Sarwan Singh vs State Of Punjab on 7 October, 2002

Equivalent citations: AIR 2002 SUPREME COURT 3652, 2003 (1) SCC 240, 2002 AIR SCW 4295, (2002) 4 SCJ 639, 2002 CRILR(SC MAH GUJ) 900, (2003) 1 ALLCRIR 845, (2002) 45 ALLCRIC 1169, (2002) 4 RECCRIR 471, 2003 ALLMR(CRI) 156, (2002) 4 ALLCRILR 812, (2002) 7 SUPREME 85, (2003) 1 MADLW(CRI) 224, (2003) SC CR R 524, (2002) 4 CURCRIR 144, (2002) 7 SCALE 351, (2003) 1 CAL HN 124, 2002 CRILR(SC&MP) 900, 2003 SCC (CRI) 282, (2002) 8 JT 114 (SC)

Author: Umesh C. Banerjee

Bench: Umesh C. Banerjee

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           CASE NO.:
Appeal (crl.)  480 of 2001

PETITIONER:
Sarwan Singh

RESPONDENT:
State of Punjab

DATE OF JUDGMENT: 07/10/2002

BENCH:
Umesh C. Banerjee & Y.K. Sabharwal.

JUDGMENT:
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J U D G M E N T BANERJEE, J On the backdrop of escalation of terrorist activities in the country, Parliamentary wisdom prompted it to introduce in the Statute Book the Terrorist and Disruptive Activities (Prevention) Act, 1985 and since there was an expectation that the activities concerned would be curbed within a period of two years, life of the said Act of 1985 was restricted to a period of two years from the date of its commencement. But unfortunately, the terrorist violence continued unabated and resultantly the Government thought it prudent to extend the life of the legislation from time to time. In one of the earliest pronouncements of this Court after the introduction of the said Act, this Court in Usmanbhai Dawoodbhai Memon & Ors. v. State of Gujarat [1988(2) SCC 271] in no uncertain terms stated that the intendment of the legislation is to provide special machinery to combat the growing menace of terrorism in different parts of the country. This court also did emphasise that since the legislation is a drastic one, the same should not ordinarily be resorted to unless the government's law enforcing machinery fails. In paragraphs 17 and 18 of the Report this Court observed :

"17. The legislature by enacting the law has treated terrorism as a special criminal problem and created a special court called a Designated Court to deal with the special problem and provided for a special procedure for the trial of such offences. A grievance was made before us that the State Government by notification issued under Section 9(1) of the Act has appointed District and Sessions Judges as well as Additional District and Sessions Judges to be judges of such Designated Courts in the State. The use of ordinary courts does not necessarily imply the use of standard procedures. Just as the legislature can create a special court to deal with a special problem, it can also create new procedures within the existing system. Parliament in its wisdom has adopted the framework of the Code but the Code is not applicable. The Act is a special Act and creates a new class of offences called terrorist acts and disruptive activities as defined in Sections 3(1) and 4(2) and provides for a special procedure for the trial of such offences. Under Section 9(1), the Central Government or a State Government may by notification published in the Official Gazette, constitute one or more Designated Courts for the trial of offences under the Act for such area or areas, or for such case or class or group of cases as may be specified in the notification. The jurisdiction and power of a Designated Court is derived from the Act and it is the Act that one must primarily look to in deciding the question before us. Under Section 14(1), a Designated Court has exclusive jurisdiction for the trial of offences under the Act and by virtue of Section 12(1) it 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. Where an enactment provides for a special procedure for the trial of certain offences, it is that procedure that must be followed and not the one prescribed by the Code.

18. No doubt, the legislature by the use of the words 'as if it were' in Section 14(3) of the Act vested a Designated Court with the status of a Court of Session. But, as contended for by learned counsel for the State Government, the legal fiction contained therein must be restricted to the procedure to be followed for the trial of an offence under the Act i.e. such trial must be in accordance with the procedure prescribed under the Code of the trial before a Court of Session, insofar as applicable. We must give some meaning to the opening words of Section 14(3) 'Subject to the other provisions of the Act' and adopt a construction in furtherance of the object and purpose of the Act. The manifest intention of the legislature is to take away the jurisdiction and power of the High Court under the Code with respect to offences under the Act. No other construction is possible. The expression 'High Court' is defined in Section 2(1)(e) but there are no functions and duties vested in the High Court. The only mention of the High Court is in Section 20(6) which provides that Sections 366-371 and Section 392 of the Code shall apply in relation to a case involving an offence triable by a Designated Court, subject to the modifications that the references to 'Court of Session' and 'High Court' shall be construed as references to 'Designated Court' and 'Supreme Court' respectively. Section 19(1) of the Act provides for a direct appeal, as of right, to the Supreme Court from any judgment or order of the Designated Court, not being an interlocutory order. There is thus a total

> departure from different classes of criminal courts enumerated in Section 6 of the Code and a new hierarchy of courts is sought to be established by providing for a direct appeal to the Supreme Court from any judgment or order of a Designated Court not being an interlocutory order, and substituting the Supreme Court for the High Court by Section 20(6) in the matter of confirmation of a death sentence passed by a Designated Court."

In a subsequent decision in Niranjan Singh (Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya : 1990 (4) SCC

76), it has been stated that while extra care must be taken to ensure that those of whom the legislature did not intend to be covered by the express language of the statute are not to be roped in by stretching the language of the Act in question but that however, does not mean and imply adoptation of a negative attitude if the materials so justify. In this context, reference may be made to the decision of this Court in Anil Sanjeev Hegde v. State of Maharasthra (1992 Supp (2) SCC 230).

One other aspect of the special statute (Terrorist and Disruptive Activities (Prevention) Act) ought to be noted in order to give credence to the legislative wisdom by reason of the incorporation of Section 12 therein. For convenience sake Section 12 is noticed hereinbelow :

> "12. Power of Designated Courts with respect to other offences. (1) When trying any offence, a Designated Court may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence.
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> (2) If, in the course of any trial under this Act of any offence, it is found that the accused person has committed any other offence under this Act or any rule made thereunder or under any other law, the Designated Court may convict such person of such other offence and pass any sentence authorised by this Act or such rule or, as the case may be, such other law, for the punishment thereof."

Obviously, the effort on the part of the legislature is not to have two sets of trial, one under general law and the other under special statute and availability of such a power cannot but be ascribed to be in tune with the jurisprudence of the country. Be it noted that the instant appeal is statutory in nature in terms of the provisions of Section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 and arises against the judgment and decision of the Designated Court of Ferozepur in Sessions Trial No.28 of 2000.

At this juncture, it would be convenient to briefly advert to the prosecution case, which runs as below :

> Darshan Singh, a resident of village Yareshah Wala has been the complainant in the instant matter. They were five brothers :

Mukhtiar Singh @ Kali was the eldest. Piara Singh @ Murli was younger to Mukhtiar Singh and Sukha Singh was the youngest. Mohinder Singh and Sukha Singh were unmarried ones whereas Darshan Singh (complainant) along with Mukhtiar Singh and Piara Singh were the married ones. Piara singh @ Murli was residing separately. The complainant along with Mukhtiar Singh were residing jointly. Mohinder Singh and Sukha Singh were residing with their father Wazir Singh. Houses of all the brothers were in the same complex. On 12.10.1990, at about 3.00 AM Mukhtiar Singh and his wife Rano were sleeping on the roof of the house of Mukhtiar Singh and somebody from the outside called Kala and directed to open the door. Complainant and his brother Mukhtiar Singh replied in the negative and by reason wherefor the persons present outside the door stated that in the event of the door remain closed, their house would be set on fire. Out of fear, the complainant and his brother Mukhtiar Singh opened the door and upon coming outside the house, sighted Sarwan Singh son of Kashmir Singh armed with 12 bore gun (SB) of their village and one Bagicha Singh son of Joginder Singh resident of Karmoowala, who used to visit the house of Sarwan Singh; Bagicha Singh was known to them earlier because he used to visit Sarwan Singh and was armed with 12 bore double barrel gun with butt and barrel cut. It was a moonlit night and both the accused tied the arms of Mukhtiar Singh. In the same manner arms of Piara Singh were also tied. The complainant along with his brothers started imploring the accused, but Sarwan Singh accused replied that they should be taught a lesson for quarreling with him. With the help of gun the complainant was directed to return. Mukhtiar Singh and Piara Singh were taken away by the accused towards the field of Shabeg Singh. After 15 minutes there was firing from the fields of Shabeg Singh. Out of fear, the complainant remained standing in the courtyard and after about half-an-hour, Mukhtiar Singh arrived with profuse bleeding. There were injuries on hands and head of Mukhtiar Singh and he disclosed that Sarwan Singh and Bagicha Singh had murdered Piara Singh in the fields of Shabeg Singh, and fire arm injuries were also inflicted to Mukhtiar Singh and with Butt blows on the head of Mukhtiar Singh. The accused persons however fled away from the spot with their respective weapons towards the side of village Sher Khan. Out of fear and darkness of the night outside, Mukhtiar Singh and Darshan Singh remained in their house. In the morning Mukhtiar Singh was shifted to Civil Hospital, Ferozepur on the tractor trolley of Piara Singh. Mohan Singh son of Jaimal Singh was deputed to guard the dead body of Piara Singh. Darshan Singh, complainant had gone to lodge the report and while near the flour-mill of Jagir Singh in the area of village Chugte Wala, met the police party headed by Jaspal Singh ASI when the statement of Darshan Singh was taken upon compliance with the required formalities. Subsequently, however the statement was sent to the Police Station, on the basis of which formal FIR was recorded at 11.15 AM on 12.10.1990.

On the further factual score, it appears that the Police party had gone to the spot. Inquest report (Ex.PC) was prepared and the place of occurrence was duly inspected. Blood stained earth and sample earth was lifted and made into a parcel sealed with the seal bearing impressions "JS". Both the sealed parcels were taken into police

possession vide separate recovery memo. Cartridges Ex.P- 1 to P-4 were also lifted from the spot and were taken into police possession vide memo attested by witnesses. Phatti of the gun too was taken into possession from the spot. After making sealed parcels, the dead body was sent to the hospital for post-mortem examination through HC Lakhbir Singh.

It is on this factual backdrop the Charge was framed under Sections 302/307/34 IPC and 3 of TADA Act on 23.4.1993 to which the accused pleaded not guilty and claimed trial. Undisputedly, Piara Singh and Mukhtiar Singh were taken towards the fields of Shabeg Singh. Piara Singh was murdered in the fields and fire arm injuries were caused to Mukhtiar Singh whereas contention of the accused is that due to previous enmity, he was named falsely - the evidence available on record however negates such a plea : Human behaviour also runs counter to such a plea since it is absurd to suggest that an injured person would take recourse to implicate someone against whom there was enmity leaving aside the real assassin. In any event on the state of evidence the factum of Sarwan Singh together with Bagicha Singh called out the deceased and Mukhtiar Singh and compelled them to accompany them to the fields of Shabeg Singh does not seem to stand contradicted at any point of time. The evidence to that effect stands out to be credit-worthy and thus acceptable. On the wake of the aforesaid the contention as regards false implication fails. Incidentally, in early nineties, terrorist activities were on peak in the border districts of Punjab and it has practically been an axiomatic truth in the area in question that no-one would in fact come out of the residential houses after dusk unless perforced at 3'o clock in the morning. There exists no other evidence nor even there being any suggestion of existence of any other factor for such perforced outing at 3 a.m. It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted. A decision of the Calcutta High Court lends support to the observation as above. (See in this context AEG Carapiet v. AY Derderian : AIR 1961 Calcutta 359 (P.B. Mukherjee, J. as he then was)].

Learned Advocate in support of the appeal next contended that accused were in fact already in the custody of police as such involvement in the case in hand does not and cannot arise. Incidentally on 13.10.1990 another FIR was registered against the accused persons on the allegations that accused attempted to murder the police officials but subsequently the accused persons were acquitted regarding the occurrence dated 13.10.1990. Acquittal of accused in FIR dated 13.10.1990 prompted the learned Advocate to state with emphasis that the same has falsified the prosecution story. The contention of the defence counsel is however without any force or merit. In this case, occurrence took place at 3.00 a.m. on 12.10.1990 and the prosecutor stated that after committing the crime, accused fled away from the spot. On 13.10.1990 there was possibility of firing upon police officials. Thus acquittal of accused in FIR dated 13.10.1990 is not sufficient to ignore the prosecution story because evidence is to be read independently in both the FIRs.

Further contentions in support of the appeal are as below:

(i) Weapons were not sent to ballistic expert;

(ii) Only interested witnesses were examined;

(iii) No expert opinion connecting the gun with the empty cartridges;

(iv) Accused was identified for the first time in Court and in the absence of test identification parade statement of the interested witnesses are without any evidentiary value.

We shall come to deal with the interested witnesses slightly later in this judgment but adverting to the other counts, be it noted that there is no evidence on record that the weapon recovered in FIR dated 13.10.1990 was the same weapon which was used by the accused while committing the crime on 12.10.1990. Much could have been argued or stated if there was availability of such an evidence, but unfortunately there being none, question of reliance thereon would not arise and in our view the Designated Court has dealt with the issue in a manner proper and effective which does not call for any interference.

As regards the examination of independent persons or witnesses, we would do well to note a decision of this Court in Ambika Prasad & Anr. v. State (Delhi Admn.) [2000 (2) SCC 646], wherein this Court in paragraph 12 observed :

"12. It is next contended that despite the fact that 20 to 25 persons collected at the spot at the time of the incident as deposed by the prosecution witnesses, not a single independent witness has been examined and, therefore, no reliance should be placed on the evidence of PW5 and PW7. This submission also deserves to be rejected. It is known fact that independent persons are reluctant to be witnesses or to assist the investigation. Reasons are not far to seek. Firstly, in cases where injured witnesses or the close relative of the deceased are under constant threat and they dare not depose the truth before the court, independent witnesses believe that their safety is not guaranteed. That belief cannot be said to be without any substance. Another reason may be the delay in recording the evidence of independent witnesses and repeated adjournments in the court. In any case, if independent persons are not willing to cooperate with the investigation, the prosecution cannot be blamed and it cannot be a ground for rejecting the evidence of injured witnesses. Dealing with a similar contention in State of U.P. v. Anil Singh (1988 Supp SCC 686), this Court observed :

(SCC pp. 691-92, para 15) "In some cases, the entire prosecution case is doubted for not examining all witnesses to the occurrence. We have recently pointed out the indifferent attitude of the public in the investigation of crimes. The public are generally reluctant to come forward to depose before the Court. It is, therefore, not correct to reject the prosecution version only on the ground that all witnesses to the occurrence have not been examined. Nor it is proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable."

The test of creditworthiness and acceptability in our view, ought to be the guiding factors and if so the requirements as above, stand answered in the affirmative, question of raising an eyebrow on reliability of witness would be futile. The test is the credibility and acceptability of the witnesses available if they are so, the prosecution should be able to prove the case with their assistance.

Coming to the contextual facts once again, while it is true that there is no independent witness but the evidence available on record does inspire confidence and the appellant has not been able to shake the credibility of the eye-witnesses : There is not even any material contradiction in the case of the prosecution. The other allied issue pertains to the identification of the accused in Court for the first time: there is no manner of doubt as it stands well settled that ordinarily identification of an accused for the first time in court by a witness should not be relied upon for the purpose of passing the order of conviction without a definite corroboration since identification for the first time in court cannot possibly be termed to be non-admissible but it is a matter of prudence and jurisprudential requirement that the same should be upon proper corroboration otherwise the justice delivery system may stand affected. The Designated Court herein has in fact recorded a positive finding that the witnesses knew the appellant from before and they were acquainted with each other by reason wherefor the names could be mentioned in the FIR itself and in view of such a state of affairs question of decrying the evidence of all the so-called interested witnesses on a first time identification in court would not arise. We however, hasten to add that the requirement of the concept of justice is acceptability and credibility of the evidence tendered by the witnesses. Once that stand completed, it will be difficult if not an impossibility to challenge a conviction only on the ground of the failure to hold prior test identification parade. The law seems to be well settled and the decisions are galore but we think it fit to refer to only one earlier judgment of this Court in the case of Budhsen & Anr. v. State of U.P.[1970 (2) SCC 128] wherein this Court stated in paragraph 7 as below:

> "7.The evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances he came to pick out the particular accused person and the details of the part which the accused played in the crime in question with reasonable particularity. The purpose of a prior test identification, therefore, seems to be to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witness in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceeding. There may, however, be exceptions to this general rule, when for example, the court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to identify persons concerned in the offence, who were not previously known to them. This serves to satisfy the investigating officers of the bona fides of the prosecution witnesses and also to furnish evidence to corroborate their testimony in court. Identification proceedings in their legal effect amount simply to this: that certain persons are brought to jail or some other place and make statements either express or implied that certain individuals whom they point out are persons whom they

> recognise as having been concerned in the crime. They do not constitute substantive evidence. These parades are essentially governed by Section 162, Criminal Procedure Code.."

The law laid down as above has since been accepted as a well settled principle and has stood the test of time. We also do record our concurrence therewith. The factum of recognition and placement of the names in the FIR practically do away with the requirement of the test identification parade someone knows them : someone deals with them and someone talks to them regularly does it mean and imply that without the test identification parade at an earlier stage and an identification in the court would have the effect of a sullied prosecution? The answer cannot possibly be in the affirmative. It is the concept of justice which predominates and if we reiterate this, the witness seems to be creditworthy and the acceptability would do away with the minor lapses. As such we do not find any merit or substance in the issue raised in support of the appeal.

As regards (i) and (iii) above, it was contended that the weapons were not sent to the ballistic expert and no expert opinion is available connecting the gun with the empty cartridges. As noticed above, in the case in hand, no weapon was recovered, as such question of having any ballistic expert opinion as regards the gun and the empty cartridges would not arise.

The preponderance of evidence available on record, in our view, does justify the view taken by the Designated Court and the same cannot and ought not to be interfered with.

In that view of the matter, this appeal fails and is dismissed.