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# Md. Ajmal Md. Amir Kasab Abu v. State of Maharashtra

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NIDA FATIMA<sup>1</sup>

## ABSTRACT

*The city of Mumbai witnessed menacing terrorist attack at the Taj Mahal on November 26, 2008, popularly known as the 26/11 attack; a team of 10 young terrorists pounced and bombarded the city of dreams at numerous places leaving the local residents terror-stricken and traumatised rest of the country. This attack left the country bearing the wounding loss of 166 human lives and grievously injuring 238 people. The impact of the attack would make anyone's flesh creep. This event is still recognised as one of the hysteric dark periods of Indian History.*

*A Pakistani patriotic, Mohammad Ajmal Amir Kasab (the only terrorist alive after the 26/11 attack), was prosecuted for various charges; the vital charges against him were conspiracy to wage war against the government, in possession of various arms to wage war against the government, waging and abetting to wage war against the government, committing murder against many people, a terrorist attack, abduction to murder, criminal conspiracy to commit the murder, dacoity to cause grievous hurt against people robbery. He seized himself with five Capital punishments along with the approximately equivalent figure of life imprisonment for committing an assorted number of heinous crimes. Among the departed martyr, there was a good rank of police officers, countless common public and many more innocent lives.*

*Kasab entered the Indian frontier with possession of arms and weapons unlawfully accompanied by two other members of his group, intriguing to take numerous blameless lives and propitiously completing their target. The author behind the petrifying plan of destroying the masses was Lashkar-e-taiba; their chief agenda was to wage war against the Indians to set free Kashmir.*

*The High Court of Maharashtra gave a stamp of approval for Kasab's sentence in compliance with the law. The high court of Maharashtra awarded him the death penalty, belated two appeals were filed in the Supreme Court of India. Not a single lawyer was in a fit state to take hold of Kasab's case as it was perspicuous that he was to be blamed for mentioned offences and would be punished rigorously.*

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## **I. INTRODUCTION**

### **(A) Brief facts of the case**

The city of Mumbai witnessed the menacing terrorist attack at the Taj Mahal on November 26, 2008 popularly known as 26/11 attack, a team of 10 young terrorist pounced and bombarded the city of dreams at numerous places leaving the local residents terror stricken and traumatized rest of the country. This attack left the country bearing wounding loss of 166 human lives and grievously injuring 238 people. The impact of the attack would make anyone's flesh creep. This event is still recognised as one of the hysteric dark periods of Indian History.

A Pakistani patriotic, Mohammad Ajmal Amir Kasab (the only terrorist alive after the 26/11 attack) was prosecuted for various charges, the vital charges against him 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 murder against many people, a terrorist attack, abduction to murder, criminal conspiracy to commit the murder, dacoity to cause grievous hurt against people robbery. He seized himself with five Capital punishment along with approximately equivalent figure of life imprisonment for committing assorted number of heinous crimes. Among the departed martyr there were a good rank of police officers, countless common public and many more innocent lives.

Kasab entered Indian frontier with possession in arms and weapons unlawfully accompanied by other two member of his group, intriguing to take numerous blameless lives and propitiously completing their target. The author behind the petrifying plan of destroying the masses was Lashkar-e-taiba, their chief agenda was to wage war against the Indians to set free Kashmir.

The High Court of Maharashtra gave a stamp of approval for Kasab's sentence in compliance with the law. The high court of Maharashtra awarded him with death penalty, belated two appeals were filed in Supreme Court of India. Not a single lawyer was in a fit state to take hold of Kasab's case as it was perspicuous that he is to be blamed for mentioned offences and would be punished rigorously.

### **(B) Facts in issue**

The court's dominant concern was whether Appellant was awarded with free and fair trail according to Article 21 of the Constitution. The query arose whether Kasab was furnished with reasonable capital punishment. S. G Abbas Kazmi, Appellant's Lawyer, filed for a query under Section 7(A) of Juvenile Justice Act,2001.

### **(C) Arguments**

1) Whether Kasab undergo free and fair trial in accordance with due process of law?

1. Inside the courtroom, an issue was raised that right to seek advice and be protected by a lawyer is not to be interpreted as allowing or authorizing the companionship of legal practitioner during cross questioning by the police. The prime objective of the legal practitioner is to concentrate on the court's hearings. Due to absence of lawyer to defend Kasab, Court ordered to assign the Appellant with a lawyer to represent his side, Kasab requested for a Pakistani lawyer in particular. He urged for Natural Justice. The court is obliged to supplement the accused with a lawyer unless the person charge with offence discretionarily opts for representing himself in the court. To address a trial as free and fair the court is required to provide the accused with a lawyer. Kasab was granted with A senior advocate and an assisting junior advocate, but soon the decision was withdrawn by the court due to conflict of interest between lawyer and accused. Subsequently, Abbas Kazmi a lawyer from Pakistan was designated to Kasab. Abbas was determined to postpone the court hearing and this fact was not interrogated or paid attention to at all. During the trial proceedings, the court obliged with all due processes, they furnished the appellant with a lawyer and it was Appellant's decision to not be represented by lawyer at pre-trial, therefore there was no contravention of provisions of the Indian Constitution.

2. By repudiating the extremist a fair trial, we are violating the people's fundamental rights and, inadvertently, inciting our police force to use unauthorized methods of torment and encounter killing. It makes sure that the court system is not corrupt by ensuring a fair trial. Given that Kasab and his companion waged war and attacked Mumbai to liberate Kashmir, he is prima facie guilty of all accusations brought against him. It was decided in the case of State of Bombay v. Kathi Kalu Oghad that no individual may be forced to testify against himself. According to Article 22(3) of the Indian Constitution, which states that no accused person may be forced to testify against himself, the court upheld his rights. In the case at hand, all police inquiries will not be used against him in court, and it is the responsibility of the relevant authority to inform him of this. The court also cited Section 161 of the Criminal Procedure Code, which prohibits police from requesting information that could lead to charges being brought against them. Following Section 161, similar clauses outline the same guarantee for the arraigned to have a free and fair trial in the court. According to the ruling in M.H. Hoskot v. State of Maharashtra, the arrested is entitled to free legal representation under Article 21 of the Constitution. As a result, it was argued that the trial was fair and free.

2) Appellant provided the unbaised Capital Punishment-

1. According to the terms of Sections 120, 300, 121, and Section 16 of the Unlawful Activities Prevention Act of 1967, Kasab was guilty as accused and deserved the death penalty. According to the ruling in the case of *Bacchan Singh v. State of Punjab*, death sentences are only imposed in the rarest of cases. The rarest of cases refers to those that are extraordinary and out of the ordinary for an offence. When severe injury is sustained, it is given. Kasab committed an awful act in the current instance by murdering masses. He engaged in an act computing to Waging war against the Government of India. In *Baccha Singh v. State of Punjab*, a case that fell under the theory of the rarest of the rare cases, the capital punishment was made an exception with a justification between 1973 and 1980. According to Article 21, the topic of the death punishment only arose where there was a genuine and persistent opposition to the use of the legal system to take a life. What one person may find to be gory may not be same for someone else. But in the present instance, Kasab's abdominal actions are quite visible.
2. Kasab was therefore deserving of all the punishment he received. Kasab cannot save himself in this circumstance because he has slain hundreds of people, including women, seniors, and children. Here, his age does not support the situation he is in. He deserved the harshest penalty imaginable, so the death penalty was fair.

## **II. 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.

## **III. JUDGEMENT**

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

1. Article 20(3)'s prohibition on self-incrimination does not apply to voluntary declarations made out of volition and free will. We also acknowledge that the Evidence Act of 1872, Sections 161, 162, and 164 of the Criminal Procedure Code, and the right against self-incrimination under Article 20(3) are all manifestations of enforceable due process; as such, submissiveness

with these statutory provisions equates to compliancy with constitutional protections. It was debated that despite the fact that regulations are not existent in Indian law, its commentary already contains the rules to broaden the accused's protection against self-incrimination, despite *Miranda v. Arizona* showing the contrary.

2. A crucial component of due process and one that is implicitly guaranteed by Article 21 of the Constitution is the right to free legal representation. *State of Bihar v. Khatri* to provide a lawyer to an accused person: "This Court has pointed out in *Hussainara Khatoon (IV)* case (94), which was decided as early as March 9, 1979, that the right to free legal services is clearly a necessary component of a reasonable and fair. The State is required by constitutional law to facilitate a legal practitioner to a charged person if the situation of the case and justice facilitation require so, provided, of course, that the accused person does not object to the provision of such lawyer. This right to a fair trial and just processes for someone accused of an offence must be held implicit in the guarantee of Article 21.

3. Every charged person who is not represented by a legal practitioner at the beginning of the trial must be given a lawyer who will stand up for him throughout the entire proceeding. The court has a constitutional obligation to assign the accused a counsel prior to the start of the trial, even if he does not request one or remains mute. The obligation to provide the accused with a lawyer at the start of the trial is absolute, and failure to do so would void the trial and the subsequent conviction and sentence, if any, given to the accused. This is true even if the accused voluntarily makes an informed decision and expresses to the court in clear and unambiguous words that he does not require the guidance of any legal practitioner and discretionally declare to represent himself in the court.

4. It was crucial to have access to legal counsel to guarantee that all statutory requirements were followed to the letter because, if they were, there would be no opportunity for constitutional or human rights violations. Yet, while police detention or questioning, the accused is not entitled to legal representation.

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

1. After a fair trial that followed Indian law and the Constitution, Kasab, a Pakistani patriotic, was sentenced to five capital punishment and an equal number of life imprisonment for these terrorist actions. Kasab was expressly responsible for all the accusations made against him. The graphic, violent episode that occurred in Bombay was broadcast live on television, allowing the entire nation to witness it.

2. The Court believed that the appellant had received a complete and fair trial. For instance, he chose to first reject the offer of an Indian attorney, even though his desire for a Pakistani attorney was ultimately accepted. There was no indication of inappropriate duress in the circumstances surrounding the minimal concessions he had made in the form of admissions. However, he was later given access to an Indian attorney and later cancelled the agreement due to a conflict of interest between the parties. Eventually, upon his request, the Pakistani attorney was also made available to him because no Indian counsel was ready to take up his case.
3. The Supreme Court believed that the application of the death penalty was fully warranted based on the evidence and that the accuse lacked penitence for the heinous crimes he carried out precluded the possibility of his reform. He could not be saved because what he committed was abhorrent and killed women, children, and the elderly. Capital punishment in this case was totally deserved because even rehabilitation facilities cannot alter him because he had no remorse and, given the chance, might have done far worse.
4. Yet, we deem Mr. Subramaniam's arguments to be equally objectionable when it comes to the right of the suspect to be represented by a legal practitioner. According to Mr. Subramaniam, the right to be represented by counsel only becomes concrete at the point of the trial's opening under Section 304 of the Criminal Procedure Code. Article 22(1) just permits an arrested individual to speak with a lawyer of his choosing. We believe that such a viewpoint is unjustified and unsupportable for two reasons. Such a viewpoint ignores the socioeconomic reality of the nation and is first founded on an unreasonable narrow interpretation of the Constitution and statutory provisions.
5. An indigent accused person has a constitutional right to free legal representation at all stages of the judicial process, including the initial appearance before the magistrate and any subsequent remands.
6. The Magistrate or Sessions Judge before whom the suspect is produced shall be regarded to have a duty to advise the accused that he is entitled to receive free legal assistance at the expense of the State if he is unable to retain the services of a lawyer due to poverty or indigence. All magistrates in the nation are required by the SC to faithfully fulfil the aforementioned duty and obligation. The SC also clarifies that any failure to do so would constitute dereliction of duty and subject the concerned magistrate to departmental actions.
7. The appellant's unwillingness to use an Indian attorney's services and his urge for an attorney from his nation can only be a result of his own free will. In those circumstances, and

particularly when Pakistan denied that the appellant was even a citizen of Pakistan, the demand for a Pakistani lawyer may have been unfeasible or even foolish, but the man did not require any guidance from an Indian court or authority regarding his rights under the Constitution of India.

8. In the case of *Bachan Singh v. State of Punjab*, excessive cruelty was used to assault the Indian government, and the country's sovereignty was sufficient to satisfy the case's requirements. The death penalty is appropriate in all cases of this nature. In this case, the death penalty was determined to be the rarest of the rare.

#### **IV. CRITICAL ANALYSIS**

##### **(A) Analysis Of Freedom Of Speech And Expression**

1. The media had a considerably larger role in all of this; the mainstream and electronic media covered the attacks on the residents of the Taj Hotel, Hotel Oberoi, and Nariman House live on television. As a result, the criminals and their allies who were sitting across the Indian boundaries were able to plan their next move because they were receiving real-time updates from the media. From beginning to end, the media continuously broadcast the graphic details. The battle among media outlets to broadcast the most recent news and boost the TRP of their programmes was fierce. Every citizen was given the right to freedom of speech and expression under Article 19(1) of the Constitution. But it was not valid on press part. That was challenging and dangerous to show in the media. In this case, it was utterly inappropriate and unacceptable. This institution's legitimacy is examined. In India, the media plays a significant role. It is thought of as a public court. In the case of *Y.V. Hanumanta Raov. K.R. Pattabhiram and Associates*, it was determined that no one should remark on the case due to the genuine and significant risk of prejudice or any situation connected. In the *Priyadarshini* case and the *Jessica* murder case, we have established the involvement of the media and its improbable methods for portraying cases that may ultimately be found to be legally incorrect.

##### **(B) Analysis of Self Incrimination**

1. In the matter at hand, it was established that the accused has a right to silence and requires the presence of a lawyer during questioning in accordance with the *Miranda v. Arizona* Case. Yet, there is no such clause in Indian law. Yet after careful analysis, it was discovered that the *Miranda* rules are already included in Indian law. *Kasab*, however, received very strict defences against being implicated in his own crimes.



According to Articles 25 and 26, it was decided that any confession given to the police is invalid and cannot be used as evidence in court. In *Sarwan Singh v. State of Punjab*, it was decided that the accused shall have at least 24 hours to consider whether or not he wishes to confess. In general: Trial Judge hailed as true flag-bearer of rule of law in India; trial court records of this case directed to be included in curriculum of various Judicial Academies in country; conduct of proceedings by trial Judge in case having international ramifications; quality of record maintained by him. Nonetheless, Kasab was well-prepared with his planning and preparation beforehand, and the execution of the plot received intense and demanding combat training. The war's scope cannot be comparable in any way; it was that intense. The number of fatalities is shockingly high and does not even include women, youngsters and seniors. The incident rocked everyone's collective consciousness on the planet.

2. There are serious concerns about the interrogation procedure. The presence of a legal practitioner is mandatory or not in circumstances where it is absolutely necessary to question the subject using these methods. It has been seen in a number of situations connected to it. The appellants in *Poolpandi v. Superintendent and Central Excise*, who had been summoned for questioning during an investigation under the provisions of the Customs Act of 1963 and the Foreign Exchange Regulation Act of 1973, argued for the right to have their attorney present during questioning by heavily quoting *Nandini Satpathy*. So, the issue before the court was whether or not a person who has been called in for questioning had a right to an attorney's presence during questioning. In the case of *D.K. Basu v. State of West Bengal*, it was decided that attorneys can be present, but they must keep a particular distance or a glass partition must be present while an interrogation is taking place. In the *Navjot Sandhu* case, it was stated that the accused should be read their right to remain silent and their right to counsel, along with the repercussions of failing to do so. Some constitutional protections are incorporated into Section 32 of the Act, and to a lesser extent, Section 52, within the strict framework of the POTA. However, the standard criminal law procedure in India, which is governed by the Cr.P.C. and the Indian Evidence Act, has a fundamentally different and significantly more liberal framework, in which the rights of the individual are safeguarded in various ways more effectively and efficiently. So, it is incorrect to claim that what is said in the context of the POTA should equally apply to the traditional criminal justice system.
3. Finding the truth is the primary goal of the legal system, not shielding the accused from

the wrongdoings he did. The defence attorney must restrict himself to using the already-done investigation evidence. If a voluntary confession is obtained during an inquiry, it should be accepted legally, morally, and constitutionally within the confines of Section 64 of the Criminal Procedure Code. In the case of *State of West Bengal v. Anwar Singh Sarkar*, the court decided that the constitution should be left open-ended enough to occasionally adapt to the changing demands of a changing world with its fluctuating priorities. Because of this, I believe that judges should analyse the facts of each case specifically, much like a jury would do. But, this isn't quite the same as a jury because we are examining a legal issue, not just a factual one. In *Hussainara Khatoon (IV) Home Secretary v. State of Bihar*, this Court referred to Article 39-An, which had just recently been added to the Constitution, and stated that it stressed the importance of free legal advice as a necessary component of a "sensible, reasonable, and only" approach because, in the absence of it, a person suffering from financial or other incapacitations would be prevented from ensuring equity.

(C) Was It Equitable To Give Little Time To Prepare For LAWYER

1. After conducting an investigation, the court denied Mr. Kazmi's application that raised the question of the litigant's immaturity. Mr. Ramachandran said that the preliminary court's eight-day deadline for the court-appointed legal counsellor was absurdly brief given that Mr. Kazmi had raised a reasonable request for nearly a month's worth of work. The knowledgeable Counsel made the argument that equity must not only be done but also be thought to have been done, and that the short period given to the defence attorney violated this norm and so interfered with a reasonable presumption. He drew attention to the fact that when Mr. Kazmi was named, the court assumed that he was a legal advisor of some kind and would need to modify his various responsibilities. Hence, Mr. Ramachandran argued that the preliminary procedure was also tainted and that it couldn't be deemed to be fair, reasonable, or logical because the defence attorney wasn't given enough time to present his case.
2. It was determined in *Owais Alam v. State of U.P.* that the court may grant the attorney enough time to prepare the case. Similar to this, it was determined in *Bashira v. State of U.P.* that the court requested a new trial because the attorney didn't have much time to prepare. Nonetheless, in the case at hand, Kazmi never voiced a complaint about running out of time to prepare the case. Throughout the trial, however, he does not provide any opportunity to obnoxiously object to the court's procedures, even though time was never the cause of the protest.

3. 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," said Patanjali Shastri, J., in *A.K. Gopalan v. State of Madras*. Hence, regardless of any errors made by the court, Kasab was a terrorist and thus deserved the death punishment.

## **V. CONCLUSION**

One of the terrible things of our day is terrorism. It poses a serious threat to humanity with its deadly spread. The different factions that have been growing in small towns and society are a serious threat, and attention must be paid to them immediately. The studies given to them with a purpose, whether religious, to incite hatred, or for any other reason, pose the greatest harm because they inherently lead to mental corruption. One of the perpetrators of this threat, Kasab, entered India illegally with the goal of liberating Kashmir before attacking Mumbai, one of the country's most significant cities. The Kasab trial was equitable and fair, although there is a claim that the evidence about the court's procedure was deficient, despite the fact that Kasab has evidently committed the acts for which he was charged. Given that his crime fell under the doctrine of the rarest of the rare and was beyond hideous and horrific, his death penalty was justifiable. He was therefore deserving of death. The courts displayed judicial respect in the area of national security.

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