

(2008) 04 RAJ CK 0095
In the Rajasthan High Court

Zakiya and Others and Maga Ram

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 03-04-2008

Acts Referred:

Arms Act, 1959 — Section 7
Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 27
Explosive Substances Act, 1908 — Section 4, 5, 7
Explosives Act, 1884 — Section 5, 9B
General Clauses Act, 1897 — Section 3, 6
Penal Code, 1860 (IPC) — Section 120B
Wireless Telegraphy Act, 1933 — Section 3, 6

Citation : (2008) 04 RAJ CK 0095

Hon'ble Judges : Bhanwaroo Khan, J

Bench : Single Bench

Judgement

Bhanwaroo Khan, J.—These two appeals i.e. D.B. Cr. Appeal Nos. 1133/2003 and D.B. Cr. Appeal No. 1032/2003 filed by accused Zakiya, Kala Khan, Achariya and Maga Ram respectively against the judgment dated 6.8.2003 passed by the learned Additional Sessions Judge (Fast Track), Balotra Camp Barmer by which accused-appellants Zakiya, Kala Khan, Achariya and Maga Ram, who have been convicted and sentenced as under:

Under Section 5/9(B) of The Indian Explosives Act- Two years" rigorous imprisonment and a fine of Rs. 1,000/- each in default to further undergo three months" rigorous imprisonment.

Under Section 4 of The Indian Explosive Substances Act- Rigorous imprisonment for life and a fine of Rs. 2,000/- each in default to further undergo six months" rigorous imprisonment.

Under Section 5 of The Indian Explosive Substances Act- Rigorous imprisonment for life and a fine of Rs. 2,000/- each in default to further undergo six months" rigorous imprisonment.

Under Section 3/6(1)(A) of The Indian Wireless Telegraphy Act- Two years" rigorous imprisonment and a fine of Rs. 500/- each in default to further undergo one month"s rigorous imprisonment.

Under Section 120B of The I.P.C.- One year"s rigorous imprisonment and a fine of Rs. 500/- each in default to further undergo one month"s rigorous imprisonment.

2. Both these appeals arise out of the same judgment are being disposed of by this judgment.

3. Briefly stated the facts are that accused Zakiya was in custody of Police Station, Jhinjhaniyali, District Jaisalmer against whom a case u/s 7/25(1)(K) of the Arms Act, Sections 4 and 5 of the Indian Explosive Substances Act, 1908 (for short "the Act of 1908" hereinafter), Section 5/9(B) of the Indian Explosives Act, 1884 (for short "the Act of 1884" hereinafter), Section 3(6)(1)(a) of the Indian Wireless Telegraphy Act (for short "Telegraphy Act" hereinafter) and Section 120B I.P.C. was registered. During the investigation which was under progress in the said police station an information u/s 27 of the Evidence Act was given by accused - Zakiya stating that Explosive Substance was sent twice by Mahardeen from Pakistan to Fotiya and Panu, from whom on the direction of Nathiya, he after receiving it handed it over to Kala son of Bilal. Again second time also the Explosive Substance along with wireless set, two antina, detonator and explosive substances on the direction of Kala, it was sent through Achariya and out of the said articles, he has buried one wireless set and the explosive substances in the field of Usman, resident of Mungariya, near his dhani. On the basis of said information in the presence of Motbirans, the explosive substances along with wireless set wrapped in polythene bag having a small tin in which a wireless hand-set was recovered. In the said polythene bag, the high explosive substance of yellow colour was recovered. A sample of 30 Grams was taken for chemical examination and rest of the articles were sealed on the spot. On the basis of this recovery, the S.H.O., Jhinjhaniyali lodged a report to the police station, Binjrad, District Barmer for further investigation because the articles recovered were within the jurisdiction of District Barmer. The case on the aforesaid offences was registered in the police station Binjrad, who after conducting the investigation submitted a challan before learned Additional Sessions Judge (Fast Track), Balotra Camp Barmer.

4. The accused-persons denied the charges levelled against them for the offence under Sections 4 and 5 of the Act of 1908, Section 5/9(B) of the Act of 1884, Section 3(6)(1)(a) of the Telegraphy Act and Section 120B I.P.C. and u/s 3(6) of the Passport Act and claimed for trial. The prosecution in all produced sixteen witnesses and exhibited documents Ex.-P/1 to Ex.-P/24. The accused-appellants in their statement u/s 313 Cr.P.C. denied the allegations of the prosecution witnesses. Three witnesses were produced in defence.

5. The trial court after evaluating the oral as well as documentary evidence and

relying on the evidence produced, has convicted all the accused for the offences charged, but acquitted u/s 3(6)(1)(a) the Passport Act.

6. Both the parties were heard. The entire record was gone through.

7. The learned Counsel for the appellants pleaded that accused - Zakiya, who was in custody of Police Station, Jhinjhaniyali in case No. 1/2002 simply gave the information in that case and not in the case of Police Station, Binjrad, District Barmer, who after investigation has submitted a challan against the accused-persons. Both cases are separately registered in two different police stations. In case of Police Station, Binjrad, there was no information given by the accused so it cannot be relied on nor any reliance can be placed on recovery, which was in another case. For rest of the accused-persons there is no material available on record which can link them in the commission of crime. Only the recovery was made at the instance of accused Zakiya and a statement given by the accused against the other co-accused, cannot be relied and read against them. The arrest of accused-Zakiya is also shrouded in mystery as the witnesses of police officers are not sure as how the accused-Zakiya was arrested in the case of Binjrad. The recovery which was made at the instance of the accused from the open field accessible to all cannot lead to the conclusion of involvement in the commission of crime. All independent witnesses have turned hostile and the explosive substances recovered were not kept intact, till it reached the Forensic Laboratory for examination. Looking to all these facts and circumstances, the learned trial court has wrongly convicted the accused-persons for the offences charged as there is not a single substance was recovered from any other accused except Zakiya, whose instance the said recoveries, if made, also become doubtful and cannot be relied on.

8. The learned Counsel for the appellants further pleaded that the Explosive Substances Act, 1908 before amendment prescribed the punishment for offence u/s 4 with transportation for a term which extend to 20 years or with imprisonment for a term which may extend to 7 years and for the offence u/s 5 is punishable with transportation for a term which may extend to 14 years or with imprisonment for a term which may extend to 5 years, but the learned trial court has punished the accused- persons with life imprisonment. In the Explosive Substances Act, the amendment in Sections 4 and 5 have been made w.e.f. 1.2.2002. The offence as per prosecution was committed and completed on 17.1.2002 then the accused could not have been punished for the said offence on the basis of the amendment in Sections 4 and 5 made on 1.2.2002 because the said offence was committed when unamended provision of the Act was in force and the amendment could not have been made applicable against the accused-persons which came in force much after 17.1.2002. The serious illegality has been committed by the learned trial court and the accused could not have been punished for life imprisonment which is the punishment provided by amending the penal sections w.e.f. 1.2.2002. At the most, sentence for transportation for any term provided under unamended section could have been

given or awarded to the accused but they could not have been punished u/s 4 for a period of more than 7 years and u/s 5 for a period of more than 5 years, so this illegality leads to the conclusion that the learned trial court has given punishment which was not within his competence and was not prescribed under the statute at the time of commission of crime. In the last learned Counsel pleaded that since the Act provides the maximum punishment of 7 years and the accused has almost undergone the sentence of more than 6 years, so the accused can be sentenced the period already undergone by them.

9. The learned Public Prosecutor while opposing the arguments put-forth by the learned Counsel for the appellants urged that as per Section 27 of the Evidence Act it is not necessary that the accused tenders the information only in the case in which he arrested. If the investigation is conducted by the police and the information is given by the accused for the commission of any other offence and the recovery is made on the basis of information tendered then certainly the information can be read against the accused if a case is registered, thereafter, in another police station having jurisdiction. In the instant case accused-Zakiya gave an information u/s 27 of the Evidence Act that led to a recovery of wireless set and explosive substances. On the basis of which, a separate case in the police station, Binjrad having jurisdiction was registered and investigated. No illegality is committed by either of the police officials of Jhinjhaniyali, Distt. Jaisalmer and Binjrad, Distt. Barmer.

10. It is true that the evidence of recovery is available only against the accused-Zakiya which was made by PW-1 Baxa Ram, who recovered the articles in the presence of PW-2 Sang Singh, PW-3 Hari Ram and PW-5 Ratan Lal, which clearly establishes that accused-Zakiya gave information Ex.-P/17 u/s 27 of the Evidence Act, which led the police to recover the wireless set and explosive substance through Ex.-P/8 which is also an FIR given by the S.H.O., Jhinjhaniyali, who sent the same to Police Station, Binjrad as the offence alleged to have been committed in territorial jurisdiction of Police Station, Binjrad. There is no other evidence available on record against rest three accused i.e. Kala Khan, Achariya and Maga Ram. They all have been implicated on the basis of statement of accused-Zakiya, but neither the circumstances nor the conduct of the accused-persons could reveals about their involvement in the crime charges. From the evidence and record submitted by the prosecution, there is not a whisper or word against Kala Khan, Achariya and Maga Ram to involve them in commission of crime. All these three accused-persons have been made accused only on the statement of accused-Zakiya without any independent evidence or circumstances which could linked the accused-persons either in conspiracy or in the commission of offence charged. All these accused can not be held guilty on the statement of accused Zakiya. The accused-persons cannot be held liable or guilty for the said offences in absence of material available on record. There is not an iota of evidence available against Kala Khan, Achariya and Maga Ram.

11. If a fact is disclosed u/s 27 of the Evidence Act and in consequence of

information tendered, if the fact is discovered in the form of recovery then only the fact recovered becomes admissible against the accused. Here in the instant case the accused gave out the information u/s 27 of the Evidence Act, which led to discover as per recovery memo Ex.-P/18, explosive substance and wireless set, then the fact which was well only within the knowledge of accused-Zakiya can be read against him and he can be held liable for the possession of all the articles recovered at his instance. The Forensic Science Laboratory Reports Ex.-P/20 and Ex.- P/21 clearly reveal that yellow colour putty type material was found live Nitrate base high explosive material and mixture of R.D.X. Similar mechanism of wireless set was found in working order, so recovery of explosive substance and wireless set is well proved on the basis of evidence of the Investigating Officers as well as other police officials and conviction can be based safely alone on the evidence of the police officials coupled with the recovery of explosive substance and wireless set recovered at the instance of accused-Zakiya on the basis of information tendered by him. The substance recovered from accused-Zakiya clearly falls within the definition of explosive. Nothing material has been brought on record to discredit the evidence of the police officials and on the basis of oral as well as documentary evidence. The case against accused-Zakiya is fully proved for the offences charged except the offence u/s 120B I.P.C.

12. As discussed above, except against accused-Zakiya there is no material available on record and evidence which could links the involvement of three accused-persons for the offences charged under the Act of 1908, the Act of 1884 and also Telegraphy Act. Similarly, there is no evidence or circumstances which can link all the accused-persons for the offence of criminal conspiracy. It is true that for criminal conspiracy direct evidence is difficult to obtain or procure, but neither circumstances nor conduct of the accused-persons lead an inference about the involvement in the commission of offence of conspiracy. Hence, neither the offence of Section 120B I.P.C. is made out against all these four accused-persons nor offence under Sections 4 and 5 of the Act of 1908 and u/s 5/9(B) of the Act of 1884 is not made out against accused-Kala Khan, Achariya and Maga Ram. The learned trial court has punished them without there being any material or evidence.

13. Now the question remains whether accused Zakiya can be punished with life imprisonment or not for the offence charged, under Sections 4 and 5 of the Act of 1908.

14. The amendment for the punishment was made in Sections 4 and 5 of the Act w.e.f. 1.2.2002, providing life imprisonment in place of transportation for 20 years and 14 years respectively. The learned trial court has awarded the life imprisonment to all the accused for the said offence. The punishment of life imprisonment for the said offence can be put in action only from 1.2.2002.

15. Here in the instant case the offence is alleged to have been committed on 17.1.2002, when recovery was made and FIR Ex.-P/18 (also recovery memo) was registered. For definition of offence. Section 3(38) of the General Clauses

Act is to applied, it means an act or omission which is punishable by any law by way of fine of imprisonment or death. Sub-section (d) of Section 6 of the General Clauses Act, 1897 is reproduced as under:

6. Effect of repeal. - Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not -

(a)-...

(b)-...

(c)-...

(d)- affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e)-...

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

16. It provides that repeal of an enactment would not affect any right, privilege, obligation, liability, acquired, accrued or incurred under repealed enactment or affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed. In the instant case, the punishment provided under Sections 4 and 5 of the Act of 1908 was replaced by the punishment of life imprisonment w.e.f. 1.2.2002. Any offence committed before 1.2.2002 would incur the penalty or punishment as provided in unamended punitive section which provide the transportation for 20 years or 7 years imprisonment u/s 4 and transportation for 14 years or 5 years imprisonment. As the offence was complete on 17.1.2002, the penalty should have been only under the old Sections, without amendment. The amended enactment will be applicable for the offences, which would be committed after 1.2.2002. The learned trial court committed illegality by punishing the accused under the amended clause.

17. Article 20(1) of the Constitution of India, which reads as under:

Article 20: Protection in respect of conviction for offences.-(1) No person shall be convicted of any offence except for violation of a law in force at the time of commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2)-...

(3)-...

18. The expression refers to the law factually in operation at the time when the offence was committed and does not relate to the law which may come in force subsequently, may be before award of punishment. The word convicted and offence provide two safeguard - first that no one shall be punished for an act, which was not an offence under the law in force when it was committed - second no one shall be subjected to a greater penalty for an offence than what was provided under the law in force for when the offence committed. The second safeguard provides the penalties which were prescribed and was in force at the time when one commits the offence for which one is being punished. This clarifies the position that one person can be punished only for the offence which he committed and with the punishment which was provided for the offence when it was committed. If the statute is amended subsequently regarding the punishment, that can not be made applicable to the person who committed the offence before amendment.

19. In the instant case, when the offence which was committed by the accused completed on 17.1.2002, when recovery of the articles took place and the case was registered. At that time the punishment prescribed under the Act of 1908 for the offence u/s 4 was transportation for life upto 20 years or imprisonment for 7 years and for Section 5 was transportation for 14 years or imprisonment for 5 years. Subsequently, an amended w.e.f. 1.2.2002 took place and punishment u/s 4 of the Act was prescribed as life imprisonment or imprisonment which may extend upto 10 years. Similarly, for Section 5 life imprisonment and imprisonment upto 10 years was prescribed. A person can be convicted only for the offence which he has committed and can be sentenced as provided in the statute at the time when the offence was committed. The learned trial court has awarded this amended punishment to the accused, which is contrary to law, because the offence was committed on 17.1.2002 and the amendment came into force on 1.2.2002 i.e. after the offence was completed. This amended punishment can not be awarded to the accused u/s 5. The accused could have been punished whatever punishment was provided under Sections 4 and 5 before amendment as the offence was complete before the amendment. The learned trial court committed illegality by giving punishment of life imprisonment as per amendment. This sentence of life imprisonment awarded to the accused Zakiya can not be sustained in the eye of law and deserves to be set-aside, but he can be given sentence under the old section which existed before amendment. To this extent the appeal of accused - Zakiya deserves to be allowed.

20. Resultantly, D.B. Cr. Appeal No. 1032/2003 filed by accused Maga Ram is allowed and conviction and sentenced passed by the learned trial court is set-aside. The accused Maga Ram is in jail and he is acquitted for the charges under Sections 4 and 5 of the Act of 1908, u/s 5/9(B) of the Act of 1884, u/s 3(6)(1)(a) of the Telegraphy Act and Section 120B I.P.C. and be released forthwith, if not required in any other case.

21. D.B. Cr. Appeal No. 1133/2003 filed by the accused Kala Khan and Achariya

is allowed. The conviction and sentenced against Kala Khan and Achariya passed by the learned trial court for the offences under Sections 4 and 5 of the Act of 1908, Section 5/9(B) of the Act of 1884, Section 3(6)(1)(a) of the Telegraphy Act and u/s 120B I.P.C. are set-aside and they are acquitted for the said offences. They be released forthwith, if not required in any other case.

22. D.B. Cr. Appeal No. 1133/2003 filed by the accused-Zakiya is partly allowed. He is acquitted for the offence charged u/s 120B I.P.C. and sentence passed for the aforesaid offence is set-aside. His conviction for the offence under Sections 4 and 5 of the Act of 1908, Section 5/9(B) of the Act of 1884 and Section 3(6)(1) (a) of the Telegraphy Act is maintained, but instead of life imprisonment accused-Zakiya is sentenced for the offence u/s 4 for 7 years with a fine of Rs. 1,000; in default thereof further to undergo six months" rigorous imprisonment and for Section 5 accused-Zakiya is sentenced for 5 years with a fine of Rs. 1,000/-; in default thereof further to undergo six months" rigorous imprisonment.

23. The conviction and sentence passed by the learned trial court for the offence u/s 5/9(B) of the Act of 1884 and u/s 3(6)(1)(a) of the Telegraphy Act are maintained. The accused-Zakiya is also in jail, who will serve remaining part of his sentence. All the sentences passed for the aforesaid offences against Zakiya shall be concurrent.