

SUPREME COURT OF INDIA

Mohd. Aslam

Vs.

State of Maharashtra

(K.T. Thomas and R.C. Lahoti JJ.)

27.04.2000

ORDER

1. A designated court convicted these two appellants, who were arraigned in that court as A-1 and A-7, along with other accused for different offences. A-1 - Mohmed Aslam (@ Sheru Mohd. Hasan) has been convicted under Section 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as 'the TADA') besides under Sections 25(1-A) and 25(1B)(a) of the Arms Act. He was sentenced to undergo rigorous imprisonment for 10 years under the first two counts each, besides fine, with a direction that sentence of imprisonment under each count will run concurrently. He filed Criminal Appeal No. 613 of 1999. A-7 - Adam Gafoor Shaikh @ Adam Toofani was convicted under Section 302 of the Indian Penal Code and has been sentenced to life imprisonment. He was also convicted under Section 5 of the TADA besides under Sections 25 and 27 of the Arms Act for which he was sentenced to varying terms of imprisonment which are lesser in duration. He filed Criminal Appeal No. 949 of 1999.

2. On 24.2.1994 at 8.15 p.m. one Amar Bhaskar Suvarna was shot dead in front of Trishna Restaurant at Kala Gohda (near the High Court of Mumbai). Then PW-3 - Cyrus was also present. A-1 was arrested on 6.10.1994 and on the strength of the information elicited from him one semi-automatic US Carbine magazine along with 113 cartridges were recovered from his own house at Mumbai. A-7 was arrested in March, 1995. Confessional statements were recorded under Section 15 of the TADA from both the appellants.

3. The designated court found that one of the assailants who fired the firearm at the deceased was A-7 and accordingly he was convicted under Section 302 of the Indian Penal Code besides other offences. While dealing with the case of A-7 - Adam Gafoor Shaikh @ Adam Toofani, we may record here that learned Counsel for the appellant frankly conceded that he is not disputing the fact that Amar Bhaskar Suvarna was shot dead in front of Trishna Restaurant around 8.15 p.m. on 24.2.1994. So, the limited question to be considered is whether A-7 was one of the assailants who shot him dead.

4. The case was initiated on the statement recorded from the deceased which became a dying declaration under Section 32 of the Indian Evidence Act. In that statement the deceased was not able to state the particulars of the assailants, but he did state that he was then in the company of PW-3 - Cyrus. If so, the decisive importance of the testimony of PW-3 need not be described in so many words. PW-3 said in court pointing to A-7 that he is one of the persons who shot at the deceased (It is unnecessary to mention the name of the other persons who shot him as the conviction passed

against the other persons has not been at all challenged in appeals). PW-3 has also identified A-7 Adam Gafoor Shaikh @ Adam Toofani in a test identification parade conducted on 30.3.1995. The version of PW-3 is further supported by another eye-witness PW-4 - Selwaraj Naikar who also identified A-7 - Adam Gafoor Shaikh @ Adam Toofani in the court as well as in a test identification parade.

5. The testimony of the above two eyewitnesses was believed by the TADA Court and their evidence had been relied on. Learned Counsel for the appellant made an endeavour to contend that the test identification parade is replete with many lapses and therefore that cannot be used for the purpose of corroborating the testimony of PW-3. We are not told of any serious lapse in the parade conducted by a Magistrate and therefore, even if there are some minor lapses that would not help to hold that the test identification parade was vitiated. We too have no reason to doubt the truth of the version given by PW-3 and PW-4. Of course, learned Counsel then contended that the time of the occurrence was night and hence it would not have been possible for the eye-witnesses to get a proper glimpse of the assailants. We cannot forget the fact that the incident happened in the city of Mumbai at about 8.15 p.m. It was not a time when the city would go dark. PWs-3 and 4 could have seen the assailant in the light of the city. The incident was also of such a nature that the face of the assailants cannot normally fade out from the memory canvass of the eye-witnesses, particularly, PW-3 who was a close associate of the deceased. Therefore, we are not impressed by the said argument of the learned Counsel.

6. As we do not find any reason to disbelieve the testimony of PWs-3 and 4, the conviction and sentence passed on A-7 - Adam Gafoor Shaikh @ Adam Toofani do not require any interference.

7. Regarding A-1 - Mohmed Aslam (@ Sheru Mohd. Hasan), the only evidence for possession of the forbidden lethal weapon is the testimony of PW-34 (Nagesh Shivdas Lohar, Asstt. Commissioner of Police, CID Intelligence, Mumbai). Learned Counsel contended that two Panch witnesses who were cited to support the recovery turned hostile and therefore, the evidence of PW-34 became unsupported. We cannot agree with the said contention. If Panch witnesses turned hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated. Nor do we agree with the contention that his testimony is unsupported or uncorroborated. The very fact that PW-34 produced in the court lethal weapons recovered is a very formidable circumstance to support his evidence. Learned Counsel made an attempt to show that the recovery in fact was not effected from the said flat in which A-1 - Mohmed Aslam (@ Sheru Mohd. Hasan) was residing. It is admitted that A-1's wife and children were residing in that flat. If no such recovery was made from such flat why nobody was examined on the defence side at least to suggest that no police officer effected any recovery from there. As the trial court has chosen to believe the testimony of PW-34 and on a further scrutiny we too have no reason to reject the same, we are emboldened to accept the testimony of that witness.

8. We, therefore, hold that the designated Court was right in holding that A-1 was in possession of the lethal weapons which would attract conviction under Section 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 besides Sections 25(1-A) and 25(1B)(a) of the Arms Act.

9. Learned Counsel lastly made a plea for reduction of the sentence as he is sentenced to R.I. for 10 years. We pointed out the futility of the said argument in view of the fact that A-1 was already convicted in another case for the offence under Section 302 IPC and was sentenced to imprisonment for life. For him to complete that period of life imprisonment he would have to suffer imprisonment

of about 4 years more which will complete almost with the sentence imposed in this case. But learned Counsel pointed out that the designated court has observed in paragraph 5 of the operative part of the sentencing order that A-1 will not be entitled to set-off under Section 428 of the Criminal Procedure Code for the period between 8.12.1994 to 19.7.1998. The jail authorities shall give the benefit of set-off provided under Section 428 of the Crl. P.C. notwithstanding such observations, if he is otherwise entitled to it as per the law declared by this Court.

10. These appeals are disposed of accordingly.