

SHAMSHER KHAN
v.
STATE (NCT OF DELHI)

OCTOBER 19, 2000

[K.T. THOMAS AND R.P. SETHI, JJ.]

Criminal Law :

Indian Penal Code, 1860—Sections 299, 304 and 308—Manufacture and stocking of bombs in a house clandestinely—Explosion of bombs during manufacture—Conviction for culpable homicide not amounting to murder—Held, on facts, there is no evidence to show that appellant had knowledge that manufacture of bombs would result in explosion; no evidence to prove that mere manufacture of bombs likely to cause death—Terrorists and Disruptive Activities (Prevention) Act, 1987—Explosive Substances Act.

Appellant-accused along with other persons was manufacturing and stocking explosive bombs clandestinely in his house at Delhi, with a criminal conspiracy to use them on an appropriate occasion. The bombs exploded in the house resulting in death of three persons and injuring nineteen others. Some adjoining multi-storeyed houses also collapsed in the impact. Appellant was charged for offences under Section 304, 308 and 120-B I.P.C and Section 5 of TADA and Section 4(b) of the Explosive Substances Acts. He was sentenced to imprisonment and fine.

In appeal to this Court, the appellant challenged the conviction and sentence for culpable homicide under Section 299 I.P.C.

Respondent contended that the case of the appellant falls within the ambit of the third alternative to Section 299 I.P.C.; and that the appellant did an act with the knowledge that he is likely by such act to cause death of another person.

Disposing of the appeal, the Court

HELD : 1. The act of the appellant proved to have been committed along with the other person who died in the explosion in manufacture of explosive substance like bombs. If some other act had intervened which the offender did not do consciously which triggered the explosions, that could not be

- A** counted as the act for that offender. No evidence was brought in by prosecution to show that mere manufacture of such bombs is likely to cause death of any person, nor any evidence for showing that appellant had the knowledge that by manufacturing bombs death would possibly be caused to any human being without any other act being done. The prosecution has also not brought out any circumstance by which the Court could remotely attribute knowledge to the appellant that by manufacturing and possessing bombs death of any person was a likely consequence. By manufacturing a bomb alone no one can normally think that it would explode without anything more done. Something more would have happened which caused the explosion which is not known. There is no material to show that the appellant had done that additional act.
- B**
- C** There is no scope to bring the proved facts within the ambit of Section 299 I.P.C. The question of culpable homicide would stand at bay. It is difficult legally to confirm the conviction for the offences under Sections 304 and 308 I.P.C. The conviction and sentence passed on the appellant on these counts is set aside. With regard to other counts, the conviction and sentence is confirmed. [291-C-G]
- D**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 502 of 2000.

From the Judgment and Order dated 2/3.5.2000 of the Designated Court-II (TADA) (P) ACT In Session Case No. 562 of 1996.

- E** Shailendra Bhardwaj, R.P. Singh Pal and Chander Shekhar Ashri for the Appellant.

Ashok Bhan, Ms. Sunita Sharma and D.S. Mehra for the Respondent.

- F** The following Judgment of the Court was delivered :

- During the wee hours on 2.11.1989 a shuddering bomb explosion took place at J.J. colony in Shakurpur (Delhi) Three persons died in the explosion almost instantaneously and 19 others were injured, some of them very seriously. The impact of the explosion was such that four adjoining multi-storeyed houses collapsed. The investigating agency concluded that explosion was the aftermath of stalking bombs in the house of the appellant which was done by himself in association with one of the victims (Babu Khan) and some others including the co-accused. They further found that there was a criminal conspiracy to manufacture explosive bombs to be used on an appropriate occasion.
- G**

- H** The appellant Shamsher Khan was one of the four persons arraigned

before a Designated Court constituted under Terrorists and Disruptive Activities (Prevention) Act, 1987 ('TADA' for short). They were charged for offences under Section 304, 308 and 120-B of the Indian Penal Code besides Sec. 5 of the TADA and Sec. 4(b) of the Explosive Substances Act. Appellant alone was convicted of all the offences and the rest of the accused were acquitted by the trial court. On the first count he was sentenced to rigorous imprisonment for 10 years for the offence under TADA and the Explosive Substances Act. He was sentenced to undergo rigorous imprisonment for 7 years. For Sec. 308 IPC he was sentenced to undergo rigorous imprisonment for 5 years. Apart from the aforesaid substantive sentences fine has also been imposed on the various counts. This appeal has been filed by the appellant as of right under Sec. 19 of TADA.

According to the prosecution, appellant enlisted the other persons for the purpose of manufacturing bombs to arm themselves to make on slaught on the members of another community. The background was that a procession was staged by an organisation called Bajrang Dal a few days earlier calling out slogans some of which were so inflammable that they instilled fear in the mind of the appellant that unless he and his companions arm themselves with lethal weapons, they might be victims of an attack. The appellant first contacted PW. 2-Shahabudin for securing the services of Babu Khan who knew how to manufacture bombs. After acquiring the necessary equipment and materials, Shahabudin's house was selected as the venue for manufacturing bombs. But the task could not be carried out at that house on account of the forceful resistance offered by Shahabudin's wife Hasina (PW. 22) and thereupon the venue was shifted to the house of the appellant. Babu Khan manufactured bombs and stored them in that house. One of those bombs (or more than one) got exploded at about 3.00 a.m. on 2.11.1989 resulting in the catastrophe mentioned above.

P.W. 2 Shahabudin was originally included in the array of the accused. However, pardon was tendered to him and he was converted into an approver. His evidence in the court is in full support of the prosecution case as narrated above. It is unnecessary to repeat the evidence given by PW. 2 as we have stated the case in the foregoing paragraphs.

If the testimony of PW. 2 is believable there can be little doubt that appellant had caused explosive bombs to be manufactured and stored them in his house. But PW.2 Shahabudin, on the showing of the prosecution itself, is an accomplice and therefore we would seek corroborative materials to give assurance to us that the testimony is true, despite the inherent drawback of

A that witness.

We came across a number of items of evidence which are corroborative materials as for the testimony of PW. 2. The foremost among them is the evidence of PW. 22-Hasina herself. She said that Babu Khan and appellant brought some materials to her house and when she realised that they were about to manufacture bombs she did not permit that to be done in her house. Because of her forceful opposition Babu Khan and appellant had shifted their activities to the house of the appellant. The testimony of PW.22 was believed by the trial court although she was treated as hostile by the prosecution on account of a minor aspect of the case.

C PW. 21 gave evidence that on coming to know of procession staged by Bajrang Dal he lodged a complaint with the police. Learned counsel contended that PW. 21 did not himself witness the procession and, therefore, his evidence is of no avail. The procession staged by Bajrang Dal is not the main issue in this case and therefore we are not persuaded by the said arguments. The evidence of PW 21 is useful for the limited purpose of showing that he lodged a complaint with the police on being informed of the staging of the procession.

E The most important circumstance which corroborates the evidence of PW.2 is the very fact that an explosion took place in the house of the appellant, which was proved to be the consequence of storing explosive bombs. Learned counsel for the appellant has candidly conceded that such an explosion took place in the house of the appellant on the early hours of 2.11.1989. PW.38 - J. Singh (Inspector of Police) said that he made a search in the house of PW.2 - Shahabudin on 3.11.1989 and traced out some packets containing chemicals, besides certain other articles. This would show that the version of PW2 that Babu Khan had been to her house with the materials for starting the work to manufacture bombs and did some work there.

F All the above circumstances and materials would ensure confidence in our mind that the testimony given by PW.2 regarding the involvement of the appellant in the manufacture of bomb in his house is a true version. The trial court has rightly placed reliance on the aforesaid testimony.

G Appellant was convicted under Sec. 304 and 308 of the IPC. Both the offences relate to commission and attempt to commit culpable homicide respectively. So culpable homicide is the common factor in both Courts. Sec. 299 of the Indian Penal Code defines culpable homicide, which has three alternative requirements. They are :-

1. Doing an act with the intention of causing death of a person, or A
2. doing an act with the intention of causing such bodily injury as is likely to cause such death, or
3. doing an act with the knowledge that he is likely by such act to cause death of another person. B

Learned counsel for the respondent State made an endeavour to bring the case within the ambit of the third alternative, as the case cannot possibly be brought under any of the other two. The act proved to have been committed by the appellant alongwith Babu Khan in this case is manufacture of explosive substances like bombs. Hence what is to be established is, the above act must have been done with the knowledge that such act by itself was likely to cause death. If some other act had intervened which the offender did not do consciously which triggered the explosions that could not be counted as the act for that offender. No evidence had been let in by the prosecution to show that mere manufacture of such bombs is likely to cause death of any person, nor any evidence for showing that appellant had the knowledge that by manufacturing bombs death would possibly be caused to any human being without any other act being done. C
D

We may also point out that prosecution has not brought out any circumstance by which the Court could remotely attribute knowledge to the appellant that by manufacturing and possessing bombs death of any person was a likely consequence. By manufacturing a bomb, alone no one can normally think that it would explode without anything more done. Here something more would have happened which caused the explosion, what was that additional act is unknown to us. At any rate there is no material to show that the appellant had done that additional act. E

In view of the aforesaid legal position, we find no scope to bring the proved facts within the ambit of Sec. 299 of the IPC. If so, the question of culpable homicide would stand at bay. We, therefore, find it legally difficult to confirm the conviction either for the offences under Sec. 304 or for Sec. 308 of the IPC. As a corollary we set aside the conviction and sentence passed on the appellant in regard to those two counts. F

But appellant cannot escape from the other counts for which he was convicted and sentenced. We confirm the conviction and sentence in regard to those counts. G

This Appeal is disposed of accordingly

B.S.

Appeal disposed of. H