CASE NO.:
Appeal (crl.) 906 of 2000
Appeal (crl.) 804 of 2001

PETITIONER:
AYYUB

Vs.

RESPONDENT:
STATE OF U.P.

DATE OF JUDGMENT: 28/02/2002

BENCH:
R.P. Sethi & K.G. Balakrishnan

JUDGMENT:

K.G. BALAKRISHNAN, J.

The appellants in these two appeals were found guilty by the Designated Judge (TADA), Meerut, for the offences punishable under Sections 3(1)(2)(i) of the Terrorists and Disruptive Activities [Prevention] Act, 1987 (hereinafter called as the 'TADA Act') and also for offences punishable under Section 302 and Section 307 read with Section 34 of Indian Penal Code. The appellants were sentenced to undergo imprisonment for life and a fine of Rs. 5,000/- u/s 3(1)(2)(i) of TADA and in default of payment of fine to undergo imprisonment for a period of one year. The appellants were sentenced to imprisonment for life and a fine of Rs. 5000/- and in default to undergo imprisonment for one year under Section 302 read with Section 34 I.P.C. The appellants were also sentenced to rigorous imprisonment of five years and a fine of Rs.3,000/- under Section 307 read with Section 34 IPC and in default of payment of fine to undergo imprisonment for six months. The appellants were further found guilty and sentenced to imprisonment for a period of two years for the offences under Section 4 of the Prevention of Damages to Property Act 1984.

The prosecution case against the two appellants was that on 26.1.1993 at about 7.45 p.m., the appellants came running to the police picket at Hapur Road, near Veterinary Hospital, Meerut and hurled bombs at the security personnel. A PAC company including the informant Platoon Commander, Ramvir Singh (PW1), Head Constable Rohitash Singh & N.K. Mahender Prasad Sharma, Constable Pramod Kumar, Constable Desh Raj Singh (PW 2), Constable Atar Singh, Constable Rambir Singh, Constable Sarvesh Singh (PW 3) and

Constable Sanjiv Kumar were posted at the said picket near the Veterinary Hospital, Meerut. The bombs hurled by the appellants exploded and Constable Pramod Kumar and three others sustained injuries. Constable Pramod Kumar and N.K. Mahender Prasad Sharma fired shots from their firearms, but the two appellants managed to escape from the scene. Government vehicles parked nearby were also damaged and the incident created a terror in the vicinity.

The Platoon Commander Ramvir Singh(PW 1) took the injured to the hospital. Later, he gave a report before the Police Station, Civil Lines, Meerut. The F.I. Statement was recorded at 10.15 p.m. on 26.1.1993 whereafter Inspector Ranvir Pratap Singh, Incharge of the Police Station (PW 38), took

over the investigation. Injured N.K. Mahender Prasad Sharma died at the hospital and an inquest report was prepared by Sri B.R. Arya (PW 41). PW 4 Dr. Ramender Singh conducted the post-mortem examination. The Investigating Officer prepared the site plan of the place of occurrence. A dog was found lying dead on the spot. The remnants of exploded bombs were collected by the Investigating Officer. On 28.1.1993, PW 16, the Station Officer of P.S. Lisari Gate, Meerut received secret information that the accused who was involved in the bomb blast at the PAC picket on 26.1.1993 was staying with one Ameer Hamza in Mohalla Kidwai Nagar. PW 16 Station Officer along with other police personnel raided the house of Ameer Hamza and found the accused Abdul Jabbar lying on a cot with multiple injuries and one doctor by name Dr. Mohd. Imran was found treating him for the injuries. Appellant Abdul Jabbar was brought to the Police Station and this information was passed on to PW 15 Superintendent of Police(City), Meerut, and he was informed that appellant Abdul Jabbar was prepared to give a confession statement. Superintendent of Police(City), Meerut recorded the confession of the appellant Abdul Jabbar on 29.1.1993 and he was produced before the then Designated Judge. Meanwhile, the other Appellant Ayyub surrendered before the Court on 1.3.1993 and expressed his willingness to make a confession statement. He was produced before PW 15 Superintendent of Police(City), Meerut. The Identification parade was held on 10.3.1993 and some of the witnesses identified both the appellants. After the completion of the investigation, charge sheets were filed against these two appellants and five others who had allegedly committed the crime or helped the appellants in the commission of the crime.

During the course of the trial before the Designated Judge, Senior Prosecuting Officer sought permission to withdraw from the prosecution against the five other accused who had been charged along with the appellants. As against those persons, permission was granted by the Designated Judge to withdraw from the prosecution by order dated 27.4.1995. Pursuant to the Order of the Govt. of Uttar Pradesh, the Senior Prosecuting Officer had also filed an application for withdrawal of prosecution in respect of the present two appellants so far as the charges framed against them under the TADA Act. The learned Designated Judge declined sanction for withdrawal from prosecution in respect of these two appellants and they were accordingly tried by the Judge and found guilty as afore-stated.

In Criminal Appeal No. 906 of 2000, Mr. Himanshu Munshi, learned Counsel appeared on behalf of the appellant and Mr. Anoop G. Chaudhary, learned Senior Counsel appeared on behalf of the State while in Criminal Appeal No. 804 of 2001, Mr. K.T.S. Tulsi, learned Senior Counsel appeared on behalf of the appellant.

Mr. K.T.S. Tulsi, learned Senior Counsel on behalf of the appellant, argued that the Designated Judge seriously erred in not allowing the withdrawal from prosecution in respect of these appellants. It was pointed out that the State Government after considering the various aspects of the matter had requested the Senior Prosecuting Officer for withdrawal from prosecution in respect of the offences charged under various provisions of the TADA Act. Mr. Tulsi argued that when such an application was filed, the Court should have normally accepted that plea as it was not tainted with any mala fide intention. The learned Senior Counsel on behalf of the State of U.P., Shri Anoop G. Chaudhary, however, stated that these appellants had not challenged the order passed by the Designated Judge declining the withdrawal from prosecution and therefore, the appellants cannot now be heard to say that the Designated Judge went wrong in passing the said order. We do not find much force in this contention as the order passed by the Designated Judge was only interim in nature and it is doubtful whether an appeal would lie against that order. This Court has expressed its doubt whether an appeal would lie against such an order and the question is still left open. The learned Senior Counsel Mr. K.T.S. Tulsi has rightly contended that the appellants are entitled to challenge the same in these proceedings.

This Court in State of Bihar vs Ram Naresh Pandey and Anr. AIR 1957 SC 389 had made following observations while dealing with an application

under Section 494 of the old Cr. P.C., which enabled the prosecution to withdraw from the prosecution. Section 321 of the new Cr.P.C. is similarly worded with slight modifications. This Court observed as follows:-

"The section is an enabling one and vests in the Public Prosecutor the discretion to apply to the Court for its consent to withdraw from the prosecution of any person. The consent, if granted, has to be followed up by his discharge or acquittal, as the case may be. The section gives no indication as to the grounds on which the Public Prosecutor may make the application, or the considerations on which the Court is to grant its consent.

The function of the Court, therefore, in granting its consent may well be taken to be a judicial function. It follows that in granting the consent the Court must exercise a judicial discretion. But it does not follow that the discretion is to be exercised only with reference to material gathered by the judicial method. Otherwise the apparently wide language of Section 494, Criminal P.C. would become considerably narrowed down in its application. In understanding and applying the section, two main features thereof have to be kept in mind. The initiative is that of the Public Prosecutor and what the Court has to do is only to give its consent and not to determine any matter judicially.

. The judicial function, therefore, implicit in the exercise of the judicial discretion for granting the consent would normally mean that the Court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes."

In State of Orissa vs. Chandrika Mohapatra and Others (1976) 4 SCC 250, P.N. Bhagwati, J. as he then was speaking for the three Judge bench regarding withdrawal from the prosecution, said:

"the paramount consideration in all those cases must be the interest of administration of justice. No hard and fast rule can be laid down nor can any categories of cases be defined in which consent should be granted or refused. It must ultimately depend on the facts and the circumstances of each case in the light of what is necessary in order to promote the ends of justice, because the objective of every judicial process must be the attainment of justice."

In Kartar Singh vs. State of Punjab (1994) 3 SCC 569, the constitutional validity of some of the provisions contained in the TADA Act was challenged. The Constitution Bench of this Court while upholding most of the provisions contained in the TADA Act, suggested that in order to ensure higher level of scrutiny and applicability of TADA Act, there must be a Screening Committee or a Review Committee constituted by the Central Government consisting of the Home Secretary, Law Secretary and other Secretaries concerned of the various Departments to review all the TADA cases instituted by the Central Government as well as to have a quarterly administrative review. In respect of the States also, a similar suggestion was made. Pursuant to the recommendations of the Review Committee, some of the cases filed under the TADA Act were proposed to be withdrawn from further prosecution. But the court passed orders under Section 321 of the Criminal Procedure Code declining permission to withdraw from prosecution. These orders were challenged in R .M. Tewari, Advocate vs. State (NCT of Delhi) and Ors. etc.etc. (1996) 2 SCC 610 and the scope of Section 321 of the Code of Criminal Procedure, 1973 came up for consideration. This Court, in paragraph 10 & 11 of the judgment, observed as under:-

"The observations in Kartar Singh have to be understood in

the context in which they were made. It was observed that a review of the cases should be made by a High Power Committee to ensure that thee was no misuse of the stringent provisions of the TADA Act and any case in which resort to the TADA Act was found to be unwarranted, the necessary remedial measures should be taken. The Review Committee is expected to perform its functions in this manner. If the recommendation of the Review Committee, based on the material present, is, that resort to provisions of the TADA Act is unwarranted for any reason which permits withdrawal from prosecution for those offences, a suitable application made under Section 321 Cr.P.C. on that ground has to be considered and decided by the Designated Court giving due weight to the opinion formed by the public prosecutor on the basis of the recommendation of the High Power Committee.

It has also to be borne in mind that the initial invocation of the stringent provisions of the TADA Act is itself subject to sanction of the Government and, therefore, the revised opinion of the Government formed on the basis of the recommendation of the High Power Committee after scrutiny of each case should not be lightly disregarded by the court except for weighty reasons such as mala fides or manifest arbitrariness. The worth of the material to support the charge under the TADA Act and the evidence which can be produced, is likely to be known to the prosecuting agency and, therefore, mere existence of prima facie material to support the framing of the charge should not by itself be treated as sufficient to refuse the consent for withdrawal from prosecution. It is in this manner an application made to withdraw the charges of offences under the TADA Act pursuant to review of a case by the Review Committee has to be considered and decided by the Designated Courts."

In the instant case, the learned Designated Judge rejected the application for withdrawal from prosecution indicating that the State Government had not given any reason for withdrawal from prosecution and that mere use of the expression "Janhit" was not sufficient for according consent in a mechanical manner. The learned Judge was also of the view that it cannot be said that ends of public interest and administration of justice would be served by the withdrawal from prosecution. The learned Judge was of the view that material records might not have been placed before the Government while taking a decision in the matter.

We do not find any merit in the reasons given by the Designated Judge. There are stringent provisions in the TADA Act and in the Government Order, it is stated that the Government after proper discussion on the facts of the case and the evidence/reports/letters available on the record decided to waive the TADA Sections in the cases recorded in the enclosed list. When the Order itself states that all records were perused and considered, we do not think that the learned Designated Judge was justified in rejecting the application. It cannot be said that the Senior Prosecuting Officer had filed the application without consideration of the relevant facts. It cannot also be said that application was filed with any mala fide intention to save some of the culprits from the clutches of law. The request was made only to withdraw from prosecution as against the offences punishable under the TADA Act. Charges in respect of other offences punishable under Indian Penal Code remained and the accused had to face trial for that. Government must have thought that the stringent and harsh provisions of TADA Act were not necessary to deal with such situations.

We are of the view that the learned Designated Judge should have accepted the application for withdrawal from prosecution as against the offences charged against the appellants under the TADA Act. Therefore, we allow that application and the appellants shall stand acquitted under Section 321(b) of Cr. P.C of all the charges framed against them under the TADA Act.

The charge of murder and other allied offences against these appellants is

held to have been proved by the prosecution from the evidence of the eyewitnesses, the circumstantial evidence and the confession made by these appellants under Section 15 of the TADA Act.

As regards their confession statements, the Special Court accepted the same and held that they are reliable. Even if the appellants are acquitted of the charges under the TADA Act, the confession recorded by the police officer could have been of some assistance to the prosecution, but in view of the infirmity in recording the confession the same is not admissible in evidence. The confession statements of appellants were recorded not in accordance with law and that there is nothing on record to show that the same was voluntarily made by these appellants. It is pertinent to note that under Section 15 of the TADA Act, it is specifically stated that the Police Officer who is recording the confession shall not record the same unless he has reason to believe that it was being made voluntarily. The relevant portion of Section 15 of the TADA Act, as amended, is as under: -

15. Certain confessions made to police officers to be taken into consideration..

(1) ..
(2) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily."

The constitutionality of Section 15 of the TADA Act was challenged in Kartar Singh vs. State of Punjab (supra) and the Constitution Bench of this Court considered the matter in detail and upheld the same . It was pointed out by this Court that sufficient safeguards have been made to see that powers given under Section 15 are not being misused by the police and the Court also noticed Rule 15 of the Terrorists and Disruptive Activities (Prevention) Rules 1987 dealing with the mode of recording of a confession made to police officers. Under that rule, the confession shall, if it is in writing be signed by the person who makes the confession and the police officer shall also certify under his own hand that such confession was taken in his presence and recorded by him and that the record contains full and true accounts of the confession made by the person and such police officer shall make a memorandum at the end of the confession. In that memorandum, he has to state that it was taken in his presence and hearing and recorded by him and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him. It also states that the officer who is recording the confession should explain that he is not bound to make a confession and that, if he does so, the confession made by him would be used against him and the police officer should also certify that he has reason to believe that it is being voluntarily made. In the instant case, the confession made by these two appellants does not indicate that the same was voluntary in nature and the police officer who recorded the same has not certified that he believed that the confession was voluntarily made. In Sharafat Hussain Abdul Rahaman Shaikh & Ors. vs. State of Gujarat and another 1996 (11) SCC 62, it was held that if there is no certificate by the police officer who is recording confession, in accordance with sub-rule 3(b) of Rule 15, TADA Rules, 1987, the same is not admissible in evidence.

Even as regards the confession made under Section 164 Cr.P.C., this Court as early as in Sarwan Singh Rattan Singh Vs. State of Punjab, etc.etc. AIR 1957 SC 637 held that in order to make the confession statement under the Act, it must be proved that the same was voluntarily made by the maker. It would, of course, be necessary in every case to put the questions prescribed by the High Court circulars but the questions intended to be put under sub section (2) of Section 164 should not be allowed to become a matter of a mere

mechanical enquiry. No element of casualness should be allowed to creep in and the Magistrate should be fully satisfied that the confessional statement which the accused wants is in fact and in substance voluntary.

In Shivappa vs. State of Karnataka (1995) 2 SCC 76, while considering the question of a confession recorded under Section 164 Cr.P.C., it was observed as under:-

".. it is manifest that the said provisions emphasise an inquiry by the Magistrate to ascertain the voluntary nature of the confession. This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused under Section164 Cr.P.C. The failure of the Magistrate to put such questions from which he could ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the same."

It was further observed in paragraph 7 as under:

". Moreover, the Magistrate must not only be satisfied as to the voluntary character of the statement, he should also make and leave such material on the record in proof of the compliance with the imperative requirements of the statutory provisions, as would satisfy the court that sits in judgment in the case, that the confessional statement was made by the accused voluntarily and the statutory provisions were strictly complied with."

Section 15 of the TADA Act altered the fundamental rules of evidence given in the Evidence Act, which stood the test of time for over a century. Under Section 25 of the Evidence Act, a confession made to a police officer by a person accused of an offence shall not be proved against him. The power to record judicial confession is given to Magistrate and strict and rigorous guidelines have been laid down in Section 164 Cr.P.C. That apart many High Courts also have framed rules giving detailed procedure for recording confession. Confession is an admission of guilt. Normally, nobody would like to admit his guilt as he is fully aware that the same would be used against him. That apart, there is constitutional right for the accused that he shall not be subjected to any "testimonial compulsion". Under Article 20(3) of the Constitution, accused person has a protection from being compelled to be a witness against himself. As the confession made under Section 15 of the TADA Act is made admissible in evidence, the strict procedure laid down therein for recording confession is to be followed. Any confession made in defiance of these safeguards cannot be accepted by the Court as reliable evidence. The confession should appear to have been made voluntarily and the police officer who records the confession should satisfy himself that the same had been made voluntarily by the maker of that statement. The recorded confession must indicate that these safeguards have been fully complied with. In this case, the recorded confession statements do not show that the officer who recorded the statement had followed those guidelines. Therefore, it is inadmissible in evidence.

According to the prosecution, these two appellants hurled bombs at the police picket and they were identified by eyewitnesses, namely, PW2 Desh Raj Singh, PW 3 Sarvesh Singh and PW1 Platoon Commander Ramvir Singh. PW1 Platoon Commander Ramvir Singh deposed that two boys came running and threw bombs one after another and that he could see them in the electric light. At the relevant time, he was standing outside the tent and the appellants were seen at a distance of ten to fifteen paces away. He also deposed that he noticed these appellants while they were coming towards them. Constable Desh Raj Singh, PW-2 also deposed that while he was standing outside the tent he saw the appellants coming and throwing bombs at them. The counsel for the appellants contended that there was no source of light available for these witnesses to see the appellants and as the incident happened at about 7.45

P.M., the assailants might not have been identified by the witnesses. The counsel also argued that no reference was made regarding the source of light in the First Information Report. But, it is important to note that in the site plan prepared later, an electric pole is shown very near to the place of incident and when as many as three of the witnesses deposed that they had identified the assailant in the electric light, we do not find any justifiable reason to reject their evidence.

The counsel for the appellants further contended that the test identification parade was conducted belatedly and no evidentiary value could be attached to it. It was submitted that in the case of appellant-Abdul Jabbar, the test identification parade was done 43 days after his arrest and in the case of appellant Ayyub the same was done 10 days after he surrendered in the court.

The test identification parade as such is not a substantive piece of evidence, but it is done only for the satisfaction of the prosecution that the investigation was moving in the right direction. In the instant case, the test identification parade was held under the supervision of a Judicial Magistrate, but as he passed away subsequently, he could not be examined. PW-6, K.P. Agarwal and PW-34, B.B. Chaturvedi were examined to prove that the identification parade was conducted in a fair manner. Both these PWs deposed in detail regarding the various steps taken by them to see that the identification parade was done properly and their evidence shows that all necessary precautions were taken by them. We do not find any apparent defect in the test identification conducted by the prosecution.

There are various other pieces of circumstantial evidence to prove the complicity of these appellants. Appellant Abdul Jabbar was arrested on 28.1.1993 pursuant to an information that he was undergoing treatment in the house of one Ameer Hamza. He was taken into custody immediately and subjected to medical examination by PW 20, Dr. R.P. Mishra. This appellant had 7 injuries on his body. Injury nos. 5 & 6 were scabbed burn injuries, and in all probability, these injuries must have been caused due to handling of some explosive substance. Appellant Abdul Jabbar was produced before PW-10, Shri R.C. Chaturvedi, the then Designated Judge, on 29.1.1993 itself. The learned Judge recorded his observations and also the statement made by appellant Abdul Jabbar at that time. The statement was marked as Ex. Ka-11. In support of this document, PW-10 gave evidence in court. In Ex. Ka-11, the appellant made a confession of his guilt and he also made a statement to the effect that a fellow named, Saleem, forced him to indulge in the bomb-throwing on 26.1.1993 evening and he also stated about his accomplice. PW-10 deposed that when appellant Abdul Jabbar was produced before him he had injuries on his body and that he had noted this in Ex. Ka-11. Appellant Abdul Jabbar when questioned under Section 313 Cr.P.C., could not give justifiable explanation for the injuries found on his body. This is a clear incriminating circumstance to prove the guilt of appellant Abdul Jabbar.

In this case, PW-4 conducted the post-mortem examination on the body of deceased N.K. Mahender Prasad Sharma and he found 13 ante-mortem injuries. Most of the injuries were lacerated injuries and PW-4, the doctor, deposed that the abrasions on the body of the deceased could have been caused by splinters as a result of bomb explosion.

Learned Special Judge considered all items of evidence and came to the conclusion that the two appellants have committed offences punishable under Section 302 read Section 34 IPC. It is proved beyond reasonable doubt that the appellants came to the police picket and hurled bombs at police personnel present there and thereby caused the death of N.K. Mahender Prasad Sharma and also caused injuries to others. The appellants have been rightly convicted under Section 302 read Section 34 IPC and Section 307 read with Section 34 IPC. Their conviction and sentences under Section 4 of the Prevention of Damage to Property Act, 1984 is also confirmed. The prayer of the respondent-State of U.P. to withdraw from prosecution as regards charges under Section 3(1)(2)(i) is granted and as directed earlier in this judgment the appellants are acquitted of the charges framed against them under the provisions of the

TADA Act. As regards the conviction and sentences awarded to the appellant on various other counts under the Indian Penal Code and Prevention of Damage to Property Act, we see no reason to interfere therewith. The conviction and sentence of the appellants under Section 302 read with Section 34 and Section 307 read with Section 34 IPC as also under Section 4 of the Prevention of Damage to Property Act, 1984 are maintained. Consequently, these appeals shall stand partly allowed.

...J.
(R.P. SETHI)

J.
(K.G. BALAKRISHNAN)

February 28, 2002.