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MOHAN SINGH
v.
STATE OF HARYANA.

MARCH 8, 1995

B

[G.N. RAY AND FAIZAN UDDIN, JJ.]

Terrorist and Disruptive Activities (Prevention) Act, 1985/Arms Act, 1959 :

C

Section 5/Section 25—Person alleged to be found in possession of revolver without licence—Apprehended in a public place viz. waiting Hall of Railway Station—convicted and sentenced by Designated Court—Public Witnesses though available but avoided to be joined/associated in search and seizure of weapon—Prosecution evidence highly discrepant creating serious doubt in prosecution case—Positive evidence of good antecedents of accused—Not a previous convict and never indulged in any subversive activities—Presumption under Section 5 TADA stands rebutted—Conviction and sentence set aside.

D

The appellant was found to be in possession of a revolver without licence at a railway station. He was charged with an offence under Section 25 of the Arms Act read with Section 5 of the Terrorist and Disruptive Activities Act, 1985 (TADA). The Designated Court convicted and sentenced the appellant for the said offence.

E

In appeal to this Court it was contended by the appellant that the trial Court did not properly appreciate the evidence and had accepted the evidence of highly interested witnesses; that when the alleged incident occurred in a public place on a railway platform where number of independent witnesses were available, only one witness that too a chance witness was examined; that the prosecution story suffered from various infirmities and that the defence evidence was rejected for which there was no reasonable ground.

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Allowing the appeal, this Court

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HELD : 1.1. According to the prosecution the investigation had taken place in the waiting hall of a Railway Station. PW6 the Head Constable

clearly deposed in cross examination that 10 to 30 persons were present in the waiting hall at that time. From the evidence of PW6 and PW 7 the Sub-Inspector, it is clear that the Railway Booking Office and the tea vendors stall were located near the place where the appellant was apprehended and searched. But no one from amongst the persons sitting in waiting hall or any one from the booking office or tea stall was joined as witness by the investigation in the search and seizure of the country made pistol said to have been recovered from the possession of the appellant. From the evidence of PW6 and PW 7 it does not appear that they made any effort whatsoever to call any public witness or railway officials working in the booking office while taking the search of the appellant and recovery of pistol in that process. No explanation is forth coming for not joining and independent witness. [614-C-E]

1.2. It is significant to note that the mobile sweet vendor, PW5 stated that he knew the Sub-Inspector PW7 since he was posted in Police Station, while PW7 denied this fact probably to show he was stranger to him so as to give the colour of credence to his evidence. According to the statement of PW.5 it took about one and a half hours in completing the investigation while according to the Police Officials PW6 and PW7 it took about four hours in completing the proceedings at the spot, which is difficult to appreciate and comprehend. According to PWs6 and 7 when they had gone to the railway station for purpose of checking, the appellant who was sitting on a bench in waiting hall, got up and started walking towards outside which raised a suspicion and, therefore, he was apprehended near the tea stall. However, PW5 deposed that the appellant was apprehended while he was sitting in the waiting hall itself. [614-H, 615-A-C]

1.3 According to the case diary statement made by PWs 5 and 6 the pistol was recovered from the right *pocket* of the pant of the appellant. But during the course of their evidence before the trial court they deposed that the pistol was recovered from the right dub of the pant. But the totality of the evidence discussed and collective discrepancies noticed do not inspire confidence and create a serious doubt in the prosecution case. Therefore it is difficult to sustain the conviction of the appellant for the alleged recovery and seizure of the pistol from his possession. [615-D].

2. There is no evidence to show that the appellant had ever acted in any manner indicating that he was indulging in terrorist or disruptive

A activity and the prosecution case rests entirely on the presumption that has to be drawn under Section 5 of TADA. But the positive evidence adduced by the appellant in defence goes to show that his antecedents are good enough and he bears a good moral character. He is also not a previous convict and that he has never indulged in any subversive activities. This evidence, probabalises the plea of defence and is good enough to rebut the presumption under Section 5 of TADA to the effect that the alleged possession of country made pistol was not meant for any terrorist or disruptive activity. [616-D-E]

Sanjay Dutt v. State [1994] 5 SCC 410, followed.

C 3. The conviction of the appellant under Section 5 of TADA read with Section 25 of Arms Act with sentences thereunder is set aside. [616-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 341 of 1988.

D From the Judgment and Order dated 18.4.88 of the Additional Judge Designated Court at Faridabad in T & D.A. (P) Act, Case No. 3 of 1988.

Rishi Kesh for the Appellant.

E Ms. Indu Malhotra for the Respondent.

The Judgment of the Court was delivered by

F FAIZAN UDDIN, J. 1. This appeal under Section 16 of the Terrorist & Disruptive Activities (Prevention) Act, 1985 has been directed against the judgment dated 15.4.1988 passed by the Additional Judge, Designated Court, Faridabad at Narnaul in T & DA (P) Act case No. 3/1988 whereby the appellant has been convicted under Section 25 of the Arms Act read with Section 5 of Terrorist and Disruptive Activities Act, 1985 (hereinafter referred to as TADA) and sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs. 1000, in default of payment of fine to undergo further Nigorous imprisonment for a period of six months.

H 2. The prosecution case was that on 25.10.1987 when Sub- Inspector, Baljit Singh, PW7 alongwith other police officials was on round for checking Railway Station they scootted the appellant sitting in the waiting hall of the railway station, Rewari and seeing Police party started walking which

raised suspicion. On personal search of the appellant one country made 12 bore pistol, Ext. P1 was recovered from the right side dub of his pant for which the appellant had no permit or licence. The said pistol was seized from the possession of the appellant. The Sub-Inspector Baljit Singh sent a rukka, Ext. FA to the Police Station, G.R.P.S. Rewari, which was received by ASI Virender Singh, PW1 on the basis of which he recorded formal F.I.R. Ext. FA/1. The said pistol was examined by the Armourer Head Constable, Chotu Ram, PW 4 and on testing the said pistol he found it to be in working order as per his report Ext. PE. After containing the sanction Ext. FD accorded by the District Magistrate, Narnaul the appellant was sent up for trial before the Designated Court. The appellant pleaded not guilty and claimed trial. In his statement recorded under Section 313.Cr. P.C. the appellant denied the allegation of recovery of the alleged pistol from his possession and stated that he was falsely implicated. The appellant examined Lal Singh, DW 1, a member of the Village Panchayat of his village and one Prithi, DW 2 as defence witnesses. The learned Trial Judge accepted the prosecution evidence and, therefore, convicted and sentenced the appellant as noticed above.

3. Learned counsel for the appellant submitted that there is no reliable evidence on record to support the conviction of the appellant yet learned Trial Judge has convicted the appellant without proper appreciation of the prosecution evidence by accepting the evidence of highly interested witnesses. He further submitted that though the incident is said to have occurred at a public place on a railway platform, Rewari where a number of independent public witnesses were available to be joined as witnesses for the search and recovery yet none of them were called to stand as witness and on the contrary one Hira Lal. PW 5 was examined as a witness for search and seizure who is nothing but a chance witness. Learned counsel for the appellant further submitted that the prosecution evidence suffers from various infirmities which rendered the prosecution story as wholly doubtful on which no conviction can legitimately be based. It was also contended that the learned Trial Judge conveniently ignored the defence evidence adduced by the appellant for which there is no reasonable ground to reject the same.

4. We have minutely scrutinised the prosecution evidence as well as the defence evidence on record as this is the first and the last appeal provided under the law and on such close scrutiny the evidence we find

A substance and much force in the aforementioned submissions made by the learned counsel for the appellant.

5. The prosecution case with regard to the search of the appellant and seizure of a country made pistol from the possession of the appellant rests on the evidence of Hira Lal, PW 5, Head Constable Desh Raj, PW 6 and Sub-Inspector, Baljit Singh, PW 7. The rest of the prosecution witnesses are formal in nature. PW 6 and PW 7 as said above are police officials being Head Constable and Sub-Inspector of Police respectively. Only Hira Lal, PW 5 is said to be an independent witness. According to the prosecution the investigation had taken place in the waiting hall of Rewari Railway Station, Head Constable, Desh Raj, PW 6 clearly deposed in cross examination that 10 to 20 persons were present in the waiting hall at that time. From the evidence of Desh Raj, PW 6 and Baljit Singh, Ex 7 it is clear that the Railway Booking Office and tea vendors stall were located near the place where the appellant was apprehended and searched. But no one from amongst the persons sitting in waiting hall or any one from the booking office or tea stall was joined as witness by the investigation in the search and seizure of the country made pistol said to have been recovered from the possession of the appellant. From the evidence of PW 6 and PW 7 it does not appear that they made any effort whatsoever to call any public witness or railway officials working in the booking office while taking the search of the appellant and recovery of pistol in that process. No explanation is forthcoming for not joining an independent witness. Baljit Singh, PW 7, however, preferred to pick up Hira Lal, PW 5 who is nothing but a mobile sweet vendor. According to the prosecution Hira Lal happened to be there when the appellant was apprehended at that particular time when search of his person was made and the country made pistol is said to have been recovered. In these facts and circumstances when the police officials deliberately avoided to join any public witness or railway officials though available at the time when the appellant was apprehended the evidence of Hira Lal who is nothing but a chance witness and the evidence of police officials PW 6 and PW 7 has to be closely scrutinised with certain amount of care and caution.

6. It is significant to note that the mobile sweet vendor, PW 5 stated that he knew the Sub-Inspector Baljit Singh since he was posted in Police Station. G.R.P. Rewari while Baljit Singh, PW 7 denied this fact probably to show he was stranger to him so as to give the colour of credence to his

evidence. According to the statement of Hira Lal, PW 5 it took about one and a half hour in completing the investigation while according to Head Constable, Desh Raj, PW 6 and Sub-Inspector, Baljit Singh, PW 7 it took about four hours in completing the proceedings at the spot. It is difficult to appreciate and the statement of Desh Raj, PW 6 and Baljit Singh, PW 7 as to how it took about four hours in completing the investigation. Further the statement of police officials PWs 6 and 7 goes to show that when they had gone to the railway station, Rewari for purpose of checking, the appellatant who was sitting on a bench in waiting hall, got up and started walking towards outside which raised a suspicion and, therefore, he was apprehended near the tea-stall while the mobile sweet vendor Hira Lal, PW 5 deposed that the appellatant was apprehended while he was sitting in the waiting hall himself. Not only this but according to the case diary statement made by Hira Lal, PW 5 and Head Constable, Desh Raj, PW 6, the pistol was recovered from the right *pocket* of the pant of the appellatant. But during the course of their evidence before the trial Court they deposed that the pistol was recovered from the right *dub* of the pant. This discrepancy though of a minor nature but the totality of the evidence discussed above and collective discrepancies noticed above do not inspire confidence and creates a serious doubt on the prosecution case. In view of such a discrepant evidence we find it difficult to sustain the conviction of the appellatant for the alleged recovery and seizure of the pistol from his possession.

7. Having regard to the evidence adduced by the appellatant in defence, further question arises whether provisions of Section 5 of TADA are attracted to the facts of the present case or not. In the case of *Sanjay Dutt v. State*, [1994 5 SCC 410], a Constitution Bench of this Court held that in order to attract Section 5 of TADA the accused must be in conscious 'possession, unauthorisedly in a notified area' of any of the specified arms or ammunition, and when these ingredients are found to exist the statutory presumption arise that the arms and ammunition, were meant to be used for a terrorist or disruptive act and on that basis alone conviction under Section 5 of TADA can be made and that such a presumption is *meccutackle* by the accused who has a right to prove non-existence of any fact essential to constitute an ingredient of section 6 such as the possession being not for any terrorist or disruptive activity. It has also been laid down that the burden of proof on the accused is of greater probability and not so heavy as it lies on the prosecution. In the present

A case the area where the appellant was apprehended is no doubt a notified area and if the seizure is accepted, the possession of the country made pistol without permit or licence would amount to unauthorised possession of an arm and, therefore, a presumption will arise that such possession of arm was meant to be used for terrorist or disruptive act unless rebutted and proved that such possession was not for any terrorist or disruptive activity. In the present case the appellant has adduced evidence by examining two witnesses in defence. DW1 is a member of Panchayat of village from which the appellant himself hails, who deposed that the appellant is known to him who has a good moral character and is not a previous convict. He also stated that on the day of the alleged occurrence the appellant was going to one Prithi of village Chapper. DW 2 a resident of village Chapper also deposed that the appellant is known to him for the last 20 years and further stated that the father of the appellant had asked him to manage some job for the appellant and that on the day of the alleged occurrence the appellant was coming to him when he was involved in the present case. This evidence adduced in defence stands unshaken. There is no evidence to show that the appellant had ever acted in any manner indicating that he was indulging in terrorist or disruptive activity and the prosecution case rests entirely on the presumption that has to be drawn under Section 5 of TADA. But the positive evidence adduced by the appellant in defence goes to show that his antecedents are good enough and he bears a good moral character. He is also not a previous convict and that he has never indulged in any subversive activities. This evidence, in our opinion, probabilities the plea of defence and is good enough to rebut the presumption under Section 5, TADA to the effect that the alleged possession of country made pistol was not meant for any terrorist or disruptive activity. But since we find that the prosecution evidence does not inspire confidence with regard to the recovery and seizure of alleged pistol from the possession of the appellant, the application of Section 5 TADA and conviction thereunder does not arise.

8. For the reasons stated above the appeal is hereby allowed. The conviction of the appellant under Section 5, TADA read with Section 25 of Arms Act with sentences thereunder is set aside. The appellant is on bail. His bail-bonds are cancelled.