

(2001) 02 SC CK 0040

In the Supreme Court Of India

Case No : Criminal Appeal No. 951 of 2000 , 1036 of 2000

Vijay Pal Singh

APPELLANT

Vs

State, N.C.T. of Delhi
Ashok Kumar Vs State of Delhi

RESPONDENT

Date of Decision : 01-02-2001

Acts Referred:

Penal Code, 1860 (IPC) — Section 300

Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 5

Citation : (2001) 2 ACR 1246 : AIR 2001 SC 2405 : (2001) AIRSCW 2444 :
(2001) 2 ALD(Cri) 56 : (2001) CriLJ 3294 : (2001) 4 JT 377 : (2001) 4 Supreme
401

Hon'ble Judges : R. P. Sethi, J;K. T. Thomas, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. These appeals have been filed by two persons, namely, Ashok Kumar and Vijay Pal Singh, who were convicted of two different offences in one trial held by a Designated Judge under the provisions of Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA). As appeals lie directly to this Court u/s 19 of the TADA we heard learned counsel for the appellants as well as learned counsel for the State in extenso. There were five accused arraigned before the Designated Court to face a charge for the offences u/s 302 read with Sections 34 and 212 of the Indian Penal Code besides Section 5 of TADA and some other Sections of the Arms Act. The Designated Judge convicted first accused Ashok Kumar who is appellant in one of the appeals for the offence u/s 302 IPC as well as Section 5 of TADA. On the first count he was awarded imprisonment for life while on the second count rigorous imprisonment for five years was awarded as sentence. The fourth accused who is appellant in the other appeal was convicted of Section 5 of TADA alone. He too was sentenced to undergo rigorous imprisonment for five years.

2. The case relates to the murder of one Shyam Sunder @ Billa. It happened at around 9.00 p.m. on 9-9-1990 on the busy street at Jhangir Puri in Delhi

deceased was shot dead by an armed assailant. Thus far we did not find any dispute between the prosecution and the defence.

3. The prosecution case runs thus: Appellant-Ashok Kumar and deceased-Shayam Sunder were friends initially, but at the instance of deceased's mother (PW 7-Sulochna) their friendship became separated. Ashok Kumar again tried to enlist the friendship of deceased but that was again dissuaded by PW7 and it resulted in burgeoning of enmity in the mind of Ashok Kumar towards the deceased. Added to this another incident happened. A lady was put in possession of a plot at the instance of Ashok Kumar but she was evacuated therefrom at the instance of deceased-Shayam Sunder. One or two days prior to the murder, appellant- Ashok Kumar visited the house of the deceased and there was a brawl between the deceased and himself. It was at the behest of the mother of deceased that they were separated and Ashok Kumar left the place in huff after giving a threat that deceased would be dealt with properly which would leave its impact for seven generations.

4. At the time of occurrence deceased Shyam Sunder was either on his way to his friend or was returning from the friend's house as he already informed his mother that he was proceeding to meet that friend. The assailants surrounded the deceased at a place which is said to be in front of house No. 1502, block B of Jhangir Puri. Delhi.

5. Ashok Kumar whipped out a revolver and shot at the deceased which injured fatally the deceased on the chest and the abdomen and the shots became fatal. He was immediately taken to a nearby Nursing Home but the people at the Nursing Home were not inclined to admit him for their own reasons and hence he was taken to a government hospital. But the doctors who examined him pronounced him dead.

6. A First Information Report was recorded from the mother of the deceased who claimed to have witnessed the occurrence. The statement was recorded at 11.35p.m. at the government hospital. After completing the investigation the charge-sheet was laid before the Designated Court.

7. While dealing with the appeal of appellant Ashok Kumar we have to focus only on two items of evidence. They are, the testimony of PW2 (Rajinder Kumar) and the testimony of PW7 (Sulochana). One more eye witness was examined by the prosecution (PW10- Anil Kumar) but he did not support the prosecution version and hence was treated as hostile. Yet one more person was cited by the prosecution as an eye witness (Murli), but he was not examined and we have noticed from the trial court's judgment that the Public Prosecutor reported that Murli was untraceable during trial.

8. Evidence of PW2 and his mother PW7 can be considered together as they lived together in the same house and they set out together and returned together, if their version is believable. Both of them said that Shyam Sundar wanted to visit his friend and hence he proceeded to that place and since he was not found even

after some time the mother and the brother became panicky and therefore both of them went out in search of Shyam Sunder. As they reached the place of occurrence they found that Shyam Sunder was encircled by a number of persons including the four persons arraigned in the case. It was then that appellant Ashok Kumar opened the revolver at the deceased.

9. The narration in the chief examination gave all the sequences of occurrence after the point of their reaching the place. Mr. B.S. Jain, learned counsel for the appellant (Ashok Kumar) contended that these two witnesses would not have seen the occurrence at all, as in all probabilities they would have reached the scene of occurrence only after being told about the occurrence. He made a strenuous bid with the help (of) certain answers elicited in the cross-examination as well as some other circumstances that PW2 and PW7 would not have been present at the scene at the time of occurrence. We will deal with those aspects now.

10. Learned counsel invited our attention to the testimony of PW6, a sub-inspector who reached the place of occurrence on hearing the news of the incident and he said that by the time he reached, the deceased was already taken to the Nursing Home. PW6 said that he saw PW2 and PW7 on the street. This would have been fatal to the prosecution, but we found from the remaining evidence that the two witnesses reached there again in the same vehicle in which the injured was taken to the Nursing Home. It is quite possible that PW6 would have reached the scene when those two witnesses had returned to the scene from the Nursing Home.

11. Learned counsel then invited our attention to the answer elicited in the cross-examination of PW7 that she tried to ask the deceased "as to how all it happened". This too, no doubt, we thought at the first blush to be a point which could have been useful to the defence to contend that PW7 would not have seen the occurrence. But on a deeper analysis we found that PW7 having reached the place of occurrence had seen her son already in a dangerous position being surrounded by a number of persons and the mother wanted to know from her son as to how the scene developed till then or what transpired prior her reaching the place of occurrence. Hence, the said answer cannot be treated as fatally affecting the testimony of PW2 and PW7.

12. Another contention raised by the learned counsel is that as PW2-Rajinder Kumar was a disabled person (his leg was fractured prior to the incident) it was not normal that he would have tottered upto the place in that disabled condition. PW2 said that he had crutches and with its help he reached the place of occurrence. If he could reach the place of occurrence after occurrence we do not find any reason why he could not reach there before the occurrence merely because he had a fractured leg.

13. The next point highlighted by the learned counsel was that the occurrence happened on a busy street and many other persons would witness it but none

else was examined. Such an argument is available in every case. Investigating officer said that when he questioned many persons in the surrounding places none of them agreed to have seen the occurrence. That apart, we are not concerned by those witnesses who were examined as eye witnesses present at the occurrence. Non-examination of others, in this case, does not matter much.

14. Lastly, learned counsel contended that the conduct exhibited by PW2 and PW7 is not natural and their version does not fit in with the natural conduct of the kith and kin of the deceased. He submitted that the mother did not raise a hue and cry when she found that her son was shot at or at least when she apprehended that the assailant was about to shoot her son. Time and again this court said that no fixed pattern of natural conduct can be laid down as different witnesses would react in different manner in the same situation vide *Rana Partap and Others Vs. State of Haryana*, .

15. After evaluating the evidence of PW2 and PW7 from different angles projected by Mr. B.S. Jain, learned counsel for the appellant (Ashok Kumar) we are unable to dissent from the finding on fact made by the learned Designated Judge in regard to the complicity of that appellant.

16. Now, we have to consider whether appellant-Vijay Pal Singh is liable to be convicted either u/s 5 of TADA or for any other offence. The only allegation against him is that he is found in possession of the revolver which Ashok Kumar used in murdering the deceased. There are two items of evidence adduced by the prosecution as against Vijay Pal Singh. First is, appellant-Ashok Kumar when arrested and interrogated by PW20, told him that the revolver was given to the house of A4-Vijay Pal Singh. Second is, when PW20, Inspector accompanied by some other police officers including PW9 went to the house of appellant Vijay Pal Singh he handed over a polythene bag and when the polythene bag was opened it contained two pieces of blood stained clothes and one revolver. If the above two items of evidence alone were available for the prosecution the appellant Vijay Pal Singh can justifiably contend that he did not know the contents of the polythene bag which was handed over to him by his boss Ashok Kumar. To obviate the said difficulty Shri Ashok Bhan, learned counsel for the respondent-State invited our attention to the evidence of PW9 who said that polythene bag contained only two pieces of cloths and the revolver was a separate article. PW9 cannot be permitted to make any improvement upon the evidence of PW20 who is the author of the recovery. In other words if there is discrepancy between the versions of PW20 and PW9 the benefit of that discrepancy cannot be extended to the prosecution. We are inclined to accept the evidence of PW20 on that score. At any rate there is an area of reasonable doubt as to whether Vijay Pal Singh had only the polythene bag with him without knowing the entire contents therein. The benefit of said doubt is available to him.

17. In the result we confirm the conviction and sentence passed on appellant Ashok Kumar and dismiss his appeal. But we set aside the conviction and sentence passed on Vijay Pal Singh and allow his appeal. We order appellant

Vijay Pal Singh to be set at liberty forthwith unless he is required in any other case. The fine imposed on him, if realised, shall be refunded to him.