

# SUPREME COURT OF INDIA

Shamsher Khan

Vs.

State of (NCT) Delhi

Crl.A.No.502 of 2000

(K. T. Thomas and R. P. Sethi, JJ.)

19.10.2000

## ORDER

1. During the wee hours on 2-11-1989 a shuddering bomb explosion took place at J.J. Colony in Shakurpur (Delhi). Three persons died in the explosion almost instantaneously and 19 others were injured, some of them very seriously. The impact of the explosion was such that four adjoining multi-storeyed houses collapsed. The investigating agency concluded that the explosion was the aftermath of staking bombs in the house of the appellant which was done by himself in association with one of the victims (Babu Khan) and some others including the co-accused. They further found that there was a criminal conspiracy to manufacture explosive bombs to be used on an appropriate occasion.

2. The appellant-Shamsher Khan was one of the four persons arraigned before a Designated Court constituted under Terrorists and Disruptive Activities (Prevention) Act, 1987 ('TADA' for short). They were charged for offences under Ss. 304, 308 and 120-B of the Indian Penal Code besides S. 5 of the TADA and S. 4(b) of the Explosive Substances Act. Appellant alone was convicted of all the offences and the rest of the accused were acquitted by the trial Court. On the first count he was sentenced to rigorous imprisonment for 10 years for the offence under TADA and the Explosive Substances Act. He was sentenced to undergo rigorous imprisonment for 7 years. For S. 308, I.P.C.

he was sentenced to undergo rigorous imprisonment for 5 years. Apart from the aforesaid substantive sentences fine has also been imposed on the various counts. This appeal has been filed by the appellant as of right under S. 19 of TADA.

3. According to the prosecution, appellant enlisted the other persons for the purpose of manufacturing bombs to arm themselves to make onslaught on the members of another community. The background was that a procession was staged by an organisation called Bajrang Dal a few days earlier calling out slogans some of which were so inflammable that they instilled fear in the mind of the appellant that unless he and his companions arm themselves with lethal weapons they might be victims of an attack. The appellant first contacted P.W. 2 Shahabuddin for securing the services of Babu Khan who knew how to manufacture bombs. After acquiring the necessary equipment and materials Shahabuddin's house was selected as the venue for manufacturing bombs. But the task could not be carried out at that house on account of the forceful resistance offered by Shahabuddin's wife Hasina (P.W. 22) and thereupon the venue was shifted to the house of the appellant. Babu Khan manufactured bombs and stored them in that house. One of those bombs (or more than one) got exploded at about 3.00 a.m. on 2-11-1989 resulting in the catastrophe mentioned above.

4. P.W. 2 Shahabuddin was originally included in the array of the accused. However, pardon was tendered to him and he was converted into an approver. His evidence in the Court is in full support of the prosecution case as narrated above. It is unnecessary to repeat the evidence given by P.W. 2 as we have stated the case in the foregoing paragraphs.

5. If the testimony of P.W. 2 is believable there can be little doubt that appellant had caused explosive bombs to be manufactured and stored them in his house. But P.W. 2 Shahabuddin, on the showing of the prosecution itself, is an accomplice and, therefore, we would seek corroborative materials to give assurance to us that the testimony is true, despite the inherent drawback of that witness.

6. We came across a number of items of evidence which are corroborative materials as for the testimony of P.W. 2. The foremost among them is the evidence of P.W. 22-Hasina herself. She said that Babu Khan and appellant brought some materials to her house and when she realised that they were about to manufacture bombs she did not permit that to be done in her house. Because of her forceful opposition Babu Khan and appellant had shifted their activities to the house of the appellant. The testimony of P.W. 22 was believed by the trial Court although she was treated as hostile by the prosecution on account of a minor aspect of the case.

7. P.W. 21 gave evidence that on coming to know of a procession staged by Bajrang Dal he lodged a complaint with the police. Learned counsel contended that P.W. 21 did not himself witness the procession and, therefore, his evidence is of no avail. The procession staged by Bajrang Dal is not the main issue in this case and, therefore, we are not persuaded by the said arguments. The evidence

of P.W. 21 is useful for the limited purpose of showing that he lodged a complaint with the police on being informed of the staging of the procession.

8. The most important circumstance which corroborates the evidence of P.W. 2 is the very fact that an explosion took place in the house of the appellant, which was proved to be the consequence of storing explosive bombs. Learned counsel for the appellant has candidly conceded that such an explosion took place in the house of the appellant on the early hours of 2-11-1989. P.W. 38-J. Singh (Inspector of Police) said that he made a search in the house of P.W. 2-Shahabuddin on 3-11-1989 and traced out some packets containing chemicals, besides certain other articles. This would show that the version of P.W. 2 that Babu Khan had been to her (his) house with the materials for starting the work to manufacture bombs and did some work there.

9. All the above circumstances and materials would ensure confidence in our mind that the testimony given by P.W. 2 regarding the involvement of the appellant in the manufacture of bomb in his house is a true version. The trial Court has rightly placed reliance on the aforesaid testimony.

10. Appellant was convicted under Ss. 304 and 308 of the I.P.C. Both the offences relate to commission and attempt to commit culpable homicide respectively. So culpable homicide in (is) the common factor in both Courts. Section 299 of the Indian Penal Code defines culpable homicide, which has three alternative requirements. They are :-

1. Doing an act with the intention of causing death of a person, or

2. doing an act with the intention of causing such bodily injury as is likely to cause such death, or

3. doing an act with the knowledge that he is likely by such act to cause death of another person.

11. Learned counsel for the respondent-State made an endeavour to bring the case within the ambit of the third alternative, as the case cannot possibly be brought under any of the other two. The act proved to have been committed by the appellant along with Babu Khan in this case is manufacture of explosive substances like bombs. Hence what is to be established is, the above act must have been done with the knowledge that such act by itself was likely to cause death. If some other act had intervened which the offender did not do consciously which triggered the explosions that could not be counted as the act for that offender. No evidence had been let in by the prosecution to show that mere manufacture of such bombs is likely to cause death of any person, nor any evidence for showing that appellant had the knowledge that by manufacturing bombs death would possibly be

caused to any human being without any other act being done.

12. We may also point out that prosecution has not brought out any circumstance by which the Court could remotely attribute knowledge to the appellant that by manufacturing and possessing bombs death of any person was a likely consequence. By manufacturing a bomb, alone no one can normally think that it would explode without anything more done. Here something more would have happened which caused the explosion, what was that additional act is unknown to us. At any rate there is no material to show that the appellant had done that additional act.

13. In view of the aforesaid legal position we find no scope to bring the proved facts within the ambit of S. 299 of the I.P.C. If so, the question of culpable homicide would stand at bay. We, therefore, find it legally difficult to confirm the conviction either for the offences under S. 304 or for S. 308 of the I.P.C. As a corollary we set aside the conviction and sentence passed on the appellant in regard to those two counts.

14. But appellant cannot escape from the other counts for which he was convicted and sentenced. We confirm the conviction and sentence in regard to those counts.

15. This appeal is disposed of accordingly.

Order accordingly.