

[REPORTABLE]

**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NOS. 920-922 OF 2009

CBI

.....APPELLANT

VS.

MUSTAFA AHMAD DOSSA

....RESPONDENT

J U D G M E N T

HARJIT SINGH BEDI, J.

1. These appeals, at the instance of the Central Bureau of Investigation, are directed against the order of the Designated Court under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (herein called TADA) dated 26th February 2009 allowing the application of the respondent herein and directing that the evidence collected before 31st December 1997 in the Bombay Blast Case (BBC) No.1 of 1993 could not be used against him unless the witnesses already examined were allowed to be cross-examined by the respondent. The facts are as under:

2. On the 12th March, 1993, a series of bomb blasts took place in Bombay and its surrounding areas resulting in the

death of 257 2

persons, injuries to 713 and damage of Rs.27 crores to property. The State Police registered 27 criminal cases on account of the blast. A single charge-sheet dated 4th November 1993 was filed in the Designated Court against 189 persons of which 44 were shown to be absconding. 15 days later, on the 19th November 1993 the investigation was transferred to the CBI which registered its own case as Crime No. RC1 (S)/93/STF/BB. 19 supplementary reports were thereafter filed before the Designated Court by the CBI under Section 173(8) of the Cr.P.C. The trial commenced on the 14th July 1994 and the Designated Court, Mumbai after hearing arguments from both sides framed the charges on the 10th April, 1995 including a common charge of criminal conspiracy against all the accused present before it or absconding as well as those who were still unidentified. An application dated 12th April 1994 was thereafter moved by the prosecution seeking orders from the Designated Court for recording the evidence of the prosecution witnesses in the absence of those who were not before the Court. The application was, however, kept

pending, as the CBI

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was making efforts to trace out the absconding accused. The CBI also filed a fresh list of those accused who were absconding and others whose name had surfaced later in the investigation and they too were included in the list of absconding persons. As the case had reached the trial stage and the prosecution witnesses were to be examined from the 20th June 1995 onwards, the Designated Court passed an order on the 19th June 1995 observing that as “there was no immediate prospect of the arrest of the absconders and as they were wanted for offences committed by them pursuant to a conspiracy it was appropriate that the evidence which was led by the prosecution may be recorded on the arrest of the accused persons whose names figure in list Annexure-A (to the order) be given in evidence against them on the enquiry on the into or trial for the offences with which they will be charged as, if the deponent was dead or incapable of giving evidence or could not be found or his presence could not be procured without expense or inconvenience which in the circumstances of the case would be unreasonable and that if

during the trial any

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of the accused wanted in this case was arrested the prosecution would be at liberty to move this Court to join him in the trial.” On the 20th August 1995 the confessional statement of accused Salem Mira Moiuddin Sheikh was recorded which disclosed the involvement of Mustafa Ahmed Dossa, the respondent herein, and five others. It also came out that the respondent had attended several meetings in Dubai in furtherance of the conspiracy and contraband material had also been sent to India by him. On the 3rd June 1996, an application was moved by the CBI for the issuance of non-bailable warrants qua the respondent Mustafa Ahmed Dossa and 5 others and it was prayed that orders for the publication of a written proclamation under Section 8(3)(a) of the TADA requiring the respondent and others to appear before the TADA Court on a specified date and further that non-bailable warrants and a Red Corner notice, be issued. This application was dismissed by the Designated Court on the 1st August 1996. The order of the Designated Court was, however, reversed by this Court on the 7th May 1997 with a

direction that the

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application of the CBI should be taken up for reconsideration by the Designated Court. This application was decided on the 29th August 1997 and the prayers made by the CBI were allowed. A proclamation was thereafter issued on the 16th September 1997 and the respondent and the others were called upon to appear in the Designated Court within 30 days thereof. As the respondent did not appear in response to the proclamation, he was declared a proclaimed offender on the 31st December 1997 in BBC No.1 of 1993. The respondent was, however, arrested at the Indira Gandhi International Airport, New Delhi on the 20th March 2003. It transpired from the documents recovered from him that he had acquired Pakistani nationality under the assumed named of Mustafa Umar Merchant and had also obtained a National Residential Permit for the UAE on the basis of his Pakistani Passport. A supplementary charge-sheet was accordingly filed before the Designated Court in Case No. BBC No.1 of 1993 against the respondent on the 3rd May 2003. It appears the prior to the arrest of the respondent, another absconder named Eizaz

Pathan had been

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deported from the UAE to India and arrested in BBC No.1 of 1993. Eizaz Pathan made an application to the Designated Court making two prayers (1) that the Court allow him to join the trial and (2) requesting that all the 684 prosecution witnesses who had been also examined thus far should be recalled for cross-examination. This application was allowed qua the first prayer but rejected qua the second one on the ground that a similar application had already been rejected earlier on the 28th May 2003. After a supplementary charge-sheet had been filed against the respondent, the prosecution moved an application that he be also joined in the trial proceedings in BBC No.1 of 1993. The respondent opposed the application and prayed that his trial should be separated whereas the co-accused also opposed the application saying that if the respondent was joined in the trial at that stage it would cause serious prejudice to them and further delay the trial which had run for almost 11 years. The application was, however, dismissed by the Designated Judge Shri P.D.Kode vide order dated 4th July 2003 holding that the evidence

recorded after the

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31st December 1997 with respect to the respondent could be used by the prosecution but in so far as the evidence recorded prior to that date was concerned the respondent was required to be given an opportunity to meet the said evidence. The order dated 4th July 2003 was challenged by the respondent by way of SLP(Crl) No. 3806 of 2003. This Special Leave Petition was disposed of on the 21st November 2003 with the following order:

“Heard the learned counsel for the parties. The petitioner is challenging an order by which separate trial has been ordered as regards the petitioner. The petitioner prays that trial should have been along with other accused learned ASG submitted that case of the other accused have already been over and judgment is reserved. In view of the above circumstances, the prayer made by the petitioner has become infructuous. The petitioner prays that his trial may be initiated at the earliest and be completed urgently. The Special Judge shall conduct the trial expeditiously. The SLP is disposed of.”

3. The respondent thereupon filed application No. 57 of 2004 on the 10th March 2004 before the Designated Court

highlighting that 8

the evidence collected during the main trial of the accused in BBC No.1 of 1993 could not be used against him and prayed that the Court be called upon to opine on this aspect and to give a reasoned order. This application was dismissed on the 11th July 2005 by observing that the matter had already been concluded by the order dated 4th July 2003. Special Leave Petition (Crl.) No. 387 of 2006 was filed by the respondent challenging the order of 11th July 2005, inter-alia, praying that this Court opine that the evidence recorded and documents and articles exhibited in BBC 1 of 1993 after the issuance of proclamation against the respondent could not be taken on record in his trial as despite the fact that he had been declared a proclaimed offender on the 31st December 1997, no request application or proceedings under section 299 of Code of Criminal Procedure Code or under Section 14 (5) of the TADA had been taken against him. The Special Leave Petition was, however, disposed of as withdrawn on the request of the counsel for the petitioner (respondent herein) on the 16th November 2006. It is the case of the appellant CBI that the

orders passed by

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the Designated Court on the 4th July 2003 and 11th July 2005 with regard to the admissibility of the evidence recorded in BBC No.1 of 1993 had attained finality on account of the subsequent orders passed by this Court and noted above. The respondent, however, still undeterred, filed another application on the 8th October 2008 before the Designated Court again praying for an order that the prosecution could not rely on the evidence collected in BBC No.1 of 1993. It was pleaded, inter-alia, that the order of the Designated Court dated 4th July 2003 made by Shri P.D.Kode was an interlocutory order and subject to review or re-appraisal under Section 362 of the Code of Criminal Procedure and there was no bar on a successor Judge to re-examine the issue more particularly as the circumstances had changed as the trial in BBC No.1 of 1993 had since been completed and that the conditions for the applicability of section 299 which permitted the recording of evidence in the absence of the accused could not be applied to the facts of the case. A reply was filed by the prosecution bringing out the facts of the case, as already

revealed above, and

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further highlighting that orders on similar prayers of the applicant had already been made by Shri Kode on the 21st February 2004 and 11th July 2005 and the question of admissibility of the evidence earlier collected had already been settled and could not be re-examined. In para 8 the Designated Judge noted that the point in dispute was thus:

“In the light of the rival submissions the point to be decided is whether prosecution can rely on and use the evidence recorded in main trial BBC 1/1993 in absence of even before arrest of this accused Mustafa Dosa.”

4. The Designated Court thereafter re-examined the matter in the light of the provisions of Sections 273 and 299 of the Cr.P.C. and Section 14 (5) of the TADA and observed that as the conditions envisaged under these provisions were not satisfied, the evidence recorded in the absence of the accused could not be admissible without his right of cross-examination being respected. The Court noted that the order of Shri Kode dated 4th July 2003 had been challenged in the Supreme Court but observed that the application had not been decided on

merits but had been

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disposed of as infructuous in the light of the submission made by the State counsel that the main trial was fixed for judgment. The Designated Court also observed that the order of 4th July 2003 was an interlocutory one and could be reviewed in the interests of a fair trial, and that the evidence collected in the absence of the accused-respondent was not admissible unless he had been given a right of cross-examination. In support of its decision, the Designated Court also cited the precedent of a co-accused of the respondent, Abu Salem Ansari, Riyaz Ahmed Siddique and Abdul Karim Shaikh who had been arrested on the 2nd August 2005 and charge-sheeted in the year 2006 pertaining to the same incident although given a separate case number of BBC1- of 1993. In these proceedings, the Designated Judge by order dated 2nd December 2008 directed that the prosecution was not entitled to rely on or to use any evidence in BBC 1 of 1993 qua Abu Salem Ansari and the others and it was for the prosecution to establish the existence of circumstances in terms of Section 299 of the Code. It appears that the order of

2nd December 2008

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was challenged by the CBI before this Court in SLP(Crl.) No.569 of 2009 and the matter was disposed of on the first hearing in the following terms on the 6th February 2009:

“In the present case, sub-section (2) of the Section 299 Cr.P.C. has no application. Therefore, we make it clear that the prosecution may rely on the earlier evidence recorded in the earlier trial against the first respondent subject to establishment of existence of any of the conditions precedent as described in first part of Section 299 Cr.P.C. The appeal is disposed of accordingly.”

5. The Designated Court accordingly sought support for its opinion from the order dated 6th February 2009 in the case of Abu Salem and observed that:

“In both the trials i.e. BBC 1-A/93 of this accused (i.e. the present trial) and BBC 1-B/93 against accused Abu Saleem and others some of the evidence is recorded in common. Some of the witnesses are examined afresh by the prosecution. And when in the case of accused Abu Salem Hon’ble Apex Court has held that the earlier evidence would not be available against Abu Saleem unless witnesses are examined afresh the same being the statement of law is also binding. In this case which is arising out of the same crime number and is simply separated for the sake of convenience as the accused is arrested later on

when the 13
earlier trial

was already over and case was reserved for judgment. No any contrary matrix can be applied to this case otherwise it will amount to discrimination before law as court will have to give distinct treatment and legal protection to two distinct sets of accused involved in the same crime. So far the evidence regarding the confessional statement is concerned I am compelled to reiterate that law does not permit the acceptance against this accused as the matter is not charged or tried together in the same case with this accused. In the circumstances prosecution cannot rely on or even prove the confessional statement of any of the accused whose trial has come to end by declaration of judgment in the year 2007 by examining any Police Officer who recorded the same. It will be inadmissible evidence and no purpose of law will be served by allowing an inadmissible evidence on record.”

6. The Court also held that in view of the order dated 6th of February 2009 the circumstances had changed and as such it was appropriate that a similar order be made and ultimately issued the following directions on the 26th February 2009:

“It is held that prosecution is not entitled to rely on any piece of evidence recorded in earlier trial BBC 1/93 AS IT IS without examining those witnesses afresh in this trial.

It is held

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that

prosecution may rely on the evidence recorded in earlier trial BBC 1/93 against accused Mustafa Dosa subject to establishment of existence of any of the condition precedent as described in Second part of Sec.299 of Cr.P.C. subject to further condition that such evidence u/sec.299 of Cr.P.C. must relate to the later evidence recorded after 31/12/1997 i.e. the date accused Mustafa Dosa was declared as proclaimed offender.

It is further held that the prosecution is not entitled to rely on any evidence tending to prove confessional statements of any of the accused who is already charged and tried in main trial BBC 1/93 which is terminated by judgment declared 12/9/2006 to 31/7/2007.

The Prosecution is at liberty to proceed to rely on any piece of evidence recorded in the aforesaid earlier trial strictly within the above parameters and subject to the conditions mentioned herein-in-above.”

This order has challenged before us by the CBI.

7. Mr. P.P.Malhotra, the learned Additional Solicitor General, has first and foremost argued that the observations of the Designated Court in the impugned order that the order of Designated Judge Shri Kode dated 11th July 2005 was an interlocutory one which could be tinkered with at any time

under Section 362

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of the Cr.P.C. were wrong as the said order had settled the rights in a very specific manner and more particularly Section 362 could operate only to correct clerical or arithmetical errors. It has been pointed out that review was a creature of a statute and there was no inherent power of review vested in a Designated Court and that even the criminal procedure did not envisage review of an order except in the limited situations mentioned in Section 362. It has also been submitted that in any case the power under Section 299 of the Code of Criminal Procedure could be exercised in the case of respondent herein as he had been an absconder and that the CBI while submitting its challan had done so not only with respect to those accused who were in the custody but even to those who were absconding or who were not yet identified and could be identified at a later stage. He has further submitted that the changed circumstances on which emphasis had been laid by the Designated Court in the impugned order had further changed as the order of 6th February 2009 in SLP (Crl.) No. 569/2009 had further been modified by this Court

subsequently vide

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order dated 24th August 2009 and that in this view of the matter the trial in the case of respondent herein was also required to proceed in accordance with the directions issued by this Court on 24th August 2009 in the case of Abu Salem.

8. The arguments raised by Mr. Malhotra, ASG have been countered by Mr. R.S.Sodhi, the learned senior counsel for the respondent. It has been pointed out that the order made by Shri Kode was nonest in the eyes of law and, therefore, interference by the successor Designated Judge ignoring them was fully justified. It has further been pleaded that the conditions for the applicability of Section 299 of the Cr.P.C. were not made out and the respondent was not an accused person or a proclaimed offender till a formal declaration to that effect and as such the evidence produced by the prosecution prior to the 31st August 1997 could not be utilized against him. It has been highlighted that Section 273 of the Cr.P.C. clearly envisaged the recording of evidence in the presence of the accused and if such a direction was violated, it would amount to a complete miscarriage of justice. The

learned counsel has

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relied upon certain documents on its plea. 9. As would be evident, several legal issues have been raised in his matter. We, however, see that the Bombay blast took place in the year 1993 and the trial with respect to some of the accused, including the respondent herein, has yet not been completed though a series of applications have been filed before the Designated Judges to be followed by appeals in this Court at the instance of the aggrieved parties. We are, therefore, of the opinion that the legal issues need not be gone into at this stage for the simple reason that the last order in this matter is the order dated 24th August 2009 made by this Court in SLP (Crl) No. 3586/2009 in the case of Abu Salem. It appears that after the order dated 2nd December 2008 in the case of Abu Salem, the matter was carried to this Court in SLP (Crl.) No. 569/2009. This SLP was disposed of on 6th February 2009 by the order already quoted above. An application was thereafter filed by the prosecution on 23rd February 2009 that the depositions of the witnesses recorded in the absence of the accused in BBC No.1/1993 may be taken on record in the

case of Abu Salem

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and others without recalling the witnesses in view of the provisions of Section 299 of the Cr.P.C. This application was, however, dismissed vide order dated 6th February 2009 in the light of the order dated 2nd December 2008 in the case of Abu Salem. It appears that the order dated 16th March 2009 in the case of Abu Salem was carried to the Supreme Court by way of SLP (Crl.) No. 3586/2009 and after hearing both parties the SLP was disposed of on the 24th August 2009 with the following directions:

“Respondent accused will file a statement within one week before the Special Judge as to who are all the witnesses whom they propose to cross-examine in BBC-1 of 1993. Thereafter the prosecution will take further steps to produce those witnesses for cross-examination. The Trial Judge will expedite the matter.

Earlier interim order is vacated.

The Special Leave Petition is disposed of accordingly.”

10. It is the case

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of the CBI that it would be satisfied if a similar order is passed in the present case. We find merit in the submission for the simple reason that the trial of the respondent herein and Abu Salem, which arises out of the same incident, cannot proceed under different procedures. Even otherwise the observations of the Designated Court in the impugned judgment dated 16th March 2009 that as the changed circumstances in the order passed by the Supreme Court in the case of Abu Salem were pre-dominant and would hold the field, on this very premise the order of the Supreme Court dated 24th August 2009 would now be the final word in the matter. We, therefore, dispose of these Appeals and make direction in terms of the order dated 24th August 2009. No other order is necessary.

.....**J.**
(HARJIT SINGH BEDI)

.....
.....**J.**
(CHANDRAMAULI KR. PRASAD)

FEBRUARY 22, 2011

NEW DELHI.