

CASE NO.:
Appeal (crl.) 208 of 2000

PETITIONER:
GHULAM NABI WAR AND ANOTHER

Vs.

RESPONDENT:
THE STATE OF N.C.T. OF DELHI

DATE OF JUDGMENT: 11/04/2000

BENCH:
M B Shah. & Doraiswamy Raju.

JUDGMENT :

Shah, J.
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Accused have filed this appeal against the judgment and order dated 10/15th December, 1999 passed by the Designated Judge-I, New Delhi in Sessions Case No.10/94 convicting accused Nos.1 and 2 for the offence punishable under Section 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short TADA Act) and under Section 5 of the Explosive Substances Act, 1908, and sentenced to undergo rigorous imprisonment for eight years and a fine of Rs.20,000/- each and in default of payment of fine to further undergo rigorous imprisonment for one year under Section 5 of TADA Act and to suffer rigorous imprisonment for five years under Section 5 of the Explosive Substances Act.

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that some members of the Muslim Mujahiddin, a terrorist outfit organisation of Jammu & Kashmir, were hiding somewhere in South Delhi to carry out terrorist activities in Delhi. To carry out and develop the information, a special team comprising of SI Kundan Singh, SI Joginder Singh, SI Radhey Shyam and ASI Swaminathan under the supervision of ACP Shri D.S. Naurawat, was constituted. The police team came to know that 2-3 Kashmiris were staying in House No.I-105, Lajpat Nagar on the second floor and their movements were found doubtful. After conveying that information to the superior officers at about 5.00 p.m. raiding party conducted raid at the said house. In the said premises, accused Ghulam Nabi War (A-1) and Meer Arshad Saleem (A-2) were found. It has been further pointed out that A-2 was the tenant in possession of the said premises. After carrying out a formal search of the room, from a closed loft of the room, one rexine bag was found which was brought down. The bag was found having a numbered lock and A-1 claimed that the said bag belonged to him and gave

secret No.365 for opening the lock. From the said bag, a polythene bag of green colour containing 800 gms. of RDX and another polythene bag containing detonators and a cash of Rs.25,000/-, one telescope of Russian make and some clothes of the accused were also found. It is stated that on further checking of the bag, three fax receipts, two cash memos and three photostat copies written in Urdu were also recovered which according to the prosecution contained formula for making a bomb. Thereafter, DCP Shri B.S. Bhola was informed and he arrived at the spot and it is alleged that on further interrogation the accused claimed to be the members of the Muslim Mujahiddin. After verification of the facts, DCP B.S. Bhola gave his approval for registration of the case under TADA Act and under the Explosive Substances Act.

After completing the investigation, the accused were charged for the offences punishable under Section 120-B of I.P.C., Sections 3 and 4 of TADA Act read with Section 120-B of I.P.C., Section 4 of the Explosive Substances Act, Section 5 of TADA Act and Section 5 of Explosive Substances Act. After recording the necessary evidence, the learned Designated Judge arrived at the conclusion that from the perusal of the prosecution evidence it is apparent that none of the ingredients of Section 3 of TADA Act has been alleged or established. The evidence led by the prosecution is mainly regarding the recovery of explosive substances only. The court further observed that there was no further reference of commission of any terrorist act committed by the accused persons by using the explosive substances to over-awe the Government lawfully established by law to create terror among the public of different sections of the society and, therefore, there was no evidence on record to bring home the guilt to the accused persons under Section 3 of TADA Act read with Section 120-B of I.P.C. Similarly, the court held that prosecution evidence is totally lacking to bring home the charge under Section 4 of TADA Act read with Section 120-B of I.P.C. The court pertinently observed that prosecution has, in fact, failed to lead any evidence, good or bad or indifferent, to show that accused persons were members of the Muslim Mujahiddin, a terrorist organisation. However, considering the evidence on record with regard to recovery of explosive substances, the court convicted the accused as stated above.

Learned senior counsel, Mr. Sushil Kumar appearing on behalf of the accused submitted that the investigation in the present case and the evidence produced on record is absolutely defective and is contradictory. He pointed out that prosecution has failed to produce on record any evidence of lock-up register to show as to where the accused were kept after their arrest. He also pointed out contradictory statements made by the witnesses. One stated that they were kept at Lodhi Road Police Station, the other stated that they were kept in Lajpat Nagar Police Station and the third stated that they were kept in their office premises at Lodhi Colony Police Station. He submitted that it is the defence of the accused that they were taken in custody prior to 12th October, 1993 and a false case is filed against them.

He next submitted that apart from the contradictory version, the registration of FIR, preparation of four

panchnamas for the recovery of items from the same bag and also the production of sanction letter granted under Section 20A of TADA Act create much doubt in the prosecution version. Still, however, considering the fact that A-1 has virtually undergone six-and-a-half years of sentence, he submitted that a lenient view for the sentence may be taken without going in detail. For A-2, he submitted that there is no evidence on record to connect him with the crime except the fact that A-1 was guest of A-2 and A-2 was staying in the premises in question as tenant. He submitted that the prosecution version, at the most, establishes that as soon as the bag was found A-1 stated that the bag belonged to him and he gave the number for opening the lock of the bag and if that is the prosecution version there is no question of connecting A-2 with the crime. He submitted that once the prosecution has failed to establish the offence under Section 120-B I.P.C. there is no question of convicting A-2 for joint possession of the explosive material.

For the recovery of the bag and the explosive substances, the prosecution has examined number of witnesses. PW-4 Inspector Kundan Singh was a member of raiding party. It is his say that on 12th October, 1993 he was posted as Sub Inspector in Operationa Cell, Special Branch of the Police. A secret information was received that some Muslim Mujahiddins of J & K group had been in Delhi for terrorist activities. After developing the information, at about 5.00 p.m. under the supervision of ACP D.S. Naurawat the premises in which those Kashmiris were staying was raided. During the search, one rexine bag was found from a closed loft (taund) of the room. On enquiry, accused No.1 Ghulam Nabi War informed that bag belongs to him. From the said bag, RDX explosive powder weighing 800 gms. was found. There was another polythene bag in the said bag containing small metal pieces which had electricity wires fitted in it and accused No.1 informed that those were detonators. Further, Rs.25,000/- of currency notes, one telescope and certain fax messages were also found. Information was sent to DCP Mr. Bhola (PW-12) and thereafter he came on the spot. After hearing the accused, he directed registration of a case under the provisions of TADA Act as well as Explosive Substances Act.

The aforesaid evidence gets support from PW-5 SI Joginder Singh. He has stated that accused No.1 identified the bag recovered during the search and stated that it belongs to him. It is his say that accused No.2 opened the lock of the said bag. Similarly, PW-9 ASI Swami Nath Shukla deposed to the same extent and he has stated that bag was opened by accused No.1. PW-11 D.S. Naurawat, Addl. D.C.P. has stated that bag was opened by accused No.1 by the use of No.365. In cross, he has stated that no finger prints of the accused were lifted from the said bag because accused No.1 had admitted the possession of the said bag. He further stated that on information Shri Bhola, DCP arrived at the spot and after questioning the accused and examining the material he accorded permission for registration of a case under TADA Act and Explosive Substances Act. Similarly, PW-12 Shri B.S. Bhola, DCP has also supported the prosecution version. He also stated that he talked with both the accused about the recovery of RDX and other articles and they disclosed that they belong to Muslim Mujahiddin militant organisation and that the recovered articles belonged to them. PW- 15 Inspector Radhey Shyam

has also stated the same facts with regard to the recovery of the said bag, RDX and that accused No.1 on being questioned informed that bag belonged to him and he disclosed a secret No.365 for unlocking it.

Considering the aforesaid evidence on record, in our view, the learned Designated Judge was right in arriving at the conclusion that the prosecution has proved recovery of RDX and other articles from the house where accused No.2 was residing as a tenant.

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belonged to him. He further gave No.365 for opening the lock of the said bag and thereafter the said bag was opened as stated by two witnesses by A-1 and by a third witness by A-2. Leaving that part of contradictory evidence, from the aforesaid evidence which is led by the prosecution itself, according to the prosecution version, A-1 was the owner of the said bag; that he had given the number for opening the lock of the bag; and that there is no other evidence on record led by the prosecution to connect A-2 with the crime. We are saying so because the trial court has specifically found that for the rest of the charges against A-2 there is no iota of evidence on record. In any set of circumstances, once the prosecution has failed to prove conspiracy, there is no question of convicting A-2 for having been in joint possession of explosive substances. Learned senior counsel for the prosecution has failed to point out any connecting evidence to establish the alleged offences against A-2. In this view of the matter, the impugned judgment and order convicting A-2 Meer Arshad Saleem S/o Ali Mohd. Mir requires to be set-aside and is quashed and set-aside.

As regard A-1, as stated above, the prosecution has established that the bag containing RDX etc. belonged to him and, therefore, he has been rightly convicted under the provisions of Section 5 of TADA Act and Section 5 of the Explosive Substances Act. Before the trial court, it was pointed out that A-1 is a Graduate in Engineering coming from a good family background and in the jail also he was running Indira Gandhi National Open University and National Open School Study Centre for the past five years and that he completely dedicated towards this noble cause. By taking into consideration the age, character, antecedents and his conduct during the period of his remaining in jail as undertrial, the learned judge has taken a lenient view. In view of the aforesaid background of accused No.1 and the fact that he has already undergone sentence of six-and-a-half years, we reduce the sentence to the period already undergone. We further set aside the order imposing a fine of Rs.20,000/- each for the offences punishable under Section 5 of TADA Act. If the fine has already been paid, the same be refunded.

In the result, the appeal is partly allowed. A-2 Meer Arshad Saleem is acquitted. He is ordered to be released forthwith, if not required in any other case. For A-1 Ghulam Nabi War, sentence is reduced to the sentence already undergone and he is ordered to be released forthwith, if not required in any other case.

JUDIS