

PETITIONER:
SHAIKH UMAR AHMED SHAIKH & ANR.

Vs.

RESPONDENT:
STATE OF MAHARASHTRA

DATE OF JUDGMENT: 28/04/1998

BENCH:
G.T. NANAVALI, V.N. KHARE

ACT:

HEADNOTE:

JUDGMENT:

J U D G E M E N T

V.N. KHARE, J.

This criminal appeal under section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as TADA), at the instance of two appellants herein, viz., Shaikh Umar Ahmed Sahikh and Mohd, Naim Mohd. Yasin Qureshir, is directed against the judgment and order dated 14.10.97 passed by the Designated Court, Greater Bombay, Maharashtra in TADA Special Case No. 21 of 1994, whereby the Designated Court has convicted the two appellants under section 3(2)(i) of TADA read with section 149 IPC and sentenced them to undergo life imprisonment. The appellants have also been convicted and sentenced to life imprisonment for the offence punishable under sections 302/149 IPC and sentenced to pay a fine of Rs. 500/- each, in default to suffer R.I. for six months. Both the substantive sentences were directed to run concurrently.

Prosecution story in brief is, that on 7.12.92, the area where J.J. Hospital is situated was in the grip of communal riots as a result of which prohibitory orders were promulgated. In Ward No. 46 of the said hospital where undertrial of various criminal cases were usually kept for medical treatment, a police escort consisting of one Head Constable and three constables was being provided there from the police headquarters. Head Constable Chandrakant Pamji Khopkar (Buckle No. 17481) was in charge of the police constable S.P. Shinde (Buckle No. 27252), Police constable Rahul Hanumant Gaikwad (Buckle No. 414) and the third Police constable (Buckle No. 27231) were on duty at Ward No. 46 along with Head Constable Khopkar. At around 7.30 P.M., on the said day, when the next batch of police escort party arrived at the ward, Head Constable Khopkar handed over the charge to the next batch, and took out the uniform shirt and wore a red coloured shirt. So also Police constable Shinde and Gaikwad changed their uniforms. Thereafter Head Constable Khopkar and the other three constables left Ward No. 46 and climbed down the building of the J.J. Hospital through gate No. 9 and reached at J.J. Corner where they took turn and proceeded towards byculla Railway Station. The third constable (Buckle No. 27231) went away from the J.J.

Hospital premises. Head Constable Khopkar was walking ahead and from he distance of about 25 feet, constable Gaikwad and constable Shinde were following him on their way to Byculla Railway Station in order to go to their respective houses. When Head Constable Khopkar came near the bus stop en route but Nos. 6 and 7 in front of gate No. 12 of J.J. Hospital, constable Shinde and constable Gaikwad saw the mob of about 100 persons standing on the other side of the footpath of Sir JJ Road. They further saw that 5 to 6 persons armed with choppers and knives suddenly crossed the road and came towards Head Constable, Khopkar. Thereafter all those persons started stabbing Khopkar by means of choppers and knives, thereby Khopkar sustained severe wounds and bleeding and thereafter he collapsed on the ground. At that stage, constable Gaikwad and Shinde got frightened and therefrom they immediately took turn and went to JJ corner and gave information to the police about the said incident. On receiving the information the police party went to the place of occurrence and took injured Khopkar to J.J. Hospital where Head Constable Khopkar after examination was declared dead. Police constable Gaikwad reported the incident to the police constable on duty in the hospital who immediately reported the incident to Byculla Police Station. On 4.11.93, the police arrested the two appellants herein and accused Mohd. Ballal and Biyakat Rasool. On 7.11.93, the police requested Special Executive Magistrate for holding identification parade. The eye-witnesses - constables Gaikwad and Shinde alleged to have identified the accused persons. Thereafter, on 25.11.93 again, the police requested Special Executive Magistrate to arrange identification parade and inducted appellants in the parade. On 15.1.94, accused Jafar Mohd. Ismail Sayyad was arrested and on 24.1.94, at the instance of police, the Special Executive Magistrate held another identification. The police subsequently obtained permission to apply the provisions of TADA and after completing the investigation the police prosecuted the accused persons under TADA. Thus, the two appellants, including the three other accused, came to be prosecuted. All the five accused were charged for the offence punishable under Section 140 IPC read with section 3(2)(i)(ii) of TADA and also under section 149/302 IPC. All the accused pleaded not guilty to the charge.

The prosecution examined two eye-witnesses viz., constables Gaikwad (PW-2) and Shinde (PW-11), who are alleged to be the witnesses of scene of occurrence and identified the two appellants in the Court. By the impugned judgment the appellants in the Court. By the impugned judgment the appellants were convicted for offence punishable under sections 302/149 IPC and under Section 3(2)(1) of TADA read with section 149 I.P.C. and were sentenced to suffer life imprisonment and to pay a fine of Rs. 500/- each, and in default to further suffer R.I. for six months. Accused Jafar Mohd. Ismail Sayyed, Mohd, Bilal and Liyakat Rasool Himayat Rasool Shaikh were acquitted for the offence punishable under sections 144, 149 and 302 IPC and under section 3 (2) (i) (ii) of TADA. It is, in this way, this appeal has come before us.

The foremost question that arises for consideration in this appeal is that, "once the Designated Court rejected the evidence of identification parade, so far as they relate to the appellants, on the ground that there was strong possibility of the suspects being shown to the eye-witnesses at the police station, could the appellants be convicted on the evidence of identification of these accused in the Court by the witnesses ? In the present case, the prosecution

examined two eye-witnesses, viz., constables Gaikwad and Shinde (PWs 2 and 11 respectively), who alleged to have witnessed the scene of occurrence. For the purpose for corroboration of the evidence of the two eye-witnesses, the prosecution relied upon the evidence of identification parades. It was brought on record that, on 7.11.93, PW-5 Special Executive Magistrate had arranged identification parade wherein he held two separate parades. In both the parades Special Executive Magistrate introduced 22 dummies and 3 suspects at a time. In the said identification parade, Police constable Shinde (PW-11) is said to have identified appellant nos. 1 and 2 viz., Shaikh Umar Ahmed Shaikh and Mohd. Naim Mohd. Yasin Quershi. The memorandum of identification parade prepared by the Special Executive Magistrate is Ex. 27. Thereafter on 25.11.93, PW-6 Special Executive Magistrate R.D. Singh held another identification parade. In that parade 18 dummies and 6 suspects were introduced. Police constable Shinde (PW-2) identified appellants Shaikh Umar Ahmed Shaikh and Mohd. Naim Mohd. Yasin Qureshi. Memorandum of identification parade prepared by R.D. Singh is Ext. 29. Singh arranged an identification parade and in that parade six dummies and one suspect were introduced. Constable Shinde (PW-2) and constable Gaikwad (PW-11) identified accused Jafar Mohd Ismail Sayyad. The purpose of filing of evidence of identification parade by the prosecution was to connect the appellants and accused No. 3, i.e. Jafar Mohd Ismail Sayyad to the incident alleged to have taken place on 7.12.92.

Although identification parades in Byculla Police Station were arranged by S.E.M. Shri Y.N. Orhal and S.E.M. Shri Singh, they took help of Police Inspector Wahule who was the Investigating officer for collecting the panchas and the documents. It was asking of Police Inspector Wahule, police went to collect the persons. When the police brought these persons to the police station, the Special Executive Magistrate did not verify as to whether the persons so brought are in any way connected with police or in fact they are serving members of police force. Further, there was no effort on the part of the two Special Executive Magistrates to verify that persons so brought to the police station were under any obligation of Police Inspector, Wahule. Admittedly, two eye-witnesses, Police Constables Gaikwad and Shinde when they went to the police station, contacted Police Inspector, Wahule and remained with him. In fact, on the date of identification parade, the accused persons, who were later introduced in the parade, were in the custody of Police Inspector, Wahule. It is also admitted that it was at the instance of Police Inspector Wahule, the Special Executive Magistrate arranged the identification parade at the police station. Thus, Police Inspector Wahule knew the timing when the parade is to take place. From all these facts and circumstances, the Designated Court concluded that there is strong possibility that the Police Inspector Wahule has shown the suspects to the two eye-witnesses who are serving members of police force. At this stage it would be useful to reproduce here the findings of the Designated Court concluded to rejection of evidence of identification parade :

".....Admittedly on the relevant day, the accused persons, who were introduced in the parade, were in the custody of PI Wahule. PI Wahule had requested the SEM to arrange the parade. PI Wahule was aware about the timing when the SEM was

going to arrange the parade. So, there is possibility that PI Wahule might have shown the suspects to the concerned constable and the constable might have given any idea to the dummies or the panchas. Admittedly, the panch alone had approached the witnesses while taking the witnesses to the parade room. That apart when the parade was arranged in the police station, itself, there is every possibility that the witnesses might have seen the suspects prior to the parade. This possibility is escalated in the present case because both the witnesses are the policemen and it was possible for the witnesses to take round in the police station and particularly in the lock up because the witnesses were aware that they were called that in the big cities like Mumbai, it is impossible to spare any space to arrange identification parade and there is no bar to arrange the parades in the police station. But sec. 9 of the Evidence Act expects the independent evidence to connect the accused to the incident. With this idea only the courts are very slow to accept the identification parades which are arranged in the police station. Apart from that in the present case the SEMs have accepted that they have not followed the guidelines given by the High Court. Not only that they are not aware of all the guidelines."

After recording the aforesaid finding, the Designated Court took the view that there being strong possibility of the suspects being shown to the witnesses who were police officers, the evidence of identification parade has no value and therefore rejected it.

Since this appeal being first statutory appeal, we asked learned counsel for the State of Maharashtra as to whether he intends to challenge the aforesaid findings pertaining to rejection of evidence of identification parade by the Designated Court, but he was unable to displace the said findings recorded by the Designated Court.

The Designated Court after having rejected the evidence of identification parade on the ground that the suspects were possible shown to the witnesses, relied upon the evidence of identification of the accused in the Court by the two witnesses and on that evidence recorded conviction against the appellants. No doubt, the evidence of identification parade is not a substantive evidence, but its utility is for purpose of corroboration. In other words, it is utilised for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to them. The real and substantive evidence of the identity of the accused comes when witnesses give statement in the Court, identifying the accused. It is true that in the present case, PW-2 and PW-11 identified the two accused

who are the appellants before us in the Court. But, the question arises; what value could be attached to the evidence of identity of accused by the witnesses in the Court when the accused were possibly shown to the witnesses before the identification parade in the police station. The Designated Court has already recorded a finding that there was strong possibility that the suspects were shown to the witnesses. Under such circumstances, when the accused were already shown to the witnesses, their identification in the Court by the witnesses was meaningless. The statement of witnesses in the Court identifying the accused in the Court lost all its value and could not be made basis for recording conviction against the accused. The reliance of evidence of identification of the accused in the Court by PW-2 and PW-11 by the Designated Court, was an erroneous way of dealing with the evidence of identification of the accused in the Court by the two eye-witnesses and had caused failure of justice. Since conviction of the appellants have been recorded by the Designated Court on wholly unreliable evidence, the same deserves to be set aside. We accordingly set aside the judgment and order dated 14.10.1997 passed by the Additional Judge, Designated Court for Greater Bombay in T.S.C. No. 21 of 1994, convicting the appellants. The appellants are acquitted of charges. The appeal is allowed. The appellants are entitled to be released forthwith. We order accordingly.