

Prasad Ramakant Khade

Vs

State of Maharashtra

Criminal Appeal No. 544 of 1999

(G. B. Pattanaik, S. P. Kurdukar, K. T. Thomas JJ)

12.10.1999

JUDGMENT

S.P. KURDUKAR, J.-

1. The appellant along with Pravin Krishna Gawand (since deceased) and Sunil Dattaram Sawant (since absconding) were put up for trial for the offences punishable under Sections 3(3), 5 and 6 of the TADA (P) Act, 1987, under Section 7 read with Section 25(1-A) of the Arms Act and Sections 4 and 5 of the Explosive Substances Act, 1908. The Designated Court, Greater Bombay under the TADA (P) Act, 1987, by its judgment and order dated 30-1-1999 found the appellant guilty of the aforesaid offences and convicted him under Section 5 of the TADA (P) Act, 1987 (hereinafter referred to as "the Act") and sentenced him to suffer rigorous imprisonment for ten years and to pay a fine of Rs. 1000 and in default of payment of fine to undergo further rigorous imprisonment for six months. The appellant, although convicted on other counts no separate sentences were awarded to him for those offences. It is against this judgment and order passed by the Designated Court, Greater Bombay, the appellant has filed this appeal under Section 19 of the Act.

2. Briefly stated the prosecution case is as under :

Several criminal gangs were operating in Mumbai and they indulged in organised crimes like extortion of money, murders, land grabbing and threats to civilians. At times, these gangs also involved in showing their muscle power to establish their supremacy over the other gang and in that process, they were involved in killing the members of rival gangs. It is alleged by the prosecution that there existed a rivalry between two gangs, one led by Arun Gawli and the other by Dawood Ibrahim. Ibrahim Parakar, the husband of the sister of Dawood Ibrahim was shot dead at his residence on 26-7-1992 by the criminals allegedly belonging to the Arun Gawli gang. Shailesh Haldankar and Bipin Shere who were allegedly belonging to the gang of Arun Gawli were said to be suspects in the murder of Ibrahim Parakar. They were chased and beaten by the mob when they were trying to escape. They came to be arrested on 2-9-1992. As both these suspects sustained the injuries, they were admitted in J.J. Hospital, Mumbai for treatment. Two armed police constables were also kept at J.J. Hospital with a view to take revenge and in that process they pumped bullets in the body of Shailesh Haldankar who died in the ward itself. In that firing, two policemen who were on guard duty also sustained bullet injuries and ultimately died. A crime in that behalf came to be registered and the trial is said to be pending. This trial is commonly known as "*J.J. Hospital short-out case*".

3. The appellant and Pravin Krishna Gawand came to be arrested on 7-6-1993. Pravin Krishna Gawand, however, died later on. The third suspect Bhopal @ Bhupinder is still absconding. The

appellant who was remanded to the police custody, during his interrogation on 16-6-1993 at about 10.30 a.m. expressed his desire to make a voluntary statement regarding the concealment of arms and ammunition. PI Raje Bhosal (PW 7) who was investigating the crime in question arranged for two panch witnesses, of which PW 2 is examined. In the presence of the panch witnesses, the appellant made a statement which came to be recorded vide Ex. 10 (memorandum) and the free admitted translation thereof is as under:

"In the last week of January 1993, I had given one AK 56 rifle and two loaded magazines and in the first week of February one pouch containing 3 hand grenades and two detonators to Pravin Gawand at his residence at 50, Tenement Building, 3rd Floor, Ambedkar Road, perel, Mumbai for keeping with him. I will point out the said place and the said person, accompany me."

Thereafter, the appellant, two panch witnesses, PI Raje Bhosale (PW 7) and API Ghule (PW 1) along with other staff members went in one Ambassador car and taxi. The driver drove the Ambassador car under the instructions of the appellant and when the vehicle reached near Hafkin Institute, Mumbai, the appellant asked the driver to stop the car. All the occupants from the Ambassador car as well as from the taxi got down and the appellant led the panchas and the police party to the third floor of the building called 50, Tenement Building, Ambedkar Road, Parel, Mumbai, and pointed out the eastern-side corner room. The door of the room was closed from inside. The appellant knocked at the door and a person by the name of Pravin Krishna Gawand opened it. The appellant identified him to be the very same person to whom he had handed over one AK 56 rifle, two magazines loaded with cartridges and pouch containing three hand grenades and two detonators. When the investigating officer questioned Pravin Krishna Gawand about these articles, he admitted to have received these articles and explosives from the appellant and thereafter took out one gunny bag which was kept concealed under the cot behind one suitcase. When the gunny bag (Article 10) was opened, it was found to contain one AK 56 assault rifle (Article 1), two magazines (Articles 2 and 3) loaded with 11 and 5 live cartridges respectively and wrapped together with the rifle; one leather multicolored pouch (Article 12) containing three hand grenades (Articles 5, 6, and 7) and two detonators (Articles 8 and 9); one assault rifle was wrapped in dark blue coloured school uniform together with two loaded magazines (Article 11). PSI Kadam of the Bomb Detection and Disposal Squad was called to defuse the detonators which he did and confirmed that the hand grenades were not loaded with detonators. All these articles were seized under the seizure panchnama (Ex. 10-A). Pravin Gawand was also then put under arrest. The seized articles were then forwarded on 24-6-1993 to the Forensic Sciences Laboratory on that day for want of time and later on 28-6-1993, they came to be forwarded. All these articles were then sent to the chemical analyser (CA) for necessary examination. The investigating officer thereafter obtained the necessary permission from the Commissioner of Police, Greater Bombay to invoke provisions of TADA. The District Magistrate also accorded sanction for prosecution of offences under the Arms Act and the Explosives Substance Act. After completing the investigation, a charge-sheet came to be filed against the appellant for the offences mentioned hereinabove.

4. The Designated Court framed the charges against the appellant under Section 3, 5 and 6 of the Act as also under Section 3, 5 and 6 of the Act as also under Section 7 read with Section 25(1-A) of the Arms Act and under Sections 4 and 5 of the Explosive Substance Act, 1908.

5. The appellant denied the charges. According to him, he never made any statement as contained in Ex. 10 nor was any recovery made as reflected in Ex. 10-A. According to him, he was not in possession of any of these incriminating articles nor were they seized from his residence or at his

instance. He is innocent and he be acquitted.

6. The prosecution case entirely rests upon the disclosure statement recorded vide memorandum (Ex. 10), the genuineness, correctness and proof of Ex. 10 and Ex. 10-A read with report of the Forensic Sciences Laboratory and the CA report. In support of its case, the prosecution examined API Ghule (PW 1) who lodged the FIR, PI Raje Bhosale (PW 7) and PW 2 who is the panch witness to Exs. 10 and 10-A. In addition to that. The prosecution also examined some more witnesses whose evidence was not seriously challenged in this criminal appeal.

7. As stated earlier, the Designated Court found that the evidence of panch witness PW 2, PI Raje Bhosale (PW 7), the memorandum (Ex. 10) and the seizure panchnama (Ex. 10-A) are free from any infirmity. The certificates of the Forensic Sciences Laboratory and the chemical analyser unmistakably prove that the AK 47 was in working condition and the number mentioned in EX. 10-A tallied with the number engraved on the weapon. The Designated Court also accepted the report of the chemical analyser in regard to the explosive substance, which was seizure panchnama (Ex. 10-A). The Designated Court resultantly convicted the appellant under Section 3 read with Sections 5 and 6 of the Act and sentenced him to suffer rigorous imprisonment for ten years and to pay a fine of Rs. 1000 and in default of payment of fine to undergo further rigorous imprisonment for six months. The Designated Court, although found the appellant guilty on other counts, but did not award any separate sentence thereon. It is this order which is the subject-matter of challenge in this criminal appeal.

8. The learned advocate for the appellant assailed the judgment of the Designated Court on various grounds. Firstly, he urged that the confessional statement of the appellant alleged to have been recorded vide memorandum (Ex. 10) on 16-6-1993 is false and at any rate, the same should not be said to have been duly proved due to non-examination of the second panch witness in court. He, therefore, urged that if the memorandum (Ex. 10) is rejected, the alleged seizure panchnama (Ex. 10-A) must fail. There is no other evidence to connect the appellant with the crime. We see no substance in this contention for two reasons: (a) the prosecution has examined PW 2 who acted as panch witness to the memorandum (Ex. 10) and the seizure memo (Ex. 10-A). PW 2 in his evidence has very succinctly described how the confessional statement of the appellant was recorded and pursuant thereto how various incriminating articles came to be seized vide seizure memo (Ex. 10-A). The witness has firmly asserted the contents of these two documents and there is no material on record to discredit his evidence, and (b) the examination of the second panch witness is not a must. If the appellant wanted to cross-examine the second panch witness, nothing prevented him from making a proper application to the trial court during trial for producing the said panch witness for cross-examination. Nothing has been done. The evidence of PW 2 finds corroboration from the evidence of Investigating Officer PI Raje Bhosale (PW 7). After going through the evidence of these two witnesses and on a perusal of the confessional statement (Ex. 10) and the seizure panchnama (Ex. 10-A), we are satisfied that there is no infirmity whatsoever to discard this evidence.

9. It was then contended on behalf of the appellant that the recovery of AK 56 rifle must stand disproved because the certificate of the ballistic expert refers to AK 47. Therefore, the seized weapon cannot be connected with the present crime. This argument at the first blush appears to us attractive but on a close scrutiny of the description of the weapon, the said argument loses its charm. The number given on the weapon tallies with the number given in the memorandum (Ex. 10-A) and the seizure panchnama (Ex. 10-A). It was the appellant who made a statement that he had handed over the weapon AK 56 to Pravin Krishna Gawand for keeping in his house. Obviously, the same

description is found in the seizure memo (Ex. 10-A). It is the ballistic expert who gave the correct description of the weapon. Once, the number on the weapon tallies with the number mentioned in the memorandum (Ex. 10-A) and the seizure memo (Ex. 10-A), the contention carries no force, and therefore, has to be rejected.

10. It was then contended on behalf of the3 appellant that actual possession of the weapon is the criterion for convicting the person in possession thereof under Sections 5 and 6 of the Act. Learned counsel urged that the weapon and other articles were recovered from the house of Pravin Krishna Gawand and, therefore, he cannot be convicted under Section 5 and 6 of the Act. This argument overlooks the material part in the confessional statement (Ex. 10) which reads thus:

"In the last week of January 1993, I had given one AK 56 rifle and two loaded magazine and in the first week of February, one pouch containing three hand grenades and two detonators to Pravin Gawand at his residence at 50, Tenement Building, 3rd Floor, Ambedkar Road, Parel, Mumbai, for keeping with him."

The crux of the statement is that it is the appellant who went to the house of Pravin Gawand and kept the said weapon at his residence for safe custody. In view of this statement, it must follow that the appellant was having the control over the said weapon and other incriminating articles and none else. This submission, therefore, must be rejected.

11. It was then contended that the incriminating articles seized vide seizure memo (Ex. 10-A) were handed over to the investigating officer by the instance of the appellant. This submission has again no substance because it is the appellant who pursuant to his confessional statement (Ex. 10-A) led the investigating party and the panch witnesses pointing out the place where he had kept the incriminating articles. It was the appellant who asked Pravin Gawand, when he opened the door, to hand over the incriminating articles to the investigating officer. In view of this positive evidence on record, it would be a futile attempt on the part of the learned advocate for the appellant to contend that the weapon and other articles were not seized at his instance.

12. It was then contended on behalf of the appellant that the FIR (Ex. 6) is a fabricated document because the date mentioned therein is as "between January 1992 and 16-6-1993" It was explained in the evidence by API Ghule (PW 1) that it was a typing error and in fact, it has to be read "between January 1993 and 16-6-1993". The learned trial Judge has accepted the explanation given by PI Ghule (PW 1) and we concur with the said finding.

13. It was then contended that no independent witness from the locality was examined when admittedly the premises in question is a big chawl where so many families reside. The panch witnesses were procured from the area near the Crawford Market and, therefore, it must cast a grave suspicion on the genuineness of the same. According to learned counsel, the memorandum (Ex. 10) and the seizure memo (Ex. 10-A) were fabricated in the office of the DCP (CID) and, therefore, this evidence be rejected. We see no substance in this contention because the evidence of PW 2, the panch witness is very categorical and the defence could not discredit this witness on this count.

14. After a careful perusal of the material on record, we are satisfied that the impugned judgment suffers from no infirmity and the appellant has been rightly convicted for the aforesaid offences. In the result, this criminal appeal to stand dismissed.