

CASE NO.:
Appeal (crl.) 602 of 2004

PETITIONER:
Vijaykumar Baldev Mishra @ Sharma

RESPONDENT:
State of Maharashtra

DATE OF JUDGMENT: 18/05/2007

BENCH:
S.B. Sinha

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

1. One Anna Shetty was facing trial for murder of one Duni Chand Kalani. Duni Chand Kalani is said to be the uncle of one Pappu Kalani. He was an accused in a murder case. The said Anna Shetty was murdered in Jail. Anna Shetty was released from Jail on 15.10.1990. He was murdered on the same day. The appellant was an accused therein with many others. The said murder took place in view of the long standing enmity between two gangs belonging to Gopal Rajwani and Pappu Kalani. A First Information Report was lodged under Section 302/307 IPC as also under the Arms Act. Appellant, however, along with others, were also charged under Terrorist and Disruptive Activities (Prevention) Act (hereinafter referred to as 'TADA').

2. Indisputably, a Constitution Bench of this Court in Kartar Singh vs. State of Punjab, [1994 (3) SCC 569], while upholding the validity of TADA directed constitution of a Committee to review the cases pending thereunder for the purpose of making recommendations to the Government, so as to enable it to consider the matters where in its opinion, the charges under TADA were required to be dropped and the matters for the prosecution thereunder should continue.

3. Kartar Singh (supra) was explained by this Court in R.M. Tewari v. State (NCT of Delhi) and Others [1996 (2) SCC 610] in the following terms:

"10. The observations in Kartar Singh 1 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 there 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 CrPC 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.

11. 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."

4. Bombay High Court also took the same view and issued similar directions.

5. Pursuant to or in furtherance of the recommendations of this Court as also the Bombay High Court, a Review Committee was constituted, headed by a retired Judge of the High Court of Bombay. The Review Committee took up for consideration 27 cases including the one pending against the appellant herein. In its report, the Review Committee opined :

"The murder of Anna Shetty appears to be out of personal enmity and not intended to cause fear or terror in the minds of the people. It is so stated in the chargesheet itself.

"To take revenge of the murder of his uncle and to establish supremacy over the rival gang, he made conspiracy to kill Anna Shetty by providing money, weapons, manpowers, vehicles and other assistance. He was the mastermind behind the killing of Anna Shetty."

It also reveals that the genesis of two murder cases i.e. TCS No.25/92 and TCS 8/93 are inter connected as observed by the Supreme Court in its order dated 2nd March 2001 in Criminal Appeal No. 12981, 1299 of 1998 as under:

"According to the prosecution there are two groups in Ulhasnagar, one is headed by Gopal Rajwani and other by Pappu Kalani. The deceased Maruti Jadhav and one Krishna Pillay were eye witness to the murder of Lalu in the year 1989 at hotel Sun & Sand, Bombay. The said Krishna was murdered and thereafter Maruti Jadhav remained the only eye

witness."

It is heard in the case of Niranjan Singh Karan Singh Punjabi vs. Jitendera Bhimraj Bijj- AIR 1990 SC 1962 (1969).

"A mere statement to the effect that the show of such violence would create terror or fear in the minds of the people and none would care to oppose them cannot constitute an offence under Section 3 (1) of TADA Act."

It was observed :

"Although the murder of Anna Shetty took place in 1990 and the case was chargesheeted in 1993, the trial has not commenced. There are three accused persons who are still in jail for more than seven years and are yet to be tried. In view of the observation of the Hon'ble Supreme Court in the various judgments cited above, the long time that has elapsed, periods spent in jail and the fact that the crime is committed due to personal enmity, the Review Committee is of the view to drop the proceedings under TADA against all the accused and they may be prosecuted for the charges under Section 302 IPC etc. in the regular Sessions Court.

6. It was opined that no case for continuation of a case under TADA had been made out against the appellant. Pursuant to or in furtherance of the said recommendations, the special public prosecutor filed an application for withdrawal of the charges under TADA inter alia as against the appellant stating :

"The reasons for withdrawal are as under :

(A) The stringent provision of TADA need not to be attracted in the instant case and the Government after proper discussion on the facts of the case and the evidence, reports and letters available on the record has decided in the enclosed list and the Government has perused all records and considered the opinion of the Review Committee formulated by the State Government under orders of the Supreme Court. It would be just and proper that this case need not be proceeded further. The request is being made to withdraw from prosecution as against the offences punishable under the TADA Act, and the stringent and hard provisions of TADA were not necessary to deal with such situations. In fact, from the record it has also been seen that the provision of the said TADA Act also could not be said to be attracted as the said provision cannot be invoked nor could the activities be said to be disruptive activities as the said incident seems to have taken place because of the personal rivalry and as held by the Hon'ble Supreme Court in the case of State vs. Nalini and others reported in 1999 (5) SCC 253, it could not be said that the provisions of Section of TADA are applicable. It is worthwhile to note that after

having seen the record that concession cannot form the basis for framing charges.

(B) The State Government having considered all this and the Special Public Prosecutor having applied his mind to this aspect, seeks to withdraw from the prosecution in respect of offences under TADA Act as against the accused in the instant case."

7. The Designated Court TADA dismissed the said application by an order dated 15.5.1993 inter alia opining :

"The case No.8/93 pertains to the murder of Anna Shetty and constable \026 Surve. He has also referred to the murder of one Ghanasham Bhjatia and Inder Bhatija on 27.7.1990 and 28.4.90 respectively, who were also accused in case of murder of Dunichand Kalani. In the order dated 10.11.98 in connected TADA Sessions Case No.25/92 and 9/93 below Exh. 27, 31, 32 etc. my learned predecessor made reference to the confessional statements of accused recorded under the provisions of TADA Act. Leaving aside the infirmities and/or evidentiary value of these statements which will be assessed during trial the fact remains that all this evidence collected after strenuous investigation will have to be ignored. In both these cases allegations are that conspiracy was hatched to eliminate Anna Shetty. Maruti Jadhav and in pursuance of this plan was executed on different dates. Thus confessional statements recorded under Section 15 of the TADA Act are very relevant and important piece of evidence to unfold conspiracy and to unfold act of main perpetrator of crime. Keeping in view this aspect of the matter, if applications for dropping of the charges under the provisions of TADA Act are considered, it would be difficult to conclude that the withdrawal from the prosecution or dropping of the charges under the provisions of TADA Act would hardly serve any public interest or would advance course of justice. This is apart from the fact that in both these matters there are orders of Hon'ble Supreme Court wherein applicability of TADA has been upheld and trials have been expedited. It is therefore expected of the State to render assistance to the Court to dispose of the matters expeditiously."

8. The State of Maharashtra being aggrieved by the said order filed a writ petition before the Bombay High Court which was marked as Criminal Writ Petition 562 of 2003. A Division Bench of the said Court by a judgment and order dated 4.7.2003 while declining to entertain the same opined that as an appeal against the order of the learned Designated Court TADA is maintainable under Section 19 of the Act, the petitioner should take recourse thereto stating:

"In our opinion therefore the objection raised by Mr. Nitin Pradhan that the writ petition is not maintainable in view of the fact that alternate and efficacious remedy by way of appeal is available to the prosecution is well founded.

In all humility, in our opinion, a remedy of appeal under Section 19 of the TADA Act is far more efficacious and better for all concerned than seeking exercise of writ jurisdiction of this court under Article 226 of the Constitution.

Yet another important aspect to be noted is that this very interveners in this case i.e. representatives of the victim are also the interveners of the appeal in the Supreme Court which was decided by the order dated 2nd March 2001. It is pertinent to note that they do not in our opinion, rightly raise any objection about maintainability of the appeal in Supreme Court on the ground that the order challenged is an interlocutory order."

9. Appellant has, thus, preferred this appeal under Section 19 of the TADA (P) Act, 1987 from the said judgment of the Designated Court TADA dated 10.3.2003.

10. Mr. R.F. Nariman, the learned senior counsel appearing on behalf of the appellant submits that keeping in view the recommendations of the Review Committee, the learned Designated Court TADA committed a manifest error in refusing to allow the public prosecutor to withdraw the case solely on the ground that certain confessions having been made thereunder, the same would not be available if the appellant is not proceeded against under TADA Act. The Review Committee, as noticed hereinbefore, was constituted in view of the directions issued by this Court in Kartar Singh (Supra) and a decision of the Bombay High Court in Criminal Writ Petition No. 289 of 2002. The Review Committee reviewed only those cases where the trial had not started. They formulated their own guidelines for scrutiny of the matter. It noticed the decision of this Court in State vs. Nalini reported in (1999) 5 SCC 253 wherein it was held :

"A reading of the first sub-section shows that the person who does any act by using any of the substances enumerated in the sub-section in any such manner as are specified in the sub-section, cannot be said to commit a terrorist act unless the act is done "with intent" to do any of the four things: (1) to overawe the Government as by law established; or (2) to strike terror in people or any section of the people; or (3) to alienate any section of the people; or (4) to adversely affect the harmony amongst different sections of the people"

11. Mr. R.K. Adsure, learned counsel appearing on behalf of the State supported the contention of Mr. Nariman.

12. Section 321 of the Criminal Procedure Code, 1973 provides for withdrawal from prosecution at the instance of the public prosecutor or Assistant public prosecutor. Indisputably therefor the consent of the Court is necessary. Application of mind on the part of the Court, therefore, is necessary in regard to the grounds for withdrawal from the prosecution in respect of any one or more of the offences for which the appellant is tried. The provisions of TADA could be attracted only in the event of one or the other of the four 'things' specified in Nalini (supra) is found applicable and not otherwise. The Review Committee made recommendations upon consideration of all relevant facts. It came to its opinion upon considering the materials on record. Its recommendations were based also upon the legality of the charges under TADA in the fact situation obtaining in each case.

It came to the conclusion that in committing the purported offence, the appellant inter alia had no intention to strike terror in people or any section of the people and in fact the murder has been committed only in view of group rivalry and because the parties intended to take revenge, the provisions of the TADA should not have been invoked.

13. The Public Prosecutor in terms of the statutory scheme laid down under the Code of Criminal Procedure plays an important role. He is supposed to be an independent person. While filing such an application, the public prosecutor also is required to apply his own mind and the effect thereof on the society in the event such permission is granted.

14. In Sheonandan Paswal v. State of Bihar [(1987) 1 SCC 288], Khalid, J, opined :

"73. Section 321 gives the Public Prosecutor the power for withdrawal of any case at any stage before judgment is pronounced. This presupposes the fact that the entire evidence may have been adduced in the case, before the application is made. When an application under Section 321 CrPC is made, it is not necessary for the court to assess the evidence to discover whether the case would end in conviction or acquittal. To contend that the court when it exercises its limited power of giving consent under Section 321 has to assess the evidence and find out whether the case would end in acquittal or conviction, would be to rewrite Section 321 CrPC and would be to concede to the court a power which the scheme of Section 321 does not contemplate. The acquittal or discharge order under Section 321 are not the same as the normal final orders in criminal cases. The conclusion will not be backed by a detailed discussion of the evidence in the case of acquittal or absence of prima facie case or groundlessness in the case of discharge. All that the court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. The court after considering these facets of the case, will have to see whether the application suffers from such improprieties or illegalities as to cause manifest injustice if consent is given. In this case, on a reading of the application for withdrawal, the order of consent and the other attendant circumstances, I have no hesitation to hold that the application for withdrawal and the order giving consent were proper and strictly within the confines of Section 321 CrPC."

15. In regard to the Courts' function in the matter of grant of consent, while opining that the grant should not be a matter of course, this Court held that even a detailed reasoned order is not necessary to be passed therefor. The Court took into consideration the jurisdiction of the Court under Section 321 of the Criminal Procedure Code vis-à-vis other provisions laid down therein opining :

"85. The scope of Section 321 can be tested from another angle and that is with reference to Section 320 which deals with "compounding of offences". Both these sections occur in

Chapter 24 under the heading "General Provisions as to Enquiries and Trials". Section 320(1) pertains to compounding of offences, in the table, which are not of a serious nature while Section 320(2) pertains to offences of a slightly serious in nature but not constituting grave crimes. The offences in the table under Section 320(1) may be compounded by the persons mentioned in the third column of the table without the permission of the court and those given in the Table II, under Section 320(2) can be compounded only with the permission of the court. Under sub-section 4(a), when a person who would otherwise be competent to compound an offence under Section 320, is under the age of 18 years or is an idiot or a lunatic, any person competent to contract on his behalf may, with the permission of the court, compound such offence. Sub-section 4(b) provides that when a person who would otherwise be competent to compound an offence under this section is dead, the legal representative, as defined in the Code of Civil Procedure, of such person may, with the consent of the court, compound such offence.

86. These two sub-sections use the expression "with the permission of the court" and "with the consent of the court" which are more or less ejusdem generis. On a fair reading of the abovementioned sub-sections it can be safely presumed that the sections confer only a supervisory power on the court in the matter of compounding of offences in the manner indicated therein, with this safeguard that the accused does not by unfair or deceitful means, secure a composition of the offence. Viewed thus I do not think that a plea can be successfully put forward that granting permission or giving consent under sub-section (4)(a) or (4)(b) for compounding of an offence, the court is enjoined to make a serious detailed evaluation of the evidence or assessment of the case to be satisfied that the case would result in acquittal or conviction. It is necessary to bear in mind that an application for compounding of an offence can be made at any stage. Since Section 321 finds a place in this chapter immediately after Section 320, one will be justified in saying that it should take its colour from the immediately preceding section and in holding that this section, which is a kindred to Section 320, contemplates consent by the court only in a supervisory manner and not essentially in an adjudicatory manner, the grant of consent not depending upon a detailed assessment of the weight or volume of evidence to see the degree of success at the end of the trial. All that is necessary for the court to see is to ensure that the application for withdrawal has been properly made, after independent consideration, by the Public Prosecutor and in furtherance of public interest.

It was furthermore held:

"90. Section 321 CrPC is virtually a step by way of composition of the offence by the State. The State is the master of the litigation in criminal cases. It is useful to remember that by the exercise of functions under Section 321, the accountability of the concerned person or persons does not disappear. A private complaint can still be filed if a party is aggrieved by the withdrawal of the prosecution but running the possible risk of a suit of malicious prosecution if the complaint is bereft of any basis."

(See also S.K.Shukla and Others vs. State of U.P. and Others [2006(1) SCC 314], Rahul Agarwal vs. Rakesh Jain and Anr. [2005 (2) SCC 377] and K.Anbazhagan vs. Superintendent of Police and Others [2004(3) SCC 767])

16. Noticing that no guidelines have been provided for in the matter of grant or withdrawal of the consent by the Court, the Constitution Bench referred to the ratio of its earlier decision in State of Bihar vs. Ram Naresh Pandey [1957 (1) SCR 279] wherein it was held:

"His discretion in such matters has necessarily to be exercised with reference to such material as is by then available and it is not a prima facie judicial determination of any specific issue. The Magistrate's functions in these matters are not only supplementary, at a higher level, to those of the executive but are intended to prevent abuse. Section 494 requiring the consent of the court for withdrawal by the Public Prosecutor is more in line with this scheme, than with the provisions of the Code relating to inquiries and trials by court. It cannot be taken to place on the court the responsibility for a prima facie determination of a triable issue. For instance the discharge that results therefrom need not always conform to the standard of 'no prima facie case' under Sections 209(1) and 253(1) or of 'groundlessness' under Sections 209(2) and 253(2). This is not to say that a consent is to be lightly given on the application of the Public Prosecutor, without a careful and proper scrutiny of the grounds on which the application for consent is made."

17. While refusing to grant permission, the Designated Court, in our opinion, was not correct in expressing its opinion in the merit of the matter and the effect of confessions made in terms of the provisions of TADA. It was, however, also not necessary to consider as to whether, the action of the public prosecutor as also the State was bonafide or not. Moreover, bonafide on the part of the public prosecutor itself cannot automatically lead to grant of consent. There are other circumstances also which are required to be taken into consideration.

18. For the reasons aforementioned, the appeal is allowed. The application filed by the State for withdrawal of the charges under TADA against the appellant shall stand allowed. The learned Designated Judge may now proceed with the matter in accordance with law.