A TARUN BORA @ ALOKA HAZARIKA

v.

STATE OF ASSAM

AUGUST 12, 2002

B [M.B. SHAH, BISHESHWAR PRASAD SINGH AND H.K. SEMA, JJ.]

Terrorist and Disruptive Activities [Prevention) Act, 1987: Sections 3(1)m 3(2) and 3(5):

C *Charges under TADA—Conviction under Section 3 (5)—Validity of—Held, since Section 3(5) was inserted in TADA subsequent to the commission of the offence, the conviction under the said Section of TADA is not sustainable in law.*

D *Punishment for terrorist acts—Absence of ingredients—Conviction—Validity of—Held, the conviction is not tenable in law.*

Penal Code; Section 365:

Conviction without sufficient corroborative evidence—Validity of—Held, E *in the area surcharged with insurgency activities witnesses are reluctant to join investigation for fear of reprisal, rendering it difficult to collect sufficient corroborative evidence—Under the circumstances, this would be no good ground to throw away otherwise trustworthy evidence of prosecution witnesses.*

Sentencing—Plea for leniency—Held, Human consideration is no ground F *for showing leniency to the perpetrator of organised crime against civilized society which is abhorrent to the concept of rule of law.*

According to the prosecution, a villager was abducted by accused, an ULFA extremist and 3-4 members of the said Organisation by blindfolding PW1 in a car. He was released by the abductor after 3 days. PW6 lodged an G **FIR. Designated TADA Court framed charge under Section 365, IPC read with Sections 3(1) and 3(5) of TADA Act against the accused-appellant and convicted him but discharged other accused for want of sufficient materials against them. Hence this appeal.**

It was contended for the appellant that he was not liable to be convicted

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for an offence under Section 3(5) of the TADA Act, as the alleged offence was committed prior to insertion of the said provision in TADA Act; that ingredients of Section 3(1) were absent, therefore, appellant could not be held guilty of the offence under this Section; and that in the absence of sufficient corroborative evidence, conviction under Section 365 IPC could not be sustained. A B

Partly allowing the appeal, the Court

HELD: 1. Sub-section 3(5) was inserted in TADA by an Act 43 of 1993 which came into force subsequent to the date of incident. This fact is uncontroverted. In view of the decision of this Court in *Kalpnath Rai* the conviction of the appellant under Section 3(5) of the Act is not sustainable in law. [462-B-C; E] C

Kalpnath Rai v. *State,* (Through CBI) [1997] 8 SCC 732, relied on.

2. The ingredients, as visualized under Section 3(1) of the Act, are absent in the facts of the instant case, and thus the conviction of the appellant under Sections 3(1) and (2) of the Act is not tenable in law. [464-E] D

Hitendra Vishnu Thakur and Ors. v. *State of Maharashtra and Ors.,* [1994] 4 SCC 602, relied on.

3.1. In cross-examination, PW1 stated that the accused neither blind-folded his eyes nor assaulted him. This would clearly suggest the presence of the accused, as admitted. The only denial is that accused did not participate in blindfolding the eyes of PW1 nor assaulted him. [465-D, E] E

3.2 PW4, driver of the offending ambassador car at the time of incident was declared hostile. The statement of this witness in examination-in-chief shows that the offending vehicle was taken away on the fateful day by two unknown youths by force. The striking feature of the statement of this witness (P.W.4) is that he knew PW1. It must be noticed that PW1 in his deposition stated that the appellant had taken him away in an ambassador car driven by PW4. It is, thus, clear that PW1 and PW4 knew each other from before. Therefore, PW1 and PW4 are not strangers to each other and PW1 could not have made mistake in naming PW4 in his statement. [465-E-F; 466-A-B] F G

3.3. The evidence of PW1, reading in between the lines, would clearly show that he had not gone to the ambassador car on his own will. He was taken away in the ambassador car by the appellant and after that he was H

A **immediately blind-folded and taken to a house and confined for three nights. On the first night he was assaulted. It has also come out clearly that the motive behind his kidnapping was that he was giving information 4 to the Army about ULFA. Therefore, keeping this motive in the background, the kidnapping of PW1 cannot be said to be for a joy ride. The conduct of the appellant clearly falls within the mischief of Section 365 I.P.C. [466-C-E]**

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4. It is quite but natural that in a prevalent situation, obtaining in the area surcharged with insurgency activities, striking terror and fear psychosis in the mind of the people, the Investigating Officer would definitely find difficulties to collect sufficient corroborative evidence. Witnesses will be

C **reluctant to come to the Court to depose or appear before the Investigating Officer to give statement for fear of reprisal. Rarely, one comes across any corroborative evidence in such type of offence. This would be no ground to throw away otherwise trust-worthy evidence of prosecution witnesses. In the facts and circumstances of the instant case, coupled with the credible and trustworthy statement of PW1, the prosecution has established its case.**

D **[467-C-E]**

5. Human consideration is no ground for showing leniency to the perpetrator of crime against organized civilized society, which is abhorrent to the concept of rule of law. Offence of kidnapping in any form impinges upon human rights and right to life enshrined in Article 21 of the Constitution.

E **Such acts not only strike a terror in the mind of the people but have deleterious effects on the civilized society and have to be condemned by imposing deterrent punishment. In fact, the designated Court has awarded a lenient punishment of 5 years R.I. and the same is confirmed. [467-F-H]**

F CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 343 of 2002.

From the Judgment and Order dated 19.1.2002 of the Designated Court. Assam in T.S.C. No. 113 of 1992.

G P.K. Goswami and Rajiv Mehta for the Appellants.

Ms. Krishna Sarma and V.K. Siddharthan, for M/s. Corporate Law Group for the Respondent.

The Judgment of the Court was delivered by

H **SEMA, J.** Aggrieved by the order dated 19th January, 2002 passed by

the Addl. Judge, Designated Court, Guwahati in TADA Sessions Case No. 113 of 1992 convicting the appellant Tarun Bora @ Alok Hazarika under Section 365 Indian Penal Code read with Section 3(1)/3(5) of Terrorist and Disruptive Activities (Prevention) Act(hereinafter referred to as 'the Act') and sentenced him to undergo RI for 5 years for the offence under Section 365 I.P.C. and further R.I. for 5 years for the offences under Section 3(1) and 3(5) of the Act, the present appeal has been preferred. The substantive sentences were ordered to run concurrently.

An F.I.R. was lodged on 23.8.1991 by P.W. 6 with the Officer-in-charge of the Bihpuria Police Station preceded by G.D. entry No. 275 dated 19.8.1991 stating therein that on 18.8.1991 at about 3.45 P.M. Bhola Kakati (P.W.1), a resident of Fakrahi Village, was taken away from the house of Nandeswar Bora, a resident of the same village by ULFA extremist named Tarun Bora @ Alok Hazarika (appellant) with the help of 3-4 members of ULFA extremists by blind folding him in a white ambassador car. Bhola Kakati (P.W.-1) was released by the abductor on 20.8.1991. Pursuant to the aforesaid F.I.R. the Officer-in-charge of Bihpuria Police Station registered case No. 303/91 dated 24.8.1991 under Sections 364/325/307/34 I.P.C. read with Section 3/4 TADA (P) Act. However, on perusal of the material submitted before him, the Addl. Judge, Designated Court framed a formal charge under Section 365 I.P.C. read with Sections 3(1) and 3(5) of TADA (P) Act against the appellant. The charge-sheet was read and explained to the appellant to which he pleaded not guilty and claimed to be tried. In the course of the trial, the Designated Court by its order dated 22nd February, 2000, discharged the other accused, namely, Madhab Saikia @ Uttam Barua, Prafulla Saikia @ Ruktim Choudhury, Bhaba Barua @ Manjil Phukan, Nitul Saikia and Mala Bora @ Hiren Saikia, for want of sufficient materials against them and proceeded the trial with the appellant.

The prosecution examined as many as six witnesses. The appellant declined to adduce any defence witness and in his examination under Section 313 Cr.P.C. he totally denied his involvement. The prosecution could not examine one witness Nandeswar Bora from whose house Bhola Kakati (P.W.1) was taken away as he had since died during the trial and before he was examined by the prosecution. After conclusion of the trial, charges under the aforesaid sections of law have been found well established against the appellant. By the impugned order, the appellant was convicted and sentenced as aforesaid.

We have heard Mr. P.K. Goswami, learned senior counsel for the appellant and Ms. Krishna Sarma, learned counsel for the respondent.

A At this stage, let us go straight to one of the arguments advanced by Mr. P K Goswami, learned senior counsel, which deserves consideration. It is the submission of Mr. Goswami that the appellant is not liable to be convicted for an offence under Section 3(5) of the Act as the alleged offence had taken place on 18.8.1991 and sub-section 3(5) was inserted in TADA by an Act 43 of 1993 which comes into force on 23.5.1993, subsequent to the date B of incident. Admittedly, the offence alleged to have been committed by the appellant had taken place on 18.8.1991. This fact is uncontroverted. This point had been set at rest by this Court in *Kalpnath Rai* v. *State* (Through CBI) [1997] 8 SCC 732 and batch of appeals, where a similar question was raised before this Court. Justice K.T. Thomas (as his Lordship then was) speaking C for the Bench, while considering the applicability of Section 3(5) of the Act, in paragraph 35 of the judgment said:

> "There are two postulates in sub-section (5). First is that the accused should have been a member of "a terrorist' gang" or "terrorists' organisation" after 23.5.1993. Second is that the said gang or D organisation should have involved in terrorist acts subsequent to 23.5.1993. Unless both postulates exist together Section 3(5) cannot be used against any person."

In view of the decision of this Court in Kalpnath Rai (supra), the conviction of the appellant under Section 3(5) of the Act is not sustainable E in law.

Mr. Goswami next contended that the ingredients of the offence under Section 3(1) of the Act are absent and therefore, no offence under said section of the Act has been made out against the appellant.

F Section 2(1)(h) of the Act defines "terrorist act" as under:

> "terrorist act' has the meaning assigned to it in sub-section (1) of Section 3, and the expression "terrorist" shall be construed accordingly;"

G Section 3 of the Act reads:

> *"3. Punishment for terrorist acts:* - (1) Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different H sections of the people does any act or thing by using bombs,

dynamite or other explosive substances or inflammable substances or fire-arms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act.

(2) Whoever commits a terrorist act, shall, -

(i) if such act has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to fine;

(ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(3) Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(4) Whoever harbours or conceals, or attempts to harbour or conceal, any terrorist shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(5) Any person who is a member of a terrorist's gang or a terrorist's organisation, which is involved in terrorist acts, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(6) Whoever holds any property derived or obtained from commission of any terrorist act or has been acquired through terrorist funds shall be punishable with imprisonment for a term which shall not

A be less than five years but which may extend to imprisonment for life and shall also be liable to fine."

This Court in *Hitendra Vishnu Thakur and Ors.* v. *State of Maharashtra and Ors.*, [1994] 4 SCC 602 had occasion to interpret the ingredients as visualized under Section 3(1) of the Act and held in para 5 of the judgment B as under:

"Section 3 when analysed would show that whoever with intent (i) to overawe the Government as by law established; or (ii) to strike terror in the people or any section of the people; or (iii) to alienate any section of the people, does any act or things by using (a) bombs or C dynamite, or (b) other explosive substances, or (c) inflammable substances, or (d) firearms, or (e) other lethal weapons, or (f) poisons or noxious gases or other chemicals, or (g) any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause or as is likely to cause (i) death, or (ii) injuries to D any person or persons, (iii) loss of or damage to or destruction of property, or (iv) disruption of any supplies or services essential to the life of the community, or (v) detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a 'terrorist act' punishable under section 3 of TADA."

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In our view, the ingredients, as visualized under Section 3(1) of the Act, are absent in the facts of the case at hand and the conviction of the appellant under Sections 3(1) & (2) of the Act is also not tenable in law.

We shall now proceed to examine as to whether the conviction of the F appellant under Section 365 of the Indian Penal Code is maintainable.

As already said, the prosecution examined as many as six witnesses. One Nandeswar Bora, from whose house P.W.-1 was taken away, could not be examined because of his death during the trial and before he could be G examined.

P.W.-1—Bhola Kakati said that on 18.8.1991 he was invited to the residence of Nandeswar Bora for settlement of some of his land disputes and he reached his place at about 3.30 P.M. He stated that before the talk of settlement started, the accused Tarun Bora appeared there and took him to H an ambassador car standing on the road and the car was driven away by Rajib

Bhuyan (P.W.-4).He was taken blind-folded. After covering some distance, the car was stopped but again it was driven away and after covering about 7 kms. the car was stopped and he was taken away from the car to the house of some person and was kept there blind-folded for three days. On the first night of confinement, he was assaulted by somebody but he did not know who the assailant was as he remained blind folded. A B

The witness further stated that during the assault, the assailant accused him of giving information to the army about the United Liberation Front of Assam (ULFA). He further stated that on the third night he was carried away blind folded on a bicycle to a different place and when his eyes were unfolded, he could see his younger brother Kumud Kakati (P.W.-2) and his wife Smt. Prema Kakati (P.W.-3). The place was Duliapather, which is about 6-7 kms. away from his village Sakrahi. The witness identified the appellant Tarun Bora and stated that it is he who took him in an ambassador car from the residence of Nandeswar Bora on the date of the incident. C

In cross-examination the witness stated as under: D

"Accused Tarun Bora did not blind my eyes nor he assaulted me."

This part of cross-examination is suggestive of the presence of accused Tarun Bora in the whole episode. This will clearly suggest the presence of the accused Tarun Bora as admitted. The only denial is the accused did not participate in blindfolding the eyes of the witness nor assaulted him. E

P.W.-4—Rajib Bhuyan, who was alleged to have driven the offending ambassador car bearing registration No. AMH-1872, at the time of incident was declared hostile. However, his examination-in- chief is important which reads as under:- F

> "I know P.W.-1Bhola Kakati and Nandeswar Bora. On 18.8.91 my mother Smt. Bimala Bhuyan owned one ambassador car bearing registration No. AMH 1872. On that day, the car was kept in our original residence at Narayanpur. I used to attend my office at N. Lakhimpur town from Narayanpur. When I returned home from my office in the evening on 18.8.91 my mother informed me that her ambassador car was taken away by two unknown youths by force. Police did not take my statement in connection with Bhipuria P.S. Case No. 303/91." G

The witness was confronted with his statement recorded under Section H

A 161 Cr.P.C.

The statement of this witness in examination-in-chief shows that the offending vehicle bearing registration No. AMH 1872 was taken away on 18.8.91 by two unknown youths by force.

B The striking feature of the statement of this witness (P.W.-4) is that he knew Bhola Kakati (P.W.-1). It must be noticed that P.W.-1 in his deposition stated that the appellant had taken him away in an ambassador car driven by P.W.-4 Rajib Bhuyan. It is, thus, clear that P.W.-1 and P.W.-4 knew each other from before. Therefore, P.W.-1 and P.W.-4 are not strangers to each other and C P.W.-1 could not have made mistake in naming P.W.-4 in his statement.

The evidence of P.W.-1, reading in between the lines, will clearly show that he had not gone to the ambassador car on his own will. He was taken away in the ambassador car by the appellant and after that he was immediately blind folded and taken to a house and confined for three nights. On the first D night he was assaulted. It has also come out clearly that the motive behind kidnapping him was that he was being accused of giving information to the army about the ULFA. Therefore, keeping this motive in the background, the kidnapping of P.W.-1 cannot be said to be for a joy ride.

The motive of kidnapping Bhola Kakati (P.W.-1) was to confine him E wrongfully for passing information to the Army about the ULFA. In our view, the conduct of the appellant clearly falls within the mischief of Section 365 of the I.P.C.

Rajib Bhuyan (P.W.-4) was declared hostile. He has, however, clearly F stated in his examination-in-chief that his mother had a car bearing registration No. AMH 1872 and on the day of the incident, he was informed by his mother Bimala Bhuyan that the said car had been taken away by two unknown youths by force. It must be remembered that the said ambassador car was brought by the appellant Tarun Bora to the house of Nandeswar Bora and P.W.-1 was taken away in that vehicle.

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We have already noticed that in cross-examination of P.W.-1 a suggestion was put to him that the appellant Tarun Bora had neither participated in blind folding him nor assaulted him. This is clearly indicative of the presence of the appellant and participation in the kidnapping episode.

H Bimal Chand Deka (P.W.-6) is the I.O. He stated that on 23.8.91 he was

working as Incharge Narayanpur Police Out Post. He further stated that the F.I.R. Ext.-1 was lodged by him and O/C Bihpuria P.S. registered a case u/s 364/325/307/34 IPC r/w Sections 3 & 4 TADA (P) Act and entrusted him for investigation. In course of investigation he has seized ambassador car No. AMH 1872 belonging to Bimla Bhuyan vide seizure memo. No. 14/91 Ext.-4. He further stated that the seized vehicle was given in zimma to the registered owner Bimla Bhuyan vide Ext.-5. He also stated that during the investigation he had recorded statement of witnesses u/s 161 Cr.P.C. and arrested the appellant Tarun Bora and forwarded him to the Court and after completion of investigation submitted the charge-sheet.

Counsel for the appellant submits that there is no sufficient corroborative evidence and material on record to sustain conviction of the appellant under Section 365 of the I.P.C. also. We are not at all convinced by such submission.

It is quite but natural that in a prevalent situation, obtaining in the area surcharged with the insurgency activities, striking a terror and fear psychosis in the mind of the people, the Investigating Officer would definitely find difficulties to collect sufficient corroborative evidence. Witnesses will be reluctant to come to the Court to depose or appear before the Investigating Officer to give statement for fear of reprisals. Rarely, one comes across any corroborative evidence in such type of offence. This would be no ground to throw away otherwise trust-worthy evidence of prosecution witnesses. In the facts and circumstances of the present case, as adumbrated above, coupled with the credible and trustworthy statement of P.W.-1 Bhola Kakati, the prosecution has established its case. It must be remembered that the statement in-chief of P.W.-1 remained unimpeached. We have no reason to doubt the credit worthy evidence of Bhola Kakati -P.W.4, apart from the other lending circumstances as discussed above.

Lastly, Mr. Goswami submits that the appellant has his mother, wife and children to support and if this Court so decides to confirm the conviction serious prejudice would be caused to his mother, wife and children and pleads for leniency. We are not at all persuaded by this submission. Human consideration is no ground for showing leniency to the perpetrator of the crime against organized civilized society, which is abhorrent to the concept of rule of law. In fact, this prayer has already been considered by the designated court and lenient punishment of 5 years R.I. has been awarded. We may say that offence of kidnapping in any form impinge upon human rights and right to life enshrined in Article 21 of the Constitution. Such acts not only strike

A a terror in the mind of the people but have deleterious effects on the civilized society and have to be condemned by imposing deterrent punishment.

For the reasons above stated the conviction and sentence of the appellant under TADA (P) Act is set aside. However, the conviction and sentence awarded to the appellant for the offence under Section 365 I.P.C. is, B hereby, confirmed. The appeal is disposed of accordingly.

S.K.S. Appeal partly allowed.