Mohammad Usman Mohammad Hussain, Maniyar and Others

Vs

State of Maharashtra

Criminal Appeals Nos. 150 and 285 of 1976

(O Chinnappa Reddy, Bahadur Islam JJ)

03.03.1981

JUDGMENT

ISLAM, J. –

These two appeals arise out of a common judgment and order passed by the High Court of Bombay. Criminal Appeal 150 of 1976 has been preferred by two appellants, Mohammad Usman Mohammed Hussain Maniyar (hereinafter 'Usman') and Mohammad Taufik Mohammad Hussain Maniyar (hereinafter 'Taufik') and Criminal Appeal 285 of 1976 has been preferred by Mohammad Hussain Fakhruddin Maniyar (hereinafter 'Fakhruddin') and Mohammad Rizwan Mohammad Hussain Maniyar (hereinafter 'Rizwan'). All of them were convicted and sentenced by the Sessions Judge as Follows :

> (i) Under Section 120-B of the Penal Code and sentenced to suffer rigorous imprisonment for three years, each :
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> (ii) Under Section 5 of the Explosive Substances Act and sentenced to suffer rigorous imprisonment for three years, each, and to pay fine of Rs. 1000 each in default, to suffer rigorous imprisonment for two months, each'
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> (iii) Under Section 5(3) (b) of the Explosives Act and sentenced to suffer rigorous imprisonment for six months, each and to pay fine of Rs. 500 in default to suffer rigorous imprisonment for one month each;
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> (iv) Under Section 3 read with Section 25(1) (a) of the Arms Act and sentenced to suffer rigorous imprisonment for two months each'
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> (v) Under Section 30 of the Arms Act and sentenced to pay a fine of Rs. 100 each, in default, to suffer rigorous imprisonment for two weeks, each;
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> (vi) Under Section 6(1) (a) of the Poisons Act read with Rule 2 of the Rules framed under the said Act and Sentenced to suffer rigorous imprisonment for one each, and to pay a fine of Rs. 50 each, in default, to suffer rigorous imprisonment for 15 days, each.

2. The substantive sentences were directed to run concurrently. The first two preferred one appeal and the second two a separate appeal before the High Court. The High Court by a common judgment dismissed both the appeals. Hence this appeal before us by special leave. This common

judgment of ours will dispose of both the appeals.

3. During the pendency of the appeal before this Court, appellants, Fakhruddin, died on October 10, 1978. His legal representatives have been brought on record as there are sentences of fine against the decreased appellant.

4. The facts necessary for the purpose of disposal of these appeals may be stated thus : In the years 1967 a number of murders were perpetrated by a gang of murderers. During the course of investigation into these offences, potassium cyanide was found to have been used for poisoning the victims. On September 11, 1967, PW 17, Bendre, P. S. I., who was attached to the local crime branch at Sholapur received an information that the firm known as M. F. Maniyar and Sons was selling potassium chlorate which is a highly explosive substance. He then initiated the work of finding out the persons responsible for the supply of the explosive to the miscreants. He received information that appellant, Fakhruddin, was the owner of the shop known as M. F. Maniyar and sons, situated at house No. 383, East Mangalwar Peth, Sholapur, and possessed licence for sale and storage for sale of potassium chlorate in house No. 615 in Each Mangalwar Peth; Fakhruddin with the assistance of his three sons (appellants 2 to 4) and his servants stored at the place mentioned in the licence but he sold them in their shop situated at house No. 383, East Mangalwar Peth, to persons who did not posses licence to purchase potassium chlorate. PW 17 and Sub-Inspector Tasgaokar of the lock Intelligence Branch proceeded to Mangalwar Peth Police Chowky and called a bogus customer, 'Basanna Pujari' by name. He also called the local Panchas. He, the, gave a ten rupee currency note to PW 4. He initialed the currency note. He also gave a bag to PW 4 and told him to by half kg. of potassium chlorate from M/s. M. F. Maniyar and Sons. PW 4 went to the shop. He found in the shop accused Chandrakant (since acquitted), who was a servant of Fakhruddin. PW 4 gave him the ten rupee currency note and asked for half kg. of potassium chlorate, which he said he needed for blasting purpose. Chandrakant gave him half kg. of potassium chlorate and returned an amount of Rs. 2.50 p. PW 4 took the powder in the bag and was returning. Police challenged him and seized the bag. Police interrogated him. He told police in presence of the Panchas that he had purchased the powder which was inside of the bag from M. F. Maniyar and got back Rs. 2.50p. PW 17 searched the cash box in the firm of Fakhruddin and found the tend rupee currency note initialed in the firm of Fakhruddin and found the ten rupee currency note initialed by him. The shop was searched and 220 grams of black gunpowder was found in the show-case. He then along with the Panchas went up too the first floor. They found black gunpowder there also. They found it to be a mixture of potassium chlorate and sulfate used for firearms. Samples were sealed and one of them was given to appellant, Fakhruddin. A panchnama, Ex. 20, was prepared PW 17, then, thought it necessary to send for an expert to identity the powder. He, therefore, posted some constables at the shop, sealed appellants' godowns in Mangalwar Peth and Shukarwar Peth and made panchnamas, Ex. 22 and 23. Next morning, he sealed both the shops and prepared panchnamas, Exs. 24 and 25. On September 13, he sent the samples to the Explosives Inspector. On the 14th he lodged a complaint at the Jail Road Police Station at Sholapur. Police registered a case and the P. S. I. started investigation. The P. S. I. sent for the Drugs Inspector and the Central Excise Inspector. All of them, the, visited the appellants' godowns at Shukarwar Peth at Sholapur. They found the shops in sealed condition. A search was conducted in the presence of the appellants. The police officer and others, having observed due formalities, searched the premises. In course of the search they found sand seized some powder as per panchnama, Ex. 27. Samples of the powder sized were also given to the appellants. After that they went and searched the appellants' premises in Mangalwar Peth. Nothing incriminating was found there. They, the, returned to the firm M/s. M. F. Maniyar and searched it. They found and seized some powders as per panchnama, Ex. 28. Samples of these powders also were given to the appellants. On the same night they found 49 percussions caps on the roof of the

adjacent shop and seized them as per Ex. 30. On the same night P. S. I., Patil, received a panchnama made by P. S. I., Joshi (PW 18) under which detonator had been seized. Acting on an information received from PW 17, PW 18 arrested appellant, Taufik on September 15, 1967. Appellant, Taufik told the police that he had buried some detonators in the compound of his bungalow and he would produce them. Accordingly, he led PW 18 to his bungalow which was admittedly in occupation of all the appellants, removed some earth under a mango tree in the premised and took out three tins containing 20 packets of detonators. It was seized under panchnama, Ex. 33. As the detonators were explosive they were not opened. Taufik was arrested and produced before PW 17.

5. The Explosives Inspector was of the opinion that some of the explosives seized were highly explosives. PW 17, the, withe permission of the District Superintendent of Police destroyed the explosives as instructed by the Explosives Inspector.

6. During the course investigation from September 11, 1967 to September 15, 1967 the following arms and explosives were seized :

(1) 200 grams of highly explosive gunpowder.

(2) 40 kg. and 150 grams of blasting powder.

(3) 3 kg. and 350 g. of mixture of potassium chlorate and sulphur.

(4) 54 detonators.

(5) 251 caps-like contrivances containing prohibited mixture of read arsenic sulphide and chlorate used to act as improvised percussion caps.

(6) 104 kg. and 500g, of potassium chlorate.

(7) 37.5 kg. of special gelatines.

(8) 300 kg. of sulphur.

(9) 2496 campion crackers of prohibited size and containing prohibited mixtures.

(10) 510 grams of potassium cyanide.

(11) About 450 kg. of sulphur

(12) 217 caps-like contrivances of the same description as is the case with Item 5 above.

(13) 2500 detonators.

(14) 27 live cartridges, 12 bores, and

(15) Mixture of sulphur and potassium chlorate 1/2 kg.

7. Out of these article, the article at serial Nos. 1 to 5 were found in the shop of M/s. M. F. Maniyar and Sons. Articles at serial Nos. 6 to 11 were found in the clandestine godown situated at 986, Shukarwar peth at Sholapur on September 15, 1667. Article at serial No. 12 was found on the roof

at East Mangalwar Peth, Sholapur, which is adjacent to the shop of M/s. M. F. Maniyar and Sons. Article at serial No. 13 were produced by appellant, Taufik, as stated earlier from the compound of their bungalow at 156-A, Railway Lines, Sholapur. Article at serial No. 14 consist of 12-bore cartridges found in the house of accused Abdulla Mandolkar (since acquitted). They were alleged to have been delivered by appellant, Fakhruddin, to accused, Fateh Ahmed Phuleri (since acquitted). The article at serial No. 15 was the one sold to PW 4, Basanna, by accused, Chandrakant (since acquitted).

8. Appellant 1 is the father of appellant 2 to 4 Accused Chandrakant and Fateh Ahmed (both since acquitted) were the servants of Fakhruddin working in the shop. Accused Abdulla Mandolkar (since acquitted) was a relation of Fateh Ahmed. Police after investigation submitted charge-sheet. Eventually the appellants and the three other above named co-accused were committed to the court of Session for trial.

9. The allegations against the appellants in substance were that they agreed to do the following illegal acts : (i) to acquire and prepare explosives unauthorisedly and to possess an supply explosives for illegal purpose; (ii) to acquire and possess sulphur unauthorisedly and to sell the same; (iii) to acquire and possess and sell gunpowder and cartridges in breach of the conditions of the licence granted under the Arms Act and Explosives Act; (iv) to acquire and stock in clandestine godown and illegally sell potassium chlorate in breach of the condition of the licence granted under the provisions of the Arms Act; (v) to acquire without licence percussion caps and to sell them illegally; and (vi) to acquire and possess without licence poison and to sell the same illegally. The charges were also to the above effect.

10. The appellants pleaded not guilty. In his statement under Section 342 of the Code of Criminal Procedure, appellant, Fakhruddin, additionally stated that he alone managed the shop M/s. M. F. Maniyar and Sons from which the incriminating substances were found. He admitted his presence at the place and at the time of the first raid on September. 11. he has also admitted the search and seizure of article as per Ex. 28. He has also admitted that potassium cyanide was purchased and possessed by him but he has pleaded that he was told that no licence was necessary for possessing potassium cyanide.

11. Mr. Lalit, learned Advocate, appeared for appellants 1 &2 and Mr. Bhasme, learned Advocate, appeared for appellants 3 & 4. Learned counsel have onto challenged the conviction and sentence of the appellants under Section 5(3) (b) of the Explosive Substance Act, Section 3 read with Section 25(1) (a), and Section 30 of the Arms Act, and under Section 6(1) (a) of the Poisons Act read with rule 2 of the Rules framed under that Act. They have only challenged the conviction and sentences under Section 5 of the Explosive Substance Act, and Section 120-B of the Penal Code. We are, therefore, called upon to examine the correctness or otherwise to the convections under Section 5 of the Explosive Substances Act and Section 120-B of the Penal Code.

12. Let us first consider the conviction under Section 5 of the Explosive Substance Act. The section reads as follows :

> 5. Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control floor a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be punishable with transportation

> for a term which may extend too fourteen years, to which fine may be added, or with imprisonment for a term which may extend to five years, to which fine may be added.

13. In order to being home the offence under Section 5 of the Explosive Substances Act, the prosecution has to prove : (i) that the substance in question is explosive substance; (ii) that the accused makes or knowingly has in his possession or under his control any explosive substance; and (iii) that he does so under such circumstances as too give rise to a reasonable suspicion that he is not doing so for a lawful object.

14. The burden of proof of these ingredient is on the prosecution. The moment the prosecution has discharged that burden, it shifts to the accused to show that he was making or possessing the explosive substance for a lawful object, if he takes that plea.

15. Explosive substance has been defined in Section 2 of the Explosive Substance Act. The definition is as follows :

> 2. In this Act the expression 'explosive substance" shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine or implement.

16. "Explosive substance" has a broader and more comprehensive meaning than the term 'explosive.'Explosive substance' includes 'explosive. The term 'explosive' has not been defined in the Act. The dictionary meaning of the work 'explosive' is 'tending to expand suddenly with loud noise'; 'tending to cause explosion' (THE CONCISE OXFORD DICTIONARY). In the Indian Explosives Act, 1884, the term 'explosive' has been defined as follows :

> 4. In this Act, unless there is something repugnant in the subject or context, -
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> (1) "explosive"
>
> (a) means gunpowders, nitro-glycerine, dynamite, gun-cotton, blasting powders, fulminate of mercury or of other metals, coloured fires and every other substance, whether similar to those above mentioned or not, used or manufactured with a view of produce a practical effect by explosion, or a pyrotechnic effect; and
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> (b) includes for-signals, fireworks, fuses, rockets, percussion caps, detonators, carriages, ammunition of all descriptions, and every adaptation or preparation of an explosive as above defined;

17. It may be mentioned that the definition of 'explosive' under Section 4 was amended later, but we are not concerned with the amendment as the occurrence in the instant case took place before the amendment.

18. On a consideration of the evidence of the Explosives Inspector, and other evidence, the Sessions Judge and the High Court have found, in our opinion correctly, that the substance in question were explosive substances within the definition of the expression.

19. In the instant case, appellant 1 has admitted, as stated earlier, that these article were seized from his position. The evidence also shows that his three sons, appellants 2 to 4, used to menage and run the shop M. F. Maniyar and sons from which the incriminating substance were seized.

20. It was argued by learned counsel that possession within the meaning of Section 5 of the Explosive substances Act means 'conscious possession'. There can be no doubt about it. The substances seized were not minute or small in quantity. They were in large quantities. In fact half kg. of the incriminating substance was sold to PW 4 by an employee of the firm. The detonators were produced by appellant 3 from the premises of the bungalow occupied by all the occupants. It cannot but, therefore, k be held that the appellants were in 'conscious possession' of the substance seized.

21. The notification dated April 1, 1966 published by the Government of India, Ministry Works and Housing and Urban Development (Ex. 65) reads as follows :

Notification

No. 3/12/65-PII(IX).-In exercise of the powers conferred by Section 6 of the Indian Explosives Act, 1884 (4 of 1884), and in supersession of the notification of the Government of India in the later Department of Labour No. M-1217, dated the 9th February, 1939, the Central Government is pleased to prohibit the manufacture, possession and importation of any explosive consisting of or containing sulphur or sulphurate in admixture with chlorate or potassium or any other chlorate :

Provided that this prohibition shall no extend to the manufacture or possession of such explosive :-

(a) in small quantities for scientific purpose;

(b) for the purpose of manufacturing heads of matched; or

(c) for use in toy amorces (paper caps for toy pistols).

Sd/- P. Rajaratnam Under-Secretary to the Government of India##

22. The appellants had no licence or authority to make or posses the explosive substance as required by the above Government notification. The licence possessed by them is dated March 31, 1956 (Ex. 90) which was not in pursuance and in conformity of the aforesaid Government a notification. The possession of the 'explosive substance' by the appellants, therefore was without any authority.

23. Learned counsel for the appellants cited before us R. v. Decey in support of his contention. The head-note of the report reads :

> Upon an indictment against an accused for knowingly having in his possession explosive substance, the prosecution has to prove that the accused was in possession of an explosive substance within the Explosive Substance Act, 1883, Section 9, in circumstances giving rise to reasonable presumption that that possession was not for a lawful object. Proof of knowledge by the accused of the explosive nature of the substance is not essential, nor need any chemical knowledge on part of the accused be proved.

24. The appellants have also cited another English decision R. v. Hallam, in which it has been

observed :

We think that the clear meaning of the section is that the person must not only knowingly have in his possession the substance but must know that it is an explosive substance. The section says he must knowingly have in his possession an explosive substance; therefore it does seem that it is an ingredient in the offence that he knew it was an explosive substance.

25. With respect, the above decisions lay the correct legal proposition. But the question is whether in this case appellants knew that the substance in question were explosive substance. The knowledge whether a particular substance is an explosive substance depends on different circumstances and varies from person to person. An ignorant man or a child coming across an explosive substance may pick it up out of curiosity and not knowing that it is an explosive substance. A person of experience may immediately know that it is an explosive substance. In the instant case, the appellants had been dealing with the substances in question for a long time. They certainly knew or at least they shall be presumed to have known what these substances they were and for what purpose they were used. In fact, when PW 4 Basanna asked for half kg. of blasting powder, appellants' servant, accused Chandrakant, immediately supplied the requisite powder to PW 4 from the shop. This evidence clearly established that the appellants did know that nature and character of the substance. In other words, they knew that the substances in question were explosive substance. The courts below therefore, were right in holding that an offence under Section 5 of the Explosive substance Act was committed.

26. Learned counsel submitted that the evidence on record shown that appellant, Fakhruddin, along acquired and possessed the substance in question. That was the plea of Fakhruddin. It also might be true that Fakhruddin alone had acquired the substance but the evidence on record clearly shown that all the appellants were in possession and control of the substance in question. The submission of the appellants has no substance and all the four persons are liable for the offence.

27. Now to turn to the conviction under Section 120-B of the Penal code. Section 120-B provides : "(1) whoever is a party to a criminal conspiracy to commit an offence...."

28. 'Criminal conspiracy' has been defined under Section 120-A of the Penal Code as follows :

> 120-A. When two or more persons agree to do, or cause to be done, -
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> (1) an illegal act, or
>
> (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy :

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation. - It is immaterial whether the illegal act is the ultimate object so such agreement, or is merely incidental to the object.

29. The contention of learned counsel is that there is no evidence of agreement of the appellants to do an illegal act.

30. It is true that there is no evidence of any express agreement between the appellants to do or cause to be done the illegal act. For an offence under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or cause to be done the illegal act; the agreement many be proved by necessary implication. In this, case, the fact that the appellants were possessing and selling explosive substances without a valid licence for a pretty long time leads to the inference that they agreed to do and/or causes to be done the said illegal act, for, without such an agreement the act could not have been done for such a long time.

31. Mr. Lalit additionally submitted that appellant 2 Rizwan did not do any overt act. He was mere partner of M/s. M. F. Maniyar and sons and as such his conviction has been bad in law the submission is not correct. For, appellant Rizwan himself in his statement under Section 342, CrPC, has stated : "Myself (and) accused 1 and 4 looked after the business of the Firm M. F., Maniyar and sons". The learned Courts below on a consideration of the evidence on record have come to the conclusion that he also occasionally used to work in the firm. We do not have valid reason too differ from them.

32. Now comes the question of sentence. The real man in the entire clandestine trade was appellant 1, who is now dead. The three other appellants being his son were merely assisting him. We are told that appellant 2, Rizwan, has already served eight and a half months of imprisonment and appellant 3 and 4, Usman and Taufik, six months of imprisonment each. In our view ends of justice will be met if the sentences of imprisonment are reduced to the periods already undergone by the three living appellants.

33. In addition to the sentence of imprisonment there was a fine of Rs. 1000 each for the offence under Section 5 of the Explosive Substances Act and also sentence of fine against the appellants under Section 593) (b) of the Explosives Act and under Section 30 of the Arms Act. In our opinion, ends of justice will be met if the fine under Section 5 of the Explosive substance Act is remitted in case of all the appellants, including appellant 1, Fakhruddin. With the above modification in the sentence the appeals are dismissed.

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