

Maqbool Hussaln and ors. Vs. State of J and K and ors.

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Court : Jammu and Kashmir

Decided On : Apr-05-2006

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Judge : Mansoor Ahmad Mir, J.

Appellant : Maqbool Hussaln and ors.

Respondent : State of J and K and ors.

Judgement :

Mansoor Ahmad Mir, J.

1. The petitioners, tea in number, have invoked the jurisdiction of this Court in terms of Section 9 of Enemy Agents Ordinance 2005 (1948 A.D.) by the medium of this petition which is directed against the judgment and order dated 4th September, 2003, passed by Principal Sessions Judge, Jammu, (Special Judge) in the case titled as State v. Mohammad Maqbool Hussain and Ors. FIR No. 164/1995, P/S Mendhar, under Section 120B of Ranbir Penal Code (hereinafter for short, RPC), 2/3 Egress and Internal Movement (Control) Ordinance, 2005 (1948 AD), hereinafter for short E&IMCO;, 7/25 Arms Act and 3 Enemy Agents Ordinance, 2005 (1948 AD), hereinafter for short EAO, whereby and where-under petitioners came to be convicted and sentenced to, imprisonment for life and fine to the tune of Rs. 20,000/- each for the commission of offence punishable under Section 3 EAO and, seven years rigorous imprisonment and fine of Rs. 5000/-

each for commission of offence punishable under Section 7/25 Arms Act. The judgment and order dated 4th September, 2003 shall be, hereinafter, referred to as impugned judgment.

FACTS

2. On 28th September, 1995, in the morning police station, Mendhar, had received information from reliable sources that one Mohammad Maqbool, along with other 12 trained militants equipped with arms, ammunitions, grenades, detonators and fuses etc., had crossed the actual line of control at the instance of secret agency of Pakistan, namely, ISI, in pursuance of the well organized criminal conspiracy, which set the police in motion FIR No. 164 of 1995 came to be registered and challan came to be presented against the accused.

The allegations as put-forth by prosecution against all the accused are as under:

3. That during the intervening night 27/28 September, 1995, a joint search operation carried out by the army and civil police in village Mendhar and accused, namely, Maqbool Hussain, Ghulam Mohammad Wani, Irshad Ahmad, Mohammad Shafi, Mohammad Hussain, Mohammad Yousuf, Kaka, Mohammad Latief, Mohammad Aslam, Barkat Hussain, Mohammad Shafi, Ghulam Hussan Wani, Nissar Hussain and Lal Hussain were apprehended and arms, ammunition and explosives were recovered from their possession details of which are given in the seizure memos.

4. Accused had brought the arms, ammunitions, explosives from Paskistan after crossing border and obtaining training from ISI, in order to escalate the militant activities in the valley in conspiracy with each other, how to use the arms and ammunition for sabotage and subversive activities to endanger life, property and security of the State to stall the political process and destabilize the Government.

5. All the accused were charged sheeted for the commission of offence punishable under Section 3 E.A.O, 120B RPC, 7/25 Arms Act and 2/3 E&IMCO; who pleaded not guilty and claimed to be tried.

6. Prosecution examined, Nasir-ul-Hussain Constable, Baldev Singh Dy. Commandant CRPF, Som Raj Head Constable, Mehar Chand, Karnail Singh Superintendent of Police, Major John Cyricoe, Dharamvir Singh, Dr. Mukarib Hussain, Krishan Chand and Talib Hussain Inspector Vigilance. It is profitable to give brief resume of the prosecution evidence herein.

7. PW Nasir-ul-Hussain, stated that on 28th September, 1995, an information was received by police about the hiding of Maqbool Hussain along with other militants with arms and ammunition within the limits of police station, Mendhar, during the intervening night of 27/28 September, 1995. Sub-Divisional Police Officer (SDPO), Station House Officer, Mendhar, police personnels and CRPF forces held 'Nakah' at Nallah Darkas. One party headed by S.I. Talib Hussain was at upper side of Dak Banglow Mendhar, and second party headed by SDPO was at upper side of post office. He (witness) along with SHO, Balwant Singh Dy. Superintendent of Police CRPF with other CRPF personnels were at Darkas Nallah. Suddenly firing started from the side of Government Middle School Gulad and SDPO informed SHO through wireless about the encounter and directed him to remain extra alert. At about 12.30 PM, 13 militants ran away towards Darkas Nallah but a police party headed by SHO had already cordoned the area. Accused opened fire and police retaliated. SHO challenged and asked the militants to surrender who raised slogans of Hindustan Zindabad and surrendered before police after laying down their arms. Accused, Mohammad Maqbool alias Mohammad Hussain, had received injuries during the encounter who was leading other militants with GPMG gun. And named Mohammad Maqbool, Barkat Hussain, Kaka, Mohd. Shafi, and another Mohammad Shafi, Irshad, Mohammad Hussain, Mohammad Yousuf. Further stated that he did not know the names of other accused who were also present in the court. All the accused present in the Court were taken in jeep. He has given the details of the arms and ammunition recovered from the accused and accepted the contents of seizure memos as true and correct and identified his signatures. Accordingly seizure memos came to be exhibited as EXPW to EXPW-NA/10. He identified all the accused by their faces.

8. PW Baldev Singh, Dy. Commandant CRPF, stated that joint operation was conducted along with local police on 28.09.1995. Accused surrendered and were

apprehended along with arms and ammunition. Weapons in possession of accused were loaded. SHO police station, Mendhar had not prepared the seizure memos on spot but at police station. Admitted the contents of seizure memos EXPW-NA to EXPW-NA/9 as correct. Accused had raised slogans of Hindustan Zindabad at the time of their surrender. All accused were present in the police station when seizure memos were prepared.

9. PW Som Raj, Constable, stated that he (witness), SHO, Dy. Superintendent of Police, Abdul Gani SGC had seized packet from a maize crop. Two pistols 9mm, 15 round, 9mm pistol, 100 round AK 47 Rifle, six fuse, one remote control were recovered from the said packet. Seizure memo was prepared. The seizure memo came to be marked as EXPW-SR.

10. PW Mehar Chand stated that SHO P/S Mendhar called him and other officers in the evening of 27th September, 1995 and also in the morning of 28th September, 1995 and informed them that militants had entered into the area after crossing the border of Pakistan. The forces went to Darkas area and laid cordon at Golad. Fire was opened from the side of forest at 12.30 PM. Baldev Singh, SHO, controlled the entire command. The militants had made an attempt to ran away and opened fire but SHO challenged and asked them to surrender and they surrendered.

11. PW Karnail Singh, Superintendent of Police stated that he was posted as SDPO at Mendhar in the month of September, 1995. Police received an information from reliable sources that one Maqbool Hussain R/o Golad had brought a group of militants who had crossed border of Pakistan at Mendhar on 27th September, 1995 and were at Golad Mendhar. He with a police party and party of CRPF forces conducted search operations. He and Talib Hussain, Inspector, had entered into the kitchen of Lal Hussain and had seen there that Lal Hussain had prepared meals for 22/23 persons. Lal Hussain told to them that the meals was for those persons who had stayed there for night and pointed towards the maize field where the said persons were hiding. Police party challenged and asked Maqbool Hussain and others to surrender but they opened fire and police retaliated. Accused ran away towards Darkas Nallah where they surrendered,

Maqbool Hussain was injured. Further stated that he knew the accused by their faces because they were in the police station.

12. PW Major John Cyricoc proved contents of letters EXPW-JC and EXPW-JC/1.

13. PW Dharamvir, stated that Ghulam Hussain was apprehended along with arms and ammunition.

14. PW Dr. Mukarib Hussain, deposed that he examined accused, Maqbool Hussain, who was brought before him by HC No. 60-B Romesh Chander and gave the details of injuries which Maqbool Hussain had sustained. Certificate came to be exhibited as EXPW-MH.

15. PW Krishan Chand retired Dy.SP stated that FIR No. 164 of 1995 was registered. Admitted the contents of FIR as true and correct which came to be marked as EXPW-KC. They went Golad along with Dy. Superintendent of Police from police station. Dy. Superintendent of Police constituted three parties of the police and CRPF. When they reached ahead of Dak Bunglow, Mendhar, they saw party of 6 Sikh Light Infantry who were on their way towards Golad. Dy. Superintendent of Police accompanied them. He (witness) along with other party of police went to Darkas in terms of direction of Deputy Superintendent of Police and third party under the command of Talib Hussain, SI, went to Golad from middle path. Maqbool Hussain along with other accused ran towards Darkas. He (witness) challenged and asked Maqbool Hussain and his associates to surrender and warned them again. Accordingly accused laid down their arms and surrendered while raising up their hands. The seizure memos are out of his handwriting and bear his signatures. Admitted the contents of seizure memos EXPW-NA to EXPW/11 as true and correct. Accused, Maqbool Hussain, was found injured at the time of arrest and taken to hospital. Accused were handed over to the army for interrogation in the way. Seized arms and ammunition were taken to the police station. He had again gone to the place of occurrence on 29th September, 1995 and seized a bag from which arms and ammunition were recovered and prepared the seizure memo EXPW-SR and site plans EXPW-KC/1 to EXPW-KC/3. Accused were sent to interrogation centre after army authority handed over them to police. The arms and ammunition shown in the court are the

same which were seized by the police from the possession of the accused. Accused had raised slogans of 'Hindustan Zindabad' while laying down their arms and surrender.

16. PW Talib Hussain, Inspector, stated that he along with police party, army party had gone to Golad under the command of Karnail Singh SDPO, Mendhar. Accused present in the court were hiding along with arms and ammunition in the maize crop of Lal Hussain. They opened fire and police retaliated. They tried to ran away towards Golad. Accused surrendered at Golad before SHO Krishan Chand Khajuria who arrested them and conducted investigation. Later on the investigation was entrusted to the witness. He prepared seizure memo EXPWSR on spot on 29th September, 1995. He had seen all the accused at the police station. Injured, Maqbool Hussain, accused, was taken to hospital.

17. The statements of accused were recorded in terms of mandate of Section 342 Code of Criminal Procedure. Accused have not led any evidence in defence.

18. The learned trial court after hearing arguments convicted the petitioners (accused) for the commission of offences punishable under Section 3 EAO and 7/25 Arms Act but acquitted the accused/petitioners for the commission of offence punishable under Section 2/3 E&IMCO.; Ghulam Hussain Wani, Nissar Hussain, accused 11 and 12 were acquitted from all the charges. Accused No. 13, Lal Hussain, came to be convicted for the commission of offence punishable under Section 3 EAO read with Section 120B RPC and acquitted for the commission of offences punishable under Section 7/25 Arms Act and 2/3 E&IMCO.;

19. It appears that Lal Hussain (accused) has not challenged the order of conviction and sentence.

State has also not challenged the impugned judgment on any count.

20. In the given circumstances, the moot point for consideration is whether the order of conviction and sentence passed against the accused/petitioners, herein, for the commission of offences under Section 3 EAO and 7/25 Arms Act is correct or otherwise?

21. In order to return finding on this issue, it is necessary to notice what was the charge framed by the Court against all the 13 accused including petitioners.

22. The charge framed against accused No. 1, Maqbool Hussain, reads as under:

1. That after it having been mutually agreed by you with other accused, you went to Pakistan and after having obtained regular training in the use of arms and ammunition at the instance of Pakistani Secret Agency namely, ISI and at the instigation of enemy country with a view to giving boost to militancy in State of J&K; and to stop the political process started in the State and to attack local defence installations, by killing Indian army, crossed the border illegally during the night intervening 27th-28th September, 1995 at Pagwari Chaki under an organized criminal conspiracy and equipping yourself with illegal arms and ammunition came into this area and the accused Lal Hussain gave food to you due to timely action of local police and the army you came to be arrested by the police with arms and ammunition. So you have committed an offence punishable Under Section 3/EAO, 2/3 E&IMCO; 120B RPC which is within the cognizance of this Court.

2. That on 28th September, 1995 police recovered from you rifle UMG/GPMG sic one No. , Cartridge of UMG/GPMG, 200 Nos. , Pouch one No. , Pistol 9 mm with cartridge, 15 Nos. , Hand grenades, 3 Nos. (sic) which came to be seized from you.

So you have committed an offence punishable Under Section 7/25 Arms Act which is within the cognizance of this Court and through this pronouncement I direct you to be tried for the aforesaid charges.

23. The allegations put-forth in para-1 of the charge sheet are same in all the charges sheets framed against all the accused. But contents contained in para-2 of the charge sheets are different. Paragraph-1 of the charge sheet contains the allegation how the accused were involved in the commission of offence punishable under Sections 3 EAO, 2/3 E&IMCO; 120B RPC. The allegations in para-2 are different only to the extent that what type of arms and ammunitions were recovered from each accused as per the details given in the seizure memos.

24. While going through para-1 of the charge sheet, it was alleged that accused had hatched a criminal conspiracy and in pursuance of the conspiracy they had gone to Pakistan and after obtaining regular training how to use arms and ammunitions at the instance of Pakistani Secret Agency, namely, ISI in order to give boost to the militancy in Jammu and Kashmir State and to stall the political process and to attack local defence installations, by killing Indian army, crossed border illegally during the intervening night of 27th - 28th September, 1995 at Pagwari Chowki.

25. The prosecution had to prove that a conspiracy was hatched by the accused and in pursuance of the conspiracy they had gone to Pakistan and obtained training how to use arms and ammunition at the instance of ISI and, after obtaining training crossed the border at Pagwari Chowki during intervening night of 27/28th September, 1995, illegally.

26. It is profitable to reproduce Sections 2 and 3 of E&IMCO, herein, which reads as under:

2. Control of egress from or movement within the State. - The Government may, by notifying in the Government Gazette, order that any person for the time being in the State or any class of such persons shall not proceed to a destination outside the State or move within the State from one place to another, except under the authority of a written permit granted in such form and manner and by such authority or person as may be specified in the order.

[3. Penalty for contravention of order under Section 2. - Whoever contravenes the provisions of any order made under Section 2, shall be punishable with imprisonment for a term which in the absence of special reasons to be record in writing by the Court, shall not be less than one year but may extend to two years and shall also be liable to fine.

27. In order to bring guilt home to the accused, the prosecution had to prove that they had crossed border illegally and came back illegally.

28. Thus the trial court vide impugned judgment acquitted all the accused for the commission of offence punishable under Section 2/3 E&IMCO.; It is profitable to reproduce relevant para of the impugned judgment herein, which reads as under:

So for offence Under Section 2/3 IMCO against accused persons 1 to 13 is concerned, there is no notification placed on record or produced during the trial of the case by the prosecution to show that the movement of these accused persons at Golad and Dharkash Mandher was restricted. Besides this, there is nothing on the file against these accused to connect them with the commission of this offence. Therefore accused 1 to 13 are acquitted for the commission of offence Under Section 2/3 IMCO.

29. Keeping in view the finding returned by the learned trial court, the very foundation of the criminal conspiracy fails. Thus the prosecution has failed to prove the first part of the agreement of the alleged criminal conspiracy. In the given circumstances, prosecution had failed to prove main step(s)/ingredient(s) of agreement of the criminal conspiracy.

30. The allegation against accused 11 and 12, Ghulam Hussain and Nissar Hussain, were that they were also involved in the criminal conspiracy but stand acquitted from all the charges, then how it can be held that accused Lal Hussain and other accused were involved in the criminal conspiracy. The trial court has not convicted the petitioners/accused 1 to 10 for the commission of offence punishable under Section 120B RPC.

31. The question is how trial court convicted Lal Hussain, accused No. 13 in terms of Section 120B of RPC?

It is useful to reproduce the finding recorded by trial court while convicting accused No. 13, herein, which reads as under:

In the back drop of the above legal position related to the criminal conspiracy, it has to be seen as to whether the prosecution proved beyond reasonable doubt that accused Lal Husain had taken part to endanger life and caused sabotage activities. The circumstances established and proved in case in hand by the

prosecution are enumerated as under:

- (1) Stay of accused in the house of accused Lal Hussain situated at Golad for the night prior to date of occurrence i.e. encounter at Golad and there after surrender at Charkash Mandher.
- (2) Cooking of meals by accused Lal Hussain in his kitchen for accused persons,
- (3) Facilitating the hiding of the accused in his maize crop field by accused Lal Hussain
- (4) Number of accused persons who surrendered with arms and ammunition being 11,
- (5) Accused equipped with heavy arms and ammunition,
- (6) Recovery and seizure of arms and ammunition from accused,

are sufficient to hold charge of criminal conspiracy and endangering life of police and army personal and causing sabotage activities when they opened firing on the Naka party at Golad where despite warning by SDPO Karnail Singh to the accused to surrender did not yield any fruit instead opened firing and in the encounter one of the accused Maqbool Husain leading the militant group 1 accused persons received injury and accused succeeded in fleeing the 1st cordon but were caught in second cordon at Dharkash where they surrendered along with their arms and ammunition, thus, all the above mentioned established and proved circumstances to the hilt beyond any bristle of doubt by the prosecution lead me to hold that accused Lal Hussain conspired with the remaining accused except accused No's 11 and 12 and accused succeeded in the commission of offence Under Section 2/3 EAO and as such is convicted Under Section 2/3 EAO.

32. The trial court had given reasons, referred hereinabove, how the accused conspired with accused 1 to 10 but trial court has lost sight of the allegations putforth in the charge sheet framed, referred hereinabove. It could not be said and held that hatching of criminal conspiracy could be inferred in the circumstances given and discussed in the impugned judgment, referred hereinabove.

33. In order to prove conspiracy, the prosecution had to prove that what was the agreement and accused had acted in terms of the agreement.

It is beaten law of the land that direct evidence cannot be led in order to prove charge of criminal conspiracy but it can be inferred from the circumstances of the case by leading evidence.

34. Apex Court in case titled *Kehar Singh v. State (Delhi Admn.)*, reported in : 1989 CriLJ1 , has held as under:

268. Before considering the other matters against Balbir Singh, it will be useful to consider the concept of criminal conspiracy under Sections 120A and 120B, IPC. These provisions have brought the Law of Conspiracy in India 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. The following passage from Russel on Crime (12 Ed. Vol.1, 202) may be usefully noted:

The gist of the 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 discussion, of the plan is not, per se, enough.²⁷¹ It will be thus seen that the most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may not be done in pursuance of agreement, but the very agreement is an offence and is punishable. Reference to Sections 120A and 120B, IPC would make these aspects clear beyond doubt. Entering into an agreement by two or more persons to do an illegal act or legal act by illegal means is the very quintessence of the offence of conspiracy.

272. Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will 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 enquire 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 conspirators, but the latter does. It is, however, essential that the offence of conspiracy required some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to prove the actual meeting words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient....

35. Apex Court in case titled Ram Narain Poply v. Central Bureau of Investigation reported in : 2003 CriLJ4801 , has held as under:

354. It was noticed that Sections 120A and 120B IPC have brought the law of conspiracy in India in line with English law by making an overt act inessential when the conspiracy is to commit any punishable offence. The most important ingredient of the offence being the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the Court must inquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object. The former does not render them conspirators but the latter does. For the offence of conspiracy some kind of physical manifestation of agreement is required to be established. The express agreement need not be proved. The evidence as to the transmission of thoughts sharing the unlawful act is not sufficient. A conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice of necessity. During its subsistence whenever any one of the conspirators does an act or series of acts, he would be held guilty under Section 120B of the Indian Penal Code.

36. Apex Court in case titled Nazir Khan v. State of Delhi reported in : 2003 CriLJ5021 , has held as under:

14. As noted above, the essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event no overt act is necessary to be proved by the prosecution because in such a

situation, criminal conspiracy is established by proving such an agreement. Where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120B read with the proviso to Sub-section (2) of Section 120A, then in that even mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction under Section 120B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions, in such a situation, do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfillment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established, the act would fall within the trapping of the provisions contained in Section 120B (See S.C. Bahri v. State of Bihar : 1994 CriLJ3271 .)

37. Apex Court in case titled K.R. Purushothaman v. State of Kerala reported in : 2005 CriLJ4648 , has held as under:

18. From the findings arrived at by the High Court Court that it was A-3 who was entrusted with the gold by the Devaswom Board, and who was looking after the affairs of making the ornament Golaka, simply because accused-appellant had accompanied him to Coimbatore, it cannot be inferred that there was an agreement entered into between them to misappropriate the gold. To constitute a conspiracy, agreement between two or more persons for doing an illegal act, or an act by illegal means, is a sine qua non. Although the agreement among the conspirators can be inferred by necessary implication, the inference can only be drawn on the parameters in the manner of proved facts, in the nature of circumstantial evidence. Whatever be the incriminating circumstance, it must be clearly established by reliable evidence and they must form the full chain whereby a conclusion about the guilt of the accused can be safely drawn. Even if we hold that at some point of time, the accused-appellant had some knowledge or suspicion about A-3 indulging in fraudulent misappropriation of gold, entrusted to A-3, in the absence of some positive evidence indicating agreement to that effect, conspiracy could not be inferred. On the findings itself arrived at by the High Court, we cannot hold that the accused-appellant was the conspirator to misappropriate

the gold, with A-3.

While applying the test to the case in hand, the prosecution had failed to prove criminal conspiracy.

38. However, be it as it is, the petitioners have not been convicted for the commission of offence punishable under Section 120B RPC, but only Lal Hussain came to be convicted for the commission of said offence. Neither State challenged the said finding nor Lal Hussain.

39. The next question is whether conviction and sentence order recorded under Section 3 EAO is legally tenable?

Keeping in view the prosecution story and the charges framed, the allegation of the prosecution is that accused were employed by I.S.I. and worked for them and acted on the instructions received from I.S.I.

40. In order to bring home the guilt, the prosecution had to prove that the accused were either 'enemy' or 'enemy agents' in terms of the definition given in Section 2 EAO. It is profitable to notice the definition of 'Enemy' and 'Enemy Agent', herein, which read as under:

(a) 'enemy' means and includes any person, directly or indirectly, participating or assisting in the campaign recently undertaken by raiders from outside in subverting the Government established by law in the State;

(b) 'enemy agent' means a person, not operating as a member of enemy armed force, who is employed by, or works for, or acts on instructions received from, the enemy.

41. The definition of word 'enemy' given in Black's Law Dictionary, reads as under:

Enemy.1. One who opposes or inflicts injury on another; an antagonist. 2. An opposing military force. 3. A state with which another state is at war. - Also termed public enemy. 4. A person possessing the nationality of the state with which one is at war. -Also termed enemy subject. 5. A foreign state that is openly hostile to another whose position is being considered.

42. The definition of word 'enemy' given in Law Lexicon Legal Dictionary, reads as under:

Enemy is properly an alien or foreigner who, in a public capacity and in an hostile manner, invades any kingdom or country; and whether such persons come hither by themselves or in company with English traitors, they cannot be punished as traitors, but shall be dealt with by martial law. But the subjects of a foreign Prince coming into England, and living under the protection of the King, may, if they take on arms against the Government, be punished as traitors, not as alien enemies. If a prisoner be rescued by enemies, the gaoler is not guilty of an escape, as he would have been if subjects had made the rescue, when he might have a legal remedy against them.

43. The definition of word 'Agent given in Black's Law Dictionary, reads as under:

Agent. - An 'agent' is a person employed to do any act for another or to represent another in dealings with third persons [Sec. 182, Contract Act,]. According to this definition, an agent never acts on his behalf but always on behalf of another. He either represents his principal in any transaction or dealing with a third person, or performs any act for the principal. The crucial test of the status of an agent is that his acts bind the plaintiff.

44. The definition of word 'Agent given in Law Lexicon Legal Dictionary, reads as under:

Agent.1. One who is authorized to act for or in place of another; a representative.

The definition of word 'Agent given in New Webster's Dictionary, reads as under:

Agent. One who or that which acts; an active power or cause; a body or substance that caused a certain action to being; a person entrusted with the business of another.

45. Keeping in view the definition given, hereinabove, read with definition given in Section 2 EAO, enemy is a person who does an act in order to sabotage or destabilize the government established.

46. While keeping in view the allegations contained in the prosecution story and charge sheets framed against the petitioners 'I.S.I' is the alleged 'enemy'.

47. Keeping in view the definition give in Section 2 EAO, the 'enemy agent' is a person, who is not a member of enemy armed force but is employed by enemy, or, who is working for enemy, or, acts on the instructions received from enemy.

48. As per the prosecution story and the charge sheet framed against the accused, the prosecution had to prove that I.S.I., employed the accused, who were working for I.S.I., and were acting or had acted on the instructions of I.S.I. The allegation putforth by the prosecution is that the accused crossed the border, went to Pakistan, obtained training at the hands of I.S.I and then crossed the border at Golad. Had the prosecution proved these facts then it was to be seen whether their action(s) and act(s) of the accused/petitioner fall within the purview of Section 2 EAO.

49. It is pertinent to mention herein that crossing of line of control from this side to Pakistan and from Pakistan to this side illegally is an offence punishable under Section 2/3 E&IMCO.; All accused stand acquitted for the commission of the offence punishable under Section 2/3 E&IMCO; then what is the proof on the file in support of the allegation put-forth in the charge sheet that accused are 'enemy agents'. There is not an iota of evidence not to speak of proof suggesting that accused were enemy agents and were acting on the instructions of the enemy or were working or acted on the instructions received from ISI.

50. The evidence on the file is that police received information that accused were hiding in a maize field and were challenged and asked to surrender, they opened fire, police retaliated and in encounter Mohammad Hussain sustained injuries and, thereafter, accused laid down arms and ammunition, raised hands and surrendered before police while raising slogans of Hindustan Zindabad.

51. Keeping in view the above discussion, the prosecution had failed to prove the charge that accused, on the instructions of ISI, went Pakistan in order to receive training and after receiving training crossed border illegally.

In the given circumstances, it could be safely held that prosecution failed to prove charge and bring guilt home to the accused.

52. It is worthwhile to mention herein that allegations contained in the charge sheet against all the accused were same. But Accused 11 and 12, namely, Ghulam Hussain and Nissar Hussain came to be acquitted then what was the proof on the file on the basis of which it could have been said that petitioners/accused were involved in the commission of offence punishable under Section 3 EAO.

53. Apex Court in case titled Nazir Khan v. State of Delhi reported in : 2003 CriLJ5021 , has held as under:

25. The Indian Law Commissioners in their second report dated 24-6-1947 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.

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 toops. 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.

54. Having view of the above discussion, there is no evidence on the file that the petitioners were enemy agents or had in any way intended to aid the enemy or

done an act or attempted to do an act or conspired with any other person to do any act which was designed or which was likely to provide assistance to the enemy.

55. While going through the prosecution story and charge sheet framed, it was not the allegation against the accused that they had worked as enemy agent or conspired or attempted to conspire to do an act which was designed or likely to provide assistance to the enemy or to endanger life or there was no allegation against that the petitioners that they were guilty of incendiarism.

56. The prosecution had to prove the case as put forth by it and as per charge sheet framed against the accused. As discussed hereinabove, the prosecution failed to prove very foundation of the case and trial court has rightly acquitted the accused for the commission of offence punishable under Section 2/3 E&IMCO.;

57. The prosecution has also failed to prove that what was the intention i.e. mens rea of the petitioners. If the petitioners would not have been arrested on 28.09.1995 at Darkas, may be the petitioners would have later on surrendered before commission of any offence(s) before the State authority(ies), Police or Army authority(ies).

58. In the given circumstances, I am of the considered view that trial court had fallen in error while convicting and sentencing the accused for commission of offence punishable under Section 3 EAO.

59. Petitioners/accused came to be convicted and sentenced for the commission of offence punishable under Section 7/25 Arms Act. The question is whether prosecution had proved the said charge?

60. The prosecution had examined the witnesses and proved the seizure memo EXPW-NA/NA10. In para-2 of the charge sheet the details of arms and ammunition which were recovered from each accused are given.

61. The prosecution has proved that arms and ammunitions, description of which is given in charge sheet of each accused, were recovered from the possession of the accused. No doubt, there are some minor discrepancies in the statements

recorded but while going through the charge sheet and seizure memos and the statement of all the witnesses examined, it is proved beyond any reasonable doubt that arms and ammunition were recovered from each accused as per description given in charge sheet. Thus, I am of the considered view that the trial court rightly came to the conclusion that the prohibited arms and ammunition were recovered from the possession of accused.

62. Apex Court in case titled Karamjit Singh v. State (Delhi Admn.) reported in : 2003 CriLJ2021 , has held as under:

8. Shri Sinha, learned senior counsel for the appellant, has vehemently urged that all the witnesses of recovery examined by the prosecution are police personnel and in absence of any public witness, their testimony alone should not be held sufficient for sustaining the conviction of the appellant. In our opinion the contention raised is too broadly stated and cannot be accepted. The testimony of police personnel should be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. The presumption that a person acts honestly applies as much in favour of police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good grounds. It will all depend upon the facts and circumstances of each case and no principle of general application can be laid down....

63. Mr. Lone argued that the arms and ammunitions recovered were neither sent to expert for opinion nor expert was examined as a witness.

The Investigating Officer, Deputy Superintendent of Police, and other witnesses stated that accused had opened fire and the arms and ammunitions were loaded.

Thus, in the given circumstances, conviction can not be assailed on the point that arms and ammunition were not sent to expert for examination and for lack of expert evidence.

64. Apex Court in case titled Jarnail Singh v. State of Punjab reported in : 1999 CriLJ453 , has held as under:

3. What is contended by the learned Counsel for the appellant is that as the identify of the gun was not established and no evidence of an expert was led to prove that it was in working condition by test firing the same, the appellant ought not to have been convicted for the offences alleged against him. In our opinion, there is no substance in this contention because the type of gun which was found from the appellant was 'Mujhal or Toredar' gun. As we have pointed out earlier this type of gun can be fired by first filling it with gun powder. In respect of such a weapon no further test firing was necessary in order to find out whether it was in a working condition or not. Once it was found by the Police Officer that the mechanism was in order, it could be reasonably inferred that it was in working condition. Therefore, even in absence of any evidence of an armourer or an expert of that type evidence of a Police Officer who is trained in handling guns can be accepted. We, therefore, confirm the conviction and order of sentence passed against him. The appeal is dismissed.

65. Lastly learned Counsel for petitioner raised an interesting question that the witnesses had failed to identify the accused in the open court and prosecution failed to conduct identification parade during investigation.

There is evidence on the file that the accused who were present in the trial Court were the persons who had surrendered before police on spot and taken into the custody and are in custody.

66. Keeping in view the evidence led by the prosecution, it could be safely held that accused persons facing trial were the persons who surrendered on spot and came to be arrested.

No doubt, identification parade was to be conducted but that can not be a ground for dismissing the case if corroboration from other source is available.

67. Apex Court in case titled Ronny alias Ronald James Alwaris v. State of Maharashtra reported in 1998 Cri.LJ 1638, has held as under:

19. Section 9 of the Evidence Act deals with relevancy of facts necessary to explain or introduce relevant facts. It says, inter alia, facts which establish the

identify of any thing or person whose identity is relevant, insofar as they are necessary for the purpose, are relevant. So the evidence of identification is a relevant piece of evidence under Section 9 of the Evidence Act where the evidence consists of identification of the accused person at his trial. The statement of the witness made in the Court, a fortiori identification by him of an accused is substantive evidence but from its very nature it is inherently of a weak character. The evidence of identification in the TIF is not a substantive evidence but is only corroborative evidence. It falls in the realm of investigation. The substantive evidence is the statement of the witness made in the Court. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what he has seen earlier, strength or trustworthiness of the evidence of the identification of an accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in Court, If a witness identifies the accused in court for the first time after a long time, the probative value of such uncorroborated evidence becomes minimal, so much so that it becomes unsafe to rely on such piece of evidence. But if a witness has known an accused earlier in such circumstances which lend assurance to identification by him in court and if there is no inherent improbability or inconsistency, there is no reason why his statement in court about the identification of accused should not be relied upon as any other acceptable but uncorroborated testimony.

24...As such evidence of identification of the appellants at their trial by the said witnesses even without the corroboration of the identification parade, had been rightly relied upon by the trial Court as well as by the High Court. We, therefore, find no illegality in the judgment of the Courts below in accepting their evidence of identification.

68. Apex Court in case titled *Visveswaran v. State* reported in : 2003 CriLJ2548 , has held as under:

11. It is unfortunate that despite the aforesaid facts, the test identification parade was not held. An important aspect of the case is that the appellant had beard and moustaches when P.W. 1 and P.W.2 were examined as witnesses for the

prosecution. It was not so at the time of the occurrence. P.W.1 and P.W. 2, therefore, it is evident, could not identify him in Court and stated in their deposition that the said person is not in Court. It does not mean that the acquittal is to follow as a natural corroboratory from the statements of P.W.1 and P.W.2. The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a times, crimes are committed under cover of darkness when none is able to identify the accused. The commission of crime can be proved also by circumstantial evidence. In the present case, there are clinching circumstances unerringly pointing out the accusing finger towards the appellant beyond any reasonable doubt.

13...The non-holding of the test identification parade, having regard to the facts of the case, is not fatal and does not create any reasonable doubt in the case of the prosecution. We are unable to accept the contention that the identity of the appellant had not been proved. From the proved circumstances, it has been fully established that P. W. 1 was picked up and raped in a hotel room as per the case set up by the prosecution by a Police Constable who was none other than the appellant. There is no infirmity in the impugned judgment of the High Court.

69. Keeping in view the ratio laid down by the Apex Court, I am of the considered view that witnesses had identified the accused. Thus, the case of the prosecution cannot be thrown out on the ground that identification parade was not conducted.

70. Keeping in view the discussion made hereinabove, I am of the considered view that the prohibited arms and ammunition were recovered from the possession of accused and trial court rightly convicted and sentenced the accused for the commission of offence punishable under Section 7/25 Arms Act.

71. In view of the above discussion, this review petition merits to be partly allowed and partly rejected. Viewed thus, the order of conviction and sentence passed under Section 3 EAO is set aside and accordingly the petitioners are acquitted. Order of conviction and sentence passed against the petitioner/accused for the commission of offence punishable under Section 7/25 Arms Act is maintained.

The petitioners/accused are in custody right from their arrest till date. The period undergone by them during investigation, trial and pendency of review petition is treated as set-off in terms of provisions of 397-A Code of Criminal Procedure.

Review petition is accordingly, disposed of. Send down the record.

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