

SUPREME COURT OF INDIA

The State of Gujarat

Vs.

Anwar Osman Sumbhaniya

Crl.A.No.1359-1361of 2007

(A.M.Khanwilkar and Ajay Rastogi,JJ.,)

27.02.2019

JUDGMENT**A.M.Khanwilkar,J.,**

1. The instant appeals filed under Section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short "TADA"), are against the final judgment and order dated 12th January, 2007 passed by the Designated Judge, Jamnagar in Special TADA Case Nos.3/1994, 3/1997 and 227 1/2005, whereby the respondents have been acquitted after finding them not guilty of the stated offences.

2. Separate charge-sheets were filed against the respondents for offences punishable under Sections 121, 121A, 122 read with Section 34 of the Indian Penal Code, Sections 3, 4 and 5 of TADA, Sections 25(1)(A)(D), 25(1AA), 25(1B)(A B F G), 27(1), 29(A) of the Arms Act, 1959 (for short "1959 Act"), Section 20 of the Indian Telegraph Act, 1885 (for short "1885 Act") and Section 6(1-A) of the Indian Wireless Telegraphy Act, 1933 (for short "1933 Act"). The respondents were tried for the aforesaid offences in Special TADA Case Nos.3/1994, 3/1997 and 1/2005, before the Special Court at Jamnagar, which was then transferred to the Court of Designated Judge at Jamnagar. Since all the three charge- sheets were in connection with one and the same offence and to obviate repetition of evidence, consolidated evidence was recorded for all the cases in Special TADA Case No.3/1994.

3. The complaint (Exh.27A) was lodged by one Bakul Vithalbhai Jani (PW-6), on the basis of information that respondent No.1 - Anwar Osman Subhaniya, resident of Salaya Barlovas, Hussaini Chowk "Hasmi Manzil", was in illegal possession of foreign made fire arms weapons at his residential house. The raiding party, after obtaining prior approval (Exh.30) of Pramod Kumar Jha, DSP (PW-15), proceeded along with search warrant, and upon search of the residential house of respondent No.1, conducted by the raiding party, following items were seized:

- (i) One - Foreign made carbine gun with magazine valued Rs.2 lakhs.
- (ii) One - Foreign made revolver with eight chambers worth Rs.60,000/-.
- (iii) One - Foreign made revolver with six chambers worth Rs.45,000/-.
- (iv) One - Transmitter walky-talky set worth Rs. 1 lakh.

- (v) 52 live cartridges of 9 mm stain guns.
- (vi) 4 live cartridges of revolvers.

4. Immediately after recovery of arms and ammunition, after seeking prior oral approval of PW-6, FIR was lodged vide CR-21/93 for the stated offences only against respondent No.1 and he came to be arrested on 18th June, 1993. Later, on 21st June, 1994, a charge-sheet was filed against respondent No.1 and the case was registered as Special TADA Case No.3/1994. Along with the charge-sheet, sanction for prosecution (Exh.84) was obtained from A.K. Tandon, Director General of Police (PW-14) under Section 20-A(2) of TADA on 3-9/11-93. Respondent No.2 - Junas Hazi Ibrahim came to be arrested on 20th March, 1997 and his confessional statement under Section 15 of TADA was recorded on 25th March, 1997, when he stated that he sold one carbine gun to respondent No.1. Charge-sheet was filed against respondent No.2 on 6th April, 1997 whereafter a case was registered against him as Special TADA Case No.3/1997 before the Designated Court, Jamnagar. Respondent No.3 came to be arrested in 2005 in connection with another CR No.43/1994 registered under Sections 3, 4 & 5 of TADA by the B. Division Police Station on 10th December, 2004. A transfer warrant was obtained from the TADA Court, Jamnagar for arresting and taking custody of the respondent No.3 before his arrest. After completion of investigation against respondent No.3, separate charge-sheet came to be filed on 29th April, 2005 after obtaining prior sanction (Exh.57) under Section 20-A(2) of TADA from A.K. Bhargav dated 1st April, 2005.

5. As aforesaid, all the three separate charge-sheets were registered as three Special TADA cases, being Special TADA Case Nos.3/1994, 3/1997 and 1/2005 before the Designated Court at Jamnagar. The Designated Court framed charges against the respondents on 12th September, 2005 to which they pleaded not guilty and wanted to be tried for the alleged offence. The prosecution examined 15 prosecution witnesses and their statements were recorded along with documentary evidence in support of the case. The respondents did not produce any defence witness. The Designated Court then proceeded to consider the rival arguments and framed the following issues for consideration:

“1) Whether prosecution proves beyond reasonable doubt that accused have with a view to do the war against India Government, by aiding and abutting each other, in furtherance of their common intention, to prepare in advance to collect the weapons by previously arranging conspiracy and as a part of that conspiracy, before any time prior to 18-6-93 at 10:00 hrs. brought sub-Machinegun, Revolver and cartridges and walky talky set for non telephonic message and kept it at the residential house of accused No.1 Anwar Osman Subhaniya?

2) Whether prosecution proves beyond reasonable doubt that accused have in connection with the same offence, in furtherance of their common intention as shown in issue No.1, with a view in furtherance of their common intention, aided and abutted each other, before any time prior to 18-6-93, found from the possession of accused No.1 Anwar Osman Sumbhaniya from his residential house, one Egypt made self operating sub machine gun and 0.22 Caliber Germany made revolver and 0.8 caliber American made revolver and stain Gun and revolver cartridges and transmeter walky talky set?

3. Whether prosecution proves beyond reasonable doubt, that in connection with the same offence during 21-45 to 23-45 on 29-7-93 at Salaya port road from the STD PCO from possession of accused No.1, wireless set without licence was found out?
4. Whether prosecution proves beyond reasonable doubt that in connection with the same offence, accused brought the above muddamal sub machine gun, revolver and cartridges without licence from abroad and where found in the conscious possession of accused No.1?
5. Whether prosecution proves beyond reasonable doubt that in connection with same offence, accused brought Japan made two transmitter, wire-less set, before 18-6-93 at any time from foreign in the above muddamal in India, with common and criminal intention without licence and done exchange mutually and where found out in the conscious possession of accused No.1 from STD PCO and from the residential house?
6. Out of accused who can be convicted and for what offence?
7. What order?"

6. Even though no issue regarding validity of prior approval before registration of FIR under Section 20-A(1) or the validity of prior sanction under Section 20-A(2) of TADA before taking cognizance was framed, the Designated Court at the outset proceeded to answer the said issues and opined that neither prior approval under Section 20-A(1) of TADA nor prior sanction under Section 20-A(2) of TADA was in conformity with the mandate of the stated provisions. So holding, the Designated Court held that the respondents could not be proceeded further for the alleged offences. Despite the Designated Court being fully convinced about the illegality of "prior approval" and "prior sanction", it also adverted to the evidence on record and observed that there was no legal evidence to record a finding of guilt against the respondents. For, the confessional statement recorded purportedly under the provisions of TADA, cannot be looked at. The same would not be admissible once the prosecution fails on account of lack of a valid sanction to prosecute under TADA. Further, the search and seizure procedure was also replete with illegalities. The Designated Court, therefore, acquitted the respondents, holding them not guilty for the stated offences, and consequently, directed immediate release of respondent No.3/accused No.3, who was in judicial custody as undertrial prisoner, if was not required in any other case. The bail bonds of respondent Nos.1 & 2/accused Nos.1 & 2 were ordered to be cancelled.

7. This decision of the Designated Court is the subject matter of challenge in these appeals filed by the State. According to the appellant, the Designated Court committed manifest error in concluding that no valid prior approval under Section 20-A(1) of TADA was obtained before registration of FIR for the stated offences. This opinion, however, was founded on a decision of this Court which is no more a good law. It is now well settled that even the prior oral approval can be reckoned as a valid approval within the meaning of Section 20-A(1) of TADA, albeit supported by contemporaneous record in that regard to

be followed by a formal written approval. As regards prior sanction accorded by A.K. Tandon (PW-14), there was ample material on record to substantiate that he had accorded sanction (Exh.-84) after due consideration of the relevant aspects and it was not a case of non-application of mind. Similarly, the prior sanction (Exh.- 57) accorded by A.K. Bhargav in respect of accused No.3, is also backed by relevant material duly considered by him, as is evident from the evidence of Raghuvirsinh Surubha Chudasama, Dy.S.P. (PW-13) and Yashodhar Ramchandra Vaidya (PW-10). The opinion of the Designated Court that even this sanction order suffers from the vice of non-application of mind is manifestly wrong. It is alternatively contended that even if the Designated Court was right in concluding that the prosecution of the respondents suffered due to lack of valid approval or valid sanction, it should not have dilated on other aspects of the case on merits - as the only option left to the Designated Court in such a situation would be to transfer the case to a regular court under Section 18 of TADA. At any rate, the Designated Court could not have acquitted the respondents/accused. Instead, it could have given opportunity to the prosecution to launch prosecution afresh with a valid sanction as per the dictum in paragraph 20 of the decision of this Court in *Rambhai Nathabhai Gadhvi & Ors. Vs. State of Gujarat*. If the prosecution was not inclined to avail of that option, the Designated Court as aforesaid, should have exercised powers under Section 18 of TADA to transfer the case to a regular court having jurisdiction under the Code for trial of other offences. To buttress the above submission, reliance is placed on the decisions of this Court in *Ahmad Umar Saeed Sheikh Vs. State of U.P.*¹, *Harpal Singh Vs. State of Punjab*², and *Prakash Kumar alias Prakash Bhutto Vs. State of Gujarat*³.

8. The respondents, on the other hand, have supported the final opinion of the Designated Court to acquit them. As regards the validity of prior approval under Section 20-A(1) of TADA, founded on oral approval followed by written approval, learned counsel for the respondents, in all fairness, submitted that the three-Judge Bench of this Court in *State of A.P. Vs. A. Sathyanarayana and Ors*⁴. holds the field. Resultantly, it may not be necessary for this Court to probe into that question and instead may proceed on the basis that a valid prior approval was accorded in the present case before registration of FIR for offences punishable under TADA. However, he contended that no fault can be found with the conclusion reached by the Designated Court that the prior sanction accorded in the present case under Section 20-A(2) of TADA suffers from the vice of non-application of mind and that finding recorded by the Trial Court is a possible view - which has been expressed after due analysis of the evidence on record in that regard. He has placed reliance on the decision of this Court in Gadhvi's case (supra) where a similar sanction order issued by A.K. Tandon (PW-14) in another TADA case, registered at Khambala Police Station under his jurisdiction, has been deprecated. The Court expressed strong disapproval regarding the approach of the officer [A.K. Tandon (PW-14)], being reflective of scanty application of mind in respect of vital and crucial aspects before according sanction under Section 20-A(2) of TADA. It is contended that even in that case, the sanctioning authority (A.K. Tandon) had merely adverted to the First Information Report and the office note sent by the Superintendent of Police seeking permission or sanction. Further, the sanction order had noted that permission to add Sections 3, 4 or 5 of TADA was being given, as is the noting made in the subject sanction order (Exh.-84). Such noting, it has been held suffers from the vice of non-application of mind, a casual approach and completely in disregard of the mandate of the law requiring prior sanction of the competent authority. For, it plainly

overlooks the marked distinction between grant of approval for adding sections of TADA at the stage of registration of FIR and, on the other hand, according sanction to prosecute the accused under the provisions of TADA before laying the charge-sheet in the Designated Court qua them. Learned counsel submits that the same logic would apply to the subject sanction order dated 3/9-11-93 (Exh. 84). The evidence of PW-14 or PW-15 or for that matter, other documentary evidence Exh.82 and Exh.83, will be of no avail to justify the validity of Exh.84. As regards the sanction accorded to prosecute accused No.3, dated 1st April, 2005 (Exh. 57), the same also, ex-facie, suffers from the vice of non-application of mind. For, the evidence gathered during the investigation against accused No.3, at best, indicated that two walky-talkies were recovered from him. The sanctioning authority ought to have reckoned this fact, which by no standard would constitute an offence under the TADA. Inasmuch as mere possession of such walky-talkies per se would not be an offence under TADA. The sanctioning authority has palpably failed to evaluate the materials gathered during the investigations before recording its satisfaction on the factum whether any terrorist act has been committed by the named person within the meaning TADA or for that matter being a member of the terrorist gang or party to the conspiracy or abetment or facilitating the commission of a terrorist act. In substance, learned counsel for the respondents submits that no interference is warranted with the finding of fact recorded by the Designated Court that the sanction orders issued by the competent authority (Exh.84 and Exh. 57) suffer from the vice of non-application of mind. To buttress this submission, learned counsel for the respondents has placed reliance on *State of Bihar & Anr. Vs. P.P. Sharma & Anr*⁵, *Rambhai Nathabhai Gadhvi (supra)*, *Mohd. Iqbal M. Shaikh & Ors. Vs. State of Maharashtra*⁶, *State (NCT of Delhi) Vs. Navjot Sandhu*⁷, *Seeni Nainar Mohammed Vs. State*⁸.

9. We have heard Ms. Pinky Behra, learned counsel appearing for the State of Gujarat and Mr. A. Sirajudeen, learned senior counsel appearing for the respondents.

10. First we intend to deal with the issue of validity of the sanction order dated 3/9-11-93 (Exh.84). This document is the outcome of the letter dated 9 th August, 1993 sent by Pramod Kumar Jha, DSP (PW-15), to the Director General of Police for grant of sanction under Section 20-A(2) of TADA. The said letter reads thus:

“Exhibit - 82

“No. RB/D/121/1993/1810 THE OFFICE OF DISTRICT SUPREINTENDENT OF POLICE JAMNAGAR DATED 09/08/1993

To,

The Director General of police And Chief of Police
Gujarat State, Ahmedabad

Subject: With regard to obtaining sanction under section 20A(1) of the TADA under Salaya Police Station Crime I 21/93. With it is hereby stated with regard to the above mentioned subject that, The Salaya Police station Crime I 21/93 under section 121, 121A, 122, 34 of the IPC, section 26(1) (AD) (1-AA), 25(1-B) A,B,C,F,G and 27 (1) 29(A) of the Arms act, section 6(1)A of the Wireless Telegraph act, section 20 of the Telegraph act and section 3, 4 and 5 of the TADA

act is committed on 18/06/1993 at 10/00 hours at Salaya Barlovas Hashmi Manzil. As for the crime, the PSI Mr. B. V. Jani, LCB Jamnagar filed complaint on 18/06/1993 at 13/30 hours against accused Anwar Osman Vadher Musalman resident of Salaya Barlovas Hashmi Manzil for keeping in possession weapons unlawfully. The copy of FIR is annexed hereby.

The accused Anwar Osman Vadher resident of Salaya kept in his possession unlawfully and without license the 1) Foreign Carbon Stand gun Magazine worth Rs.2 lacs, 2) Foreign made revolver with eight cylinders in chamber worth Rs.60 thousand, 3) one foreign made revolver with six cylinders in chamber having worth Rs. 45 thousand, 4) one transmitter walky talky set foreign made worth Rs.1 lakh, 5) stand gun live cartridges nos. 52 nos. worth Rs.1040, 6) Revolver live cartridges nos. 4 worth Rs.80/- and therefore he was arrested on 19/00 of 18/06/1993. He was produced before the honourable court and a remand was sought, thereby a remand till 01/07/1993 was granted and during the remand, upon further investigation, it was divulged by him that the weapons were obtained from 1) Mamummiya Panjumiya resident of Porbandar, 2) Junus Ibrahim Gajwa Vadher resident of Salaya, 3) Adam Jusab Bhaya Vadher resident of Salaya since deceased. Upon investigating as to the nos. 1 and 2, it was found that they had fled and thus the further investigation is held so as to arrest these persons. Upon completion of the remand period of accused Anwar Osman Patel, the further remand was sought, but it was rejected by the court and thus the accused was sent to the court custody. As for the above mentioned offence, the sanction is received by letter no. VIR/ATK/1993/3717 dated 06/07/1993 from the side of the home department, for the purpose of application of TADA. Therefore it is submitted that relevant order be passed for sanction of section 20A(2) of TADA.

Sd/- illegible P K Za
District Superintendent of Police
Jamnagar”

11. On the basis of this communication, Office Note (Exh. 83) was placed for consideration before A.K. Tandon, DGP (PW-14).The said Office Note (Exh.83) reads thus:

“Exhibit 83 (Office note)

“Salaya Police station Crime I 21/93 under section 25(A), 25(1)AA B A, Customs act section 135 and section 3, 4 and 5 of the TADA act.

From the house possessed and used by the accused Anwar Osman Vadher Musalman, weapons without any license being Foreign Carbon Stand gun Magazine worth Rs.2 lacs, Foreign made revolver with eight cylinders in chamber worth Rs.60 thousand, one foreign made revolver with six cylinders in chamber having worth Rs.45 thousand, one transmitter walky talky set foreign made worth Rs.1 lakh, stand gun live cartridges nos. 52 nos. worth Rs. 1040 and Revolver live cartridges nos. 4 worth Rs. 80/- and upon investigation from the accused, he stated

that, the weapons were obtained from 1) Mamummiya Panjumiya resident of Porbandar, 2) Junus Ibrahim Gajwa Vadher resident of Salaya, 3) Adam Jusab Bhaya Vadher resident of Salaya (since deceased). Upon investigating as to the nos. 1 and 2, it was found that they had fled and thus the further investigation for these two persons.

Placed with regards:

It is a request to taken into perusal the order passed by the honourable Inspector General of Police at page P-19/NS.

2. In the Salaya police station Crime I 21/93, Jamnagar City B Division Police station Crime 151/93, Panchnoshi B Division police station Crime I 57/93 and Bharwad Police Station Crime I 43/93, the S1 to S8 documents are placed on record for signature, in reference to the order passed by the Inspector General of Police. Kindly sign the same.

Orders giving permission for applying TADA as placed at S1 TO S8, which may please be illegible.
Sd/- -1/11/1993”

12. Indeed, P.K. Jha (PW-15) in his evidence has stated that after sending the letter (Exh. 82), the DGP Mr. A.K. Tandon (PW-14) had summoned him with papers of the case for discussion. Further, Mr. Tandon had personally discussed about the case with him. During that interaction, P.K. Jha had apprised the DGP about the details of the investigation and other details as to why it was necessary to apply the provisions of TADA and file the charge-sheet in that regard. Pramod Kumar Jha, DSP (PW-15) has been cross-examined by accused Nos.1 & 2. In the cross-examination, he stood by his version that he had gone to Director General of Police (PW-14) at Padadhari and had also gone to Ahmedabad but was unable to give the dates and time of the said meetings. He asserted that he had made notes about the meeting in his records and in his personal diary which is called E-statement. However, the fact remains that the purported sanction order dated 3/9-11-93 (Exh.84) makes reference only to have taken note of the FIR and the proposal received from DSP, Jamnagar. We may assume that the two officers - Pramod Kumar Jha (PW-15) and A.K. Tandon, DGP (PW-14) had interacted regarding the nature of investigation before issuing the purported sanction order dated 3/9-11-93 (Exh.84). Even though A.K. Tandon, DGP (PW-14) had asserted that he had fully applied his mind before issuing the purported sanction order under Section 20-A(2) of TADA, that order, however, is suggestive of a casual approach of A.K. Tandon, DGP (PW-14). The same reads thus:

“Annexure-P/5

Mark 80/5 Exh.84.

No.J.1/1909/1 /Salaya/21 93/4327.

Office of DGP and Chief Police Officer, Gujarat State, Ahmedabad

3-9/11-93.

Ref:- 1. FIR of Salaya Police Stn. CR No.21/93 u/s. 122 of IP Code and u/s. 25(1)(A)

25(1AA) 25 (AB,AF) 25(1)(B)(A)(F) of Arms Act and u/s. 6(1)A of Wireless Telegraph Act and u/s. 20 of Telegraph Act and u/s. 135 of Customs Act and u/s. 3,4,5 of TADA Act.
2. Proposal No. DSP, Jamnagar, RB-D-121- Proved in 1993/1810 dtd. 9-8-93 by DSP, Jamnagar.

Deposition of witness No.14 Mark 80/5 be exhibited at exh.84 in spl. case No.3/94.
Sd/- Desi. Judge, 4-7-06.
Jamnagar.

After carefully reading and considering the proposal for approval to apply TADA section vide letter No. RBD/121/ 1993/1810 dtd. 9-8-93 by DSP Jamnagar and FIR of Jamnagar Dist. Salaya Police Station CR No.21/93 u/s. 122 of IP Code and u/s. 25(1)(A) of Arms and u/s. 3,4,5 of TADA act, I A.K. Tandon, DGP and Chief Police Officer Gujarat State, Ahmedabad do hereby approval/sanctioned to apply TADA act 3,4,5 under amended provisions of amended TADA act 1987 (Amendment 1993) u/s. 20(1)(2).

Sd/
A.K. Tandon DGP and Chief Police Officer, Guj. State, Ahmedabad.

To,
DSP, Jamnagar Dists. Jamnagar

Copy to: Chief Special police officer/Dy. Chief Police Officer, Rajkot Division, Rajkot, Addl. DGP Shri, CID, Crime and Range Gujarat State, Ahmedabad.
Sd/ Pramodkumar Asst. Chief Police Officer, Crime.

Endorsement for true copy Copy applied for by Dy.S.P. Khambhalia on 13-4-07
And copy ready on 23-4-07 and copy delivered on 25-5-07.

Sd/ Registrar
True copy.
Sd/ Registrar.
Dist. & Sessions Court, Jam.
Translated from guj.
Into eng. Version by me.”

13. On a fair reading of this document it is evident that the author of the document A.K. Tandon, DGP (PW-14), adverted only to the FIR and the proposal received from DSP, Jamnagar. The understanding of PW-14 was that the proposal received from DSP, Jamnagar (PW-15) was for granting approval to apply provisions of TADA and the said proposal was accepted. The respondents have rightly relied on the dictum in Gadhvi's case (supra), where a similar purported sanction under Section 20-A(2) of TADA issued by the very same officer A.K. Tandon, DGP (PW-14), in respect of some other TADA case, came up for consideration. The wording of sanction order considered by this Court is similar to the one under consideration. In paragraph 9 of the reported judgment, the said sanction order has been reproduced, which reads thus:

“9. In this case the prosecution relies on Ext. 63, an order issued by the Director General of Police, Ahmedabad, on 3-9-1993, as the sanction under Section 20-A(2) of TADA. We are reproducing Ext. 63 below:

“Sr. No. J-1 /1909/1 /Khambalia 55/93 Director General of Police, Dated 3-9-1993 Gujarat State, Ahmedabad.

Perused: (1) FIR in respect of offence Registered No. 55/93 at Khambalia Police Station 25(1)(b)(a)(b) of Arms Act and Sections 3, 4 and 5 of the TADA. (2) Application sent by DSP Jamnagar vide his letter No. RB/D/122/1993/1820 dated 9-8-1993.

Having considered the FIR in respect of offence Registered No. 55/93 at Khambalia Police Station District Jamnagar under Section 25(1)(b)(a)(b) of Arms Act and Sections 3, 4 and 5 of TADA and letter No. RB/D/122/1993/1820 of DSP dated 9-8-1993 seeking permission to apply the provisions of TADA carefully, I A.K. Tandon, Director General of Police, Gujarat State, Ahmedabad under the powers conferred under the amended provisions of TADA (1993) Section 20-A(2) give permission to add Sections 3, 4 and 5 of TADA. A.K. Tandon Director General of Police Ahmedabad Gujarat”

While analyzing the said sanction in paragraph 10, this Court observed thus:

“10. Apparently Ext. 63 makes reference only to two documents which alone were available for the Director General of Police to consider whether sanction should be accorded or not. One is the FIR in this case and the other is the letter sent by the Superintendent seeking permission or sanction. No doubt in that letter to the Director General of Police the Superintendent of Police had narrated the facts of the case. But we may observe that he did not send any other document relating to the investigation or copy thereof along with the application. Nor did the Director General of Police call for any document for his perusal. All that the DGP had before him to consider the question of granting sanction to prosecute were the copy of the FIR and the application containing some skeleton facts. There is nothing on record to show that the Director General of Police called the Superintendent of Police at least for a discussion with him.”

And again in paragraphs 14 and 15 of the judgment, this Court observed:

“14. Apart from what we have noticed above, the non-application of mind by the Director General of Police, Gujarat State, is even otherwise writ large in this case. A perusal of Ext. 63 (supra) shows that the Director General of Police in fact did not grant any sanction for the prosecution of the appellants. Last part of the order reads: ‘I A.K. Tandon, Director General of Police, Gujarat State, Ahmedabad under the powers conferred under the amended provisions of TADA (1993) Section 20-A(2) give permission to add Sections 3, 4 and 5 of TADA Thus, what the Director General of Police did was to grant permission “to add Sections 3, 4 and 5 of TADA” and not any sanction to prosecute the appellants. It is pertinent to note here that the permission to add Sections 3,

4 and 5 of TADA had been granted by the Home Secretary, the competent authority, much earlier and no such permission was sought for from the Director General of Police by the DSP. The Designated Court thus, failed to notice that Ext. 63 was not an order of sanction but an unnecessary permission of the Director General of Police to add Sections 3, 4 and 5 of TADA. The Director General of Police, apparently, acted in a very casual manner and instead of discharging his statutory obligations under Section 20-A(2) to grant (or not to grant) sanction for prosecution proceeded to deal with the request of the DSP contained in his letter dated 9-8-1993, as if it was a letter seeking permission to apply the provisions of TADA. The exercise exhibits that the Director General of Police did not even read, let alone consider “carefully”, the FIR and the letter of the DSP dated 9-8-1983. We cannot but express our serious concern at this casual approach of the Director General of Police. On a plain reading of Ext. 63, therefore, we must hold that it is not an order of sanction to prosecute the appellants as required by Section 20-A(2) of the Act.”

15. In view of the aforesaid legal and factual position we have no doubt that sanction relied on by the prosecution in this case was not accorded by the Director General of Police in the manner required by law. Ext. 63 is not the result of a serious consideration and the document reflects scanty application of the mind of the sanctioning authority into vital and crucial aspects concerning the matter. It vitiates sanction and hence Ext. 63 cannot be treated as sanction under Section 20-A(2) of TADA.”

14. The subject sanction (Exh.84) as aforesaid is issued by the very same officer and presumably prepared on the same date 3.11.93, but signed and issued on 9th November, 1993. Even in the present case, reference is only to two documents reckoned by PW-14 before issuing the sanction. To wit, the FIR and the letter or proposal sent by the DSP, Jamnagar. In the evidence, although it is asserted that the DSP (PW-15) was called for discussion and who, in turn, apprised him of all the relevant details of the investigation, but that fact is not reflected in any contemporaneous record. No such record has been produced by the prosecution. What is significant is the wording of the subject sanction (Exh.84). When juxtaposed with the sanction in the reported case (Exh.63 reproduced in paragraph 9 of the said judgment), it is obvious that even in the present case, what has been noted in Exh.84 is the permission to apply Sections 3, 4 and 5 of TADA. In paragraphs 14 and 15 of the reported decision extracted above, this Court opined that such noting was itself indicative of the fact that it was not a sanction to prosecute the accused but at best giving permission to apply the provisions of TADA. Such a sanction cannot be considered as a valid sanction, much less issued after due application of mind. We wish to adopt the same logic, which applies proprio vigore to the fact situation of the present case.

15. In other words, the purported sanction dated 3/9-11-93 (Exh.84), granted by PW-14 is not a valid sanction within the meaning of Section 20-A(2) of TADA. It must, therefore, follow that the Designated Court could not have taken cognizance of the offences punishable under TADA for want of a valid sanction.

16. Reverting to the sanction dated 1st April, 2005 (Exh.57), concerning accused

No.3/respondent No.3, issued under the signature of A.K. Bhargav (who is not examined) read with the evidence of Yashodhar Ramchandra Vaidya (PW-10), it may appear that it has been issued after due consideration of all the relevant material, including police papers. The evidence of Yashodhar Ramchandra Vaidya (PW-10) indicates that a Yadi was received on 27th March, 2005 in the Office of Director General of Police and Chief Police Officer, where the witness was working as ASI. The same is dated 11th March, 2005 (Exh.55), issued under the signature of R.S. Chudasama (PW- 13). It read thus:

“EXHIBIT - 55

OUTWARD NO.RB/741/05 Office of the Deputy Superintendent of police Khambhaliya Division, dated 11/03/2005

To,

The Inspector General of Police Gujarat State, Gandhinagar.

Subject: Sanction for filing of charge sheet against accused Umarmiya @Mamumiya s/o Ismailmiya s/o Ismailmiya Panjumiya Saiyed Bukhari resident of Porbandar under section 20 (a) (2) of the Terrorist and Disruptive Activities (Prevention) act 1987.

The deputy superintendent of police, Khambhaliya Mr. R. S. Chudasama, hereby submit that, That investigation of the Salaya Police station Crime I 21/93 under section 121, 121A, 122, 34 of the IPC, section 26 (1) (AD) (1-AA), 25 (1-B) A, B, C, F, G and 27 (1) 29 (A) of the Arms act, section 6 (1) A of the Wireless Telegraph act, section 20 of the Telegraph act and section 3, 4 and 5 of the TADA act, is held by me.

On 18/06/1993 at 13/30 hours at the Salaya Police Station, on behalf of the state Mr. B. V. Jani police sub inspector LCB Branch, Jamnagar declared complaint against Anwar Osman SubhaniyaVagher resident of SalayaHussaini Chowk, Hazmi Manzil and declared that that accused was arrested with the muddamal of 1) Foreign Carbon Stand gun Magazine worth Rs.2 lacs, 2) Foreign made revolver with eight cylinders in chamber worth Rs. 60 thousand, 3) one foreign made revolver with six cylinders in chamber having worth Rs.45 thousand, 4) one transmitter walky talky set foreign made worth Rs.1 lakh, 5) stand gun live cartridges nos. 52 nos. worth Rs.1040, 6) Revolver live cartridge nos. 4 worth Rs.80/- and the above mentioned crime was registered in detail.

The above mentioned accused Anwar Osman, during the remand showed one transmitter walky talky wireless set worth Rs. 75 thousand and during the remand he stated that two wireless set were purchased by him from accused Umarmiya @Mammumiya s/o Ismailmiya @PanjumiyaSaiyed Bukhari resident of Porbandar. In this manner the name of accused Umarmiya was declared for the crime and this accused thereby remained absconding. As the accused remained absconding, during the year 1994, the honourable court notified the accused as absconding under section 8(3) of the TADA act.

This particular accused Umarmiya @Mammumiya s/o Ismailmiya @Panjumiya Saiyed Bukhari resident of Probandar, was arrested for the Porbandar city Kamlabaug B Division police station Crime I 43/94 under sections 3, 4, 5, etc. of the TADA act on 10/12/2004 and he was brought before the Probandar Judicial First Class magistrate court No.1. In this particular case, the transfer warrant was issued by the Jamnagar designated court on 14/12/2004, it was submitted before the Porbandar court and the accused was brought before me after obtaining his custody by the police sub inspector Mr. B. V. Pander on 08/02/2005. This particular accused was arrested as per proceedings in its presence of the panch witnesses on 08/02/2005 at 23-00 hours. During the hearing, the accused was brought before the honourable additional sessions and designated judge Khambhaliya and a remand of days-30 were sought for the accused and therefore the honourable court approved the remand in police custody, of the accused till 11-00 hours of 14/02/2005. During the remand, the accused was inquired from and he mentioned that, the two Walky Talky set that he gave to Anwar Osman Subhaniya were taken by him from his brother Abdullah Osman Subhaniya in the year 1985 for smuggling activities. Thereafter he gave both these Walky Talky sets to Anwar Osman Subhaniya and thereby these details were divulged during the investigation. Upon investigating as to Abdullah Osman Subhaniya, it came out during the investigation that, that particular person does not reside in Salaya and has gone to Abu Dhabhi (Foreign nation). As for this, the further remand of 15 days was sought for the accused but it was rejected by the court and thereby he was taken under judicial custody. The evidence found during the investigation against the accused are hereby marked and provided.

- Mark A Salaya police station Crime I 21 /93 FIR
- Mark B Panchnama for taking into custody the weapons dated 18/06/1993
- Mark C Discovery panchnama dated 29/06/1993 for Walky Talky shown by the accused Anwar Osman Subhaniya during the remand.
- Mark D Total 23 statements of the police officer and staff that were present in the raiding party.
- Mark E The statement of the accused Anwar Osman Subhaniya dated 21/06/1993
- Mark F The order passed for application of TADA sections in the Salaya Crime I 21/93
- Mark G The letter mentioning the details of case registered against the accused Umarmiya @Mammumiya s/o Ismailmiya by Customs Porbandar for smuggling silver.
- Mark H The FSL certificate issued by Ahmedabad office for the weapons taken into custody.
- Mark I The charge sheet no.19/94 registered against the accused Anwar Osman Subhaniya on 18/06/1994 and the copy of the charge sheet wherein the accused Mammumiya Panjumiya Saiyed is shown as absconding under column no.2.
- Mark J The letter under report no.4/93 under section 8(3)(A) of TADA act against the accused Mammumiya Panjumiya.
- Mark K The papers wherein the accused Mammumiya Panjumiya was

declared absconding.

Mark L The transfer warrant of accused Mammumiya Panjumiya.

Mark M The physical situation panchnama dated 08/02/05 at the time of arrest of accused Mammumiya Panjumiya.

Mark N Face mark register for accused Mammumiya Panjumiya.

Mark O The explanation dated 08/02/2005 to 14/02/2005 by accused Mammumiya Panjumiya.

Mark P The further statement dated 11-12/02/2005 by accused Anwar Osman Subhaniya.

Mark Q The further statement dated 11-12/02/2005 by accused Junus Ibrahim Gajan.

Mark R The copy of court order for application no.88/05 filed for days-30 remand against the accused Mammumiya Panjumiya.

Mark

S The copy of court order for application no.96/05 filed for days-15 remand against the accused Mammumiya Panjumiya. In this manner, as for the purpose of filing a charge sheet under Section 20(A) (2) of the TADA act against the accused Saiyed Bukhari aged 50 years, resident of Porbandar Thakkar Plot, Sheri no.1, Jamadar Fadi, the sanction is required and thus it is hereby submitted that the above mentioned documents be taken into perusal and the sanction be provided for filing a charge sheet against the accused under section 20(A)(2) of the TADA act.

Kindly consider the above.

Sd/- illegible (R S Chudasama)

Deputy Superintendent of Police Khambhaliya Division

Sent with regards,

Superintendent of Police, Jamnagar.”

17. This was followed by a communication sent under the signature of Manoj Shashidhar, Superintendent of Police, Jamnagar (not examined) dated 15th March, 2005 (Exh.56). It read thus:

“Exhibit - 56

“OUTWARD NO. RB/illegible 4/2005 Office of the Superintendent of police Jamnagar, dated 15/03/2005

To,

The Inspector General of Police Gujarat State, Gandhinagar.

Subject: Sanction for filing of charge sheet against accused Umarmiya @Mamumiya s/o Ismailmiya s/o Ismilmiya Panjumiya Saiyed Bukhari resident of Probandar under section 20(a)(2) of the Terrorist and Disruptive Activities (Prevention) act 1987, so as to held further proceedings against him before the honourable court.

Reference: The Deputy superintendent of police, Khambhaliya division letter No.RB/741/05 dated 11/03/2005. The investigation of the Salaya Police station Crime I 21/93 under section 121, 121A, 122, 34 of the IPC, section 26(1) (AD) (1-AA), 25 (1-B) A, B, C, F, G and 27 (1) 29(A) of the Arms act, section 6 (1) A of the Wireless Telegraph act, section 20 of the Telegraph act and section 3, 4 and 5 of the TADA act, is held by deputy superintendent of police, Khambhaliya Mr. R.S. Chudasama. On 18/06/1993 at 13/30 hours at the Salaya Police Station, on behalf of the state Mr. B. V. Jani police sub inspector LCB Branch, Jamnagar declared complaint against Anwar Osman Subhaniya Vagher resident of Salaya Hussaini Chowk, Hazmi Manzil and declared that the accused was arrested with the muddamal of 1) Foreign Carbon Stand gun Magazine worth Rs. 2 lacs, 2) Foreign made revolver with eight cylinders in chamber worth Rs.60 thousand, 3) one foreign made revolver with six cylinders in chamber having worth Rs. 45 thousand, 4) one transmitter walky talky set foreign made worth Rs.1 lakh, 5) stand gun live cartridges nos. 52 nos. worth Rs. 1040, 6) Revolver live cartridges nos. 4 worth Rs. 80/- and the above mentioned crime was registered in detail.

The above mentioned accused Anwar Osman, during the remand showed one transmitter walky talky wireless set worth Rs.75 thousand and during the remand he stated that two wireless set were purchased by him from accused Umarmiya @Mammumiya s/o Ismailmiya @Panjumiya Saiyed Bukhari resident of Probandar. In this manner the name of accused Umarmiya @ Mammumiya s/o Ismailmiya @Panjumiya Saiyed Bukhari resident of Porbandar was declared for the crime and this accused thereby remained absconding. As the accused remained absconding, during the year 1994, the honourable court notified the accused as absconding under section 8(3) of the TADA act. The particular accused Umarmiya @ Mammumiya s/o Ismailmiya @ Panjumiya Saiyed Bukhari resident of Porbandar, was arrested for the Probandar city Kamlabaug B Division police station Crime I 43/94 under Sections 3, 4, 5, etc. of the TADA act on 10/12/2004 and he was brought before the Probandar Judicial First Class magistrate court no.1. In this particular case, the transfer warrant was issued by the Jamnagar designated court on 14/12/2004, it was submitted before the Porbandar court. The accused Umarmiya @Mammumiya s/o Ismailmiya @Panjumiya Saiyed Bukhari resident of Porbandar was brought before superintendent of police, Khambhaliya division Mr. R.S. Chudasama after obtaining his custody by the police sub inspector Mr. B.V. Pander on 08/02/2005. This particular accused was arrested as per proceedings in the presence of the panch witnesses on 08/02/2005 at 23-00 hours. During the hearing, the accused was brought before the honourable additional sessions and designated judge Khambhaliya and a remand of days-30 were sought for the accused and therefore the honourable court approved the remand in police custody, of the accused till 11-00 hours of 14/02/2005. During the remand, the accused was inquired from and he mentioned that, the two Walky Talky set that he gave to Anwar Osman Subhaniya were taken by him from his brother Abdullah Osman Subhaniya in the year 1985 for smuggling activities. Thereafter he gave both these Walky Talky sets to Anwar Osman Suhaniya during 1989/90 and thereby these details were divulged during the investigation. Upon investigating as to Abdullah Osman Subhaniya, it came out during the investigation that, that particular person

does not reside in Salaya and has gone to Abu Dhabhi (Foreign nation). As for this, the further remand of 15 days were sought for the accused Umarmiya @Mammumiya s/o Ismailmiya @Panjumiya Saiyed Bukhari resident of Probandar but it was rejected by the court and thereby he was taken under judicial custody. The evidence found during the investigation against the accused are hereby provided as marked along with the letter submitted.

In this manner, as for the purpose of filing a charge sheet under section 20(A) (2) of the TADA act against the accused Umarmiya @Mammumiya s/o Ismailmiya @Panjumiya Saiyed Bukhari aged 50 years, resident of Porbandar Thakkar Plot, Sheri no.1, Jamadar Fadi, it is requested that a sanction be provided.

Kindly consider the above.

Annexed:

The documents placed on record along with the letter.

Sd/- illegible (Manoj Shashidhar) Superintendent of Police Jamnagar

Copy sent:

Deputy Superintendent of police Khambhaliya Division, Khambhaliya”

18. The purported sanction dated 1st April, 2005 (Exh.57) was finally issued under the signature of A.K. Bhargav, IGP (not examined). The stated sanction reads thus:

“Exh.57.

Mark 13/18 No. G-1(Crime/T-1/TADA chargesheet/approval/1239/2005 Office of DIG and Chief Police officer Gujarat State Police Bhavan, Sector 18 Gandhinagar.. proved in deposition of Yashodhar Ramchandra in sessions case No.3/94 mark 13/8 is given exhi. in deposition of witness No.10.

Sd/ Designated Judge, Jamnagar.

Ref:- 1. Regarding giving of approval for chargesheet u/s. 20(A)(2) of TADA act against accused Umarmiya Aliyas Mamumiya S/o Ismailmiya Alias Panjumiya Bukshari resi. of Porbander for offence u/s. 121, 121(A), 122, 34 of IPC and u/s. 1(AD) (1 AA) 25(1B), ABCFG and 27(1), 29(A) of Arms act and u/s. 1 of Wire-less Telegraphic act and u/s. 20 of Telegraph act and u/s. 3,4,5 of TADA act who was arrested on Salaya CR No. 21/93.

2. Proposal for giving sanctioned for chargesheet under TADA act letter No. RBR/1014/2005 dtd. 15-3-05 of DSP, Jamnagar. After carefully considering and going through the proposal for giving approval for chargesheet under the TADA act of the papers and the letter No.RBR/1014/2005 dtd. 15-3-05 of DSP, Jamnagar and going through the FIR filed against accused Umarmiya Mamumiya S/o. Ismailmiya alias Panjumiya Bukhari of Porbander who is arrested for the offence u/s. 121, 121 A, 122, 34 of IPC and u/s. (1) (AD) (1AA) 25(1B) A,B,C,F,G and 27(1), 29(A) of Arms and u/s. (1) A of Wireless telegraphic act and u/s. 20 of Telegraph acts and under sec. 3,4,5 of TADA act in Salaya Police station 21/93 Dist. , Jamnagar I A.K. Bhargav IG and Chief Police officer Gujarat State Gandhinagar do hereby grant approval/sanctioned under the provisions of TADA Act 1980 sec. 20(A) (2)

Amended 1993 for filing chargesheet against Umarmiya alias Mamumiya S/o. Ismailmiya Alias Panjumiya Bukhari of Porbander in CR No.21/39 u/s. 20(A) (2) of TADA act.

Sd/ A.K. Bhargav

IGP and Chief Police officer Gujarat State Gandhinagar.

Inward No. 14237 office of DSP, Jamnagar.

RB

To IO and SDPO KBL for N/A.

Sd/- Illegible 15-4-05”

19. On a bare perusal of Exh.57, there is nothing to indicate as to whether the sanctioning authority was conscious of the materials gathered during investigation qua the concerned accused (respondent No.3), which merely suggested possession and recovery of two walky-talkies from him. If that is the only incriminatory material against accused No.3/respondent No.3, the sanctioning authority ought to have pondered over the crucial aspects including as to how such possession would entail in commission of any offence punishable under Sections 4 or 5 of TADA. Further, section 3 of TADA posits different offences, namely, terrorist acts [Section 3(2)], being party to conspiracy or abetment or knowingly facilitating the commission of terrorist acts [Section 3(3)], harbouring or concealing any terrorist [Section 3(4)], being member of a terrorist gang or terrorist organization, which is involved in terrorist acts [Section 3(5)], and to hold any property derived or obtained from commission of any terrorist act [Section 3(6)]. The sanctioning authority was under a bounden duty to accord sanction, specific to offences, from amongst the different offences under sub-sections (1) to (6) of Section 3 of TADA. Similarly, we are at a loss to know as to how Sections 4 & 5 of TADA would apply to a case of mere possession of walky-talkies. Section 4 refers to disruptive activities whereas Section 5 refers to possession of unauthorized classified arms and ammunition. A walky-talky is certainly not one of those classified arms and ammunition. In our opinion, the purported sanction vide Exh.57 also suffers from the vice of non-application of mind, on this count alone.

20. The necessity of obtaining prior sanction under Section 20-A(2) need not be underscored considering the draconian provisions of TADA. In our opinion, therefore, even sanction qua accused No.3/respondent No.3 dated 1st April, 2005 (Exh.57) does not stand the test of a valid sanction to prosecute him for offences punishable under TADA. Indeed, the prosecution has relied on the evidence of PW-10 and PW- 13. That, in our opinion, at best, would suggest that all the relevant papers gathered during the investigation were placed for consideration before the sanctioning authority. The fact remains that Exh.57 issued under the signature of A.K. Bhargav, IGP, makes no attempt to even remotely indicate as to why sanction to prosecution for offences punishable under Sections 3, 4 or 5 of TADA has been accorded qua accused No.3/respondent No.3 merely on the basis of possession and recovery of two walky-talkies from him. Further, he has not been examined by the prosecution which also could have thrown light on that crucial aspect. Therefore, we have no hesitation in concluding that the sanction dated 1st April, 2005 (Exh.57), is not a valid sanction qua accused No.3/respondent No.3.

21. We are conscious of the fact that the Designated Court did not frame any issue regarding validity of prior approval under Section 20-A(1) or prior sanction under Section 20-A(2). As the question of prior approval or prior sanction goes to the root of the matter and is sine qua non for a valid prosecution concerning TADA offences and including the jurisdiction of the Designated Court, no fault can be found with the Designated Court for having answered that issue at the outset.

22. The next question is whether the Designated Court could have had convicted the respondents for offences punishable under other enactments (other than TADA). Even though the Designated Court, in paragraph 17 of the impugned judgment, took note of the fact that the learned APP had not alternatively argued this point, it went on to analyse the efficacy of the evidence on record in reference to offences under other enactments namely, IPC, Arms Act, Indian Telegraph Act, Indian Wireless and Telegraphy Act. It noted that the fulcrum of the prosecution case was founded on the confessional statement of the accused, which came to be recorded under the provisions of TADA. It took the view that since the accused cannot be proceeded for TADA offences for lack of a valid sanction, that confessional statement will be of no avail and cannot be looked at in reference to charges for offences under other enactments (not being admissible) muchless to record a finding of guilt against the accused for offences under the other enactments. It also found that the evidence regarding search and recovery was replete with fatal deficiencies and was insufficient to establish the complicity of the respondents in the commission of offences under the other enactments. Thus, it held that the accused deserved to be acquitted. However, relying on the observations in paragraphs 17 and 18 of Gadhvi's case (supra), it erroneously opined that the Designated Court had no independent power to try any other offence, as valid sanction under Section 20-A (2) was not in place.

23. We may hasten to observe that it is now well settled that the Designated Court, besides trying the case under TADA, can also try any other offence with which the accused may be charged at the same trial if the offences are connected with offences under TADA. For, implicit power has been bestowed upon the Designated Court to convict the accused for offences under other enactments if there is legally admissible evidence to establish those charges. We may usefully refer to the dictum in paragraph 37 of the Constitution Bench judgment in Prakash Kumar alias Prakash Bhutto (supra), which reads thus:

“37. The legislative intendment underlying Sections 12(1) and (2) is clearly discernible, to empower the Designated Court to try and convict the accused for offences committed under any other law along with offences committed under the Act, if the offence is connected with such other offence. The language “if the offence is connected with such other offence” employed in Section 12(1) of the Act has great significance. The necessary corollary is that once the other offence is connected with the offence under TADA and if the accused is charged under the Code and tried together in the same trial, the Designated Court is empowered to convict the accused for the offence under any other law, notwithstanding the fact that no offence under TADA is made out. This could be the only intendment of the legislature. To hold otherwise, would amount to rewrite or recast legislation and read something into it which is not there.”

(emphasis supplied)

This exposition has been applied by a Two Judge Bench in a recent decision in *Ashrafkhan alias Babu Munnekhan Pathan & Anr. Vs. State of Gujarat*¹, as is evident from paragraph 41, which reads thus:

“41. We have held the conviction of the accused to have been vitiated on account of non-compliance with Section 20-A(1) of TADA and thus, it may be permissible in law to maintain the conviction under the Arms Act and the Explosive Substances Act but that shall only be possible when there are legally admissible evidence to establish those charges. The Designated Court has only relied on the confessions recorded under TADA to convict the accused for offences under the Arms Act and the Explosive Substances Act. In view of our finding that their conviction is vitiated on account of non-compliance of the mandatory requirement of prior approval under Section 20-A(1) of TADA, the confessions recorded cannot be looked into to establish the guilt under the aforesaid Acts. Hence, the conviction of the accused under Sections 7 and 25(1-A) of the Arms Act and Sections 4, 5 and 6 of the Explosive Substances Act cannot also be allowed to stand.”

(emphasis supplied)

24. Even in the present case, it is noticed that the prosecution has essentially relied upon the confessional statement of the accused recorded under the provisions of TADA. That will be of no avail and certainly not admissible against the accused in the trial for offences under other enactments, especially when the Designated Court could not have taken cognizance of the offence under TADA for lack of a valid sanction. Additionally, in the present case, the evidence produced by the prosecution regarding search and seizure is replete with fatal deficiencies. We do not wish to deviate from the view taken by the Designated Court that there was no legally admissible evidence to establish the charges against the respondents regarding offences under other enactments (other than TADA).

25. Having said this, it must follow that the conclusion reached by the Designated Court, that the respondents are not guilty of the offences for which they were charged and tried, needs no interference for the reasons mentioned hitherto.

26. In view of the above, the appeals must fail and are dismissed.

Judgment Referred

¹(1997) 7 SCC 0744

²(1996) 11 SCC 0061

³(2007) 13 SCC 0387

⁴(2005) 2 SCC 0409

⁵(2001) 10 SCC 0597

⁶(1992 Supp. (1) SCC 0222

⁷(1998) 4 SCC 0049

⁸(2005) 11 SCC 0600

⁹(2017) 13 SCC 0685