

(2007) 03 DEL CK 0068

In the Delhi High Court

Case No : Writ Petition (Criminal) No. 2987 of 2006

Union of India (UOI)

APPELLANT

Vs

Maninder Pal Singh Kohli

RESPONDENT

Date of Decision : 21-03-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311

Evidence Act, 1872 — Section 136

Extradition Act, 1962 — Section 5, 7, 7(2)

Citation : (2007) 1 ILR Delhi 1281

Hon'ble Judges : Reva Khetrapal, J

Bench : Single Bench

Advocate : A.K. Vali, N.K. Matta and Anand Jha, for the Appellant; C.S. Bakshi, for the Respondent

Judgement

Reva Khetrapal, J.—The prayer made in this petition is for taking on record additional evidence, which was not allowed to be taken on

record by the impugned order dated 4th December, 2006 passed by the learned Extradition Magistrate in the Extradition Enquiry proceedings

pending before her.

2. The facts relevant for the decision of the present petition are as follows:

On 14th March, 2003, one Hannah Foster aged about 17 years was reported to be missing by her parents at Southampton, England, United

Kingdom. Two days later, that is, on 16.03.2003, the body of Hannah Foster deceased was found in the undergrowth by the side of Ellington

Lane in West End, Southampton. On investigation by the Hampshire Constabulary, Maninder Pal Singh Kohli (hereinafter referred to as the

Fugitive-Criminal") was suspected for the offence of kidnapping, rape and murder of the deceased Hannah Foster. Sometime in June, 2004, the

Fugitive-Criminal was arrested by the West Bengal Police from Patnighata (Indo-Nepal Border), Kalimpong, West Bengal while he was about to

flee from India to Nepal. Consequent to his arrest, the ACMM, New Delhi was, as per law, appointed as an Extradition Magistrate by the Central

Government vide order dated 6th September, 2004 on account of the extradition treaty between India and U.K., copy whereof is enclosed with

the petition as Annexure P-1.

During the period from September, 2004 to July, 2006, the ACMM remained seized of the matter. In August, 2006, during the course of enquiry

proceedings in the matter, some queries were raised and clarification sought on some points and issues by the learned Extradition Magistrate as

evidenced by her orders dated 7th August, 2006, 23rd August, 2006 and 25th August, 2006 enclosed with the petition as Annexure P-2

(collectively). It is not proposed to dwell at length on the said orders. Suffice it to say, that a perusal of the said orders shows that the learned

Extradition Magistrate desired to seek certain clarifications with regard to the route taken by the Fugitive-Criminal and as to whether the blood

sample of the Fugitive-Criminal had been taken for the purpose of DNA testing, to which the Fugitive-Criminal furnished an affidavit on 25th

August, 2006 to the effect that after he had been brought from Patnighata to Kalimpong, his blood samples for DNA tests and finger prints were

taken by the British Police. In this regard, he also placed before the learned Extradition Magistrate two news item in the ""Chandigarh Tribune

dated 16.07.2004 and 17.07.2004 to show that DNA testing had been done pursuant to his arrest. In his affidavit, the Fugitive-Criminal also

submitted that his DNA test was also conducted by the Crime Branch of Delhi in the Swiss Diplomat rape case after taking his blood samples

when he was lodged in Kalimpong jail. In this regard also, he placed on record the news item published in ""The Hindu"" dated 21st July, 2004,

wherein DCP Sh. Tajender Luthra had stated that ""....Kohli's DNA test would be conducted..."". It was submitted that all these tests were done on

the asking of the British agencies and the Crime Branch while he was at the Kalimpong Hospital. Pursuant to a query put by the learned Extradition

Magistrate as to whether he was ready and willing to submit for DNA examination by the investigating agency, the Fugitive-Criminal submitted that

he was not willing to submit for DNA test, in view of the fact that his blood samples, DNA tests and finger prints had been taken on several

occasions, and several blood tests had been conducted by both the British agencies and the Delhi Police; which reports, according to him, should

be available with the concerned agencies. In the aforesaid circumstances, the following observations were made by the learned Extradition

Magistrate in her order dated 25th August, 2006:

...I have considered the submissions made before me. In case if what has been submitted by the Fugitive Criminal is correct then it is certainly a

matter of serious concern as to why the results in respect of the DNA analysis carried out by the British agencies and the Delhi Police have not

been placed before this Court till date. This aspect assumes importance in view of the fact that both the investigating agency and the prosecution

are relying upon the DNA test report in respect of the samples taken from the children of fugitive in order to connect the present Fugitive Criminal

with the offence.

This Court is given to understand that the DNA science is an exact science and leaves no chance to probabilities or conclusiveness. In this

background once the Fugitive Criminal had been apprehended in India and if in case his blood samples had been taken for the purposes of

conducted (sic.) DNA testing as alleged, the report in respect of the same could have been relevant for the purposes of present inquiry in order to

conclusively connect the Fugitive Criminal with the offence. In this background, I direct the UOI to:

(i) inform this Court regarding the correctness of the claims of the Fugitive Criminal with regard to taking of his blood samples by the British

Agencies at Kalimpong at the time of his arrest for DNA analysis and also by the Delhi Police during the investigations of the Swiss diplomat rape

case.

(ii) In case if the blood samples of the Fugitive Criminal as alleged had been taken by the concerned agencies whether the DNA matching had been

carried out vis-a-vis the present case or not.

(iii) In case if the said tests have been carried out, to inform this Court why the reports in respect of the same have not been placed before this

Court.

3. On 20th October, 2006, the petitioner/U.O.I. pursuant to the queries put and clarifications sought by the learned Extradition Magistrate filed an application for taking on record additional evidence/documents/ photographs, copy whereof is enclosed with the petition as Annexure P-3. The said application was opposed by the respondent/Fugitive-Criminal by filing a reply dated 04.11.2006, copy whereof is enclosed with the petition as Annexure P-4. On 13.11.2006, the petitioner filed a rebuttal to the reply filed by the respondent/Fugitive-Criminal to the application dated 20th October, 2006, copy whereof is Annexure P-5. On 4th December, 2006, the learned Extradition Magistrate after hearing arguments passed the impugned order on the application dated 20th October, 2006, whereby the application of the petitioner for taking on record the additional evidence was partly allowed. The grievance of the petitioner is that some very material evidence has not been permitted to be taken on record which, in fact, was filed by the petitioner pursuant to the queries raised and the clarifications sought by the learned Extradition Magistrate herself. This material evidence/record was called for from the Requesting State, i.e., U.K. pursuant to the queries raised by the learned Extradition Magistrate. Copies of the documents/additional evidence, which were not permitted to be taken on record are annexed with the petition as Annexure P-6 (collectively), while a copy of the impugned order dated 04.12.2006 is annexed as Annexure P-7.

4. I have heard Shri A.K. Vali, learned Counsel for the petitioner and Shri C.S. Bakshi, learned Counsel for the Fugitive-Criminal and carefully perused the impugned order passed by the learned Extradition Magistrate as well as the earlier orders dated 7th August, 2006, 23rd August, 2006 and 25th August, 2006. I have also perused the reply filed by the Fugitive-Criminal to the present petition and scrutinised the documents (Annexure P-6) (collectively) in respect of which the whole controversy has arisen.

5. Learned Counsel for the petitioner, Shri Vali forcefully contended that the documents/statements sought to be filed as additional evidence before the learned Extradition Magistrate were essential for establishing conclusively the complicity of the respondent/Fugitive-Criminal in the commission of the crime alleged and by not allowing the same to be placed on record, the learned Extradition Magistrate had gravely erred. The reason given

by her for the rejection of the aforesaid material evidence was equally untenable, in as much as while admitting the statement of Harrington Stephen

Anthony, three statements of James Dennis, one statement of Mitchell Gordon and the additional 65 photographs of the postmortem of the victim

produced on deposition of Brian Platt, Imaging Specialist, Hampshire as relevant, the remaining material was brushed off by her as ""not necessary

or relevant"" and as ""only explanatory in nature"". He further contended that this observation of the learned Extradition Magistrate reflected a total

non-application of judicial mind and submitted that the learned Extradition Magistrate failed to appreciate that the original Request Bundle/Request

Compendium, which was received by the Government of India when the request was made by the Requesting State, i.e., U.K., also contained

many statements/documents/photographs/ electronic data like Compact Disc Recording (Audio and Video), which were also explanatory in nature

and all had been allowed and taken on record.

6. Shri Vali further contended that the learned Extradition Magistrate while rejecting the additional evidence failed to appreciate that the same was

filed pursuant to the specific queries raised by her and that the same deserved to be taken on record as material evidence, especially when, on

23rd August, 2006, on a query put by her to the respondent/Fugitive-Criminal if he was ready to give his blood sample for the DNA test, the latter

in response to the said query alleged that his blood samples had already been taken twice by the I.O., Mr. Alan Betts and by the Delhi Police after

his arrest. The additional evidence, he pointed out, sought to establish the fact that the aforesaid statement made on oath by the Fugitive-Criminal

was palpably false.

7. Shri Vali submitted that the learned Extradition Magistrate had wholly failed to appreciate the entire gamut of the provisions of the treaty

between India and U.K. (hereinafter referred to as the "Extradition Treaty"). A perusal of the provisions of the aforesaid Treaty makes it amply

clear that as long as a Request from a Requesting State to the Requested State is pending consideration, any additional evidence or information

either sent by the Requesting State or submitted at the request of the Requested State is required to be considered at an appropriate stage. There

is no bar to taking fresh evidence in totality once it is supplied by the

Government of India after receiving the same from the Requesting State for the purpose of arriving at a just and lawful decision by an Extradition Court appointed by the Requested State/Union of India.

8. In the above context, my attention was drawn by Shri Vali to the provisions of Article 11(3) of the Extradition Treaty between U.K. and India

which states:

Article 11(3) If "the request" relates to an accused person, it must also be accompanied by a warrant of arrest issued by a judge, magistrate or

other competent authority in the territory of the Requesting State and by such evidence as, according to the law of the Requested State, would

justify his committal for trial if the offence had been committed in the territory of the Requested State, including evidence that the person requested

is the person to whom the warrant of arrest refers.

9. My attention was also drawn to Article 14 of the Extradition Treaty between U.K. and India which relates to ""Evidence"" and reads as under:

Article 14(1) The authorities of the Requested State shall admit as evidence, in any proceedings for extradition, any evidence taken on oath or by

way of affirmation, any warrant and any certificate of or judicial document stating the fact of a conviction, if it is authenticated:

(a) (i) in the case of a warrant being signed, or in the case of any original document by being certified, by a judge, magistrate or other competent

authority of the Requesting State; and

(ii) either by oath of some witness or by being sealed with the official seal of the appropriate Minister of the Requesting State; or

(b) in such other manner as may be permitted by the law of the Requested State.

(2) The evidence described in paragraph (1) shall be admissible in extradition proceedings in the Requested State whether sworn or affirmed in the

Requesting State or in some third State.

10. Article 11(6) of the Extradition Treaty between U.K. and India, it was pointed out, clearly stipulated that where the Requested State

considered that the evidence supplied was not sufficient in order to enable a decision to be taken as to the request, additional evidence shall be

submitted within such time as the Requested State shall require. Article 11(6) reads as under:

Article 11(6) If the Requested State considers that the evidence produced or information supplied for the purposes of this Treaty is not sufficient in order to enable a decision to be taken as to the request, additional evidence or information shall be submitted within such time as the Requested State shall require.

11. Learned Counsel for the Union of India, Shri Vali emphatically urged that Article 11(3) and Article 14 nowhere bar any document/affidavit/certificate stating facts, etc. to be taken on record as evidence, so long as the same are duly authenticated as per the procedure prescribed in the Act, no matter of what nature they are or at what time or stage they are being produced by the Requested State or called for by the Requested State from the Requesting State. He further contended that Article 11(6) expressly provides for additional evidence without any embargo of time and the provisions of Article 11(6) of the Extradition Treaty were in consonance with the aim and objective of the treaty between India and U.K., which is to facilitate each other for just conclusion of extradition proceedings and not to get carried away by trivial technicalities.

12. Shri Vali on behalf of the Union of India submitted that the learned Extradition Magistrate had failed to appreciate that a request from a Requesting State to the Requested State is essentially a political decision by the Government of the Requested State. Thus, the request begins from the day when formally papers are sent which are considered for appointment of an Extradition Magistrate to conduct an independent judicial probe/enquiry and, thereafter, on submission of the enquiry report by the Magistrate, if the Magistrate comes to a conclusion that a prima facie case is made out against the Fugitive-Criminal and sends the enquiry report accordingly, the Central Government again considers the material before it, that is, the initial request, the enquiry report by the Magistrate and its own parameters, and thereafter takes a final decision on the request whether to extradite or not the demanded Fugitive-Criminal to the Requesting State. Only after completion of this exercise, a decision on the request is treated as final.

13. Shri Vali, learned Counsel for the Union of India also referred to the provisions of Section 7(2) of the Extradition Act, 1962 to vigorously contend that in view of the provisions thereof, the learned Extradition Magistrate

is bound to receive all such evidence as may be produced in support of the request of the foreign State or on behalf of the fugitive and that the learned Extradition Magistrate cannot refuse to admit any evidence produced by either side during the said enquiry. The provisions of Section 7 being relevant are reproduced hereunder:

7. Procedure before Magistrate.-(1)When the fugitive criminal appears or is brought before the Magistrate, the Magistrate shall inquire into the case in the same manner and shall have the same jurisdiction and powers, as nearly as may be, as if the case were one triable by a Court of Session or High Court.

(2) Without prejudice to the generality of the foregoing provisions, the Magistrate shall, in particular, take such evidence as may be produced in support of the requisition of the foreign State and on behalf of the fugitive criminal, including any evidence to show that the offence of which the fugitive criminal accused or has been convicted is an offence of political character or is not an extradition offence.

(3) If the Magistrate is of opinion that a prima facie case is not made out in support of the requisition of the foreign State, he shall discharge the fugitive criminal.

(4) If the Magistrate is of opinion that a prima facie case is made out in support of the requisition of the foreign State, he may commit the fugitive criminal to prison to await the orders of the Central Government and shall report the result of his inquiry to the Central Government, and shall forward together with such report, any written statement which the fugitive criminal may desire to submit for the consideration of the Central Government.

14. In order to rebut the contentions of Shri Vali, learned Counsel for the respondent Shri C.S. Bakshi vociferously contended that the scope and ambit of the extradition proceedings pending decision before the Extradition Magistrate, New Delhi is limited to evidence brought on record as a result of investigation conducted by the British Investigation Agencies when they had sent the request for extradition to India as was patently clear from Note No. CH/55/03 dated 02.05.2003 written by the British High Commission to Shri B.A. Roy, MEA, South Block, New Delhi, wherein it is specifically stated as under:

The High Commission would like to clarify that the suspect is wanted for prosecution rather than for investigation (a request for extradition of the said person would follow provisional arrest).

15. On the basis of the above Note, Shri Bakshi contended that the British High Commission had concluded its investigation in the Hannah Foster

case and had sought extradition of the respondent only for the purpose of trial/prosecution and not for investigation. It was in this background that

the order appointing the Extradition Magistrate, New Delhi u/s 5 of the Extradition Act, 1962 was made. Lamentably, the British Government

through the Union of India, he contended, had now further investigated/re-investigated into the matter for the reason that the Extradition Court had

found serious anomalies in the prosecution version and had given a clear indication that the evidence as adduced by the Union of India (furnished

by the British High Commission) may be inadequate to extradite the respondent. The Union of India could not, Therefore, be allowed to fill the

lacunae at this stage to the prejudice of the Fugitive-Criminal, more so, when the arguments stood concluded.

16. It was also submitted by Shri Bakshi on behalf of the Fugitive-Criminal that the clarifications were sought by the learned Extradition Magistrate

on the aspect of the route taken by the Fugitive-Criminal from the evidence which was already available on the judicial record in the form of CC-

TV records and at no point of time, did the Court seek clarifications which were beyond the evidence already filed by the Union of India. By

misconstruing the orders of the learned Extradition Magistrate, in their garb, the Union of India had filed as many as 150 documents some of which

furnished new facts and revealed that facts pertaining to the case under enquiry by the Extradition Court had been investigated afresh.

17. Emphasis was also laid by Shri Bakshi on the provisions of Section 136 of the Indian Evidence Act, 1872 to contend that the Judge, who is

trying a case has absolute powers to take or not to take evidence on record proffered by either party and, Therefore, the admissibility of evidence

in the instant case was entirely within the domain of the learned Extradition Magistrate. If the learned Magistrate chose to partly accept the request

of the Union of India to place on record the additional evidence and reject the remaining documents as ""irrelevant"" and ""only explanatory in nature"",

the order could not be assailed on this score or on any other score whatsoever.

18. Finally, Shri Bakshi sought to contend that the British agencies having accepted about the DNA test, the evidence to the contrary could not be

taken on record, but was unable to point out any admission made by the British agencies in this regard.

19. After giving my anxious consideration to the matter and keeping in view the provisions of the Extradition Act, the Extradition Treaty between

India and U.K., and the fact that in the instant case the learned Extradition Magistrate had herself expressed the need for clarification with regard

to important aspects of the case, such as the route taken by the Fugitive Criminal and the aspect of DNA testing, I proceed to analyze and deal

with the rival contentions advanced at the Bar.

20. It is a cardinal rule of interpretation that objects and reasons of a statute may be looked into as an extrinsic aid to find out the legislative intent.

The Extradition Act, 1962, as its preamble suggests, is: "'An Act to consolidate and amend the law relating to the extradition of fugitive criminals'".

21. Extradition according to Article 1149, page 560 Halsbury's Laws of England, Vol.16, 3rd Edition is defined as follows:

Extradition is the delivery on the part of one State to another of those whom it is desired to deal with for crimes of which they have been accused

or convicted and are justiciable in the Courts of other States.

22. In other words, extradition is the surrender by one State to another of a person desired to be dealt with for crimes for which he has been

accused or convicted in pursuance of a treaty or an arrangement ad-hoc. It is founded on the broad principle that it is in the interest of civilized

communities that crime should not go unpunished, and on that account it is recognised as a part of the Comity of Nations that one State should

ordinarily afford to another State assistance towards bringing offenders to book. It is this which has to be borne in mind while dealing with the

instant matter. Thus viewed, the provisions of the Act and the Extradition Treaty must be strictly adhered to and it will not be open either to the

Central Government or to the Fugitive Criminal/respondent to deviate there from.

23. As noticed above, Section 7 of the Extradition Act makes it amply clear that the Extradition Magistrate shall take all such evidence as may be

produced in support of the requisition of the foreign State and on behalf of the

Fugitive-Criminal. In this context, the following observations made by a Single Judge of this Court in the case of Mohammad Hanif Haji Jusab v. Union of India in Crl. R.202 and 321/2002 decided on 29th January, 2003 are apposite and are accordingly being reproduced hereunder:

It will be seen that Sub-section 2 of Section 7 of the Extradition Act contains a clear mandate to the Magistrate to take such evidence as may be produced in support of the requisition of the foreign State as well as the evidence produced on behalf of the fugitive criminal. The use of the word "shall" in Sub-section 2 indicates that the Magistrate can not refuse to admit any evidence produced by either side during the said inquiry, no matter whether it is the evidence originally tendered or any additional evidence tendered subsequently. From the wordings of Section 7 of the Extradition Act, it does not appear that the Magistrate can refuse to admit/consider the evidence subsequently tendered by either party. In Section 311 Cr.P.C. which is invoked for adducing additional evidence during the trial of a criminal case the word used is "may" which means it is the discretion of the Court to admit or refuse to receive additional evidence. In contrast to this, word used in Section 7(2) of the Extradition Act is "shall" which means that the Magistrate will have to receive all such evidence as may be produced in support of the request of the foreign State or on behalf of the fugitive. There is no separate provision under the Act regarding reception of the additional evidence. The word "shall" used in Section 7(2) of the Act is comprehensive enough to include additional evidence also. (Emphasis added)

24. Then again, it cannot be lost sight of that Article 11(6) of the Extradition Treaty provides for additional evidence to be submitted within such time as the Requested State shall require in case the Requested State considers that the evidence produced or information supplied for the purposes of the treaty is not sufficient in order to enable a decision to be taken on the Request.

25. With regard to the reception of additional evidence during Extradition enquiry in the case of Mohammad Hanif Haji Jusab (*supra*), the following pertinent observations were also made in the context of Article 10 of the Treaty between India and Canada, the provisions whereof are *para materia* with the provisions of Article 11(6) of the Treaty in the instant case:

...After receiving the request of the extradition, the requested State may at any stage ask the requesting State to furnish additional evidence and if

the requesting State does not furnish the additional evidence within the time limit set out by the requested State the fugitive may be discharged.

Thus Article contemplates a situation where the requested State whether before or after the institution of the inquiry u/s 5 of the Act considers the evidence to be inadequate....

26. In view of the above, clearly, the contention of Shri Bakshi that the ambit of extradition proceedings is confined to the Request and its

accompanying documents sent by the Requesting State to the Requested State as on 2nd May, 2003 is untenable. The submissions made by him

with regard to the introduction of new evidence in order to fill in the lacunae is also wholly misconceived, as is his contention that British agencies

had accepted the statement made by the Fugitive-Criminal regarding DNA test. Such an occasion in fact never arose and to say that the British

agencies had accepted that DNA test had been undergone by the Fugitive-Criminal appears to be the ipse dixit of the respondent.

27. For the aforesaid reasons, the prayer made in the writ petition for allowing all those documents/statements which were not allowed to be taken

on record as additional evidence, by the impugned order dated 04.12.2006 passed by the learned Extradition Magistrate in the extradition enquiry

proceedings pending before her, deserves to be allowed and is hereby allowed. The learned Extradition Magistrate shall proceed with the

extradition enquiry after taking on record the aforesaid evidence, as expeditiously as possible.

28. Having held that the documents tendered by the petitioner be taken on record, it is deemed expedient to clarify that no observation made in

this order shall be construed as an expression of opinion on the merits of the enquiry pending before the Extradition Magistrate. Learned

Extradition Magistrate shall be at liberty to arrive at her own independent conclusion in the enquiry, particularly on the aspect of the DNA test of

the Fugitive-Criminal. Needless to state that for this purpose she may take into account the existing evidence or call for further evidence, if deemed

necessary by her. In case learned Extradition Magistrate arrives at the conclusion that DNA test of the Fugitive-Criminal was conducted by the

British agencies or the Delhi Police, she may call for the reports thereof. In case, however, she is satisfied that blood samples of the Fugitive-

Criminal for DNA analysis were never taken either by the British agencies or by the Crime Branch in the Swiss Diplomat rape case or otherwise,

then she may in her discretion examine the remaining evidence on record in that light.

29. Petition stands disposed of accordingly, leaving the parties to bear their own costs.

Crl. M. Nos. 14207/2006 and 2590/2007

In view of the order passed in W.P. (Crl.) No. 2987/2006, Crl. M. Nos. 14207/2006 and 2590/2007 stand disposed of accordingly.