AFZALKHAN @ BABU MURTUZAKHAN PATHAN

v.

STATE OF GUJARAT

MAY 17, 2007

[S.B. SINHA AND MARKANDEY KATJU, JJ.]

Bail—Entitlement to, in case of TADA detenus—One accused allegedly went to Pakistan as part of a group for training in terrorist activities—Another accused provided monetary help to the group and was also found in possession of large quantity of arms—Held: Ordinarily, bail application, in a case of this nature, which involves the security of the State should be rejected—It is very difficult to say at this stage as to whether the accused are parties to a larger conspiracy or not—Strong prima facie case made out against the accused—Their release at this juncture may hamper smooth conduct of trial since main witnesses are yet to be examined—Designated Judge directed to conclude trial as expeditiously as possible—Terrorist and Disruptive Activities (Prevention) Act, 1987—Penal Code, 1860—ss. 120(B), 121, 121(A), 122 and 123—Arms Act—ss. 25(1)(b), 25(1)(c), 27 and 29.

Bail application—Duty of the Court—Held: Courts should assign reasons while allowing or refusing an application for bail—But detailed reasons touching the merit of the matter should not be given, which may prejudice the accused.

According to the prosecution, the two Appellants were involved in terrorist activities. It is alleged that one Appellant went to Pakistan as part of a group for training in terrorist activities, while the other Appellant provided monetary help to the group and had also been in possession of a large quantity of arms which was recovered pursuant to confessional statements of various persons.

In appeals to this Court, it is contended that the Appellants are entitled to grant of bail *inter alia* on the ground that no overt acts has been attributed to them; that the confessional statements recorded were not confidence inspiring and that recovery of arms by itself would not lead to any conviction under TADA.

A **Dismissing the appeals, the Court**

HELD: 1.1. The value of a confessional statements made before a high ranking officer under the Special Acts and the precautions which are necessary to be taken therefrom which are exceptions to the provisions of the general statute namely Indian Evidence Act had been considered by this B **Court in some of its decisions. The question as to where irregularity, if any had been committed in recording the confessional statement of the accused or the same otherwise would not inspire confidence before a court of law is a matter which would fall for consideration of the Trial Judge. An irregularity made in recording a statement may be held to be curable and admissible in** C **evidence. [Paras 8, 12, and 13] [77-D; 81-A, B]**

1.2. Courts should assign reasons while allowing or refusing an application for bail. But detailed reasons touching the merit of the matter should not be given, which may prejudice the accused. What is necessary is that the order should not suffer from non-application of mind. At this stage a D **detailed examination of evidence and elaborate documentation of the merit of the case is not required to be undertaken. [Para 16] [82-C, D]**

1.3. Ordinarily, a bail application, in a case of this nature, which involves the security of the State should be rejected. In a case of this nature, it is very difficult to say at this stage as to whether they are parties to the larger E **conspiracy or not. In the evidence, it is alleged that one of the appellants had gone for training to Pakistan, another had provided money and he had been in possession of a large quantity of arms. A strong *prima facie* case has been made out against the appellants. Their release at this juncture may hamper the smooth conduct of trial since main witnesses are yet to be examined. One** F **of the appellants hails from a different State. It may be difficult to secure his presence, if released on bail at this crucial juncture. In this view of the matter, the interest of justice shall be subserved if the Designated Judge is directed to conclude the trial as expeditiously as possible and preferably within six months from the date of communication of this order.**

[Paras 17, 20, and 21] [82-E; 83-A, B, C, D]

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State of Tamil Nadu through Superintendent of Police CBI/SIT **v.** *Nalini and Ors.,* **A.I.R. (1999) SC 2640, relied on.**

People's Union for Civil Liberties and Anr **v.** *Union of India,* **[2004] 9 SCC 580,** *State of Maharashtra* **v.** *Sitaram Popat Vetal and Anr.,* **[2004] 7** H **SCC 521;** *Kartar Singh* **v.** *State of Punjab,* **[1994] 3 SCC 569;** *Simon and Ors* **v.** *State of Karnataka,* **[2004] 1 SCC 74;** *S.N. Dube* **v.** *N.B. Bhoir,* **[2000]**

2 SCC 254; *Hardeep Singh Sohal and Ors.* v. *State of Punjab through CBI,* [2004] 11 SCC 612; *State (NCT of Delhi)* v. *Navjot Sandhu,* [2005] 11 SCC 600]; *Shaheen Welfare Association* v. *Union of India and Ors.,* [1996] 2 SCC 616 and *State (NCT of Delhi)* v. *Navjot Sandhu alias Afsan Guru,* [2005] 11 SCC 600, referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 757 of 2007.

From the Judgment and Order dated 08.09.2006 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 334 of 2005.

Kamini Jaiswal, Sunita Dwivedi, Nitya Ramakrishnan, M.A. Chinnasamy for the Appellant.

Hemantika Wahi, Pinky Behera and V. Madhukar for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

2. These appeals arise out of the judgments and orders dated 8.9.2006 as also the judgment and order dated 10.8.2006 passed by the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 334 of 2005 and Criminal Appeal No. 751 of 2006 respectively whereby and whereunder the bail petitions filed by both the appellants were dismissed. A First Information Report was lodged on or about 4.4.2003 for commission of an alleged offence under Section 120(B), 121, 121(A), 122 and 123 of the Indian Penal Code, 1860 and Section 25(1)(b), 25(1)(c), 27 and 29 of the Arms Act in the D.C.B. Police Station, Ahmedabad. The names of the appellants, however, did not figure in the said First Information Report. The first informant was one Tarun Kumar Amrutlai Barot, Police Inspector, Ahmedabad Crime Branch. An information was received that after the Godhra massacre some youths from Ahmedabad City had gone to Pakistan for obtaining training for carrying out terrorist activities with a view to take revenge of loss of lives and properties caused to the Muslim community in communal riots which had taken place therein and they have returned back to India after training. An investigation was carried out. On the allegations that he was a party to the conspiracy, Appellant Afzal Khan was arrested on 15.4.2003. We may notice that a First Information Report almost on the same terms was registered in Hyderabad on or about 19.4.2003 wherein also allegations had been made that a group of boys had gone to Pakistan

A for terrorist training. Appellant Saiyed Ejaz Ahmed @ Chota Ejaz who is a resident of Hyderabad was arrested in connection with the said case on 3.12.2003. During investigation of the Ahmedabad case also, Appellant Saiyed Ijaz Ahmed was arrested by the Gujarat Police on 14.12.2003.

B 3. A chargesheet against the first appellant was filed on 10.9.2003 and a chargesheet against the second appellant was filed on 21.1.2004.

4. In both the cases, confessional statements of various persons accused of commission of the said offence were recorded. Pursuant to such confessional statements of the appellant as also those of the co-accused, a huge quantity C of arm was recovered from the first appellant. The principal allegations against the second appellant are that he had gone to Pakistan for training.

5. It is also not in dispute that the first appellant had moved the learned Special Judge as also the High Court for grant of bail which had been rejected. It now appears that charges have also been framed on 1.12.2005.

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6. Ms. Kamini Jaiswal, learned counsel appearing for the first appellant and Ms. Lata Krishnamurthy, learned counsel appearing for the second appellant would *inter alia* submit that the appellants should have been enlarged on bail as :-

E (i) No overt act has been attributed against them.

(ii) Confessions have been obtained subsequent to their arrest.

(iii) Recovery of any weapon by itself would not lead to any conviction under TADA.

F (iv) Confessions of Mohammed Riyaz @ Goru, Mohammed Parvez Abdul Kayyum Shaikh and Mohammed Yunus were recorded on 24.4.2003 in similar language and hence do not inspire confidence.

(v) Purported Confessions of two more accused had been recorded in the year 2005 alleging that the first appellant had rendered G monetary help to the group was also recorded in similar language.

(vi) In view of the decisions of this Court in *Shaheen Welfare Association* v. *Union of India and Ors.*, [1996] 2 SCC 616, *People's Union for Civil Liberties and Anr* v. *Union of India*, [2004] 9 SCC 580, *State of Maharashtra* v. *Sitaram Popat Vetal and Anr.*, H [2004] 7 SCC 521, and *State (NCT of Delhi)* v. *Navjot Sandhu alias Afsan Guru*, [2005] 11 SCC 600, the appellants are entitled

to grant of bail.

7. Ms. Hemantika Wahi, learned counsel appearing on behalf of the respondent, on the other hand, brought to our notice that the trial has already commenced and two witnesses have been examined. It was pointed out that as some other co-accused had moved this Court, wherein the original records had been called for, the designated court could not proceed with the trial, but as now the original records have since been received by the learned Special Judge, all endeavours would be made to complete the trial as expeditiously as possible.

8. The validity of Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) came up for consideration before this Court in *Kartar Singh* v. *State of Punjab,* [1994] 3 SCC 569. Therein *inter alia* the validity of provisions in regard to the exceptions made to Sections 25 and 26 of the Indian Evidence Act by reason thereof had been upheld. At this stage, it is not desirable, although called upon to do so by the learned counsel, to go into the merit of the matter so as to prejudice the case of either of the parties in the main trial. The value of a confessional statements made before a high ranking officer under the Special Acts and the precautions which are necessary to be taken therefrom which are exceptions to the provisions of the general statute namely Indian Evidence Act had been considered by this Court in some of its decisions. We may notice some of them.

9. In *Simon and Ors* v. *State of Karnataka,* [2004] 1 SCC 74, this Court held:-

> "22. It is the duty of the recording officer to ensure that the confession is made voluntarily and out of free will by the accused without any pressure. Except the omnibus statement about the general practice which was being followed by PW 108, there is no evidence of any question or attempt being made by the officer to satisfy himself that the confession was being made voluntarily. This factor becomes, on the facts and circumstances of the case, very important since immediately after the arrest, the accused was produced and the person actively associated with the recording of statement was none other than the investigating officer who by nature of things is interested in the success of the prosecution case. Recording of confessional statement is not a mechanical exercise. A duty has been cast and considerable amount of confidence has been reposed in a senior officer under Section 15 of the TADA Act in giving him the duty to

A record the confession and making such a confession before a police officer admissible in evidence..."

10. In *S.N. Dube* v. *N.B. Bhoir,* [2000] 2 SCC 254, it was held:-

"31. As regards the breach of Rule 15(3) it has been held that Shinde B did not write the certificates and the memorandums in the same form and terms as are prescribed by that rule. It was submitted by the learned counsel for the respondents that the certificates and memorandums have not been recorded by Shinde in identical terms and as Rule 15 is held mandatory the trial court was right in holding them inadmissible for non-compliance with that mandatory requirement. C Therefore, the question to be considered is whether the certificate and the memorandum are required to be written by that rule in the same form and terms. What Rule 15(3)(b) requires is that the police officer should certify under his own hand that

D "such confession was taken in his presence and recorded by him and that the record contains a full and true account of the confession made by the person".

According to that rule the memorandum should be to the following effect:

E "I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing and recorded by me and was read over to the person making it and admitted by him to be F correct, and it contains a full and true account of the statement made by him."

Writing the certificate and making the memorandum are thus made mandatory to prove that the accused was explained that he was not bound to make a confession and that if he made it it could be used G against him as evidence, that the confession was voluntary and that it was taken down by the police officer fully and correctly. These matters are not left to be proved by oral evidence alone. The requirement of the rule is preparation of contemporaneous record regarding the manner of recording the confession in the presence of the person making it. Though giving of the statutory warning, H ascertaining the voluntariness of the confession and preparation of a

contemporaneous record in the presence of the person making the confession are mandatory requirements of that rule, we see no good reason why the form and the words of the certificate and memorandum should also be held mandatory. What the mandatory requirements of a provision are cannot be decided by overlooking the object of that provision. They need not go beyond the purpose sought to be achieved. The purpose of the provision is to see that all formalities are performed by the recording officer himself and by others to ensure full compliance with the procedure and seriousness of recording a confession. We fail to appreciate how any departure from the form or the words can adversely affect the object of the provision or the person making the confession so long as the court is able to conclude that the requirements have been substantially complied with. No public purpose is likely to be achieved by holding that the certificate and memorandum should be in the same form and also in the same terms as are to be found in Rule 15(3)(b). We fail to appreciate how the sanctity of the confession would get adversely affected merely because the certificate and the memorandum are not separately written but are mixed up or because different words conveying the same thing as is required are used by the recording officer. We hold that the trial court committed an error of law in holding that because the certificates and memorandums are not in the same form and words they must be regarded as inadmissible. Having gone through the certificates and the memorandums made by Shinde at the end of the confessions what we find is that he had mixed up what is required to be stated in the certificate and what is required to be stated in the memorandum. He has stated in each of the certificates and the memorandums that he had ascertained that the accused was making the confession willingly and voluntarily and that he was under no pressure or enticement. It is further stated therein that he had recorded the confession in his own handwriting (except in case of A-7 whose confession was recorded with the help of a writer). He has also stated that it was recorded as per the say of the accused, that it was read over to the accused completely, that the accused had personally read it, that he had ascertained thereafter that it was recorded as per his say and that the confession was taken in his presence and recorded by him. It is true that he has not specifically stated therein that the record contains "a full and true account of the confession made". The very fact that he had recorded the confession in his own handwriting would imply that it was recorded in his presence and was recorded by him. So also

A B C D E F G H

A when he stated in the certificates and memorandums that the confession was recorded as per the say of the accused, that it was read over to him fully, that the accused himself personally read it and that he had ascertained that it was recorded as per his say, that would mean that it contains "a full and true account of the confession" and that the contents were admitted by the accused. Thus, while writing the B certificate and the memorandum what Shinde has done is to mix up the two and use his own words to state what he had done. The only thing that we find missing therein is a statement to the effect that he had explained to the accused that he was not bound to make a confession and that if he did so the confession might be used as C evidence against him. Such a statement instead of appearing at the end of the confession in the memorandum appears in the earlier part of the confession in the question and answer form. Each of the accused making the confession was explained about his right not to make the confession and the danger of its being used against him as evidence. That statement appears in the body of the confession but D not at the end of it. Can the confession be regarded as not in conformity with Rule 15(3)(b) only for that reason? We find no good reason to hold like that. We hold that the trial court was wrong in holding that there was a breach of Rule 15(3) and, therefore, the confessions were inadmissible and bad."

E 11. In *Hardeep Singh Sohal and Ors.* v. *State of Punjab through CBI,* [2004] 11 SCC 612, it was held:-

"17. Ext. PAA does not contain such a certificate having been given by PW 34. It is true that PW 34 had put certain questions to the F accused as to whether he was aware that the statement which he wants to make could be used against him and on the basis of the same he will be sentenced. The officer also asked him whether there is any pressure, fear on him and he answered in the negative. However, PW 34 did not give the certificate at the end of the confession. The certificate should have specifically stated that he had explained to the G person making the confession that he was not bound to make the confession and, if he does so, the confession he may make may be used against him and that he believed that this confession was voluntarily made and it was taken in his presence and recorded by him and was read over to the person making it and admitted by him to be correct, and it contained a full and true account of the statement made H

by him."

12. Thus, the question as to where irregularity, if any had been committed in recording the confessional statement of the accused or the same otherwise would not inspire confidence before a court of law is a matter which in our opinion would fall for consideration of the learned Trial Judge.

13. An irregularity made in recording a statement may be held to be curable and admissible in evidence. [See *State of Tamil Nadu through Superintendent of Police CBI/SIT* v. *Nalini and Ors.*, A.I.R. (1999) SC 2640].

14. Strongly relying upon the decision of this Court in *State (NCT of Delhi)* v. *Navjot Sandhu,* [2005] 11 SCC 600, however, it was submitted that under a Special Statute like POTA or TADA confession of a co-accused could not be taken into consideration even for the purpose of Section 30 of the Indian Evidence Act. It is not necessary to examine that aspect of the matter at this stage.

15. In *Navjot Sandhu* (supra) this Court held

> "39. The crucial expression used in Section 30 is "the *Court may take into consideration such confession"* (emphasis supplied). These words imply that the confession of a co-accused cannot be elevated to the status of substantive evidence which can form the basis of conviction of the co-accused. The import of this expression was succinctly explained by the Privy Council in *Bhuboni Sahu* v. *R.* 23 in the following words: (AIR p. 260)
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> "[T]he court may take the confession into consideration and thereby, no doubt, makes its evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; *it can be put into the scale and weighed with the other evidence ."*
>
> (emphasis supplied)"

However, it was held:-

> "50. We are, therefore, of the view that having regard to all these weighty considerations, the confession of a co-accused ought not to be brought within the sweep of Section 32(1). As a corollary, it follows

A that the confessions of the first and second accused in this case recorded by the police officer under Section 32(1), are of no avail against the co-accused or against each other. We also agree with the High Court that such confessions cannot be taken into consideration by the Court under Section 30 of the Evidence Act. The reason is that the confession made to a police officer or the confession made while a person is in police custody, cannot be proved against such person, not to speak of the co-accused, in view of the mandate of Sections 25 and 26 of the Evidence Act. If there is a confession which qualifies for proof in accordance with the provisions of the Evidence Act, then of course, the said confession could be considered against the co-accused facing trial under POTA. But, that is not the case here.

As at present advised, we need not go into the said question.

16. We are not oblivious of some of the decisions of this Court that the Courts should assign reasons while allowing or refusing an application for bail. But then it is trite that detailed reasons touching the merit of the matter should not be given, which may prejudice the accused. What is necessary is that the order should not suffer from non-application of mind. At this stage a detailed examination of evidence and elaborate documentation of the merit of the case is not required to be undertaken.

17. Ordinarily, a bail application, in a case of this nature, which involves the security of the State should be rejected.

18. Our attention has, however, been drawn to *Shaheen Welfare Association* v. *Union of India and Ors.*, [1996] 2 SCC 616, paragraph 13 of the case reads as under:-

"13. For the purpose of grant of bail to TADA detenus, we divide the undertrials into three (sic four) classes, namely, (a) hardcore undertrials whose release would prejudice the prosecution case and whose liberty may prove to be a menace to society in general and to the complainant and prosecution witnesses in particular; (b) other undertrials whose overt acts or involvement directly attract Sections 3 and/or 4 of the TADA Act; (c) undertrials who are roped in, not because of any activity directly attracting Sections 3 and 4, but by virtue of Section 120-B or 147, IPC, and; (d) those undertrials who were found possessing incriminating articles in notified areas and are booked under Section 5 of TADA."

19. In *Nalini* (supra), the learned Judges forming the Division Bench differed in their opinion as to whether confession of a co-accused would be admissible as a substantive evidence against another co-accused. We, however, at this stage, are not concerned with such a situation.

20. In a case of this nature, it is very difficult to say at this stage as to whether they are parties to the larger conspiracy or not. In the evidence, it is alleged that one of the appellants had gone for training to Pakistan, another had provided money and he had been in possession of a large quantity of arms. A strong *prima facie* case has been made out against the appellants herein. Their release at this juncture may hamper the smooth conduct of trial since main witnesses are yet to be examined. One of the appellants hails from a different State. It may be difficult to secure his presence, if released on bail at this crucial juncture.

21. In this view of the matter, we are of the opinion that the interest of justice shall be subserved if the learned Designated Judge is directed to conclude the trial as expeditiously as possible and preferably within six months from the date of communication of this order. With this observation, the appeals are dismissed.

B.B.B. Appeals dismissed.