

PETITIONER:
ANIRUDHSINHJI KARANSINHJIJADEJA & ANR.

Vs.

RESPONDENT:
THE STATE OF GUJARAT

DATE OF JUDGMENT 11/08/1995

BENCH:
HANSARIA B.L. (J)
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HANSARIA B.L. (J)
AHMADI A.M. (CJ)
SEN, S.C. (J)

CITATION:
1995 AIR 2390 1995 SCC (5) 302
JT 1995 (6) 146 1995 SCALE (4) 715

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

HANSARIA, J.

The two appellants are in jail being accused of having committed offences, inter alia under Sections 3 and 5 of the Terrorists and Disruptive Activities (Prevention) Act, 1987 (for short 'the TADA'). Their prayer is to release them on bail, which has been denied by the Designated Court. In support of this plea, a large number of points were raised before us in course of arguments. It is not necessary to go into all these questions as, according to us, the appeal deserves to be allowed on the sole ground of wrong invocation of TADA in the case of the appellants.

2. To bring home the above, we may note the prosecution case in short, which is that:

".....on March 15, 1995 one Jayantilal Mohanlal Vadodaria who is a son of elder brother Mohanlal Kalabhai of the complainant, was murdered by some assailants near Ashapura Dam at the distance of 3 K.M. from Gondal town. So on receiving this information, the complainant went to the scene of offence where a dead body of his nephew Jayantilal was lying. One Vespa-scooter of the deceased was also lying there. It was found that there were injury marks by fire on the body of the deceased. There was a certridge of red colour which was used, was lying near the body. It was further stated in the complaint that deceased Jayantilal was travelling on his scooter for going to his vadi from his house at 4.00 p.m. as usual and he was passing throught the way of

Ashapura Dam. His vadi is situated on the road of Kotda Sangani Village".

3. It has been alleged that deceased Jayantilal, aged 32 years, was a resident of Gondal and was a leading member of the Patel community. Previously, he was a member of the Gondal Nagar Palika and also Director of Gondal Nagrik Sahakari Bank. The post-mortem revealed that the deceased had received gun-shot injuries and also injuries caused by knives. The murderers had come in a white Ambassador Car No. GIG-375 and had fired twice at the deceased and had caused injuries by sharp weapons. After killing the deceased, the murderers absconded. The car was ultimately recovered from a place within Jamkandorna Police Station, and all the four accused were arrested there on 16.3.1995 at 2115 hours.

4. The further allegation is that the four persons, after committing the murder, went to Anirudhsinh Karansinh Jadeja, Sarpanch of village Mota Umvada and a resident of that village and sought refuge. Anirudhsinh was in his field at that time (5.30 P.M.) and Digubha Jadeja was present there. Anirudhsinh declined to provide shelter but agreed to keep the weapons. One country-made gun with cartridges and two knives were packed in a kundle and Vishubha and Digubha had concealed the bundle by digging a pit on the ground of a small room in the field belonging to Anirudhsinh. After hiding the weapons, Vishubha along with other alleged murderers left the field and went away by the white Ambassador car in which they had come. Police arrested and started criminal proceedings not only against the alleged murderers but also against Anirudhsinh Jadeja and Digubha Jadeja, the appellants herein.

5. Anirudhsinh (appellant No.1) was produced before the Executive Magistrate, Gondal, on 18.3.1995 on the allegation that one country made gun and cartridges were recovered from his field and a case was registered against him under Section 25(1)(b) of the Arms Act bearing Crime Registration No.28/95. The allegation against Digubha; appellant was that he had abetted in secreting the weapon. They were arrested and produced before the Executive Magistrate who granted five days' remand. On a prayer made on behalf of the appellants on 23.3.1995, the Executive Magistrate directed the police authorities not to ill-treat the appellants. On 24th March, 1995 the Executive Magistrate sent all the accused persons, including the appellants, to hospital where they were kept till 27th March, 1995. Thereafter, an order was passed on 27th March, 1995 by which all the accused were remanded to judicial custody. On behalf of the State, the order of the Magistrate refusing police remand was challenged before the Sessions Judge. On 28th March, 1995 the appellants had made an application for bail, which was rejected by the Designated Court on 18th April, 1995. Hence this appeal to this Court by special leave.

6. The first point to be decided is about the legality of invocation of TADA. Its Section 20-A lays down:-

"Cognizance of offence.

20A. (1) Notwithstanding anything contained in the Code, no information about the commission of an offence under this Act shall be recorded by the police without the prior approval of the District Superintendent of Police.

(2) No court shall take cognizance of any offence under this Act without the previous sanction of the Inspector-General of Police, or as the case may be, the Commissioner of Police".

7. Therefore, condition precedent for recording an information about the commission of an offence under TADA is the approval of the District Superintendent of Police and cognizance of any offence under TADA cannot be taken by any court 'without the previous sanction of the Inspector-General of Police, or, as the case may be, the Commissioner of Police'. The provision of the statute is clear that the District Superintendent of Police under sub-section(1) can grant approval/sanction for recording of any information about commission of an offence under TADA. The jurisdiction under Section 20A (1) to grant approval for recording of any information about the commission of an offence under TADA, has been vested in the District Superintendent of Police.

8. In the instant case, a specific point has been taken in the Special Leave Petition that prior approval, as required by section 20A(1) of TADA, was not taken. This section was introduced to safeguard the citizens from vexatious prosecution under TADA. The Designated Court had failed to appreciate that the DSP had not given prior approval and the case of the appellants under TADA was, therefore, nonest.

9. This ground appears to be of substance. The DSP did not exercise the jurisdiction vested in him under Section 20A (1). On the contrary, he abdicated his jurisdiction and referred the matter to the Additional Chief Secretary, Home Department, on 17th March, 1995, requesting for permission to invoke the provisions of Sections 3 and 5 of TADA by sending a report for this purpose as under:-

"In the matter of Gondal City Police Station I.C.R. NO.34/1995 under Section 302. 120-B of the Indian Penal Code and Indian Arms Act Section 25(1) (c) of the Indian Arms Act the facts are that the victim, i.e., the deceased Jayantibhai Mohanbhai Vadodaria, aged 32, resident of Yoginagar, Gondal was an active member of B.J.P. and was a leader of Patel community. In past, he was member of Gondal Municipality and was also a director in Gondal Nagrik Sahakari Bank Ltd., which is managed by B.J.P.

on 15.3.1995 when the First Chief Minister of B.J.P. Government took oath and installation ceremony was being performed at Gandhinagar, on that very day in the evening at 14-30, Jayantibhai Vadodaria was killed on Ashapura Dam by firing shots and by sharp weapons. The complaint of this murder is lodged by Shri Nanalal Kalabhai Patel, the uncle of deceased and on the strength of that complaint, on making investigation, it is revealed that the murderers had come in white coloured Ambassador car No. GRG 375 and had fired twice on him and had also caused injuries by sharp weapons and killed Jayantibhai and then they have absconded. In this case during the investigation, the names of following persons are disclosed:

1. Dinubha alias Dineshsinh Kiritsinh Jadeja, Resident of Gondal.
2. Harshyamsinh Jalamsinh Jadeja, Dismissed Constable of SRP,

resident of Sindhavadar. Tal Gondal.

3. Veshubha Abhesinh Jadeja, (SRP Constable) resident of Gondal.
4. Jitendrasinh Chandrasinh Chudasam, resident of Virpur (Jetpur).

During the course of investigation, on 16.3.1995 at 21-15 all the four accused are arrested from the limits of Jamkandorna Police Station along with the car used in the offence.

All the four accused declare during investigation that they reside in Gondal and when accused No.2 and 3 was in need of loan from Gondal Nagrik Sahkari Bank and had contacted the deceased who was director of the said Bank at that time, the deceased had told to the applicant, i.e., accused No.2 and 3 herein that 'Go Go, this Bank is not meant for Darbars; for getting loans, only Patels may come to me and no Darbar can get loan'. On this talk, there was quarrel. This quarrel had taken place before about 10 or 12 days and since then the said four Darbars had decided to kill Jayantibhai, else, the strength of Patels will be increasing, therefore, since last 10 days, they were planning to kill Jayantibhai and on 15.3.1995 on finding an opportunity, they have killed him. In past also the murder of MLA of Gondal, Popatbhai Sorathia by the member of Darbar community. Therefore, on happening of the present incident, the members of Patel community are feared and frightened and nobody dared to come to Police Station. Later on Jayantibhai Dhol a leader of Patel community, informed us on telephone at Rajkot and told about the incident and requested to make some arrangement and to direct the local police to reach at the scene of offence. Therefore, we informed local police and after the local police reached on the scene of offence, the family members of the deceased could not go there.

All the accused who have committed the murder belong to Darbar community and by committing murder of Patel leader, they have created enmity between the two community. In Gondal City in past also the Darbar community have committed the murder of Patel leader and now also Jayantibhai is murdered mercilessly by firing shots and knife blows and they have spread the atmosphere of terror and fear. Therefore, the harmony between the two community is very seriously and adversely affected. because of this incident, the people in that area had started running and moving here and there and the hawkers doing business in

hand-crafts were also frightened and ran away. The police force in large number was put on patrolling and numerous vehicles and police officers were put to patrolling and only thereafter public could dare to come out from home.

From the above facts, it is clear that the accused have committed offence under Sections 3 and 5 of the Terrorist and Destructive Activities (Prevention) Act, 1987 by keeping illegal weapons and by keeping ammunition and therewith murdering the citizen, they have done the act of terrorist and offence under Section 5 of the said Act is committed.

C.I.D., I.B. of Gujarat State has also reported that due to this incident and as a reaction of this incident, the enmity prevailing in Saurashtra between Darbar and Patel Community may intensify and opposite party, i.e., Patels may also indulge in such activities.

Considering the situation which has arisen permission may please be given to invoke the provisions of Sections 3 and 5 of the TADA in this matter.

Sd/- in English

District Police Superintendent
Rajkot Rural, Camp at Gondal".

10. The Deputy Director-General of Police and the Additional Director-General of Police also sent FAX Messages to the Chief Secretary on 18th March, 1995, requesting him to grant the prayer of the DSP and permit him to proceed under TADA. On 18th March, 1995, the Additional Chief Secretary, Home Department, gave sanction/consent to apply provisions of TADA; and the District Superintendent of Police, Rajkot Rural, was informed accordingly. There is nothing in the Act to suggest that the Additional Chief Secretary has to grant permission to the District Police Superintendent for proceeding under TADA.

11. The case against the appellants originally was registered on 19th March, 1995 under the Arms Act. The DSP did not give any prior approval on his own to record any information about the commission of an offence under TADA. On the contrary, he made a report to the Additional Chief Secretary and asked for permission to proceed under TADA. Why? was it because he was reluctant to exercise jurisdiction vested in him by the provision of Section 20A (1)? This is a case of power conferred upon one authority being really exercised by another. If a statutory authority has been vested with jurisdiction, he has to exercise it according to its own discretion. If the discretion is exercised under the direction or in compliance with some higher authority's instruction, then it will be a case of failure to exercise discretion altogether. In other words, the discretion vested in the DSP in this case by Section 20A (1) was not exercised by the DSP at all.

12. Reference may be made in this connection to Commissioner of Police vs. Gordhandas Bhanji, 1952 SCR 135, in which the action of Commissioner of Police in cancelling the permission granted to the respondent for construction of cinema in Greater Bombay at the behest of the State Government was not upheld, as the concerned rules had conferred this power on the Commissioner, because of which it was stated that the Commissioner was bound to bear his

own independent and unfettered judgment and decide the matter for himself, instead of forwarding an order which another authority had purported to pass.

13. It has been stated by Wade and Forsyth in 'Administrative Law', 7th Edition at pages 358 and 359 under the heading 'SURRENDER, ABDICATION, DICTATION' and sub-heading "Power in the wrong hands" as below:-

"Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with some one else, or may allow some one else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the courts in applying this principle that they condemn some administrative arrangements which must seem quite natural and proper to those who make them.....".

"Ministers and their departments have several times fallen foul of the same rule, no doubt equally to their surprise....".

14. The present was thus a clear case of exercise of power on the basis of external dictation. That the dictation came on the prayer of the DSP will not make any difference to the principle. The DSP did not exercise the jurisdiction vested in him by the statute and did not grant approval to the recording of information under TADA in exercise of his discretion.

15. The aforesaid is however not all. Even if it be accepted that as an additional safeguard against arbitrary exercise of the drastic provisions, the State Government had provided by administrative instructions an additional safeguard where under the DSP was required to obtain the sanction/consent of the State Government, we are of the view that in the present case the same was given by the State Government without proper application of mind. We have taken this view because the sanction/consent was given by the Government merely on the basis of the FAX message dated 17.3.1995 of the DSP. The reason for our saying so is that though there is on record a FAX message of Deputy Director General of Police also, which is dated 18.3.1995, the sanction/ consent order has mentioned above the FAX message of the DSP only. Now, no doubt the message of the DSP is quite exhaustive, as would appear from that message which has been quoted above in full, we are inclined to think that before agreeing to use of harsh provisions of TADA against the appellants, the Government ought to have taken some steps to satisfy itself whether what had been stated by the DSP was borne out by the records, which apparently had not been called for in the present case, as the sanction/consent was given post haste on 18.3.1995, i.e., the very next day of the message of the DSP. It seems the DSP emphasised the political angle in the first two paragraphs of his message. The dispute or motive stated was that the Darbars were annoyed because they were refused loan and not because of

any political rivalry. In the third paragraph there is reference to statements of accused after arrest which would ordinarily be inadmissible in evidence. Reference to avoid incident of the past does not provide any nexus. The State Government gave the sanction without even discussing the matter with the investigating officer and without assessing the situation independently. All these show lack of proper and due application of mind by the State Government while giving sanction/consent.

16. For the aforesaid twin reasons we state that the entire proceeding against the appellants under TADA is vitiated and the same is, therefore, quashed. It would however be open to the respondents to proceed against the appellants even under the TADA in accordance with law.

17. Insofar as other offence is one under Section 25(1) (b) of the Arms Act is concerned, no contention has been advanced to deny bail to the appellants. We, therefore, order the release of the two appellants on bail on each of them furnishing a bond of Rs. 10,000/- with one surety in the like amount. The appellants shall observe the following conditions also after release on bail:

(1) They shall make themselves available for interrogation by police as and when required.

(2) They shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade them from disclosing such facts to the court or to police.

(3) They shall not leave the State of Gujarat without the permission of the Designated Court.

18. The appeal is allowed accordingly.