

CASE NO.:
Appeal (crl.) 1298-1299 of 1998

PETITIONER:
SURESH ALIAS PAPPU BHUDHARMAL KALANI

Vs.

RESPONDENT:
THE STATE OF MAHARASHTRA

DATE OF JUDGMENT: 02/03/2001

BENCH:
K.T. Thomas & D.P. Mohapatra

JUDGMENT:

With Criminal Appeal Nos. 66-67/1999 and
Criminal Appeal Nos. 572-73 of 1999

J U D G M E N T

D.P. MOHAPATRA, J.
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In these three sets of appeals the judgment/order passed by the Designated Court of Thane at Pune on 10th November, 1998 in T.S.C. No.25/92 and 9/93 has been challenged. Criminal Appeal Nos. 1298-99/98 and Criminal Appeal Nos. 66-67/99 have been filed by the accused persons against rejection of the petition filed by them under section 18 of the Terrorists and Disruptive Activities (Prevention) Act, 1987 [for short the TADA (P) Act]. Criminal Appeal Nos. 572-573/1999 have been filed by the State of Maharashtra against finding recorded by the Special Court that on the materials placed on record by the prosecution no charge can be framed under section 3 of the TADA (P) Act. Since the incidents giving rise to the criminal cases are the same and the appeals are directed against the same judgment/order for the sake of convenience we will state the facts and deal with the case in Criminal Appeal Nos.1298-99/ 1998 in detail.

In this appeal filed under section 19 of the TADA (P) Act, accused no.4 (Suresh @ Pappu Bhudharmal Kalani) of T.S.C.No.25/1992, has challenged the order passed by the Designated Court of Thane rejecting the application filed by him under section 18 of the Act for discharging him from the charges under sections 3 and 5 of the TADA (P) Act and to transfer the case to the Sessions Court on the ground, inter alia, that no case under section 3 or section 5 of the TADA (P) Act is made out against him.

The prosecution case, shortly stated, is as under:-

One Dunichand Kalani, who was the President of Ulhasnagar Taluka Congress, used to make complaints against one Gopal Rajwani and his political supporters about their

criminal activities. On 9th of April 1989 at about 9.00 p.m. the said Dunichand Kalani was murdered on a public road by 10-12 persons armed with weapons like knives, gupties, revolvers, etc. On the FIR lodged by one Narayan Budharmal Kalani at Ulhasnagar Police Station a case under sections 302, 147, 148, 149 of the Indian Penal Code and section 25 of the Arms Act was registered against Gopal Rajwani and some others. In the said case the provisions of TADA (P) Act was involved and it was registered as C.R.No.T-296/89 under section 3 of the TADA (P) Act and under sections 147, 148, 149 and 120B, 302 of IPC and section 25 of the Arms Act. After investigation charge-sheet was filed in the case against 23 persons. The appellant is the nephew of deceased Dunichand Kalani. Both Gop Beharani as well as the accused no.4 were elected as Municipal Councillors and a dispute arose between them on account of claim over Presidentship of the Ulhasnagar Municipal Council. On this account, it is alleged, that there was enmity between Gop Beharani and accused no.4.

On 10.7.1992 while the deceased Maruti Dagadu Jadhav was sitting in his office at about 8.15 p.m. and chit- chatting with one Arun Kaklij, one white coloured Maruti van No.MH-12-1042 came near his office and three persons alighted from the same and rushed inside the office. Those three persons fired bullets at Maruti Dagadu Jhadav from the revolver held by them. In the incident Arun Kaklij was also injured. After the incident the assailants escaped in the Maruti van. The FIR was recorded by PSI of the Vithalwadi Police Station on the dying declaration made by Maruti Dagadu Jadhav in which he gave the description of three assailants. The motive for the murder was ascribed to previous enmity. Thereafter Maruti Degadu Jadhav was admitted in the nursing home for treatment. At about 10.35 p.m. on the same day i.e. 10th July, 1992, he succumbed to the injuries. Thereafter the case registered under sections 147, 148, 149 and 307 IPC and section 25(1)(A) of the Arms Act was changed from section 307 to section 302 IPC. On 20th July 1992 the provisions of section 5 of the TADA (P) Act was invoked in the case. In course of investigation it came to light that there was long standing enmity between Gopal Rajwani and Pappu Kalani, and they have murdered the trusted men of each other due to rivalry and on account of enmity. According to the prosecution accused No.4 and other accused armed with revolvers and pistols killed Maruti Jadhav and attempted to murder Arun Kaklij. The further case of the prosecution is that the other co-accused has used un-licensed revolvers and pistols attracting the offence under sections 3 and 5 of the TADA (P) Act and section 25 of Arms Act in addition to the sections of IPC.

The accused No.4 filed the application under section 18 of the TADA (P) Act stating, inter alia, that the entire charge-sheet and the materials collected by the investigating agency do not disclose any offence under section 3 or section 5 of the TADA (P) Act. The other offences alleged to have been committed by the accused are not triable by the special court. He, therefore, prayed that he may be discharged from the provisions of the TADA (P) Act and the case may be transferred to the Sessions Court, Thane for trial of the offences under IPC and Arms Act, if any.

According to the prosecution there are two groups in

Ulhasnagar, one is headed by Gopal Rajwani and the other by Pappu Kalani. The deceased Maruti Jadhav was the body-guard of Gopal Rajwani. The deceased Maruti Dagadu Jadhav and one Krishna Pillaye were the eye-witnesses to the murder of Lalu in the year 1989 at Hotel Sun-N-Sand Bombay. The said Krishan Pillaye was murdered, thereafter Maruti Dagadu Jadhav was the only remaining eye witness in the said case in which notorious gangsters have been involved. From these facts, according to the accused no.4, it was crystal clear that murder of Maruti Dagadu Jadhav was either because of the fact that he was an eye witness against some dangerous criminals or he was a victim of a gang war. The accused contended that in either case it disproves the commission of terrorist act which requires that the act must be done with the intention to strike terror in the people which is an expression of much wider import. The accused alleged that the police has fabricated certain confessions which were purely involuntary and even these alleged confessions spelt out no offence under section 3 or section 5 of the TADA (P) Act. None of the confessions recorded in the case satisfies the mandatory requirement of the TADA (P) Act and as such they cannot be used as evidence. Invocation of the TADA (P) Act in this case is otherwise wrong and illegal.

The learned special Judge has discussed in great detail, to some extent unnecessarily, different aspects of the case, the scope of inquiry at the stage of framing charge under section 227 of the Code of Criminal Procedure, the manner in which the evidence collected by the investigating agency is to be sifted at that stage and the approach to the question whether the charge should be framed against the accused and he should be called to face the trial or he is to be discharged from the case at that stage. The learned special Judge has noticed several judgments of the Supreme Court and different High Courts on these points and quoted extensively from them. He has also dealt with in detail the statements made by the witnesses who are proposed to be examined in support of the prosecution case.

We do not feel it necessary to repeat the discussions on the different points and the decisions which have been referred to in the judgment. However we notice a few recent decisions of this Court touching on the question. In the case of State of Maharashtra vs. Priya Sharan Maharaj and others (1997) 4 SCC 393, this Court referring to the case of Niranjana Singh Karam Singh Punjabi vs. Jitendra Bhimraj Bijjaya, (1990) 4 SCC 76, held that at the stage of sections 227 and 228 the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction.

(Emphasis supplied) @@
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In the case of State of M.P. Vs. Mohan Lal Soni (2000) 6 SCC 338, this Court referring to several previous decisions, held that the crystallised judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused.

(Emphasis supplied)

The learned special Judge in para 18 of the order extracting from the Judgment of the Bombay High Court in Rudolf Fernandes vs. State of Goa (1993 Mh.L.J. 1664), observed and in our view rightly, that each case depends upon its particular facts and circumstances and sometime even a remote link between the activities of an accused and the facts of the case may justify a reasonable inference warranting a judicial finding that there is ground for presuming that an accused has committed the offence or at least to presume that the question of his being directly or indirectly involved in the commission of such offence is not to be ruled out.

In paras 24 to 31 he has considered the question whether the offences under section 3 and 5 of the TADA (P) Act are made out against the accused without taking aid of the confessional statement of the accused.

After sifting the materials and after considering the contentions raised on behalf of the prosecution and the accused, the learned special Judge held: On perusal of all the statements of the witnesses it clearly appears that this was of rivalry between two goons and for some reasons which is mentioned by the prosecution that Maruti Jadhav was an eye witness to one of the murder incidents and therefore he was liquidated. There is no other evidence on record to show that the accused persons had committed these acts i.e. firing at Maruti Jadhav to strike terror in the people or section of the people.

In paragraph 32 the learned special Judge has considered the question whether the offence under section 3(1) of the TADA (P) Act is attracted in the case. Testing the case on the principles laid down by the Supreme Court in Niranjana Singh Karam Singh Punjabi vs. Jitendra Bhimraj Bijjaya case (supra) and the case of Mohd. Saleem Vs. State of Gujarat (1994) 5 SCC 369 the Court held in para 35 of the order that the allegation of the prosecution regarding intention to strike terror are not clearly mentioned in the charge-sheet. The intention of the accused is not to strike terror in the people or any section of the people, but to liquidate the persons who are eye witnesses to the earlier incident or the offences committed by the accused. The learned special Judge further observed :

But the fact remains that the prosecution has not produced sufficient evidence on record to justify the inference that the accused while committing the murder of Maruti Dagadu Jadhav or attempting to commit murder of Arun Kaklij (these contentions are taken on the basis of the evidence through the statements adduced by the prosecution on record) by using fire arms, despite Raju Jadhav and Pruthviraj Baviskar in their statement after about 3 months

submitted that due to the fear of the accused, they could not tell the names of the assailants earlier, that fact by itself will not make out the intention of the accused u/s 3 of the TADA. True that use of fire arms is in one of the ingredients to be covered u/s 3 of the TADA. But even then the intention, as stated above, should be coupled with it and in its absence, the charge u/s 3(1) of TADA cannot sustain in view of the above authorities particularly in the cases of Hitendra Thakur, Niranjan Singh, Kashmir Singh and Bonkya. Consequently, charge u/s 3(13) of the TADA can also not be framed as these offences are inter-linked with Section 3(1) of the TADA.

From para 37 onwards the learned special Judge has discussed the question as to whether prima facie offence under section 5 of the TADA has been made out, for the purpose of framing of the charge against the accused person. The Court has taken note of the observations in Sanjay Dutts case reported in 1995 CrI. L J 477 to the following effect :

In the prosecution for an offence punishable u/s 5 of TADA the prosecution is required to prove, that the accused was in conscious possession unauthorisedly, in a notified area of any of the arms and ammunition specified in columns 2 and 3. No further nexus with any terrorist or disruptive activity is required to be proved by the prosecution in view of the statutory presumption.

It was further observed that once the prosecution has proved unauthorised conscious possession of any of the specified arms and ammunition etc. in a notified area by the accused, the conviction would follow on the strength of presumption unless the accused proves the non-existence of fact essential to constitute any of the ingredients of the offence.

In para 49 of the Order the learned special Judge held that: On perusal of the allegations against the accused persons, it would be seen that this is not the case of only possession of arms and ammunition by the accused, but it is a case of its use for causing the death of one person and injuring the other.

In para 59 of the order the learned Judge observed that: some empty cartridges were recovered from the person of the deceased as well as from the injured and from spot. Therefore, the possession of the same by the accused is explicit and apparent.

In para 61 the learned Judge held that in the facts and circumstances of the case and on the material on record it is not possible to say that the accused persons did not possess the arms and ammunition.

In para 64 of the order it is observed that: the fact remains that if evidence of eye witnesses is accepted, then the possession of arms and ammunitions at the relevant time will have to be held to be proved and when we are considering the case for discharge of the accused, it will have to be held that in such circumstances, the accused cannot be discharged for the offence under section 5 of the TADA Act.

In para 65 of the order the learned special Judge took note of the position that if the case is tried by Designated Court the said Court can try the offence under the TADA (P) Act as well as the offences coupled with those under I.P.C. and if the case is tried by the Sessions Court the said Court cannot try the offences under the provisions of the TADA Act. He was of the opinion that in case of doubt such cases should be tried by the Designated Court itself. The learned Special Judge observed that the area in which the alleged offences are said to be committed, is not stated to be not notified area and the accused do not claim possession of used arms and ammunition in incident, as authorised. Therefore, on conviction it would be obvious that offence under section 5 of the TADA would be made out but the Sessions Court will not be able to try the offence and convict the accused for that offence. Then the learned Special Judge summed up his conclusions in these words:

Therefore, on that conviction it would be obvious that the offence under section 5 of the TADA Act would be made out, but the sessions court may not be able to try that offence and convict the accused for that offence and, therefore, in my opinion, the result of the above discussion would be that the accused cannot be discharged from the offence under section 5 of the TADA Act and consequently, no order under section 18 of the TADA Act to transfer these cases to the Court of Sessions, Thane, can be passed.

Thereafter the learned Judge proceeded to consider the cases of the individual accused persons and came to the conclusion expressed in these words:

It is true that these incriminating statements are recorded after considerable time. But, as stated above, statements of the witnesses have to be taken at their face value. It is already pointed above that while considering the discharge application of the accused, the evidence is not to be assessed meticulously. It is also necessary to state that at that stage, it cannot be considered as to whether the case will surely end in conviction or not, although possibility of sure acquittal for some reason may be considered for this purpose. On the basis of the statements on record which are filed along with the charge-sheet ex-facie, it is not possible to hold that on that particular day, accused Pappu Kalani and accused Akbar were not associated with the assailants named in the statements of the eye witnesses at the material time, in an incriminating manner.

The concluding portion of the order reads:

In view of the above findings, the applications of the above accused for discharge for the offence under section 5 of the TADA Act cannot be allowed. Hence, they are rejected to that extent.

Prayer of the accused for transfer of the case under section 18 of the TADA Act is also rejected.

The charges against the accused will be framed after hearing both the counsel in pursuance of the above observations.

The trial is already expedited.

We have carefully perused the order of the Special Judge, which is under challenge and other relevant@@ JJJ documents. We are not satisfied that the order passed by@@ JJJJJJJJJJ

the Special Judge suffers from any jurisdictional error in the approach to the case or in sifting of the materials for the purpose of ascertaining whether a prima facie case under Sections 3 and 5 of the TADA (P) Act is made out against the appellant and in arriving at the conclusions as expressed in the order.

Section 18 of the TADA (P) Act provides that where, after taking cognizance of any offence, a Designated Court is of opinion that the offence is not triable by it, it shall, notwithstanding that it has no jurisdiction to try such offence, transfer the case for the trial of such offence to any court having jurisdiction under the Code. In this case the learned special Judge has recorded the finding that a prima facie case under section 5 of the TADA (P) Act has been made out. Therefore the petition filed by the accused under section 18 of the TADA (P) Act was rightly rejected. The finding recorded by the learned special Judge holding that on the materials placed by the prosecution a prima facie case under section 3 of the TADA (P) Act is not made out also does not suffer from any serious illegality. In the circumstances the judgment/order passed by the learned special Judge does not warrant any interference. Accordingly, the appeals, being devoid of merits, are dismissed. Hearing of the cases be expedited. The records be returned forthwith.