**CASE ANALYSIS OF MD. AJMAL MD. AMIR KASAB ABU V. STATE OF MAHARASHTRA**

**Brief Facts Of The Case**

On November 26, 10 terrorist attacked various places in Mumbai thereby terrorising many people. It is in relation to Mumbai terrorist attack on Taj Mahal on 26 November 2008. This attack results in murder of 166 people and grievously hurting 238 people. It is one of the black days in the history of India. Its famously known as 26/11 attack.

Mohammad Ajmal Amir Kasab, a Pakistani Nationalist has earned himself five death penalties along with equal number of imprisonments for committing various number of crime which were grotesque in the city of Mumbai. Some of the major charges against Kasab were, conspiracy to wage war against government, in possession of various arms to wage a war against the government, waging and abetting to wage a war against the government, committing a terrorist attack, criminal conspiracy to commit the murder, committing murder against many people, abduction to murder, robbery and dacoity to cause grievous hurt against people. The people who were killed includes police officers, people, and many more.

Kasab with his two other member entered Indian boundaries illegally with possession in arms and weapons, conspired to kill many people and thereby at the end killing many people. Lashkar-e-taiba was the mastermind operation who was behind this whole ploy of killing many. This operation tried to wage a war against the Indians to liberate Kashmir.

The sentence of Kasab was confirmed in accordance by the law by the High Court of Maharashtra. The high court of Maharashtra in a view to give him death penalty without so much so as a, later on two appeals were filed in the Supreme Court. Nobody was ready to take up the case of Kasab as it was crystal clear that he committed all the above-mentioned crimes and would be given grievous punishment.

**Facts In Issue**

The court has major issues that whether Kasab went through free and fair trial according to the due process of law under Article 21 of the Constitution. The question appeared whether the Appellant was provided equitable death sentence. Kasab’s lawyer, S. G Abbas Kazmi filed for an inquiry under Section 7(A) of Juvenile Justice Act, 2001.

**Arguments**

1) Whether Kasab went through fair trial according to due process of law

1. In the court, the point made that the right to consult and be defended by a legal practitioner is not to be construed as sanctioning or permitting the presence of a lawyer during police interrogation. The main work of the lawyer is to focus on the court proceedings. As no Indian lawyer was ready to fight a case for Kasab, the court made a point that there should be a lawyer to represent Kasab, and Kasab requested for a lawyer from Pakistan. He demanded for the natural justice from the court. It is the duty of the court to provide the accused with a lawyer unless the accused voluntarily made a decision to defend himself in the court of law. To have a fair and just trial, it is absolute to provide him with one. The court provided him with a senior advocate and an assisting junior Advocate, but soon the court revoked it due to the conflict of interests between the accused and the Advocate. Later, Abbas Kazmi from Pakistan was appointed as his lawyer. Kazmi was adamant to delay the trial proceedings but it was not questioned a bit. During the process, there was no fault at the side of the Court, as court provided him with the lawyer and at pee-trial, it was Appellant’s wish to not to take a lawyer and therefore, there is no violation of the provisions of the Constitution.

2. By denying fair trial to the militant, we are denying the constitutional rights given to the people and indirectly encouraging our police force to resort to illegal means of torture and encounter killings. By fair trial, it ensures that the judicial system is not corrupt. The fact that Kasab prima facie is guilty of all the charges against him as he and his accomplice waged the war and attacked Mumbai to liberate Kashmir. In the case, State of Bombay v. Kathi Kalu Oghad, it was held that no person will be compelled to be witness against himself. The court protected his rights under Article 22(3) of Constitution of India, where no accused shall be compelled to be witness against himself and in the case in hand, all the police queries will not be held against him in the court of law and it is the duty of the concerned authority to tell him that. Court also referred t Section 161 of CrPC, where police cannot ask the questions which would make him commit criminal charges against him. Similar provisions following Section 161 delineates the same protection of accused to have a free and fair trial. In M.H. Hoskot v. State of Maharashtra, it was held that free legal aid is given to the accused under Article 21 of the Constitution. Therefore, it was submitted that it was free and fair trial.

2) Appellant provided the equitable death sentence-

1. Kasab was guilty as charged and deserved death penalty to him under the provisions, Section 120, section 300, section 121 of IPC,section 16 0f Unlawful Activities Prevention Act, 1967. Death penalties are given in the rarest of the rare case, as held in the case, Bacchan Singh v. State of Punjab. The rarest of case, here means the case which are exceptional and different from the normal course of offense. It’s given in the cases where grievous hurt is caused. In the case in hand, Kasab did inhumane crime by killing hundreds of people. He waged a war against the government. It was rarest of the rare case, the doctrine of rarest of the rare case, Baccha Singh v. State of Punjab, from 1973 to 1980 the legislative dictate has been changing and death sentence became exception accompanied by the reason. Under Article 21, the question of death penalty came only for the real and abiding concern for the dignity of human of human life postulates resistance for taking a life through law’s instrumentality. However, what appears to be gruesome may not be for another. But in the case in hand, it is clearly evident about the abdominal acts by Kasab

2. Therefore, Kasab deserved every bit of punishment he got. It is a situation where Kasab is in no position to redeem himself as he has killed hundreds of people including women, elders and children. Here, age cannot justify the position he is in. He deserved the severest punishment possible and therefore, death punishment was equitable.

**STATUTORY PROVISIONS DISCUSSED**

1.Section 120B, 302, 109, 121, 300 Indian Penal Code, 1860

2. Arms Act, 1959

3. Explosives Act, 1884

4. Section 15, 16, chapter IV Unlawful Activities Prevention Act, 1967

5. Article 21, 20, 19(1), 22, 39(A) Constitution of India, 1950

6. Section 366, 304, 169, 361, 162, 163, 164, 315 Criminal Procedure Code, 1973

7. Prevention of Terrorism Act.

**Judgement**

**Ratio Decidendi** (reason for the decision)

1. The right against self-incrimination under Article 20(3) does not exclude any voluntary statements made in exercise of free will and volition. We also accept that the right against self- incrimination under Article 20(3) is fully incorporated in the provisions of the Cr.P.C (Sections 161, 162, 163 and 164 and the Evidence Act, 1872, as manifestations of enforceable due process, and thus compliance with these statutory provisions is also equal compliance with the Constitutional guarantees. However, certain cases have proved otherwise like Miranda v. Arizona, it was discussed that although the rules are not present in Indian law, but its commentary already has those rules to expand the accused self-incrimination rights.

2. The right to free legal aid is an essential ingredient of due process that is implicit in the guarantee of Article 21 of the Constitution. (Khatri v. State of Bihar). To provide a lawyer to an accused person - “This Court has pointed out in Hussainara Khatoon (IV) case(94) which was decided as far back as March 9, 1979 that the right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer”.

3. Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial. Even if the accused does not ask for a lawyer or he remains silent, it is the Constitutional duty of the court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused.

4. Access to a lawyer was imperative to ensure full compliance with statutory provisions which, if duly complied with, would leave no room for any violation of Constitutional provisions or human rights abuses. Accused has right to legal aid during trial but not during police custody or interrogation.

**Obiter Dicta**: (The Rule Of Law Based On Merely on Hypothetical Facts)

1. Kasab, a Pakistani nationalist, was sentenced by five death penalties and equal number of life terms in prison for these terrorist crimes following a trial affording due process in accordance with the laws and the Constitution of India. Kasab explicitly was liable of all the charges against him. The whole country saw the vivid gory incident which happened in Mumbai which was showed by Media in the live TV.

2. The Court was of the view that the accused had been afforded full due process. E.g. his initial refusal of the offer of an Indian lawyer was his own decision, though his request for a Pakistani legal representative was subsequently granted. The circumstances in which the few concessions he had made in the form of confessions did not suggest the presence of inappropriate duress. On the other hand, he was later provided with an Indian lawyer but later revoked the contract as there was conflict of interests between the parties. Later, on his request he was also provided with the Pakistani lawyer as no one in India was willing to take on his case.

3. On the facts and given the possibility of reform of the accused-appellant being foreclosed by his absence of remorse for the terrorist crimes committed, the Supreme Court was of the view that the imposition of the death penalty was fully justified. There was no scope of redeeming him as what he did was abominable and killed children, women and elders. Even the rehabilitation centres cannot change him as there was no regret on his part and if given a chance, he could do a lot worse, so death penalty in this was fully justified.

4. But on the issue of the right of the suspect or the accused to be represented by a lawyer, we find Mr. Subramanium’s submissions equally unacceptable. Mr. Subramanium contends that Article 22(1) merely allows an arrested person to consult a legal practitioner of his choice and the right to be defended by a legal practitioner crystallizes only at the stage of commencement of the trial in terms of Section 304 of the Cr.P.C. We feel that such a view is quite incorrect and insupportable for two reasons. First, such a view is based on an unreasonably restricted construction of the Constitutional and statutory provisions; and second, it overlooks the socio-economic realities of the country.

5. The State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first produced before the magistrate as also when he is remanded from time to time.”

6. The Magistrate or the Sessions Judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. SC direct all the magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.

7. The appellant’s refusal to accept the services of an Indian lawyer and his demand for a lawyer from his country cannot be anything but his own independent decision. The demand for a Pakistani lawyer in those circumstances, and especially when Pakistan was denying that the appellant was even a Pakistani citizen, might have been impractical, even foolish, but the man certainly did not need any advice from an Indian court or authority as to his rights under the Indian Constitution.

8. In the case*, Bachan Singh* v. *state of Punjab*- extreme brutality, attack the government of India and the sovereignty of India is sufficient to meet the requirement of Bachan Singh case and the death penalty is justified in all this type of cases. Here, the rarest of the rare was adjudged and held that the death penalty.

**Critical Analysis**

Analysis Of Freedom Of Speech And Expression

1. The role of Media in all of this was so much bigger, the attacks on the people in Taj Hotel, Hotel Oberoi and Nariman House were covered by the mainstream and the electronic media on live TV. Due to this, the perpetrators and accomplices sitting across the border were getting live updates due to media, and they were able to strategize their next move. The media showed the gory details from start and end non-stop. All the media channels were in the competition to show latest news and increase the TRP of their shows. Under the Article 19(1) of the Constitution, it provided with the speech and expression to every citizen. The media. But it was not justified on the part media. It was difficult and risky to show on the media. It was unacceptable and totally wrong in this situation. The credibility of such institution is tested. The role of media is very large in India. It is regarded to be public court. It was seen in the case *Y.V Hanumanta Rao*v. *K.R Pattabhiram and Anr*.,[[1]](#footnote-2) it was held that no one should comment on the case as there is real and substantial danger of prejudice or any instance related. In Jessica murder and Priyadarshini case, we’ve established the role of media and its farfetched ways to show such cases which could prove to judicially wrong.

Analysis of Self Incrimination

1. In relation with the *Miranda*v. *Arizona Case*,[[2]](#footnote-3) as discussed in the case in hand, it was delineated that accused has a right to remain silent and need a lawyer present at the time of interrogation. But this is not a provision in Indian law. But by through analysing, it was pointed out that the Miranda rules are already present in the Indian Statutes. However, Kasab was given very firm protections against self-incrimination. Under Article 25 and 26, it was held that any confession made in front of Police is inadmissible and cannot holds its validity in the court. In the case, *Sarwan Singh* v. *State of Punjab*,[[3]](#footnote-4) it was held that accused should be given at least 24 hours to think whether he wants to make the confession or not. Generally - Conduct of proceedings by trial Judge in case having international ramifications and credibility of India as a nation governed by rule of law - Quality of record maintained by him - Trial Judge hailed as true flag-bearer of rule of law in India, and trial court records of this case directed to be included in curriculum of various Judicial Academies in country. However, Kasab prepared well with prior planning and preparation, and the execution of the conspiracy were given extensive and rigorous training as combats. The magnitude of the war is not compared to any case, it was to that degree. The number of the people killed are staggeringly high to no extent including women. Children and elders. The case shocked the collective conscience of the people in the whole world.

2. The interrogation process is highly questionable. The situations where it’s very necessary to interrogate the person through its means, the presence of lawyer is required or not. In various cases, related to that it has been observed. In*Poolpandi v. Superintendent and Central Excise*,[[4]](#footnote-5) the appellants before this Court, who were called for interrogation in course of investigation under the provisions of the Customs Act, 1963, and the Foreign Exchange Regulation Act, 1973, claimed the right of presence of their lawyer during interrogation, relying strongly on Nandini Satpathy. The question before the Court was thus directly whether a person summoned for interrogation is entitled to the presence of his lawyer during questioning. In the case, *D.K Basu v. State of West Bengal*,[[5]](#footnote-6) it was held that the lawyer can be present in the cases akin, but they will need to maintain a certain distance or a partition of glass will be there while interrogation as such is going on. In *Navjot Sandhu case*,[[6]](#footnote-7) it was given that the rights of self-incrimination and of a lawyer are to be read to the accused and what would be the consequences if it doesn’t abide by the way.In the severe framework of the POTA, certain constitutional safeguards are built into Section 32, and to some extent in Section 52, of the Act. But the mainstream criminal law procedure in India, which is governed by the Cr.P.C and the Indian Evidence Act, has a fundamentally different and far more liberal framework, in which the rights of the individual are protected, in a better and more effective manner, in different ways. It is, therefore, wrong to argue that what is said in context of the POTA should also apply to the mainstream criminal law procedure.

3. The main aim of the judicial system is to find the truth and nit to protect the accused from the wrongdoings he committed. The defence lawyer has to limit himself to work with the investigation evidences which have been don. The test which is done during the investigation should be voluntary and within the safeguards stipulated under Section 64 of Cr.P.C, if the confession is taken voluntary, then it should be admissible constitutionally, legally and morally. In the case, *State of West Bengal v. Anwar Singh Sarkar*,[[7]](#footnote-8) while deciding on the cases, the constitution in regard of the judgement be left flexible enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs. I feel therefore that in each case Judges must look straight into the heart of things and regard the facts of each case concretely much as a jury would do; and yet, not quite as a jury, for we are considering here a matter of law and not just one of fact. in *Hussainara Khatoon (IV) Home Secretary* v. *State of Bihar*,[[8]](#footnote-9) this Court alluding to Article 39-An, at that point recently added to the Constitution, said that the article underlined that free legitimate guide was an unalienable component of a “sensible, reasonable and only” technique, for without it a individual experiencing monetary or different incapacities would be denied from making sure about equity.

Was It Equitable To Give Little Time To Prepare For Lawyer

1. Mr. Kazmi presented an application raising the issue of the immaturity of the litigant, which was dismissed by the court after it held an enquiry into the issue. Mr. Ramachandran submitted that the hour of eight days given by the preliminary court to the court-designated legal counsellor was nonsensically short, taking into account that Mr. Kazmi had made a sensible solicitation for about a month's time. The educated Counsel presented that equity isn't just to be done yet in addition to be believed to be done, and the brief timeframe conceded to the safeguard counsel fell afoul of this rule and consequently influenced reasonable preliminary. He called attention to that while naming Mr. Kazmi the court itself perceived that he was a legal counsellor of some norm and would be required to alter his different duties. Mr. Ramachandran, along these lines, presented that the preliminary technique was likewise vitiated and that it can't be said to be simply, reasonable and sensible on account of the refusal of adequate time to the protection legal advisor to set up his case.

2. In *Owais Alam* v. *State of U.P.*,[[9]](#footnote-10) it was held that the court itself may allow the lawyer adequate time to prepare the case. Similarly, in the case *Bashira* v. *State of U.P.*,[[10]](#footnote-11) it was held that when the lawyer didn’t get much time to prepare the case, the court asked for the re-trial. However, in the case in hand, Kazmi never complained about the lack of time to prepare the case, in the trial, however, he gives no opportunity to noisily protest against the proceedings of the court, yet the time was never the object to protest.

3. In *A.K. Gopalan* v. *State of Madras,[[11]](#footnote-12)* Patanjali Shastri, J., explaining the necessity of this provision said: “The sinister looking feature, so strangely out of place in democratic Constitution, which invests personal liberty with the sacrosanctity of a fundamental right, and so incompatible with the promises of its preamble, is doubtless designed to prevent the abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant republic”. Therefore, irrespective of every wronged on the part of the court is not questionable as Kasab being a terrorist deserved death penalty.

**Conclusion**

Terrorism is one of the dreadful phenomena of the present time. Its expansion is dangerous and a great threat to mankind. It’sa great menace and its the need of the hour to focus on the various groups that have been developing in the small towns and society. The biggest threat is the studies that have been given to them with an agenda, whether its religious, hate, an agenda or what not, the corruption of mind is inevitable due to this. Kasab being one of the victims of this menace with an agenda to liberate Kashmir entered the borders of India illegally and then attacked one of the important places in India, i.e Mumbai. The trial of Kasab was fair and reasonable, however, its an allegation that the evidences on the procedure of the court was incomplete, but it was explicitly evident that he committed the crimes he was accused for. His death was equitable as his crime was beyond grotesque and abdominal and comes under rarest of the rare doctrine. Therefore, he deserved death penalty. Judicial deference was shown by the courts in the field of National security.

**BRIEF ABOUT THE AUTHOR**

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1. AIR 1975 AP 30. [↑](#footnote-ref-2)
2. 384 U.S. 436. [↑](#footnote-ref-3)
3. 1957 SCR 953. [↑](#footnote-ref-4)
4. 1992 SCR (3) 247. [↑](#footnote-ref-5)
5. (1997) 1 SCC 416. [↑](#footnote-ref-6)
6. State (N.C.T. of Delhi) v. Navjot Sandhu, AIR 2005 SC 3820. [↑](#footnote-ref-7)
7. 1960 SCR (2) 646. [↑](#footnote-ref-8)
8. 1979 SCR (3) 532. [↑](#footnote-ref-9)
9. Criminal Appeal No.284 of 1968, decided on December 17, 1968. [↑](#footnote-ref-10)
10. 1968 SCR (1) 32. [↑](#footnote-ref-11)
11. 1950 SCR 88. [↑](#footnote-ref-12)