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Case Comment: Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid v State of Maharashtra

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FACTS OF THE CASE

The 'Mumbai attacks' in November 2008 were a series of heinous terrorist attacks on famous and crowded landmarks in Mumbai including the Taj Hotel, killing approximately 166 people, injuring approximately 238 people, and destroying the millions worth of property. On November 26, 2008, Lashkar-e-Taiba, also known as LeT, infiltrated the Indian city of Mumbai and attacked the monuments mentioned above. The LeT dispatched ten armed fanatics on an inflatable rubber dinghy across the Arabian Sea. They also slaughtered civilians on a ferry boat and utilized the boat to achieve their objective. The objective was to wage war against the Indian government. From December 2007 through November 2008, this attack was planned. Pakistan allegedly supplied these terrorists with weapons as well. Ajmal Kasab was the lone terrorist apprehended alive by Indian police after nine other associates were slain in police encounters.

Following Kasab's arrest on February 25, 2009, a charge sheet of over 100 pages was submitted against him. Several lawyers were approached to represent Kasab, but most declined due to ethical concerns until Anjali Wagmare volunteered to take over the case. The first hearing was

moved from April 15 to April 17, 2009, due to a conflict of interest involving Anjali Waghmare, and Abbas Kazmi replaced her. The trial court gave a death sentence to Kasab and the Bombay High Court upheld the same on February 21, 2011. On July 30, 2011, Kasab challenged the lower courts' decisions before the Honorable Supreme Court of India. Raju Ramchandran, a senior lawyer, was selected as *amicus curiae* to review all evidence. The central question in deciding the case was whether or not there was a 'free and fair trial.

CONTENTIONS OF THE APPELLANT

It was evident that the appellant was actively involved in the attacks owing to evidence against him; therefore, the question of a free and fair trial was raised. It was submitted that A.21¹ is inclusive of the right to a free trial. The decisions in *G.Someshwar Rao v Samineni Nageshwar Rao*² and *Jayendra Vishnu Thakur v the State of Maharashtra*³ were used to support the contention. Furthermore, the cases of *T.Nagappa v Y.R. Muralidhar*⁴, *Zahira Habibulla Sheikh v the State of Gujarat*⁵, and *Noor Aga v the State of Punjab*⁶ were also referred to.

Further, it was also submitted that since the right of free trial under A.21 is a fundamental right, it is inalienable, and no questions regarding the waiver of the right can be raised. The decisions in *Olga Tellis v Bombay Municipal Corp*⁷. and *Behram Khurshid v State of Bombay*⁸ were used to support the contention.

It was alleged that the appellant was deprived of a fair trial which the Constitution guaranteed. This led to him being denied two crucial Constitutional rights. The first one is, A.22 (1)⁹, and the

¹ Constitution of India, art. 21

² *G Someshwar Rao v Samineni Nageshwar Rao* (2009) 14 SCC 677

³ *Jayendra Vishnu Thakur v State of Maharashtra* (2009) 7 SCC 104

⁴ *T Nagappa v YR Muralidhar* (2008) 5 SCC 633

⁵ *Zahira Habibulla H Sheikh v State of Gujarat* (2004) 4 SCC 158

⁶ *Noor Aga v State of Punjab* (2008) 16 SCC 417

⁷ *Olga Tellis v Bombay Municipal Corpn* (1985) 3 SCC 545

⁸ *Behram Khurshid Pesikaka v State of Bombay* (1955) 1 SCR 613

⁹ Constitution of India, art. 22(1)

second is A.20(3)¹⁰, which is the right to protection against self-incrimination. He relied upon *Selvi and others v the State of Karnataka*¹¹ to support his argument.

Constitutionally, under A.22(1), the accused must be informed about his right to counsel before arrest and production in front of the Judicial Magistrate. It was alleged that just because the accused was offered legal aid, it was not the same as awareness regarding the right to a legal practitioner. For this, the learned Counsel referred to the judgments of *Nandini Satpathy v P.L. Dani*¹² and *Khatri v State of Bihar*¹³.

CONTENTIONS OF THE DEFENDANT

The defence lawyer claimed that the right guaranteed to the appellant, inclusive of the right against self - incrimination by the Constitution, was not compromised. Further, it was claimed that all relevant provisions of the Indian Evidence Act¹⁴, of 1872, and the Criminal Procedure Code¹⁵ (CrPC), of 1973, were duly followed. The rights, and protections constitutionally granted were intact. It was further said that A.22(1) is enablement rather than a right.

Furthermore, the defence lawyer submitted a need to understand Sections 161¹⁶ to 163¹⁷ of the Criminal Procedure Code within the purview of the Indian Investigation Process. He further claimed that in the course of the police investigation, the concept of self-incrimination does not exist under Indian Law except contemplation under S.162 (2)¹⁸. It was also said that S.164(1)¹⁹ allows for recorded confession while investigating. Also, the right against self-incrimination under A. 20(3) is not related to statements made by one's own will.

¹⁰ Constitution of India, art. 20(3)

¹¹ *Selvi v State of Karnataka* (2010) 7 SCC 263

¹² *Nandini Satpathy v PL Dani* (1978) 2 SCC 424

¹³ *Khatri v State of Bihar* (1981) 1 SCC 623

¹⁴ Indian Evidence Act 1872

¹⁵ Criminal Procedure Code 1973

¹⁶ Criminal Procedure Code 1973, s 161

¹⁷ Criminal Procedure Code 1973, s 163

¹⁸ Criminal Procedure Code 1973, s 162

¹⁹ Criminal Procedure Code 1973 s 164

It was submitted that the **Miranda decision**²⁰ in the US Supreme Court could not be compared since, in the American system, confessions in front of the police were admissible in the court of Law, which is contrary to the Indian scenario. Moreover, it was also submitted that the Miranda rule was substantially diluted in its home country. Moreover, the defence lawyer stated that the Nandini Satpathy case, the decision of which was heavily based upon the Miranda judgment, was not followed in the cases of *Directorate of Revenue Intelligence v Jugal Kishore Samra*²¹ and *Poolpandi v Superintendent, Central Excise*²².

RATIO DECIDENDI AND OBITER DICTA

- The appeal was dismissed, and the judgment of the lower courts was upheld.
- The court said that the accused had various protections under several jurisdictions and was not denied any right or privilege.
- It was noted that the right against self - incrimination does not exclude voluntary confessions. Furthermore, it was said that the right against self - incrimination is incorporated under provisions of the Criminal Procedure Code and the Evidence Act.
- Under A.21, as held in *Khatri v State of Bihar*²³ and *Hussainara Khatoon*²⁴ case, every accused had the right to free legal aid. However, this stands true unless the accused does not object to the provision of such a lawyer. Moreover, the accused is entitled to legal aid only during the trial and not during police custody or interrogation. Since the accused refused to be defended by an Indian lawyer and wanted a lawyer from Pakistan, it cannot be said that he was denied legal aid.
- Supreme Court opinionated that the death penalty given to the accused was fully justified owing to the quantum of crimes committed. There was no scope for improvement even if he were sent to a rehabilitation centre since the accused showed no signs of regret for his actions.

²⁰ *Miranda v Arizona* 384 US 436 (1966)

²¹ *Directorate of Revenue Intelligence v Jugal Kishore Samra* (2011) 12 SCC 362

²² *Poolpandi v Superintendent, Central Excise* (1992) 3 SCC 259

²³ *Khatri v State of Bihar* (1981) 1 SCC 623

²⁴ *Hussainara Khatoon v Home Secretary, State of Bihar* (1980) 1 SCC 81

- Based on the case of *Bachan Singh v State of Punjab*²⁵, the attack on the government of India and the act of waging war against the state is sufficient to meet the requirements. Therefore, the rarest of the rare was upheld.

COMPARATIVE ANALYSIS

In *Salduz v Turkey*²⁶, the police took custody of the accused over suspicion that he was involved in support of a criminal organization. The accused claimed he was denied the right to a fair trial guaranteed under Article 6(3)²⁷ of ECHR since he was not provided legal aid from the first police interrogation. It was held that the said article had been violated and access to a lawyer should be given before police interrogation. This judgment was delivered by referencing *Imbrioscia v Switzerland*²⁸. And it was further cited in *Cadder v Her Majesty's Advocate*²⁹, *Gafgen v Germany*³⁰, and *Her Majesty's Advocate v P*³¹. However, the factor that separates this case from the case at hand is that Kasab denied being represented by a lawyer.

In the case of *McGowan v B*³², the accused denied exercising his right access to legal advice. The bench had to decide whether Article 6(3)³³ (Right to a fair trial) of the ECHR would be breached. This is similar to the case at hand since Kasab denied being represented by an Indian lawyer. In *McGowan v B*, the Court held that no breach was committed and there was no incompatibility with the ECHR since the accused had already been informed of his rights. A similar course of action was taken while deciding upon the case.

In *Khatri and Ors. v State of Bihar*³⁴, the apex court observed that a trial without the provision of legal support to the accused would be vitiated. Therefore, it was held that the accused must be provided with free legal services to ensure a just trial. In the case of *Sarwan Singh v State of*

²⁵ *Bachan Singh v State of Punjab* AIR 1980 SC 898

²⁶ *Salduz v Turkey* (2008) ECHR 36391/02

²⁷ European Convention on Human Rights, art 6(3)

²⁸ *Imbrioscia v Switzerland* (1994) 17 EHRR 441

²⁹ *Cadder v Her Majesty's Advocate* (2010) UKSC 43

³⁰ *Gafgen v Germany* (2010) ECHR [GC]

³¹ *Her Majesty's Advocate v P* (2011) UKSC 44

³² *McGowan v B* (2011) UKSC 54

³³ European Convention on Human Rights, art. 6(3)

³⁴ *Khatri v State of Bihar* (1981) 1 SCC 623

*Punjab*³⁵, it was further said by the Supreme Court that the accused should be given at least 24 hours to decide whether he wants to confess or not. In *Bachan v State of Punjab*³⁶, the death sentence was served over the cause of waging war against the State.

CRITICAL ANALYSIS, CONCLUSION, AND RECOMMENDATION

Abbas Kazmi, Kasab's previous defence lawyer, did not have enough time to prepare the case and defend him after he replaced Waghmare. Kazmi asked for four weeks but was given only eight days to prepare for a case that involved hefty documentation. To hasten the trial process, fuelled by political happenings, the right to a free and fair trial had been denied to Kasab since he was not made aware of his right to free legal counsel at the time of representation.

Moreover, he should have been provided 24 hours to decide to be represented by a lawyer. However, owing to the quantum of harm that afflicted by him on innocent citizens of India, the case of Ajmal Kasab was the rarest of the rare, thereby justifying the death sentence. The attacks of 26/11 were arguably an act of war against the state, which left several dead, wounded, and bereft of family. The horrors of the crime are such that witnesses still shudder at the thought of the happenings. In the wake of wars breaking out across the globe, be it in Palestine, Ukraine, Syria, Yemen, Taiwan, and Afghanistan, India should develop a curated apparatus to deal with those accused of extremism since the stakes are higher than ever. Currently, the Indian subcontinent is subject to vulnerabilities owing to the takeover of Afghanistan by the Taliban, the fall of Sri Lanka, growing Chinese stake holdings, and insurgent movements in Kashmir. It is imperative to draft stringent guidelines to prevent atrocities among the growing extremism in the era of developed intelligence.

³⁵ *Sarwan Singh v State of Punjab* (1957) AIR 637

³⁶ *Bachan Singh v State of Punjab* AIR 1980 SC 898