A RAMBHAI NATH BHAI GANDHVI AND ORS.

v.

STATE OF GUJARAT

AUGUST 6, 1997

B [DR. A.S. ANAND AND K.T. THOMAS, JJ.]

Criminal law :

Criminal Procedure Code, 1973 :

C *Section 197—Cognizance of offence—Duty of court—No valid sanction order for prosecution—Held, Court has no jurisdiction to take cognizance.*

Terrorist and Disruptive Activities [Prevention] Act, 1987—Section 20A—Sanction order for prosecution—Non-application of mind—Hence, not D *valid under section 20A of TADA.*

Arms Act, 1959 Section 25—Trial under TADA vitiated for want of valid sanction - No valid trial could be held by the Designated Court into any other offence including under the Arms Act as it has no such independent power.

E

The accused in this case were actively engaged in smuggling of goods particularly arms and ammunition. The District Superintendent of Police got information about their smuggling activities and conducted a search. In that operation the D.S.P. arrested all the accused and seized a gun, F **pistols, cartridges, sub-machine guns and some more fire arms and ammunitions from them. All accused were prosecuted under TADA and Arms Act.**

On the basis of sanction order and other witnesses and materials adduced on behalf of the prosecution, the Designated Court convicted the G **first accused and sentenced him to undergo imprisonment for 7 years under Section 5 of TADA. The other three accused were convicted and were sentenced to undergo imprisonment for 5 years under Section 5 of TADA.**

In this Appeal, appellants contended *inter alia* that the evidence of the prosecution was unrealistic and unreliable and that there was no valid H **sanction for prosecution.**

Allowing the appeal, this court A

HELD : 1.1. Valid sanction is *sine qua* non for enabling the prosecuting agency to approach the court in order to enable the court to take cognizance of the offence under TADA as disclosed in the report. The corollary is that, if there was no valid sanction the Designated Court gets no jurisdiction to try a case against any person mentioned in the report B as the court is forbidden from taking cognizance of the offence without such sanction. If the Designated Court has taken cognizance of the offence without a valid sanction, such action is without jurisdiction and any proceedings adopted thereunder will also be without jurisdiction.

[361-B-D] C

1.2. Taking cognizance is the act which the Designated Court has to perform and granting sanction is an act which the sanctioning authority has to perform. Latter is the permission to prosecute a particular person for the offence or offences under TADA. Sanction is not granted to the Designated Court to take cognizance of the offence but it is granted to the D prosecuting agency to approach the court concerned for enabling it to take cognizance of the offence and to proceed to trial against the persons arraigned in the report. [360-H; 361-A-B]

2.1. The sanction order makes reference only to two documents which E alone were available for the DGP to consider whether sanction should be accorded or not. One is the FIR in this case and the other is the letter sent by Superintendent of Police seeking permission or sanction. No doubt in that letter to the DGP the Superintendent of Police had narrated the facts of the case. But he did not send any other documents relating to the F investigation or copy thereof along with the application. Nor did the DGP call for any documents 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 DGP called the superintendent of police at least for a discussion with him. In such a situation, it cannot be said G that the sanctioning authority granted sanction after applying its mind effectively and after reaching a satisfaction that it is necessary in public interest that prosecution should be launched against the accused under TADA. As the provision of the TADA are more rigorous and the penalty provided is more stringent and the procedure for trial prescribed is H

summary and compendious, the sanctioning process mentioned in Section 20-A[2] must be adopted more seriously and exhaustively than the sanction contemplated in other penal statutes. [362-C-F]

2.2. Apart from that, the non-application of mind by DGP, is even otherwise writ large in this case. In the instant case what the DGP 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 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 DGP by the DSP. The Designated Court thus, failed to notice that the sanction order was not an order of sanction but unnecessary permission of the DGP to add sections 3,4, and 5 of TADA. The DGP apparently acted in a very casual manner and instead of discharging his statutory obligation 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 as if it was a letter seeking permission to apply the provisions of TADA. So, there can be no doubt that the sanction relied on by the prosecution in this case was not accorded by this DGP in the manner required by law. Sanction order, in the instant case, is not the result of a serious consideration and the document reflects scanty application of mind of the sanctioning authority into vital and crucial aspects concerning the matter. It vitiates sanction and sanction order cannot be treated as sanction under Section 20-A[2] of TADA.

[363-F-H; 364-A-E]

Hitendra Vishnu Takur v. *State of Maharashtra*, [1994] 4 SCC 602 and *Anirudhsinhji Karansinhji Jadeja* v. *State of Gujarat*, [1995] 5 SCC 302, relied on.

3.1. Power of Designated Court to charge the accused with any offence other than TADA offence can be exercised only in a trial conducted for any offence under TADA. When trial for offence under TADA could not have been held by the Designated Court for want of valid sanction envisaged in Section 20-A[2] the consequence is that no valid trial could have been held by that court into any offence under the Arms Act also. It is clear that a Designated Court has no independent power to try any other offence. Therefore, no conviction under Section 25 of the Arms Act is possible on the materials collected by the Designated Court in the present case.

[365-C-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1909 of 1996 Etc. A

From the Judgment and Order dated 10.10.96 of the Designated Court in Jamnagar at Gujarat in Special (TADA) Case No. 8 of 1994.

Sushil Kumar, A.V. Palli, Atul Sharma and Mrs. Rekha Palli for the Appellants; Dr. N.M Ghatate, Ms. Rekha Pande and Ms. Hemantika Wahi for the Respondent. B

The Judgment of the Court was delivered by

THOMAS, J. The Designated Court, Jamnagar convicted 4 persons under Section 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987, (for short 'TADA'). They were also tried for certain offences under Section 25 of the Arms Act, 1959 but the trial judge refrained from convicting them under that section on the premise that the other offence under TADA is a cognate offence of a graver dimension. In the matter of sentence the trial court awarded rigorous imprisonment for 7 years as against first accused Rambhai Nathabhai Gadhvi, while the three others were given only a sentence of rigorous imprisonment for 5 years each. The convicted persons have come up in appeal under Section 19 of TADA and the State of Gujarat have filed an appeal for enhancement of the sentence of the first accused to the maximum limit provided in law. We heard both appeals together. C D E

First accused is the father of second accused Kalu Rambhai Gadhvi and also elder brother of the fourth accused Nagshi Nathabhai Gadhvi. The third accused Hitesh Vajshi Pindariya is their neighbour. The nub of the case against them is that they all were actively engaged in smuggling of goods particularly arms and ammunitions. First accused is described as the kingpin of the joint venture of all the accused in the nefarious activities. F

Further details of the prosecution case would show that the District Superintendent of Police, Jamnagar, got some information about the activities of the accused and so he proceeded to their residence at Khambalia (in Jamnagar District) with a posse of police personnel during the wee hours on 18.6.1993. On the way, he secured the presence of the Sub Divisional Magistrate (PW-4) and two other persons for witnessing the operation which was in the offing. On arrival at the residence of the first G H

A accused the Superintendent of Police knocked at the door and first accused opened the door with a pistol in his hand, but was suddenly overpowered by the police. The Superintendent of Police also succeeded in snatching the pistol from him. Police party then raided the house of the second accused and seized one gun and another air gun and a belt containing 10 B cartridges besides currency notes for Rs. 67,000. When the person of the third accused was searched a pistol and some cartridges were recovered. Thereupon the police wanted to raid the ice factory of the accused. In that operation they succeeded in unearthing 9 boxes containing smuggled goods. First accused was arrested and on interrogation the Superintendent of Police came to know of the places where first accused had hidden other C articles. When he was taken to one such place he removed a heap of stones and disintered a bag containing submachine guns, pistols, cartridges etc. From another place some more firearms and ammunitions were recovered. On 23.6.1993 police arrested the fourth accused and recovered a pistol from a place where that firearm was concealed.

D

After obtaining sanction purportedly under Section 20A[2] of TADA the prosecution was launched against all the accused. After trial the Designated Court convicted the four accused and sentenced them as aforesaid.

E

Learned counsel for the appellant adopted a twin strategy to get the appellants absolved of the conviction and sentence. Counsel attacked the veracity of the evidence and tried to persuade us to hold that the evidence of the prosecution is unrealistic and unreliable. Next he focussed on the validity of the sanction under section 20A of TADA.

F

It is advantageous to advert first to the contention relating to validity of the sanction, for, if that contention deserves approval it renders the entire trial vitiated and then it would be unnecessary to harp on the other contention.

G

Under Section 20A(2) of TADA : "No Court shall take cognizance of any offence under this Act without the previous sanction of the Inspector-General of Police, or as the case may be, the Commissioner of Police."

H

Taking cognizance is the act which the Designated Court has to

perform and granting sanction is an act which the sanctioning authority has to perform. Latter is a condition precedent for the former. Sanction contemplated in the sub-section is the permission to prosecute a particular person for the offence or offences under TADA. We must bear in mind that sanction is not granted to the Designated Court to take cognizance of the offence, but it is granted to the prosecuting agency to approach the court concerned for enabling it to take cognizance of the offence and to proceed to trial against the persons arraigned in the report. Thus a valid sanction is *sina qua non* for enabling the prosecuting agency to approach the court in order to enable the court to take congizance of the offence under TADA as disclosed in the report. The corrolary is that, if there was no valid sanction, the Designated Court gets no jurisdiction to try a case against any person mentioned in the report as the court is forbidden from taking cognizance of the offence without such sanction. If the Designated Court has taken cognizance of the offence without a valid sanction, such action is without jurisdiction and any proceedings adopted thereunder will also be without jurisdiction.

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 20A(2) of TADA. We are reproducing Ext. 63 below :

> "Sr. No. J-1/1909/1/Khambalia 55/93 Director General of Police, Gujarat State, Ahmedabad
>
> Dt. 3.9.93
>
> Persued: (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 & 5 of the TADA.
>
> (2) Application sent by DSP Jamnagar vide his letter No. RB/D/122/1993/1820 dt. 9.8.93.
>
> 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 & 5 of TADA and letter No. RB/D/122/1993/1820 of DSP dt. 9.8.93 seeking permission to apply the provisions of TADA carefully. I A.R. Tandon, Director General of Police, Gujarat State, Ahmedabad under the

A powers conferred under the Amended provisions of TADA (1993) Section 20(A)(2) give permission to add Section 3, 4 & 5 of TADA.

A.R. TONDON
DIRECTOR GENERAL OF POLICE
AHMEDABAD
B GUJARAT"

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 C 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 D 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 atleast for a discussion with him.

E In such a situation, can it be said that the sanctioning authority granted sanction after applying his mind effectively and after reaching a satisfaction that it is necessary in public interest that prosecution should be launched against the accused under TADA. As the provisions of TADA are more rigorous and the penalty provided is more stringent and the F procedure for trial prescribed is summary and compendious, the sanctioning process mentioned in Section 20A(2) must have been adopted more seriously and exhaustively than the sanction contemplated in other penal statutes. One of us (Dr. Anand, J.) has explained in Hitendra Vishnu Thakur and Ors. v. *State of Maharashtra and Ors.*, [1994] 4 SCC 602, while dealing with sanction under Section 20A of TADA, that

G

> "The section was obviously introduced to safeguard a citizen from any vaxatious prosecution under TADA. Vide Section 20-A(2) of TADA no court can take cognizance of an offence under TADA unless there is a valid sanction accorded by this competent
H authority as prescribed by the section."

In *Anirudhsinhji Karansinhiji Jadeja and Anr.* v. *State of Gujarat*, [1995] 5 SCC 302, a three Judges Bench had looked at the broad principles governing sanction contemplated under TADA. The Bench noted in that case that for prosecution under TADA the State Government had provided two administrative instructions as additional safeguards against the drastic provisions of TADA wherein the DSP would require the consent of the State Government. When the consent relied on by the prosecution in that case was considered the three Judges Bench observed that it was given by the State Government without proper application of mind, even though the said consent was granted on the strength of "a quite exhaustive" letter addressed by the DSP. The following observations are pertinent :

> "Now, no doubt the message of the DSP is quite exhaustive, as would appear from that message which has been quoted above in full, we are inclined to think that before agreeing to the use of harsh provisions of TADA against the appellants, *the Government ought to have taken some steps to satisfy itself whether what had been stated by the DSP was borne out by the records*, which apparently had not been called for in the present case, as the sanction/consent was given post-haste on 18.3.1995, i.e., the very next day of the message of the DSP."
>
> (emphasis supplied)

If the consenting exercise even in respect of an administrative instruction was construed to be of such a meaningfull and serious matter it is needless to point out that sanctioning exercise under a statutory provision like Section 20A(2) would be no less.

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.R 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 Section 3, 4 and 5 of TADA*." Thus, what the Director General of police did was to grant *permission "to add Section 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

A 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
B 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 "care fully", the FIR and the letter of the DSP dated 9.8.1983. We*
C *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.

In view of the aforesaid legal and factual position we have no doubt
D 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
E be treated as sanction under Section 20A(2) of TADA.

Faced with this situation, learned counsel for the State of Gujarat contended that it is open to this Court to convict the accused under Section 25 of the Arms Act with the available evidence on record since the interdict contained in Section 20A(2) of the TADA has no application to the offence
F under the Arms Act.

The said contention cannot be accepted for obvious reasons. Trial in respect of the offence under Section 25 of the Arms Act was conducted by the Designated Court under the purported power conferred by Section 12
G of the TADA. The said Section read thus :

> Power of Designated Courts with respect to other offences - (1) When trying any offence, a Designated Court may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such
H other offence.

(2) If, in the course of any trial under this Act of any offence, it is found that the accused person has committed any other offence under this Act or any rule made thereunder or under any other law, the Designated Court may convict such person of such other offence and pass any sentence authorised by this Act or such rule or, as the case may be, such other law, for the punishment thereof.

A

B

It is obvious that power of the Designated Court to charge the accused with any offence other than TADA offences can be exercised only in a trial conducted for any offence under TADA. When trial for offence under TADA could not have been held by the Designated Court for want of valid sanction envisaged in Section 20-A(2) the consequence is that no valid trial could have been held by that court into any offence under the Arms Act also. It is clear that a Designated Court has no independent power to try any other offence. Therefore, no conviction under Section 25 of the Arms Act is possible on the materials collected by the Designated Court in the present case.

C

D

In view of the above legal position we have to record an order of acquittal of the accused. We, therefore, set aside the conviction and sentence passed on them and acquit them and direct them to be set at liberty forthwith unless they are required in any other case. Bail bonds executed by accused 4 shall stand discharged.

E

Learned counsel for the State of Gujarat submitted that we may clarify that acquittal of the accused on the above ground would not preclude the State from launching a prosecution afresh with valid sanction. We may observe that if the State Government considers the feasibility of launching any such fresh prosecution it would bear in mind the fact that first accused has remained in jail for all these years pursuant to the prosecution already launched against him and, therefore, whether it would be desireable to launch fresh prosecution.

F

Criminal Appeal No. 1909 of 1996 is thus, allowed and Criminal Appeal No. 162 of 1997 is dismissed.

G

P.T.

Crl. A. No. 1909/96 allowed.
Crl. A No. 162/97 dismissed.