

**Khalid Vs. State of Rajasthan**

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**Court :** Rajasthan

**Decided On :** Apr-06-1989

**Reported in :** 1989(2)WLN198

**Judge :** Navin Chandra Sharma, J.

**Appeal No. :** S.B. Cr. Misc. Application No. 66 of 1989

**Appellant :** Khalid

**Respondent :** State of Rajasthan

**Advocate for Pet/Ap. :** Mr. M.M. Singhvi

**Disposition :** Petition allowed

**Judgement :**

**Navin Chandra Sharma, J.**

1. This is a petition by Khalid alias Rasheed under Section 482 of the Code of Criminal Procedure for quashing the order of Sessions Judge, Bikaner dated January 18, 1989 passed in Sessions Case No. 1 of 1989 (State v. Major Singh and Ors.) where by he directed framing of charge of criminal conspiracy under Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 to commit an offence under Chapter-IV of the said Act.

2. Facts in brief are that according to the prosecution Malluram Assistant Sub-Inspector gave an information on September 20, 1988 regarding some tracks to camel and two persons having been found near Indo-Pak International Border. On the evening of that day the Station House Officer, Poongal reached Chak 4 Pawli and found tracks going upto that place. This created suspicion in his mind that the camel and the two persons were in the same Abadi. The SHO and the Police party, therefore, surrounded this Chak and on the morning of September 21, 1988, they further found tracks in the fields of nursery peaching towards a Kotha on the agricultural land of Nichhatar Singh. The SHO found that a blue jeep was standing there and eight persons were loading some bags in the jeep. The SHO divided the Police party into two parts and reached near the place. The Police people knew from before Nishan Singh and Garni alias Gurnam Singh. They and one more person who were loading the bags, seeing the Police, ran away from the spot and could not be apprehended. Five persons were caught held of by the police party and they were Major Singh, Gurnam Singh alias Baldeo Singh, the jeep driver Kundan Lal, Nichhatar Singh and Balvinder Singh. Two bags were lying inside the jeep and two other bags were lying near the jeep. In all 311 packets were found. The packets were opened and smelt. It was found to be a brown coloured powder and Major Singh also told that the third person who ran away was Balkar Singh. These 311 packets were weighed and samples were taken. The above named five persons were arrested. At the time of search of Major Singh, a diary was found in his possession in which address of Khalil and the petitioner was found written. Major Singh was taken to the house of Superintendent of Police, Bikaner by Hanumandutt Circle Officer, Bikaner. The Superintendent of Police had talks with Major Singh. Then Major Singh detailed the petitioner who was staying in Minerva Hotel Bombay by phone No. 393911. After the phone was connected at the hotel, Major Singh told the Manager of the hotel to connect him with the petitioner who was staying in room No. 8 of the hotel. The Manager of the hotel called the petitioner and Major Singh talked with him on phone. Major Singh told him on phone about his welfare and further told that the goods had arrived and he himself would be reaching within 2 or 3 days. From the side of the petitioner welfare of Major Singh was asked and the Fetter was asked to reach early. It also appears that a VIP attache was also seized from Maruti Car No. DCB 6496. On this attache, name of

Major Singh was written. Apart from some clothes a letter written in Urdu on lined paper was also found in the attache. The contents of that letter show that it was written by one Jamshed to Khalil. In this letter Jamshed had referred to his talks with Khalil on phone. He also wrote that Major Singh agent of Khalil had met the man of Jamshed named Shareef. It was also mentioned that 311 packets of the goods had reached the house of Jogendersingh at Pawli which was a decided place on the night intervening 19th and 20th. Then it was written that Shareef and Garni will deliver these goods to Rayees at Minerva Hotel Bombay. When they reached Bombay with the goods, it was the responsibility of Rayees to settle the accounts. These are only three pieces of evidence on the basis of which challan was filed by the police against the petitioner Khalid alias Rasheed alias Rayees. On the basis of the documents filed along with the challan, the Sessions Judge, Bikaner framed a charge of criminal conspiracy under Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 for the commission of offence under Chapter IV of the said Act against the petitioner which the petitioner is seeking to get quashed by the present petition under Section 482 Cr. PC

3. It was contended by Mr. M.M. Singhvi appearing for the petitioner that the alleged telephonic talk by the co-accused Major Singh with the petitioner and relied upon by the prosecution was firstly, inadmissible in evidence and secondly, it does not show that the petitioner entered into any conspiracy with the other co-accused persons. It was urged by him that the process of the court has been abused so far as the petitioner is concerned and, therefore, to secure the ends of justice the order of the Sessions Judge, Bikaner framing charge against the petitioner and all proceedings sought to be undertaken in pursuance thereof be set aside and quashed. The learned Public Prosecutor relied upon the above three pieces of circumstantial evidence as against the petitioner.

4. It is trite that jurisdiction under Section 482 of the Code of Criminal Procedure which saves the inherent power of the High Court to make such orders as be necessary to prevent the abuse of the process of any court or otherwise to secure the ends of justice, has to be exercised sparingly and with circumspection. In exercising that jurisdiction the High Court would not embark upon an enquiry whether the allegations in the complaint are likely to be established by the

evidence or not. That is, the function of the trial court when evidence comes before him. Though it is neither possible nor advisable to lay down any inflexible rules to regulate that jurisdiction, one thing however, appears clear and it is that when the High Court is called upon to exercise this jurisdiction to quash a proceeding at the initial stage of trial of an offence, the High Court is guided by the allegations whether those allegations set out in the complaint or the charge sheet do not in law constitute or spell out any offence and that resort to criminal proceedings would, in the circumstance, amount to an abuse of the process of the court or not.

5. It is manifestly clear that proceedings against an accused in the initial stages can be quashed only if on the facts of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are without adding or subtracting anything, if no offence is made out, then the High Court will be justified in quashing the proceedings in exercise of its power under Section 482 of the Code of Criminal Procedure. The law thus is that we have to see whether there is some legal evidence at all in support of the prosecution. The above proposition of law is well settled by a series of decisions in *Talib Haji Hussain v. Madhukar Parashotam Mandkar* AIR 1978 SC 376; *R.P. Kapoor v. State of Punjab* : 1960 CriLJ1239; *Madhu Limiyee v. State of Maharashtra* : 1978 CriLJ165 ; *State of Karnataka v. L. Muniswamy and Ors.* : 1977 CriLJ1125 ; *Dr. Sharda Prasad Singh v. State of Bihar* : 1977 CriLJ1146 ; *Municipal Corporation of Delhi v. R.K. Rohtagi* : 1983 CriLJ159 ; *Municipal Corporation of Delhi v. P.D. Jhunjunwala* : 1983 CriLJ172 ; *State of Punjab v. Devindra and Ors.* : 1983 CriLJ980 ; and *State of Bihar v. Murad Ali Khan* : 1989 CriLJ1005 .

6. The law of conspiracy in India is in line with the English Law by making the overt act unessential when the conspiracy is to commit any punishable offence. The English Law on this matter is well settled. *Russell on Crime* 12th Edition Vol. I page 202 stated:

The gist of offence of conspiracy then lies, not in doing the act or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between

the parties. Agreement is essential. Mere knowledge or even discussing of the plan is not, per se, enough.

Glanville Williams in the Criminal Law (Second Edition) 382 quoted an illustration in which the accused was acquitted of conspiracy because there was no agreement for 'concert of action' no agreement to 'cooperate'. Coleridge, J. while summing up the case to Jury, in Regina v. Murphy (1837) 173 ELR 502 (8) said that 'If you find that these two persons pursued by their acts the same object, often by some means, one performing one part of an act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask your self is 'Had they this common design, and did they pursue it by these common means the design being unlawful'. Thus entering into an agreement by two or more persons to do any illegal act or legal act by illegal means is the very essence of the offence of conspiracy

7. Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the court must inquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them co-conspirators but the latter does. It is, how ever, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, how ever, need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to prove actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient.

8. Gerald Orchard University of Caterbury Newzeal and Criminal Law Review 1974,297 at p 299 explains the limited nature of this proposition. 'Although it is not in doubt that the offence requires some physical manifestation of agreement, it is important to note the limited nature of this proposition. The law does not require

that the act of agreement take any particular form and the fact of agreement may be communicated by words or conduct. Thus, it has been said that it is unnecessary to prove that the parties actually came together and agreed in terms to pursue the unlawful object; there need never have been an express verbal agreement, it being sufficient that there was a tacit understanding between the conspirators as to what should be done. The relevant act or conduct of the parties must be conscientious and clear to mark their concurrence to what should be done. The concurrence cannot be inferred by a group of irrelevant facts artfully arranged so as to give an appearance of coherence. The innocuous, innocent or inadvertent events and incidents should not enter the judicial verdict. We must be strictly on guard.'

9. From an analysis of Section 10 of the Evidence Act it will be seen that Section 10 will come into play only when the court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence. There should be in other words, a prima facie evidence that the person was a party to the conspiracy before his acts can be used against his co-conspirator. One such prima facie evidence exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was first entertained, is relevant against the others. It is relevant not only for the purpose of proving the existence of the conspiracy, but also for proving that the other person was a party to it.'

10. We have to judge the case in the light of above well settled legal propositions so far as the statement of Hanumandutt Circle Officer (N) Bikaner with regard to the telephonic conversation of Major Singh with the petitioner is concerned, it may firstly be stated that it is a statement of Hanumandutt under Section 162, Cr PC and can be used only for the purpose of contradicting Hanumandutt. Secondly, it is a confession by Major Singh of the offence before the police and thirdly, even as an admission it is relevant only against the maker thereof. Fourthly, it was not an act of Major Singh done in pursuance of conspiracy. Lord Atkin in *Narayanswami v. Emperor* AIR 1939 PC 47 held that 'a confession must in terms admit the offence or at any rate substantially all the facts which constitute the offence. Admission of a gravely incriminating, fact is not itself a confession. The Supreme

Court has followed the decision in Narayanswami's case and Palvinder Kaur v. State of Punjab AIR 1953 SCJ 545 Mahajan, J. observed:

The confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence. The admission of gravely incriminating fact, even conclusively incriminating fact is not by itself a confession. Three things fall outside the pale of the confession (1) guilty conduct, (2) exculpatory statement. (3) acknowledgment of subordinate facts, colourless with reference to the actual guilty (Wigmore).

As I have already stated that there was no confession of Majorsingh of facts constituting the offence. Even if there was any confession, it was made before a Police Officer and it was inadmissible by the virtue of Section 25 of the Evidence Act which clearly provides that no confession made to a Police Officer shall be proved as against a person accused of any offence. No less fatal is the position in law that Section 10 of the Evidence Act applies to acts done in furtherance of the conspiracy and does not apply to a confession made after conspiracy and acts done in pursuance thereof were at end, when persons have been taken into custody and are in a condition which makes it impossible for them to act in aid or furtherance of the conspiracy i.e. when so far as they are concerned the conspiracy has come to an end acts of persons who were members of the conspiracy and who are still free to act in pursuance thereof, are not admissible against them, these acts cannot be deemed the acts of co-conspirators. Reference in this connection may be made to the decisions in Dengo Kadero v. Emperor AIR 1938 Sindh 94, Achhaylal Singh and Ors. v. Emperor AIR 1947 Pat. 90 and Sitalsingh and Ors. v. Emperor AIR 1920 Neal 30. It was clearly ruled that such a statement was not admissible under Section 30 of the Evidence Act against others. Locked, therefore, from any angle the alleged telephonic conversation in the presence of the Superintendent of Police is not at all admissible in evidence as against the co-conspirator, namely, the petitioner.

15. The next piece of evidence is a letter in Urdu alleged to have been written by Jamshed to Khalil. It is clear from the challan papers that Jamshed has not been made an accused and, therefore, the prosecution has not alleged that he was a

co-conspirator. His act of writing a letter to Khalil cannot, therefore, be held to be an act of a co-conspirator so as to be an evidence against the petitioner.

16. The first piece of evidence is a diary which is said to have been recovered from the possession of Major Singh and which inter alia mentioned in it the addresses of the petitioner of Minerva Hotel, Bombay. Except address of the petitioner, nothing else is mentioned in this diary. A more abnoxious document than this was recovered from the possession of Balbeer Singh in the case of *Kehar Singh v. State (Delhi Administration)* AIR 1988 SC 1983. In that case (Indira Gandhi Murder's case) the document recovered from the possession of Balbeer Singh was a sheet of paper and there was an entry in it of June 1984 mentioning 'Army operation' felt like killing', 'Beant Singh/Eagle meeting act. It was observed in relation to this document that there was no reference in it to a killing of the Prime Minister. In fact except for a 'felt like killing' in early June as an immediate reaction of the Blue Star operation was not considered as an evidence of criminal conspiracy. His Lordship Ray, J. observed:

The only one entry which makes a reference to killing is the accused entry. It refers to 'felt like killing' but one does not know who felt like killing and killing whom. If the document is read as a whole, it does not reveal any thing incriminating against Balbir Singh.

How can then a mere note of the address of the petitioner in the diary consisting of few pages could be an incriminating material as against the petitioner.

13. Having considered all the aspects of the case, I am of the opinion that the case falls in the category of case like *Municipal Corporation Delhi v. Ramkishan Rohtagi and Ors.* : 1983 CriLJ159 where in it was observed. 'It is manifestly clear that proceedings against an accused in the initial stages can be quashed only if on the fact of the complaint or the papers accompanying the same no offence is constituted. In other words, the test is that taking the allegation and the complaint as they are without adding or subtracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of its powers under Section 482 of the Criminal Procedure Code.' In the instant case, there is no legal evidence at all to support the prosecution case against the

petitioner Khalid alias Rasheed son of Haji Salam.

14. I therefore allow this petition and quash the order of the Sessions Judge Bikaner dated January 18, 1989 and the charge framed by him against the said petitioner on the same date for the offence under Section 29 of the Narcotic Drugs and Psychotropic Substances, Act 1985. The petitioner Khalid will forth with be released from jail unless he is wanted in some other case.

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