

# SUPREME COURT OF INDIA

State of J&K

Vs.

Wasim Ahmed Malik @ Hamid & Anr.

CrI.A.No.1743/2009

(A.K.Sikri and Uday Umesh Lalit, JJ.,)

01.07.2015

## JUDGMENT

### **Uday Umesh Lalit, J.,**

1. This Appeal under section 19 of the Terrorist and Disruptive Activities (Prevention) Act 1987 (hereinafter referred to as the Act) challenges the judgment and order dated 02.03.2009 passed by the third Additional Sessions Judge i.e. the Designated Court under the Act in File No. 26/Challan, acquitting the respondents of the offences under sections 3 and 4 of the Act, section 120-B read with sections 302, 307 and 34 of Ranbir Penal Code and sections 4 and 5 of the Explosives Substances Act, 1908 arising out of FIR No. 12 of 1995.

2. On the occasion of celebration of Republic Day on 26.01.1995 at about 10:20 a.m. in Maulana Azad Memorial Stadium, Jammu, General KV Krishna Rao, Governor of Jammu and Kashmir was addressing a huge gathering of about 40,000 people including high dignitaries, VIPs, Senior Officers of the Govt., leaders of political parties and respectable citizens when three powerful bomb explosions took place at the site of public address system, near the dais and on the main road, outside the stadium resulting in killing of eight persons, and in causing grievous injuries to eighteen persons and disruption of the celebrations. Soon after the incident FIR No. 12 of 1995 dated 26.01.1995 of PS Nowbad, Jammu (J&K) relating to said bomb blasts was registered. At the request of the Government of Jammu and Kashmir, the investigation was transferred to Central Bureau of Investigation (C.B.I.) vide notification dated 31.01.1995 and Regular Case No. RC1(5)/95-SIUV was registered in CBI on 31.01.1995.

3. After investigation was taken over by CBI, one Mohd. Irfan was arrested on 07.04.1995. On 09.04.1995 he made disclosure statements leading to certain recoveries. On 24.04.1995 said Mohd. Irfan made a confessional statement which was recorded by PW2, Sharad Kumar, S.P. CBI, under section 15 of the Act, inter alia, to the following effect:

“a) Accused Mohd. Irfan along with Maj Tariq of ISI, Pakistan, Ahmed Hassan, Commander of HM, Muzaffarabad, Mebhoob-ul-Haq, Commander of HM, Sialkot,

Amir-ul-Haq, Naib Commander, HM and Zia Kashmiri and others unknown had assembled in the office of Jamait-e-Islami, Model Town, Sialkot, Pakistan on 26.12.1994 and hatched a conspiracy to kill Governor, J&K, Senior officers of the Government and other persons with a view to strike terror in Jammu city on the occasion of Republic Day Celebrations. In furtherance of the said conspiracy, accused Mohd. Irfan, Menboob-ul-Haq and Ahmed Hassan visited the office of ISI situated near village Langaryali, Sialkot Cantt. Pakistan on 26.12.1994 and held a meeting with Major Tariq, Major Ibrahim, Captain Farhan, Subedar Anwar of ISI, Pakistan and Wasim Ahmed @ Hamid S/o Jallaluddin Malik R/o Asthan Mohalla, Kishtawar, J&K and hatched the plan. In order to achieve the object of the aforesaid criminal conspiracy, they decided to carry two pre-set time bombs across the border to Jammu for planting the same, one near the dais and the other near the pavilion of MAM Stadium Jammu and deputed Mohd. Irfan and Ghulam Nabi for this task.

b) On 23.12.1994 in the ISI Office, Sialkot at 11:00 a. m. Mohd. Irfan and Wasim Ahmed were imparted knowledge about the bombs and their functioning and operations, which were to be planted in the MAM Stadium. They were also issued instructions to protect the bombs from water and to plant them in the Stadium after the night would set in, to take two detonators for each bomb, to carry the Khurpa for digging the pits, and not to leave any clue of the planting of the bombs at the site. They were also told that the bombs were pre set so to explode at the time of the Republic Day function on 26.01.1995. Capt. Farhan gave Rs. 3,000/- each to Mohd. Irfan and Wasim Ahmed and Rs. 2,000/- to Ghulam Nabi in Indian Currency and also a sack to Mohd. Irfan wherein he put his boots, trouser, khurpa and pistol. Major Ibrahim provided one time bomb of 5 Kg each to Mohd. Irfan and Wasim Ahmed duly wrapped in black polythene and green coloured sacks. All of them left ISI Office, Sialkot and reached Check Post Jhumian at about 10:00 p.m. on 28.12.1994. Subedar Anwar and Mahboob-ul-Haq returned to Sialkot, while Mohd. Irfan, Wasim Ahmed and Ghulam Nabi crossed the border and entered into Indian Territory concealed the bombs and khurpa near River Tawi, outside Jammu city.

c) On 30.12.1994 Mohd. Irfan, Wasim Ahmed and Ghulam Nabi went to a park where Ghulam Nabi stayed behind while Mohd. Irfan and Wasim Ahmed went to MAM Stadium where Wasim Ahmed pointed out to Mohd. Irfan a place near the dais and also place inside the fenced area of north Pavilion where bombs were to be planted. On 30.12.1994 at about 7:45 p.m., Mohd. Irfan and Wasim Ahmed took out two explosive devices and khurpa and left for MAM Stadium leaving Ghulam Nabi there. Both carried one explosive device each and entered into the stadium along with 'khurpa'. Inside the stadium, they connected detonators and batteries to the device and planted two explosive devices; one near the dais and other near the fenced area of the Northern Pavilion after digging the pits for each bomb. After planting the bombs, they filled both the pits with earth and made shoe marks thereon to avoid suspicion. Thereafter, both left for Tawi Bridge. Mohd. Irfan concealed the 'khurpa' in the bushes near Tawi Bridge. Thereafter, both Mohd. Irfan and Wasim Ahmed contacted Ghulam Nabi and all three reached Pakistani Check Post Jhumian after crossing the

international border from where they were taken to the ISI Office Sialkot. Maj. Tariq, Maj. Ibrahim, Maj. Aamir, Capt. Farhan praised Wasim Ahmed and Mohd. Irfan for accomplishing the task. As desired by Captain Farhan, Subedar Anwar paid Rs. 5,000/- to Mohd. Irfan for the work done by him.

d) On 03.01.1995 said Mohd. Irfan and Wasim Ahmed were again deputed by Mahboob-Ul-Haq to plant one time bomb of 10 Kg. and two bombs of 5 Kg. each outside MAM Stadium, Jammu and pursuant thereto they dug a pit on the main road leading to that stadium and put the bomb weighing 10 Kg. on 09.01.1995. The other two bombs of 5 Kg. each could not be put because of rains, which bombs were then concealed near Tawi River.

e) On 26.01.1995 Mohd. Irfan, Mahboob-ul-Haq, Aamir-ul-Haq, Amzad and 2/3 other Kashmiri boys were present in the office of Jamait-e-Islami, Sialkot. They had waited for the news of bomb explosions, killing of VIPs and general public in Jammu. At about 12 noon they received news about the explosions in MAM Stadium, in which lot of persons had been killed and several other injured. After the incident, Maj. Tariq, Capt. Farhan, Subedar Anwar called Mohd. Irfan, Wasim Ahmed and Mahboob-ul-Haq to ISI Office, Sialkot and praised them for planting the bombs and declared that their mission had been successful even though the Governor of J&K had providentially escaped. On 30.01.1995 Mohd. Irfan, Wasim Ahmed and Mahboob-ul-Haq visited office of Jamai-e-Islami, Muzaffarabad and met Salauddin, Chief of the Hizbul Mujahideen who declared that their mission was to spread terrorism in J&K which got fulfilled with the bomb explosions in MAM Stadium. Salauddin awarded one shield and Rs. 10,000/- each to Mohd. Irfan and Wasim Ahmed.

4. After completion of investigation, charge sheet was filed on 28.09.1995 in the Court of the Special Judge, Designated TADA Court, Jammu (J&K) u/s 120-B RPC r/w section 302, 34, 307 RPC, 4 and 5 of the Explosives Substances Act and section 3(2), 4 and 6 of the Act. The charge sheet was filed against Mohammad Irfan @ Anwar, a Pakistani National and other absconding accused. While the matter was pending before the Trial Court, Ghulam Nabi Guide was arrested by J&K police on 25.10.1995. Upon CBI making an appropriate application, custody of Ghulam Nabi Guide was granted to CBI on 04.12.1995. While in custody, said Ghulam Nabi Guide made a confessional statement which was recorded by PW1 S.K. Bhatnagar Superintendent of Police, CBI on 18.12.1995 u/s. 15 of the Act wherein he confessed about his involvement as also that of Mohd. Irfan, Wasim Ahmed Malik @ Hamid, Major Tariq, Major Ibrahim, Major Amir, Captain Farhan, Subedar Anwar (all of ISI, Pakistan), Ahmed Hassan, Commander of HM, Sialkot, Amir-ul-Haq, Naib Commander, HM Sialkot and Zia Kashmiri R/o Kupwara, J&K in the criminal conspiracy culminating in the explosions at the MAM Stadium, Jammu 26.01.1955. Supplementary charge sheet was therefore filed against him. During the pendency of the trial, in a jailbreak said Mohd. Irfan escaped from high security jail. While the trial was pending and had reached the concluding stage, another accused named Wasim Ahmed Malik, who was marked as absconding accused, was arrested on 15.01.2009. Since according to the prosecution there was sufficient evidence in the form of confessional statements of Mohd. Irfan and Ghulam Nabi Guide, said

Wasim Ahmed Malik was supplied with copies of all the relevant material and produced before the Trial Court. Thus only two accused i.e. Ghulam Nabi Guide and Wasim Ahmed Malik, present respondents, were tried while the others remained absconding.

5. The evidence led by prosecution during the trial was to prove following aspects, namely: -

“a) That there were three bomb explosions on 26.01.1995 at 10:20 a.m. at the places in question, i.e. near the dais and at the site of public address system in MAM Stadium and on the main road outside the Stadium.

b) That at the time of such bomb explosions, large gathering had assembled while the Governor was addressing on the occasion of Republic Day Celebrations.

c) That it resulted in death of eight persons and caused grievous injuries to eighteen persons and disruption of the Celebrations.

d) That the act in question was a terrorist act, within the meaning of the Act.

e) That it was an act of conspiracy hatched by the accused being tried before the court and by the absconding accused and

f) That the involvement of the accused before the court was completely made out.”

6. Various witnesses were examined and material was produced by the prosecution to establish its case. Since the aspects (a) to (d) mentioned in the preceding paragraph were never challenged, we refrain from dealing with evidence pertaining to said aspects (a) to (d). Proceeding on the basis that it was a terrorist act, where bomb explosions were caused with the idea of terrorizing people in general and those who had assembled there at the gathering in particular, which resulted in loss of life of eight persons and injured eighteen persons, we confine the discussion as regards aspects (e) to (f) i.e. the role of the accused in the act in question. The trial Court had also confined itself to the question whether involvement of the respondents had been made out or not.

7. In order to bring home the involvement of the respondents the prosecution relied upon the confessions of Mohd. Irfan and Ghulam Nabi recorded under section 15 of the Act. Apart from such confessions and the statements of these accused leading to recovery of certain facts, no direct evidence could be placed on record. The evidence principally relied upon by the prosecution can be summarized as under:

“A) While in custody, accused Mohd. Irfan upon being interrogated, made three disclosure statements, “EXPW-BD/2, EXPW-S/3 and EXPW-S/2”. The testimony of PW86 Harbhajan Singh, Investigating Officer shows that pursuant to these disclosure statements two khurpas were recovered and identification of the shop from where a khurpa was purchased was also got done. Those khurpas were identified in court. The factum of such disclosure and consequential recovery was also supported by panch

witnesses PW23 S.K. Sudan and PW24 Gautam Goyal. PW67 Rajesh Kumar, Inspector, CBI also testified to similar effect.

B) On 22.04.1995 another disclosure statement “EXPW-BR” was made by accused Mohd. Irfan leading to the recovery of a bomb vide Seizure Memo Ext.PW/BR/1. The evidence of PW86 Harbhajan Singh, PW67 Rajesh Kumar and panch witness PW26 B.R. Saraf were relied upon in that behalf.

C) On 22.04.1995 Mohd. Irfan expressed his desire to confess and was produced before PW2 Sharad Kumar, Superintendent of Police. PW2 Sharad Kumar gave warning to the accused that the confession could be used against him and also gave him time to reflect. The accused was again presented before the witness on 23.04.1995 on which date the confessional statement Ext.PW-SK-3 of accused Mohd. Irfan was recorded by PW2 Sharad Kumar. The gist of the confession and the facts as disclosed therein are dealt with earlier. The confession of Mohd. Irfan clearly stated about the roles of the confessing accused as well as the co-accused.

D) After the arrest of Ghulam Nabi Guide, his custody was granted to CBI on 04.12.1995. He having expressed his desire to make a confessional statement, said Ghulam Nabi Guide was produced before PW1 S.K. Bhatnagar, Superintendent of Police, CBI on 16.12.1995. The witness administered statutory warning to the accused and also gave him time to rethink. The questions were put to the accused which were replied by him and true record thereof was made by the witness in Hindi. According to the witness he had explained everything to the accused and after recording of the statement, thumb impression of the accused was taken on the statement. The accused was again produced before the witness on 18.12.1995 and having expressed the desire to make a confessional statement, his statement was recorded by the witness. After recording of the statement, it was read over and the accused was made to understand the statement whereafter admitting the statement to be true the accused put his thumb impression.

E) The confessing accused Ghulam Nabi Guide was produced in the court of the Chief Judicial Magistrate, Jammu on 19.12.1995. The confessional statement in original in a sealed cover was also produced, for its onward submission to the Designated Court, Jammu. The text of the letter was as under:

“Sir,

Kindly find enclosed herewith original statement (sealed) of accused Ghulam Nabi Guide recorded under Section 15 TADA Act in case RC. 1(S)/95/SIU.V for onward submission to the Hon’ble Judge of Designated Court, Jammu. The accused has also been brought.

Applicant

Sd/-

19.12.95

(S.K. Bhatnagar)

Supdt. Of Police, CBI,  
SIC.II, New Delhi.”

F) On the same day, the Chief Judicial Magistrate, Jammu passed the following order:

“Submitted in original to the Presiding Officer of Designated Court under TADA. Sealed envelope is enclosed herewith.”

Sd/-

Chief Judicial Magistrate JAMMU”

8. The trial court acquitted both the respondents of all the charges leveled against them. The case of the prosecution as regards explosion of bombs which resulted in the death of eight persons and caused serious injuries to 18 persons was not disputed at all. However, the trial court rejected the evidence regarding confessional statement of Ghulam Nabi Guide on the ground that the confessional statement was recorded in Hindi i.e. not in the language of the accused. It observed that the safeguards provided in Rule 15 of the Rules made under the Act were not adhered to and therefore, the confessional statement of accused Ghulam Nabi Guide was required to be discarded. The relevant observations of the trial court in this behalf were as under:

"In the present case, the confessional statement has been recorded in Hindi and not in the language of accused. PW Habhajan Ram who is the Investigating Officer stated that he cannot say whether accused Ghulam Nabi knows Hindi or not. In any case, accused Ghulam Nabi being a Pakistan national, his language cannot be Hindi. Even so, PW Sushil Kumar who is the recording officer of the confessional statement of accused Ghulam Nabi has stated that accused had given the statement in Urdu and he had written the same in Hindi. No reason has been given by the said witness as to why it was not practical to record the confession of accused in Urdu. Even so, the record does not show that Hindi is the language used by PW Sushil Kumar for official purposes. Rather, the record would show that the said witness Sushil Kumar uses English languages for official purposes. This is apparent from the letter EXPW-SK/III written by him to the CJM while forwarding the confession to the Designated Court. And finally, the language of the Designated Court is Urdu or English."

9. The trial court further observed that as apart from such confessional statement there was nothing else against said Ghulam Nabi Guide, the accused was entitled to be acquitted. The other accused, namely, Wasim Ahmed had not given any confessional statement and the case against him completely depended upon the confessional statement of co-accused Ghulam Nabi Guide. Consequently accused Wasim Ahmed was also held entitled to be acquitted. The trial court thus acquitted both the accused vide its judgment and order dated 02.03.2009, which is challenged in the present appeal.

10. The record of the present appeal indicates that respondent Wasim Ahmed Malik was duly served but chose not to engage any lawyer. It was reported that respondent Ghulam Nabi Guide was residing in Pakistan and was served through the concerned office of the Government of India. However, no appearance was entered on behalf of Ghulam Nabi

Guide, though duly served. Consequently, Mr. Dushyant Parashar, learned Advocate was requested to appear for respondent Ghulam Nabi Guide under instructions from the Supreme Court Legal Services Committee. Since there was no appearance for respondent Wasim Ahmed Malik by order dt. 12.03.2015, Mr. Dushyant Parashar was requested by this Court to represent said Wasim Ahmed Malik as amicus curiae. We must record our appreciation for the assistance rendered by Mr. Dushyant Parashar.

11. Appearing in support of the appeal Mr. P.K. Dey, learned Advocate submitted:

“(a) Confession of accused under Section 15 of the Act is a substantive piece of evidence and can form the foundation for conviction of an accused for the offences punishable under the Act.

(b) Such confession, subject to the conditions stipulated in Section 15 of the Act itself, can also be read against the co-accused and form basis for his conviction.

(c) The confession recorded by PW1 S.K. Bhatnagar itself disclosed that the entire statement was read over to the confessing accused and only thereafter thumb impression of the confessing accused was taken under the statement. Since the language used during such conversation was Hindi which the confessing accused could understand, the recording of the statement was done in Hindi and such recording was completely in conformity with Rule 15 of the Rules framed under the Act.

(d) Lastly, soon after recording of the confession, the confessing accused was produced before the Chief Judicial Magistrate. The Confessional statement in a sealed cover was also produced for onward transmission to the Designated Court. Thus, the guidelines also stood completely complied with. Mr. Dushyant Parashar, learned amicus curiae attempted to support the judgment under appeal. The learned amicus curiae fairly accepted that the document recording the confession itself disclosed that the entire statement was read over and explained to the confessing accused. He further fairly accepted that there was no effective cross examination on this issue when PW1 S.K. Bhatnagar was in the box.

12. Section 15(1) of the Act expressly makes confession of an accused recorded by a Police Officer admissible in a trial of such person, co-accused, abettor or conspirator for an offence punishable under the Act. While upholding the constitutional validity of Section 15(1) of the Act, this Court in *Kartar Singh vs. State of Punjab* specifically referred to the statutory obligation in Section 15(2) of the Act and conditions imposed in Rule 15 of the TADA Rules in paras 258 and 259 respectively and then proceeded to lay down certain guidelines in para 263. The extent of admissibility of such confession under Section 15(1) of the Act as against a co-accused was considered by this Court in *State vs. Nalini & Others* . Wadhwa J. in para 424 observed as under:

“424. In view of the above discussions, we hold the confessions of the accused in the present case to be voluntarily and validly made and under Section 15 of TADA confession of an accused is admissible against a co-accused as a substantive evidence. Substantive evidence, however, does not necessarily mean substantial evidence. It is the quality of evidence that matters. As to what value is to be attached to a confession will fall within the domain of appreciation of evidence. As a matter of prudence, the court may look for some corroboration if confession is to be used against a co-accused though that will again be within the sphere of appraisal of evidence.”

Quadri J. struck a similar note of caution in para 706 as under:

“706. It is also to be borne in mind that the evidence of confession of a co-accused is not required to be given on oath, nor is it given in the presence of the accused, and its veracity cannot be tested by cross-examination. Though the evidence of an accomplice is free from these shortcomings yet an accomplice is a person who having taken part in the commission of offence, to save himself, betrayed his former associates and placed himself on a safer plank — “a position in which he can hardly fail to have a strong bias in favour of the prosecution”, the position of the accused who has given confessional statement implicating a co-accused is that he has placed himself on the same plank and thus he sinks or sails along with the co-accused on the basis of his confession. For these reasons, insofar as use of confession of an accused against a co-accused is concerned, rule of prudence cautions the judicial discretion that it cannot be relied upon unless corroborated generally by other evidence on record.”

13. It is settled position in law that a confession recorded under Section 15(1) of the Act in accordance with statutory requirements and in keeping with the guidelines is admissible against the maker, his co-accused, abettor or conspirator in a trial for an offence under the Act, subject to the condition stipulated in the proviso to Section 15(1). Such confession is taken as substantive piece of evidence and can form the foundation or basis for conviction of the maker, co-accused, abettor or conspirator. However, the note of caution struck by this Court is, insofar as use of confession of an accused against a co-accused is concerned, rule of prudence would require the Court not to rely thereon unless corroborated generally by other evidence on record.

14. With these principles in mind, we now turn to the requirements of Rule 15(1) of TADA Rules and the facts in the matter. Rule 15(1) stipulates that the confession “shall invariably be recorded in the language in which such confession is made and if that is not practicable, in the language used by such police officer for official purposes or in the language of the Designated Court ” The expression “invariably” itself suggests that the requirement under the Rule is discretionary and not mandatory. The record in the present matter is very clear that the confessing accused Ghulam Nabi was produced before PW1 S.K. Bhatnagar on 16.12.1995, was given statutory warning and time to reflect. Everything was explained to him and only thereafter his thumb impression was taken. On the next occasion when the confessing accused was again produced before the witness, soon after the recording of the

confession it was again explained to him, read over and only thereafter the thumb impression was taken. At no stage during the recording on these two occasions, nor at the stage when the witness was in the box, there is anything on record, or even a suggestion that the confessing accused did not understand or was not made to understand the contents of the confession. The contents of the confession also disclose that many of the assertions are personal to the confessing accused which could only be gathered after due conversation with the Recording Officer.

15. The language used as a means of communication between the confessing accused and the recording officer being Hindi or Hindustani, such recording of confession in Hindi language is completely in conformity with the requirement of the Rule. The conclusion drawn by the trial court that Ghulam Nabi being Pakistani national his language must be Urdu and therefore the recording of the confession in a language other than Urdu, must be held to be not in conformity, is wrong. Nothing has been placed on record that the confessing accused did not understand the line of questioning or that he was not made to understand the contents of the confession after the recording was complete. In our view the assessment made by the trial court in this behalf is completely incorrect and against the record.

16. We find no infirmity in the recording of confession by PW1 S.K. Bhatnagar. The confession of accused Ghulam Nabi was recorded in keeping with the guidelines issued by this Court and was in accordance with the statutory requirement. Holding the confession to be admissible, we have gone through the contents of the confession which clearly admitted the guilt of the confessing accused and his involvement right from the hatching of conspiracy to the execution thereof. The confessing accused had spoken about various stages since the conspiracy was hatched and how the confessing accused had helped in transporting the explosive material from across the border and then placed it in the pits, dug inside the stadium and on the main road outside the stadium. The consequential explosion of the bombs which was timed with the celebrations on account of Republic Day was definitely designed to disrupt the celebrations and terrorize the people in general and those who had gathered at the time of celebration in particular. We, therefore, hold that from the confession, the involvement of accused Ghulam Nabi in entering into the conspiracy, execution and facilitation thereof is completely made out. As held by this Court, the confession of an accused is a substantive piece of evidence and his conviction can be founded on such confession itself. We, therefore, hold Ghulam Nabi Guide to be guilty of the offences with which he was charged.

17. However, as regards the other accused, namely, Wasim Ahmed Malik, apart from the confession of Ghulam Nabi Guide that is to say the confession of co-accused, nothing has been placed on record which could lend corroboration as regards his role in the conspiracy and execution thereof. We have minutely considered the material but could not locate anything which could afford such corroboration. Going by the rule of prudence as highlighted by this Court in the case of State vs. Nalini (supra), we do not find any justification to reverse the finding of acquittal as recorded in respect of said Wasim Ahmed Malik. We, therefore, affirm the acquittal of Wasim Ahmed Malik as recorded by the trial court in respect of the offences with which he was charged.

18. Consequently, this appeal is partly allowed. The acquittal of Wasim Ahmed Malik is confirmed. However, the order of acquittal in respect of Ghulam Nabi is set aside and said accused Ghulam Nabi Guide is convicted of the offences with which he was charged. This being an appeal against the decision of acquittal rendered by the trial court, we deem it appropriate to issue notice to said Ghulam Nabi Guide on the issue of sentence. The authorities are directed to produce said Ghulam Nabi Guide before this Court so that appropriate opportunity to address this Court on the sentence to be awarded to him, can be afforded to him.

19. The appeal stands allowed in the aforesaid terms. The authorities are directed to ensure that Ghulam Nabi Guide is taken in custody forthwith and brought before this Court for the hearing on sentence.

20. We also direct the Supreme Court Legal Services Committee to pay to Mr. Dushyant Parashar Rs.20,000/- as remuneration for the assistance rendered to this Court.