

CASE NO.:
Appeal (crl.) 756 of 2003

PETITIONER:
DURGA PRASAD GUPTA

RESPONDENT:
STATE OF RAJASTHAN THROUGH C.B.I.

DATE OF JUDGMENT: 25/09/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT

JUDGMENT:
JUDGMENT

2003 Supp(4) SCR 1

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. : Appellant was found guilty of offences punishable under Section 5 of Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the "TADA Act"), Sections 4 and 5 of the Explosive Substances Act, 1908 (in short the 'Explosive Act') and Section 9-B of Explosives Act, 1884 (in short the 'Act') read with Rule 115 of Explosives Rules, 1983 (in short the 'Rules').

Prosecution case which led to the trial of the accused who was charge sheeted along with five others in a nutshell is as follows :

On 19.11.1990 complainant Ram Niwas (PW-7), S.H.O., P.S. Mod Dungri, Jaipur filed a written report Ex. P/10-A through Shri Sanwat Singh on the basis of which FIR Ex. P/138 was registered at police station Moti Dungri, Jaipur station that on 19.11.1990 at about 8.15 a.m. complainant Ram Niwas Yadav along with the driver Ram Pratap of the official vehicle were patrolling. At 9.30 a.m. Ram Niwas received information from 'Mukhbir' that the appellant at his residence plot No. A-4, Gupta Bhawan, Deepak Marg, had illegally kept explosives in huge quantity without licence at the godowns and under ground room and at the upper story of his house. On this information, Ram Niwas called Prabhu Dayal A.S.I., Sampat Singh ASI, Sanwat Singh H.C., Jaggu Ram G.C., Gordhan Lal, Ramswaroop, Nand Singh S.I., Suraj Narayan ASI, Bhagwana Ram L.C., Girdhari Lal, Jawahar Lal, Rohitash Kumar from the police stations and the Deputy Controller of Explosive, Adarsh Nagar, Jaipur, was also called. At 10.30 a.m. Ram Niwas along with the above officials Deputy Controller and independent witnesses Abdul Latif and Amardeen gathered at a place. C.O. Adarsh Nagar Sunder Lal S.H.O. Police Station, Adarsh Nagar, Chain Singh, Addl. S.P., Jaipur city were also informed, who come over. The search of the Gupta Bhawan along with the above officials was conducted. During the search, appellant was also present and during the search at the back of his house from godown No. 1, 149 bags and 69 bags containing Barium nitrate powder, 2 bags containing blue coloured powder (explosive substance), 1 bag containing powder chips were found. During the search of godown No. 2, 7 bags of white crystalline powder (Sodium nitrate) and 40 plastic bags containing brown coloured powder, 2 bags containing brownish coloured powder, 1 bag containing gum, 1 bag containing gandhak powder and 1/2 bag also containing gandhak powder were found. During the search of godown No. 3, 10 big iron drums and 7 small drums containing Aluminium powder, 14 bags containing other Aluminium substances, 16 plastic bags containing kusturi coloured shining substance, 25 plastic bags containing shining substance and 1 bag containing 1/2 sinduri colour powder were found. During the search of godown No. 4, 18 bags which were full and 2 bags which were half filled containing yellow sulphur powder and 2 1/2 bags containing yellow coloured mixture and sulphure, 48 bags containing kalmishora were found. During the search of

godown No. 5, 141 bags white coloured powder each bag weighing 15 kilogram and on each bag Calcium ammonium nitrate written were found. During the search of godown No. 6, 176 bags were found, each bag contained 50 kilograms of powder on which Calcium ammonia nitrate was written were found. Thereafter, the underground room of the house of the appellant was searched and 262 cartons of safety fuse were found. Each carton contained 550 meter fuse wire and 18 cartons contained Tiger Brand Commercial safety fuse and each had 150 coils. The length of each coil was 7.32 meters. Thereafter, the room above the godowns was searched and from the room which had an almirah in which big paper cartons containing 50 kilogram explosive, gelatine were found. From the brown packets 10 packets containing 500 electric detonators were found, while the small carton contained 5200 detonators and all these were explosive substances. All the above items were sealed separately and taken into custody and from each godown separate samples for examination were taken and properly sealed, and sample seal was marked on the seizure memos. Appellant was asked to produce the licence for the above explosives, but he said that he did not have a licence. It was accepted that the explosive substances were kept in the godowns for sale. Against the appellant, offences under Section 3, 4, 5 of Explosive Act, Section 9-B of the Act and Section 6 of the TADA Act were made out. On this written report, FIR No. 275/90 was lodged at police station Moti Dungri, Jaipur. Though charge sheet was filed after investigation Government of Rajasthan, with consent of the Ministry of Personnel, Public Grievances and Pension (Department of Personnel and Training), Government of India, New Delhi entrusted the investigation of the case to Central Bureau of Investigation (in short the 'CBI') vide Notification dated 28.10.1991. The case was registered on 9.12.1991 under sections 3, 4 and 5 of Explosive Act, Section 9-B of the Act and Sections 5 and 6 of the TADA Act by DSPE, CBI and further investigation was taken up. Charge sheet was filed by the local police on 23.10.1991 in the Designated Court against four of the accused persons.

According to the prosecution the investigation disclosed that during the year 1989-90 at Jaipur and other-places, Mohd. Ismail Bhat (A-5) entered into a criminal conspiracy with the appellant (A-1), Khaju Lal Golcha and Mitha Lal Golcha (A-2 and A-3) respectively and Kuldeep Jain (A-4) to procure the explosives illegally and divert the same to unauthorized persons for illegal and terrorist activities.

In pursuance of the aforesaid criminal conspiracy, appellant had procured from the accused Khaju Lal, Mitha Lal of M/s Beawar Explosives and Chemicals, Jaipur, Kuldeep Jain. of M/s. Bharat Explosives and Chemicals, Jaipur and others huge quantity of chemicals, gelatine, detonators and safety fuse wire to be used as explosives for terrorist activities and stored the same in clandestine manner in various godowns at this residences, Gupta Bhavan, Plot No. A-4, Deepak Marg, Jaipur, which were recovered by the local police on 19.11.1990. The accused-appellant had booked two consignments of explosives for supply to the accused Ismail Bhat of M/s. Modern Fire Works, Srinagar vide Bill No. 7403 dated 12.11.1990 and Bill No. 7404 dated 12.11.1990, through Transport Corporation of India, Jaipur Branch and consignment note No. V-23343 and V-23344 both dated 14.11.1990 for transportation to Srinagar. These consignment notes contained the description of goods as H.L. chemicals. On 24.11.1990 the said consignments were checked and seized by the police at the godown of Transport Corporation of India, Chikamberpur (U.P.) Ghaziabad border. It was detected that out of said consignments, 27 gunny bags contained 54 cartons of gelatine i.e. explosives and not H.L. chemicals. The contents i.e. gelatine contained in 56 cartons (54 cartons recovered from the godown of Transport Corporation of India and 2 cartons from the residence of accused-appellant) were manufactured by I.C.I. Gomia (Bihar). 56 cartons of gelatine were opened and out of the same, 27 boxes were found containing batch number slips of 13 batches i.e. 3 cartons of batch No. 404, 1 carton of batch No. 411, 1 carton of batch No. 413, 2 cartons of batch No. 418, 2 cartons of batch No. 419, 1 carton of batch No. 423, 3 cartons of batch No. 425, 1 carton of batch No. 428, one carton of batch No. 434, 4 cartons of

batch No. 435, 4 cartons of batch No. 451, 3 cartons of batch No. 457 and one carton of batch No. 461.

The gelatine cartons of the above mentioned 13 batches were initially sold by I.C.I. Gomia to M/s. Jagat Explosives, Udaipur vide Gate Pass No. 2952 dated 29.8.1990 with connected dispatch details No. Jagat/25 dated 29.8.1990 and gate pass No. 3346 dated 28.9.1990 with connected dispatch details No. 6404 dated 28.9.1990. M/s; Jagat Explosive, Udaipur further sold these gelatine boxes to Rameshwar Lal Porwal vide two bills No. 126 dated 29.8.1990 with connected delivery memo 566 and dispatch detail Sr. No. 466 and also bill No. 144 dated 28.9.1990 with connected delivery memo No. 585 and dispatch detail Sr. No. 474. Out of the gelatine boxes so received by Rameshwar Lal Porwal, Shri Krishan Copal Soni who was running the business of Rameshwar Lal Porwal being duly authorized through power of attorney dated 4.7.1998 executed by Ramesh Lal Porwal, sold 180 cartons of gelatine boxes vide Bill No. 156 dated 18.9.1990 and 200 cartons of gelatine vide Bill No. 190 dated 20.10.1990 to M/s. Beawar Explosives and Chemicals, Jaipur, owned by Khaju Lal and Mitha Lal, without mentioning the batch number in the records in violation of mandatory terms and conditions of the licence on Form No. 21 and in contravention of section 9-B of the Act. The accused Khaju Lal and Mitha Lal, partners of Ms. Beawar Explosives and Chemicals had supplied gelatine boxes to the accused-appellant without issuing any bill. Appellant had earlier supplied two consignments vide bill No. 7395 dated 22.10.1990, bill No. 7396 dated 22.10.1990 to the accused Mohd. Ismail Bhat of M/s. Modern Fire Works, Srinagar, through T.C.I., Jaipur Branch giving the description of the articles as H.L. chemicals. These consignments had reached the branch of T.C.I, at its godown Chikamberpur U.P. Ghaziabad border from where the same were transported in truck No. JKS 6749 and the said truck reached Lakhanpur, J&K border where on 18.11.1990, the said consignments were checked and seized by police of J & K as it contained explosives. The J and K police had registered case F.I.R. No. 433/1990, P.S. Kathua in this regard. Similarly, on earlier occasions also accused-appellant supplied 7 consignments during the period from 7.8.1990 to 20.9.1990, through T.C.I, and 18 consignments during the period from 30.6.1989 to 20.3.1990 through Economic Transport Organisation. In the consignment notes prepared on the basis of bills issued by Jaipur Acid Supply Company, Jaipur, the contents of all these consignments were also described as H.L. chemicals/safety fuse/Kalmishora.

The 259 boxes all of Sun Brand, Safety Fuses and bearing box numbers were recovered from the residence of accused-appellant on 19.11.1990, which were found manufactured by Deccan Explosive, Yawat, Pune. All these 259 cases except 3 cases bearing box numbers 56625, 52358, 56301 were procured by M/s Jaipur Acid Supply Company owned by accused-appellant from Deccan Explosives, Yawat, Pune, vide Excise Gate pass No. 1143 dated 17.12.1989, 245 dated 3.3.1990, 330 dated 17.3.1990, 477 to 484 dated 22.5.1990, 554 to 557 dated 11.6.1990, 746, 751, 754 dated 8.9.1990, 826 to 835 dated 22.10.1990. Out of the said three boxes, box No. 56625 was supplied to Ayyappa Fire Works, Irinjalkoda, Kerala vide Excise Gate Pass No. 823 dated 13.10.1990, another box No. 52358 was supplied to Gopu Durga Basu Parsada Rao, Vijawada vide Excise Gate pass No. 330 dated 17.3.1990 and the third box No. 56301 was supplied to M/s. Srikanth Paras Ram Puria, Bilari, vide Excise Gate pass No. 836 dated 27.10.1990 by the manufacturer i.e. Deccan Explosives, Pune.

In addition to the 259 'Sun Brand' safety fuse boxes, other 21 boxes bearing (Tiger Brand) mark and Box Nos., all manufactured by Commercial Explosives, Nagpur were also recovered from the residence of accused-appellant on 19.11.1990. Out of these 21 boxes, 13 boxes bearing Box Nos. 11363, 11365, 11370, 11371 11372, 11373, 11374, 11375, 11377, 11380, 11383, 11384 and 11385 were supplied by Commercial Explosives, Nagpur to Jaipur Acid Supply Company, Jaipur owned by the appellant, 7 boxes bearing box Nos. 31144, 31148, 31162, 31170, 31176, 31177 and 70177 were supplied by the manufacturer to M/s Jaipur Explosives and Chemicals, Jaipur owned by Shri Gopal Modi of Jaipur Explosives, Jaipur. The remaining one box bearing

box No 11361 was supplied by the manufacturer to Twins Armoury of Trivandrum.

As regards 60 small bundles of safety fuse recovered from the godown of T.C.I, at Chikamberpur U.P. Ghaziabad border on 24.11.1990 which were part of the consignment booked by the appellant through T.C.I., Jaipur office vide consignment Note No. V-23343 and V-23344 both dated 14.11.1990, all these boxes were manufactured by Commercial Explosives, Nagpur. However, none of the boxes bore the box number.

Accused-appellant had applied for renewal of licence from time to time and as such transaction of supply of safety fuse wire by Gopal Modi to the accused-appellant was in contravention of the provisions of Explosive Act. The accused-appellant had no licence to deal with gelatine or detonators and as such the transactions to this effect were illegal and were to aid and abet the terrorist activities. Accused Mohd. Ismail Bhat had no licence to deal with gelatine or detonators but he had indulged, in such transaction pursuant to the criminal conspiracy as detailed above. He was having license to deal in gunpowder and 3 cases of safety fuses only.

As regards detonators, in all 5200 special ordinary detonators and 500 electric detonators were recovered from the residence of accused-appellant and 11000 ordinary special detonators were recovered from the godown of T.C.I. Chikamberpur U.P. Ghaziabad border which was a part of the consignment booked on 14.11.1990 by the accused-appellant for transportation to Srinagar. These ordinary special detonators were manufactured by I.D.L. Chemicals Limited, Hyderabad and the remaining 500 electric detonators were manufactured by R.E.C.L., Dholpur. The batch number was not given on any of the packets of detonators. The 11000 ordinary special detonators recovered from T.C.I, godown Chikamberpur U.P. Ghaziabad border were supplied by the accused Kuldip Jain, proprietor of M/s. Bharat Explosives and Chemicals, Jaipur, to the accused-appellant of M/s Jaipur Acid Supply company, Jaipur.

Accused Mohd. Ismail Bhat was engaged in abetting the terrorist activities in J and k and used to procure explosives from the co-accused as preparatory acts for the terrorist activities. Accused Mohd. Ismail Bhat used to take the delivery of the consignments so booked by the accused-appellant of M/s Jaipur Acid Supply Company, Jaipur, through the branch office of T.C.I, and Economic Transport Organization.

According to prosecution the above facts and circumstances of the case clearly establish that the accused Mohd. Ismail Bhatt, accused-appellant, Khaju Lal, Mitha Lal and Kuldip Jain have committed offences punishable under Section 120-B of the Indian Penal Code, 1860 (in short the 'IPC') read with Sections 3(1), 5 and 6 of TADA Act, Sections 3, 4, 5 and 6 of the Explosive Act and Section 9-B of the Act and Section 3(3) and 6 of TADA Act, Sections 4, 5 and 6 of Explosive Act and Section 9-B of the Act. Accused Krishna Gopal Soni has committed offence punishable u/s. 9-B of the Act.

Accused Mohd. Ismail Bhat was absconding and was declared absconder on 25.2.1994. By order of the Designated Court on 1.2.1996, the accused persons facing trial were discharged in respect of offences under Sections 3(3), 4, 6 of TADA Act and accused Khaju Lal, Mitha Lal and Kuldip Jain were discharged in respect of offence under Section 5 of the TADA Act. Accused Krishna Gopal Soni was discharged in respect of offence under Section 9-B of Act. Thus, the case of co-accused Khaju Lal, Mitha Lal and Kuldip Jain was transferred to the Court of Chief Judicial Magistrate, Jaipur under Section 18 of the TADA Act for trial of the offences relating to Sections 6 and 9-B of the Act. Prosecution examined 43 witnesses to further its version. Accused appellant pleaded innocence and took a stand that he had a licence for his business, he has not been present during search of his house and godowns, and gelatine and detonators were not seized from his premises. Since he had applied for renewal of his licence and there was no

letter of cancellation, it is presumed that nothing illegal has been committed by him and he was falsely implicated.

Learned trial Judge found the accused guilty for offences punishable under Section 5 of the TADA Act, Sections 4 and 5 of the Explosive Act and Section 9-B of the Act, after considering the evidence. He was sentenced to undergo five years imprisonment and to pay a fine of Rs. 10,000 with default stipulation in relation to Section 5 of the TADA Act, Similar custodial sentence was imposed for the offence under the Explosive Act and the Act and a fine of Rs. 5,000 for the offence under the Explosive Act and Rs. 3,000 under the Act default stipulation.

The conviction was based on following incriminating circumstances:

(1) recovery of gelatine and detonators from the room above the godown; (2) sale of articles to absconding accused which were seized at the U.P. Ghaziabad border when being taken back to Jaipur. The articles were kept in the godown of the two accused who were facing trial separately and, (3) the confessional statement was recorded before the Superintendent of Police strictly in accordance with law, and that was sufficient for finding the accused guilty with the aforesaid findings, the conclusions of guilt and award of sentence were done.

In support of the appeal, it was submitted that conscious possession which is sine qua non for establishing the accusations has not been proved. It was clear from the evidence that the room from where the contraband articles were seized was easily accessible. Even the witnesses have not consistently said that the room and the almirah from where the articles were allegedly kept were not locked. The Explosives Controller's report is not very clear. There is also no material to show where the articles were kept during the date of seizure and the date of report. Some of the witnesses have not specifically said about seizure of the articles. Section 5 refers to possession "in present". Even if it is held that at some point of time possession was there, and same was pursuant to any conspiracy, that cannot stick to the appellant as there was no charge under Section 120B of the IPC. The confessional statement was recorded without granting proper time for reflection.

It is also submitted that the appellant is nearly 80 years of age and since accusations under the TADA Act have not been conclusively established and the appellant had already undergone custody for about 4 years, the sentence may be reduced to the period already undergone in case it is held that the accusations have been established.

Per contra, learned counsel for the respondent submitted that the stand taken about conscious possession is clearly untenable because the room was part of the premises owned by the accused. There was not even any suggestion that somebody else had planted the articles. On the contrary, the suggestion was that one Chitarmal had kept the articles for safe custody. The confessional statement suffers from no legal infirmity and all requisite procedural safeguards have been taken. It is not the date of discovery which is relevant, and earlier possession subsequent to the date of notification is material. Merely because there has been a detection subsequently, it does not take away the rigor of Section 5. So far as the articles seized at the U.P. Ghaziabad border is concerned, a camouflage was made to take out the articles as if they are harmless chemicals. Appellant himself had admitted that he was previously having a licence to deal with explosives, but the licence was subsequently not renewed. Whether the almirah was locked or whether the room was locked or open does not make any difference when possession has been established.

We shall first deal with the question relating to conscious possession.

Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the

evidence on record is that the accused was owner of the premises. It has not even been remotely suggested that somebody else kept the articles, without his knowledge.

It is highlighted that unless the possession was coupled with requisite mental element, i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 5 is not- attracted.

The expression 'possession' is polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunia and Ors., AIR (1980) SC 52, to work out a completely logical and precise definition of "Possession" uniformly applicable to all situations in the context of all statutes.

The word 'conscious means awareness about a particular fact. It is a state of mind which is deliberate or intended.

As noted in Gunwantlal v. The State of M.P., AIR (1972) SC 1756 possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.

The word 'possession' means the legal right to possession (See Health v. Drown, [1972] 2 All ER 561 (HL)). In an interesting case it was observed that where a person keeps his firearm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same.

See Sullivan v. Earl of Caithness, [1976] 1 All ER 844 (QBD).

Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge.

The factual scenario noticed by the trial Court is based on the evidence of PWs 2 and 5. The evidence of the Explosive Controller and the analysis made by him has been established. The Explosive Controller's report shows that the seals were intact. In fact the suggestion given by the defence was that the goods were kept for safe custody by one Chitarmal. It strengthens the prosecution version rather than weakening it. Samples (Ext. 25) draw on 19.11.1990. It was found out that the articles were gelatine, electric detonator and detonator. There was an attempt to erase the seals of the manufacturer on the seized containers. The Explosive Controller has indicated about the seals to be intact. In State of Tamil Nadu v. Sivarasan @ Raghu @ Sivarasa and Ors., [1997] 1 SCC 682 it was held that the prosecution must prove that the accused was in conscious possession unauthorisedly in a notified area of any specified arms and ammunition. The large quantities of the explosives and other contraband articles not only belies but militates against the very plea of the appellant relating to conscious possession. No further nexus with any terrorist or disruptive activity is required to be proved as a statutory presumption would arise that the said arm or explosive substance was meant to be used for a terrorist or disruptive act.

Statements of Ramniwas (PW-7), Nand Singh (PW-5), Prabhu (PW-6) has been analysed in great detail. The Explosive Controller, Dr. S. Kamal was examined as PW-8. As rightly noticed by the trial Court in spite of lengthy cross examination, no crack has been noticed in their statements to discredit their testimony.

It has been noticed by the trial Court that there was only one entrance towards the concerned room which was above the godown at the back of the house. It was not an open place as contended to which any one, without

getting into the house itself, can gain entry. In Sivarasana's case (supra) it was observed that gelatine goods were explosive substance within the meaning of Section 5 of the TADA Act. Since it is a complete article or device capable of exploding, ordinary detonator and electric detonators are also complete explosive substances within the purview of Section 5 of the TADA Act. Additionally, the ordinary detonator and electric detonator in huge quantity were seized. The possession of these articles in such large quantity by the accused has been proved and there is nothing to discard the prosecution version that the possession was conscious. Additionally, the confessional statement recorded by PW-4 does not suffer from any infirmity. Though it is desirable that sufficient time gap should be given to the declarant, in addition, to telling him that the statement could be used in law against him, there is no rigid formula as to what would be an adequate time. It would depend upon the circumstances of each case. On the facts of the present case, the time though was not very long, yet cannot be said to be too short to cast doubt on the voluntariness of the statement. At no point of time there was any challenge made that the statement which was produced in the Court in presence of the accused was not voluntary and/or was the result of coercion or undue influence or threat. In fact there was no denial of the fact that the statement was recorded. It has not been shown as to in what manner the accused has been prejudiced by non-granting of longer time. The statement recorded is very elaborate and the accused has inculpated himself with the details like the source of purchase of the articles which were within his personal and special knowledge. There is no reason to discard the evidence of PW-4, and The confessional statement.

In S.N. Dube v. N.B. Bhoir and Ors., [2000] 2 SCC 254 it was held that neither Section 15 of the TADA Act nor rule 15 contemplates recording of confessional statement in two parts or giving time to the person making a confession to think over and re-consider whether he still wants to make the statement inspite of being told that he is not bound to make it and that it can be used against him. The ratio of this decision has full application to the facts of the present case. In view of these findings, it is not necessary to go into the other question whether the past transactions come within the umbrella of Section 5, though prima facie that appears to be the correct position. That being the position, the appeal is without merit and deserves dismissal, which we direct.