

A.F.R.
Reserved on 06.02.2019
Delivered on 05.08.2019

Court No. - 34

- (1) **Case :-** JAIL APPEAL No. - 8326 of 2007
Appellant :- Mohd. Waris @ Raza
Respondent :- State
Counsel for Appellant :- From Jail, J.P. Gupta
Counsel for Respondent :- Udit Chandra (A.G.A.)
- (2) **Case :-** CRIMINAL APPEAL No. - 3779 of 2007
Appellant :- Ashphaq Alias Nanhey
Respondent :- State Of U.P.
Counsel for Appellant :- Lav Srivastava, Noor Mohammad, Pawan Singh Pundir, Rajiv Gupta, S.M.N.A. Abidi, T.K. Mishra, V.P. Srivastava
Counsel for Respondent :- Udit Chandra (A.G.A.)

Hon'ble Sudhir Agarwal, J.
Hon'ble Rajendra Kumar-IV, J.

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Both the aforesaid appeals arise out of common judgment and order dated 18.05.2017 passed by Sri C.K. Kulshrestha, Additional District and Sessions Judge, Court No.7, Muzaffar Nagar in Sessions Trial No. 820 of 2000, under Sections 121, 121-A, 122, 123 IPC, under Section 13 and 14 of Foreigners Act, 1946, under Section 3 of Passport Act, 1967 and under Sections 25/27 Arms Act, 1959. Jail Appeal No.8326 of 2007 has been filed by Mohd. Waris @ Raja under Section 383 Cr.P.C. through Jailor, Central Prison, Bareilly against his conviction and sentence whereas Criminal Appeal No. 3779 of 2007 has been preferred by accused-appellant Ashfaq @ Nanhey under Section 374(2) Cr.P.C. against his conviction and sentence.

2. By the impugned judgment and order, both accused-appellants Mohd. Waris @ Raja and Ashfaq @ Nanhey have been convicted under Sections 121, 121-A, 122 and 123 IPC and each of them has been sentenced under Section 121 IPC to undergo life imprisonment along-with

fine of Rs.1,00,000/- each. In the event of default in payment of fine they have to undergo further imprisonment of one year. Both appellants have further been sentenced to ten years imprisonment and a fine of Rs.10,000/- each under Section 121-A IPC. In default of payment of fine they have to suffer ten months additional imprisonment. They have been further sentenced to ten years imprisonment and fine of Rs.10,000/- under Section 122 IPC. In the event of default of payment of fine, they shall undergo ten months additional imprisonment. They have been sentenced to seven years imprisonment under Section 123 IPC along-with fine of Rs.7,000/- each, and in default of payment of fine, provision for seven months additional imprisonment was made. Further under Section 13 and 14 of Foreigners Act, 1946, both appellants have been sentenced to three years imprisonment and a fine of Rs.3,000/- each, and in case of default in payment of fine they have to undergo further three months additional imprisonment.

3. Accused-appellant Mohd. Waris @ Raja has been acquitted of the charge under Section 3 of Passport Act, 1967 and under Section 3 of Explosive Substances Act, 1908. Accused-appellant Ashfaq @ Nanhey has been acquitted of the charge under Section 27, Arms Act, 1959.

4. Accused-appellant Ashfaq @ Nanhey has been convicted and sentenced under Section 25 Arms Act, 1959 to undergo two years imprisonment along-with fine of Rs.2,000/-. In case of default in payment of fine he has to undergo two months additional imprisonment.

5. Other co-accused, namely, Gayur, Mustaqeem and Sardar Ali have been acquitted of the charges under Sections 121, 121-A, 122 and 123 IPC.

6. All the sentences of accused appellants have been ordered to run concurrently.

7. For the sake of convenience and ready reference, conviction and sentences awarded to respective accused-appellants as well as acquittal

under different sections may be shown in the form of a chart as under:-

| S.Nos. | Jail Appeal / Criminal Appeal | Name of Accused Appellants | Sessions Trial Nos. | Tried U/S | Sentence imposed / Acquittal |
|--------|---------------------------------|----------------------------|---------------------|-------------------------------|---|
| 1 | Jail Appeal No.8326 of 2007 | Mohd. Waris @ Raja | 820/ 2000 | 121 IPC | Life Imprisonment + Fine of Rs.1,00,000/- |
| | | | | 121-A IPC | Ten years imprisonment + Fine of Rs.10,000/- |
| | | | | 122 IPC | Ten years imprisonment + Fine of Rs.10,000/- |
| | | | | 123 IPC | Seven years imprisonment + Fine of Rs.7,000/- |
| | | | | 13/14 Foreigners Act | Three years imprisonment + Fine of Rs.3,000/- |
| | | | | 3 Passport Act | Acquitted |
| | | | 821/2000 | 3 of Explosive Substances Act | Acquitted |
| 2 | Criminal Appeal No.3779 of 2007 | Ashfaq @ Nanhey | 820/ 2000 | 121 IPC | Life Imprisonment + Fine of Rs.1,00,000/- |
| | | | | 121-A IPC | Ten years imprisonment + Fine of Rs.10,000/- |
| | | | | 122 IPC | Ten years imprisonment + Fine of Rs.10,000/- |
| | | | | 123 IPC | Seven years imprisonment + Fine of |

| | | | | | |
|---|--|----------|-------------------|----------------------------|--|
| | | | | | Rs.7,000/- |
| | | | | 13/14 Foreigners Act | Three years imprisonment + Fine of Rs.3,000/- |
| | | 819/2000 | 25 Arms Act | | Two years imprisonment + Fine of Rs.2,000/- |
| | | | 27 Arms Act | | Acquitted |
| By the impugned judgment, other co-accused Gayur, Mustaqeem and Sardar Ali have been acquitted of the charges under Sections 121, 121-A, 122 and 123 IPC. | | | | | |

8. The factual matrix of the case emanating from First Information Report (hereinafter referred to as “FIR”) and evidence available on record is as under :-

9. On 31.03.2000 at about 02:30 PM, a written report Ex.Ka-1 was lodged at Police Station Kandhla, District Muzaffar Nagar by PW-4 Sri J.K. Tomar, Station Officer (hereinafter referred to as “SO”) Kandhla, stating that on 31.03.2000 at about 11:30 AM, he had received a telephonic message from Senior Superintendent of Police (hereinafter referred to as “SSP”) Muzaffar Nagar, whereby, SO was required to go to the house of accused-appellant Ashfaq @ Nanhey S/o Rasheed, resident of Village Jaula under Police Circle Burhana, District Muzaffar Nagar and verify, whether or not any Foreigner was residing there, since an information had been received from Inspector of Local Intelligence Unit (hereinafter referred to as “LIU”) that activities of a person was found suspicious who seemed to be member of one of the Terrorist Organization sponsored by Inter-Services Intelligence (hereinafter referred to as “ISI”) Pakistan. Concerned LIU Inspector Sri Achal Kumar was also instructed to reach Khandla Police Station. Thereafter PW-4 Sri J.K. Tomar along-with Sub Inspector (hereinafter referred to as “SI”) PW-1 Sri Amit Singh, PW-2 SI Yogendra Singh, SI Bhagat Singh Bist, Constable Satpal Singh,

Constable Haroon Ali, Constable Ajit Singh, Constable Ajay Dutt Sharma, Constable Naveen, Constable Vinay Kumar and LIU Inspector PW-3 Achal Kumar reached the house of accused-appellant Ashfaq @ Nanhey, where they found two persons, one of whom disclosed his identity as Ashfaq @ Nanhey, resident of Village Jaula and another revealed his name as Ash Mohd. @ Raja S/o Alauddin, resident of Village Jaula. When he (Ash Mohd.) was enquired of his relation with Ashfaq @ Nanhey and as to how he came over there, he (second accused) got perplexed and could tell nothing. When inquiry was made from other villagers, they told that the said person did not belong to their Village Jaula. When he was again interrogated, he disclosed his name as Waris S/o Firozuddin R/o Village Barkatpur, Police Station Sadar, Gujara Wala, Pakistan. Accused-appellant Ashfaq @ Nanhey told Police that Waris was tempting him with money and pressurizing for preparing forged Passport. On being satisfied that these two persons are indulged in Anti India activities, both were arrested on the charge of waging or attempting to wage war, conspiracy for war against India, residing in India without Passport, concealment of such accused with intent to facilitate design to wage war. At the spot, recovery memo of arrest was prepared by SI Bhagat Singh on the dictation of SO, J.K. Tomar. Thereafter aforesaid two accused-appellants were brought to Police Station and lodged in lockup. On being interrogated, they admitted in their possession foreign made hand grenades, pistols etc.

10. On the basis of said written report Ex.Ka-1, three cases, (1) case crime no.106 of 2000, under Section 121, 121-A, 122 and 123 IPC; (2) case crime no.107 of 2000, under Section 3 of Passport Act, 1967, and (3) case crime no.108 of 2000, under Section 14 of Foreigners Act, 1946 were lodged against both accused-appellants and chik FIR Ex.Ka-11 was prepared at Police Station by PW-6 Chhote Lal Yadav Head Moharrir. On interrogation, accused-appellant Mohd. Waris @ Raja took police party to the house of appellant Mohd. Ashfaq @ Nanhey and on pointing out by

Mohd. Waris @ Raja, four pieces of live hand grenades kept in a polythene were recovered from beneath the heap of bricks kept on the roof of the house. Out of hand grenades recovered, on one hand grenade "P.O.F. 71 T.M.T." was written and one other hand grenade was also similar but 100 was written in English thereon. Outer surface of aforesaid two hand grenades were divided into four parts by red paint. Two hand grenades were coated with green colour plastic and on the cover / lid letters "ARGES 046/83 U/P" and on body "ARGES HD GS" was written. All the four recovered hand grenades were found live. Accused-appellant Ashfaq @ Nanhey also took out two pistols of 32 bore from beneath the pillow lying on the bed of the room, situated on the roof, and handed over the same to police. Both the pistols were English Make 32 bore, and on left side of one pistol "CAL 30 MOURSER MADE A.S. CHINA BY NORINCO" was written. The second pistol of 32 bore contained magazine and on the bottom side of magazine "9652" was written. After keeping the recovered hand grenades inside sand in a bucket, recovery memos were prepared.

11. On 01.04.2000, PW-4 SO J.K. Tomar was on routine checking and gasht (patrolling) near the grove of one Athar S/o Maulvi Tahir, situated on Burhana Road, when all of sudden, a Scooter with high speed appeared coming from Khandla side and when it was stopped, the person (subsequently known as Sardar Ali) sitting on rear seat took out a pistol and aimed at Police party. However, his pistol was snatched but the driver and accused Sardar Ali succeeded in escaping. The pistol had a safety catch with trigger for firing. Pistol contained particulars as "63305 COLT-SPT FAMEG CO HART FORACT. USI PATENTED APR-21897, DEC 23, 1903". When magazine was opened, six cartridges were found therein, on the bottom whereof "GEVELOT 9MM-1" was written. Pistol and magazine were sealed and recovery memo was prepared in respect thereof. Thereafter FIR was lodged against Sardar Ali as case crime no.116 of 2000, under Sections 25/27 Arms Act, 1959 and chick FIR

Ex.Ka-7 was prepared.

12. In the night between 31.03.2000 / 01.04.2000 during course of search of co-accused of the crime, PW-4 J.K. Tomar along with police personnel went to the house of Rajveer of Village Mazra under Police Circle Burhana. When he (Rajveer) saw Police party, he tried to flee away but caught. On search being conducted one revolver of 38 bore made in U.K. whereon "WEBLY and SCOUT 1380" was written, recovered. Besides six cartridges were also recovered from him. On further interrogation, he said that the said arms were given to him by accused-appellant Ashfaq @ Nanhey. Said revolver was sealed and recovery memo in respect thereof was prepared. FIR was lodged and chik FIR Ex.Ka-4 was prepared in respect thereof at case crime no.111 of 2000, under Sections 25/27 Arms Act against co-accused Rajveer.

13. During course of search operation, on 01.04.2000 Police party reached Village Dhaula in search of Gayur, accused, and raided his house. When Gayur was being chased, Police party saw four persons sitting on a cot in open field, who tried to flee away seeing the Police, but Police personnel caught hold of them and on search, one country made pistol of 315 bore, was recovered from Gayur; one country made pistol of 315 bore was recovered from co-accused Islam and likewise from other two co-accused Sayeed Hasan and Mustaqeen also one country made pistol of 315 bore was recovered from each of them. Recovery memos were prepared in respect of recovered arms and four FIRs were lodged under Sections 25/27 Arms Act against accused persons, namely, Gayur, Islam, Sayeed Hasan and Mustaqeen and registered as case crime nos.112 of 2000, 113 of 2000, 114 of 2000 and 115 of 2000 respectively. Composite chik report of the FIRs against these accused persons is Ex.Ka-5.

14. After conclusion of investigation and obtaining requisite sanction from District Magistrate, Muzaffar Nagar, to launch prosecution against accused-appellants along-with other co-accused under Explosive

Substances Act, 1908 and Arms Act, 1959, Police submitted five charge sheets in the Court of Chief Judicial Magistrate (hereinafter referred to as "CJM"), Muzaffar Nagar in June, 2000. Charge sheet Ex.Ka-21 was submitted against the two accused-appellants and three other co-accused, namely, Gayur, Mustaqeen and Sardar Ali under Sections 121, 121-A, 122 and 123 IPC, cognizance whereof was taken by CJM, Muzaffar Nagar on 09.06.2000. Charge sheet Ex.Ka-22 was submitted against two accused-appellants, namely, Mohd. Waris @ Raja and Ashfaq @ Nanhey under Section 3 Passport Act, 1967 and cognizance was taken by CJM, Muzaffar Nagar on 09.06.2000. Charge sheet Ex.Ka-23 was submitted against two accused-appellants, namely, Mohd. Waris @ Raja and Ashfaq @ Nanhey under Section 14 of Foreigners Act, 1946, cognizance whereof was taken by CJM, Muzaffar Nagar on 09.06.2000. Charge-sheet Ex.Ka-24 was submitted before CJM, Muzaffar Nagar against accused-appellant Mohd. Waris @ Raja under Section 3 of Explosive Substances Act, 1908, cognizance whereof was taken by CJM on 03.06.2000 and Charge sheet Ex.Ka-25 was submitted against accused-appellant Ashfaq @ Nahey under Section 25/27 Arms Act, 1959, cognizance whereof was taken by CJM, Muzaffar Nagar on 03.06.2000.

15. Case, being exclusively triable by Court of Sessions, was committed to Sessions Court by CJM, Muzaffar Nagar vide order dated 13.09.2000. Sessions Trial Nos. 820 of 2000 and 819 of 2000 came up for hearing before learned Additional District and Sessions Judge / FTC No. 1, Muzaffar Nagar. In Sessions Trial No.820 of 2000. Accused-appellants Mohd. Waris @ Raja and Ashfaq @ Nanhey along-with other other co-accused Mustaqeem, Sardar Ali and Gayur were charged on 30.07.2001 as under:-

“मैं, शिव शंकर लाल अपर जिला जज, एफ.टी.सी.सं० 1 मु० नगर आप मो० वारिस उर्फ राजा, अशफाक उर्फ नन्हा, मुस्तकीम सरदार अली एवम् गययूर पर निम्नलिखित आरोप लगाता हूँ

प्रथम:- यह कि दिनांक 31.3.2000 को समय करीब 12.

30 बजे बमुकाम घटनास्थल ग्राम जौला थाना कांधला जिला मुजफ्फरनगर में आपने भारत सरकार के विरुद्ध युद्ध करना या युद्ध करने का प्रयत्न करना तथा युद्ध करने का दुष्प्रेरण किया। इस प्रकार आपने धारा 121 भा.द.स. के अधीन दण्डनीय अपराध किया जो इस न्यायालय के प्रसंज्ञान में है।

द्वितीयः— यह कि उपरोक्त दिनांक समय व स्थान पर आपने राज्य के विरुद्ध कतिपय अपराधो को करने के लिये षडयन्त्र रचा। इस प्रकार आपने धारा 121 क भा.द.स. के अधीन दण्डनीय अपराध किया जो इस न्यायालय के प्रसंज्ञान में है।

तृतीयः— यह कि उपरोक्त दिनांक, समय व स्थान पर आपने भारत सरकार के विरुद्ध युद्ध करने के आशय से आयुध आदि संग्रह किया। इस प्रकार आपने धारा 122 भा.द.स. के अधीन दण्डनीय अपराध किया जो इस न्यायालय के प्रसंज्ञान में है।

चतुर्थः— यह कि उपरोक्त दिनांक, समय व स्थान पर आपने युद्ध करने की परिकल्पना को सुकर बनाने के आशय से छिपाया और इस प्रकार आपने ऐसा अपराध किया जो भारतीय दण्ड संहिता की धारा 123 के अधीन दण्डनीय अपराध है और इस न्यायालय के प्रसंज्ञान में है।

एतद्वारा निर्देश देता हूँ कि उपरोक्त आरोपों का विचारण इस न्यायालय द्वारा किया जाये।”

“I Shiv Shanker Lal, Additional District Judge (FTC No.1), Muzaffar Nagar charge you Mohd. Waris @ Raja, Ashfaq @Nanhey, Mustaqeem, Sardar Ali and Gayur as follows:

Firstly, that you all waged or attempted to wage war or abetted waging of war against Government of India on 21.03.2000 at about 12:30 PM at Village Jaula, Police Station Kandla, Distirct Muzaffar Nagar. Thus you have committed an offence punishable under Section 121 IPC and within the cognizance of this Court.

Secondly, that on the aforesaid date, time and place you conspired to commit certain offence against the State and thereby committed an offence punishable under Section 121-A IPC which is within the cognizance of this Court.

Thirdly, on the aforesaid date, time and place you collected arms etc. with intention of waging war against the Government of India. Thereby you committed an offence punishable under Section 122 IPC which is within cognizance of this Court.

Fourthly, on the aforesaid date, time and place you

concealed the existence of a design to wage war against Government of India and intended to facilitate the waging of such war and thereby you have committed an offence punishable under Section 123 IPC and within the cognizance of this Court.

I hereby direct you to be tried for the aforesaid charge of this Court.”

(English Translation by Court)

16. Accused-appellant Mohd. Waris @ Raja was charged under Sections 13 and 14 of Foreigners Act, 1964 on 26.02.2002 :-

*“I, Yad Ram, Additional Sessions Judge (F.T.C. No.1), Muzaffar Nagar do hereby charge you **Warish** as follows:*

*That you prior to 31.03.2000 at some time and place entered into the territory of Union of India unauthorizably without any valid Passport and had not informed any authority about your entry and stay in India and also not got yourself registered as citizen of India and you thereby committed an offence punishable **under Sections 13 and 14 of Foreigners Act** and within the cognizance of this Court of Sessions.*

And I hereby direct that you be tried by this Court on the said charge.”

17. Trial Court also framed charge against accused-appellant Mohd. Waris @ Raja under Section 3 of Passport Act, 1967 on 26.02.2002 as under:-

*“I, Yad Ram, Additional Sessions Judge (F.T.C. No.1), Muzaffar Nagar do hereby charge you **Warish** as follows:*

*That you prior to 31.03.2000 at 12:30 PM at the house of Ashfaq alias Nanha situated in Village Jola within the circle of P.S. Budhana, District Muzaffar Nagar failed to produce your Passport or travel document for inspection by the police, being a Pakistani citizen and you thereby committed an offence punishable **under Section 3 of Passport Act** and within the cognizance of this Court of Sessions.*

And I hereby direct that you be tried by this Court on the said charge.”

18. Accused-appellant Ashfaq @ Nanhey was charged for the offence under Sections 13 and 14 of Foreigners Act, 1946 on 26.02.2002 as under:-

“I, Yad Ram, Additional Sessions Judge, Muzaffar Nagar do hereby charge you Ashfaq alias Nanha as follows:

*That you on 31.03.2000 at 12:30 PM and some time prior to it knowingly gave an assistance to Warish a Pakistani National intentionally to hide his arrest and concealed his presence, who entered into the territory of Union of India without valid documents / Passport into your house situated in Village Jola within the circle of P.S. Budhana, District Muzaffar Nagar and you thereby committed an offence punishable under **Section 13 read with 14 of Foreigners Act** and within the cognizance of this Court of Sessions.*

And I hereby direct that you be tried by this Court on the said charge.”

19. In Session Trial No.719 of 2000, accused-appellant Ashfaq @ Nanhey was charged under Section 25/27 of Arms Act, 1959 on 30.07.2001 as under:-

“मैं, शिव शंकर लाल, अपर जिला जज/एफ.टी.सी.सं.1, मु0 नगर आप अशफाक पर निम्नलिखित आरोप लगाता हूँ

*यह कि दिनांक 31.3.2000 को समय करीब 22.30 बजे बमुकाम ग्राम जौला थाना कांधला जिला मुजफ्फरनगर में आपको पुलिस द्वारा गिरफ्तार किया गया और आपकी निशानदेही से दो अदद पिस्टल अंग्रेजी मैगजीन सहित जिसमें पाँच पाँच कारतूस जीवित थे नम्बरी बरामद किये गये। जिसका आपके पास कोई वैध लाइसेंस नहीं था। इस प्रकार आपने धारा **25/27 शस्त्र अधिनियम** के अधीन दण्डनीय अपराध किया जो इस न्यायालय के प्रसंज्ञान में है।*

एतदद्वारा निर्देश देता हूँ कि उपरोक्त आरोप का विचारण इस न्यायालय द्वारा किया जावे।”

“I Shiv Shanker Lal, Additional District Judge (FTC No.1), Muzaffar Nagar charge you Ashfaq as follows:

That on 31.03.2000 at about 22:30 hours you were arrested by the Police in Village Jaula, Police Station Khandla, District Muzaffar Nagar and on your pointing out, two pistols (English) with magazines containing five live cartridges,

each, for which you had no valid licence. Thus you have committed an offence punishable under Section 25/27 Arms Act which is within the cognizance of this Court.

I hereby direct you to be tried for the aforesaid charge of this Court.”

(English Translation by Court)

20. All the aforesaid accused persons denied charges and claimed to be tried.

21. At this point, it is worth mention that aforesaid charges framed by Trial Court are tagged and available on the original record of Session Trial No.820 of 2000 at pages no. 15 to 19 which also includes charges framed in Session Trial No.819 of 2000 against Ashfaq. Though in the description of array of parties in the impugned judgment dated 18.05.2007, mention of Sessions Trial No.821 of 2000 against Mohd. Waris @ Raja under Section 3 of Explosive Substances Act, 1908 has been made but original charge framed by Trial Court in this respect, in case crime no.109 of 2000 is not available on record nor record of Sessions Trial No. 821 of 2000 has been tagged with original record, whereas charge framed in another Sessions Trial No.819 of 2000 is placed in the file of Session Trial No.820 of 2000 and also available with paper book.

22. In support of its case, prosecution examined as many as eight witnesses. PW-1 SI Amrit Singh had accompanied raiding Police party to the house of Ashfaq @ Nanhey. PW-2 SI Yogendra Singh, PW-3 LIU Inspector Achal Kumar and PW-4 SI J.K. Tomar, all were members of Police party who raided the house of Ashfaq @ Nanhey on 31.03.2000 consequent upon intimation having been received from SSP Muzaffar Nagar that at his house a Foreigner was residing. They are also the witnesses of recovery of arms, ammunitions and arrest of accused persons. PW-5 Sri Hridesh Kumar CO had also participated in interrogation and visited the spot etc. PW-6 Chotey Lal Yadav, Head Moharrir had lodged FIRs and proved chick report Ex.Ka-8 as well as

corresponding entry in the GD at report Nos.21 and 22 being Ex.Ka-9 and Ex.Ka-10. After arrest of accused-appellants on the report of PW-4 J.K. Tomar, case crime no.106 of 2000 under Sections 121, 121-A, 122 and 123 IPC and case crime no. 108 of 2000 under Sections 14 of Foreigners Act was registered by him. He has proved chik FIR Ex.Ka-11 and corresponding entry in General Diary (hereinafter referred to as "GD"), Ex.Ka-12. He also proved copy of GD Ex.Ka-2 which gives details with respect to query made by PW-5 CO Hridesh Kumar from accused Waris and Ashfaq. PW-6 has also proved chik FIR Ex.Ka-13 in case crime no.109 of 2000 under Section 3 of Explosive Substances Act and case crime no.110 of 2000 under Section 25/27 Arms Act. He has proved GD entry Ex.Ka-14 with respect to articles recovered from accused-appellants. PW-7 SI Om Pal Singh, In-charge Bomb Disposal Squad had defused the hand grenades. PW-8 SI Ganeshi Lal is Investigating Officer (hereinafter referred to as "IO") who had submitted charge sheets Ex.Ka-21 to 25 in the Court of CJM, Muzaffar Nagar against the accused persons.

23. After conclusion of prosecution evidence, accused-appellant Ashfaq @ Nanhey and Mohd. Waris @ Raja and other co-accused were examined under Section 313 Cr.P.C. Accused-appellant Mohd. Waris @ Raja had denied charges levelled against him and stated prosecution story to be false. He has further stated that he had come to India on Passport and had gone to police Station Kandhla where they (Police) had torned his Passport. No recovery had been made from him. He had also money with him but Police has not shown the same. Accused Gayur Khan has stated to be implicated falsely and that the prosecution story is false and no recovery was made from him. Accused Mustaqeen and Sardar Ali have also claimed prosecution story to be false and to have been implicated falsely. Accused-appellant Ashfaq had stated that prosecution story is incorrect and he has no relation in Pakistan; he does not know Mohd. Waris @ Raja nor had been arrested from his house and he had been

implicated falsely in connivance with the then Pradhan Munna.

24. One Abdul Haq DW-1 has been examined at the instance of the Court. He was Assistant Record Keeper in Police Office, Muzzafar Nagar. He has proved weeding register in which at serial no.23, page no.36, Police Station, Kandala, is entered and has stated that the relevant GD dated 30.03.2000 and 01.04.2000 had been weeded out. He has deposed that on every five years, GD, Case Diaries (hereinafter referred to as “CD”) registers are weeded out.

25. After hearing Counsel for parties, Trial Court has recorded verdict of conviction against accused-appellants in the manner indicated in the beginning of this judgment. As stated earlier, other co-accused Gayur, Mustaqeen and Sardar Ali were acquitted of the charges under Sections 121, 121-A, 122 and 123 IPC.

26. We have heard Sri Pawan Singh Pundir, learned Amicus Curiae for appellants and Sri Udit Chandra, learned A.G.A for State-respondent at length and have gone through the record carefully with the valuable assistance of learned Counsel for parties.

27. Learned counsel for accused-appellants in both appeals has confined his challenge to the judgement in appeals only on the ground that prosecution and trial of appellants under Sections 121, 121-A, 122 and 123 I.P.C. is patently illegal and without jurisdiction, since no sanction under Section 196(1) Cr.P.C. was obtained either from the Central Government or the State Government at any stage. He drew our attention to Section 196 Cr.P.C. which contemplates a prior sanction, if offence is punishable under Chapter-VI I.P.C. Chapter-VI I.P.C. runs Sections 121 to 130 I.P.C. He contended that there was complete bar in taking cognizance of the offences mentioned in Chapter-VI I.P.C., if prior sanction from Central Government or State Government is not obtained. It is submitted that there was not sanction prior whatsoever or subsequent, either, at any stage, till the judgement in question has been passed by

Court below or even during pendency of the appeal. It is not case of State that any sanction has been obtained from Central Government or State Government. Learned counsel for the appellants placed reliance on **Manoj Rai and others Vs. State of Madhya Pradesh, 1999 (1) SCC 728** and Division Bench judgement of this Court in **Criminal Appeal No. 1636 of 2008 (Altah Hussain @ Mohd. Altah @ Rohit @ Abdul Rahman Vs. State of U.P.)** connected with **Criminal Appeal No. 1667 of 2008 (Saleem Qamar @ Neeraj Kumar Singh @ Babu @ Munna Vs. State of U.P.)** decided on 17.01.2017. This is contended that conviction under Sections 121, 121-A, 122 and 123 I.P.C is illegal and deserves to be set aside.

28. Learned counsel for appellants did not address on merits at all and confined his argument on the question of want of sanction as contemplated under Section 196 Cr.P.C. in respect of Offence under Chapter VI I.P.C.

29. Learned AGA contesting the submission, has said that no such objection was raised either before Magistrate and after committal, even before Sessions Judge; for the first time, this objection is being raised before this Court, hence it cannot be allowed and judgement of Court below cannot be vitiated on this ground. He submitted that matter of sanction of Section 196 Cr.P.C. is a part of procedural requirement and therefore, at the appellate stage, it cannot be allowed and will not vitiate the proceedings in view of section 465 Cr.P.C., which says that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in sanction for prosecution. He placed reliance on Supreme Court's Judgements in **Dharmesh @ Nanu Nitinbhai Shah vs. State of Gujarat, (2002) 6 SCC 370**; **Central Bureau of Investigation vs. V.K. Sehgal, 1999 (8) SCC 501**; **State of Orissa vs. Mrutunjay Panda, 1998 (2) SCC 414**; **State of Madhya Pradesh vs. Bhooraji, 2001 (7) SCC 679**; **State by Police Inspector vs.**

T. Venkatesh Murti, 2004 (7) SCC 763 and a judgement of Single Judge of this Court in **Mohd. Zuber and others vs. State of U.P. and another, 2006 (54) ACrC 129.**

30. Learned AGA further argued that appellant Mohd. Waris is a Pakistani national, who entered India unauthorizedly and illegally i.e. without any valid passport and visa. Investigation has shown that he is a trained Terrorist and working for Jaish-E-Mohammad. He has established his own terrorist origination. Recovered guns and bombs fortify involvement of Mohd. Waris in terrorist activities. Appellant Ashfaq was the person in whose house Mohd. Waris was staying and since he had provided shelter, it is evident that he had knowledge of activities of Mohd. Waris and was accomplice in the terrorist activities, since recovery was made from his house. For technical reasons, if two appellants engaged in terrorist activities, are acquitted, it will cause great harm and injustice to public interest in particular and Indian Society in general. Court must take into consideration the factum that they had ample opportunity but did not raise any such objection regarding sanction either before concerned Magistrate or even before Trial Court, though similar objection was raised by them in respect of offences under Passport Act and Explosive Substance Act. This shows that they were aware of everything but deliberately did not raise any objection, since this technical lacuna could have been made good immediately at that stage, but they allowed the proceedings to conclude and for the first time, having raised this objection before this Court, so as to frustrate entire trial under the offences punishable under Sections 121, 121-A, 122 and 123 I.P.C. which are serious enough justifying punishment in the instant case, as has been imposed upon by Court below.

31. We have examined rival submissions very carefully and given in our serious thoughts to the entire aspect of the matter.

32. Chapter-VI I.P.C contains Sections 121 to 130, therefore, Sections

121, 121-A, 122 and 123 I.P.C whereunder appellants have been prosecuted, convicted and sentenced and which have been assailed before us, are the offences covered by Chapter-VI I.P.C. Section 196 Cr.P.C. provides as under :-

"196. Prosecution for offences against the State and for criminal conspiracy to commit such offence.

(1) No Court shall take cognizance of-

(a) any offence punishable under Chapter VI or under section 153-A, [Section 295-A or sub section (1) of section 505] of the Indian Penal Code,1860 (45 of 1860), or

(b) a criminal conspiracy to commit such offence, or

(c) any such abetment, as is described in section 108-A of the Indian Penal Code (45 of 1860),

except with the previous sanction of the Central Government or of the State Government.

(1-A) No Court shall take cognizance of-

(a) any offence punishable under section 153-B or sub- section (2) or sub- section (3) of section 505 of the Indian Penal Code,1860 (45 of 1860), or

(b) a criminal conspiracy to commit such offence,

except with the previous sanction of the Central Government or of the State Government or of the District Magistrate.

(2) No Court shall take cognizance of the offence of any criminal conspiracy punishable under section 120-B of the Indian Penal code (45 of 1860), other than a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceedings:

Provided that where the criminal conspiracy is one to which the provisions of section 195 apply, no such consent shall be necessary.

(3) The Central Government or the State Government may, before according sanction under sub- section (1) or sub- section (1-A) and the District Magistrate may, before according sanction under sub- section (1-A) and the State Government or the District Magistrate may, before giving consent under sub- section (2), order a preliminary investigation by a police officer not being below the rank of Inspector, in which case such police officer shall have the powers referred to in sub-section (3) of Section 155."

33. A perusal of Section 196 Cr.P.C., clearly shows that it contemplates a prior sanction from Central Government or State Government before cognizance is taken of any offence punishable under Chapter-VI I.P.C. Therefore, apparently, it cannot be disputed and learned AGA has also fairly stated that as per requirement of Section 196 Cr.P.C., no cognizance could have been taken of offence punishable under Chapter-VI I.P.C. unless prior sanction from Central Government or State Government is obtained.

34. In the present case, opportunity was granted to State to show whether such sanction was given of categorical statement has been made by learned AGA before this Court that no such sanction was granted or even sought to be obtained, hence, question of grant by competent authority does not arise. Prosecution, in fact, strangely proceeded in complete and absolute ignorance of Section 196 Cr.P.C. It is really surprising that prosecution was not aware that for offences punishable under Chapter-VI I.P.C., there was/is a statutory requirement of obtaining prior sanction of Competent Authority. No efforts at all were made to obtain the same.

35. Proceeding further now we have to examine, “whether requirement of ‘prior sanction’ under Section 196 Cr.P.C. is mandatory” and secondly, if no such issue was raised before Magistrate, who committed proceedings to Court of Sessions/Trial Court, whether it will stop appellants from raising issue for the first time in appeal, or flaw is so inherent it goes to the root of the matter and even in appeal, it can be taken for the first time and may vitiate Trial and conviction.

36. The object of Section 196 Cr.P.C. is to ensure prosecution after due consideration by appropriate authority so that frivolous or needless prosecution is avoided. To appreciate the nature of “sanction” contemplated under Section 196 Cr.P.C., in correct perspective, it would

be appropriate to bear in mind and examine Section 465 Cr.P.C., which reads as under :-

465. Finding or sentence when reversible by reason of error, omission irregularity.

(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

(Emphasis added)

37. A perusal of Section 465 Cr.P.C. shows that it runs into two parts; (i) “on any error, omission or irregularity”, and three words have been used and it is said that the same will not justify setting aside of conviction in appeal or revision etc. but with reference to “sanction” only two words “error or irregularity” have been used and the word “omission” has not been mentioned. Meaning thereby, in the cases where sanction is required, if there is an error or irregularity in the “sanction”, then conviction or finding will not be reversed in appeal or revision. It contemplates that sanction is there but there is some error or irregularity in granting sanction. If there is a complete “omission” of sanction, then in our view, Section 465 Cr.P.C. will not come into picture and will not help prosecution. It, therefore, leads to irresistible inference that if there is no sanction, whatsoever, by competent authority as contemplated in Section 196 Cr.P.C., it will be a serious flaw and an illegality and would vitiate the entire proceedings.

38. In the cases, where sanction order has been passed but there exists

some error or irregularity therein, then if such an objection raised for the first time in appeal that would not vitiate conviction of an accused and Court will not interfere with such conviction and sentence on this account.

39. Herein, it is admitted position that neither on the part of State any effort to obtain sanction from the competent authority under Section 196 Cr.P.C. has been made, nor any such sanction has been granted. Thus, issue in the present case is squarely covered by Supreme Court judgement in **Manoj Rai and others Vs. State of Madhya Pradesh (supra)** and a Division Bench judgement of this Court in **Altah Hussain @ Mohd. Altah @ Rohit @ Abdul Rahman Vs. State of U.P. (supra)** and connected appeal decided on 17.01.2017.

40. So far as authorities cited by learned AGA are concerned, we find that in **Dharmesh @ Nanu Nitinbhai Shah vs. State of Gujarat (supra)** an order of sanction was there but obtained after filing of Charge sheet. It was not a case where no sanction at all was granted. Court exercising its power under Article 136, in the facts of that case, refused to interfere holding that even if Magistrate had taken cognizance without sanction and at proper juncture i.e. before recording of evidence or framing charge, sanction is obtained, then also, prosecution cannot relegate to take recourse to fresh proceedings and in these circumstances taking of cognizance by Magistrate or the Court of Sessions would be merely an irregularity and not illegality. In that case sanction was filed before Trial Court though with slight delay at the stage of trial. In the present case, sanction as required under Section 196 Cr.P.C. is wholly absent and not filed before Court at any stage, therefore, the said judgment cannot help State in any manner.

41. Similar position is with respect to other judgments cited by learned AGA appearing for State where issue of valid sanction was raised but in the instant case there is no sanction at all.

42. At this stage, we find it necessary to observe that this case is a

glaring example of lack of competence, knowledge and sincere efforts on the part of officers responsible for prosecution and that too in a matter which is so serious, as the present one. In a most clandestine and causal manner, prosecution has commenced investigation and proceeded. Even specific requirement of statute has been given a go bye and completely ignored. Whether it was due to lack of knowledge of officers of prosecution or sheer negligence is a matter of inquiry but evidently show their incompetence.

43. From our experience, while dealing with criminal appeals arising day to day before this Court, we have no hesitation in observing that frequently it is incompetence of investigation and prosecution authorities which is causing such lapses as a result whereof in many serious matters, accused persons, who are otherwise on the basis of evidence have been rightly and justiciably convicted and sentenced, derive advantage of non-compliance of statutory provisions pertaining to previous sanction etc. and escape the punishment.

44. In these circumstances, we have no option but to set aside impugned judgement of Court below, insofar as, appellants have been convicted and sentenced under Sections 121, 121-A, 122 and 123 IPC. Both the appeals deserve to be allowed partly to this extent.

45. Accordingly, **both the appeals are partly allowed**. Conviction and sentence of appellants under Section 121, 121-A, 122 and 123 IPC is set aside.

46. It is made clear that this Court has not interfered in respect to other offences and also has not expressed any opinion on merit of the matter specially so far as offences under Sections 121, 121-A, 122 and 123 IPC are concerned. These appeals are being decided on limited legal issue, i.e. consequence of, absence of sanction under Section 196(1) Cr.P.C.

47. Thus, conviction and sentence awarded by Court below under Sections 13/14 of Foreigners Act, 1946 awarded to accused-appellant

Mohd. Waris @ Raja; and Section 13/14 of Foreigners Act, 1946 and Sections 25 Arms Act, 1959 awarded to accused-appellant Ashfaq @ Nanhey by the learned Trial Court are hereby confirmed. They shall serve out the sentences awarded by Trial Court.

48. Let record be returned to Trial Court forthwith for compliance.

49. Before parting we provide that Sri Pawan Singh Pundir, learned Amicus Curiae for appellants who assisted the Court very diligently, shall be paid counsel's fee as Rs. 10,000/-. State Government is directed to ensure payment of aforesaid fee through Additional Legal Remembrancer posted in the office of Advocate General at Allahabad, to him without any delay and, in any case, within one month from the date of receipt of copy of this judgement.

50. A copy of this order shall be forwarded to Principal Secretary (Home) and Legal Remembrancer to look into the observation made by Court and take appropriate action.

Order Date :- 05.08.2019

I.A.Siddiqui