

SUPREME COURT OF INDIA

Madan Singh

Vs

State of Bihar

Appeal (Crl.) 1285 of 2003

(Doraiswamy Raju and Arijit Pasayat)

02/04/2004

JUDGMENT

ARIJIT PASAYAT, J.

In this appeal under Section 19 of Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the 'TADA Act') the appellants question their conviction for offences punishable under Section 302 read with Sections 149, 307 read with Sections 149, 352, 379 of Indian Penal Code, 1860 (in short 'the IPC'), Section 27 of the Arms Act, 1959 (in short 'the Arms Act') and Section 3 (2)(i) of the TADA Act as done by the Sessions Judge, Jahanabad-cum- Special Judge, TADA.

Twenty persons faced trial for alleged commission of various offences punishable under IPC, TADA Act and Arms Act. Two of them (i.e. A-8 and A-9) died during trial. Two other accused persons were held to be juveniles within the meaning of Juvenile Justice Care Protection of Children Act, 2000 (in short 'the Juvenile Act'). It was held that they were entitled to the benefit under the said Act. Each of the convicted accused-appellants was given life imprisonment for the offences punishable under Section 302 read with Section 149 IPC and Section 3 (2)(i) of the TADA Act in addition to 7 years and one year custodial sentence imposed for the offence relating to Section 307 read with Sections 149 and 353 IPC respectively. No separate sentence was imposed for the offence relating to Section 379 IPC and 27 of the Arms Act.

Prosecution version as unfolded during trial is as follows:

According to the first information report (Ext.4) lodged on 27.11.1988 Sri Rasid Imam (hereinafter referred to as 'deceased') the officer-in-charge of Arwal Police Station on receiving information about assemblage of extremists at village Bhadasi in the house of acquitted accused Vakil Ram, with police revolver and other ammunitions looted from the police giving rise to Arwal P.S. Case No. 174/88 and their plan to attack their adversaries to kill them, formed a raiding party with the other police officials including Sub Inspector Mohan Singh, the informant (PW-12), Sub Inspector Gajadhar Chaubey (PW-22), Assistant Sub Inspector S.N. Pandey (PW-11), Constable Ram Binay Singh (PW-9), Constable Amul Kumar Singh (PW-10), Constable Md. Najim (PW-8), Constable Babu Mahto (PW-5) and others. He also requisitioned additional force from Kishan Bhavan, Baidrabad. After entering the information in the station diary he proceeded to village Bhadasi. On the way he met another police official Irshad Ahmed who was going to see the DSP. He was asked by the deceased to inform the DSP in regard thereto. On reaching Jahanabad, more additional force consisting of Hridyanand Puri (PW-17), Babu Lal Manjhi (PW- 18) and others reported to him. At about 11.30 a.m. on reaching village Bhadasi, the police party proceeded towards the house of acquitted accused Vakil Ram along with Sant Prakash (PW-3) and Jitendra Prasad (PW-4) by observing the required procedures. On reaching the house of Vakil Ram, the deceased posted some police personnel with Sub Inspector Gajadhar Choudhary at the gate of the house, and sent another section of force with S.N. Pandey towards eastern northern direction. The deceased along with others on entering the house saw 20-25 persons there. On seeing the police party accused Mukaiya Shah Chand of Bhadasi (A-1) directed others to bring rifles and carbines and to kill the police party, whereupon the accused persons started firing by going inside a room. As a result of the firing, constable Amul Kumar Singh (PW-10) was hit on his left side of the body. In spite of the injury, said Amul Kumar Singh (PW-10) fired one round, but fell on the ground. One of the extremists snatched his rifle who was shot at by firing made by Babu Mahto (PW-5). Again while one of the extremists attempted to flee away with the rifle, the deceased snatched it after chasing him. But in between the extremist had made firings as a result of which the deceased died at the spot.

In the meantime, the extremists started firing upon the police party, who by taking position behind a door fired at the extremists. As a result of firing by the extremists Hridyanand Puri received injury in his hand. Taking stock of the situation, the informant apprehending threat on the life of police party as well as snatching of the ammunition, ordered for firing. On the firing made by Hridyanand Puri, one of the extremists was killed followed by three rounds of firing by Babu Lal Manjhi (PW-18) and five rounds of firing by Md. Nazim (PW-8). As a result of the firing, one more extremist was killed. Even after firing by the police the accused persons continued firing on the police party which compelled the police party for further firing, which caused injury in the leg of one extremist, who started fleeing away. While the accused persons started fleeing, some of them Lakshman Sao (A-5), Lakhi Choudhary, Shyama Choudhary (A-7), Madan Singh (A-10), Ajit Kumar (A-6), Ram Janam Ram (A-3), Nanhe Rajwar (A-4), Manhgu Choudhary (A-15), Mahendra Choudhary, Shorai Choudhary (A-12), Baleshwsar Choudhary (A- 14), Arvind Chaudhary (A-13) were apprehended by the police party. They also apprehended Shanti Devi (A-8) along with two children Lila and Chandan from a room situated south of the courtyard of the house. In the meantime DSP Arwal arrived along with Sub Inspector Irshad Imam and additional reinforcement. It came to light that the extremists were fleeing away by making firing and he along with other police personnel chased the extremists for seizing their arms, but they managed to flee away.

On search of the house of Vakil Ram in presence of witnesses, arms, ammunitions, several documents, files, letters regarding banned organizations, rifles, cartridges and carbine were seized. A copy of the seizure list was handed over to Ram Janam Ram son of Vakil Ram. The informant claimed to have identified Tribhuwan Sharma (A-18), Dr. Jagdish (A-16), Arun Kumar Bharti (A-17), and Churaman Bhagat (A-2) besides Shah Chand Mukaiya (A-1) while they were fleeing.

After investigation charge sheet was placed and cognizance was taken for offences relatable to Sections 302, 307, 353, 379, 411, 324, 326, 414, 124A read with Section 34 IPC and Sections 25, 27 and 35 of the Arms Act and Sections 3 and 4 of the TADA Act. Charges were framed for offences punishable under Sections 302 and 307 read with Section 149 IPC and Sections 353, 379, 124A IPC and Sections 3 and 4 of the Explosive Substances Act, 1908 (in short 'the Explosive Act') and Section 3(5) of the TADA Act. Acquitted-accused Vakil Ram was separately charged for offence punishable under Sections 3 (4) of the TADA and 25(1B) and 27 of the Arms Act.

In order to substantiate its accusations, 25 witnesses were examined by the prosecution. The accused persons pleaded innocence and examined 5 witnesses. On consideration of the materials on record the Trial Court recorded conviction and imposed sentences as aforesaid.

In support of the appeal, Mr. Shanti Bhushan, learned senior counsel for the appellants in Criminal Appeal No.1297 of 2003 submitted that the judgment of the Trial Court cannot be maintained on several grounds. Firstly, there is no evidence to show that the accused persons were terrorists or extremists or that the activities or actions alleged are encompassed by Section 3 (1) of the TADA Act to be described as terrorist acts. Further, the prosecution evidence is to the effect that on getting secret information the police officials went to the spot of occurrence and then some one amongst them is supposed to have cried out that police officials have come and got weapons. Thereafter, the firing is supposed to have started from both sides. 3 persons have been killed who were claimed to be terrorists by the prosecution. It may be that they are responsible for the killing of the deceased and for the injuries on the police constables. The witnesses have admitted that they did not know the accused persons earlier and after firing started when some persons were fleeing away they were caught. There is no reason to hold that they were guilty of any offence when admittedly large number of villagers had assembled on hearing the gun fire. It has also come on record that when the persons were apprehended no arms were recovered, from any of the persons who were apprehended while allegedly fleeing, though one witness has stated that some arms were recovered from the persons running away. Even if there was any assembly it cannot be said that the same was unlawful to bring in application of Section 149 IPC. There is no evidence to show as to who had fired the gun or had asked to start firing. The definite case of the accused persons, right from the beginning, was that there was dispute regarding cutting of singadas. Investigating Officer accepted that he had not made any investigation to find out as to whether persons had assembled for cutting singada. Documents were produced to show that some of the accused persons had raised singada crops. The accused persons have taken a definite stand that they were apprehending danger from the higher caste people and, therefore, some of them may have been armed to protect themselves in case of attack by the higher caste people. The Trial Court has acquitted Vakil Ram in whose house the alleged occurrence took place.

It has not been shown that the assembly had any common object to commit any crime or any member of the assembly had knowledge that crime was likely to be committed. Those who were supposedly present may not have information about presence of arms which were seized. Therefore, Section 149 IPC has no application. The place of occurrence has not been established by cogent evidence. The defence stand that occurrence took place near Singara pond is more probable in view of the evidence adduced. In this background it was submitted that conviction as done is uncalled for. Learned counsel for appellants in CrI.A. No.1285/2003 advanced similar arguments.

In response, Mr. H.L. Agarwal, learned senior counsel for the respondent-State submitted that the assembly was in an isolated place. The materials seized clearly show that there was planned preparation and intention to cause terrorist activities. Sophisticated arms were used and seized. Common object can develop at the spot. It is the existence of the common object at the time of actual occurrence which is to be seen. The factual scenario clearly goes to show the existence of common object. If the assembly was for protection from an attack by higher caste people as claimed, the arrival of the police would have been welcomed because that would have provided protection. When the call was given to start firing, after collecting arms several persons started firing. All the arms were inside the house and it is not the stand of the accused persons that anybody went outside to collect them. Therefore, the accused persons were well prepared to commit violent acts. If really there was any apprehension of attack by the higher caste people, the normal conduct would have been to inform the police personnel on their arrival about their so called fears and sought their assistance or protection and not to start firing at them. The acts referred to in Section 3 (1) of TADA Act are comprehensive in nature and, therefore, the acts committed are clearly covered by said provision. The plea that place of occurrence was different and was near the singada pond is clearly disproved by the fact that dead bodies of the 3 terrorists were recovered from the house itself.

Major plea which was emphasized relates to the question whether Section 149, IPC has any application for fastening the constructive liability on the basis of unlawful acts committed pursuant to the common object by any member or the acts which the members of the unlawful assembly knew to be likely to be committed which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he shared the same or was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless the commission of an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means always necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common

object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may also vary on different members of the same assembly.

'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language and utterances of the members composing it the nature of arms carried, and from a consideration of all the surrounding circumstances. It may be gathered also from the course of conduct adopted by and behaviour of the members of the assembly at or before the actual conflict. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one, comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful may subsequently become unlawful. In other words it can develop during the course of incident at the spot *eo instante*.

Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down as to the circumstances from which the common object can be called out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident.

The word 'knew' used in the second branch of the section implies something more than a possibility

and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object.

That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would fall within first part being offences committed in prosecution of the common object, while at the same time, though not always falling within the second part, as offences which the members of the unlawful assembly knew to be likely to be committed by a person engaged in the prosecution of the common object and acting with the purpose of executing it. (See Chikkarange Gowda and others v. State of Mysore)

As noted by this Court in Sukhbir Singh v. State of Haryana 0) common object in terms of Section 149 can develop at the spot. Existence of the object has to be considered at the time of actual occurrence and not necessarily from anterior point of time.

When the factual scenario is considered in the background of the legal position enumerated above, the inevitable conclusion is that Section 149 has been rightly applied. **The fact that the unlawful assembly's common object was to resist the enforcement of law, and to commit criminal offences and to overawe the authorities/public servants by use and show of criminal force stood firmly established on the evidence on record. Consequently, the criminal acts committed in furtherance of the common object, which acts were not only part of the common object of the unlawful assembly but also such which the members of the assembly knew reasonably well are such as are likely to be committed squarely attract Section 149 I.P.C. #** Certain salient factual aspects clearly establish prosecution version. Firstly, defence plea regarding alleged apprehended attack by higher caste people has been found to be of no substance. If really the accused persons had gathered for reaping singada as claimed, there was no reason for the call to be given to start shooting at the police and then actual firing. A person who apprehends attack from some other person would rather welcome the arrival of the police and bring to notice of the officials about the apprehended danger and not to start firing at the police officials knowing them to be police, with defiance adopting a violent posture. This it is sufficient to discard the defence version about nature and object of assembly. Further, **the materials seized show that the object of the assembly was preparation for commission of crime. The presence of huge quantity of arms and that too sophisticated arms unerringly shows the nature of the assembly was unlawful. #** One of the printed materials i.e. literatures seized clearly indicates their involvement in nature and type of activities which were envisaged in and covered by section 3 (1) of the TADA Act. The plea that place of occurrence was different and was near pond where singadas were grown is also without substance. The dead bodies of the 3 persons who fired at the police officials were found in the house said to belong to the acquitted accused Vakil Ram and the dead body of the deceased was also nearby. The evidence of the injured police officials is also relevant, and there is no reason as to why they would falsely implicate the accused persons. It is not correct as submitted by the learned counsel for the appellants that none the persons who were arrested were carrying arms. In fact, some

of the prosecution witnesses have stated that they were also carrying arms, and this evidence has not been successfully rebutted.

A 'terrorist' activity does not merely arise by causing disturbance of law and order or of public order. The fallout of the intended activity is to be one that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law. It is in essence a deliberate and systematic use of coercive intimidation. # It is a common feature that hardened criminals today take advantage of the situation and by wearing the cloak of terrorism, aim to achieve acceptability and respectability in the society; because in different parts of the country affected by militancy, a terrorist is projected as a hero by a group and often unfortunately even by many misguided youth. As noted at the outset, it is not possible to precisely define "terrorism". Finding a definition of "terrorism" has haunted countries for decades. A first attempt to arrive at an internationally acceptable definition was made under the League of Nations, but the one which the convention drafted in 1937 never came into existence. The UN member States still have no agreed-upon definition apparently on account of what at times reveal to be state sponsored terrorism, both at national and international levels. Terminology consensus would, however, be necessary for a single comprehensive convention on terrorism, which some countries favour in place of the present 12 piecemeal conventions and protocols. The lack of agreement on a definition of terrorism has been a major obstacle to meaningful international countermeasures. Cynics have often commended at national and international levels that one State's "terrorist" is another State's "freedom fighter" and that too with the blessings of those in power. Crime became an highly politicised affair and greed compounded by corruption and violence enabled unscrupulousness and hypocrisy reigns supreme, supported by duplicity and deceitful behaviour in public life to amass and usurp public power to perpetuate personal aggrandizement, pretending to be for the common good. If terrorism is defined strictly in terms of attacks on non-military targets, a number of attacks on military installations and soldiers' residences could not be included in the statistics. In order to cut through the Gordian definitional knot, terrorism expert A. Schmid suggested in 1992 in a report for the then UN Crime Branch that it might be a good idea to take the existing consensus on what constitutes a "war crime" as a point of departure. If the core of war crimes - deliberate attacks on civilians, hostage-taking and the killing of prisoners - is extended to peacetime, we could simply define acts of terrorism veritably as "peacetime equivalents of war crimes".

League of Nations Convention (1937)

*"All criminal acts directed against a State along with intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public." * (GA Res. 51/210 - Measures to eliminate international terrorism)*

"1. strongly condemns all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed;

2. Reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic,

*religious or other nature that may be invoked to justify them." **

3. Short legal definition proposed by A.P. Schmid to United Nations Crime Branch (1992) Act of terrorism = peacetime equivalent of war crime

4. Academic consensus definition *"Terrorism is an anxiety-inspiring of repeated violent action, employed by (semi-) clandestine individual, group or State actors, for idiosyncratic, criminal or political reasons, whereby - in contrast to assassination - the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat-and violence-based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target [audience(s)], turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought." ** (Schmid, 1988)

Definitions:

Terrorism by nature is difficult to define. Acts of terrorism conjure up emotional responses in the victims (those hurt by the violence and those affected by the fear) as well as in the practitioners. Even the U.S. Government cannot agree on one single definition. The old adage "one man's terrorist is another man's freedom fighter" is still alive and well. Listed below are several definitions of terrorism used by the Federal Bureau of Investigation:

"Terrorism is the use of threatened use of force designed to bring about political change." Brian Jenkins "Terrorism constitutes the illegitimate use of force to achieve a political objective when innocent people are targeted." Walter Laqueur

*"Terrorism is the premeditated, deliberate, systematic murder, mayhem, and threatening of the innocent to create fear and intimidation in order to gain a political or tactical advantage, usually to influence an audience." **

James M. Poland

*"Terrorism is the unlawful use or threat of violence against persons or property to further political or social objectives. It is usually intended to intimidate or coerce a Government, individuals or groups, or to modify their behavior or politics." ** Vice-President's Task Force, 1986

*"Terrorism is the unlawful use of force or violence against persons or property to intimidate or coerce a Government, the civilian population, or any segment thereof, in furtherance of political or social objectives." **

FBI definition

Terrorism is one of the manifestations of increased lawlessness and cult of violence. Violence and crime constitute a threat to an established order and are a revolt against a civilised and orderly society. "Terrorism" though has not been separately defined under TADA there is sufficient indication in Section 3 itself to identify what it is by an all inclusive and comprehensive phraseology adopted in engrafting the said provision, which serves the double purpose as a definition and punishing provision nor is it possible to give a precise definition of "terrorism" or lay down what constitutes "terrorism". It may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travels beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb the harmony of the society or "terrorise" people and the society and not only those directly assaulted, with a view to disturb the even tempo, peace and tranquility of the society and create a sense of fear and insecurity.

In the aforesaid background, the inevitable conclusion is that the appeals are sans merit and deserve dismissal, which we direct.