

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

**Reserved on 28.06.2022
Pronounced on 16.07.2022**

Crl A(D) No.16/2022(O&M)

Waiz-ul-Islam

.....Appellant(s)/Petitioner(s)

Through: Mr. Molvi Aijaz Ahmed, Advocate

Vs

Union Territory of J&K through
NIA Jammu

..... Respondent(s)

Through: Mr. Vishal Sharma, ASGI

**Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE
HON'BLE MR. JUSTICE MOHAN LAL, JUDGE**

JUDGMENT

Per Oswal-J

1. This appeal arises out of the order dated 12.03.2022 passed by the court of 3rd Additional Sessions Judge, Jammu [Special Judge under section 11 of the National Investigation Agency(NIA) Act] (hereinafter to be referred as the trial court) by virtue of which the claim of juvenility raised by the appellant has been rejected by the trial court.
2. In the present appeal, the order impugned has been assailed on the grounds that the appellant was minor when he allegedly placed the order for purchase of the Aluminium powder from the Amazon twice in the month of January, 2019, whereas the date of birth of the appellant is 25.01.2001 and secondly that, there is no evidence that the appellant was part of the conspiracy that led to the killing of 40 Central Reserve Police Force (CRPF) personnel on 14.02.2019 in a Vehicle Borne Improvised Explosive Device(VBIED) attack at Lethpora, Pulwama.

3. Though objections were not required, yet the respondent has filed the same, in which it has been stated that the learned trial court has rightly declared that the appellant is not juvenile because the appellant had purchased the Aluminium powder on two different occasions from Amazon for its delivery to the other accused persons for making two IEDs which were used for VBIED attack on 14.02.2019. Besides that, the allegations against the appellant in the charge-sheet have also been reproduced in the objections.
4. Mr. Molvi Aijaz Ahmed, learned counsel for the appellant has vehemently argued that even if the findings of the Investigating Officer are accepted that the appellant received the Aluminium powder twice from Amazon, still the appellant is required to be treated as juvenile because the last consignment of the Aluminium powder was received by the appellant on 22.01.2019 whereas the date of birth of the appellant is 25.01.2001. He further argued that the appellant being minor is entitled to be treated as juvenile under the Juvenile Justice (Care and Protection of Children) Act, 2013 (for short the JJ Act). He further laid stress upon the disclosure statement made by the co-accused, Shaqir Bashir dated 02.03.2020 to demonstrate that in fact it was accused Shakir Bashir, who had supplied the Aluminium powder that was used in VBIED attack upon the CRPF personnel. He also submitted that the learned trial court has wrongly observed that the JJ Act is not applicable when the allegations are for commission of offences under Unlawful Activities (Prevention) Act.
5. On the contrary, Mr. Vishal Sharma, learned ASGI, has vehemently argued that there are grave and serious allegations against the appellant

of conspiring with the other accused to cause VBIED attack upon the CRPF Bus, in which 40 CRPF personnel attained martyrdom. He further argued that the appellant had procured the Aluminium powder that was used in making the IED, which was used in the attack on 14.02.2019.

6. Heard and perused the record.
7. A perusal of the record reveals that the appellant figures as an accused No. 7 in the charge-sheet filed by the National Investigation Agency (NIA) before the trial court and further has been accused for commission of offences under sections 120-B read with sections 121, 121-A, 122, 123, 302 and 307 RPC, sections 4, 5 and 6 of the Explosive Substances Act, sections 16, 17, 18, 19, 20, 21, 38 and 39 of the Unlawful Activities (Prevention) Act, section 14 C of the Foreigners Act and section 4 of the Jammu and Kashmir Public Property (Prevention of Damage) Act, 1985.
8. The allegations against the appellant, as laid down in the charge-sheet, are reproduced as under:

“Investigation has revealed that Waiz-ul-Islam is a terror associate of Jaish-e-Mohammed. In August, 2018, he harboured three JeM terrorists including Mohd Ismail (A-11)@ Saifullah and Sameer Ahmed Dar (A-12) at the house of one his friends. The terrorists gave him a virtual number starting with +1 along with an OTP to activate that number for whatsapp communication. He was also told to open an online shopping account on Amazon.

Since Waiz-ul-Islam (A7) already had an account, Saifullah started sending him links to purchase certain items such as apple lighters, hiking shoes, cargo pants, head-mounted torches, LED flash lights, Aluminium powder, big knives, laser pointers, mobile covers etc. He used to make the payment either by way of cash-on-delivery or by using the debit card of Inayat Ullah Malik.

Investigation also revealed that in January, 2019, he received one kg of Aluminium Powder and then again in late January, 2019, he received three (03) kg of Aluminium powder from Amazon.

These consignments of aluminium powder were used in making the two IEDs which were used in the VBIED attack. He used to deliver the incriminating articles at Nowgam bypass of JeM terrorists. Even after the Pulwama IED attack on 14th February, 2019, he continued working for JeM as a terror associate.

He used virtual numbers along with his own number to communicate with JeM terrorists on Whats app.

Many incriminating voice notes and picture of Waiz-ul-Islam (A-7) have been recovered from Mohammad Umar Farooq's mobile extract.

His mobile number has been found saved in the phone book of Mohammad Umar Farooq and there are many Whats app calls between him and Mohammad Umar Farooq.”

9. The respondent has also placed on record the documentary evidence as well as digital evidence.
10. The appellant had laid a motion before the trial court for declaring him as a juvenile under the JJ Act on the ground as mentioned above. The respondent objected to the said motion and the learned trial court vide order impugned, dismissed the said application filed by the appellant.
11. The allegations as they emanate from the charge-sheet against the appellant are that the appellant harboured three Jaish-e-Mohammad terrorists in the month of August, 2018. He started purchasing certain items after Saifullah sent him links to purchase the same. In earlier part of month of January, 2019, he received 01 Kg of Aluminium powder and then again in late January, 2019, he received 03 kg of Aluminium powder from Amazon. These consignments of Aluminium powder were

used in making two IEDs which were used in the VBIED attack. He used to deliver the incriminating articles at Nowgam bypass to JeM terrorist. Even after the Pulwama IED attack on 14.02.2019, he continued to work for JeM as a terror associate. Many incriminating voice notes and pictures of the appellant have been recovered from Mohammad Umar Farooq's mobile extract. His mobile number was found saved in the phone book of Mohammad Umar Farooq and there are many whats-app calls between him and Mohammad Umar Farooq.

12. The contention of the appellant is that when the appellant received the Aluminium powder twice in the month of January, 2019, he was minor as his date of birth is 25.01.2001.
13. Though the learned counsel for the appellant has argued that the appellant was not a part of the conspiracy that led to VBIED blast on 14.02.2019 and he relied upon the statement of co-accused Shakir Bashir to demonstrate that the Aluminium powder used in the blast was procured by him, but we are not inclined to consider the said issue as the charges are yet to be framed and more so, in the present appeal, the only issue that requires to be determined is as to whether the learned trial court has rightly refused to consider the appellant as juvenile under the JJ Act. The other issue that JJ Act is applicable in the cases under Unlawful Activities (Prevention) Act as well, would arise only if the appellant is able to demonstrate that the learned trial court has wrongly refused to treat the appellant as juvenile under JJ Act.
14. The allegations against the petitioner are very serious in nature. The appellant was in contact with the other Jaish-e-Mohammad terrorists and in pursuance of a conspiracy to cause a blast, he procured

Aluminium powder twice in the month of January, 2019 and further that the said Aluminium powder was used in VBIED attack on 14.02.2019 at Pulwama, in which 40 CRPF personnel were martyred. It is not in dispute that when the Lethpora, Pulwama attack took place on 14.02.2019, the appellant was not juvenile.

15. The criminal conspiracy as provided by section 120-A RPC defines as under:

“[120A. Definition of criminal conspiracy.—When two or more persons agree to do, or cause to be done,—

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.]”

16. Thus, it is clear that when two or more persons agree to do an illegal act, such an agreement is a criminal conspiracy and further it is immaterial whether the illegal act, is the ultimate object of such agreement or is merely incidental to that object. The conspiracy in the instant case was to cause a VBIED blast which in fact took place on 14.02.2019 leading to the death of 40 CRPF personnel. Needless to say that mere agreement to commit an offence amounts to criminal conspiracy notwithstanding the fact that no act in pursuance to the said agreement is committed. So far as the present case is concerned, the allegations are with regard to use of aluminium powder procured by the appellant in the VBIED attack on 14.02.2019. As such if the prosecution case is to be believed then act, pursuant to the conspiracy was also committed.

17. The Hon'ble Apex Court in **Firozuddin Basheeruddin and others vs State of Kerala, (2001)7 SCC 596** has held as under:

“It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective and all are equally responsible. What part each conspirator is to play may not be known to every one or the fact as to when a conspirator joined the conspiracy and when he left.

It is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished.

A criminal conspiracy is a partnership in crime and that there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incidental to and growing out of the original purposes.

It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-conspirators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested.”

18. Thus, it is clear from the law laid down by the Apex Court that if two or more persons engage into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible there for.
19. Once the VBIED blast took place on 14.02.2019 at Lethpora, Pulwama that was the ultimate result of a conspiracy of which the appellant has been alleged to be a partner, then he is equally responsible for the said

illegal act, that was committed on 14.02.2019. In the instant case, the relevant date would be 14.02.2019, as such we are of the view that if an offence is constituted of several acts and when the accused is major at a time when subsequent act is committed forming part of an offence, he cannot claim to be juvenile. Thus, this court has no hesitation to hold that the appellant was more than 18 years of age and was not juvenile at the time of commission of offence. We have perused the order impugned and find the learned trial court has rightly rejected the claim of juvenility.

20. For all what has been discussed above, we find no reason whatsoever to interfere with the same, as such, the present appeal is dismissed. Nothing contained herein shall be considered as an expression of opinion upon the merits of the case while considering issue for framing of charge or discharge, as we have only examined the allegations levelled in the charge-sheet against the appellant for the purpose of considering the claim of juvenility raised by the appellant before the trial court.

(MOHAN LAL)
JUDGE

(RAJNESH OSWAL)
JUDGE

Jammu
16.07.2022
Rakesh

Whether the order is speaking:	Yes/No
Whether the order is reportable:	Yes/No