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SALIM AKHTAR @ MOTA
v.
STATE OF UTTAR PRADESH

APRIL 9, 2003

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[S. RAJENDRA BABU AND G. P. MATHUR, JJ.]

Criminal Trial:

C *Terrorist and Disruptive Activities Prevention Act, 1985; Sections 4 & 5/Penal Code, 1860; Sections 147, 148, 302 & 307: Arms Act, Section 25/ Explosive Substances Act, Section 5:*

D *Charges under TADA—Conviction—Statement of accused vis-a-vis recovery of incriminating articles—Factum of recovery—Held: since evidence shows that cartridges were sealed but not the pistol which was allegedly recovered along with other incriminating articles, raises considerable doubt on the factum of recovery—Since the recovery was made from an open place accessible to all, recovery of incriminating articles does not amount to conscious possession—Only that part of the statement indicating the place of recovery of the bag containing incriminating articles is admissible—Hence accused*
E *cannot be held liable for possession of such incriminating articles—Evidence Act, 1872— Section 27.*

Words & Phrases:

'conscious possession'—Meaning of.

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According to the prosecution, accused-appellant and others hurled bombs at a police picket resulting in the death of one police officer and injuries to several security personnel. After investigation and sanction of the concerned authorities, charge-sheets against the accused were submitted before the Designated Court (TADA). The Designated Court
G found all the accused guilty of committing offences under Section 25 of Arms Act, Section 5 of Explosive Substances Act and Section 8 of TADA and convicted and sentenced them accordingly. Hence the present appeal preferred by one of the accused.

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It was contended for the appellant that he was detained/tortured in the police custody for several days; that neither disclosure statement was given by him nor any incriminating material was recorded at his instance; that the photographer, one of the witnesses, was on the pay roll of the police as such he was not an independent witness; that since recovery was made from a place accessible to all and pistol allegedly recovered was not sealed on the spot, appellant could not be held in possession of such articles.

Allowing the appeal, the Court

HELD: 1.1. The evidence on record clearly shows that the pistol alleged to have been recovered from the polythene bag which was allegedly taken out from the mud by the appellant was not sealed on the spot. Though the cartridges were sealed but the most important object, namely, the pistol was not sealed on the spot and the same was deposited as it is in the police station. The fact that the pistol alleged to have been recovered at the pointing out of the appellant was not sealed on the spot coupled with the fact that neither its number nor its make, etc. to fix its identity was mentioned in the recovery memo or in the FIR, raises considerable doubt regarding the factum of recovery. [477-C-F]

Amarjit Singh v. State of Punjab, [1995] Supp. 3 SCC 217 and *Sahib Singh v. State of Punjab*, [1996] 11 SCC 685, relied on.

1.2. The disclosure statement of the appellant was admittedly made to police personnel and only that part of the statement would be admissible which is permissible under Section 27 of the Evidence Act. In the facts and circumstances of the instant case, what is admissible is the place from where the polythene bag containing pistol and other articles was allegedly recovered. The fact that some terrorist organisation had given the pistol and other articles to the appellant or its use would not be admissible.

[477-G; 478-A-B]

Pulukuri Kottaya and Ors. v. Emperor, AIR (1947) PC 67, relied on.

1.3. The recovery was made from an open place which was accessible to all and PW1 has clearly admitted in his cross-examination that the recovery of the polythene bag was made from an open 'Gher' in a lonely place, where anyone could easily come. The principle laid down in the various decisions of the apex Court that mere knowledge of the accused that incriminating articles were kept at certain place does not amount to

A conscious possession is fully applicable here and it cannot be held that the appellant was in possession of the articles alleged to have been recovered from his possession. [478-C; 479-A]

Sanjay Dutt v. State through CBI, Bombay, [1994] 5 SC 540, followed.

B *Trimbak v. State of M. P., AIR (1954) SC 39; Raosaheb Balu Killedar v. State of Maharashtra, (1995) 3 CrL. Law Journal 2632 and Khudeswar Dutta v. State of Assam, [1998] 4 SCC 492, relied on.*

C 1.4. The evidence adduced by the prosecution fails to establish the charge against the appellant beyond reasonable doubt. Hence conviction and also sentence imposed upon the appellant by the Designated Court, is set aside. [479-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 685 of 2001.

D From the Judgment and Order dated 30.3.2001 of the Designated Court at Meerut in CrL. C. No. 24 of 1993.

Uday Umesh Lalit and Atul Sharma for the Appellant.

E T.N. Singh and Pramod Swarup for A. S. Pundir, for the Respondent.

The Judgment of the Court was delivered by

F **G. P. MATHUR, J.** This appeal has been preferred against the judgment and order dated 30.3.2001 of the Designated Judge (TADA) Meerut by which the appellant has been convicted under Section 5 of Terrorist and Disruptive Activities (Prevention) Act (for short "TADA") and has been sentenced to 5 years R. I. and a fine of Rs. 1,000 and in default to undergo one month R. I.

G The case of the prosecution, in brief, is that at about 7. 45 p. m. on 26.1.1993, some miscreants hurled bombs at a police picket near Veterinary Hospital, Hapur Road, Meerut in which several security personnel received injuries and N.K. Mahender Prasad Sharma died. An FIR of the incident was lodged at 10. 15 p. m. on the same night at P. S. Civil Lines, Meerut and a case was registered under Sections 147/148/307/302 IPC and Sections 4 and 5 of TADA. Some persons including Jabbar, Ayyub and the appellant Salim **H** Akhtar @ Mota were arrested in connection with the aforesaid case and

subsequently were taken on police remand. While in custody of the police, they made disclosure statements of having concealed some weapon, bomb and explosive material. Accordingly, in the morning of 24.3.1993, Inspector N.P. Rai of P.S. Lalkurti took the aforesaid persons to the place where according to their disclosure statement they had concealed the incriminating material. Inspector Shri Narayan Tripathi of P.S. Lisari Gate, some police personnel and two public witnesses namely, Anuj Kaushik (PW3) and Vipin also accompanied them. The appellant Salim Akhtar @ Mota (A-1) took them to a place by the side of Mansoor Denting Works on the road going to Lakhipura. He took out a polythene bag from inside the mud which contained one pistol, cartridges, a moosli bomb and RDX weighing 1 kg. A recovery memo of the recovered articles was prepared on the spot and Anuj Kaushik (PW3), who is a photographer and who had accompanied the police party, also took photographs of the recovery. From there, the police party went to a place near Agarwal Tubewell on the same road and from there accused Ayyub (A-2) took out a polythene bag from inside the mud which contained 1 kg. RDX. Thereafter, accused Jabbar (A-3) took the police party towards South-West of the grove of Shri Kripal Singh near a kachcha rasta and dug out a polythene bag which contained a factory made hand grenade. Recovery memos of the articles recovered on the pointing out of A-2 and A-3 were also made. An FIR of the incident relating to recoveries made at the instance of the accused was lodged at 12.30 p. m. on 24.3.1993 at Police Outpost Pillokhari and the recovered articles were dispatched to PS Lisari Gate. S.P. Sharma, SHO, PS Lisari Gate took over investigation of the case on 27.3.1993. He prepared site plans (Ext. Ka 4 to Ext. Ka 7) of the places of recoveries, obtained diffusion report from Shri Satish Kumar and sent the recovered material to Forensic Science Laboratory Agra for expert opinion. After concluding the investigation, he obtained sanction from the District Magistrate, Meerut, for prosecution of the accused under Arms Act and Explosive Substances Act and also from Inspector General of Police for their prosecution under TADA and thereafter submitted charge-sheets against the three accused.

The Designated Judge, Meerut, took cognizance of the offences and framed charges under Section 25 of the Arms Act, Section 5 of the Explosive Substances Act and Section 5 of TADA against the three accused. The prosecution in support of its case examined 12 witnesses and filed some documentary evidence. The articles recovered were also produced in Court. The appellant Salim Akhtar @ Mota in his statement under Section 313 Cr. P. C. denied the case of the prosecution and stated that the police had arrested him on 26.2.1993 when he was going to offer Namaz. He was detained in the

A police station for several days and was produced in Court on 12.3.1993 and during this period he was also beaten in the police station. He examined 5 witnesses in his defence. The other accused, namely, Ayyub (A-2) and Jabbar (A-3) also denied the prosecution case. The learned Sessions Judge (Designated Court) believed the prosecution case and convicted and sentenced all the three accused. However, only Salim Akhtar @ Mota has preferred appeal against his conviction and sentence. The remaining two accused, namely A-2 and A-3 have not challenged their conviction and sentence probably on account of the fact that their conviction under Sections 302 and 307 IPC and sentence of imprisonment for life imposed thereunder in the case relating to throwing of bomb on police picket has been upheld up to this Court and they are undergoing sentences in the said case.

In order to appreciate the contention raised by Shri U. U. Lalit, learned counsel for the appellant, and also of the learned State counsel, it is necessary to notice the main evidence which has been adduced by the parties. PW1 NP Rai, was posted as in-charge PS Lalkurti on 24.3.1993. He has deposed that the three accused, namely, A-1, A-2 and A-3 were taken on police remand from the Court in Crime Case No. 30 of 1993 under Section 302/207 IPC and Sections 3 and 4 of TADA and Sections 5 and 6 of Explosive Substances Act. The accused made disclosure statement that they will get bombs and explosive materials recovered. Accordingly, he along with some other police personnel and the accused proceeded for Lisari Gate, where PW2, SN Tripathi, Inspector in-charge of the said police station and some other police personnel also joined them. Two public witnesses, namely, Vipin and Anuj Kaushik (PW3) who is a photographer, were asked to accompany them. Accused A-1 took them to near Mansoor Denting Works, which is situate on the road going to Lakkhipura. He took out a polythene bag from under the mud from a place which is near the boundary wall of the said factory. The bag contained one factory made pistol of 7. 62 bore, four live cartridges, a moosli bomb and 1 kg. RDX. Similarly recovery of 1 kg. RDX was made at the pointing out of A-2 and one hand grenade at the pointing out of A-3 from different places. Photographs of the recoveries made was taken by PW3, Anuj Kaushik. After all the recoveries had been made, an FIR was lodged at Police Outpost Pillokhari and the recovered articles were deposited at PS Lisari Gate. PW2, SN Tripathi was posted as in-charge of PS Lisari Gate on 24.3.1993. He deposed that PW1, NP Rai, Inspector, accompanied by one Sub-inspector and three Constables along with three accused in custody, came to the police station at about 6. 30 a. m. He was informed that the accused had made a disclosure statement and were prepared to recover the articles concealed by

them. Two public witnesses, namely, PW3 Anuj Kaushik and Vipin were summoned and thereafter all of them proceeded towards Lakkhipura. A-1 asked them to stop near Mansoor Denting Works and he took out a polythene bag from the side wall of the factory from under the mud. The bag contained a pistol, four live cartridges, 1 kg. RDX and a moosli bomb. The witnesses also deposed regarding the recovery made at the instance of A-2 and A-3. PW3 Anuj Kaushik is a photographer by profession and he deposed that the police asked him to accompany them at about 6. 30 a. m. on 24.3.1993 while he was near Lisari Gate Chopala. The three accused were present along with the police party. A-1 asked to stop the police vehicle near Mansoor Denting Works which is situate on the road going to Lakkhipura. He, thereafter, took out a polythene bag from under the mud from a place near the southern boundary wall of the factory and the said bag contained one pistol, four cartridges, one moosli bomb and 1 kg. RDX. He had taken photographs of the recovery made by A-1 and had also signed the recovery memo. He also deposed about the recoveries made at the instance of A-2 and A-3.

PW5, Raj Singh recorded the FIR and registered the case at Police Outpost Pillokhari. PW10, Satish Kumar, SI, was in-charge, Bomb Disposal Squad and gave diffusion report while PW12, OP Taneja, Joint Director, Forensic Science Laboratory, Agra examined and gave report regarding RDX. PW6, Tej Pal Sharma, Head Constable, PW7, Harpal Singh, Malkhana Moharrir, PW8, Ranvir Singh, Constable and PW9, Radhey Shyam Sharma, head of armoury at Meerut have given evidence of formal character regarding deposit of the recovered articles, their safe custody and taking them to Forensic Science Laboratory, Agra. PW4, SP Sharma, SHO, PS Lisari Gate has given details of the steps taken by him during the investigation of the case, obtaining of sanctions from the District Magistrate, Meerut for prosecution under Arms Act and Explosive Substances Act, which are Ext. Ka 10 to Ext. Ka 13 and sanctions granted by Shri SN Naseem, IG, Meerut Zone for prosecution of the accused under TADA, which is Ext. Ka 7 to Ext. Ka 9. He has also proved the charge sheets which were submitted by him.

The appellant examined 5 witnesses in his defence. DW1, Mahipal Singh, Constable, who is working as Dispatch Clerk in the office of DIG proved the telegram sent by the appellant's wife, which was received on 2.3.1993. DW2 Mohd. Farooq is the real brother of the appellant and he deposed that the police had arrested the appellant on 26.2.1993 and he and his family members sent many telegrams to higher authorities and also to the Supreme Court on 9.3.1993 and a copy of the same has been filed as Ext.

- A Kha 2. DW3, Mohd. Nazir, who is a neighbour of the appellant, gave a similar statement that the appellant was arrested on 26.2.1993. DW4, Smt. Munawar Jahan is the wife of the appellant and she deposed about the arrest of the appellant by the police on the said date. DW5 Banarsidas Gautam, clerk in the office of IG, Zone Meerut, stated that an application and also a telegram had been received from Smt. Munawar Jahan, which were forwarded to DIG Range and SSP Meerut, respectively, for necessary action.

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- Shri Lalit, learned counsel for the appellant, has submitted that A-1 was actually arrested by the police on 26.2.1993 and was detained at the police station for several days, during which he was beaten and thereafter he was produced in Court on 12.3.1993. He has further submitted that in fact no disclosure statement was given by the appellant nor any incriminating article was recovered on his pointing out. The witnesses examined on the point of recovery are police witnesses and PW3 Anuj Kaushik was a professional photographer who was on the pay roll of the police as he used to be called by the police on every occasion whenever a photograph was required to be taken for which he was paid remuneration and as such he was not an independent witness. Learned counsel has also urged that after the alleged recovery was made the pistol was not sealed on the spot and that the recovery having been effected from an open place accessible to everyone, it is not possible to hold that the appellant was in possession of the aforesaid articles.
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- E Learned State counsel has supported the case of the prosecution and has urged that the evidence on record clearly established that the appellant was in exclusive possession of pistol, bomb and RDX and the learned Sessions Judge (Designated Court) had rightly convicted and sentenced him.

- F PW1, NP Rai, has stated that after reaching PS Lisari Gate, he had summoned two public witnesses, namely, Vipin and PW3 Anuj Kaushik out of whom only one has been examined in Court. PW3 has deposed that he works as a photographer for a magazine known as 'Sachi Duniya'. He had received a phone call from his office that there was a traffic jam near Medical College and accordingly he started for the said place on his scooter to take photographs. However, he saw some police personnel near Lisari Gate Chaupla and inquired from them why they were standing there and on their asking he accompanied the police party. He has admitted that he often goes to the police stations in the city and he had been paid Rs. 640 for taking the photographs but he had not issued any receipt for the same. The statement of this witness shows that he is a frequent visitor to the police stations and this may be on account of the fact that the police may have been obliging him
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by asking him to take photographs on those occasions in which taking of photographs was considered necessary. It is not possible to accept his statement that though he was paid Rs. 640 by the police for taking the photographs but he did not issue any receipt. PW1 has admitted that though Lisari Gate locality was only two or three furlongs from the place from where recovery was made but no witness was summoned there. It, therefore, shows that the police made no effort to get any independent public witness at the time when the alleged recovery was made at the pointing out of A-1 and the only public witness examined, appears to be a person who was not only intimate but was also obliged to them.

The evidence on record clearly shows that the pistol alleged to have been recovered from the polythene bag which was allegedly taken out from the mud by the appellant was not sealed on the spot. PW1 in his cross-examination has stated that the pistol was not sealed as it was factory made and in the recovery memo its "number" or "make" was not written as the same was not clear and legible. However, the cartridges and bomb and RDX were sealed. Similar statement has been given by PW2, SN Tripathi and PW4 SP Sharma that at the time when the pistol was deposited in the Malkhana, the same had not been sealed. In the FIR, no details have been given to fix the identity of the pistol. PW4 has stated that the same was of Chinese make while PW6 Tej Pal Sharma, Head Constable of PS Lisari Gate, where the recovered articles were deposited, has stated that the same was of English make. In *Amarjit Singh v. State of Punjab*, [1995] Supp. 3 SCC 217 and *Sahib Singh v. State of Punjab*, [1996] 11 SCC 685, it has been held that the possibility of tampering cannot be ruled out where the recovered articles were not sealed on the spot. We are little surprised that though the cartridges were sealed but the most important object, namely, the pistol was not sealed on the spot and the same was deposited as it is in the police station and, thereafter at the Malkhana. In our opinion the fact that the pistol alleged to have been recovered at the pointing out of the appellant was not sealed on the spot coupled with the fact that neither its number nor its make, etc. to fix its identity was mentioned in the recovery memo or in the FIR, raises considerable doubt regarding the factum of recovery.

So far as the disclosure statement of the appellant is concerned, the same was admittedly made to police personnel and only that part of the statement would be admissible which is permissible under Section 27 of the Evidence Act. The scope of this provision was explained by the Privy Council in the well known case of *Pulukuri Kottaya and Ors. v. Emperor*, AIR (1947)

- A PC 67, wherein it was held that it is fallacious to treat the “fact discovered” within the section as equivalent to the object produced. The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given, must relate distinctly to this fact. Information as to the past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Therefore,
- B what is admissible is the place from where the polythene bag containing pistol and other articles was allegedly recovered. The fact that some terrorist organisation had given the pistol and other articles to the appellant or its use would not be admissible.
- C The other feature of the case is that the recovery was made from an open place which was accessible to all and everyone. PW1 NP Rai, has clearly admitted in his cross-examination that the recovery of the polythene bag was made from an open ‘Chor’ in a lonely place, where anyone could easily come. 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
- D 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
- E 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
- F 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
- G 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
- H 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 *Khudeswar 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. The principle laid down in the decisions of this Court referred to above is fully applicable here and it is not possible to hold that the appellant was in possession of the articles alleged to have been recovered from his possession.

For the reasons discussed above, we are of the opinion that it will not be safe to uphold the conviction of the appellant as the evidence adduced by the prosecution fails to establish the charge against the appellant beyond reasonable doubt. The appeal is accordingly allowed and the conviction of the appellant and also the sentence imposed upon him by the learned Sessions Judge (Designated Court), Meerut is set aside. The appellant is on bail. He need not surrender. His sureties and bail bonds are discharged.

S.K.S.

Appeal allowed.