* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CRL.REV.P. 833/2006

Reserved on : 13.2.2007
Pronounced on : 4.5.2007

NASIR SAFI MIR ..... Petitioner
Through Mr. Ram Jethmalani, Mr. Dinesh Mathur, Sr. Advocates with Mr. K.K. Manan, Mr. Mohit Mathur, Mr. Tarun Goomber, Mr. Rishikesh Choudhary, Advocates

versus

STATE, NCT OF DELHI ..... Respondent
Through Mr. Pawan Sharma, Advocate

CORAM:
HON'BLE MR. JUSTICE S.RAVINDRA BHAT

1. Whether reporters of local papers may be allowed to see the judgment.? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

Mr.Justice S. Ravindra Bhat :

1. This revision is directed against an order on charge dated 31-10-2006, by which the the trial court *inter alia,* charged the Petitioner for commission of offences under Sections 3/5 Arms Act and 4/5 Explosives Substance Amendment Act 2001 and Sections 17/18 and 23 Unlawful Activities Prevention Act.

2. The prosecution version was that on 3.2.2006, the petitioner was apprehended on a information through a central intelligence agency while he was travelling in a black

colour car bearing No. DL3CAA-2289 from near Narula Restaurant, Defence Colony Flyover and stopped in front of D-146 Defence Colony. The information of the prosecution was that the petitioner is Dubai based conduit for banned terrorist outfit Hijbul Mujahideen and was involved in a number of acts of providing funds through "Hawala" Channels and explosives through terrorist organisations and he was to deliver a consignment of explosives and Hawala money. The prosecution alleged that the petitioner got down from the car, when he reached the spot and walked towards South Delhi Public School, B Block, Defence Colony. At that point of time he was holding a black coloured bag in his right hand. He was identified by an informer.

3. The petitioner waited for someone; after 15 minutes of waiting no one came there he turned back to his car. Then, he was apprehended and his search led to the recovery of two Kg of RDX, one electronic timer, and a detonator; one pistol make star with magazine was also recovered from the pocket of the bag. The magazine had six live cartridges. A cash amount of Rs.10 lakh was recovered from the bag. The petitioner allegedly made a disclosure statement in which he revealed that he was working for Hizbul Muzahideen and for Mir Waiz Ummar Farooq, Chief of Hurriyat Conference. He stated that the consignment was collected by him from one Latif on the direction of Sayed Salahuddin Chief of Hizbul Muzahideen terrorist outfit; it was to be delivered to one Zahoor of Hizbul Mujahideen from the place where he was apprehended. He allegedly also disclosed that he collected a sum of Rs.55 lakhs from a Hawala Operator and out of that Rs.10 lakh was to be delivered to Zahoor alongwith recovered arms, explosive and ammunition, while 40 lakhs was to be sent to Jammu & Kashmir to be distributed to

various outfits.

4. It was alleged that a sum of Rs.45 lakhs was kept in a blue air bag; that too was recovered from the front seat of the car. On the basis of these materials, the petitioner was booked for offences under Section 121/121A/122/123/120B read with Section 4 & 5 Explosive Substance Act and 25 Arms Act and also under Section 17,18, 20 and 23 Unlawful Activities (prevention) Act. Sanctions were obtained to prosecute the accused for the offences under the Indian Penal Code, Explosive Substances Act, Unlawful Activities (Prevention) Act and under the Arms Act.

5. After investigation, a charge sheet was filed in court, on 2 May, 2006. After hearing the accused, the trial court, i.e., the Additional Sessions Judge, framed charges under Section 25, Arms Act, Sections 4 and 5 Explosive Substances (Amendment) Act and Sections 17/23 and 18, Unlawful Activities (Prevention) Act. The court did not, however frame charges under provisions of the Indian Penal Code.

6. Mr. Ram Jethmalani, learned senior counsel contended that since the trial Court formed the opinion that elements of conspiracy, under Section 120B IPC were absent, it was not open for it to frame charges under Section 17 and 18 of the Act. Counsel for the petitioner submitted that the offence under Section 17, i.e. “raising money” for the unlawful purposes was not made out. In that context, it was submitted that the expression "raising money" merely implies obtaining or procuring it, by donation/subscription, borrowing it, expropriation (or use of State power) or through extortion. Even if it were assumed that the sum of Rs. 55 lakhs was recovered, that by itself could not lead to grave suspicion that the petitioner had raised that money for the purposes mentioned in Section

17, to justify a charge. Learned counsel relied upon the *Black's Law Dictionary*, page 1132-33 and *Advance Law Lexicon*, 3rd Edition (2005), page 3928, in support of his submission regarding the expression "raised money".

7. It was next contended that a charge under Section 18 i.e. act preparatory to a terrorist act could be framed only subject to sanction. It was submitted that there was no valid sanction within the meaning of the expression and that reliance placed upon the order dated 01.05.06 is mis-placed. Shri Jethmalani submitted that there is nothing on the face of the so-called sanction order indicative of proper application of mind and adequacy of materials, in support of the sanction. He relied upon the judgment of the Privy Council in *Gokulchand Dwarkadas -v- The King* AIR 1948 PC 82 to say that a sanction order must, facially indicate brief facts of the case and that if it does not do so, it would be invalid.

8. It was contended by counsel that there was also no evidence in support of the charge under Section 18, which presupposed some objective facts pointing to the accused acting so as to "*conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to the commission of a terrorist act...*" The learned counsel submitted that mere recovery of some amounts, howsoever substantive would not be indicative of any conspiracy, or attempt to commit, advocacy, abetment, advice, incitement, or intentional facilitation of a terrorist act, as defined under Section 15; there had to be something more than the mere recovery of amounts.

9. It was further contended that the materials on record show that there were serious discrepancies about the time of the arrest. Allegedly, the *rukka* was sent on 03.02.06 at 8:30 PM, whereas the time of recording of the FIR was 8:50 PM. Counsel contended that the seizure of materials, from the petitioner allegedly took place on 03.02.06 at 7:10 PM. These inconsistencies were fatal to the genuineness of the prosecution version, and pointed out to grave and serious suspicions about the truth of the allegations. In these circumstances, the Court should not have proceeded to frame the charges, since on the basis of the materials, two views were reasonably possible. Reliance was placed upon *Dilawar Babu Kuarane -v- State of Maharashtra* AIR 2002 SC 564 for the proposition that in such case the accused has to get the benefit of doubt.

10. Learned counsel for the State opposed the petition and submitted that the order on charge does not require interference. It was contended that the petitioner was apprehended and a huge quantity of dangerous explosives were recovered from him. Also Rs. 10 lakhs were recovered at the same time and soon thereafter another Rs,. 45 lakhs was recovered, from the vehicle. The money was all unaccounted. Even if the petitioner's allegation that disclosure statement were not to be taken into account, were accepted nevertheless, the cumulative recovery of a large quantity of deadly explosives and a huge sum of unaccounted money reasonably led to grave suspicion of the petitioner's act preparatory to a terrorist act and also of his having raised amounts for the purpose of committing a terrorist act. Under these circumstances, the charges under Section 17 and 18 were correctly framed. In view of the recovery of explosives, the charge under Section 23 of the Unlawful Activities (Prevention) Act had to be framed.

11. Learned counsel submitted that as far as the question of sanction is concerned, the judgment of the Supreme Court in *State of Maharashtra -v- Som Nath Thapa* 1996 SCC (Crl.) 669 concludes the issue. The sanction order specifically mentions about application of mind to the materials placed before the sanctioning authority. Therefore, the Court cannot in the absence of compelling reasons go behind that order and see whether the sanction order was vitiated.

12. The offence of "terrorist activities" finds mention in Section 2; after several amendments, a new Chapter IV was added to the Unlawful Activities (Prevention) Act, by Amendment Act of 29, which was brought into force with effect from 21st September, 2004. Section 15, defines terrorist activities, and Sections 17, 18 and 23 provide for specific offences. The material provisions are extracted below:

> *"PUNISHMENT FOR TERRORIST ACTIVITIES*
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> **15. Terrorist Act**.-*Whoever, with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people in India or in any foreign country, does any act by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community in India or in any foreign country or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government in India or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act.*
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17. Punishment for raising fund for terrorist act.-*Whoever raises fund for the purpose of committing a terrorist act shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.*

18. Punishment for conspiracy, etc.-*Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to the commission of a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.*

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23. Enhanced penalties.-*(1) If any person with intent to aid any terrorist contravenes any provision of, or any rule made under the Explosives Act, 1884 (4 of 1884) or the Explosive Substances Act, 1908 (6 of 1908) or the Inflammable Substances Act, 1952 (20 of 1952) or the Arms Act, 1959 (54 of 1959), or is in unauthorised possession of any bomb, dynamite or hazardous explosive substance or other lethal weapon or substance capable of mass destruction or biological or chemical substance of warfare, he shall, notwithstanding anything contained in any of the aforesaid Acts or the rules made thereunder, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.*

(2) Any person who, with intent to aid any terrorist, attempts to contravene or abets, or does any act preparatory to contravention of any provision of any law or rule specified in sub-section (1), shall be deemed to have contravened that provision under sub-section (1) and the provisions of that sub-section in relation to such person, have effect subject to the modification that the reference to "imprisonment for life" therein shall be construed as a reference to "imprisonment for ten years".

12. Apart from the above, no other point was urged in support of the petition. The records of the trial court were called for. I have carefully considered them.

13. The first question is regarding the charge under Section 17. The controlling expression is "raises fund" and the object clause is " purpose of commission of a terrorist

act". There can be no dispute with the argument that the sources of funds may be four fold; some lawful, and some unlawful. The question here is not the source, but the suspicion about the possession. If the funds alone had been recovered, the argument on behalf of the petitioner would have been attractive. However, that is not the case; apart from the substantial amount of Rs. 55 lakh, recovered from the petitioner, a Dubai national, he was also found in possession of a dangerous explosive, i.e two kilograms of RDX. Now, the recovery of these two, ie. the sum of Rs. 55 lakhs, and the explosive, in my opinion, was sufficient for the court to have entertained a grave suspicion about the use of both. In other words, the cumulative, or total effect of the recoveries was seen by the court, for framing the charge under Section 17, as well as Section 18. I find no infirmity with that approach.

14. As regards the second submission, i.e that there was no other material to connect the petitioner with any unlawful or terrorist act, or organization, and therefore in the absence of any overt act toward that end, the charge under Section 18 could not be framed, the answer, to my mind, is that the provision is not merely indicative of one or few positive acts, but a series of acts, over a period of time. This necessarily would imply a wider canvas in time, and a time continuum. This view is strengthened by use of such expressions as "abet"; "conspire" "*advocates, abets, advises or incites or knowingly facilitates"* any "act preparatory to a terrorist act". The intention here is to prevent a potential abettor, or facilitator, or conduit, aiding the preparation of a terrorist act. The recovery of the huge quantity of RDX is sufficient for a charge for that offence. I am not persuaded with the submission that something overt or positive, on the part of the accused

is necessary for the charge; to insist on such a condition would be to import limitations which possibly were not contemplated. All the actions covered covert deeds performed, or planned in stealth, and highlighted by isolated actions, or circumstances. If at the stage of charge, the limited interpretation advanced were to be accepted, possibly the court would be defeating the legislative intent.

15. The next question is whether the sanction granted, and produced in support of the case was valid, as it did not contain reasons to support application of mind. *Gokulchand's case (supra)* was cited for the purpose. An identical argument was apparently raised, in *Mohammed Afzal -vs- State of Delhi* 2005-(11)-SCC -600 when, after considering the ratio in *Gokulchand,* the Supreme Court held as follows:

> *"Ultimately, the test to be applied is whether relevant material that formed the basis of allegations constituting the offence was placed before the sanctioning authority and the same was perused before granting sanction. We are of the view that this test has been amply satisfied in the instant case. The sanction orders on their face indicate that all relevant material viz., FIR, disclosure statements, recovery memos, draft charge sheet and other material on record was placed before the sanctioning authority. The fact that the sanctioning authority perused all this material is also discernible from the recital in the sanction orders. The sanction orders make it clear that the sanctioning authority had reached the satisfaction that prima facie the accused committed or conspired to commit the offences mentioned therein. The elaborate narration of facts culled out from the record placed before the sanctioning authority and the discussion as to the applicability of each and every Section of the penal provision quoted therein is not an imperative requirement. A pedantic repetition from what is stated in the FIR or the draft charge-sheet or other documents is not what is called for in order to judge whether there was due application of mind. It must be noted that the grant of sanction is an executive act and the validity thereof cannot be tested in the light of principles applied to the quasi-judicial orders vide the decisions in State of Bihar v. P. P. Sharma ((1992) Suppl 1 SCC 222) (1991 AIR SCW 1034 : AIR 1991 SC 1260) and Superintendent of Police v. Deepak Chowdary ((1995) 6 SCC 225) (1996 AIR SCW 3905 : AIR 1996 SC 186 : 1996 Cri LJ 405)."*

16. The last point urged was that the time of the rukka, the FIR and the arrest were so discrepant, as to falsify and discredit the entire story and version of the prosecution; the court could never have framed the charges. It is far too well settled that the court does not embark upon a meticulous and microscopic foray into the evidence and materials relied upon the prosecution, at the charge framing stage; it only sees the broad *prima facie* aspects or features. Thus, some discrepancies, cannot completely destroy the version, so as to preclude the court from framing charges.

17. For the above reasons, I find no ground to interfere with the order of the trial court. The revision petition is accordingly dismissed.

(S. RAVINDRA BHAT)
JUDGE

May 02, 2007