



CASE COMMENT: STATE (NCT OF DELHI) V NAVJOT SANDHU

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FACTS OF THE CASE

It was on 13 December 2001, roughly around 11:40 a.m., that five armed men driving a white Ambassador car bearing the sticker of the Home Ministry and other false security marks entered the premises of Parliament House in New Delhi when both houses of the Parliament were in session and when senior political figures, including the Union Home Minister, were present within. This car collided with the car of the then Vice President of India. When questioned by the security guards, the five terrorists alighted from the car and started firing indiscriminately using AK-47 rifles as well as throwing hand grenades. A gunfight ensued for nearly thirty minutes in which all the five terrorists were killed. Nine people, including eight security guards and one gardener, died while sixteen others, mostly security guards, were wounded.

An FIR was lodged at the Parliament Street Police Station. Investigation was entrusted to the Special Cell of the Delhi Police. In the course of seventeen days, the police declared that the plot had been cracked open, and four people were arrested:

Mohd. Afzal Guru (A-1): A surrendered terrorist said to be the principal conspirator who provided the vehicle, weapon and logistics, and was associated with militant groups in the past.

Shaukat Hussain Guru (A-2): The cousin of Afzal Guru, charged with helping provide shelter and logistics to the dead terrorists, along with the provision of the vehicle and chemicals for the bomb.

S.A.R. Gilani (A-3): A teacher of Arabic in Delhi University, charged with being party to the conspiracy based on the telephonic conversation with others and his association with other accused (he married Shaukat and Navjot Sandhu).

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Navjot Sandhu @ Afsan Guru (A-4): The wife of Shaukat Hussain Guru, charged with receiving a phone call from one of the dead terrorists.

The prosecution's case was based largely on: (a) circumstantial evidence because all five perpetrators did not survive to become witnesses; (b) confessions made by accused persons under Section 32 of POTA; (c) seizure of incriminatory items (money, cellular phones, laptop, etc.) through the process of disclosure under Section 27 of Evidence Act; and (d) CDRs which were sought to be proved to show that a communication pattern existed between the accused persons and the deceased terrorists prior to the attack.

On 16 December 2002, the Special POTA Court convicted Afzal Guru, Shaukat Hussain Guru and S.A.R. Gilani for offences under IPC (Sections 121, 121-A, 122 and 120-B), POTA and Explosive Substances Act, and gave the death sentence to all three. The fourth accused person, Navjot Sandhu, was found innocent of the substantive charges of terrorism but guilty under Section 123 of IPC (concealing knowledge of a design to wage war) and awarded rigorous imprisonment for five years.

By an order dated 29th October 2003, the Delhi High Court has rejected the appeals preferred by Afzal Guru and Shaukat Hussain Guru and has upheld the death sentences passed on them (in addition to the appeals preferred by the State for the death penalty to be awarded against them under Section 121 IPC, which had not been separately awarded by the Special Court). However, the High Court has accepted the appeals preferred by S.A.R. Gilani and Navjot Sandhu and has acquitted them of all the charges due to lack of any admissible evidence against them. As a result, there have been seven appeals filed in the Supreme Court – two by Shaukat Hussain Guru, one by Mohd. Afzal Guru, and four by the State / NCT of Delhi regarding the acquittal of Gilani and Navjot Sandhu.

ISSUES

Several questions of law and fact were posed before the Supreme Court, the important among them being:

1. Whether the punishment for prosecution under Section 50 of the POTA was lawfully imposed, and whether the necessary procedures prescribed under the POTA, including Section 32 dealing with confessions, were duly observed.

2. Whether the confessions made by the accused before the Deputy Commissioner of Police were voluntary, authentic, and admissible as evidence, and if they could be taken as the sole basis for conviction.
3. The admissibility of the disclosure statement and subsequent recovery under Section 27 of the Indian Evidence Act, and whether such evidence has been properly proved.
4. Whether the call detail record (CDR) and electronic evidence have been proved according to Section 65-B of the Indian Evidence Act, and whether due to procedural lapses in intercepting/certifying, such evidence became inadmissible.
5. If the circumstantial evidence proved, taken collectively, that there was a complete chain of evidence pointing directly at the guilt of the accused, meeting the test for proof of guilt by circumstantial evidence.
6. If the actions of the accused constitute "waging war against the Government of India," under Section 121 of the IPC, and if the elements of criminal conspiracy under Section 120-B IPC are proved.
7. Whether the case against S.A.R. Gilani and Navjot Sandhu was strong enough to justify the conviction, or whether the judgment of the High Court in their acquittal was proper.
8. Whether the sentence of death given to Mohd. Afzal Guru and Shaukat Hussain Guru is proper under the rarest of rare doctrine that was laid down by Bachan Singh vs. State of Punjab.

ARGUMENTS

Arguments put forward for Appellant Side –

As per the unique position of the case on account of cross-appeals, the arguments made on the "appellant side" need to be taken note of in two parts: (A) The arguments put forward by the convicted accused (Afzal Guru and Shaukat Hussain Guru) in their appeals challenging their conviction and death sentence; and (B) The arguments put forward by the State in its appeals against the acquittal of Gilani and Navjot Sandhu.

Argument for Mohd. Afzal Guru and Shaukat Hussain Guru: Senior counsel representing the convicted accused (Mr. Sushil Kumar for Afzal Guru and Mr. Shanti Bhushan for Shaukat Hussain Guru) argued the following points: Sanction for prosecution under POTA was not valid: It was argued that the sanction for prosecution under Section 50 of POTA was given in mechanical terms without applying the mind of the sanctioning authority to the material on

record. It was further argued that the officer granting sanction was not provided with the complete material to form an opinion. Voluntary confessions not recorded as per requirements: The confession of Afzal Guru and Shaukat Hussain Guru, made under section 32 of POTA, has been challenged as being involuntarily made by way of coercion and long detention in illegal custody, and the recording of the confession has not been done in accordance with the requirements of Section 32(2) to (5) of POTA, which requires that the confession along with the person should have been brought before the Chief Metropolitan Magistrate and he should have been given adequate time to reflect upon the confession.

Disclosures and Recoveries being Unreliable: The disclosures and recoveries made through the disclosures made under Section 27 of the Evidence Act have been challenged as the panch witnesses were tutored by the police and the recoveries were pre-planned. Defect in proving the call records: The case of the prosecution rested primarily upon the use of mobile phone call records to tie up the accused with the deceased terrorists. In other words, it was maintained that the proof of the said call records was not in compliance with the mandatory certificate rule contained under Section 65-B(4) of the Evidence Act because no certificate of a person holding an office of responsible nature in regard to the operation of the concerned device was presented; therefore, the CDRs could not be admissible as secondary evidence of electronic records.

No Proof of 'Waging War': It was maintained that in any event, taking into consideration the case of the prosecution at its highest, the activities allegedly performed by Afzal Guru and Shaukat Hussain Guru, which are basically acts of facilitation, did not constitute "waging war against the Government of India" under Section 121 IPC, a section, which requires an organised armed struggle against the government and not just a lone terrorist attack.

Circumstantial Evidence Insufficient: It was stated that as the culprits who perpetrated the incident had been killed at the scene, the charge against the petitioners, Afzal Guru and Shaukat Hussain Guru, was based solely on circumstantial evidence and that too was insufficient and inconsistent, providing sufficient room for doubt which needed to be decided in favor of the accused in accordance with the test laid down by *Sharad Birdhichand Sarda v. State of Maharashtra*.

Undue Punishment: In the second instance, with regard to the issue of sentence, it was contended that even assuming the guilt of the petitioners was proved, still the facts of the case did not constitute the "rarest of rare" kind that called for capital punishment, especially in the

case of Shaukat Hussain Guru, whose participation was claimed to be subsidiary and auxiliary in nature.

Arguments in Favour of the State (in its appeals against acquittal of Gilani and Navjot Sandhu): In arguing for the State, Mr. Gopal Subramaniam submitted that: It was an error on part of the High Court in ignoring the substantial circumstantial evidence available in this case, especially the sequence of telephonic conversations held by Gilani, Shaukat, Afzal, and the terrorists prior to the attack, which collectively proved Gilani's involvement in the conspiracy. The behaviour of Gilani in the aftermath of the attack, including some recorded conversations expressing reaction to the attack, could only be consistent with guilt.

The receipt of a phone call by Navjot Sandhu from a dead terrorist along with her actions made it clear that she was not a passive participant in this matter; rather, she had information regarding the conspiracy, which she did not disclose to others, at least making her liable for withholding information regarding waging war according to Section 123 IPC.

The High Court had imposed an excessively technical standard while examining the evidence presented through electronic devices and other circumstances, thus defeating the case of the prosecution due to excessive technicalities.

Arguments from Respondent Side –

Accordingly, there are also two limbs to the "respondent side" contentions viz., (A) the State's defences of the convictions of Afzal Guru and Shaukat Hussain Guru (as respondents in their appeals); and (B) the defence of the acquittal of Gilani and Navjot Sandhu (as respondents in the State's appeals).

(A) Arguments on behalf of the State in defence of conviction and sentence of Afzal Guru and Shaukat Hussain Guru.

The sanction under Section 50 of POTA had been validly issued after proper application of mind by taking into consideration the materials available before the sanctioning authority, and the briefness of the sanction order does not necessarily indicate non-application of mind.

The confessions made had been made in accordance with the procedure laid down in Section 32 of POTA, which provides for production before a judicial officer, opportunity to reflect

upon the consequences of such confession and medical examination, and there was nothing on record to suggest that they had been involuntarily made due to any kind of torture or coercion.

The sequence of circumstantial evidence starting from recovery of arms, explosives and a laptop, identification of the deceased terrorists, financial transaction and arrangements made for hide-out by Shaukat Hussain Guru, and the collective behaviour of the accused itself completed the circle, and was possible only in case of guilt of the accused, thus passing the Sharad Birdhichand Sarda test.

As far as the telephone records are concerned, the State contended that accepting any technical defect in the certificate under Section 65-B(4), still the electronic record could be proved independently by the oral evidence of an expert witness (a telecom company's employee) familiar with the functioning of the system, and could depute about the authenticity and accuracy of the printouts; the rigid requirement of certificate under Section 65-B is one method of proving and not the exclusive one, more especially when Section 63 along with Section 65 of the Evidence Act (secondary evidence generally) can also apply.

Regarding the issue of waging war, it was said that a concerted attack through arms by professional soldiers on the place where the legislature of the state is located at a time when all the leaders of politics were gathered there was a classic example of "waging war" on the state and thus went much further than a mere act of terrorism and certainly fell under Section 121 IPC as decided in previous cases.

Regarding sentencing, the State said that the crime, an assault through arms on Parliament, which is the embodiment of democracy in India and which caused the deaths of security guards, had shocked the conscience of the nation and fell under the rarest of rare case where death sentence could be imposed, especially on Afzal Guru who was the mastermind of the conspiracy.

Reasons supporting the acquittal of S.A.R. Gilani and Navjot Sandhu: The arguments by senior counsels of Gilani (Mr. Ram Jethmalani) and Navjot Sandhu were: All of the evidence against Gilani was almost entirely circumstantial and mainly relied on telephonic conversations which, even assuming that they took place, did not in any way prove knowledge or agreement of the conspiracy in the attack on Parliament; merely having acquainted or having made phone calls to the other co-accused does not constitute conspiracy to commit crime.

The prosecution failed to comply with the strict provisions of Section 65-B of the Evidence Act in proving the CDRs. The intercepted post-incident conversation of Gilani could be interpreted without imputing to Gilani an admission of an incriminatory nature; suspicion, howsoever strong, cannot substitute the need for proof in a criminal case.

The fact that Navjot Sandhu received only one phone call and that she was generally associated with her husband, Shaukat, did not prove that she had the necessary intention of waging war against the State; in fact, it was rightly held by the High Court that the prosecution had not been able to establish this intention beyond reasonable doubt even under Section 123 IPC.

It was rightly held by the High Court that, in case of circumstantial evidence, the chain has to be unbroken and must preclude every reasonable hypothesis of innocence, and it was rightly held by the High Court that this was not fulfilled in the case of Gilani and Navjot Sandhu.

JUDGMENT

In its elaborate judgment written by Justice P. Venkatarama Reddi, the Supreme Court dismissed all seven appeals as follows:

Mohd. Afzal Guru: The appeal filed by him was dismissed, his conviction under Sections 121, 121-A and 120-B IPC (along with POTA) was upheld, and the death penalty was confirmed. The Court held that the confessional statement, which he had retracted later on, was voluntary and truthful, and was corroborated to a substantial extent by independent circumstantial evidence viz. recovery, telephonic call list (though objected to on technical grounds, it was admissible since a competent witness had sworn to its genuineness), identification of hideouts, and financial transaction, proving beyond reasonable doubt that he was the mastermind behind the conspiracy. The Court held that the acts committed by him constituted 'waging war against the Government of India', and the case belonged to 'rarest of rare' category; and observed (using much quoted words): that the incident where many security personnel who were defending the Parliament the apex body of India's democracy were killed had shocked the collective conscience of the society, and the collective conscience of the society could only be satisfied by giving capital punishment to the offender.

Conviction of Shaukat Hussain Guru: The conviction for conspiracy is upheld by the Supreme Court but as his part in the conspiracy was merely supportive and facilitative in nature as he arranged the shelter and logistics but not as a key conspirator hence the court commutes his

capital punishment to ten years rigorous imprisonment along with dropping of his conviction of Section 121 IPC (waging war) for want of sufficient evidence of his participation in such crime while upholding the conviction for conspiracy under Section 120-B IPC in conjunction with other provisions.

Acquittal of S.A.R. Gilani: The conviction for conspiracy is overturned by the Supreme Court, as its judgment sustains his acquittal. According to the Court, the telephonic records and conversation between co-conspirators and himself do not create the situation of beyond reasonable doubt as far as his participation in the conspiracy is concerned. The Court further makes it clear that no amount of suspicion can replace legal proof, which was absent here.

The Supreme Court has also dismissed the appeal filed by the State against her, affirming her acquittal. The Supreme Court has held that there was no evidence that she had any specific knowledge about the conspiracy to wage war, and the evidence, which basically included just one telephone call and her association with Shaukat, did not amount even to proving an offense under Section 123 IPC.

In relation to the issue of admissibility of electronic records under Section 65-B, the Court ruled that, although Section 65-B provides for a special mechanism for proof of electronic records generated by computers through a certificate, this does not preclude the application of Sections 63 and 65 of the Evidence Act (general law regarding secondary evidence) so that electronic records can also be proved through oral testimony of a witness, who is aware of the working of the computer/telecom system and confirms the accuracy of the document without a Section 65-B certificate.

(The above mentioned aspect of the judgment has been re-examined by a three judges' bench in the case of *Anvar P.V. v. P.K. Basheer* (2014) and in effect reversed by the judgment holding that in cases where secondary evidence of electronic records is adduced, the requirements of Section 65-B(4) shall be mandatory, which was further elucidated by the Constitution Bench in the case of *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal* (2020).)

As far as confessions within POTA were concerned, the Court made it clear that the confessions that had been made by an accused person under Section 32 of POTA through a police officer are admissible provided there is strict adherence to the requirements laid down in sub-sections (2) to (5), which are presentation before a Magistrate, reflection period without any coercion from the police, and making a statement that the confession has been made voluntarily.

In the matter of the sentence, considering the application of the “rarest of rare” rule as laid down by Bachan Singh, it was held that in light of the aggravated circumstances, which included a brazen and premeditated attack with firearms on the representative of Indian democracy, with the resultant deaths of security forces on duty, which posed a serious danger to constitutional democracy, there were no mitigating circumstances in case of Afzal Guru that could outweigh these and hence the imposition of death penalty was justified.

In awarding sentences, using the Bachan Singh “rarest of rare” theory, the Court concluded that in view of the aggravating circumstances, including the blatant and planned armed attack on the symbol of Indian parliamentary democracy that led to the death of security officers who were on duty, the factors that could be in favour of Afzal Guru were far outweighed by those against him. The comparatively minor role played by Shaukat Hussain Guru called for commutation of his sentence.

CONCLUSION

State (NCT of Delhi) vs Navjot Sandhu @ Afsan Guru is perhaps one of the most frequently referred to judgments in the field of criminal jurisprudence in India, both because of the decisions made in the case and due to the controversy it created. In terms of its contribution to doctrinal development, the judgment has made valuable contributions in terms of law on confessions in special laws against terrorism, Section 27 of the Evidence Act, proof of conviction based on circumstantial evidence, and the interpretation of "waging war" under Section 121 IPC. Its handling of electronic evidence in Section 65-B although significant in its own right, was later considerably modified by the Supreme Court itself in Anvar P.V. and Arjun Panditrao Khotkar where it was decided that Section 65-B(4)'s certificate condition was mandatory in all cases involving secondary electronic evidence – this shows that the judgment while pioneering, needed a follow-up modification for the reliable handling of digital evidence in a tech-driven criminal process.

However, this decision was also highly significant and controversial because of the sentencing principles. The invocation by the court of "collective conscience of the society" to justify the imposition of the death penalty upon Mohd. Afzal Guru became the subject of extensive debate in academia and in civil society organisations. The critics argued that the reference to such an ill-defined concept like "collective conscience," which can be media-driven, does not match the personalised nature of the capital sentencing process envisaged in Bachan Singh, and

creates a risk of substituting the objective assessment of aggravating and mitigating factors with general public sentiment. Another group of scholars referred to the inconsistencies in the results of the proceedings in this case – the acquittal of Gilani and Navjot Sandhu in contrast to the execution of Afzal Guru and the ultimate commutation of Shaukat's death penalty sentence – as proof of both strengths and weaknesses of the prosecution's case, in particular of the heavy dependence on retracted confessions and computerised records of telephone calls.

The petition for clemency for Afzal Guru was rejected by the President of India, and he was executed at Tihar Jail on 9 February 2013. Hence, besides being an important case from the point of view of law, the case is also extremely controversial when one talks about politics of the law against terror and the justice of the trials of those accused of terrorism. For all those interested in criminal law and the process of law, Navjot Sandhu is a case worth studying not only for its legal propositions, but also for its importance in the context of the dilemma faced between national security and a fair trial.