

Abdul Hamid and ors Vs. State

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Court : Rajasthan Jodhpur

Decided On : Oct-31-2014

Appellant : Abdul Hamid and ors

Respondent : State

Judgement :

-1- IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

Abdul Hamid & Ors. vs. State of Rajasthan D.B. Criminal Appeal No.929/2013 against the judgment dated 28.4.2012 passed by Special Judge, SC/ST (Prevention of Atrocities) Act Cases, Jodhpur in Sessions Case No.36/2010. Date of Judgment ::

31. t October, 2014 P R E S E N T HON'BLE MR.JUSTICE GOVIND MATHUR HON'BLE MR.JUSTICE ATUL KUMAR JAIN Mr. Dharendra Singh, for the appellants. Mr. J.P.Bhardwaj, Public Prosecutor, for the State. BY THE COURT : (PER HON'BLE MATHUR,J.) REPORTABLE Being questioned correctness of the judgment dated 28.4.2012 passed by the Court of learned Special Judge, SC/ST (Prevention of Atrocities) Act Cases, Jodhpur in Sessions Case No.36/2010, this appeal is before us. By the judgment impugned learned trial Judge convicted the accused appellants for the offences punishable under Sections 121, 121-A, 122, 123 Ranbir Penal Code read with Section 14 of the

Foreigners Act and Section 25 read with Section 7 of the Arms Act. -2- The facts necessary to be noticed for adjudication of this appeal are that on 31.10.1997 at 1700 hours Mohd. Makbool, Constable No.15/kp of police post Karalpora, Police Station Trehgam, District Kupwara (Jammu & Kashmir) produced a first information report signed by Major P.Rajnarain at police station Trehgam and on basis of that a case bearing numbers 187/1997 was registered. As per contents of the first information report, at about 1350 hours, on 19.10.1997, the security personnels of India while patrolling on Border spotted few suspicious persons in the forest area of village Kachama. One person under suspicion was over powered by security personnels and on interrogation he revealed presence of seven other persons in the nearby area. On search being made seven other persons were forced to surrender. The eight persons surrendered before the security force disclosed their identity as Taza Sarbaz, Abdul Hamid, Abdul Gair, Kharuddin Khan, Zohrab Khan, Ayub Khan, Mohd. Hamza and Baaz Mohd, residents of Afghanistan. The persons named above also surrendered huge arms and ammunitions including eight AK-56 guns, AK-32 rifles, hand grenades 15, hand grenades (Pak)-1 and ammunitions AK-960. The complainant also informed that from 19.10.1997 to 31.10.1997 the persons apprehended were interrogated by the security force and after availing necessary instructions from the senior officers the report was filed and that caused delay in lodging the first information report. The seizure memo with regard to recovery of arms comprising of eight paper leaves was also submitted alongwith the first information report. -3- A charge sheet was submitted before the competent court after completing necessary investigation. On denial of charges trial commenced and by judgment dated 31.7.2006 learned Principal Judge, Kupwara acquitted all the accused persons being lacking evidence to establish the charges. Hon'ble High Court of Jammu & Kashmir by an order dated 1.5.2008 quashed the order passed by learned Principal Judge, Kupwara acquitting the accused persons and remanded the matter to be tried afresh. The trial in pursuance to an order passed by Hon'ble Supreme Court of India came to be transferred to learned Sessions Judge, Jodhpur. Learned Sessions Judge, Jodhpur transferred the case to the court of learned Special Judge, SC/ST (Prevention of Atrocities) Act Cases, Jodhpur in the month of July, 2010. On 11.7.2011 learned trial court framed amended charges

and the same were read over and explained to the accused persons. On denial of the same trial commenced as desired. Important to mention here that after amendment of charges the prosecution did not choose to adduce any further evidence beyond the evidence already adduced before the trial court at Kupwara in State of Jammu & Kashmir. Looking to this fact the trial court did not find any need to provide further opportunity to the accused persons to explain the adverse and incriminating circumstances existing in the prosecution evidence, hence no further opportunity was given as required under Section 313 Code of Criminal Procedure. The statement given before the trial court at Kupwara was accepted the explanation of -4- the accused persons as per provisions of Section 313 Code of Criminal Procedure. In defence statements of DW-1 Soharab Khan @ Zohab Khan were recorded and two documents Ex.D/1 (police statement of Major P.Rajnarain) and Ex.D/2 (police statement of Kushal C8hand) were exhibited. During pendency of trial one accused Taza Sarbaz Khan preferred an application before Hon'ble Supreme Court of India with prayer to deport him to his native country i.e. Afghanistan. The application so preferred came to be accepted on October 5, 2010. A direction was given by Hon'ble Supreme Court to deport Taza Sarbaz Khan to his home country within a period of three months from the date of order in accordance with the directions given by Hon'ble the Apex Court in the case of Bhim Singh v. Union of India & Ors. In writ petition No.310/2005, decided on 20.9.2007. Learned trial court after hearing learned Special Public Prosecutor and learned Amicus Curiae convicted all the seven accused persons for the offences punishable under Section 121, 121-A, 122 and 123 of Ranbir Penal Code and further for the offence punishable under Section 14 of the Foreigners Act and Section 25/7 of the Arms Act. All the accused persons were sentenced to undergo life term imprisonment for the offences punishable under Sections 121, 121-A and 122 of Ranbir Penal Code with fine and default stipulation. For the offence punishable under Section 123 Ranbir Penal Code they were sentenced to -5- undergo rigorous imprisonment for ten years with a fine of Rs.2000/- and further to undergo nine months simple imprisonment in the event of default in payment of fine by each of the accused. For the offence punishable under Section 14 of the Foreigners Act they were sentenced to undergo five years rigorous imprisonment with fine and default stipulation in the event of non payment of fine. For the offence

punishable under Section 25 read with Section 7 of Arms Act the accused persons have been sentenced to undergo ten years rigorous imprisonment with a fine of Rs.2000/- each and further to undergo nine months simple imprisonment in the event of default in payment of fine by each of the accused. In appeal, the argument advanced by learned Amicus Curiae Shri Dhirendra Singh is that instant one is a case of no evidence. It is stated that the prosecution did not choose to produce even the recovered arms and ammunitions before the trial court. The trial court simply relied upon the seizure memo and accepted the prosecution version. Much emphasis is given by learned counsel to the argument that even by accepting the prosecution evidence, no evidence on record is available to establish waging or attempt to wage war or abating waging of war against the Government of India., thus, no foundation exists for any offence described under Sections 121, 121-A, 122 and 123 Ranbir Penal Code. Despite service of notice, the State of Jammu & Kashmir did not choose to represent itself through Public -6- Prosecutor, however, looking to serious nature of the case we availed assistance of Shri J.P.Bhardwaj learned Public Prosecutor appointed by the State of Rajasthan. As per Shri Bharadwaj the statements made by Lt. Col. P.Rajnarain (PW-2), Shri Kushal Chand (PW-3), Shri Rakesh Chand Bhardwaj (PW-4 and Subedar Maharaj Singh (PW-5), the factum of apprehending the accused persons with huge arms and ammunitions, all the charges stand established. It is asserted that in view of the statement made by Subedar Maharaj Singh (PW-5) the seizure of the arms and ammunitions stands proved and, therefore, the conviction recorded does not require any interference. According to Shri J.P.Bhardwaj, learned Public Prosecutor, that no innocent person could have carried sensitive arms and ammunitions, if had no intention to wage war against Government of India. Heard learned counsels and in lucid also examined the record. Shri Gulam Rasul (PW-1), being Investigating Officer, in his statement narrated all the steps taken by him during the course of investigation. As per this witness, on 31.10.1997 Major P.Rajnarain gave a report in writing about arrest of ten persons and recovery of arms and ammunitions from their possession. On receiving the report a case was registered and during investigation site plan was prepared. The seizure memo was also handed over alongwith report Ex.P/1 given by Major P.Rajnarain. The seizure memo (Ex.P/2-A) was taken on record through a memo -

7- Ex.P/3. The place of occurrence was also inspected by this witness and the report of that is available on record as Ex.P/4-A. This witness admitted that the seized arms and ammunitions were not given to him by the security personnels and the investigating agency received only the seizure memos. The charge sheet was also filed on basis of the seizure memos. The other important witnesses of the prosecution are Rakesh Chand Bharadwaj (PW-4) and Subedar Maharaj Singh (PW-5). As per Shri Rakesh Chand Bharadwaj (PW-4) he alongwith Subedar Maharaj Singh while patrolling at Kachama post spotted certain persons and on warning these persons surrendered with their arms including AK-47 rifles and some grenades. On asking the surrendered persons disclosed that they are residents of Afghanistan. Shri Subedar Maharaj Singh (PW-5) stated that he was posted at post Kachama in Kupwara sector. He saw accused persons coming towards the post. On being challenged, accused persons surrendered with arms. The accused persons also disclosed their identity as Afghanis. A seizure memo then was prepared by Major P.Rajnarain and that was signed by this witness. The other important prosecution evidence Lt. Col. P.Rajnarain (PW-2) stated that in the month of October, 1997 a Santry and a Junior Commission Officer were at Kachama post, where they saw few persons coming towards the Indian post. The coming persons on being threatened -8- surrendered. After receiving the information from the persons posted at Indian post, this witness arrived at the place of occurrence and seized huge arms and ammunitions. The surrendered persons were taken for interrogation by security personnels and information thereafter was given to the police. Shri Kushal Chand (PW-3) stated that as per the information given by post commander, he arrested eight militants with arms and ammunitions from their possession. On basis of the evidence mentioned above the trial court arrived at the conclusion that arrest of the accused persons within Indian territory stands established. The recovery of sensitive arms and ammunitions too stand established and the facts established are sufficient to arrive at the conclusion that the accused persons were waging and attempting to wage war against Government of India. The trial court also found a conspiracy to commit an offence punishable under Section 121 of Ranbir Penal Code. The trial court also came to the conclusion that collecting arms by accused persons was with an intention to wage war against Government of India. The important questions

deserve adjudication in this appeal are that whether the trial court is right in arriving at the conclusions that - (1) the accused persons were arrested with huge arms and ammunitions as referred in the seizure memo; -9- (2) the accused persons waged or attempting to wage war or abating waging of war against Government of India or entering into any conspiracy to commit offence punishable by Section 121 of Ranbir Penal Code; and (3) they collected arms etc. with intention of waging war against Government of India or concealing existence of a design to wage war against Government of India. To examine the issues aforesaid the prosecution evidence deserves to be appreciated in detail. From perusal of the statements given by Subedar Maharaj Singh (PW-5) and Rakesh Chand Bharadwaj (PW-4) it is apparent that these two persons were posted at an Indian Post and they spotted eight persons in Indian territory. These security personnels warned the entrance and on being warned the intruders surrendered with huge quantity of arms and ammunitions. On apprehending of intruders information was given to senior officials resulting to arrival of Major P.Rajnarain (subsequently ranked Lt. Col. P.Rajnarain) at the post concerned and preparation of seizure memo. The seizure memo was signed by Subedar Maharaj Singh. The accused persons also disclosed that they are Afghan Nationals. The statements made by Subedar Maharaj Singh and Rakesh Chand Bharadwaj in quite clear terms indicate about entrance of foreign nationals in Indian territory with arms. We do not find any reason to disbelieve these witnesses as no just reason exists for them to tell anything false against the accused persons. The intrusion -10- of accused persons in Indian territory with arms, as such, stands established. It is also pertinent to mention here that these witnesses would have not signed the seizure memo prepared at the spot by Major P.Rajnarain, if no recovery of arms and ammunitions would have been made. Whatever stated by these witnesses is also stands substantiated by the evidence given by Lt. Col. P.Rajnarain. The evidence available is sufficient to arrive at the conclusion that - 1. the appellant accused persons are foreign nationals; 2. the accused appellants entered into Indian territory and were spotted by a patrolling team of the Indian Army; 3. On asking, accused appellants surrendered before the officers of the Indian Army without any resistance; and 4. from possession of the accused appellants lethal arms and ammunitions were recovered. With the findings aforesaid, the important issue that

needs consideration is that whether the evidence available and the findings arrived on basis of that are sufficient to establish that the offences are punishable under Sections 121, 121-A, 122 and 123 of the Ranbir Penal Code?. Suffice to mention that the provisions aforesaid are para-materia to the same numbered offences described under Chapter-VI of the Indian Penal Code. The offence prescribed -11- under Section 121 as described in the Code is with the ingredients as under:- (i)whoever, (ii)wages war against Government of India; (iii)or attempts to wage such war; (iv)or abates the waging of such war. The prime ingredient for commission of an offence is wage war against the Government of India.. Section 121-A describes the offence of conspiracy to commit offence punishable by Section 121. To constitute an offence under this Section the important ingredient is to examine existence of conspiracy to wage war, or abating waging of war, or attempt to wage war against Government of India. Section 122 of the Code describes the offence relating to collecting arms etc. with intention of waging war against Government of India. and Section 123 relates to concealing with intent to facilitate design to wage war. In all the offences mentioned above the term important is waging of war against Government of India.. What does this term mean is the prime question and whether that applies in present set of facts is issue for adjudication before us. -12- Hon'ble Supreme Court had occasion to examine the expression waging war. as used under Sections 121, 121-A and 122 Indian Penal Code in Nazir Khan and others v. State of Delhi, reported in 2003 Cri.L.J.

5021(1). The law laid down in the case of Nazir Khan (supra) has been discussed at length in the case of State (N.C.T. of Delhi) v. Navjot Sandhu (supra). In the case aforesaid, the court while dealing with the case of nine accused persons who hijacked a plane of Indian Airlines and made the travellers hostages, were found in contact with militant organisations and had a mission to perpetrate terrorists activities in India. One accused as a part of conspiracy made a rekey of several places in the National Capital Delhi and then indulged in terrorists activities to pressurise Indian government to release some dreaded militants confined in Indian prisons. The accused persons in the case aforesaid were subjected to trial for several offences prescribed under Chapter-VI of Indian Penal Code and for the offences prescribed under the Terrorists and Disruptive Activities (Prevention) Act, 1987. Hon'ble the Apex Court in length discussed the term wage war against

Government. and held as under:- 23.The Trial Court has convicted the accused under Sections 121A, 122 and 124 IPC. For convicting the accused persons under the aforesaid provisions, the trial Court has relied on the fact that the accused persons were trying to overawe the Government of India by criminal force and to bring out hatred and contempt in the people of India and to arouse dissatisfaction in -13- a section of people in India against the Government of India established by laws and collected materials and arms for the aforesaid offences. 24.The line dividing preaching disaffection towards the Government and legitimate political activity in a democratic set up cannot be neatly drawn. Where legitimate political criticism of the Government in power ends and disaffection begins, cannot be ascertained with precision. The demarcating line is thin and wavy. 25.The Indian Law Commissioners in their Second Report dated 24.6.1847 had observed We conceive the term "wages war against the Government" naturally to import a person arraying himself in defiance of the Government in like manner and by like means as a foreign enemy would do, and it seems to us, we presume it did to the authors of the Code that any definition of the term so unambiguous would be superfluous". Mere collection of men, arms and ammunitions does not amount to waging war. 26.There is a difference, says Foster: (3 Crown cases, pp.208, 209 and

210) "between those insurrections which have carried the appearance of an army formed under leaders, and provided with military weapons, and with drums, colours, etc., and those other disorderly tumultuous assemblies which have been drawn together and conducted to purposes manifestly unlawful, but without any of the ordinary shew and apparatus of war before mentioned. "I do not think any great stress can be laid on that distinction. It is true, that in case of levying war the indictments generally charge, -14- that the defendants were armed and arrayed in a warlike manner; and, where the case would admit of it, the other circumstances of swords, guns, drums, colours etc., have been added. But I think the merits of the case have never turned singly on any of these circumstances". "In the cases of Damaree and Purchase,...there was nothing giving in evidence of the usual pageantry of war, no military weapons, no banners or drums, nor any regular consultation previous to the rising; and yet the want of these circumstances weighed nothing with the Court, though the prisoners' counsel insisted much on

that matter. The number of the insurgents supplied the want of military weapons; and they were provided with axes, crows, and other tools of the like nature, proper for the mischief they intended to effect.... "The true criterion, therefore, in all these cases is, Quo animo did the parties assemble?. For if the assembly be upon account of some private quarrel, or to take revenge on particular persons, the statute of treasons hath already determined that point in favour of the subject.... "Upon the same principle and within the reason and equity of the statute, risings to maintain a private claim of right, or to destroy particular inclosures, or to remove nuisance, which affected or were thought to affect in point of interest the parties assembled for these purposes, or to break prisons in order to release particular persons without any other circumstances of aggravation, have not been holden to amount to levying war within the statute."

-15- 27. It is the fundamental right of every citizen to have his own political theories and ideas and to propagate them and work for their establishment so long as he does not seek to do so by force and violence or contravene any provision of law. Thus where the pledge of a Society amounted only to an undertaking to propagate the political faith that capitalism and private ownership are dangerous to the advancement of society and work to bring about the end of capitalism and private ownership and the establishment of a socialist State for which others are already working under the lead of the working classes, it was held that it was open to the members of the Society to achieve these objects by all peaceful means, ceaselessly fighting public opinion that might be against them and opposing those who desired the continuance of the existing order of society and the present Government; that it would also be legitimate to presume that they desired a change in the existing Government so that they could carry out their programme and policy; that the mere use of the words 'fight' and 'war' in their pledge did not necessarily mean that the Society planned to achieve its object by force and violence.

1. About the expression 'Whoever' - the Law Commissioners say: (2nd Report: Section

13) "The laws of a particular nation or country cannot be applied to any persons but such as owe allegiance to the Government of the country, which allegiance is either perpetual, as in the case of a subject by birth or naturalization, &c., or temporary, as in the case of a foreigner residing in the country. They are applicable of course to all such as thus owe allegiance to the Government, whether as subjects or foreigners, excepting as excepted by reservations or -16- limitations which are parts of the laws in question.

2. Regarding 'Wage war' according to the Law Commissioners - These words "seems naturally to import a levying of war by one who throwing off the duty of allegiance arrays himself in open defiance of his Sovereign in like manner and by the like means as a foreign enemy would do, having gained footing within the realm. There must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature. 28. The expression "waging war" means and can only mean waging war in the manner usual in war. In other words, in order to support a conviction on such a charge it is not enough to show that the persons charged have contrived to obtain possession of an armoury and have, when called upon to surrender it, used the rifles and ammunition so obtained against the Government troops. It must also be shown that the seizure of the armoury was part and parcel of a planned operation and that their intention in resisting the troops of the Government was to overwhelm and defeat these troops and then to go on and crush any further opposition with which they might meet until either the leaders of the movement succeeded in obtaining the possession of the machinery of Government or until those in possession of it yielded to the demands of their leaders. Hon'ble the Supreme Court discussed nature and scope of the offence under Chapter-VI of the Indian Penal Code in *State (N.C.T. of Delhi) v. Navjot Sandhu*, reported in AIR 2005 SC3820 In the case aforesaid certain -17- terrorists attacked on the parliament of India with arms and ammunitions. They were having a planned conspiracy with the aid of certain persons who were not on scene of the spot of occurrence. Hon'ble Apex Court with the aid of several judgments of Foreign Courts, Indian Courts and the discussions and recommendations made by Law Commission interpreted scope and nature of the offences punishable under Sections 121, 121-A, 122 and 123 of the Indian Penal Code inter-alia. While examining scope and nature of the offences concerned,

Hon'ble the Apex Court observed as under:- Section 121 and 121A occur in the Chapter 'Offences against the State'. The public peace is disturbed and the normal channels of Government are disrupted by such offences which are aimed at subverting the authority of the Government or paralyzing the constitutional machinery. The expression 'war' preceded by the verb 'wages' admits of many shades of meaning and defies a definition with exactitude though it appeared to be an unambiguous phraseology to the Indian Law Commissioners who examined the draft Penal Code in 1847. The Law Commissioners observed: "We conceive the term 'wages war against the Government' naturally to import a person arraying himself in defiance of the Government in like manner and by like means as a foreign enemy would do, and it seems to us, we presume it did to the authors of the Code that any definition of the term so unambiguous would be superfluous."

The expression 'Government of India' was substituted for the expression 'Queen' by the Adaptation of Laws Order of 1950. Section 121 now -18- reads- "Whoever wages war against the Government of India or attempts to wage such war, or abets the waging of such war, shall be punished with death or imprisonment for life and shall also be liable to fine". The conspiracy to commit offences punishable under Section 121 attracts punishment under Section 121A and the maximum sentence could be imprisonment for life. The other limb of Section 121A is the conspiracy to overawe by means of criminal force or the show of criminal force, the Central Government or any State Government. The explanation to Section 121A clarifies that it is not necessary that any act or illegal omission should take place pursuant to the conspiracy, in order to constitute the said offence. War, terrorism and violent acts to overawe the established Government have many things in common. It is not too easy to distinguish them, but one thing is certain, the concept of war imbedded in Section 121 is not to be understood in international law sense of inter-country war involving military operations by and between two or more hostile countries. Section 121 is not meant to punish prisoners of war of a belligerent nation. Apart from the legislative history of the provision and the understanding of the expression by various High Courts during the preindependence days, the Illustration to Section 121 itself makes it clear that 'war' contemplated by Section 121 is not conventional warfare between two nations. Organizing or joining an insurrection against the Government of India is

also a form of war. 'Insurrection' as defined in dictionaries and as commonly understood connotes a violent uprising by a group directed against the Government in power or the civil authorities. "Rebellion, revolution and civil war are -19- progressive stages in the development of civil unrest the most rudimentary form of which is 'insurrection'-vide Pan American World Air Inc. v. Actna Cas & Sur Co. [505 F.R. 2D989P.1017].. An act of insurgency is different from belligerency. It needs to be clarified that insurrection is only illustrative of the expression 'war' and it is seen from the old English authorities referred to supra that it would cover situations analogous to insurrection if they tend to undermine the authority of the Ruler or Government. It has been aptly said by Sir J.F. Stephen "unlawful assemblies, riots, insurrections, rebellions, levying of war are offences which run into each other and not capable of being marked off by perfectly definite boundaries. All of them have in common one feature, namely, that the normal tranquility of a civilized society is, in each of the cases mentioned, disturbed either by actual force or at least by the show and threat of it". "There are four major constituent elements in Oppenheim's view of War: (i) there has to be a contention between at least two States (ii) the use of the armed forces of those States is required, (iii) the purpose must be overpowering the enemy (as well as the imposition of peace on the victor's terms); and it may be implied, particularly from the words 'each other' and (iv) both parties are expected to have symmetrical, although diametrically opposed, goals."

The learned author commented that Oppenheim was entirely right in excluding civil wars from his definition. Mr. Dinstein attempted the definition of 'war' in the following terms: -20- "War is a hostile interaction between two or more States, either in a technical or in a material sense. War in the technical sense is a formal status produced by a declaration of war. War in the material sense is generated by actual use of armed force, which must be comprehensive on the part of at least one party to the conflict."

In international law, we have the allied concepts of undeclared war, limited war, war-like situation-the nuances of which it is not necessary to unravel. There is no doubt that the offence of waging war was inserted in the Indian Penal Code to accord with the concept of levying war in the English Statutes of treason, the first

of which dates back to 1351 A.D. It has been said so in almost all the Indian High Courts' decisions of the pre- independence days starting with AIR1931 Rangoon 235. In Nazir Khan's case [2003 (8) SCC461 this Court said so in specific terms in paragraph 35 and extensively quoted from the passages in old English cases. Sir Michael Foster's discourses on treason and the passages from the decisions of the High courts referred to therein are also found in Ratanlal's Law of Crimes. We should, therefore, understand the expression "wages war" occurring in Section 121 broadly in the same sense in which it was understood in England while dealing with the corresponding expression in the Treason Statute. However, we have to view the expression with the eyes of the people of free India and we must modulate and restrict the scope of observations too broadly made in the vintage decisions so as to be in keeping with the democratic spirit and the contemporary conditions associated with the working of our democracy. The oft-repeated phrase 'to attain the object of -21- general public nature' coined by Mansfield, LCJ and reiterated in various English and Indian decisions should not be unduly elongated in the present day context. On the analysis of the various passages found in the cases and commentaries referred to above, what are the high-lights we come across?. The most important is the intention or purpose behind the defiance or rising against the Government. As said by Foster, "The true criterion is quo animo did the parties assemble"?. In other words the intention and purpose of the war-like operations directed against the Governmental machinery is an important criterion. If the object and purpose is to strike at the sovereign authority of the Ruler or the Government to achieve a public and general purpose in contrast to a private and a particular purpose, that is an important indicia of waging war. Of course, the purpose must be intended to be achieved by use of force and arms and by defiance of Government troops or armed personnel deployed to maintain public tranquility. Though the modus operandi of preparing for the offensive against the Government may be quite akin to the preparation in a regular war, it is often said that the number of force, the manner in which they are arrayed, armed or equipped is immaterial. Even a limited number of persons who carry powerful explosives and missiles without regard to their own safety can cause more devastating damage than a large group of persons armed with ordinary weapons or fire arms. Then, the other settled proposition is that there

need not be the pomp and pageantry usually associated with war such as the offenders forming themselves in battle-line and arraying in a war like manner. Even a stealthy operation to overwhelm the armed or other personnel deployed by the Government and to -22- attain a commanding position by which terms could be dictated to the Government might very well be an act of waging war. While these are the acceptable criteria of waging war, we must dissociate ourselves from the old English and Indian authorities to the extent that they lay down a too general test of attainment of an object of general public nature or a political object. We have already expressed reservations in adopting this test in its literal sense and construing it in a manner out of tune with the present day. The Court must be cautious in adopting an approach which has the effect of bringing within the fold of Section 121 all acts of lawless and violent acts resulting in destruction of public properties etc., and all acts of violent resistance to the armed personnel to achieve certain political objectives. The moment it is found that the object sought to be attained is of general public nature or has a political hue, the offensive violent acts targeted against armed forces and public officials should not be branded as acts of waging war. The expression 'waging war' should not be stretched too far to hold that all the acts of disrupting public order and peace irrespective of their magnitude and repercussions could be reckoned as acts of waging war against the Government. A balanced and realistic approach is called for in construing the expression 'waging war' irrespective of how it was viewed in the long long past. An organized movement attended with violence and attacks against the public officials and armed forces while agitating for the repeal of an unpopular law or for preventing burdensome taxes were viewed as acts of treason in the form of levying war. We doubt whether such construction is in tune with the modern day perspectives and standards. Another aspect on -23- which a clarification is called for is in regard to the observation made in the old decisions that "neither the number engaged nor the force employed, nor the species of weapons with which they may be armed" is really material to prove the offence of levying/waging war. This was said by Lord President Hope in *R v. Hardie* in 1820 and the same statement finds its echo in many other English cases and in the case of *Maganlal Radha Krishan v. Emperor* [AIR1946 Nag 173 at page 186].. But, in our view, these are not irrelevant factors. They will certainly help the Court in forming an

idea whether the intention and design to wage war against the established Government exists or the offence falls short of it. For instance, the fire power or the devastating potential of the arms and explosives that may be carried by a group of persons-may be large or small, as in the present case, and the scale of violence that follows may at times become useful indicators of the nature and dimension of the action resorted to. These, coupled with the other factors, may give rise to an inference of waging war.. In State (N.C.T. of Delhi) v. Navjot Sandhu (supra) the court while examining intent of the accused persons noticed entrance of foreign nationals in Indian territory and an open attempt to capture parliament house with the aid of sophisticated arms and powerful explosives. The business of parliament too was in currency when the attack was made. The act was to subvert functions of the Government and de-stabilise Indian society. The undoubted objective and determination of the assailants was to impinge sovereignty of Indian nation and its Government, hence the crime committed was found as waging war as -24- described under Section 121 of the Ranbir Penal Code. The intention of the assailants as gathered from the evidence available in the case of State (N.C.T. of Delhi) v. Navjot Sandhu (supra) was one of the prime considerations for convicting them for the charge of waging war against Indian Government. The other important aspect of commission of an offence described under Section 121 Ranbir Penal Code is abatement for waging war. While examining a case of abatement to wage war against Government of India the foremost need is to see the nature and degree of instigation that would have been resulted into upsurge of war against Indian Government. It should not be remote or incidental purposes, but must be active stimulation to over throw the Government. A definite, clear and purposeful action of instigation to commit crime is necessary to establish the crime of abatement. We would also like to refer a Division Bench judgment of Hon'ble Bombay High Court in the case of Javed alias Java Ahmed Mohammed Akbar Bhatt and Ors. v. State of Maharashtra, reported in 2007 Cri.L.J.

1386, considering the scope of term waging war. while dealing with Sections 121 and 121-A of the Indian Penal Code. In the case aforesaid the Division Bench of Bombay High Court by relying upon the case of State (N.C.T. of Delhi) v. Navjot Sandhu (supra), held as under:- -25-

14. On a consideration of the entire evidence on record, we find that none of the tests and criteria delineated by the Supreme Court in the State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru and Ors. (supra), are borne out by the evidence led by the prosecution. According to the prosecution, the print publications contained objectionable material and were, therefore, seized. As noted earlier, the prosecution has not led any evidence on record to substantiate this claim. It is possible that the accused had a political ideology, different from that of Government of India or other political parties functioning in India. However, the prosecution has not placed any material on record to establish that the accused had literature in their possession which described their political philosophy. Nor is there evidence to prove that their political ideology was such that it preached disaffection or provoked insurgency. The articles in the magazines and journals have not been proved to have instilled or instigated them to follow an ideology and perform acts which amounted to waging a war against the Government of India. The Supreme Court in the case of Nazir Khan v. State of Delhi (supra) in paragraphs 30 and 33 of its judgment has observed thus:

30. The line dividing preaching disaffection towards the Government and legitimate political activity in a democratic set-up cannot be neatly drawn. Where legitimate political criticism of the Government in power ends and disaffection begins, cannot be ascertained with precision. The demarcating line is thin and wavy.

33. It is the fundamental right of every citizen to have his own political theories and ideas and to propagate them and work for their establishment so long as he does not seek to do -26- so by force and violence or contravene any provision of law. Thus where the pledge of a society amounted only to an undertaking to propagate the political faith that capitalism and private ownership are dangerous to the advancement of society and work to bring about the end of capitalism and private ownership and the establishment of a socialist State for which others are already working under the lead of the working classes, it was held that it was open to the members of the society to achieve these objects by all peaceful means, ceaselessly fighting public opinion that might be against them and opposing those who desired the continuance of the existing order of the society and the present

Government; that it would also be legitimate to presume that they desired a change in the existing Government so that they could carry out their programme and policy; that the mere use of the words "fight" and "war" in their pledge did not necessarily mean that the society planned to achieve its object by force and violence.

15. The prosecution has failed to establish that the literature obtained from the room was in any manner inflammatory or provocative or that it incited the readers to unite in waging war against the Government of India. The prosecution has not cared to bring on record the translations of the Urdu periodicals and the offending literature. A perusal of the impugned judgment does not disclose that such translations were made available to the learned trial Judge. However, the learned trial Judge has elaborately dealt with the criticism against India published in these Urdu periodicals. We are not aware as to how the learned Judge came to the conclusion that the Urdu periodicals criticised the premise that India was an ancient culture. Such criticism or -27- the mere publication of photographs of some important dignitaries of India or Osama Bin Laden or the President of America, would not in our opinion, establish that the literature incited and instigated the readers to wage war against the Government of India.

. In light of the law discussed above, we are required to examine the evidence available in the instant matter. It is the case admitted that the accused appellants are Afghan residents, thus, are foreign nationals. In view of the evidence adduced by Subedar Maharaj Singh (PW-5), Rakesh Chand Bhardwaj (PW-4) and Lt. Col. P.Rajnarain (PW-2), we are having no doubt that the accused appellants entered and spotted in Indian territory. They were asked to surrender by the patrolling team. Subedar Maharaj Singh (PW-5) stated that in the month of October, 1997 he was posted at Kachama in Kupwara sector. He saw accused persons standing in a canal. On asking, the accused disclosed that they were coming from Pakistan. They also surrendered before the patrolling person. As per this witness, on search arms and Pakistan currency were recovered from the persons surrendered before him. In cross examination this witness stated that the recovery memo of the arms recovered was made after two days of the incident and he signed on recovery memo under instructions of the higher officials. -28- The other witness Nayak

Rakesh Chand Bhardwaj (PW-4) stated that on 19.10.1997 he was posted at Kachhua post in sector Kupwara where he spotted few persons carrying arms. On order, the persons spotted surrendered and put down the arms. Few rifles and grenades were recovered from the persons spotted and on asking it was disclosed that they were Afghanistan nationals. Lt. Col. P.Rajnarain (PW-2) stated that in the month of October, 1997 one J.C. and one Santry posted on Indian post spotted few persons carrying arms in Indian territory. On order, all the persons who were eight in number surrendered and put down their arms. They did not fire from the arms available. The persons spotted were arrested and on surrender one AK-47 of gun with 32 magazines and 16 grenades were recovered. In cross examination this witness stated that the accused persons were in his custody for two days and thereafter they were sent for safe custody. Subsequent thereto they were handed over to the civil police. Shri Gulam Rasul (PW-1) stated that on 31.10.1997 Major B.Raj, 17th Gadwal Regiment Camp Chowki Kupwara- Kalpura submitted a written report about arrest of eight militants and recovery of arms from them. On basis of the information given, a criminal case bearing No.187/1997 was registered. The seizure memo as made by the Army personnels was included with regard to investigation, statements of the witnesses were recorded and after completion of investigation challan was filed before the court competent. -29- From the evidence noticed above, it is apparent that the accused persons though were armed with sophisticated weapons did not choose to fire on the patrolling persons of the Indian Army, but decided to surrender and put down their arms. No document or other material was recovered from them to arrive at the conclusion that they in any manner intending to lodge any kind of war against the Indian Government. No effort for making any abatement for waging war against Indian Government is evident from the record available. In view of it, we are of the considered opinion that the accused appellants did not wage war against Indian Government, no material is available on record to establish their intention for waging war against Indian Government and the evidence available is also not indicating any effort for abatement for waging war against Indian Government. The evidence is also not adequate to arrive at any conclusion about any conspiracy for waging war against Indian Government. Despite unavailability of such evidence there is no doubt about entry of these foreign nationals in Indian territory with sophisticated

weapons and that indicates for concealment of their intention to facilitate design to wage war. As such, in our opinion, in view of the material available on record the accused appellants could have been convicted for an offence punishable under Section 123 Ranbir Penal Code, but not for the offences punishable under Sections 121, 121-A and 122 Ranbir Penal Code. The offence relating to Section 14 of the Foreigners Act and Section 25 read with Section 7 of the Arms Act has not been -30- contested by learned counsel for the appellants as i.e. apparently established and further that the accused appellants have already served sentence awarded for these offences. The conclusion of the discussions made above is that the appeal deserves acceptance in part. Accordingly, the same is allowed in part. The conviction of the accused appellants for the offences punishable under Sections 121, 121-A and 122 Ranbir Penal Code is declared illegal and, therefore, the same is set aside. The sentence awarded by the trial court for the offences referred above too is set aside. The conviction of the accused appellants for the offence punishable under Section 123 Ranbir Penal Code is affirmed and the sentence awarded by the trial court for that is maintained. The accused appellants have already served the sentence awarded for the offence punishable under Section 123 Ranbir Penal Code, hence they deserve to be deported to their home country i.e. Afghanistan. The respondent State shall complete the entire process of deporting the accused appellants to their home State at earliest, as far as possible within a period of one month from today. (ATUL KUMAR JAIN),J.

(GOVIND MATHUR),J.

Mathuria KK/ps.

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