# Sanjay Dutt vs State Through C.B.I. Bombay on 9 September, 1994

## Bench: A.M. Ahmadi, J.S. Verma, P.B. Sawant, B.P. Jeevan Reddy, N.P. Singh

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           CASE NO.:
Special Leave Petition (crl.)  1834-35 of 1994

PETITIONER:
SANJAY DUTT

RESPONDENT:
STATE THROUGH C.B.I. BOMBAY

DATE OF JUDGMENT: 09/09/1994

BENCH:
A.M. AHMADI & J.S. VERMA & P.B. SAWANT & B.P. JEEVAN REDDY & N.P. SINGH

JUDGMENT:
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JUDGMENT 1994 ( 3 ) Suppl. SCR 263 The Judgment of the Court was delivered by J.S. VERMA, J. By an order dated 18.8.1994 made in these special leave petitions by the Division Bench (B.P. Jeevan Reddy and N.P. Singh, JJ.), these matters relating to grant of bail to the petitioner, an accused in the Bombay blasts' case being tried by the Designated Court for Greater Bombay, have been referred for decision by a Constitution Bench since certain questions involved in these special leave petitions arise in respect of a large number of persons accused of offences punishable under the Terrorist and Disruptive Activities (Prevention) Act. 1987 (hereinafter referred to as 'the TADA Act'). This is how these matters have come up for decision by this Bench. At the commencement of hearing before us, we had indicated that this Bench would decide only the questions of law involved in the case as indicated in the order of reference and then send back these matters to the appropriate Division Bench for decision on merits in accordance with the answers we give to the questions of law. Accordingly, only those facts which are material for appreciating the questions of law which are being decided by us require mention in this order.

The questions of law indicated in the said order of reference, to be decided by us, are three, namely -

(1) The proper construction of Section 5 of the TADA Act indicating the ingredients of the offence punishable thereunder and the ambit of the defence available to a person accused of that offence ;

(2) The proper construction of clause (bb) of sub- section (4) of Section 20 of the TADA Act indicating the nature of right of an accused to be released on bail thereunder, on the default to complete investigation within the time allowed therein; and (3) The proper construction and ambit of sub-section (8) of Section 20 of the TADA Act indicating the scope for bail thereunder.

The only material facts for answering the above question are these: The petitioner is one of the several accused persons in case No. 1 of 1993 being trial in the Designated Court for Greater Bombay in connection with the bomb blasts which took place in Bombay on 12.3.1993 killing a large number of person and causing huge destruction of property. The case of the prosecution against the petitioner, set out in the charge-sheet, is that on 16.1.1993 he "knowingly and intentionally procured from accused Anees Ibrahim Kaskar through Sameer Ahmad Hingora, Hanif Kadawala, Baba @ Ibrahim Musa Chouhan, Abu Salem Abdul, Qayoob Ansari and Man-zoor Ahmed Sayed Ahmed 3 AK-56 rifles, 25 hand grenades and one 9 mm. Pistol and cartridges for the purpose of committing terrorist acts. By keeping the AK-56 rifles, hand grenades, pistol and cartridges' in his possession willingly, accused Sanjay Dutt facilitated these objectives. Some parts of the rifle, the 9 mm. pistol and 53 rounds of live cartridges were recovered during the course of investigation. Accused Yusuf Mohsin Nullwaal, Kesri Bapuji Adenia, Rusi Framrose Mulla, Ajay Yashprakash Marwah, caused wilful destruction of evidence namely 1 AK-56 rifle, one 9 mm. pistol, and cartridges by deliberately removing them from the house of accused Sanjay Dutt, at his instance, with the intention to protect the offender i.e. Sanjay Dutt from legal consequences and therefore, they are also guilty of the offence u/s 201 IPC". The charge against the petitioner is of several offence including those under the TADA Act, of which Section 5 thereof is one, Reliance is placed by the prosecution on the testimony of certain witnesses, some incriminat-ing circumstances and an unretracted confession by the petitioner himself. In the said confession, which has remained unretracted, the petitioner admitted receiving three AK-56 rifles on 16.1.1993 along with ammunition from the aforesaid persons adding that two days later he returned two of them but retained only one for the purpose of self-defence. The petitioner further stated that in view of the tense communal situation as a result of the incident at Ayodhya on 5.12.1992 and the serious threats given to petitioner's father Sunil Dutta then a Member of Parliament, for his active role in steps taken to restore communal harmony and serious threats to petitioners' sisters also, all of whom were residing together, the petitioner agreed to obtain and keep one AK-56 rifle with ammunition for protection of him family without the knowledge of his father. In short, the petitioner's statement is that his possession of one AK-56 rifle with am-munition was in these circumstances for self defence on account of the serious threats to the members of his family, unrelated to any terrorist activity and, therefore, mere unauthorised possession of the weapons and ammunition by him in these circumstances cannot constitute an offence under Section 5 of the TADA Act. and has to be dealt with only under the Arms Act, 1959. The petitioner claims to be released on bail on this basis and places reliance on certain other facts pertaining to his conduct to support his assertion that his action in unconnected with any terrorist or disruptive activity. It is unnecessary here to refer to any other facts which may be material only for the purpose of considering the case of petitioner on the merits for grant of bail. The Designated Court has refused bail to the petitioner. These special leave petitions are against the order of the Designated Court, in substance, for grant of bail to the petitioner.

On these facts, the aforesaid questions of law arise for determination by us. These questions arise in a large number of cases of persons accused of offences punishable under the TADA Act and detained for that reason. It is the general importance of these questions, numerous cases in which they arise and the frequency of their occurrence during the life of the TADA Act which has occasioned this reference. questions. It is also urged that the principle enunciated by the Division Bench in Hitendra Vishnu Thakur & Ors. v. State of Mahrashtra & Ors, JT (4) SC 255 = [1994] 4 SCC 602, read in the

context of the final order made therein, raises some ambiguity about the true meaning and effect of Section 20(4) (bb) of the TADA Act which requires that controversy also to be settled. We shall now deal with these questions.

The Terrorist and Disruptive Activities (Prevention) Act, 1987 is 'an Act to make special provisions for the prevention of, and of coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto'. The Statement of Objects and Reason indicates the historical background and the situation which led to enactment. It is useful to refer to the material portion of the Statement of objects and Reasons which is, as under : -

> "The Terrorist and Disruptive activities (Prevention) Act, 1985, was enacted in May, 1985, in the background of escalation of terrorist activities in many parts of the country at that time. It was expected then that it would be possible to control the menace within a period of two years and, therefore, the life of the said Act was restricted to a period of two years from the date of its commencement, However, it was subsequently realised that on account of various factors, what were stray incidents in the begnning have now become a continuing menace specially in States like Punjab. On the basis of experience, it was felt that in order to combat and cope with terrorist and disruptive activities effectively, it is not only necessary to continue the said law but also to strength it further. The aforesaid Act 1985 was due to expire on the 23rd May, 1987. Since both House of Parliament were not in session and it was necessary to take immediate action, the President promulgated the Terrorist and Disruptive Activities (Prevention) Ordinance, 1987 (2 of 1987) on the 23rd May, 1987, which came into force with effect from the 24th May, 1987.
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> Subsequent to the promulgation of the Ordinance, it was felt that the provisions need further strengthening in order to cope with the menace of terrorism. It is, therefore, proposed that persons who are in possession of certain arms and ammunition specified in the Arms Rules, 1962 of other explosive substances unauthorisedly in an area to be notified by the State Government, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and with fine. It is further proposed to provide that confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device shall be admissible in the trial of such person for an offence under the proposed legislation or any rules made thereunder. It is also proposed to provide that the Designated Court shall presume, unless the contrary is proved, that the accused had committed an offence where arms or explosives or any other substances specified in Section 3 were recovered from his possession, or where by the evidence of an expert the finger prints of the accused were found at the site of offence or where a confession has been made by a co-accused that the accused had committed the

> offence or where the accused had made a confession of the offence to any other person except a police officer....."

(emphasis supplied) We have heard Shri Kapil Sibal on behalf of the petitioner and Shri K.T.S. Tulsi, Additional Solicitor General on behalf of respondent C.B.I. In view of the general importance of the questions for decision affecting a large number of persons accused of offences under the TADA Act, we requested Shri Soli J, Sorabjee, a senior advocate of this Court to appear as ambicus curiae to assist us in decision these questions, We have also taken into account the written submission filed by the National Human Rights Commission with our leave. We are grateful to the learned counsel for the able assistance rendered by them at the hearing.

Certain provisions of the TADA Act may now be referred. Section 1 provides for the extent, application, commencement and duration of the Act, which says that it extends to the whole of India and was to remain in force initially for a period of two years from May 1987 but has been extended from time of tune. The last extension by Act No. 43 of 1993 is for eight years from its commencement. Several clauses in sub-section (1) of Section 2 contain the definitions. The definition of 'abet' in clause (a) is much wider than that in the Indian Penal Code. Clauses (d) defines 'disruptive activity' to give it the meaning assigned to it in Section 4; and 'terrorist act' in clause (h) is defined to give the meaning assigned to it in sub-section (1) of Section 3. Clause (f) defines 'notified area' to mean such area as the State Government may by notification in the Official Gazette specify. Apart from the aid given by the general scheme of the TADA Act and the object of its enactment to guide the State Government in specifying a 'notified area' for the purpose of the TADA Act, there is no other specific provision dealing with the manner of performance of that exercise. A notified area significant for the purpose of Section 5 of the TADA Act which makes mere unauthorised possession of certain arms and ammunition etc. specified therein, a punishable offence. Part II of the TADA Act relates to 'Punishments for, and measures for coping with, terrorist and disruptive activities' containing Sections 3 to 8, Section 3 gives the meaning assigned to the expression 'terrorist act' and also prescribes the punishment for the same. Similarly, Section 4 gives the meaning assigned to the expression 'disruptive activity' and prescribes the punishment fcr the same. Then comes Section 5 which says that a person in mere unauthorised possession of certain arms and ammunition etc. specified therein, in a 'notified area' is punishable "with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine'. This offence is more grave and the punishment more severe that the offence of mere unauthorised possession of the same arm and ammunition etc. provided in the Arms Act. Section 6 provides from enhanced penalties in certain cases. Section 8 provides for forfeiture of property of persons convicted of any offence punishable under this Act in . addition to the punishment awarded for the offence. This Section also provides for forfeiture of property of certain other persons accused of any offence under this Act. Part III containing .Section 9 to 19 relates to constitution of 'Designated Courts'. There place of sitting, jurisdiction and power with respect to other offences, apart from the procedure to be followed by the Designated Courts and certain other matters relating to trial. Section 15 deals with certain confessions made to police officers and the admissibility thereof. Part IV contains miscellaneous provisions which are in Sections 20-30. Section 20 provides for the modified application of certain provisions of the Code of Criminal Procedure and Section 21 deals with presumption as to offences under Section 3 of this

Act.

We may now quote for the sake of convenience the provisions of the TADA Act which are particularly material for our purpose.

> "2. Definitions. (1) In this Act, unless the context otherwise requires.
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> (d) "Disruptive activity" has the meaning assigned to it in section 4, and the expression "disruptionist shall be construed accordingly:
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> (f) "notified area" means such area as the State Government may, by notification in the Official Gazette, specify :
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> (h) "terrorist act" has the meaning assigned to it in sub-section (1) of Section 3, and the expression "terrorist" shall be construed accordingly,"
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> "PART-II Punishments for, and measures for coping with, terrorist and disruptive activities.

3. Punishment for terrorist acts. -(1) Whoever with intent to overawe the Government as by law established or to strike terror in the people of any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different actions of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or fire arms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or other-wise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to who are abstain from doing any act, commits a terrorist act.

(2) Whoever commits a terrorist act, shall -

(i) if such act has resulted in the death of any person, be punishable with death or imprisonment for Ufe and shall also be liable to fine ;

(ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for Ufe and shall also be liable to fine.

(3) Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for Ufe and shall also be liable to fine.

(4) Whoever harbours or conceals, or attempts to harbour or conceal, any terrorist shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for Ufe and shall also be liable to fine.

(5) Any person who is a member of a terrorists gang or a terrorists organisation, which is involved in terrorist act, shall be punishable with imprisonment for a terms which shall not be less than five years but which may extend to imprisonment for Ufe and shall also Uable to fine.

(6) Whoever holds any property derived or obtained from commission of any terrorist act or has been acquired through the terrorist funds shall be punishable with imprisonment for a terms which shall not be less than five years but which may extend to imprisonment for life and shall also Uable to fine.

4. Punishment for disruptive activities, - (1) Whoever commits or conspires or attempts to commit or abets, advocates, advises, or knowingly facilitates the commission of, any disruptive activity or any act preparatory to a disruptive activity shall be punishable with imprisonment for a terms which shall not be less than five years but which may extend to imprisonment for Ufe and shall also be Uable to fine.

5. Possession of certain unauthorised arms, etc., in specified areas. - Where any person is in possession of any arms and ammunition specified in Columns 2 and 3 of Category I or Category III (a) of Schedule I to the Arms Rules, 1962, or bombs, dynamite or other explosive substances unauthorisedly in a notified area, he shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a terms which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

6. Enhanced Penalties, - (1) If any person with intent to aid any terrorist or disruptionist, contravenes any provision of, or any rule made under, the Arms Act, 1959 (54 of 1959), the Explosives Act, 1884 (4 of 1884), the Explosive Substances Act, 1908 (6 of 1908), or the Inflammable Substances Act, 1952 (20 of 1952), he shall, notwithstanding anything contained in any of the aforesaid Acts or the rules made thereunder, be punishable with imprisonment for a term which shall not be less than five year but which may extend to imprisonment for life and shall also be liable o fine.

(2) For the purpose of this section any person who attempts to contravene or abets, or attempts to abet, or does any act preparatory to the contravention of any provisions of any law, rule or order,

shall be deemed to have contravened that provision, and the provisions of sub-section (1) shall, in relation to such person, have effect subject to the modification that the reference to "imprisonment for life" shall be construed as a reference to "imprisonment for ten years".

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"PART-III

Designated Courts

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12. Power of Designated Court 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 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 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, as the case may be, such other law, for the punishment thereof.

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15. Certain confession made to police officers to be taken into consideration. - (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made thereunder :

Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

(2) The police officer shall, before recording any confession under sub-

section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used us evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily.

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"PART-IV Miscellaneous

20. Modified application of certain provisions of the Code. -

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(4) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act or any rule made thereunder subject to the modifications that -

(a) the reference in sub-section (1) thereof to "Judicial Magistrate"

shall be construed as a reference to "Judicial Magistrate or Executive Magistrate or Special Executive Magistrate.";

(b) the references in sub-section (2) thereof to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "sixty days", and "one hundred and eighty days" respectively:

and (bb) in sub-section (2), after the proviso, the following proviso shall be inserted namely :

Provided further that, it is not possible to complete the investigation within the said period of one hundred and eighty days, the Designated Court shall extend the said period upto one year, on the report of the Public Prosecutor indicating the progress of the Investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days; and

(c) sub-section (2-A) thereof shall be deemed to have been omitted.

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(7) Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence punishable under this Act or any rule made thereunder.

(8) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own ( bond unless -

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(9) The limitations on granting of bail specified in sub-section (8) are in addition the limitations under the Code or any other law for the time being in force on granting of bail.

21. Presumption as to offences under Section 3. - (1) In a prosecution for an offence under sub-section (1) of Section 3, if it is proved -

(a) that the arms or explosive or any other substances specified in Section 3 were recovered from the possession of the accused there is reason to believe that such arms or explosive or other substances of a similar nature, were used in the commission of such offence : or

(b) that by the evidence of an expert the finger prints of the accused were found at the site of the offence or on anything including arms and vehicles used in connection with the commission of such offence;

the designated Court shall presume unless the contrary is proved, that the accused had committed such offence.

(2) In a prosecution for an offence under sub-section (3) of Section 8, if it is proved that the accused rendered any financial assistance to a person accused of, or reasonably suspected of, an offence under that section, the Designated Court shall presume, unless the contrary is proved, that such person has committed the offence under that sub-section.

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25. Overriding effect. - The provisions of this Act or any rule made thereunder or any order made under any such rule shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.

We would now consider the question referred for decision. The true meaning and sweep of the Offence made punishable under Section 5 of the TADA Act is the main controversy for decision by us. The Constitution Bench in Kartar Singh has upheld its constitutional validity and, therefor, the question is one of proper construction of the provision keeping in view the object for which it was enacted, notwithstanding the existence of similar provision in the Arms Act, 1959. For the sake of convenience, Section 5 of the TADA Act may be quoted :

"5. Possession of certain unauthorised arms, etc. in specified areas.- Where any person is possession of any arms and ammuni-tion specified in Columns 2 and 3 of Category I or Category III (a) of Scheduled I to the Arms Rules, 1962, or bombs, dynamite or other explosive substances unauthorisedly in a notified area, he shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall be liable to fine."

(emphasis supplied) The relevant part of Schedule I to the Arms Rules, 1962 incorporated by reference in section 5 of the TADA Act is as under :

SCHEDULE-I Category 1 Arms Ammunition 3

1. I(a) Prohibited arms as defined in section 2(1) (i) and such other arms as the Central Government may, by notification in the Official Gazette, specify to be prohibited arms.

Prohibited ammunition as defined in section 2(l)(h) and such other articles as the Central Government may, by notification in the Official Gazette, specify to be prohibited tion.

I(b) Semi-automatic fire-arms, other than these included in categories I

(c) and III(a); smooth bore guns have barrel of less than 20" in length. Ammunition for arms of category I (b).

I(c) Bolt action or semi-automatic rifles of 303 or 7.62 mm. bore or any other bore which can chamber and fire service ammunition of .303 or 7.62 mm. calibre; muskets of .410 bore or any other bore which can fire .410 musket ammunition; pistols, revolvers, or carbines of any bore which can chamber an fire .380 or .455 rimmed cartridges or service 9 mm. or.45 rimless cartridges. Ammunition for fire-arms of category l(c).

I(d) Accessories for any fire-arms designed or adapted to diminish the noise of flash caused by the firing thereof.

XXX XXX XXX III. Fire-arms other than those in categories I, II and IV, namely :-

Ammunition for fire-arms other than those in categories I, II and IV namely :-

III(a) Revolvers and pistols Ammunition for fire-arms of category III(a).

xxxx Note : Parts and accessories of any arms or ammunition and charges for fire-arms and accessories for charges belong to the same category as the arms or ammunition."

In the Arms Act, 1959, Section 24A inserted by Act No. 25 of 1983 w.e.f. 22.6.1983 contains provision relating to the 'Prohibition as to possession of notified arms in disturbed areas, etc' : and Section 25 prescribes the 'punishment for certain offences' which includes punishment to a person who acquires, has in his possession or carries any prohibited arms or prohibited ammunition in contravention of Section 7, in sub sections (1) and (LA) inserted by Act No. 25 of 1983 w.e.f. 22.6.1983 and Act No. 42 of 1988 w.e.f. 27.5.1988 respectively. Section 7 prohibits acquisition or possession etc. of prohibited arms or prohibited ammunition unless spe-

cially authorized by the Central Government in this behalf. Clauses (h) and

(i) of sub-section (1) of Section 2 of the Arms Act define 'prohibited ammunition' and prohibited arms' respectively. Section 11 of the Arms Act empowers the Central Government by notification in the Official Gazette to prohibit import or export of arms etc. while Section 12 contains a similar power to restrict or prohibit transport of arms. There is no dispute that the prohibition against unauthorised possession of the categories of arms and ammunition etc. specified in Section 5 of the TADA Act could as well be covered by the Arms Act and the rules framed thereunder, if necessary by a further amendment thereof which would be governed by the general law relating to investigation and trial of such offence without attracting the more stringent and drastic provisions of the TADA Act. However, the parliament has chosen to adopt the course of enacting Section 5 in the TADA Act which has the result of governing the investigation, trial and punishment of the offence by the more stringent provisions in this behalf in the TADA Act. In short, the offence prescribed by and made punishable under Section 5 of the TADA Act is a graver offence governed by more stringent provisions for its investigation and trial while providing a more severe maximum, with a minimum punishment of five years' imprisonment for it. It is this difference which is the reason for the controversy raised about the true meaning and scope of the offence prescribed by Section 5 of the TADA Act and the rights of the accused in this context.

The ingredients of the offence punishable under Section 5 of the TADA Act are; (i) possession of any of the specified arms and ammunition etc. (ii) unauthorisedly, (iii) in a notified area. If these ingredients of the offence are proved, then the accused shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine. Admittedly, this punishment prescribing a minimum sentence of five years imprisonment for unauthorised possession of any of the specified arms etc. with the maximum extending to life imprisonment, is more severe as compared to the punishment for the corresponding offence under the Arms Act. In addition to it, the other provisions of the TADA Act which include admissibility of some evidence against the accused which is in admissible under the general law coupled with a longer period available for completing the investigation enabling longer custody of the accused and the overall more stringent provisions of the TADA Act loads the prosecution more heavily against the accused under the TADA Act.

The TADA Act was enacted to make special provisions for the prevention of. and for coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto in the

background of escalation of the terrorist and disruptive activities in the country. There is also material available for a reasonable belief that such activities are encouraged even by hostile foreign agencies which are assisting influx of lethal and hazardous weapons and substances into the country to promote escalation of these activities. The felt need of the tunes is, therefore, proper balancing of the interest of the vis-a-vis the rights of person accused of an offence under this Act. The rights of a person found in unauthorised possession of such a weapon or substance in this context, to prove his innocence of involvement in a terrorist of disruptive, is to be determined.

The construction made of any provision of this Act must, therefore, be to promote the object of its enactment to enable machinery to deal effectively with persons involved in, and associated with, terrorist and disruptive activities while ensuring that any person not in that category should not be subjected to the rigours of the stringent provisions of the TADA Act. It must, therefore, be borne in mind that any person who is being dealt with and prosecuted in accordance with the provisions of the TADA Act must ordinarily have the opportunity to show that he does not belong to the category of persons governed by the TADA Act. Such a course would permit exclusion from its ambit of the persons not intended to be covered by it while ensuring that any person meant to be governed by its provisions, will not escape the provisions of the TADA Act. which is the true object of the enactment. Such a course while promoting the object of the enactment would also prevent its misuse or abuse. Such a danger is not hypothetical but real in view of serious allegations supported by statistics of the misuse of provisions of the TADA Act and the concerned to this effect voiced even by the National Human Rights Commission. It is the duty of courts to accept a construction which promotes the object of the legislation and also prevents its possible abuse even though the mere possibility of abuse of a provision does nor effect it constitutionality or constitution. Abuse has to be checked by constant vigilance and monitoring of individual cases and this can be done by screening of the cases by a suitable machinery at a high level. It is reported that in some States, after the decision of this Court in Kartar Singh, his powered committees have been constituted for screening all such cases. It is hoped that this action will be taken in all the States throughout the country. Persons aware of instances of abuse, including the National Human Rights Commission, can assist by reporting such instances with particulars to that machinery for prompt and effective cure. However, that is no reason, in law, to doubt its constitutionality or to alter the proper construction when there is a felt need by the Parliament for enacting such a law to scope with, and prevent terrorist and disruptive activities threatening the unity and integrity of the country.

The settled rule of construction of penal provisions is, that 'if there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction and if there are two reasonable constructions, we must give the more lenient one'; and if 'two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. See London & North Eastern Railway v. Berriman, [1946] 1 All ER 255 (HL). p. 270 ; Tolaram Relumal and Anr. v. The State of Bombay, [1955] 1 SCR 158 and State of Madhya Pradesh v. M/s Azad Bharat Finance Co. and Anr., [1966] Supp. SCR 473.

Applying the settled rule of construction of penal statutes in Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya and Ors., [1990] 4 SCC 76, a Division Bench of this Court speaking through

one of us (Ahmadi, j.) construing certain provisions of the TAD A Act reiterated the principle thus :

> "The Act is a penal statute. Its provisions are drastic in that they provide minimum punishments and in certain cases enhanced punishments also; make confessional statements made to a police officer not below the rank of a Superintendent of Police admissible in evidence and mandates raising of a rebuttable presumption on proof of facts stated in clauses (a) to (d) of sub-section (1) of Section 21. Provision is also made in regard to the identification of an accused who is not traced through photographs. There are some of the special provisions introduced in the Act with a view to controlling the menance of terrorism. These provisions are a departure from the ordinary law since the said law was found to be inadequate and not sufficiently effective to deal with the special class of offenders indulging in terrorist and disruptive activities. There can, therefore, be no doubt that the legislature considered such crimes to be of an aggravated nature which could not be checked or controlled under the ordinary law and enacted deterrent provisions to combat the same. The legislature, therefore, made special provisions which can in certain respects be said to be harsh, created a special forum for the speedy disposal of such cases, provided for raising a presumption of guilt, placed extra restrictions in regard to the release of the offender on bail, and made suitable changes in the procedure with a view 'to achieving its objects. It is well settled that statutes which impose a term of imprisonment for what is a criminal offence under the law must be strictly construed.....
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> .....Therefore, when law visits a person with serious penal consequences extra care must be taken to ensure that those whom the legislature did not intend to be covered by the express language of the statute are not roped in by stretching the language of the law....."

(at pages 85-86) With respect, we fully concur with the above perception for construing the provisions of the TADA Act.

It is with this perspective we must proceed to spell out the ingredients of the offence created by section 5 of the TADA Act and the extent of the right of the accused to defend himself of that charge. We have already indicated the ingredients of the offence punishable under Section 5 of the TADA Act.

The meaning of the first ingredient of "possession' of any such arms etc. is not disputed. Even though the word 'possession' is not preceded by any adjective like 'knowingly', yet it is common ground that in the context the word 'possession' must mean possession with the requisite mental element, that is, conscious possession and not mere custody without the awareness of the nature of such possession. There is a mental element in the concept of possession. Accordingly, the ingredient of 'possession' in Section 5 of the TADA Act means conscious possession. This is how the ingredient of possession in similar context of a statutory offence importing strict liability on account of mere possession of an unauthorised substance has been understood. (See Warner v. Metropolitan Police

Commissioner, (1969) 2 A.C. 256 and Sambasivam v. Public Prosecutor, Federation of Malaya, (1950) AC 458.

The next ingredient is that the possession of such an arm etc. should be 'unauthorised. That also presents no difficulty. The unauthorised pos- session in the context means without the authority of law. There is not disputed even in this area. The difficulty arises only hereafter. The unauthorised possession so understood of such an arm etc. 'in a notified area' constitutes the offence. The true import of this last ingredient is the area of real controversy.

Section 2(l)(f) defines 'notified area' to mean such area as the State Government may, by notification in the Official Gazette, specify. There is no express indication in the Act of the manner in which the State Government is to exercise this power of issuing the notification. It is rightly urged by the learned Additional Solicitor General that the manner in which this power is to be exercised by the State Government has to be inferred by reading the enactment as a whole keeping in view its object, from which it follows by necessary implication. He submits that the indication is, that the State Government is to notify a specified area for this purpose with reference to the extent of terrorist and disruptive activities herein with a view to check the influx into. The availability without the notified area of the specified arms and ammunition etc. which by their inherent nature are lethal and hazardous and, therefore, facilitate commission of terrorist and disruptive activities. He submits that the unauthorised possession of arms and ammunition etc. of the specified category facilitates the commission of terrorist and disruptive activities and, therefore, an area which is more prone to such activities is notified with a view to prevent the availability of unauthorised weapons and substances of this kind in that area. Learned Additional Solicitor General submitted that it is because of this fact of greater proneness of a notified area to the commission of terrorist and disruptive activities that mere unauthorised possession of the specified arms etc, therein is made a statutory offence of strict liability. This is the basis of his contention that a conviction under Section 5 of the TADA Act must follow on proof by the prosecution of conscious 'possession', 'unauthorisedly', of any of the specified arms and ammunition etc. in a 'notified area'. We think the submission of the learned Additional Solicitor General that the State Government's power to notify an area under Section 2(l)(f) must have relation to curbing terrorist and disruptive activities in the notified area is well founded for otherwise the State Government's power would be unfettered and unguided which would render Section 5 vulnerable.

Shri Kapil Sibal, learned counsel for the petitioner submitted that the unauthorised conscious possession of any such specified arms and ammuni- tion etc. in a 'notified area' may not necessarily be related to, or associated with, a terrorist or disruptive activity and it may be possible for the accused to show that the object even of the unauthorised possession was different, for example, self-defence. He submits that the accused must have the opportunity in law of raising such a defence and proving its. The construction of Section 5 suggested by Shri Soli J. Sorabjee as amicus curiae, as well as by the National Human Rights Commission in its written submissions is the same. Shri Sibal further submitted that unless such an opportunity to the accused to prove his innocence of the graver offence punishable under Section 5 of the TADA Act is read into it, even though he may be punished for mere unauthorised possession of such arm and ammunition etc. under the Arms Act, the provisions would suffer from the vice of arbitrariness being unrelated to the object of its

enactment.

Several facets of the arguments of sides aim at supporting the rival contentions. Learned Additional Solicitor General contends that there is not such right available to the accused being tried for an offence punishable under Section 5 of the TADA Act while the others canvass for accepting the other view. The clue for resolution of his controversy lies in the significance and true import of the third ingredient of the offence, namely, a 'notified area'.

We have already indicated the manner in, and the purpose for which, a specified area is declared to be a notified area by the State Government under Section 2(1) (f) of the TADA Act. This is done with reference to the fact that a notified area is treated to be more prone to the commission and escalation of terrorist and disruptive activities. This is the basis for classification of 'a notified area' differently from the non-notified areas and it has a reasonable nexus with the object of classification. Such activities must, therefore, have a bearing on the constitution of any special offence confined to that area. Declaration of a specified area as a notified by the State Government is based on its satisfaction , subjective in nature that the area is prone to terrorist and disruptive activities and its escalation. This opinion of the State Government has to be formed necessarily with reference to facts relating to incidents of terrorist and disruptive activities, for the prevention of which check on the influx of the specified arms and ammunition etc. in that area, is the object of enacting Section 5. The existence of the factual basis for declaring a specified area as notified area has to be presumed for the purposes of Section 5 for otherwise it would be put to proof in every case. This is not true significance of the third ingredient of the offence under Section 5.

The significance of unauthorised possession of any such arms and ammunition etc. in a notified area is that a statutory presumption arises that the weapon was meant to be used for a terrorist or disruptive act. This is so, because of the proneness of the area to terrorist and disruptive activities, the lethal and hazardous nature of the weapon and its unauthorised possession with this awareness, within a notified area. This statutory presumption is the essence of the third ingredient of the offence created by Section 5 of the TADA Act. The question now is about the nature of this statutory presumption.

The position which emerges is this. For constituting the offence made punishable under Section 5 of the TADA Act, the prosecution has to prove the aforesaid three ingredients. Once the prosecution has proved 'unauthorised' 'conscious possession' of any of the specified arms ammuni- tion etc. in a 'notified area' by the accused, the conviction would follow on the strength of the presumption unless the accused proved the non- existence of a fact essential to constitute any of the ingredients of the offence. Undoubtedly, the accused can set up a defence of non-existence of a fact which is an ingredient of the offence to be proved by the prosecution.

There is no controversy about the facts necessary to constitute the first two ingredients. For proving the non-existence of facts constituting the third ingredient of the offence, the accused would be entitled to rebut the above statutory presumption and prove that his unauthorised possession of any such arms and ammunition etc. was wholly unrelated to any terrorist or disruptive activity and the same was neither used nor available in that area for any such use and its availability in a 'notified

area' was innocuous. Whatever be the extent of burden on the accused to prove the non-existence of the third ingredient, as a matter of law he has such a right which flows from basic right of the accused in every prosecution to prove the non-existence of a fact essential to constitute an ingredient of the offence for which he is being tried. If the accused succeeds in proving non-existence of the facts necessary to constitute the third ingredient alone after his unauthorised possession of any such arms and ammunition etc. in a notified area is proved by the prosecution, then he cannot be convicted under Section 5 of the TADA Act and would be dealt with and punished under the general law. It is obviously to meet situations of this land that Section 12 was incorporated in the TADA Act.

The non-obstante clause is Section 5 of the TADA Act shows that within a notified area, the general law relating to unauthorised possession of any of the specified arms and ammunition etc. is superseded by the special enactment for that area, namely, the TADA Act. If however the third ingredient to constitute the offence under Section 5 of the TADA Act is negatived by the accused while the first two ingredients are proved to make out an offence punishable under the general law, namely, the Anns Act, then the Designated Court is empowered to deal with situation in accordance with Section 12 of the TADA Act. Section 12 itself shows that the Parliament envisaged a situation in which a person tried under the TADA Act of any offence may ultimate be found to have committed any other offence punishable under any other law and in that situation, the Designated Court is empowered to punish the accused for the offence under such other kw. The offence under Section 5 of the TADA Act is graver and visited with more servere punishment as compared to the corresponding offence under the general kw. This is because of the greater propensity of misuse of such anms and ammunition etc. for the terrorist of disruptive act within notified area. If the assumed propensity of such use is negatived by the accused, the offence gets reduced to one under the general kw and is punishable only thereunder. In such a situation, the accused is punished in the same manner as any other person found to be in unauthorised possession of any such arms and ammunition etc. outside a notified area. The presumption in law is of the greater and natural danger arising from its unauthorised possession within a notified area more prone to terrorist or disruptive activities.

The Statement of Objects and Reasons for enacting the TADA Act clearly states as under :

> ".....It is also proposed to provide that the Designated Court shall presume, unless the contrary is proved, that the accused had committed an offence where arms or explosives or any other substances specified in Section 3 were recovered from his possession, or where by the evidence of an expert the finger prints of the accused were found at the site of offence or where a confession has been made by the co-accused that the accused had committed the offence or where the accused had made a confession of the offence to any other person except a police officer.....
>
> (emphasis supplied ) The above extract gives a clear indication of the purpose for enacting Section 21 in the TADA Act creating the statutory presumption as to offences under Section 3 of the TADA Act, if it is proved that the arms or explosive or any other substances specified in Section 3 were recovered from the Possession of the

accused any where, and there is reason to believe that such arms or explosives or other substances of a similar nature were used in the commission of such offence. On proof of possession alone and not also its use, the statutory presumption which arises is of the lesser offence under Section 5 and that too when the possession is unauthorised within a notified area, which is more prone to terrorist or disruptive activities. The presumption arising of the commission of an offence under Section 3 by virtue of Section 21 is expressly made rebuttable and the accused can even then prove the non-existence of a fact essential to constitute an ingredient of the offence under section 3. On the same principle, the statutory presumption arising of the lesser offence under Section 5 on proof of the fact of unauthorised possession in notified area would be rebuttable presumption enabling the accused to prove that the weapon was not meant for use for any terrorist or disruptive act. Where its actual use in addition to the possession has been proved, the presumption is of an offence under Section 3 and burden on the accused is to prove the non-existence of any fact required for constituting an ingredient of the offence under Section 3. The distinction that an offence under section 3 can be committed anywhere but that under Section 5 only within a notified area, is also significant. Enactment of Section 21 also supports the view that the statutory presumption arising of commission of an offence under section 5, on proof of the requisite facts, is a rebuttable and not an irrebuttable presumption. If the presumption arising of an offence under Section 3 by virtue of section 21 is expressly made rebuttable, there can be no reason why presumption of the offence under Section 5 would be irrebuttable and no rebuttable. After all the offence under Section 5 is less serious that than under Section 3 of the Act. This construction is also preferable because the statute is penal in nature. The nature and extent of burden on the accused to rebut the statutory presumption under Section 5 is the same as in case of the presumption arising by virtue of Section 21 of an offence under Section 3 of the Act.

It is clear that the statutory presumption so read into Section 5 is in consonance with the scheme of the statute and section 5 read in the context makes the statutory presumption implicit in it. The clear words in Section 21 that the 'Designated Court shall presume, unless the contrary is proved' is an unambiguous expression that the presumption thereunder is a rebuttable presumption. The language in Section 21 of the TADA Act has to be contrasted with the Section 112 of the Indian Evidence Act, 1972 which shows that the presumption under section 112 of the Indian Evidence Act is irrebuttable whereas the presumption under Section 21 of the TADA Act is rebuttable. It may here be noticed that Section 5 is attracted only in case of unauthorised possession in a notified area, of arms and ammunition specified in columns 2 and 3 of Category I or Category III(a) of Schedule I to the Arms Rules, 1962 which are prohibited arms, semi-automatic fire ares, smooth bore guns, bolt action or semi-automatic rifles of certain categories, revolvers and pistols, and their ammunition, or bombs, dynamite or other explosive substances, which are all inherently more dangerous weapons. None of these weapon is meant for, or kept, for ordinary use. The statutory presumption is also, therefore, reasonable.

> In Sambasivam v. Public Prosecutor, Federation of Malaya, (1950) AC 458, the accused was charged with carrying a fire-arm and being in possession of 10 rounds of ammunition for which he was convicted under reg. 4, sub-reg. 1, of the Emergency Regulations, 1948, which was as under : "4. - (I.) Any person who carries or who has in his possession or under his control -
>
> (a) any fire-arm, not being a fire-arm which he is duly licenced to carry or possess under any other written law for the time being in force; or
>
> (b) any ammunition or explosives without lawful authority therefor, shall be guilty of an offence against these Regulations and shall on conviction be punished with death."

The Privy Council while dismissing the appeal of the accused held as under

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> "Another submission on behalf of the appellant, which may be conveniently considered now, was directed to the nature of the offence of carrying a firearm of which the appellant was convicted. It was contended that an intent to use the firearms in question as an offensive weapon, or to have it so used, was an essential ingredient of this offence and that the evidence fell short of establishing such intent. Several decisions of India courts were cited in support of this argument, but they relate to different enactment and their Lordships do not find them of assistance in determining the present point, which must depend on the true construction of reg. 4, sub-reg. I, of the Emergency Regulations, The material words are: "Any person who carries.....any firm-arm, not being a firearm which he is duly licenced to carry ..... shall be guilty of an offence....." It was conceded on behalf of the Crown - and rightly, in their Lordship' opinion - that "carries" here means "carries to his knowledge", and that the carrying of a firearm by a person who did not know what he carried would not constitute an offence under this provision. But the regulation says nothing of any special intent, and their Lordships are unable to find any ground on which such an intent should, as a matter of implication, be regarded as an claimant of the offence. The Emergency Regulations form a drastic code designated to meet a state of grave disorder and their Lordships see no reason to suppose that reg.4, sub-reg. I, was not intended to strike at the carrying of firearms simpliciter, if engaged in knowingly and without lawful authority."

(at pages 469-70) (emphasis supplied) The mental element of knowledge as requirement of the ingredient 'carry or possess' was read into this provision but the requirement of any special intent as a matter of implication as an element of the offence was negatived. That was the construction made of a provision similar to Section 5 of the TADA Act where death penalty was provided for the offence in similar legislation. On principle, there is no requirement of reading anything more than the rebuttable presumption into Section 5 of the TADA Act indicated by us.

A decision of the Supreme Court of Canada in Louis Beaver v. Her Majesty The Queen, [1957] S.C.R. 531 is also useful in this context. The offence there related to possession of the forbidden narcotic substance. It was held that the element of knowledge formed part of the ingredient of possession when mere possession of the substance amounted to an offence. However, it was clearly stated that it would be within the power of Parliament to enact that mere physical possession without any guilty knowledge constituted the crime but such an intention would not be imputed to the Parliament unless the words of the statute were clear and admitted of no other interpretation. We have construed in Section 5 of the TADA Act, the ingredient of 'possession' to mean 'conscious possession'. This decision also supports the principle that mere conscious possession of a forbidden substance is sufficient to constitute an offence and the offence created by Section 5 in a statute like the TADA Act is not extraordinary or conceptually impermissible. Moreover, that is also the position in the general law, with difference only in the prescribed punishment.

The construction we have made of Section 5 of the TADA Act shows that it creates a statutory offence with strict liability and no statutory exception therein. However, we have also taken view that the accused has a right as a part of his defence to prove the non-existence of a fact essential to constitute an ingredient of the offence under Section 5 of the TADA Act and for that purpose he can rebut the presumption against him, as indicate above. The question whether the defence set up by an accused is really a defence of an exception or is a defence to assert the non- existence of a fact, which is an ingredient of an offence to be proved by the prosecution, depends upon the construction of the particular statute. If the language of the statute does not clearly reveal the parliamentary intent, it has then to be inferred with reference to the mischief to be checked and the 'practical considerations affecting the burden of proof and the comparative ease or difficult which the respective parties would encounter in discharging the burden. In R. v. Hunt, [1987] 1 All ER 1, the rule of construction in such a situation was indicated as under :

> "I would summarise the position thus by saying the Wool-mington v. DPP did not lay down a rule that the burden of proving a statutory defence only lay on the defendant if the statute specifically so provided, that a statute can, on its true construction, place a burden of proof on the defendant although it does not do so expressly and that if a burden of proof is placed on the defendant it is the same burden whether the case be tried summarily or on indictment, namely a burden that has to be discharged on the balance of probabilities.
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> The real difficulty in these case lies in determining on whom Parliament intended to place the burden of proof when the statute has not expressly so provided. It presents particularly difficult problems of construction when what might be regarded as a matter of defence appears in a clause creating the offence rather than in some subsequent proviso from which it may more readily be inferred that it was intended to provide for a separate defence which a defendant must set up and prove if he wishes to avail himself of it.
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> xxxx xxxx
> xxxx

> .....However, their Lordships were in agreement that if the linguistic construction of the State did not clearly indicate on whom the burden should lie the court should look to other considerations to determine the intention of Parliament, such as the mischief at which the Act was aimed and practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respective parties would encounter in discharging the burden. I regard this last consideration as one of great importance, for surely Parliament can never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a criminal case, and a court should be very slow to draw any such inference from the language of a statute.
>
> When all the cases are analysed, those in which the courts have held that the burden lies on the defendant are cases in which the burden can be easily discharged....."

(at pages 10 and 11) The decision of the U.S. Supreme Court in W.D.Manty v. State of Georgia, 73 L.Ed. 575 also supports the view that ordinarily in such a statute, the statutory presumption is to be treated as rebuttable.

It is a settled rule of criminal jurisprudence that the burden on an accused of proving a fact for rebutting a statutory presumption in his defence is not as heavy as on the prosecution to prove its case beyond reasonable doubt but the lighter burden of proving the greater probability. Thus, the burden on the accused of rebutting the statutory presumption which arises against him under Section 5 of the TADA Act on proof by the prosecution that the accused was in unauthorised possession of any of the specified arms and ammunition etc. within a notified area, is of greater probability. When the prosecution has proved these facts, it has to do nothing more and conviction under Section 5 of the TADA Act must follow unless the accused rebuts the statutory presumption by proving that any such arms and ammunition etc, was neither used nor used meant to be used for a terrorist or disruptive activity. No further nexus of his unauthorised possession of the same with any specific terrorist or disruptive activity is required to be proved by the prosecution for proving the offence under Section 5 of the TADA Act. The nexus is implicit, unless rebutted, from the fact of unauthorised conscious possession on any such weapon etc. within a notified area and the inherent lethal and hazardous nature and potential of the same. The observations of Sahai, J. alone in Kartar Singh cannot be read to enlarge the burden on the prosecution to prove the implicit nexus by evidence aliunde, or to require the prosecution to prove anything more than what we have indicated.

We may deal with one more aspect pertaining to the construction of Section 5 of the TADA Act to which reference was made placing reliance on the decision in Paras Ram v. State of Haryana, [1992] 2 SCC 662, to which one of us (J.S. Verma, J) was a party. Correctness of that decision has been doubted by the learned Additional Solicitor General. That decision holds that the words 'arms ammunition' in Section 5 should be read conjunctively and so read, the conclusion is that a person in possession of only both, a fire-arm and the ammunition therefore, is punishable under Section 5 and not one who has either the firm-arm or the ammuni-tion alone.

Section 5 applies where 'any person is in possession of any arms and ammunition specified in column 2 and 3 of Category I or Category III (a) of Schedule I to the Arms Rules, 1962, or

.....unauthorisedly in a notified area'. After specifying the forbidden arms and ammunition, Section 5 proceeds to include in that category other substances by using the expression' or bombs, dynamite or the explosive substances'. It is clear that unauthorised possession in a notified area is forbidden of 'any arms and ammunition' which is specified 'or bombs or dynamite or other explosive substance'. The other forbidden substances being r.ead disjunctively, the only questions being read disjunctively, the only question is : Whether in this context the words 'arms and ammunition' in Section 5 should be read conjunctively? We do not think so.

Schedule I to the Arms Rules specifies the categories of both arms and ammunition mentioned therein. This is what has led to use of the words 'arms and ammunition' in section 5 while referring to them as those specified in columns 2 and 3 of Category I or Category III(a) of Schedule I. The word 'and' has been used because Schedule I specified both arms and ammunition in columns 2 and 3 thereof. The words 'any arms and ammunition' in Section 5 mean any of the arms and ammunition so specified or in other any arms or any ammunition specified in columns 2 and 3 of Category I or Category III (a) of the Schedule. The word 'and' instead of 'or' is used in the expression 'any arms and ammunition specified.....' because reference to both is made a specified in the Schedule. For this reasons, the words, 'arms and ammunition' are not to be read conjunctively. This is further evidence from the fact that the disjunctive 'or' is used while describing other forbidden substances like bombs etc. It means the forbidden substances, the unauthorised possession of any of which in a notified area is an offence under Section 5, are any of the specified arms or its ammunition or bombs or dynamite or other explosive substances. Unless these words are read disjunctively instead of conjunctively in this manner, the object of prohibiting unauthorised possession of the forbidden arms and ammunition would be easily frustrated by the simple device of one person carrying the forbidden arms and his accomplice carrying its ammunition so that neither is covered by Section 5 when any one of them carrying both would be so liable. We must, therefore, correct the view taken in Paras Ram. This part of section 5 has to be read in the manner indicated herein by us. With respect, the decision in Paras Ram does not lay down the correct law.

The Parliament envisages that enactment of the TADA Act is necessary to deal terrorists, disruptionists and their associates or even those reasonably suspected of such association. A purposive construction promoting the object of the enactment but not extending its sweep beyond the frontiers within which it was intended to operate must be adopted keeping in view that a construction which exempts a person from its operation must be preferred to the one includes him in it, in view of the penal nature of the statute. The construction we have made of Section 5 of the TADA Act which give an opportunity to the accused to rebut the presumption arising against him of the commission of an offence by mere unauthorised possession of any such arms etc. within a notified area is manifest from the Statement of Objects and Reasons. This is in consonance with the basic principle of criminal jurisprudence and the basic right of an accused generally recognised. We must attribute to the Parliament the legislative intent of not excluding the right of an accused to prove that he is not guilty of the graver offence under section 5 of the TADA Act and, therefore, he is entitled to be dealt with under the general law which provides a lesser punishment. The provision of a minimum sentence of five years' imprisonment for unauthorised possession of any of the specified arms etc. with the maximum punishment of life imprisonment under Section 5 of the TADA Act is by itself sufficient to infer such a legislative intent, more so, when such intent is also more

reasonable. The practical considerations in prosecution for an offence punishable under Section 5 of the TADA Act affecting the burden of proof indicate that the intended use by the accused of such a weapon etc. of which he is in unauthorised possession within a notified area is known only to him and the prosecution would be unable most often to prove the same while the accused can easily prove his intention in this behalf. The practical considerations also support the view we have taken.

In the view we have taken, it is unnecessary to consider the several arguments advanced at the hearing relating to the requirement of metis rea as an ingredient of this offence, the nature of the statutory offence, whether it is one of strict liability, whether any exception can be read into the provision and if so, how. These aspects do not require any further consideration on the construction we have made of Section 5 and the manner in which we have read into it the right and extent of defence available to the accused tried of an offence punishable under Section 5 of the TADA Act. This purpose is achieved by a route which is free of most of the debated area in the controversy. For this reason we need not refer to the details of the other argument and the decisions cited at the Bar to support the rival contentions.

SECTION 20(4)(bb) OF THE TADA ACT Section 20 of the TADA Act prescribes the modified application of the Code of Criminal Procedure indicated therein. The effect of sub-section (4) of Section 20 is to apply Section 167 of the Code of Criminal Procedure in relation to a case involving an offence punishable under the TADA Act subject to the modifications indicated therein. One of the modifications made in Section 167 of Code by Section 20(4) of the TADA Act is to require the investigation in any offence under the TADA Act to be completed within a period of 180 days with the further proviso that the Designated Court is empowered to extend that period upto one year if it is satisfied that it is not possible to complete the investigation within the said period of 180 days, on the report of the public prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of 180 days. This gives rise to the right of the accused to be released on bail on expiry of the said period of 180 days or the extended period on default complete the investigation within the tune allowed.

In Hitendra Vishnu Thakur & Ors. v. State of Maharashtra & Ors, JT (1994) 4 SC 255 = [1994] 4 SCC 602, the conclusion was summarised, as under : -

> "In conclusion, we may (even at the cost of repetition) say that an accused person seeking bail under section 20(4) has to make an application to the court for grant of bail on grounds of the 'default' of the prosecution and the court shall release the accused on bail after notice to the public prosecutor uninfluenced by the gravity of the offence or the merits of the prosecution case since Section 20(8) does not control the grant of bail under Section 20(4) of TADA and both the provisions operate in separate and independent field. It is, however, permissible for the public prosecutor to resist the grant of bail by seeking an extension under clause (bb) by filing a report for the purpose before the court. However, no extension shall be granted by the court without notice to an accused to have his say regarding the prayer for grant of extension under clause (bb).In this view of the matter, it is immaterial whether the application for bail on ground of 'default' under Section 20(4) is filed first or the

> report as envisaged by clause (bb) is filed by the public prosecutor first so long as both are considered while granting or refusing bail. If the period prescribed by clause (b) of Section 20(4) has expired and the court does not grant an extension on the report of the public prosecutor made under clause (bb), the court shall release the accused on bail as it would be an indefeasible right of the accused to be so released. Even where the court grants an extension under clause (bb) but the charge sheet is not filed within the extended period, the court shall have no option but to release the accused on bail, if he seeks it and is prepared to furnish the bail as directed by the court. Moreover, no extension under clause (bb) can be granted by the Designated Court except on a report of the public prosecutor nor can extension be granted for reasons other than those specially contained in clause (bb), which must be strictly construed."

(Para 28 at page 280 of JT) In Hitendra Vishnu Thakur, it was held that the Designated Court would have 'no jurisdiction to deny to an accused his indefeasible right to be released on bail on account of the default of the prosecution to file the challan within the prescribed time if an accused seeks and is prepared to furnish the bail bond as directed by the court'; and that a 'notice' to the accused is required to be given by the Designated Court before it grants any extension under the further proviso beyond the prescribed period of 180 days for completing the investigation. Shri Kapil Sibal, learned counsel for the petitioner contended that the requirement of the 'notice' con- templated by the decision in Hitendra Vishnu Thakur before granting the extension for completing the investigation is mere production of the accused before the court and not a written notice to the accused giving reasons for seeking the extension requiring the accused to show cause against it. Learned counsel submitted that mere production of the accused at that time when the prayer for extension of time is made by the Public Prosecutor and, considered by the court, to enable such a decision being made in accordance with the requirements of Section 167 Cr. P.C., is the only requirement of notice to be read in the decision of the Division Bench in Hitendra Vishnu Thakur. The Grievance of the learned counsel was, that quite often the accused was not even produced before the court at the time of consideration by the court of the prayer of the public prosecutor for extension of the period.

On the other aspect, Shri Kapil Sibal conceded that the indefeasible right for grant of bail on expiry of the initial period of 180 days for completing the investigation or the extended period prescribed by Section 20(4) (bb) as held in Hitendra Vishnu Thakur is a right of the accused which is enforceable only upto the filing of the challan and does not survive for enforcement on the challan being filed in the court against him. Shri Sibal submitted that the decision of the Division Bench in Hitendra Vishnu Thakur cannot be read to confer on the accused an indefeasible right to be released on bail under this provision once the challan has been filed if the accused continues in custody. He stated unequivocally that on filing of the challan, such a right which accrued prior to filing of the challan has no significance and the question of grant of bail to an accused in custody on filing of the challan has to be considered and decided only with reference to the provisions relating to grant of bail applicable after filing of the challan, since Section 167 Cr. P.C. has relevance only to the period of investigation.

Learned Additional Solicitor general, in reply, agreed entirety with the above submission of Shri Sibal and submitted that principle enunciated by then Division Bench in Hitendra Vishnu Thakur must be so read. However, the grievance of the learned Additional Solicitor General is that the direction for grant of bail by the Division Bench in Hitendra Vishnu Thakur,on the facts of that case, is not in consonance with such reading of that decision and indicates that the indefeasible right of the accused to be released on bail on expiry of the time allowed for completing the investigation survives and is enforceable even after the challan has been filed, without reference to the merits of the case or the material produced in the court with the challan. He further submitted that it should be clarified that the direction to grant bail under this provision on this ground alone in Hitendra Vishnu Thakur after the challan had been filed was incorrect. Such a clarification, he urged, is necessary because the decision in Hitendra Vishnu Thakur is being construed by the Designated Courts to mean that the right of the accused to be released on bail in such a situation is indefeasible in the sense that it survives and remains enforceable, without reference to the facts of the case, even after the challan has been filed and the court has no jurisdiction to deny the bail to the accused at any time if there has been a default in completing the investigation within the time allowed. Bail is being claimed by every accused under the TADA Act for this reason alone in all such cases. This is the occasion for seeking a fresh decision of this question by a larger Bench.

We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4) (bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrud to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filled because Section 167 Cr. P.C. ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in section 20(4) (bb), both of them should be considered together. It is obvious that no bail can be given of the even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provisions on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order. (See Naranjan Singh Nathawan v. The State of Punjab, [1952] SCR 395; Ram Narayan Singh v. The State of Delhi and Others, [1953] SCR 652 and A.K. Gopalan v. The Government of India, [1966] 2 SCR 427).

This is the nature and extent of the right of the accused to be released on bail under Section 20(4) (bb) of the TADA Act read with Section 167 Cr. P.C. in such a situation. We clarify the decision of the Division Bench in Hitendra Vishnu Thakur, accordingly, and if it gives a different indication because of the final order made therein, we regret our inability to subscribes to that view.

SUB-SECTION (8) OF SECTION 20 OF THE TADA ACT Shri Kapil Sibal, learned counsel for the petitioner submitted that the meaning and scope of sub-section (8) of Section 20 of the TADA Act is indicated by the Constitution Bench in Kartar Singh (supra) as under : -

> "The conditions imposed under Section 20(8)(b), as rightly pointed out by the Additional Solicitor General, are in consonance with the conditions prescribed under clauses (i) and (ii) of subsection (1) of Section 437 and clause (b) of sub; section (3) of that section.....Therefore, the condition that "there are grounds for believing that he is not guilty of an offence. " which condition in different form is incorporated in other Acts such as clause (i) of Section 437(1) of the Code..... cannot be said to be an unreasonable condition infringing the principle of Article 21 of the Constitution."

(page 707 of SCC) In reply, the learned Additional Solicitor General submitted that the pronouncement of the Constitution Bench in Kartar Singh is clear and unambiguous and, therefore, there is no occasion for a fresh consideration of that matter. The pronouncement of the Constitution Bench as extracted above is clear and does not require any further elucidation by us, beside it being binding on us.

CONCLUSIONS As a result of the above discussion, our answers to the three question of law referred for our decision are as under : -

> (1) In the prosecution for an offense punishable under Section 5 of the TADA Act, the prosecution is required to prove that the accused was in conscious 'possession', 'unauthorisedly', in a 'a notified area' of any arms and ammunition specified in columns 2 and 3 of Category I or Category in (a) of Schedule I to the Arms Rules, 1962 or bombs, dynamite or other explosive substances. No further nexus with terrorist or disruptive activity is required to be proved by the prosecution in view of the statutory presumption indicated earlier. The accused in his defence is entitled to prove the non existence of a fact constituting any of these ingredients. As apart of his defence, he can prove by adducing evidence, the non-existence of facts constituting the third ingredient as indicated earlier to rebut the statutory presumption. The accused is entitled to prove by adducing evidence, that the purpose of his unauthorised possession of any such arms and ammunition etc. was wholly unrelated to any terrorist or disruptive activity. If the accused succeeds in proving the absence of the said third ingredient, then his mere unauthorised possession of any such arms and ammunition etc. is punishable only under the general law by virtue of Section 12 of the TADA Act and not under Section 5 of the TADA Act.

(2)(a) Section 20(4)(bb) of the TADA Act only requires production of the accused before the court in accordance with Section 167(1) of the Code of Criminal Procedure and this is how the requirement of notice to the accused before granting extension beyond the prescribed period of 180 days in accordance with the further proviso to clause (bb) of sub-section (4) of Section 20 of the TADA Act has to be understood in the Judgment of the Division Bench of this Court in Hitendra Vishnu Thakur. The requirement of such notice to the accused before granting the extension for completing the investigation is not a written notice to the accused giving reasons therein. Production of the accused at that time in the court informing him that the question of extension of the period for completing the investigation is being considered, is alone sufficient for the purpose.

(2)(b) The 'indefeasible right' of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which ensures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed.

If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to-the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing on the challan, notwithstanding the default in filing it within the time allowed, as governed from the time of filing of the challan only by the provisions relating to the grant of bail applicable at the stage.

(3) In view of the decision of the Constitution Bench in Kartar Singh on the meaning and scope of sub-section (8) of Section 20 of the TADA Act as extracted earlier, this question does not require any further elucidation by us.

The question referred are answered in the above manner. This case, for decision of the petitioner's claim for grant of bail on merits, like any other bail matter, has now to be considered and decided by the appropriate Divisions Bench. We direct, accordingly.

T.NA.

Petitions dismissed.