

CASE NO.:
Appeal (civil) 307 of 1998

PETITIONER:
Aslam Parwez

RESPONDENT:
Govt. of NCT of Delhi

DATE OF JUDGMENT: 16/04/2003

BENCH:
S. Rajendra Babu & G.P. Mathur.

JUDGMENT:

JUDGMENT
(with CrI.Appeal No. 941 of 1998)

G.P. Mathur, J.

Criminal Appeal No. 941 of 1998 has been preferred by Mohd. Ishtiaq and Criminal Appeal No. 307 of 1998 has been preferred by Aslam Parwez against the judgment and order dated 2.2.1998 of Addl. Designated Court (II) Delhi by which the former was convicted under Section 25 of the Arms Act and Section 5 of Explosives Substances Act and was sentenced to two years RI and a fine of Rs.1,000/- under the first count and four years RI and a fine of Rs.1500/- under the second count and the latter was convicted under Section 5 of Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred as 'the TADA') and was sentenced to five years RI and a fine of Rs.1500/-. The sentences imposed upon Mohd. Ishtiaq were ordered to run concurrently.

The case of the prosecution, in brief, is that on 8.9.1987 Surinder Kumar, who was posted as Sub-inspector in PS Subzi Mandi was patrolling in the area along with Shashi Pal, Head Constable, and some others. At about 9.30 a.m. the S.H.O. of P.S. Subzi Mandi informed him that he had received information that Mohd. Ishtiaq resident of Kabir Basti was manufacturing arms in his workshop and was supplying the same to others and that lot of arms were kept in his workshop. After receiving the information he requested 3 or 4 passers-by namely Om Prakash Saxena, Rakesh Kumar Sharma, Bilu Ram and others and went near house No.347 Kabir Basti. At about 10.00 a.m. Mohd. Ishtiaq (A-1), Saleem (A-2) and Jameel (A-3) came there. A-1 opened the lock of the factory and all of them went inside and closed the door but the same was not bolted from inside. At about 11.00 a.m. Surinder Kumar pushed the door open and entered the room along with members of the raiding party. They saw that A-1 was having a canvass bag in his hands from which A-2 was taking out a country made pistol and was handing over the same to A-3. One country made revolver was lying on the adjoining table. All the three accused were caught by the raiding party. The canvass bag was found containing two country made unassembled revolvers, one pen pistol, some cartridges, one crude hand grenade, four shells of HE 36 grenade and ten live sutli bombs. A book captioned as 'Encyclopedia of Ammunition' which described the process of manufacturing of weapons with illustrations and photographs was found lying on the table. All the recovered articles were sealed in 11 packets and the same were given to Rakesh Kumar. The police party also found a tin containing 18 parts for manufacturing arms which were sealed in a packet and also a bag containing sulphur, potassium sulphate, yellow colour powder which was also sealed. There were some more tins which contained various objects used for manufacture of arms, drill machine, one blade/saw and 8 tools which were also sealed. Surinder Kumar S.I. then wrote a rukka which was sent to the police station through Kailash Chandra constable for

registration of the case. A-1, A-2 and A-3 led the raiding party to Bara Hindu Rao on 9.9.87 where Vakeel, Aslam and Afzal were found standing and they were arrested. A-2 while in police custody made a disclosure statement on 12.9.87 that he had test exploded two bombs in the hills of Hindu Rao Hospital and A-2 and A-3 led the police party to the said place, but nothing was found. Thereafter they led the police party to a place near the tomb where some explosive material in open condition was found lying which was sealed. A-4 Aslam Parwez could not be arrested and therefore proceedings under Sections 82 and 83 Cr.P.C. were taken against him. The case of the prosecution further is that after about 8 months on 2.5.1988 Aslam Parwez (A-4) was produced in the Court and at that time he had kept his face covered with a cloth. The Investigating officer moved an application for holding an identification parade but the same was declined by the accused. Thereafter an application was moved for police remand which was granted. The case of the prosecution further is that A-4 made a disclosure statement on 3.5.1988 that he had been given one revolver by A-1 and that he had kept the same concealed by the side of the building under construction which was said to be opposite the factory from where the arms were recovered. The accused took the police party to the aforesaid place, dug out some earth by the side of the wall and retrieved one revolver which contained three live rounds in its chamber. The revolver and cartridges were sealed separately.

After completion of investigation, papers were submitted before the Deputy Commissioner of Police and after sanction had been accorded, charge sheet was filed before the Designated Court. The notification regarding the area was issued on 20.10.87 i.e. subsequent to the recovery made on 12.9.87 and accordingly A-1, A-2 and A-3 were charged under Section 25 of Arms Act and Section 5 of Explosive Substances Act. Since the recovery at the pointing out of Aslam @ Pappu was made subsequent to the issuance of notification, he was charged under Section 5 of TADA. The prosecution in support of its case examined 17 witnesses and filed some documentary evidence. The articles recovered from House No.347, Kabir Basti, Sabzi Mandi and the revolver at the pointing out of A-4 was also produced in Court. A-1 and A-3 in their statement under Section 313 Cr.P.C. denied the case of the prosecution and stated that they had been falsely implicated by the police. A-1 stated that nothing was recovered from his possession and that he had already been arrested before the alleged time of recovery. A-4 in his statement denied the prosecution case and stated that he had come to surrender before the Court when he was arrested and the revolver and cartridges had not been recovered at his pointing out but the same had been planted. The accused however did not lead any evidence in their defence. The Addl. Designated Court (II) believed the case of the prosecution and convicted and sentenced the accused, as stated earlier.

Before we consider the contentions raised by learned counsel for the parties, it will be advantageous to briefly notice the evidence which has been produced by the prosecution. In order to establish the recovery of fire arms, cartridges, bombs and explosives from House No.347 Kabir Basti, Subzi Mandi, the prosecution examined 7 witnesses out of whom 3 are police personnel and four are public witnesses and we will take up their testimony first. PW2 Rakesh Kumar is a government servant and is working as Clerk in DDA. He stated that at about 11.30 a.m. while coming from the side of Hindu Rao Hospital, he saw a crowd near a kothri where he stopped and came to know that some unauthorized arms and ammunitions had been seized from the factory. He was taken to the police station where he was shown huge quantity of arms and ammunition and was asked to sign some papers. He further stated that nothing was recovered from the factory in his presence. The witness was declared hostile and was permitted to be cross-examined where he stated that some documents had already been written and he was asked to sign the same which he did without going through the contents thereof. PW 3 Om Prakash Saxena stated that at about 11 or 11.30 a.m. he was passing through the Nehru Park, Subzi Mandi and seeing the crowd he stood there. The police took him to Police Station Subzi Mandi and showed him some arms and ammunition and thereafter he put his signatures on some papers. The witness was declared hostile and was cross-examined by the prosecution. PW 4 Bilu Ram, a fruit commission agent,

stated that he was summoned by the police at PS Subzi Mandi where he put his signatures on some papers and that he knew nothing about the case. This witness was also declared hostile and was cross-examined by the prosecution. PW 5 Pammi, an agent in subzimandi stated that about 2-3 years back he was going towards his house in the evening and that he knew nothing about the case. The prosecution cross-examined the witness after declaring him hostile and he denied to have given any statement to police under Section 161 Cr.P.C. or that he had given any false statement.

PW 14 Surinder Kumar deposed that he was posted as Sub-Inspector at PS Subzi Mandi on 8.9.1987 and while he was patrolling in the area, the SHO met him and told him that an information had been received that A-1 was manufacturing arms in his workshop and was supplying the same to others and that huge quantity of arms and machinery was kept in the workshop. Thereafter he requested 3-4 passersby to join the raiding party and reached House No.347 Kabir Basti and held a 'Nakabandi' at about 10.00 a.m. A-1, A-2 and A-3 came there and after A-1 had opened the lock of his factory they all went inside and closed the door though it was not bolted from inside. At about 11.00 a.m. he pushed the door open and the raiding party entered the room and saw that A-2 was taking out a country made pistol from a canvass bag which was in the hands of A-1 and was handing over the same to A-3. A revolver was found lying in the adjoining table, two country made unassembled revolvers and cartridges, crude hand grenade, four shells of HE 36 grenade and 10 sutli bombs were recovered from the canvass bag. Besides the above material, some quantity of sulphur and yellow coloured powder were also recovered from the room. He has further deposed that on the disclosure statement made by A-3 on 12.9.1987 they went to hills of Hindu Rao Hospital but nothing was recovered from there. A-3 then led the police party near a tomb where some explosive material in open condition was found lying. Regarding the recovery made at the pointing out of A-4, the witness has stated that the said accused was produced in Court on 2.5.1988 and he moved an application for holding his test identification parade, which he declined. Thereafter on the basis of the disclosure statement made on 3.5.1988 he along with other police personnel went to the building which was being constructed opposite the factory and after digging out the earth, he took out a revolver which had three rounds of live cartridges in its chamber. The witness further deposed that a photograph had been taken of the factory from where the arms and ammunitions were recovered and all the recovered articles had been sealed on the spot. PW 10 Ram Narain is Head Constable who was present in police booth Malkaganj and was accompanying PW 14 Surinder Kumar on patrol duty. He has also deposed about the arrival of the three accused, opening of the lock of the house by A-1, thereafter the recovery of the fire arms, ammunitions and bombs etc from that place and the arrest of A-1, A-2 and A-3. He also witnessed the incident regarding the recovery of a country made revolver on 3.5.1988 which was done in pursuance of the disclosure statement made by A-1. PW 11 VP Kohli was posted as incharge of PP Andha Mughal, PS Subzi Mandi on 8.9.1997. He has deposed that after receiving information from Shri Ishwar Singh SHO, Police Station Subzi Mandi at 8.00 a.m. he immediately went near the main gate of Hindu Rao Hospital and found PW 14 Surinder Kumar, PW 10 Ram Narain and some other police personnel and also PW 3 Om Prakash Saxena and PW 2 Rakesh Kumar standing near police booth. He has described as to how the accused were seen coming at 10.00 a.m., the raid which was conducted in the premises at about 11.00 a.m. and the recovery of various incriminating articles from the said place. PW 7 Jagpal Singh Head Constable recorded the FIR of the case. PW 8 Sukhdev Singh was working as MHC (M) PS Subzi Mandi on 8.9.1987. He has deposed that sealed packets were deposited on 8.9.1987 and were subsequently sent for defusing on 12.9.1987. PW9 Ramesh Kumar is a photographer and had taken photographs of the place of occurrence i.e. Kabir Basti but did not remember whether he had taken the photographs at the instance of SI Surinder Kumar on 8.9.1987. He further stated that he did not remember whether he had given any developed prints of the photographs to the police and also that his studio was burnt in a fire on 15.11.1993. PW 1 Major MS Joshi of National Security Guard defused the explosives which were

brought to him in September, 1987 by a police officer of PS Subzi Mandi. PW13 Smt. Kiran Bedi who was posted as DCP North District granted sanction on 18.1.1988 to prosecute the accused under the Arms Act and she has proved the same. PW 15 Pradeep Singh, PW 16 Virender Singh and PW 17 Satish Kumar, Constables have given evidence of formal character.

Learned counsel for the appellants has submitted that on the point of recovery of arms, ammunitions, bombs and explosives from the possession of A-1, A-2 and A-3 the prosecution had examined four public witnesses but they all turned hostile and did not at all support the prosecution case and in these circumstances it will be wholly unsafe to place reliance on the testimony of police personnel only in order to fasten the liability upon the accused. He has also urged that the testimony of the three police personnel cannot be relied upon as the version of the incident given by them is stereotyped and is highly artificial and unnatural. It has been urged by the learned counsel for A-4 that on the disclosure statement made by him, a country made revolver and some cartridges were allegedly recovered and the same was done from an open place which is accessible to all where a big building was under construction and from the said fact alone it is not possible to draw any inference that A-4 was in exclusive and conscious possession of the weapon and, therefore, his conviction under Section 5 of TADA is wholly illegal.

Learned counsel for the State has, on the other hand, submitted that the recovery of the incriminating articles from the possession of the three accused had in fact been made in the presence of public witnesses but they were won over by the accused and therefore did not support the case of prosecution. Learned counsel has submitted that the testimony of the three police witnesses, namely PW 10, PW 11 and PW 14 was trustworthy and reliable as the same was corroborated by the recovery made and in these circumstances there was no reason not to place reliance upon the same. It has been urged that the Designated Court rightly held that the charges against the accused had been established and consequently they were rightly convicted and sentenced.

We will first consider the incident which is alleged to have taken place on 8.9.1987 when A-1, A-2 and A-3 were found to be in possession of arms, ammunitions, bombs and explosives in House No. 347 Kabir Basti, Subzi Mandi. It is the consistent statement of PW 10 Ram Narain Head Constable, PW 11 VP Kohli Inspector and PW 14 Surinder Kumar SI that after the SHO of PS Subzi Mandi had informed them that some persons were illegally manufacturing arms in the factory, they decided to organize a raid and requested 3-4 passers-by to accompany them and that is how PW 3 Om Prakash Saxena, PW2 Rakesh Kumar and others became members of the raiding party. However all the four public witnesses namely PW2, PW3, PW4 and PW5, who were chosen by the raiding party to witness the arrest or recovery of the incriminating articles, did not at all support the prosecution case. PW2 categorically stated in his examination-in-chief that nothing was recovered from the factory in his presence, while PW 3 stated that the recovered arms were shown to him at the police station. PWs 4 and 5 stated that they know nothing about the case. The statement of these witnesses does not show that they are in any manner connected with the accused or that there was any reason why they would depose falsely in order to help them and would not support the prosecution case. PW 2 is a graduate and was working as a Clerk in DDA for the last 12 years. He appears to be a responsible person and there is no reason why he would make a false statement in Court. This is a very important feature of the case that all the four public witnesses examined in the case did not support the prosecution version of the incident.

According to the testimony of the three police personnel, namely PWs 10, 11 and 14 after receiving information from SHO P.S. Subzi Mandi it was decided to organize a raid and thereafter the police party did "Nakabandi" by taking position behind the building under construction opposite the premises in question. The accused are said to have arrived at 10.00 a.m. but the raid was done after one hour at 11.00 a.m. It looks highly improbable that though the accused were seen arriving and entering the house at 10.00 a.m., yet the police party waited for full one hour and entered the room of the factory at 11.00 a.m. and that too just at the nick of the time when A-2 was taking out

a country made pistol from the canvass bag being held by A-1 and was in the process of handing over the said pistol to A-3. All the three witnesses have given exactly identical stereotyped version on this point. The statement of the witnesses appears to be highly artificial and improbable.

PW 11 and PW14 have admitted that all the police personnel were putting on their uniforms. The accused while coming would have seen the presence of a large police force at the spot and in natural course of conduct would have become apprehensive. It is rather strange that though a considerable quantity of arms, ammunitions, explosives and bomb was allegedly present in the factory, yet the accused did not take even the ordinary precaution of bolting the door from inside and A-1 waited for full one hour for handing over the weapons to A-2 and A-3. It appears that the witnesses have deposed about taking out of the pistol by A-2 from the bag of A-1 and his handing over the same to A-3 only in order to implicate A-2 and A-3 and by attributing to them a direct positive role in the incident. If all the three accused had arrived at the factory at 10.00 a.m., A-1 would have forthwith given the arms to the other two accused and they would have immediately left the place. A-2 and A-3 are not likely to have remained present and waited for an hour in the premises just to obtain the delivery of the weapons. It has come in the evidence of the prosecution witness that A-1 is running a "Kharad" workshop in House No.347 Kabir Basti. He had given documents to show that his workshop was registered and he was regularly paying electricity bills for running the said workshop. The presence of A-1 in his own workshop is not an incriminating circumstance at all. However, an artificial version of the incident has been given in order to show the complicity of A-2 and A-3 and to implicate them in the alleged crime. In view of these features of the case we are of the opinion that the testimony of three police personnel, namely PWs 10, 11 and 14 does not inspire confidence and it will be highly unsafe to place reliance upon the same in order to convict the accused specially when the public and independent witnesses did not at all support the prosecution case on any material particular.

Aslam Parwez has been convicted under Section 5 of TADA on the ground that he made a disclosure statement on 3.5.1988 to the effect that A-1 had given him a revolver on 8.9.1989 which he had concealed near the building which was being constructed opposite the factory and that the said revolver was recovered by him after digging out the earth. It may be stated at the very outset that the evidence on record does not show that any effort was made by the police party to have any public witness with them when A-4 took them to the spot on 3.5.1988, where the revolver is alleged to have been recovered. Only two witnesses, namely, PW10 Ram Narain Head Constable and PW14 Surinder Kumar SI, who are both police personnel, have deposed about the aforesaid recovery. The recovery has been made after 8 months and that too from an open place which was by the side of a building under construction. The recovery has not been made from any closed or concealed place but from an open place which is accessible to all and everyone including those who were engaged in the construction of the building.

The inference to be drawn where an incriminating article is recovered at the pointing out of an accused from an open place accessible to all was considered by us in CrI.A. No.685 of 2001 Salim Akhtar @ Mota v. State of Uttar Pradesh decided on 9.4.2003 and it was observed as under:-

"In Sanjay Dutt v. State through C.B.I., Bombay 1994 (5) SC 540 it has been held by a Constitution Bench that with a view to hold an accused guilty of an offence under Section 5 of TADA, the prosecution is required to prove satisfactorily that the accused was in conscious possession, unauthorisedly in a notified area of any arm or ammunition of the specified description. In Trimbak v. State of MP AIR 1954 SC 39 recovery of certain stolen articles was made at the pointing out of the accused and on that basis he was convicted under Section 411 IPC by the High Court. Reversing the judgment it was held by this Court that when the field from which the ornaments were recovered was an open one and

accessible to all and sundry, it is difficult to hold positively that the accused was in possession of these articles. It was further held that the fact of recovery by the accused is compatible with the circumstance of somebody else having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of discovery cannot be regarded as conclusive proof that the accused was in possession of these articles. In *Raosaheb Balu Killedar v. State of Maharashtra* (1995) 3 CrL. Law Journal 2632 the accused had made a disclosure statement and had led the police party to a place behind a mill, pointed out the place and himself removed the earth and from a pit about 6 inches deep recovered a revolver loaded with a live cartridge wrapped in a polythene bag. It was held by this Court that the statement made by the accused was capable of an interpretation that the appellant had the knowledge about the concealment of the revolver at the particular place from where it was got recovered and not that he had concealed the same and therefore it was not possible to say conclusively and beyond a reasonable doubt that the appellant had conscious possession of the revolver and the cartridge. This principle was reiterated in *Khudesar Dutta v. State of Assam* (1998) 4 SCC 492 and it was held that mere knowledge of the accused that incriminating articles were kept at certain place does not amount to conscious possession and conviction under Section 5 of TADA was set aside."

In our opinion the principle laid down above is clearly applicable here and accordingly it is not possible to hold that A-4 was in possession of the revolver and cartridges which were recovered on 3.5.1988. His conviction, therefore, deserves to be set aside.

In the result, both the appeals succeed and are hereby allowed and the conviction of the appellants and also the sentences imposed upon them by the Designated Court are set aside. The appellants are on bail, they need not surrender. Their sureties and bail bonds are discharged.