Jalgaon against these eleven accused and they were charged for the offences punishable under Sections 153-A r/w 34, 120-B r/w 34, 121 r/w 34, 121-A r/w 34, 122 r/w 34, 123 r/w 34, 201 r/w 34, 506B r/w 34 of the Indian Penal Code and u/s 4(a) of the Explosive Substances Act, 1908, u/s 4(b) of the Explosive Substances Act, 1908, u/s 4(a) and 5 of the Explosive Substances Act, 1908 and u/s 4(b) and 5 of the Explosive Substances Act, 1908. The said session trial was bearing Session Trial No. 126/2002. In that trial, the learned Sessions Judge framed charge, which I reproduce for convenience.

1. Sk. Ilias Sk. Yusuf, age 19 years.
2. Sk. Shakil Ahmad Abdul Annan, 27 years.
3. Sk. Irfan Abdul Rauf, age 21 years.
4. Sharifkhan Sarfarajkhan, age 23 years.
5. Sk. Rijwan Sk. Rashid, age 21 years.
6. Sk. Siddik Sk. Ajij, age 21 years.
7. Khalid Alidkhan Ajamalkhan, age 22 years.
8. Wakarul Hussen Mujaffar Husen age 29 years.
9. Guljar Ahmad Gulam Mohammad, age 28 years.
10. Sayyad Shah Hasib Raja @ Tasib Raja @ Hasibbhai @ Hasif Raja s/o Firdosh Raja, age 34 years.

Along with accused Sk. Rashid Sk. Chand and absconding accused Sk. Mushtaq Sk Chand, Asif Sk. Supadu, Khalid Sk. Iqbal, Hanif Sk. Ismail, Parvejkhan, Asif Khan, as follows:

That you all in furtherance of your common intention 4 or 5 years prior to 25-7-2001 at Jalgaon, Nagpur, Delhi, Jammu & Kashmir, Doda, Kupwar, Shrinagar and Patana by speaking of writing or by visible representation viz., by giving lectures in weekly meeting, upper yearly Isetma () by publishing posters - promoted or attempted to promote feelings of enmity or hatred between Hindu community and Muslim community by giving provocative speeches and publishing the posters, prejudicial to maintenance of harmony between the Hindu and Muslim community disturbed or likely to disturb the public tranquility and thereby committed an offence punishable u/s 153-A r.w. 34 of the Indian Penal Code, and within my cognizance.

Secondly, during the same time and place, during the course of same transaction you all in furtherance of your common intention agreed to do or caused to be done an illegal act to enroll the persons of Muslim community as the members of Students Islamic Movement of India (SIMI) instigated them by provocative speeches and by publication of posters by their religious feelings by sending them to Delhi, Kashmir liaising with the members of SIMI and agents of Terrorists Organization, providing training in arms and preparation of Bombs and supplying arms, ammunition to instigate some young Muslim persons and the Members of SIMI to cause Bomb blasts by illegal means by adopting illegal means and with some act i.e., waging war against the Indian Army in Doda and Kashmir, and attempting to cause Bomb blasts at Nagpur on 20-5-2001, and thereby committed an offence punishable under 120B r.w. 34 of the Indian Penal Code and within my cognizance.

Thirdly, at the same time and place and during the course of same transaction you all in furtherance of your common intention waged the war or attempted to wage the war or abetted waging of war against the Government of India, and thereby committed an offence punishable u/s 121 r.w. 34 of the Indian Penal Code and within my cognizance.

Fourthly, during the same time and place and within India and in the Course of same transaction, you all conspired to wage war or abet the waging of war against the Government of India or conspired to overawe by means of criminal force the Central Government and thereby committed an offence punishable u/s 121-A r.w. 34 of the Indian Penal Code, and within my cognizance.

Fifthly, during the same time and place and in the course of same transaction you collected the men or arms or ammunition with the intention of waging war or being prepared to wage war against the Government of India, and thereby committed an offence punishable u/s 122 r.w. 34 of the Indian Penal Code, and within my cognizance.

Sixthly, during the same time and place and in the course of same transaction

you accused No. 3 - Sk. Irfan Abdul Rauf, accused No. 5 Sk. Rijwan Sk. Rashid, accused No. 7 Khalid Alidkhan Ajmalkhan, and accused No. 1 Sk. Iliyas Sk. Yusuf and absconding accused Sk. Mustak Sk. Shafi had design to wage war against the Government of India, concealed the existence of such design by concealing the explosive substance, chemicals detonators, A, B, C, D - timers, batteries, fuse wire etc. intending by such concealment to facilitate the waging of such war and, thereby committed an offence punishable u/s 123 r.w. 34 of the Indian Penal Code and within my cognizance.

Seventhly, at the same time and place and during the course of same transaction, you all in furtherance of your common intention were knowing or reason to believe that certain offence to wit waging war against the Government punishable with death has been committed, did cause certain evidence of the said offence to disappear to wit to conceal explosive substances or throw them or burnt them with intention of screening yourself from legal punishment and thereby committed an offence punishable u/s 201 r.w. 34 of the Indian Penal Code and within my cognizance.

Eightly, at the same time and place and in the course of same transaction, you accused No. 2 Sk. Shakil Ahmad Abdul Annan, accused No. 8 Wakarul Husen Mujaffar Husen and absconding accused Asif Sk. Supadu have committed criminal intimidation by threatening the guardians of absconding accused Khalid Sk. Iqbal, Asif Sk. Supadu, Hanif Sk. Ismail with injury to their life with intend to cause an alarm to the said guardians or to cause them to omit i.e., to report the matter to the police, and thereby committed an offence punishable u/s 506-B r.w. 34 of the Indian Penal Code, and within my cognizance.

Ninthly, at the same time, place and during the course of same transaction you all along with dead and absconding accused unlawfully and maliciously did any act to wit you accused No. 9 Guljar Ahmad Gulam Mohammad Conspired with accused No. 5 Sk. Rijwan Sk. Rashid, accused No. 3 Sk. Irfan Abdul Rauf, accused No. 7 Khalid Alidkhan Ajmalkhan caused an explosion at Nagpur by appointing latter as Area Commander of Hisbul Mujahiddin by explosive substance of nature likely to endanger the life or to cause serious injury to the property, and thereby committed an offence punishable u/s 4(a) of the Explosive Substance Act, 1908 and within my cognizance.

Tenthly, at the same time and place and in the course of same transaction, you accused No. 9 - Guljar Ahmad Wani @ Guljar Ahmad Gulam Mohammad and called accused No. 7 Khalid Alidkhan Ajmalkhan, accused No. 1 Sk. Ilias Sk. Yusuf at Jama Masjid, Delhi, and supplied the latter two - accused explosive substances, chemical, detonators, A.B.C.D timers, remote control, fuse wire etc., used for preparing Bombs and also provided training to accused No. 7 Khalid Alidkhan Ajmalkhan and accused No. 5 Sk. Rijwan Sk. Rashid, accused No. 1 Sk. Ilias Sk. Yusuf and absconding accused Sk. Mustak Sk. Shafi, accused No. 3 Sk. Irfan Abdul Rauf, prepared two pipe bombs(improvised explosive devices) at the house of Sk. Jainuddin resident near Millat High School, Meharun, who is relative

of accused No. 7 Khalid Alidkhan Ajmalkhan, and thereby committed an offence punishable u/s 4(b) of the Explosive Substance Act, 1908, and in the course of same transaction, you accused No. 7 Khalid Alidkhan Ajamalkhan, accused No. 5 Sk. Rijwan Sk. Rashid tried to cause explosion on 20-5-2001 at Nagpur and thereby committed an offence punishable u/s 4(a) and 5 of the Explosive Substance Act, 1908 and within my cognizance.

Eleventhly, at the same time and place and in the course of same transaction accused No. 3 Sk. Irfan Abdul Rauf, accused No. 1 Sk. Ilias Sk. Yusuf, accused No. 5 Sk. Rijwan Sk. Rashid, accused No. 7 Khalid Adidkhan Ajmalkhan, and absconding accused Sk. Mustak Sk. Shafi were found in possession of explosive substances, chemical detenators, A.B.C.D timers, batteries, fuse wires etc., used for preparing the Bombs with intend to endanger or property under suspicious circumstances and thereby committed an offence punishable u/s 4(b) and 5 of the Explosive Substance Act, 1908 and within my cognizance.

5. It is not in dispute that the trial in the said Session Trial No. 126/2002 was held by the Sessions Judge at Jalgaon and all these accused were tried and some of them were convicted and some were acquitted by the said Court. Learned Counsel for respondents stated before me that the respondents have preferred appeals before Aurangabad Bench of this Court and the Aurangabad Bench has also released them on bail by suspending the sentence.

6. Perusal of the charge in Session Trial No. 126/2002 held at Jalgaon Court clearly shows in substance that four or five years prior to 25.7.2001 at Jalgaon, Nagpur, Delhi, Jammu & Kashmir, Doda, Kupwar, Shrinagar and Patna lectures were given by the accused persons so also by publishing posters and promoting the feelings of hatred between Hindu and Muslim community. The accused persons had prepared bombs in the M.I.D.C. area of Jalgaon and those bombs were delivered in possession of accused No. 1 - Sk. Rijwan Sk. Rashid and accused No. 2 - Khalid Alidkhan Ajamalkhan for being planted at Nagpur. As a result of the said conspiracy, these two accused Nos. 1 and 2 then came to Nagpur and planted one bomb at Naik road and another at Badkas chowk. It is not in dispute that none of these bombs exploded and they were found out and defused by transporting them to Gorewada jungle. Thus one bomb was detected at Naik road on 21.5.2001, while other was detected on 24.5.2001 at Badkar square. On these very facts and charges, chargesheet in the Nagpur Sessions Court in the above two session trials was filed and all accused persons are being tried in Nagpur Sessions Court also.

7. Sessions Court, Jalgaon delivered the judgment on 12.5.2006, holding some of the accused persons guilty of the offences charged against them and were sentenced to jail. Thereafter all accused persons who are being tried in the above two session trials at Nagpur filed applications, Exh.160 and Exh.75 in the above two sessions trials for stopping the trial on the ground that since all accused persons were already tried by Jalgaon Court and were convicted and sentenced also on the self same incident, facts and charges they cannot be tried and

protection u/s 300 of the Code of Criminal Procedure read with Article 20 Clause II of the Constitution of India would be available to them as they cannot be tried twice for the same offences. The learned Sessions Judge heard learned Counsel for both the parties at length and made an order, holding that except accused No. 1 - Sk. Rijwan Sk. Rashid and accused No. 2 - Khalid Alidkhan Ajamalkhan, all other accused persons were entitled to the benefit of Section 300 of the Code of Criminal Procedure since they were already tried and convicted by the Jalgaon Court. The learned Sessions Judge, however, made a distinction in so far as accused Nos. 1 and 2 are concerned and the distinction was that these two accused persons had actually planted bombs at Nagpur and therefore, their trial will have to continue for the charges levelled against them all the more so because they were never tried for actual planting the bombs at Nagpur by Jalgaon Court. It is this order which is under challenge in the present criminal revision application.

8. In support of the criminal revision application, learned A.P.P. Shri Doifode with A.P.P. Shri Sonare argued that the incident of 20.5.2001 was alone the subject matter of charge in Jalgaon Court while the incident of 24.5.2001 was not the subject matter of charge in Jalgaon Court and therefore, there is clear distinction and at least for the incident of 24.5.2001 all the accused persons can be tried by Nagpur Court and therefore, the principle of double jeopardy would not come into play for that reason. Learned A.P.Ps. then argued that the preparation of bombs at Jalgaon for being dispatched to Nagpur through accused Nos. 1 and 2, as a result of conspiracy hatched at M.I.D.C. Jalgaon, in so far as planting of bombs at Nagpur is concerned, were not tried by Jalgaon Court and therefore, all the accused persons will have to be tried by Nagpur Court. Learned A.P.Ps. then argued that the accused persons were not charged for the offence punishable u/s 4(b) of the Explosive Substances Act, 1908 by Jalgaon Court and therefore, Nagpur Court cannot be stopped from trying them and they have neither been tried nor convicted for the said offence.

9. Per contra, learned Counsel for the respondents supported the impugned order and argued that perusal of the chargesheets filed in the Nagpur Court in the above two session trials clearly show that it is replica of chargesheet that was filed in the Jalgaon Court and as a matter of fact according to learned Counsel for the respondents, Nagpur Police did nothing except copying Jalgaon chargesheet and filing the same in Nagpur Court. According to him, at any rate, perusal of the charges levelled against the accused persons at Jalgaon Court show this position, namely, that the conspiracy by all accused persons hatched in M.I.D.C. Jalgaon, bombs were prepared at Jalgaon and they were dispatched through accused Nos. 1 and 2 for being planted at Nagpur for creating explosions in public places. According to learned Counsel for the respondents, it is not the case of the prosecution that all accused persons including accused Nos. 1 and 2 had come down to Nagpur to execute the plan of planting the bombs and exploding them. He, therefore, submits that distinction will have to be drawn between accused Nos. 1 and 2 as against other accused persons, in so far as the session trial at

Jalgaon is concerned. Session trial at Jalgaon has come to an end and that is the reason why these applications were filed thereafter and therefore, submission made by learned A.P.Ps. that they were filed too late and therefore, the Court should have rejected the same, is misconceived.

10. I have gone through the impugned order made by the learned Sessions Judge, Nagpur. I have also gone through the charge that was framed in Session Trial No. 126/2002 by Jalgaon Court, which I have already reproduced above. Perusal of the record shows that the aforesaid facts narrated herein before are also the subject matter of chargesheet of the two sessions trials pending before the Sessions Judge, Nagpur and there is no separate incident or facts constituting different offences than those which have been enumerated above. The only difference i.e. being pointed by learned A.P.Ps. about incident of 24.5.2001 is hardly a point for making distinction. The reason is that as a result of conspiracy which was hatched at Jalgaon and as a result of preparation of bombs at Jalgaon and planting them at Nagpur through accused Nos. 1 and 2, these two bombs were found on different dates. One bomb was found on 21.5.2001 at Naik road, while other bomb was found on 24.5.2001 in Badkas Chowk. Merely because these bombs were found on different dates or discovered on different dates, the same cannot become a point of distinction. As a matter of fact even according to the prosecution both these bombs were planted as a result of the conspiracy and preparation of bombs which took place at Jalgaon and therefore, in my opinion, incident of 24.5.2001 cannot be said to be a separate incident in that sense, as even the said incident is directly related to the prosecution case about conspiracy and preparation of bombs at Jalgaon. Merely because the other bomb was found or discovered on 24.5.2001, no distinction can be drawn therefrom as contended by learned A.P.Ps.

11. Perusal of the chargesheet filed in Nagpur Court in both these session trials reveal the above position and there is no separate material to hold that Nagpur Court would try the session trial in respect of any other offences than the one narrated herein before which was tried by Jalgaon Court. To put in other words, all the accused persons except accused Nos. 1 and 2 have been already tried and some were acquitted and some were convicted for hatching conspiracy at Jalgaon against Government of India, preparing bombs for being transported to Nagpur through accused Nos. 1 and 2. For the same charges, therefore, they cannot be again tried in session trials at Nagpur, in the light of specific bar u/s 300 of the Code of Criminal Procedure and the principle of double jeopardy.

12. In the case of State through Superintendent of Police, CBI/SIT Vs. Nalini and Others, , the Apex Court has had to say:

235. The period of the aforesaid activities, as involved in that case, covered the period from 1987 to end of 1991. Section 300(1) of the Code of Criminal Procedure contains the ban against a second trial of the same offence against the same person. Sub-section (1) reads thus:

300(1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Sub-section (1) of Section 221, or for which he might have been convicted under Sub-section (2) thereof.

236. The well-known maxim "nemo debet bis vexari pro eadem causa" (no person should be twice vexed for the same offence) embodies the well-established common law rule that no one should be put to peril twice for the same offence. The principle which is sought to be incorporated into Section 300 of the Criminal Procedure Code is that no man should be vexed with more than one trial for offences arising out of identical acts committed by him. When an offence has already been the subject of judicial adjudication, whether it ended in acquittal or conviction, it is negation of criminal justice to allow repetition of the adjudication in a separate trial on the same set of facts.

237. Though Article 20(2) of the Constitution of India embodies a protection against a second trial after a conviction of the same offence, the ambit of the clause is narrower than the protection afforded by Section 300 of the Criminal Procedure Code. It was held by this Court in *Manipur Admn. v. Thokchom Bira Singh* that "if there is no punishment for the offence as a result of the prosecution, Article 20(2) has no application". While the clause embodies the principle of *autrefois convict* Section 300 of the Criminal Procedure Code combines both *autrefois convict* and *autrefois acquit*.

238. Section 300 has further widened the protective wings by debarring a second trial against the same accused on the same facts even for a different offence if a different charge against him for such offence could have been made u/s 221(1) of the Code, or he could have been convicted for such other offence u/s 221(2) of the Code. In this context it is useful to extract Section 221 of the Criminal Procedure Code.

221. Where it is doubtful what offence has been committed - (1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

(2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of Sub-section (1), he may be convicted for the offence which he is shown to have committed, although he was not charged with it.

239. As the contours of the prohibition are so widely enlarged it cannot be contended that the second trial can escape therefrom on the mere premise that

some more allegations were not made in the first trial....

13. It is, however, clear that since accused Nos. 1 and 2 have played the role of planting two bombs at Nagpur and in addition for execution of the conspiracy that was made at Jalgaon, they cannot claim benefit of the said provision of Section 300 of the Code of Criminal Procedure and therefore, the learned Sessions Judge has rightly rejected their applications.

14. The upshot of the above discussion is that the order made by the learned Sessions Judge is legal, correct and proper and it is better to quote relevant portion from paragraph No. 24 thereof for the sake of brevity.

24. However, except accused No. 1 Sheikh Rizwan and accused No. 2 Khalid Asaf Khan, other accused No. 3, 5, 6, 8, 9, 10 and 11 have no direct concern in respect of the offence of actually planting bomb by accused No. 1 and 2 at Nagpur on 20-5-01 and on 24-5-01 at two different places. Other accused are already tried along-with accused No. 1 and 2 of the offences committed by them at Jalgaon and the said incident and offence at Jalgaon in respect of accused No. 3 to 7 including accused No. 1 and 2 are different and they are already decided and dealt with. Therefore, joining accused No. 3 to 11 again in this trial for the same act committed by them at Jalgaon will amount to double jeopardy u/s 300 of Cri.P.C. against accused No. 3 to 11. So far as the offences at Nagpur is concerned, it is only the accused No. 1 and 2 who are liable to be tried for offence of planting pipe bombs on 20-5-01 and on 24-5-01 at Badkas Chowk and at Naik Road respectively which is their independent act amounts to independent offences u/s 153B of I.P.C. for planting of bombs near the religious places with intention to create prejudice, to maintain harmony between Hindu and Muslim and to disturb the public tranquility....

15. In the result, I make the following order.

ORDER

(i) Criminal Revision Application is dismissed.

(ii) The learned Sessions Judge shall now try the said two trials bearing Session Trial No. 84/2002 and Session Trial No. 85/2002 against accused No. 1 - Sk. Rizwan Sk. Rashid and accused No. 2 - Khalid Alidkhan Ajamalkhan and complete the same as expeditiously as possible and in any case within a period of one year from today.

Learned A.P.Ps. make a request for suspending this judgment for a period of six weeks.

Since the matter is pending since 2007, it would be appropriate to suspend the effect of this judgment for a period of six weeks from today to enable the State to take such steps as are advised.