
(1992) 06 BOM CK 0053

In the Bombay High Court

Case No : Criminal Writ Petition No. 223 with 694 of 1992

Santosh Dattaram More and other

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 20-06-1992

Acts Referred:

Arms Act, 1959 — Section 25, 27, 4, 5
Constitution of India, 1950 — Article 226
Penal Code, 1860 (IPC) — Section 147, 148, 149, 307, 324
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 12, 18, 3, 5, 6

Citation : (1992) 3 BomCR 292 : (1992) 94 BOMLR 547 : (1992) CriLJ 3409 :
(1992) 2 MhLj 1163

Hon'ble Judges : W.M. Sambre, J;S.P. Kurdukar, J

Bench : Division Bench

Advocate : B.B. Bahal, S.G. Samant and Miss Poonam Maria, for the Appellant;
R.F. Lambay, Assistant Public Prosecutor, for the Respondent

Judgement

Kurdukar, J.—Both these petitions under Article 226 of the Constitution of India can be disposed of by this common judgment since they arise out of a common judgment dated December 20, 1991 in Discharge Application No. 171 of 1991 in ADA R.A. No. 52 of 1991. Both the petitioners are challenging legality and correctness of the impugned order. Impugned order is at Exhibit A to the compilation. Compilation. Compilation taken on record.

2. Pursuant to a complaint dated 31st January 1991 filed by Jayantilal Nanji of M/s. Dedhia Jewellers, at Matunga Police Station, Bombay, Crime No. 113 of 1991 came to be registered against the 6 unknown and unidentified persons for offense punishable u/s 395 of the Indian Penal Code read with section 25(3) of the Arms Act. Pursuant to this complaint, investigation commenced and statements of various witnesses came to be recorded. During investigation, suspected accused were also arrested which include the present petitioners. Chargesheet also came to be filed by the investigating officer in respect of the incident dated 31st January 1991 in which the petitioner in Criminal Writ Petition

No. 223 of 1991 is shown as Accused No. 4 whereas applicant in Criminal Application No. 694 of 1992 is shown as Accused No. 5. Both these petitioners will be hereinafter referred to as Accused Nos. 4 and 5 respectively.

3. In the complaint lodged with the Matunga Police Station it was alleged that on 31-3-91 at about 16.30 Hrs. in a business premises known as Dedhia Jewellers, Laxminarayan Lane, Matunga, Bombay-19, a dacoity was committed by 6 unknown persons of the age group of 25 to 30 years. These 6 persons entered the shop premises, 5 persons were having deadly weapons like chopper in their hands and one person was having revolver. At the point of these deadly weapons, these 6 accused ransacked the business premises of Dedhia Jewellers and thereby committed an offence punishable u/s 395 of the I.P.C. read with section 25(3) of the Arms Act. In this incident, the accused are alleged to have ransacked the gold ornaments and cash worth Rs. 58,64,000/-. Details of ornaments and cash amount were also furnished in the complaint. The Matunga Police Station registered the case being C.R. No. 113/91. During investigation suspected accused came to be arrested and as stated earlier, petitioner in writ petition No. 223/92 is accused No. 4 whereas Applicant in Criminal Application No. 694 of 1992 is accused No. 5. During the investigation, property which is subject matter of dacoity was also recovered at the instance of various suspected accused persons. In the proceeding before us, we are concerned, with Accused Nos. 4 and 5. Charge sheet submitted by the police in Court relating to these accused persons reads as under :

"THAT THE accused No. 1 to 3 and six absconding accused on the day of 31st January 1991 between 15.20 Hrs. and 15.33 Hrs. at Dedhia Jewellers Laxminarayan Lane, Matunga, Bombay-19 committed dacoity in respect of 17 Kgs. of gold ornaments and cash or Rs. 15,83,500/- by using fire arm and choppers and thereby committed an offence punishable u/s 395 IPC.

SECONDLY that the accused Nos. 1, 2, 3 and six other absconding accused on the aforesaid day and aforesaid time did commit dacoity in respect of aforesaid ornaments and cash by using deadly weapons to wit firearm and chopper. Out of them two choppers were recovered, and did and abet one another for committing the offence and thereby committed an offence punishable u/s 397 of IPC.

THIRDLY that the accuse Nos. 1, 2, 3 and six absconding accused on the aforesaid date and time aforesaid place did commit dacoity in respect of gold ornaments and cash by using deadly weapons to wit fire arm (not recovered) and choppers (out of that two choppers were recovered) and did and abet one another for committing the offence and thereby committed an offence punishable u/s 398, 34 IPC.

FOURTHLY that the accused Nos. 4 & 5 between 31st January 1991 and 19th March 1991 dishonestly received/retained stolen property to wit gold and gold ornaments belonging to Dedhia Jewellers knowingly or having reason to believe that the possession of the same had been transferred by the commission of

dacoity thereby committed an offence punishable u/s 412 IPC.

FIFTHLY that the accused Nos. 4 & 5 between 31st January 1991 and 19th March 1991 voluntarily assisted in concealing and or disposing of property to wit gold and gold ornaments which accused knew or had reason to believe to be stolen property and thereby committed an offence punishable u/s 414 IPC.

SIXTHLY that the accused Nos. 1, 2, 3 and six absconding accused of their common intention on the aforesaid day and aforesaid time and place during the course of same transaction used firm arm (not recovered) to wit revolver in contravention of section 5(1)(a) of the Arms Act and thereby committed an offence punishable u/s 27(1) of Arms Act r/w 34 IPC.

SEVENTHLY that in furtherance of their common intention accused Nos. 1, 2, 3 and absconding accused on the aforesaid day and at the aforesaid time and place being the members of dacoit (sic) and during the course of same transaction acquired and was in their possession of choppers more the 9" long and thereby committed an offence punishable u/s 25(1B) r/w 4 of the Arms Act.

EIGHTHLY that in furtherance of their common intention accused Nos. 1 to 3 and six absconding accused on the aforesaid date and aforesaid place being the members of dacoit (sic) and during the course of same transaction with intent to strike terror in the people did certain act as mentioned in the aforesaid charge by using fire arm and lethal weapons to wit revolver and choppers in such a manner as to cause fear in the minds of complainants witnesses, and residents of Matunga at the time of committing dacoity and co-jointly committed terrorist act and in particular accused Nos. 4 & 5 financially aided and abetted the offence and actually helped in disposing the property concerned in commission of dacoity and accused Nos. 1, 2 and 3 along with the absconding accused being the actual participants in commission of dacoity and accused Nos. 4 & 5 being the abettor and abiders have committed the terrorist act and thereby all the accused committed and offence u/s 3(2) and (3) of Terrorist and Disruptive Activities (Prevention) Act, 1987."

Originally, the suspected accused persons including the Accused Nos. 4 and 5 were produced before the Metropolitan Magistrate, 30th Court, Kurla, Bombay and they were remanded from time to time. Accused No. 4 made an application to the learned Magistrate on 18-3-1991 for releasing him on bail. However, before the bail order could be passed, Matunga Police station applied provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "TADA"), and as a result thereof, the suspected accused including the present petitioners were produced before the Designated Court on 22-3-1991. The learned Judge of the Designated Court took cognizance of the offence and remanded the suspected accused from time to time. Accused No. 4 then filed an application u/s 18 of the Act praying for discharge under sections 3 and 5 of the TADA. He further prayed that the case be transferred to regular Court for trial.

3.1 Accused No. 5 on 21-4-1991, filed application for discharge and bail before the learned Judge of the Designated Court, Bombay, praying for discharge under sections 3 and 5 of the TADA. Two more applications were also filed by Accused Nos. 1 and 2 respectively. All these applications were heard together by the Judge of the Designated Court and vide his impugned order he rejected application of Accused Nos. 1 & 2. As far as application for discharge and bail filed by Accused Nos. 4 and 5 are concerned, the learned Judge did discharge them under TADA, but however, in para 33 of the order he observed as under :-

"Therefore, I see no difficulty in passing the order in favour of the T/Accused Nos. 4 and 5 in view of the Ld. P.P. not bringing on record and satisfying this Court from the material that, prima facie, there is any charge made out by him against the Terrorist Accused Nos. 4 & 5. It can be seen that the Ld. P.P. according to me and my opinion has conceded in favour of the T/Accused No. 4 & 5 as they absent on the scene of offence on the day, time and place and it can also be seen in the instant case that the T/Accused Nos. 4 was given the melted gold bars by the T/Accused Nos. 1, 2 and 3 for the purpose of disposing of the same. It can also be seen that the T/Accused No. 5 had purchased the same from T/Accused No. 4. However, after evaluating the material on record prima facie, there appears to be charge against T/Accused Nos. 4 & 5, under I.P.C. It can be seen that the T/Accused No. 4 has accepted the property from T/Accused No. 1 to 3 and has taken for disposal and accordingly approached to T/Accused No. 5 for selling the same. Therefore there is charge against the T/Accused Nos. 4 and 5 under IPC made out from the material on the record and at the time of trial to show the link with the T/Accused Nos. 1, 2 & 3, in my opinion, it would be better that their case should not be ordered to be transferred to the regular Court. I, therefore, proceed to pass the following order"

The learned Judge discharged Accused Nos. 4 and 5 under TADA and ordered to release them on bail in the sum of Rs. 1,00,000/- with one surety in like amount. The learned Judge of the Designated Court also directed Accused Nos. 4 and 5 to report to Matunga Police Station between 6 p.m. and 8 p.m. every day, till disposal of the case.

The net result of the above finding and order is that Accused Nos. 4 and 5 came to be discharged under TADA and were directed to be released on bail as indicated in the order.

4. We have already reproduced the charge-sheet which was submitted by the police in this case. As far as Accused Nos. 4 and 5 are concerned, material charges are set out in "Fourthly" and "Fifthly". The other charges do not relate to Accused Nos. 4 and 5.

5. Mr. Bahal, learned Advocate appearing for the petitioners humanly urged that once the Designated Court comes to the conclusion that provisions of TADA are not applicable to Accused Nos. 4 and 5, the only course left open to him was to transfer the cases of Accused Nos. 4 and 5 to the competent Court for trial.

Counsel urged that the Designated Court has no jurisdiction to try cases of Accused Nos. 4 and 5 in the court constituted under TADA. Mr. Bahal, therefore, urged that as far as order of release of accused No. 4 is concerned, the only appropriate course would have been to transfer Accused No. 4's case to the regular Court for trial of offences i.e. "Fourthly" and "Fifthly" in the charge sheet.

6. Mr. Samant, appearing for Accused No. 5 adopted the same arguments and urged that the bail amount ordered by the learned trial Judge is too excessive and the same should be reduced to appropriate amount.

6.1 Mr. Lambay, learned Assistant Public Prosecutor appearing for the State of Maharashtra, however, urged that the course adopted by the learned trial Judge to hold trial of Accused Nos. 4 and 5 along with other accused in the Designated Court is perfectly legal and valid and the said course is also supported by Section 12 of TADA. Mr. Lambay urged that no fault whatsoever could be found against the impugned order. Writ petition as well as Criminal Application have no substance and the same be rejected.

7. It is not the claim of Mr. Lambay that the State of Maharashtra has gone in appeal to higher Court challenging the order of discharge of Accused Nos. 4 and 5 under TADA. Result, therefore, is that as on today, accused Nos. 4 and 5 stood discharged under TADA. As per charge sheet, as on today, they are triable for offences punishable under sections 412 and 414 of the IPC. At this stage, we may make a reference to the charge "EIGHTHLY" wherein accused Nos. 4 and 5 are tried to be roped in with the aid of section 3(2) and (3) of the TADA. Since Accused Nos. 4 and 5 were discharged, under the provisions of TADA, obviously, charge "EIGHTHLY" will not survive against accused Nos. 4 and 5. Net result, therefore, is that Accused Nos. 4 and 5 will be tried only for the offences punishable u/s 412 (Fourthly) and u/s 414 (Fifthly).

8. Mr. Bahal urged that section 12 of the TADA will have no application to the facts of the present case. According to Mr. Bahal, the key word in section 12 refers to an offence and not offender. In order to appreciate this contention, we may reproduce section 12 of the TADA which reads as under 2.

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

If section 12 is analysed, carefully, it is clear to us that when the Designated Court is trying any offence it may also try any other offence with which accused

is charged under the Code at the same trial, if offence is connected with such other offence. It is, therefore, clear that the Designated Court may have a jurisdiction to try any other offence in respect of the accused in its court provided that other offences are connected with such other offence under TADA. In the present case, since Accused Nos. 4 and 5 have been discharged under TADA the offences alleged to have been committed by Accused Nos. 4 and 5 under sections 412 and 414 of the I.P.C. cannot be tried along with other accused Nos. 1 to 3 whose offences were being tried by the Designated Court. On the basis of the charge-sheet, Mr. Bahal submitted that here offenders as well as offences of Accused Nos. 4 and 5 are distinct qua the other accused and, therefore, Accused Nos. 4 and 5 cannot be tried along with other accused whose offences fall under TADA and being triable by the Designated Court. Mr. Bahal in support of this submission drew our attention to a decision of the Supreme Court in *Niranjan Singh Karam Singh Punjabi and Others Vs. Jitendra Bhimraj Bijja and others*, . In this reported decision the question that fell for consideration before the Supreme Court was whether provisions of TADA were applicable to the facts of the case. While holding that provisions of TADA did not apply to the facts and circumstances of the case, the Supreme Court in para 12 held as under :

"Once the Designated Court came to the conclusion that the evidence was not sufficient to frame a charge u/s 3(1) of the Act, the Designated Court had no alternative but to resort to section 18 and transfer the cases to the competent Court under the Code. We therefore, do not see any merit in the contention of the learned counsel for the State of Maharashtra that even after the Designated Court came to the conclusion that no ground was made out u/s 3(2) of the Act, it was duty bound by virtue of section 12(1) of the Act to proceed with the trial for the other offences under the Penal Code and the Bombay Police Act. We think that the course adopted by the Designated Court in transferring the case to the Sessions Court is clearly in keeping with section 18 of the Act."

It is true that the Supreme Court in this case transferred the criminal case to regular Criminal Court u/s 18 of the TADA. That was because, the Supreme Court came to the conclusion that provisions of Section 3(1) of TADA have no application to the facts of that case. This decision, in our opinion, supports the contention raised on behalf of the petitioner. Mr. Bahal then drew our attention to another decision of this Court in *Rafiq Abid Patel and others etc. Vs. The Inspector of Police, Kashimira Police Station, Thane and another*, . In this reported decision also, crime was registered against the petitioners along with one Asif Patel. Asif Patel alone had a revolver in his hand whereas petitioners were armed with stones, soda water bottles and other weapons. It was the case registered under sections 307, 341, 147, 148, 149 324, 336 and 427 of the Indian Penal Code and sections 25(1)(a) and 27 of the Arms Act. The Circle Police Inspector, Kashimira Camp, informed the TADA Court that provisions of sections 3 and 5 of the TADA have been applied to all the accused in the said case. While construing the scope and ambit of section 5 of the TADA, the Court held that having regard to the phraseology used in section 5 of the TADA, the

said provisions cannot be made applicable to the petitioners. The Division Bench of this Court accordingly quashed the application of provisions of sections 3, 5 and 6 of the TADA. The police officers were restrained from carrying out any investigation against the petitioners under sections 3, 5 and 6 of TADA. It is true that in this case provisions of Section 12 of the TADA were not considered because question of transferring case it appears, did not arise. From paragraph 16 of the said judgment it appears, to us, that investigation was under progress at that stage and, therefore, question of considering Section 12 did not arise. The decision of this Court in Rafiq Patel (supra) lays down that if provisions of TADA do not apply, then investigation under the said provisions cannot be carried out.

9. Mr. Lambay, learned Assistant Public Prosecutor however, urged that all offences connected with C.R. No. 113/91 can be tried together in a Designated Court under the TADA with the aid of section 12 of the Act. The Designated Court has been empowered to try any other offences of which offender accused was charged if such offences are connected with such other offence for which Accused Nos. 1 to 3 are being tried under TADA. Mr. Lambay also urged that role of Accused Nos. 4 and 5 for which they have been charged, is so intimately connected that separate trial as regards their offences by another Court would be inappropriate and contrary to section 12 of the TADA. We are unable to agree with this submission and we have already indicated that in section 12 emphasis is on "trying any offence". The Designated Court which is trying any offence under TADA may try any other offence with which accused whose offence is being tried by the Designated Court, if charged with the offences connected with offence under TADA, may club together and try such offences. The position in the present case is altogether different because order of discharge has been passed by the trial judge. Moment accused Nos. 4 and 5 were discharged under TADA, then their trial by the Designated Court would be without jurisdiction. Section 12 would not be attracted to try Accused Nos. 4 and 5 along with other accused in a Designated Court.

10. Mr. Lambay, then urged that if separate trial is ordered, it will lead not only to multiplicity of proceeding but it will also lead to production and examination of the witnesses over and again and that will be sheer waste of time, money and energy, in addition to likelihood of inconsistent orders. This argument clearly overlooks certain other provisions contained in TADA. Accused Nos. 4 and 5 if allowed to be tried along with other TADA accused by the Designated Court, great prejudice would be caused to the accused before us. In our opinion, viewed from any angle, trial of Accused Nos. 4 and 5 who have been discharged by the Designated Court under TADA will be without jurisdiction and, therefore, u/s 18 of the TADA, the case of Accused Nos. 4 and 5 will have to be transferred to the Competent Court for trial.

11. The impugned order to the extent of holding trial of Accused Nos. 4 and 5 by the Designated Court is unsustainable and the same is accordingly quashed and

set aside, and the Designated Court is directed to transfer the cases of Accused Nos. 4 and 5 to the appropriate Court for disposal in accordance with law.

12. Necessary consequence of this order is that the bail orders passed by the learned Designated Court of Accused Nos. 4 and 5 also become without jurisdiction and will have to be vacated. We are told that accused No. 5 has availed the bail in terms of the order passed by the Competent Court. Accused No. 4 was unable to furnish surety or cash deposit and as a result thereof he could not avail the bail facility. Having regard to the facts and circumstances of the case, we continue operation of this impugned order for a period of four months. The Designated Court will transfer cases of accused Nos. 4 and 5 under S. 18 of TADA to appropriate Court within two weeks from the date of receipt of the writ from this Court. It would be open to the learned advocate for the accused Nos. 4 and 5 to obtain certified copy of this order and move Competent Court for desired reliefs. On transfer of cases of accused Nos. 4 and 5 to the appropriate Court under S. 18 of the TADA, accused Nos. 4 and 5 are permitted to renew their application for bail. If such applications are made by accused Nos. 4 and 5, the same shall be dealt with by the trial Judge on top priority and preferable the same may be disposed of within two weeks since the accused No. 4 has been in jail for the last about 18 months. We may make it clear that the learned Judge who will hear the proposed applications for bail, will not be influenced by the fact that the Designated Court has granted bail to accused Nos. 4 and 5 in the sum of Rs. 1,00,000/- or cash deposit of Rs. 1,00,000/-. It would be open to the learned trial Judge to consider the amount of bail in accordance with law and pass appropriate orders.

In the result, rule in Writ Petition No. 223/92 is made absolute in terms of prayer (a) and rule in Criminal Application No. 694/92 is made absolute in terms of prayer (c).

13. Order accordingly.