SUPREME COURT OF INDIA

Yusuf @ Babu Khan

Vs.

State of Rajasthan

(N.S. Hegde and B.P. Singh JJ.)

23.01.2003

ORDER

1. The appellants in the above appeals have been found guilty of offences punishable under Section 5 and 6 of the *Terrorist and Disruptive Activities (Prevention) Act, 1987* (TADA) and were sentenced to 5 years' Rl with fine of Rs. 500/- each; in default a simple imprisonment for 3 months was awarded. They were also sentenced under Section 5 of the Explosive Substances Act, 1908 and were sentenced to Rl for a period of 2 years with fine of Rs. 500/-; with default clause to suffer further imprisonment for 3 months if the fine was not paid. Both the sentences were to run concurrently.

2. The prosecution case, briefly stated, is that on 10.11.1990, when PW-4, Jagdish Narain, ASI, the incharge of the Highways police checking along with his colleagues received a wireless message that a maruti van which had met with an accident, had got away without stopping, therefore, these police were on the look out for the said van. It is stated that in the midnight at above 12.25. a.m., a maruti van bearing no. CIW-17 came from Jaipur-Sikandara side, the abovesaid police signalled to stop the said van and on checking the same, they found 4 cartons of gelatin and 31 packets of electronic detonators. The four appellants named above were the occupants of that van. They did not have any licence to carry the said explosives, hence, the van with the explosives was seized and the accused persons were taken into custody. A case under Sections 4 to 6 of the *Explosive Substances Act, 1908* was registered in FIR no. 195/90. Subsequently it came to the knowledge of investigating agency that the place where the explosive material was sized, was a notified area declared under section 2(1)(f) of the TADA Act, hence, the provisions of the said Act were also invoked. After completing the investigation, a chargesheet was filed against the appellant and the TADA Court which tried the appellants after considering the material on record, accepted the prosecution case and convicted the appellant, as stated above. The appellants are therefore before us in these appeals. Even though many questions involving the facts are raised in these appeals, we are of the opinion that these appeals could be disposed of on a short point argued by the learned counsel for the appellants.

3. It is contended on behalf of the appellants that the foundation of the prosecution case was that these appellants were found travelling in a maruti van bearing no. CIW-17 which came from Jaipur Sikandara side to the checkpost and on stopping the vehicle and checking the

same, the explosives in question were found. But this very material circumstance was not put to the accused persons when their statements were recorded under Section 313 Cr.P.C.. which is an omission which goes to the root of the prosecution case. Learned counsel argued that the omission on the part of the prosecution to comply with this mandatory requirement of law had vitiated the entire trial, therefore, they are entitled to an acquittal. The learned counsel in support of this contention of theirs relied upon the judgments of this Court in Jaidev & Anr. v. State of Punjab , Harijan Megha Jesha v. State of Gujarat and State of Maharashtra v. Sukhdeo Singh & Anr. .

4. Mr. V.N. Raghupathy, learned counsel appearing for the State, did not and could not on the basis of the material on record, dispute the fact that this material question was not put to the accused persons when their statements were recorded under Section 313 Cr.P.C. but he contended that this is not a fatal omission so as to vitiate the prosecution case. He contended that no prejudice has been caused to the appellants by this omission, hence, there is no force in the contention of the appellants on this point. He also contended that assuming for argument's sake that there is such omission then the matter should be remitted to the TADA court for trial in accordance with taw.

5. We have heard learned counsel and perused the records. We are also satisfied that from the material on record that the material on which the prosecution relies upon i.e. the factum of these appellants being found in the maruti van which carried the explosives in question, was not put to these appellants when their statements were recorded under Section 313 of the Code. The question then is whether this omission is fatal to the prosecution case. As could be seen from the judgment cited on behalf of the appellants referred to hereinabove, it is clear that if the circumstances relied upon by the prosecution are material circumstances, then such omission will be fatal to the prosecution case. This Court in the case of Jaidev (supra) while examining the effect of Section 342 of the Code as it stood, held thus: "The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him." In the case of Harijan Megha (supra), this Court held: "Unfortunately, however, as this circumstance was not put to the accused in his statement under Section 342, the prosecution cannot be permitted to rely on this statement in order to convict the appellant..." In that case, the recovery of a blood stained cloth from the accused which was a material circumstance to establish the charge against the accused was not put to him, therefore, this Court held that the appellant therein could not be convicted of the offence charged against him. In the case of State of Maharashtra v. Sukhdeo Singh (supra), this Court held : "It is trite law that the attention of the accused must be specifically invited to inculpatory pieces of evidence of circumstances laid on record with a view to giving him an opportunity to offer an explanation if he chooses to do so. Section 313 imposes a heavy duty on the court to take great care to ensure that the incriminating circumstances are put to the accused and his response solicited. The words 'shall question him' clearly bring out the mandatory character of the clause and cast an imperative duty on the court and confer a corresponding right on the accused to an opportunity to offer his explanation for such incriminating material appearing against him." From the above, it is clear that it is the mandatory duty of the trial court to put

all such material circumstances on which the prosecution relies to base a conviction to the accused when his statement is recorded under Section 313 of the Code. Learned counsel for the respondent however contends that assuming that a material circumstance is not put to the accused when his statement is recorded under Section 313, the same omission ipso facto does not vitiate the trial because it is for the accused person to establish that by such omission he has been prejudiced in his trial, learned counsel while admitting that the above referred circumstances were not put to the accused, contended that the appellants are not prejudiced by the said omission. He relied on the judgments of this Court in Suresh Chandra Bahri v. State of Bihar . State of Punjab v. Naib Din and State (Delhi Administration) v. Dharampal and contended that in the instant case also the appellants have not pointed out any prejudice therefore the above argument addressed on behalf of the appellants should fail.

6. We have already noticed the fact that the entire prosecution case is based on the circumstance that these appellants were found in a maruti van from which the explosives were seized. If they were not found in the van, there is no other material to connect them with the said explosives, therefore, without the said circumstance it will not be possible for that prosecution to establish the charges against these appellants. Therefore this circumstance becomes so material that the omission of which would go to the root of the prosecution case and benefit of which omission would naturally go to the accused, therefore, any conviction inspite of such omission is per se contrary to the requirement of law, therefore, prejudice is inherent on the face of the record, hence, there is no need to establish the said prejudice by any other material on record. As stated above, without the said circumstance which is not put to the accused persons there can be no conviction.

7. Having considered the material on record we are of the opinion that the omission to put the circumstance that these appellants were found in a maruti van in which the explosives were found is such a material omission which has gone to the root of the prosecution case and which has prejudiced the defence of the appellants hence has vitiated the trial. The question then is whether we should accede to the request of learned counsel for the State by remanding the matter to the TADA court for fresh trial from the stage prior to stage at which the statements of the accused were recorded under Section 313 of the Code. We have considered the material on record. The incident in question dated back to the year 1990 and the only circumstance connecting the accused with the crime is the fact that they were found in the van with the explosives and there being no other charges especially connecting the accused of involvement in any other terrorist activity, we think in the interest of justice, we should put an end to these proceedings, hence, we are not inclined to remand this case for fresh trial. In that view this prayer of the learned counsel is also rejected.

8. Consequently, these appeals are liable to be allowed and the judgment and conviction award by the designated Court is set aside. The appellants are on bail, their bail bonds shall stand discharged.