SUPREME COURT OF INDIA

Pulin Das @ Panna Koch

Vs.

State of Assam

Criminal Appeal No. 706 OF 2007

(P.P. Naolekar & P. Sathasivam)

22/02/2008

JUDGMENT

P. SATHASIVAM, J.

1) These appeals, under Section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "the TADA Act") are directed against the common judgment dated 19.04.2007 of the Designated Judge at Assam, Gauhati in TADA Sessions Case No. 1 of 1996 whereby the Designated Judge convicted Pulin Das @ Panna Koch appellant in Criminal Appeal No.706 of 2007 and Mahendra Saikia @ Dilip Saikia appellant in Criminal Appeal No. 836 of 2007 for offences under Section 3(2)(ii) of the TADA Act and sentenced them to undergo rigorous imprisonment for five years and to pay a fine of Rs.500/-, in default further R.I. for another six months.

2) Brief facts, in a nutshell, are as follows: On the night of 08.12.1993, on secret information, the police party under the leadership of S.P. Sonitpur and S.D.P.O., Bishwanath Chariali raided the house of Uday Chetry. It was alleged that the extremist fired upon the police party and the police

party also fired in self-defence and as such there was exchange of fire from both sides and thereafter Pulin Das @ Panna Koch appellant in Crl.A.No.706 of 2007 and Mahendra Saikia @ Dilip Saikia appellant in Crl.A. No.836 of 2007 were apprehended and arms and ammunitions were recovered from their possession. On the basis of the above incident, an F.I.R. No.187/1993 was recorded and the police registered a case under Sections 3/4/5 of the TADA Act. On 17.12.1995, Charge Sheet No.101 of 1995 in FIR No.187/1993 was filed against both the accused. On 30.08.2006, statements of the appellants-accused were recorded under Section 313 of the Criminal Procedure Code. The prosecution examined nine witnesses in support of its case and exhibited the seizure list (Ex.1), the FIR (Ex.2), the sketch map(Ex.3), the expert report (Ex.4), prosecution sanction(Ex.5) and the charge sheet (Ex.6) and also exhibited the seized arms and ammunitions (Mat. Ex.1-4). The Designated Court, Assam, Gauhati convicted the appellants herein under Section 3(2)(ii) of TADA and sentenced each of them to undergo rigorous imprisonment for five years and to pay a fine of Rs.500/-, in default further rigorous imprisonment for another six months. However, the Designated Court acquitted the accused persons under Section 5 of the TADA Act as there was no evidence available for possession of unauthorized arms and ammunition. Being aggrieved by the said judgment, the appellants preferred separate appeals before this Court.

3) Heard Mr. Nitin Sangra, learned counsel, for the appellant in Criminal Appeal No.706 of 2007 and Mr. Vijay Hansaria, learned senior counsel, for the appellant in Criminal Appeal No.836 of 2007 and Mr. Avijit Roy, learned counsel, appearing for the State of Assam.

4) Since both the appellants/accused were convicted only under Section 3(2)(ii) of the TADA Act, it is useful to refer to the said provision.

"3. Punishment for terrorist acts . (1) Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act. (2) Whoever commits a terrorist act, shall, (i) if such act has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to fine; (ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine."

5) In Kartar Singh vs. State of Punjab, (1994) 3 SCC 569, the legality and the efficaciousness of Sections 3 and 4 were assailed on the following grounds, namely,-

(1) These two sections cover the acts which constitute offences under ordinary laws like the Indian Penal Code, Arms Act and Explosive Substances Act;

(2) There is no guiding principle laid down when the executive can proceed under the ordinary laws or under this impugned Act of 1987; and

(3) This Act and Sections 3 and 4 thereof should be struck down on the principle laid down in State of W.B. vs. Anwar Ali Sarkar, AIR 1952 SC 75 and followed in many other cases including A.R. Antulay vs. Union of India and Ors., (1988) 2 SCC 764.

While upholding the validity of Sections 3 and 4, the Constitution Bench laid down that the Act tends to be very harsh and drastic containing the stringent provisions and provides minimum punishments and to some other offences enhanced penalties also. The provisions prescribing special procedures aiming at speedy disposal of cases, departing from the procedures prescribed under the ordinary procedural law are evidently for the reasons that the prevalent ordinary procedural law was found to be inadequate and not sufficiently effective to deal with the offenders indulging in terrorist and disruptive activities, secondly that the incensed offences are arising out of the activities of the terrorists and disruptionists which disrupt or are intended to disrupt even the sovereignty and territorial integrity of India or which may bring about or support any claim for the cession of any part of India or the secession of any part of India from the Union, and which create terror and a sense of insecurity in the minds of the people. Further the Legislature being aware of the aggravated nature of the offences have brought this drastic change in the procedure under this law so that the object of the legislation may not be defeated and nullified.

6) In Hitendra Vishnu Thakur and Others vs. State of Maharashtra and Others, (1994) 4 SCC 602, while considering Section 3(1) and (2), two-Judge Bench of this Court basing reliance on Kartar Singh case (supra), Usmanbhai Dawoodbhai Memon & Ors. vs. State of Gujarat, (1988) 2 SCC 271 and Niranjan Singh Karam Singh Punjabi, Advocate vs. Jitendra Bhimraj Bijjaya & Ors., (1990) 4 SCC 76 held thus:

"11. Thus, unless the Act complained of falls strictly within the letter and spirit of Section 3(1) of TADA and is committed with the intention as envisaged by that section by means of the weapons etc. as are enumerated therein with the motive as postulated thereby, an accused cannot be tried or convicted for an offence under Section 3(1) of TADA. When the extent and reach of the crime committed with the intention as envisaged by Section 3(1), transcends the local barriers and the effect of the criminal act can be felt in other States or areas or has the potential of that result being felt there, the provisions of Section 3(1) would certainly be attracted. Likewise, if it is only as a consequence of the criminal act that fear, terror or/and panic is caused but the intention of

committing the particular crime cannot be said to be the one strictly envisaged by Section 3(1), it would be impermissible to try or convict and punish an accused under TADA. The commission of the crime with the intention to achieve the result as envisaged by the section and not merely where the consequence of the crime committed by the accused create that result, would attract the provisions of Section 3(1) of TADA. Thus, if for example a person goes on a shooting spree and kills a number of persons, it is bound to create terror and panic in the locality but if it was not committed with the requisite intention as contemplated by the section, the offence would not attract Section 3(1) of TADA. On the other hand, if a crime was committed with the intention to cause terror or panic or to alienate a section of the people or to disturb the harmony etc. it would be punishable under TADA, even if no one is killed and there has been only some person who has been injured or some damage etc. has been caused to the property, the provisions of Section 3(1) of TADA would be squarely attracted. Where the crime is committed with a view to overawe the Government as by law established or is intended to alienate any section of the people or adversely affect the harmony amongst different sections of the people and is committed in the manner specified in Section 3(1) of TADA, no difficulty would arise to hold that such an offence falls within the ambit and scope of the said provision.

12. Of late, we have come across some cases where the Designated Courts have charge-sheeted and/or convicted an accused person under TADA even though there is not even an iota of evidence from which it could be inferred, even prima facie , let alone conclusively, that the crime was committed with the intention as contemplated by the provisions of TADA, merely on the statement of the investigating agency to the effect that the consequence of the criminal act resulted in causing panic or terror in the society or in a section thereof. Such orders result in the misuse of TADA. Parliament, through Section 20-A of TADA has clearly manifested its intention to treat the offences under TADA seriously inasmuch as under Section 20-A(1), notwithstanding anything contained in the Code of Criminal Procedure, no information about the commission of an offence under TADA shall even be recorded without the prior approval of the District Superintendent of Police and under Section 20-A(2), no court shall take cognisance of any offence under TADA without the previous sanction of the authorities prescribed therein. Section 20-A was thus introduced in the Act with a view to prevent the abuse of the provisions of TADA.

13. We would, therefore, at this stage like to administer a word of caution to the Designated Courts regarding invoking the provisions of TADA merely because the investigating officer at some stage of the investigation chooses to add an offence under same (sic some) provisions of TADA against an accused person, more often than not while opposing grant of bail, anticipatory or otherwise. The Designated Courts should always consider carefully the material available on the record and apply their mind to see whether the provisions of TADA are even prima facie attracted.

15. Thus, the true ambit and scope of Section 3(1) is that no conviction under Section 3(1) of TADA can be recorded unless the evidence led by the prosecution establishes that the offence was committed with the intention as envisaged by Section 3(1) by means of the weapons etc. as enumerated in the section and was committed with the motive as postulated by the said section. Even at the cost of repetition, we may say that where it is only the consequence of the criminal act

of an accused that terror, fear or panic is caused, but the crime was not committed with the intention as envisaged by Section 3(1) to achieve the objective as envisaged by the section, an accused should not be convicted for an offence under Section 3(1) of TADA. To bring home a charge under Section 3(1) of the Act, the terror or panic etc. must be actually intended with a view to achieve the result as envisaged by the said section and not be merely an incidental fall out or a consequence of the criminal activity. Every crime, being a revolt against the society, involves some violent activity which results in some degree of panic or creates some fear or terror in the people or a section thereof, but unless the panic, fear or terror was intended and was sought to achieve either of the objectives as envisaged in Section 3(1), the offence would not fall stricto sensu under TADA. Therefore, as was observed in Kartar Singh case by the Constitution Bench : (SCC p. 759, para 451) "Section 3 operates when a person not only intends to overawe the Government or create terror in people etc. but he uses the arms and ammunition which results in death or is likely to cause death and damage to property etc. In other words, a person becomes a terrorist or is guilty of terrorist activity when intention, action and consequence all the three ingredients are found to exist."

7) In State through Superintendent of Police, CBI/SIT vs. Nalini and Others, (1999) 5 SCC 253, three-Judge Bench of this Court held thus:

544. "Under Section 3 of TADA in order there is a terrorist act three essential conditions must be present and these are contained in sub-section (1) of Section 3

(1) criminal activity must be committed with the requisite intention or motive, (2) weapons must have been used, and (3) consequence must have ensued."

8) In the light of the language used and interpreted by this Court in various decisions, it is clear from Section 3(1) that whoever with intent (i) to overawe the Government as by law established; or (ii) to strike terror in the people or any section of the people; or (iii) to alienate any section of the people; or (iv) to adversely affect the harmony amongst different sections of the people, does any act or things by using (a) bombs or dynamite, or (b) other explosive substances, or (c) inflammable substances, or (d) firearms, or (e) other lethal weapons, or (f) poisons or noxious gases or other chemicals, or (g) any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause or as is likely to cause (i) death, or (ii) injuries to any person or persons, (iii) loss of or damage to or destruction of property, or (iv) disruption of any supplies or services essential to the life of the community, or (v) detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a 'terrorist act' punishable under the said Section.

9) In view of the same, an activity which is sought to be punished under Section 3(1) of TADA has to be such which cannot be classified as a mere law and order problem or disturbance of public order or disturbance of even tempo of the life of the community of any specified locality but is of the nature which cannot be tackled as an ordinary criminal activity under the ordinary penal law by the normal law enforcement agencies because the intended extent and reach of the criminal activity

of the 'terrorist' is such which travels beyond the gravity of the mere disturbance of public order even of a 'virulent nature' and may at times transcend the frontiers of the locality and may include such anti-national activities which throw a challenge to the very integrity and sovereignty of the country in its democratic polity. The Designated Court must not act mechanically and record conviction without examining whether or not from the evidence led by the prosecution an offence under Section 3 (1) is made out.

10) Though the appellants/accused were charged under Section 5 for possession of arms and ammunitions along with Section 3(1) and (2), since the Designated Court itself acquitted them in respect of offence under Section 5, in the absence of appeal by the State there is no need to consider the same.

11) Now, let us consider whether prosecution has established the charge under Section 3(2) (ii) of the TADA Act. Before going into the oral evidence examined on the side of the prosecution in support of their claim, since learned counsel appearing for the respondent/State insisted us to see the contents of charge-sheet (Annexure 3), we verified the same. The written ejahar received from the complainant has been treated as FIR. The following materials available under clause 7 of the charge-sheet read thus:-"The fact of the case is that on 8.12.93 on secret information, it is known that some ULFA outfit members have taken shelter in the house of Uday Chetry situated at Christian Pura under Dhekiajuli P.S. Accordingly, the said house was gheroed by the outfit members. Thereafter the outfit members (1) Pulin Das @ Panna Koch, (2) Mohendra Saikia @ Dilip Saikia were arrested. From their possession, one revolver, one 303 rifle, one stand gun and some cartridges were recovered. Be it mentioned while they were nabbed, they opened fire upon police for which there were exchange of fire from both sides. Accordingly, a case under Sections 3, 4 and 5 of TADA Act was registered and started investigation."

The charge-sheet proceeds that the accused are ULFA outfit members. In order to prove the charge against the accused persons, the prosecution has examined as many as nine witnesses.

12) P.W.1 - Abdul Rahman, a Constable, who proceeded along with the other members of the police party to Christianbasti has not stated anything about the accused particularly their activities. He merely stated that "police arrested two inmates of that house and seized some arms and ammunitions". In the cross-examination, he admitted that he was away from the house and did not see who made the firing and he did not know whether any gun was fired or not. He also admitted that he did not know whether any arms and ammunitions or any other articles were seized from the accused persons.

13) Nandaraj Sharma, one of the police personnel, who visited the house of P.W. 5 was examined as P.W.2. He mainly referred about possession of arms and ammunitions in the residence where the accused were apprehended. In the cross-examination, he stated that 6/7 empty cartridges were

seized from the place of occurrence. He further deposed that there were five or six persons inside the house where the accused persons were arrested and there were also women in that house. According to him, he did not know who fired from inside the house. He also did not whisper a word about the character and activities of the accused.

14) Another police personnel by name Phuleswar Konwer was examined as P.W.3. Though he furnished more details about the occurrence particularly gun shot from the house, over-powering by the police personnel, entering the house, apprehending the two accused and seizing arms and ammunitions and also identified both the accused in the court when he was examined, he also did not say anything about either banned organization (ULFA) or the accused and their activities. On the other hand, he fairly admitted that he did not know whether the arrested accused persons belonged to any banned organization. In other words, even the prime witness of prosecution did not whisper anything about the banned organization (ULFA) their connection and unlawful activities.

15) Next witness one Phuleswar Das who is also one of the police personnel was examined as P.W.4. Though he mentioned that he heard some firing at the place of occurrence, he did not say anything about the accused and their activities.

16) Shri Uday Chetry, resident of the house in question was examined as P.W.5. According to him, on 08.12.1993, after attending a kirtan party, he returned home at 10 p.m. His wife told him that two guests have come and they are sleeping after taking food. He also returned to bed after food. The following statement made by him before Court is relevant and the same is reproduced hereunder:-

"At about 12.30 A.M. midnight, I heard the sound of firing in the house. Out of fear we did not go out. Thereafter police called us. Police showed us some arms and disclosed that they recovered it from two ULFA men."

Except the above statement, he did not say anything about the accused persons and their activities.

17) P.W.6, Om Chetry, who is none else than the brother of P.W.5. deposed that he lives with his brother Uday Chetry, and is residing in the same house. Like P.W.5, he also deposed that at mid-night, he heard the sound of firing, woke up and both of them were called by the police. He also deposed that from police we came to know that both the guests are members of ULFA.

18) As rightly pointed out by learned counsel appearing for the appellants/accused though the prosecution has claimed that P.W.5 and P.W.6 were important witnesses, their evidence clearly show

that they did not know about the activities of the accused persons particularly whether they are members of ULFA. Both of them have stated that from the police only they came to know that both are members of ULFA. It is clear that they heard the above information about the accused persons from the police. In such situation and particularly in the light of the charge against the accused, it is but proper on the part of the prosecution to put-forth reliable and acceptable evidence/material to show that the accused were members of ULFA which is a banned organization. Apart from the above witnesses, the prosecution has examined two more witnesses in support of their case.

19) One Durga Mohan Brahma, Inspector of Police, has been examined as P.W.7. His entire evidence is available from pages 39-41 of the paper-book. We scanned the same. Nowhere he mentioned anything about the activities of the accused and ULFA. His evidence is also not helpful to the prosecution.

20) The next witness examined on the side of the prosecution is P.W.8, Bhadra Kanta Buragobain. He has nothing to do with the charge framed since according to him he examined arms and ammunitions on 15.12.1995 though seized on 08.12.1993. We have already referred to the fact that the Designated Court itself acquitted the accused persons from the charge under Section 5 of the Act.

21) The last witness examined on the side of the prosecution was P.W.9, namely, Jogesh Barman. He was, at the relevant time, working as D.S.P. H.Q. at Tezpur. According to him, he received an order from S.P. Sonitpur for completion of the investigation of the case. He further deposed that after going through the materials from the CD, he submitted charge-sheet against both the accused persons. Though P.W.9 is a D.S.P. Senior Officer of the District, he also did not whisper about ULFA, the connection of the accused persons with the said organization and their activities etc.

22) In a case of this nature, particularly, in the light of the stringent provisions as provided in sub-section (1) of Section 3 as well as Section 20A which mandates that no information about the commission of an offence under this Act shall be recorded by the police without prior approval of the D.S.P, and no court shall take cognizance of any offence under this Act without previous sanction of the Inspector General of Police or Commissioner of Police, we are of the view that P.W.9 D.S.P. ought to have explained all the details about the ULFA organization its activities and the alleged connection of the accused persons. It is the bounden duty of the prosecution to examine highest police officer of the district, namely, Superintendent of Police or equivalent officer about the above-mentioned relevant materials. We have already highlighted the relevant ingredients and conditions to be fulfilled before initiating prosecution under Section 3(1) of the TADA Act. Though most of the prosecution witnesses adverted to seizure of arms and ammunitions and the accused were charged for an offence under Section 5 which speaks about possession of unauthorized arms etc. in specified areas, the Designated Court acquitted them on the said charge and admittedly the State has not preferred any appeal.

23) In view of the above discussion and in light of strict compliance to be followed to attract Section 3(1), the conviction under Section 3(1) and punishment under sub-section 2(ii) of Section 3 of the TADA Act cannot be sustained. We are satisfied that the prosecution has miserably failed to establish the charge levelled against both the accused. The Designated Court has committed an error in accepting the prosecution case based on a mere reference of ULFA by P.Ws. 5 and 6. In fact, both of them have stated that it was the police who disclosed that they recovered some arms from two ULFA men and it is not their own assertion. Neither P.Ws.5 and 6 nor the remaining seven police personnel including Dy. Superintendent of Police, who were examined, whisper a word about the banned organization - ULFA and the alleged unlawful activities of the accused persons in terms of Section 3(1) of the Act. These material aspects have not been adverted to by the Designated Court.

24) For the reasons stated above, both the appeals succeed and are hereby allowed. The conviction of the appellants under Section 3(1)(2)(ii) of the TADA Act with sentence and fine thereunder is set aside. The appellants are directed to be released forthwith, if not required in any other offence.