State Rep. By Dy. Supdt. of Police, Cbi, Visakhapatnam, Andhra Pradesh

Vs

V. Jayachandra Alias Ezhu Viral and Others

Criminal Appeal No. 823 of 1996

(G. T. Nanavati, G. N. Ray JJ)

13.03.1997

JUDGMENT

NANAVATI, J. –

1. This appeal filed under Section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as the "TADA Act") is directed against the judgment and order dated 29-6-1996 passed by the learned Sessions Judge and Designated Judge, Visakhapatnam in Sessions Case No. 31 of 1994. The State has come in appeal as the a learned Judge acquitted all the nine accused.

2. On 13-1-1993 at about 11.10 pm., the Officers-in-Charge of the Coast Guard vessel named "C. G. S. VIVEK" of the Government of india noticed one vessel/ship on high seas, about 440 nautical miles South-east of Madras. It was not displaying its nationality flag. It was displaying "NOT UNDER COMMAND" lights. It was found drifting and was not responding to radio calls. After repeated radio calls V. Jayachandra at the rate of Ezhu Viral (A-I) informed that he was the Master of that vessel but did not give the correct name of the vessel or the call sign and other details regarding the vessel. C. G. S. VIVEK, therefore, entertained suspicion about the nationality and intentions of that ship and demanded boarding for verification. It was the prosecution case that the Master of that ship threatened C. G. S. VIVEK of dire consequences if an attempt for boarding was made, by saying that it was carrying 110 tonnes of explosives. It then started fleeing away by taking a zigzag course. After a chase for about 2-1/2 hours, it agreed to sail towards Madras, along with C. G. S. VIVEK, though it did not agree for its inspection. On 14-1-1993, INS KIRPAN of Indian Navy joined C. G. S. VIVEK and escorted the said vessel to Madras. A-1 revealed that the name of the ship was M. V. YAHATA and it was carrying 10 AK 47 rifles, one FNC rifle, one rocket-propelled gun and about 25 hand grenades and huge quantity of oil and explosives. On 16-1-1993, by about 7.45 a.m., M. V. YAHATA was anchored about 8 nautical miles away from Madras coast inside the lndian territorial waters. All the persons on board of M. V. YAHATA were ordered to assemble on the foxle side without any arms and explosives to enable the Indian Navy and Coast Guard ships to exercise their right of visit. The Master and other persons on board again denied this right and took their positions with their AK 47 rifles. They also fired shots from rocket-propelled gun launcher and small arms and after some time set fire to their ship by using explosives. A-1 to A-9 jumped overboard and were rescued by Indian Naval and Coast Guard vessels. The vessel got badly damaged by fire. When it was in the danger of sinking, the Naval Commandos boarded the vessel and recovered two dead bodies, two assault rifles and a hand grenade. The vessel sank at about midnight.

3. The investigation revealed that the real name of the vessel was YAHATA but deliberately A-8,

under instructions of A-1, had obliterated the first letter 'Y' and the last letter 'A' in order to avoid detection of its correct name and identity. It was registered at the Embassy of Honduras in Singapore showing the port of registration as San Lorenzo in Honduras. The said vessel belonged to LTTE and A-1 was its Master. A-2 was the member of the Black Sea Tiger Unit and LTTE and was a cadet in the vessel. A-3 was the Chief Engineer and A-4 to A-9 were the crew. A-b to A-19 were hardcore LTTE militants who died as a result of the fire and sinking of the ship. Out of them, A-12 (Krishnakumar at the rate of Kittu) was one of the top LTTE leaders. The investigation also revealed that it was on a clandestine voyage and was carrying explosives for terrorist operations. Soon after the said vessel was intercepted by C. G. S. VIVEK all the 19 accused had conspired to throw overboard all the boxes containing explosives and to destroy evidence as regards their links and not to surrender to Indian Navy or to allow them to a inspect their vessel. After the said vessel wasbrought near the Madras Port they had fired shots at Naval/Coast Guard Officers in order to prevent them from exercising their right of inspection and discharging their duty They had set fire to the ship in order to destroy evidence and to strike terror amongst people including Naval Officers on board the Indian Naval/Coast Guard ships who were involved in the said operation. With these allegations the CBI charge-sheeted A-1 to A-9 and ten others who had died, in the Court of the Sessions Judge and Designated Judge at Visakhapatnam for the offences punishable under Section 120-B read with Sections 201, 353 and 438 IPC, Section 27 of the Indian Arms Act, Sections 3, 4 and 6 of the Indian Explosive Substances Act, Sections 3(2) and (3) of the TADA Act, Rules 11(a) of the TADA Rules.

4. On consideration of the material produced before him the learned Judge framed charges not only for the conspiracy to commit the said offences but also for the offences punishable under Sections 201, 438 and 353 of IPC read with Section 34 IPC, Section 3(2) TADA Act read with Section 34 IPC and Section 3(3) of TADA Act. A-2 was individually charged under Section 27 of the Indian Arms Act and Section 6 of the Indian Explosive Substances Act, 1908. A-1 to A-9 were also charged under Rule 11(a) of the TADA Rules.

5. In order to establish its case the prosecution examined all the material witnesses and also produced supporting documents. A-1, in his examination under Section 313 of the CrPC, admitted that he was the Captain of the ship, YAHATA, that at the material time the ship was drifting and was exhibiting "NOT UNDER COMMAND" lights and was not flying any national flag. He, however, denied that when contacted by C. G. S. VIVEK he did not respond to radio calls for a long time and ultimately when he responded he did not give the correct name of the vessel or the call sign and other details regarding the vessel. He also stated the ship was not flying any nationality flag as it was night time and, therefore, it was not necessary to fly the same. He also denied that C. G. S. VIVEK was informed that YAHATA was an LTTE vessel, that it was carrying arms and ammunition and that he had threatened the Officers-in-Charge of VIVEK with dire consequences if they came near his ship. He explained that at the material time the vessel was drifting and was exhibiting "NOT UNDER COMMAND" light as he was waiting for some passengers to come from sri Lankan coast. He admitted that he had not agreed to the demand for inspection as the Officers-in Charge of Vivek had no right to do so. As regards the incident of 16-1-1993 he denied that any shot was fired from his ship at C. G. S. VIVEK or INS KIRPAN. On the contrary, he stated that C. G. S. VIVEK and KIRPAN had fired shots at his ship and as it was hit by one of those shots it caught fire and got sunk. He also stated that in order to cover up their illegal acts a false case was made out by the Officers-in-charge of C. G. S. VIVEK and KIRPAN. The other accused also adopted this version of A-1 in their examination under Section 313 of the Code. In addition, they denied any knowledge about the a conversation between the Officers-in-Charge of C. G. S. VIVEK and A-I.

6. The accused also submitted a written statement wherein they further stated that they had not denied the demand for inspection but had insisted that inspection be done in presence of a neutral umpire. They also stated that the persons other than the crew, who were found present in the ship, had boarded the ship claiming that they were Sri Lankan refugees and they did not know that they belonged to LTTE. They also stated that they were not carrying arms and ammunition in the ship and there were petrol batteries in it. They also denied that they had made confessions voluntarily and that they were true.

7. The learned Sessions Judge held that interception of M. V. YAHATA and demand for its inspection by C. G. S. VIVEK were not justified as A-1 had, though belatedly, given the correct nationality of his ship. Therefore, C. G. S. VIVEK and INS KIRPAN were also not justified in forcing M. V. YAHATA to proceed towards Madras coast. The learned Judge did not believe the evidence of PW 1, PW 9, PW 12, PW 13, PW 14 and PW 22 that C. G. S. VIVEK and INS KIRPAN had fired only warning shots without explosives and held that it was not established beyond doubt that M. V. YAHATA had opened fire with rocket-propelled gun launcher and small arms at the Indian Naval ships. He also held that M. V. YAHATA probably caught fire due to the shots fired by the Indian Naval ships and not because of any act of the accused. He also did not believe the prosecution evidence that the accused had thrown the boxes containing arms and ammunition into the sea. On the basis of these findings he further held that the prosecution has failed to establish any of the charges levelled against the accused.

8. Mr. M. S. Usgaocar, learned Additional Solicitor General, contended that the learned Judge has not correctly appreciated the evidence and also the correct legal position as regards the right of Public Armed Vessels to demand boarding for inspection when there is reasonable ground for suspecting that the other ship is without nationality. He submitted that the trial court has recorded a finding that at the material time M. V. YAHATA was not flying any flag of any nationality. It was drifting, displaying "NOT UNDER COMMAND" lights and was not responding to radio calls. He also submitted that there is sufficient and reliable evidence on record to prove that A-1 had not given the correct name of the vessel or the call sign and certain other details regarding his vessel. Therefore, the Naval Officers-in-Charge of C. G. S. VIVEK and INS KIRPAN had a right to demand boarding for inspection particularly when they were also informed that it was carrying huge quantity of arms and ammunition. He, however, fairly conceded that the evidence on record is not sufficient to come to the conclusion that the accused had hatched a conspiracy to commit the offences specified in the charge. He also fairly conceded that the evidence on record is not sufficient to establish any offence under the TADA Act and the TADA Rules and, therefore, the confessions of the accused recorded under Section 15 of the TADA Act cannot come to the help of the prosecution. However, he submitted that the evidence led in the case clearly establishes the offences under Sections 353 and 437, both read with Section 34 IPC and the contrary a finding recorded by the learned Designated Judge is incorrect.

9. The learned Additional Solicitor General drew our attention to Articles 91, 92 and 110 of the U. N. Convention on Law of Seas, 1982, to which India is a signatory. Under Articles 91 and 92 of the Convention it is mandatory for a vessel to fly its nationality flag. Under Article 110 a Public Armed Vessel if it encounters on high seas a foreign ship, and has a reasonable ground for suspecting that the ship is without nationality, it has a right to intercept and demand boarding for verification. Applicability of these provisions was not disputed by the accused. It was also not disputed by the accused that at the material time M. V. YAHATA was not flying any flag indicating its nationality. Having gone through the evidence it appears to us that the learned Designated Judge has not correctly appreciated the evidence of PW 12, Commanding Officer of C. G. S. VIVEK and PW 22,

Captain of INS KIRPAN as regards the facts and circumstances under which they had demanded boarding for the purpose of verification. However, in view of the concession made by the learned Additional Solicitor General that in view of the insufficient evidence on record the charge of conspiracy has rightly been not held proved, it is not necessary to reappreciate the evidence and record any finding with respect to the right or justification for demanding boarding.

10. After re-examining the evidence we also find that the prosecution has failed to establish any offence punishable under the TADA Act or the Rules framed thereunder. Even though it is found by the learned Designated Judge, as a matter of fact, that M. V. YAHATA was carrying huge quantity of arms and ammunition none of the accused can be said to have committed any offence under the Indian Explosive Substances Act and the Indian Arms Act.

11. The only point which now survives for our consideration is whether the prosecution has established the offences punishable under Sections 353 and 437, both read with Section 34 IPC. The officers of the C. G. S. VIVEK and INS KIRPAN who were insisting upon boarding M. V. YAHATA were performing their duty as they bona fide believed that they had a right to do so. They were demanding boarding and the accused were refusing the same. The defence of the accused in this behalf was inconsistent. They firstly denied that the officers of the Public Armed Vessels of the Government of India, had any right to intercept or inspect their vessel as it was sailing on high seas beyond 200 nautical miles from Indian baseline. Thereafter they also stated that they had not denied inspection of their vessel but had only insisted upon a neutral umpire. Though the accused had stated that they were unjustly forced to take their vessel near the Madras sea coast we do not find any evidence or even suggestion in the cross-examination of the prosecution witnesses that either C. G. S. VIVEK or INS KIRPAN had threatened to use force if they did not come along with them to the Madras coast. As regards what happened in the morning of 16-1-1993 the defence of the accused was that none of the accused had fired at the Indian Naval vessels when they were making an attempt to board their vessel. The evidence of PW 9, PW 12, PW 13, PW 14 and PW 22 is to the effect that at about 10.00 a.m. they had started the operation for boarding M. V. YAHATA and at that time warning shots were fired from C. G. S. VIVEK and INS KIRPAN with a view to divert the attention of the accused. There was retaliatory fire from M. V. YAHATA. PW 22, the Captain of INS KIRPAN has clearly stated in his evidence that in spite of his direction to M. V. AHAT to bring all their men to fore-peak without arms and ammunition and explosives, they came to the aforesaid fore-peak fully armed. He has also stated that he had noticed "RPG LAUNCHER" was being trained by the accused against his ship. He has also stated that when he fired warning shots to make them surrender and divert their attention for facilitating the boarding operation there was retaliatory fire from M. V. AHAT. Nothing has been brought out in the cross-examination of this witness which would create any doubt regarding his credibility and reliability of his version. His evidence has been disbelieved by the learned Designated Judge on the ground that if really the occupants of M. V. YAHATA had an intention to resist boarding by using firearms they would not have obeyed the directions given to them earlier by C. G. S. VIVEK and INS KIRPAN to sail towards Madras coast. The learned Judge has also disbelieved his evidence because there was no mention of retaliatory fire from M. V. YAHATA in the complaint, Exhibit P-1 given by PW 1 who was then the Captain of INS SAVITRI and also because PW 1 and PW 12 (the Captain of C. G. S. VIVEK) had not stated anything about the retaliatory fire in their evidence before the court. The learned Judge failed to appreciate that it was decided that INS SAVITRI was to be used only as a full-fledged hospital vessel in case there were casualties. It is, therefore, quite likely that he had not noticed retaliatory fire from M. V. YAHATA. Significantly, he had also not stated in his complaint anything about the warning shots fired by C. G. S. VIVEK and INS KIRPAN, though admittedly, such shots were fired. Therefore, on the basis of the omission in the complaint, Exhibit P-1 it was not proper to discard the

evidence of PW 22. It is quite likely that PW 1 and PW 12 did not notice the retaliatory fire from M. V. YAHATA because of their respective positions and because they were engaged in doing their jobs. PW 9 has supported PW 22 but the learned Judge discarded his evidence as this witness had not stated before the police that he had seen any projectile emerging from M. V. YAHATA. Having carefully gone through the evidence of this witness we find that it was not put to him that he had not so stated before the police. What he has stated in cross-examination is that he had noticed splash of water on the right side of INS KIRPAN and he had also seen the projectile emerging from M. V. YAHATA. The only suggestion put to this witness was that he had merely suspected firing from M. V. YAHATA on the basis of splash water near INS KIRPAN. The learned Judge was, therefore, not right in discarding the evidence of this witness who has clearly supported the evidence of PW 22 on this point. PW 13 was the Commanding Officer of INS SD BT. 56. He has also stated that there was retaliatory fire from M. V. AHAT when he was on the deck. He has further stated that seeing the retaliatory fire he ducked down otherwise he would have been hit. What this witness has stated in his cross-examination is that : 'I did not specifically a state in my statement to the CBI Officers that on seeing firing shots from 'M. V. AHAT' I ducked down but I stated that I heard 'Phat-Phat' sound from 'M. V. AHAT' and ducked down which according to me is the same thing as seeing firing from the 'M. V. AHAT'. " Evidence of this witness has been disbelieved on the ground that it was not likely that the occupants of M. V. AHAT would have ventured to fire at the Indian Naval ships and also because this witness had not specifically stated before the police that the shots which were fired by the Indian Naval ships were warning shots only. These reasons can hardly be regarded as good reasons for discarding his evidence. So also, it was not proper to discard the evidence of this witness because PW 14 who was also on INS SD BT. 56 did not say anything in his evidence regarding retaliatory fire from his evidence it clearly appears that he was not even present when the briefing session for the boarding operation was conducted. Therefore, it is quite likely that he was assigned some other function and was busy with his own work when M. V. YAHATA had fired in retaliation. There is nothing on record to show that he was with PW 13 or on the deck when M. V. YAHATA had indulged in retaliatory fire.

12. We have perused the evidence of PW 9, PW 13 and PW 22 closely on this point and we find no reason to disbelieve the same. The reasons given by the learned Designated Judge for not believing this part of the prosecution evidence are not at all proper and sufficient. We, therefore, hold that the prosecution has satisfactorily established that the accused had used criminal force against the Indian Naval Officers while they were performing their duty and that was done with an intention to prevent or deter them from discharging their duty. They are, therefore, held guilty of having committed the offence punishable under Section 353 IPC read with Section 34 IPC.

13. We also hold that the finding of the learned Designated Judge that M. V. YAHATA was, in all probability, hit by a shot fired from one of the Indian Naval ships and, therefore, caught fire and got destroyed is against the weight of evidence on record. The prosecution witnesses have deposed that the shots, which were fired by the Indian Naval ships, were only warning shots and they did not contain explosives. The learned Judge has disbelieved this evidence for the reason that in their earlier version before the police they had not stated that the shots, which they had fired, were only the warning shots and also because the investigating officer had not seized gunnery reports maintained by the ships. The learned Designated Judge failed to appreciate that there was hardly any reason for the Officers-in-Charge of Indian Naval ships to fire shots with explosives at M. V. YAHATA as their object was not to destroy that ship but to facilitate boarding on that ship by the Commandos. The prosecution witnesses appear to be right in their say that the warning shots were fired with a view to make the accused surrender and also to divert their attention from the Commandos who were being sent to board that vessel. The Prosecution witness have stated that they

had seen smoke coming out from M. V. YAHATA after some time. In view of the facts and circumstances of the case it can be reasonably inferred a that the accused, finding that it was no longer possible to avoid boarding of their vessel by the Indian Naval Officers, thought it proper to destroy their ship in order to avoid detection of the true state of affairs and consequential action. In our opinion, the prosecution can be said to have satisfactorily established that accused had, in furtherance of their common intention, destroyed their ship. We, therefore, hold that the accused thereby have committed an offence punishable under Section 438 IPC read with Section 34 IPC.

14. In the result, this appeal is partly allowed, acquittal of the accused under Sections 353 and 438 IPC is set aside and they are convicted for those offences. For the offence punishable under Section 353 IPC they are ordered to suffer rigorous imprisonment for a period of two years. For the offence punishable under Section 438 IPC they are ordered to suffer rigorous imprisonment for a period of three years. Both the sentences are ordered to run concurrently. The acquittal of the accused for the other offences, with which they were charged, is maintained.