

A

GURMAIL SINGH
v.
STATE OF PUNJAB

MARCH 18, 2002

B

[UMESH C. BANERJEE AND P. VENKATARAMA REDDI, JJ.]

Criminal Law:

C

Terrorist & Disruptive Activities (Prevention) Act, 1987—Section 5—Ingredients of offence punishable thereunder—Allegation that accused found carrying a bag containing explosives on his head alongwith four detonators—Constables inspired accused to surrender and brought him before the Officer at the Police Station—Accused carried the explosives in the same manner in the Police Station itself—Report of expert and evidence of Police Officials—

D

Designated Court convicted accused on the basis of statutory presumption under Section 5 of the Act—Whether conviction justified—Held, such conviction is erroneous since Designated Court found case made out by prosecution improbable—Also reliance on the evidence of police officials is misplaced due to absence of police constables, who inspired the accused to surrender.

E

It is alleged that appellant-accused was found carrying one bag on his head along with four detonators on his right hand. Constables inspired the accused to surrender and brought him before the police official at the Police Station. Accused carried the bag and detonators in the same manner in the Police Station itself. On search, bag was found to contain explosive material.

F

Then on basis of formalities carried out, appellant-accused was charged under Section 5 of the Terrorist and Disruptive Activities Act, 1987. Designated Court then convicted the appellant-accused under the Act. Hence the present appeal.

G

The issue that arises for consideration is whether the factual background as suggested by the prosecution can in fact take place ever or the same stands granted to rope in the accused person.

Allowing the appeal, the Court

H

HELD : 1. The provisions of the Terrorist and Disruptive Activities Act are rather drastic and have been introduced in the Statute Book only to

combat the situation which the existing state of the law may not be able to achieve. Exercise of powers under TADA Act cannot possibly be taken recourse to as a matter of course. The invocation is not available on ordinary situation but to meet only a situation which cannot but be ascribed to be extraordinary and by reason of the felt need of the society. Unfortunately it is a serious in-road to the liberty of an individual, but having regard to betterment of the society and upliftment of social strata the authority to take recourse to the legislation stands approved by the few courts inspite of the same being very stringent in nature. It however, ought always to be thus of very limited in applications. [524-D-E; F-G]

2.1. In the instant case Designated Court's entire emphasis seem to be on the report of the expert and the evidence of the police officials and prosecution witnesses which is said to have proved that the accused possessed an explosive material in violation of Section 5 of Terrorist and Disruptive Activities Act. Designated Court does not rule out the improbability of the prosecution and ascribes it to be a story which looked improbable and upon recording of such a finding it is a matter of great significance that the Designated Judge holds the accused guilty of the offence under Section 5 of the Act. In the event, the case made out by the prosecution is improbable, where however, is the scope for introduction of Section 5 of the Act-it is difficult to appreciate. [522-D-F]

2.2. The absurdity of the situation, though recorded by the Designated Court, but obviously being overawed by the presence of the two police officials in Court, as otherwise there is no rhyme nor any reason to rely on the evidence, far less to convict the accused, for rigorous imprisonment in terms of the Statute. [524-G-H]

2.3. Both on facts and on law and on perusal of the relevant evidence on record, it is expedient to record that the reliance on the evidence of police officials is wholly misplaced since the available evidence does not warrant any credence more so by reason of the absence of two police constables who, it has been stated to be true inspiration for the two accused persons to surrender and thus the consequent conviction under section 5 of the TADA Act is manifestly erroneous and liable to the set aside. [525-A-B]

Sanjay Dutt v. State through C.B.I. Bombay (II), [1994] 5 SCC 410, referred to.

A 686 of 2001.

From the Judgment and Order dated 12.9.2000 of the Designated Court, Bhatinda in TADA (P) F.No. 8/5.9.94 in F.I.R. No. 70 of 11.10.1992.

B D.N. Goburdhan, Ms. Pinky Anand and Ms. Geeta Luthra for the Appellant.

Seeraj Bagga and R.S. Suri for the Respondent.

The Judgment of the Court was delivered by

C **BANERJEE, J.** In *Sanjay Dutt v. State through C.B.I. Bombay (II)*, [1994] 5 SCC 410 a Constitution Bench of this Court while according a true conspectus of Section 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 came to a conclusion that the ingredients of the offence punishable under Section 5 of the Act are :

- D (i) Possession of any specified arms and ammunition, etc.;
- (ii) unauthorisedly; and
- (iii) in a notified area.

E In the event of availability of the above mentioned three ingredients of the offence and the same are proved, then and in that event the accused shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than five years but may extend to imprisonment for life and shall also be liable to fine. The expression 'possession' in Section 5 has been stated to mean in *Sanjay Dutt (supra)* a conscious possession introducing thereby

F involvement of a mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession and as regards meaning of the word 'unauthorised' in the context means and implies without any authority of law.

G Incidentally, the TADA Act cannot but be said to be a drastic piece of legislation and the statutory intent is clear enough to indicate that the same has been introduced in the Statute Book for the purpose of combating the growing menace of terrorism in different parts of the country. Needless to state that in the normal course of events the provisions ought not to be resorted to unless the felt necessity of the situation definitely prompts the

H authority concerned to invoke the same.

Having had a brief look at the relevant statutory provision and advert-
ing to the factual element involved in the matter in issue, it appears that on 11th
October, 1992 at about 1.00 p.m. Constable Mangat Singh and Constable
Sukhpal Singh brought accused Gurmail Singh before the SSP Anil Kumar
Sharma at the Police Station Phul. It stands alleged that the accused was
found carrying one bag on his head along with four detonators on his right
hand at the police station itself. The bag was searched and the same was
found to be containing explosive materials. Usual formalities were completed,
to wit, preparation for the seizure; drawing of samples; preparation of the
seizure memo in the presence of punch witnesses, etc. etc. and it is on the
basis of the aforesaid that the appellant herein was charged under Section 5
of the TADA Act. The learned Designated Court on the basis of the statutory
presumptions available in terms of Section 5 of the Act convicted the appellant
with an imprisonment of six years RI and to pay a fine of Rs. 500 and in
default of payment of fine to undergo further RI for six months and thus the
statutory appeal in terms of Section 19 of the Act before this Court.

Mr. Goburdhan, learned counsel appearing for the appellant, with his
usual eloquence strongly contended the impossibility of the situation as
depicted by the prosecution by stating that it is in the realm of imagination
to book an accused with unauthorised possession of an explosive substance
in the notified area. The implication, he contended, is out and out a mere
figment of imagination and the manner and method of arrival of the accused
person at the Police Station stands out to be utterly absurd.

Mr. Goburdhan contended that a person is supposed to be a conscious
carrier of an explosive substance unauthorisedly in terms of Section 5 of the
Act and in the event of translating the requirement of the Act, it appears that
a person carrying 27 Kgs of explosive substance in a gunny bag on his head
together with four detonators on his right hand enters a Police Station so that
he may be taken into custody and thus be punished with a minimum
imprisonment of five years and also may be with fine - nobody in his senses
would be able to do such an act which stands, as stated by the prosecution,
to the credit of accused person and that too at the instance of two constables
of the Police Station : it is this factual backward which Mr. Goburdhan wants
to ascribe to be incredulous exercise of power under Section 5 of the TADA
Act. Ex-facie, however, in the event of there being a reality of such a situation,
question of escape from the rigours of law (TADA Act) would not arise.

The issue thus arises as to whether the factual background as suggested

A by the prosecution can in fact take place ever or the same stands planted to rope in the accused person.

B Significantly, the charge-sheet also included, apart from Section 5 of TADA Act, offences punishable under Sections 4/5 of the Explosive Act as also under Section 6 of the TADA Act and the accused stands acquitted thereunder. The learned Designated Court observed :

C “Since the offence proved against the accused is covered by Section 5 of the TADA [P] Act, so all the other offences punishable under Section 4 and 5 of the Explosive Act and Section 6 of TADA [P] Act which relates to only enhancement of penalty is found not attracted in this case. So, accused is acquitted of the offence punishable under Section 4 and 5 of Explosive Act and Section 6 of TADA [P] Act, for which there is no positive evidence.”

D As regards Section 5, the entire emphasis of he Designated Court seem to be on the report of the expert and the evidence of the police officials, PW5 - Sukhdev Singh and PW6 - Des Raj, DSP, which is said to have proved that the accused possessed such an explosive material in violation of Section 5 of the TADA Act. The learned Judge at Designated Court, Bathinda while dealing with the matter, does not rule out the improbability of the prosecution and ascribes it to be a story which looked improbable and upon recording of such
 E a finding it is a matter of great significance that the learned Designated Judge holds the accused guilty of the offence under Section 5 of the Act. In the event the case made out by the prosecution is improbable, where however, is the scope of introduction of Section 5 of the TADA Act - it is difficult to appreciate. Reliance has been placed on the evidence of PW5 and PW6,
 F relevant extracts whereof are set out hereinbelow :-

“PW. 5.

G On 11.10.92 I was posted as DSP Rampura Phul. On that day I was present at PS Phul, where SSP Anil Kumar Sharma and SPD Sh. Mokam Singh along with gunman had come to the police station. Accused Gurmail Singh r/o Ravikalan had surrendered on the inspiration of C. Mangal Singh & Shispal Singh one Onkar Singh was also alongwith accused who had also surrendered in my presence. Inspector Des Raj had conducted the personal search of the accused Gurmail Singh and accused was carrying a gunny bag from which
 H black coloured explosive gun powder were recovered which is also

black Gellatin and it was weight to be 27 kg. and he was found carrying 4 detonators in his bag in right hand. One sample of 250 gm of separate (sic) was also prepared and it was converted into the separate parcel and remaining was sealed in the same bag and both the parcels were sealed bearing impression DR by Sh. Des Raj and same were taken into possession vide memo Ex.PE attested by me and H.C. Rajinder Singh and C-Mangat Singh, the accused present in the Court and my statement was recorded. Seal after its use was handed over to H.C. Rajinder Singh, and sample seal was also prepared.....”

“PW. 6.

On 11.10.92 I was posted as SHO P.S. Phul. On that day I was present in the P.S. Phul. C. Mangat Singh and C. Sukhpal Singh, who brought Gurmail Singh accused present in the Court and one Onkar Singh. At that time SSP Anil Kumar Sharma, SPD Sh. Mokam Singh and DSP Sukhdev Singh along with their gunman were present in the police station P.S. Phul, the accused brought before the said officer. At that time accused was found carrying the bag on his head. It was searched and was found to be explosive. It was black gellatin. A sample of 250 gm was separate and was sealed and remaining bulk was also sealed after weighing and total was found 27 kg. and out of this 27 kg., 250 gm sample was drawn on and both the parcel were separately sealed with seal bearing impression DR and specimen sample seal was kept separately and seal after its use was handed over to H.C. Rajinder Kumar. The accused was also carrying a bag from his right hand from which 4 detonators were recovered and a separate proceeding was done about the said detonators.....”

Since no body from the public came to us so none was joined. I had not sent written requisition to call of public witness u/s 160 CPC. It is wrong to suggest that accused had been implicated falsely and the case property was recovered from any other person and false case was planted.....”

“The accused surrendered at the police station at about 1.00 PM. The detonators were not tested by me. The gun powder was in black colour and I cannot tell of what chemical it was prepared, nor I know any chemical test about the gun powder. I have not taken any training regarding the material of gun powder. I cannot say if the gun powder

A is available in the Bazar. Only one seal was used on the bag. The seal was taken back on the same day in the evening after completion of investigation. The detonators were not sealed. There was no special mark of identification on the detonators. The gunny bag in which detonators were put was not sealed. The seal in some broken condition and the letters of the seal are not proper and legible. A chit bearing particulars of the case was affixed on the parcel Ex.P1 but there is no chit on the Ex. P1 at present.....”

B

Significantly, Mangal Singh and Sukhpal Singh, said to be the source of inspiration which prompted the accused person and Onkar Singh to surrender along with 27 Kgs. of explosive substance and four detonators, have not been called as to the nature of inspiration which has prompted the accused person to come to the police station with 27 Kgs of explosive material along with four detonators : why this lapse : Is this a deliberate or to cover up or to present make-belief situation which otherwise stands not only improbable but totally absurd : unfortunately, learned State Advocate has answered the same in silence rather than on a definite note.

C

D

As noticed earlier, the provisions of the TADA Act are rather drastic and have been introduced in the Statute Book only to combat the situation which the existing state of the law may not be able to achieve. Exercise of powers under TADA Act cannot possibly be taken recourse to as a matter of course. The invocation is not available on ordinary situation but to meet only a situation which cannot but be ascribed to be extra-ordinary and by reason of the felt need of the society. We have already, in the earlier part of this judgment, recorded our observations pertaining to the TADA Act, as such we need not dilate further excepting that the provisions are to be taken recourse to as a last resort and for the good and betterment of the society in general, which was otherwise not possible having regard to the existing state of law. Unfortunately it is a serious in-road to the liberty of an individual, but having regard to betterment of the society and upliftment of social strata the authority to take recourse to the legislation stands approved by the few courts inspite of the same being very stringent in nature. It however, ought always to be thus of very limited in application. The absurdity of the situation, though recorded by the learned Designated Court, but, obviously being overawed by the presence of the two police officials in Court, as otherwise there is no rhyme nor any reason to rely on the evidence, as noticed above, far less to convict the accused, for rigorous imprisonment in terms of the Statute.

E

F

G

II Needless to record that the statutory appeal confers jurisdiction on to

this Court to hear an appeal, both on facts and on law, and on perusal of the relevant evidence on record, we do feel it expedient to record that the reliance on the evidence of police officials is wholly misplaced since the available evidence does not warrant any credence more so by reason of the absence of two police constables who, it has been stated to be true inspiration for the two accused persons to surrender and the consequent conviction on the basis thereof thus is manifestly erroneous and liable to be set aside. A B

In that view of the matter, this statutory appeal in terms of Section 19 of the TADA Act succeeds. The order of the Designated Court stands set aside and quashed as regards the appellant. The appellant be released forthwith, if not wanted in any other matter. C

N.J.

Appeal allowed.