SUPREME COURT OF INDIA

Ganesh Gogoi

Vs.

State of Assam

Crl.A.No.1018 of 2007

(Dalveer Bhandari and Asok Kumar Ganguly JJ.)

07.07.2009

JUDGMENT

A.K.Ganguly, J.

1. This appeal has been filed under Section 19(1) of the *Terrorist and Disruptive Activities (Prevention) Act, 1987* (hereinafter referred to as the `TADA(P) Act') impugning the judgment dated 11.7.2007 passed by the learned Designated Court, Assam, Guwahati in Sessions Case No. 68 of 2001 whereby the appellant has been convicted by the learned Judge of the Designated Court under Section 3(2)(i) TADA(P) Act and was sentenced to undergo imprisonment for life and to pay a fine of Rs.2000/- in default further imprisonment for six months.

2. On the benefit of doubt being extended, the other accused, namely, Premodhar Gogoi was acquitted.

3. The material facts of the case as alleged by the prosecution are that on 2.9.1991 at about 7.30 a.m., Sub-Inspector B. Kalita, who was in-charge of Naohalia Out Police Post informed the Office-in-Charge of Bordubi Police Station over telephone that on the previous day i.e. on 1.9.1991 at about 7.30 p.m. one Dinanath Agarwalla Naohalia was taken away in a Maruti car by some unknown persons and this information was entered vide General Diary Entry No. 19 dated 2.9.1991.

4. Thereafter, Prabhat Gogoi, Officer-in-Charge along with his staff reached the place of occurrence for investigation and subsequently an FIR was lodged by him.

5. On conclusion of the investigation, charge- sheet dated 25.9.2001 was filed under Sections 365/302/34 of the Indian Penal Code read with Sections 3(2)(i) and 3(5) of the TADA (P) Act against the appellant and Premodhar Gogoi.

6. Thereafter, on 10.1.2003, the learned Designated Court, Assam framed charges against the appellant under Section 302 of the Indian Penal Code and Section 3(5) of the TADA(P) Act.

In the Trial evidence was adduced and the appellant was examined under Section 313 of the Code of Criminal Procedure and ultimately by the impugned judgment dated 11.7.2007 the appellant was convicted by the learned Designated Court under Section 3(2)(i) of the TADA(P) Act and was sentenced as stated hereinabove.

7. Mr. P.K. Ghosh, learned senior counsel appearing on behalf of the appellant while assailing the judgment under appeal advanced various submissions.

8. His first submission is that there is no evidence which can connect the appellant with the alleged incident and, therefore, the judgment of the learned Judge of the Designated Court is wholly unsustainable in law. Learned Counsel further submitted that apart from the aforesaid infirmity the appellant has been convicted only under Section 3(2)(i) of TADA(P) Act whereas he has not been charged under that Section at all.

9. Learned Counsel submitted that in view of the charge which has been framed, he could not have been convicted under Section 3(5) of the TADA(P) Act. He submitted that a charge under Section 3(2)(i) and a charge under Section 3(5) of the TADA(P) Act are different charges and one is not encompassed by the other. His further submission is that admittedly Section 3(5) of the TADA(P) Act has been inserted in the statute book in 1993 by Section 4 of Act 43 of 1993.

10. The incident, as alleged by the prosecution, had taken place in September 1991. Therefore, the appellant cannot be charged for having committed an offence which was not in existence on the day of alleged commission but was brought into the statute much later.

11. This appeal has been filed before this Court under Section 19(1) of the TADA(P) Act which provides for an appeal both on facts and on law and this Court being the First Appellate Court is entitled to look into the evidence on record. Section 19(1) reads as under:

> "19. Appeal - (1) Notwithstanding anything contained in the Code, an appeal shall lie as a matter of right from any judgment, sentence or order, not being an interlocutory order, of a Designated Court to the Supreme Court both on facts and on law."

12. In this case from the impugned judgment it is clear that there is no direct evidence but there is only circumstantial evidence (see para 20 of the impugned judgment).

13. From paragraph 3 of the impugned judgment, it appears that the prosecution examined ten witnesses.

14. P.W.1 - Dharam Chand Agarwalla is the brother of the deceased. He is not an eye witness. He was informed by his mother about the missing of his elder brother Dinanath Agarwalla and his evidence is that he does not know who kidnapped Dinanath Agarwalla from their house on the material day and killed him. Therefore, the evidence of P.W.1 is that his elder brother was kidnapped from their house.

15. But the evidence of the prosecution is that Dinanath Agarwalla was kidnapped from the pan shop of Narayan Dey (P.W.2).

16. P.W.2- Narayan Dey in his evidence stated that police took his signatures on a prepared statement to the effect that the deceased was killed on the previous day though he had no knowledge about the killing of Dinanath Agarwalla. P.W.2 was declared hostile and was cross-examined by the prosecution. In his cross-examination also he stuck to his evidence given in Examination-in-Chief. In cross-examination he deposed that he did not state before the I.O. that Dinanath came to his shop for taking pan and one Maruti car arrived near his shop and accused persons while coming out of the car had some discussion with Dinanath and he was taken in the car which was driven towards Madhuting.

17. P.W.3- Sushil Mazumdar was also declared hostile and he stated in Chief that Police did not record any statement from him in regard to the death of the deceased. He was similarly cross-examined by the Police and in the cross- examination also he stuck to his original statement and made it very clear that he did not see the appellant and the other accused person kidnapping the deceased from the pan shop of Narayan Dey.

18. P.W.4- Joyram Das is a police officer. He deposed that on 17.8.1992 he was working as an Office in-charge at Borubi Police Station. He deposed that he took over the investigation and arrested one of the accused persons and from his interrogation came to know that on the alleged date of occurrence Dinanath Agarwalla was kidnapped by the present appellant. In cross-examination P.W.4 admitted that he did not send Premodhar Gogoi to any Magistrate for recording his statement. It appears from the so called statement of Premodhar Gogoi that the same is not at all admissible having been made before a police officer while in custody and in the course of alleged interrogation. Therefore, it has been rightly contended by the learned counsel for the appellant that the deposition of P.W.4 is not admissible in evidence.

19. P.W.5 is one Bibhusan Gogoi. He had merely seen the dead body of victim fastened by rope and he was informed by another person that the name of the deceased is Dinanath Agarwalla. He is not a material witness at all. He categorically stated that he did not know who had killed the Dinanath, the victim.

20. P.W.6-Suresh Kr. Agarwalla is also not a material witness. He merely identified the dead body of Dinanath and merely deposed that the hands and feet of dead body were tied with a rope and the rope was seized by the police and he signed the said document of seizure.

21. P.W.7-Prabhat Gogoi is another police officer. He initially took up the investigation and he recorded the statements of witnesses Dharam Chand Agarwalla and Sushil Mazumdar but they have not been examined in Court. He claimed to have filed the FIR. In cross-examination P.W.7 deposed that in the FIR he has not specifically mentioned the involvement of the appellant in the aforesaid incident. He did not mention anything about the statement of witness Sushil Mazumdar. The FIR was recorded by the P.W.7 in this case during investigation. However, in the course of his evidence P.W.7 never stated anything about the appellant being a member of the United Liberation Front of Assam. In the FIR it

has clearly been stated that investigation has already been taken up by me. The certified copy of G.D.E. No.19 is enclosed herewith.

22. It is clear from the aforesaid statement, investigation in the case had already commenced and once investigation commences the FIR is hit by Section 162 Cr.P.C. and no value can be attached to the same.

23. P.W.8- Satyaraj Hazarika merely deposed that he submitted the prayer for accord of necessary prosecution sanction to the then D.G.P of Assam and he also filed certain other documents. He is not a material witness at all.

24. P.W.9 is Dr. N. Sonowal, who conducted postmortem on the dead body of the victim.

25. P.W.10- Bipulananda Choudhury is another police officer, who obtained sanction from D.G.P Assam and submitted the charge sheet against the accused persons. He is also not a material witness.

26. From the above discussions, this Court finds that there is no evidence to connect the appellant with the alleged incident of killing of the victim.

27. Apart from that this Court finds that in Section 313 Cr.P.C. examination of the accused-appellant, the Court has put a question which is totally unfair. Three questions were put to the appellant. The second question is as follows:-

> Q. No.2 The witnesses deposed that you are a member of ULFA?

28. It does not appear that any witness has deposed that the appellant is a member of ULFA. Therefore, it is a very unfair question. This Court has allegedly convicted the appellant under Section 3(2)(i) but the ingredients of the Section 3(2)(i) were not been put to him. Therefore, there has not been a fair examination under Section 313 of the Cr.P.C. at all. The provisions of Section 313 are for the benefit of the accused and are there to give the accused an opportunity to explain the circumstances appearing in the evidence against him. In *Basavaraj R. Patil others Vs. State of Karnataka others*[1] this Court held that those provisions are not meant to nail the accused to his disadvantage but are meant for his benefit. These provisions are based on the salutary principles of natural justice and the maxim `audi alteram partem' has been enshrined in them. Therefore, the examination under Section 313 has to be of utmost fairness. But that has not been done here. This is also a factor vitiating the trial.

29. It appears that in the instant case the charge which was framed by the Court against the appellant was under Section 3(5) of the said Act. But such a charge could not have been framed against him by the Court in as much as on the alleged date of occurrence, i.e. in September 1991, Section 3(5) of the Act was not brought on the statute. The framing of the charge was thus inherently defective. However the appellant has been convicted only under Section 3(2)(i). Section 3(2)(i) reads as follows:-

> 3(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.

30. On perusal of the provision of Section 3(2)(i), it is clear that Section 3(2)(i) has to be read with Section 3(1). Section 3(1) is set out herein below:-

> 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 fire- arms 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.

31. The provision of Section 3(1) has been construed by this Court in several cases and reference in this connection may be made to the decision of *Hitendra Vishnu Thakur and others Vs. State of Maharashtra and others*[2] wherein learned judges explained the ambit of a terrorist act which has not been defined in detail under TADA(P) Act. Sub-section (h) of Section 2 of the Act defines `terrorist act' to mean the same thing as assigned to it in sub-section (i) of Section 3.

32. Section 3(1) of the said Act is therefore very vital for understanding the true meaning and purport of terrorist acts. In paragraph 5 of Hitendra Vishnu Thakur (supra), at page 617 of the report, Dr. Justice A.S. Anand (as His Lordship then was) analysed Section 3 as follows:-

> 5. Section 3 when analysed would show 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 Section 3 of TADA.

33. It is clear from the perusal of Section 3 and its interpretation in Hitendra Vishnu Thakur (supra) that the requisite intention is the sine qua non of terrorist activity. That intention is totally missing in this case. It is not there in the charge and it has also not come in the evidence. Therefore, both the framing of charges against the appellant under Section 3(5) and his conviction under Section 3(2)(i) of the said Act are totally bad in law.

34. In Hitendra Vishnu Thakur (supra) the Court has made it clear that in many cases criminal activities constituting the terrorist act may also be an offence under the ordinary penal law. Therefore before framing a charge under the stringent provisions of TADA(P) Act the Court has to be very careful. In view of seriousness of the offence alleged under the stringent provisions of the said Act, this Court in Hitendra Vishnu Thakur (supra) (paragraph 14 at page 623 of the report), explained the Court's duty in very explicit terms and which I quote:-

> 14. ...An onerous duty is therefore cast on the Designated Courts to take extra care to scrutinise the material on the record and apply their mind to the evidence and documents available with the investigating agency before charge- sheeting an accused for an offence under TADA. The stringent provisions of the Act coupled with the enhanced punishment prescribed for the offences under the Act make the task of the Designated Court even more onerous, because the graver the offence, greater should be the care taken to see that the offence must strictly fall within the four corners of the Act before a charge is framed against an accused person. Where the Designated Court without as much as even finding a prima facie case on the basis of the material on the record, proceeds to charge-sheet an accused under any of the provisions of TADA, merely on the statement of the investigating agency, it acts merely as a post office of the investigating agency and does more harm to meet the challenge arising out of the `terrorist' activities rather than deterring terrorist activities. The remedy in such cases would be worse than the disease itself and the charge against the State of misusing the provisions of TADA would gain acceptability, which would be bad both for the criminal and the society. Therefore, it is the obligation of the investigating agency to satisfy the Designated Court from the material collected by it during the investigation, and not merely by the opinion formed by the investigating agency, that the activity of the `terrorist' falls strictly within the parameters of the provisions of TADA before seeking to charge-sheet an accused under TADA. The Designated Court must record its satisfaction about the existence of a prima facie case on the basis of the material on the record before it proceeds to frame a charge-sheet against an accused for offences covered by TADA. Even after an accused has been charge-sheeted for an offence under TADA and the prosecution leads evidence in the case, it is an obligation of the Designated Court to take extra care to examine the evidence with a view to find out whether the provisions of the Act apply or not. The Designated Court is, therefore, expected to carefully examine the evidence and after analysing the same come to a firm conclusion that the evidence led by the prosecution has established that the case of the accused falls strictly within the four corners of the Act before recording a conviction against an accused under TADA.

35. In the instant case the Designated Court has failed in its duty both in the matter of application of mind to the materials on record at the stage of framing of charge and also at the time of convicting the appellant.

36. This Court is, therefore, of the clear opinion that in the facts of the case no charge against the accused under the said Act could be framed, consequently he cannot be convicted under the provisions of the said Act. In any way in the instant case as discussed above, there is no evidence to connect the appellant with the alleged incident. Therefore, the judgment and order of conviction is totally unsustainable in law and is set aside. The appeal succeeds and the appellant be set at liberty forthwith if he is not wanted in connection with any other case.

[1] *(2000) 8 SCC 740*
[2] *(1994) 4 SCC 602*