Supreme Court of India
Kalpnath Rai vs State (Through Cbi) on 6 November, 1997
Equivalent citations: 1997 (2) ALD Cri 805, 1998 CriLJ 369, JT 1997 (9) SC 18, 1997 (6) SCALE 689, (1997) 8 SCC 732
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Bench: M Mukharji, K Thomas
JUDGMENT JUDGMENT K.T. Thomas, J.

1. Out of twelve accused persons arraigned before a Designated Court in Delhi, ten were convicted of different offences under Terrorist and Disruptive Activities (Prevention) Act 1987 (for short TADA'). They are the appellants before us. Some of them were found to be members of a terrorists gang called 'Davood Ibrahim Group.' Three persons, including a former Union Minister of State for Power (Kalpnath Rai) were found to have harboured hardcore terrorists, besides fastening such a finding with A12 (M/s. East West Travel and Trade-Links Ltd). All of them except the company were sentenced to varying terms of imprisonment (three of them to life imprisonment) and fine ranging from Rupees ten lakhs downwards. A-12, company was sentenced to a whopping fine of Rs. fifty lakhs.

2. The incipient backdrop with events which culminated in the nabbing of five accused (A1-Subhash Singh Thakur; A2-Jaynendra Thakur @ Bhai Thakur; A3-Shyam Kishore Garikapti; A4-Chanderkant Patil and A5-Paresh Mohan Desai) has been delineated by the prosecution by referring to three different incidents which took place during the nascent stages. The first was an incident which happened on 30.4.1991 when a ruthless attack was launched on the villagers at Vadrai (a coastal village in Maharashtra) in retaliation for picking up the scattered silver bars strewn in the sea from a capsized vessel employed by some smugglers. (The said incident is referred to in the evidence as Vadrai incident). The second one happened in the City of Mumbai when a number of multistory buildings were blasted with bombs on 12.3.1993 in which a lot of people died and a lot others were seriously injured. (That incident is referred to in evidence as Bombay blast). The third is some terrorists armed with highly sophisticated weapons, had gate crashed into the JJ hospital Bombay where some former members of a terrorists gang were hospitalised and they were all shot dead by the intruders. (That incident is referred to as the JJ shoot-out case).

3. For some time in early July 1993 the Delhi Police were getting secret informations that certain members of a terrorists gang having nexus with "Davood Ibrahim group" have escaped from Bombay and perched in hideouts in Delhi. Those hiding terrorists were closely watching the developments following the arrest of one Amit Tyagi who belong to yet another terrorists' gang. They feared that the police might track them down getting scent from the arrested terrorist. Delhi Police were on the alert to trace out such hide-outs. Delhi Crime Branch Police formed a squad to prevent any blitz being operated by the hiding terrorists.

4. On 23.7.1993 Delhi Crime Branch Police got secret information about the movements of certain terrorists and that they might proceed to Indira Gandhi International Airport as part of an orchestrated cabal to strike at designed targets. So a posse of police personnel, headed by Shri Ajay Kumar, Assistant Commissioner of Police, proceeded to Gagan Vihar Extension, Vikas Marg, Delhi

in six private cars and reached there by 3.00 A.M. The police-party got themselves divided into four different teams and each took different strategic position by keeping a close vigil on the suspected persons.

5. During the wee hours, around 4.00 A.M., accused 1 to 5 sneaked out from their hiding place in a Toyota car. The police party stopped the car. When its driver tried to reverse it in a bid to escape, the police-party surrounded the vehicle. They caught the five accused red-handed with lethal arms as well as ammunitions. A-1 Subhash Singh Thakur had a hand-grenade wrapped in a bag; A-2 Bhai Thakur had a pistol (0.38 bore) and four live cartridges; A-3 Shyam Kishore Garikapati had a country-made pistol and some cartridges; A-4 Chanderkant Patil had a revolver (0.38 bore) and four live cartridges; A5 Paresh Mohan Desai had a button actuated knife. With the help of Fateh Singh, SI of the Bomb Disposal Squad, the hand-grenade was dismantled and diffused. The police-party seized all the lethal weapons as well as ammunitions under seizure memorandums prepared then and there. Requisitions were forwarded to the DCP seeking permission to proceed with the case and after obtaining written permission they arrested the five accused and brought them to the police station.

6. On 26.7.1993, investigation of this case was made over to the Central Bureau of Investigation as per orders of the Government. On interrogation of the five accused CBI officials came to know that there were links between them and other hardcore terrorists.

7. On 24.10.1993, the CBI officials caught A-6 Ahmad Mansoor @ Suhel Ahmed from near Jama Masjid area in Delhi, being an active associate of the arrested persons besides being a member of the "Davood Ibrahim group." It was further revealed that A-6 Ahmad Mansoor and other terrorists were sheltered by A-9 (Kalpnath Rai) in the guest house of National Power Transmission Corporation (NPTC) at Safdarjang Development Area in New Delhi. Such accommodation was arranged by A-9 through his Personal Secretary S.P. Rai (A-8). It was also revealed that A-10 (Brij Bhushan Saran Singh) a Member of Parliament had sheltered some terrorists in his residence at New Delhi. It was also known that A6-Ahmad Mansoor had received substantial financial help from A7 (Sabu V. Chako) who gave shelter to A1 (Subhash Singh Thakore) as well as one B.N. Rai (another hardcore terrorist) in his "Hotel Hans Plaza". During investigation PW-45 (Superintendent of Police) recorded confessional statements made by A-1 to A-6 in the purported exercise of Section 15 of TADA. Sanction to prosecute A1 was accorded by the Director of CBI, for the offences under Section 3(5) of TADA and Section 25 of the Arms Act, 1959. Charge-sheet, at the first instance, was filed against A1 to A6 for the said offences. Learned Judge of the Designated Court, upon consideration of the charge-sheet, found that there were materials to proceed against A7 (Sabu V.Chacko) for harbouring some terrorists. Thereupon he issued summons to that accused. Subsequently the CBI filed a supplementary charge-sheet against A8 (SP Rai), A9 (Kalpnath Rai), A10 (Brij Bhushan Saran Singh), A11 (Sanjay Singh) and A12 (M/s. East West Travel and Trade Links Ltd.) on the allegations that those accused have harboured one or another terrorist during some time or the other.

8. As A-11 (Sanjay Singh) could not be brought to trial, inspite of many efforts, he was declared a proclaimed offender and the case against him was hence split up. Subsequently, the Director of CBI

accorded sanction to prosecute all the accused in the Designated Court. After hearing both the prosecution and the accused charges were framed against different accused for different offences under TADA and also under Section 25 of the Arms Act.

9. After a long drawn trial, examining a large number of witnesses and marking a good number of documents and after questioning each accused under Section 313 of the CrPC (for short 'the Code') and after affording an opportunity to the accused for adducing defence evidence the Designated Court convicted A1, A2 and A3 under Section 3(5) and Section 5 of the TADA and also under Section 25 of the Arms Act, (Each of them was sentenced to undergo imprisonment for life and a fine of rupees ten lacs under first count, imprisonment for five years and a fine of rupees ten thousand under the second count, imprisonment for three years and a fine of rupees ten thousand under the third count)

10. A-4 was convicted under Section 3(4) and Section 5 of the TADA as well as Section 25 of the Arms Act. (He was sentenced to undergo imprisonment for life and a fine of Rs. five lacs on the first count, imprisonment for five years and a fine of rupees ten thousand on the second count, and imprisonment for three years and a fine of rupees ten thousand on the third count).

11. A-5 was convicted only under Section 25 of the Arms Act and was sentenced to undergo imprisonment for the period he had already undergone and to pay a fine of rupees ten thousand. A6 was convicted under Section 3(5) of the TADA and was sentenced to undergo imprisonment for life and to pay a fine of rupees five lacs.

12. A7, A8, A9 and A12 were convicted under Section 3(4) of TADA. (A7 was sentenced to imprisonment for five years and a fine of rupees ten thousand. A8 was sentenced to imprisonment for five years and to pay a fine of rupees five hundred. A9 was sentenced to undergo imprisonment for ten years and to pay a fine of rupees ten lacs. A12 was sentenced to pay a fine of rupees fifty lacs and a period was fixed for its payment and provision was made for recovery of the fine in default of payment committed by the company.) A10 (Brij Bhusan Saran Singh) was however acquitted.

13. We heard arguments of different senior counsel for different appellants at length. Shri V.R. Reddy, Addl. Solicitor General argued for CBI in defence of the conviction and sentence passed on the respective appellants.

14. We deem it necessary to deal first with the contention pertaining to the requirement in Section 20A(1) of the TADA. If that contention deserves acceptance the entire charge and the subsequent proceedings would stand vitiated. The sub-section reads like this:

20A(1) Notwithstanding anything contained in the Code, no information about the commission of an offence under this Act shall be recorded by the police without the prior approval of the District Superintendent of Police.

15. All the senior counsel contended that the said requirement was not complied with in this case before FIR was registered in respect of each of the five accused intercepted on 23.7.1993. PW1

(Prithvi Singh- Inspector of Crime Branch) who claimed to have been in the raiding operation has deposed that immediately after the arrest of the armed men he sent a written application to DCP (same rank as District Superintendent of Police) seeking permission to register the case against first accused under the TADA. According to PW1 the application so forwarded is Ext. PW1/A and DCP has accorded approval thereon. Similar applications were forwarded by the persons who headed the other three teams also and they too claimed to have obtained similar approval. The said factual position adopted by the Crime Branch was very hotly assailed during cross- examination.

16. All the applications for approval were typewritten records. PW1 has said during cross-examination, that one typewriter was brought from the office of the ACP to the venue of capture of the accused and all the applications were got typewritten on it. The trial judge was not persuaded to believe this part of the evidence of the prosecution because the types found on different applications could only have been produced from different typewriters.

17. We scrutinised the applications and we are satisfied that there is considerable force in the contention of the defence that all the applications were not typed on the same typewriter. So the stand of the prosecution that written requests were made by the police party for approval cannot be believed and the contention of the defence on that score was rightly repelled by the Designated Court.

18. But the above finding is not enough to end the travails of the appellants in this case. Ex. PW-1/D is the report (Rukka) which PW1 submitted to the Crime Branch Police Station and Ex. PW10/A is the FIR prepared by the said police on its basis. It is clearly mentioned in the former that "permission for registration of the case was obtained from DCP/CR after informing him of the facts and circumstances." The said fact is mentioned in the FIR also. So the factual position is this. PW 10/A is the FIR. It could only have been made with the approval obtained from the DCP, though it might not have been a written approval.

19. Then the question is whether prior approval envisaged in Section 20A(1) of the TADA should necessarily be in writing. There is nothing in the sub-section to indicate that prior approval of the District Superintendent of Police should be in writing. What is necessary is the fact of approval which is sine qua non. for recording the information about the commission of the offence under TADA. The provision is intended to operate as a check against police officials of lower ranks commencing investigation into offences under TADA because of the serious consequences which such action befalls the accused. However, the check can effectively be exercised if a superior police official of the rank of DSP first considers the need and feasibility of it. His approval can be obtained even orally if such an exigency arises in a particular situation. So oral approval by itself is not illegal and would not vitiate the further proceedings.

20. That apart, one of the offences included in the FIR (Ex. PW10/A) is Section 5 of the Explosive Substances Act. There is no legal requirement to obtain prior permission from the DSP to register a case for that offence. So the FIR as such was not vitiated even otherwise. Perhaps investigation into the offences could not have been commenced until approval was obtained from the DSP. Be that as it may, as we found that oral approval was obtained from the DSP concerned, that is sufficient to

legalise the further action.

21. In Ahmad Umar Saeed Sheikh v. State of U.P. an FIR was registered under Sections 332, 307, 427 of the IPC and also under Sections 3 and 4 of the TADA. No prior approval was obtained in that case under Section 20A(1) and hence it was contended that the entire FIR was liable to be quashed. A Bench of two judges of this Court has repelled the contention and observed thus:

It is of course true that when the above FIR was recorded no prior approval of the Superintendent of Police was obtained as required under Section 20A(1) but, as noticed above, the FIR was recorded not only for offences under TADA but also for offences under the Indian Penal Code for commission of which the police officer concerned was competent to lodge an FIR without such approval. The absence 'of approval of District Superintendent of Police as required under Section 20A(1) of TADA at that stage only disentitled the investigating agency to investigate into the . offences relating to' TADA but it had a statutory right to investigate into the other offences alleged in the FIR.

22. The next hurdle which prosecution has to surmount was regarding sanction under Section 20A(2) of the TADA. The sanction accorded by the Director of the C.B. I. to prosecute A-1 to A-6 has been marked in this case as Ext. PW-93/27. The order narrates the facts leading to the seizure of arms and ammunitions from A-1 to A-5 and also about the activities of A-6. In the operative portion thereof the Director has stated thus:

AND WHEREAS I, K. Vijay Rama Rao, Inspector General of Police, Delhi Special Police Establishment & Director, Central Bureau of Investigation, New Delhi being the competent authority to sanction prosecution in respect of offences Under Section 3(5) of TADA (P) ACT, 1987 and 25 Arms Act, 1959 after fully and carefully examining the material placed before me in regard to the said allegations and circumstances of the case consider that accused Subhash Singh Thakur, Jaynendra Thakur, Shyam Kishore Garikapatti, Chandrakant Patil, Paresh Mohanlal Desai and Mohd. Ahmed Mansoor should be prosecuted in the court of law for the said offences.

NOW, THEREFORE, I...do hereby accord sanction Under Section 20A(2) of TADA(P) ACT, 1987 for the prosecution of S/Sh. Subhash Singh Thakur, Jaynendra Thakur, Shyam Kishore Garikapatti, Chandrakant Patil, Paresh Mohanlal Desai and Mohd. Ahmed Mansoor for the said offences in respect of abovesaid acts and taking of cognizance of the said offences by the court of competent jurisdiction.

23. Learned Counsel for the appellants made a multi- pronged onslaught on the aforesaid sanction. First is that the sanction is not sufficient to proceed against the accused under Section 3(4) and under Section 5 of the TADA. Second is, the sanctioning authority did not intend prosecution proceedings to be launched against the appellants for any offence other than those specifically mentioned in the sanction order. Third is, the sanction even in respect of offences mentioned therein is without application of mind of the sanctioning authority.

24. We may observe, straightway, that we are not impressed by the third point as we are satisfied, by reading the sanction order, that the authority concerned was satisfied of the facts constituting the

offences mentioned therein. Of course, Shri V.S. Kotwal, learned senior counsel contended that the sanctioning authority did not have necessary materials before him to show that the arms seized on 23.7.1993 were live arms. But the report of the officers who seized them to the effect that they were live arms was available to the Director of C.B.I. If he felt that such a report can be believed it is not necessary that the Director should have waited for the result of the analysis conducted by the laboratory upon those arms. That the sanctioning authority really intended to launch prosecution for the offence of illegal possession of arms is quite clear from the statements made in the order. True, the section for the offence (Section 5 of TADA) has not been specifically mentioned therein but that is of no serious consequence as long as the authority has specified the facts and mentioned further that for the offence arising from such facts, sanction is accorded.

25. In this context we would refer to Section 465 of the Code:

465. Finding or sentence when reversible by reason of error, omission or irregularity.- (1) Subject to the provisions hereinbefore contained, on finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

26. In the corresponding provision under the old Code (of 1898) the words "or any error or irregularity in any sanction for the prosecution" were absent. Legal position under the old Code, as settled by the decisions of various courts, was that any defect in sanction was not curable and hence the prosecution- itself would have been void, [vide Dr. Hori Ram Singh v. Emperor MR 1939 FC 43, Gokulchand Dwarkadas Morarka v. The King , Shreekantiah Ramayya Munipalli v. State of Bombay MR 1955 SC 287.

27. When Parliament enacted the present Code they advisedly incorporated the words "any error or irregularity in any sanction for the prosecution" in Section 465 of the present Code as they wanted to prevent failure of prosecution on the mere ground of any error or irregularity in the sanction for prosecutions. An error or irregularity in a sanction may, nevertheless, vitiate the prosecution only if such error or irregularity has occasioned failure of justice.

28. Learned Counsel adopted a twin contention on this aspect. First is that the defence has raised this objection at the earliest instance itself as they were concerned with the impact of such irregular sanction affecting the prosecution. Second is that non-mention of other offences in the sanction is not merely an irregularity but it will go to the root of it.

29. Sub-section (2) of Section 465 of the Code is not a carte blanche for rendering all trials vitiated on the ground of the irregularity of sanction if objection thereto was raised at the first instance itself. The sub-section only says that "the court shall have regard to the fact" that objection has been raised at the earlier stage in the proceedings. It is only one of the considerations to be weighed but it does not mean that if objection was raised at the earlier stage, for that very reason the irregularity in the sanction would spoil the prosecution and transmute the proceedings into a void trial.

30. Shri V.R. Reddy, learned Addl. Solicitor General, adopted another contention in this context. According to him, Section 12(2) of the TADA is sufficient to equip the Designated Court with valid jurisdiction to convict any accused for any other offence whether or not sanction for such offence was also accorded. The said sub-section reads as under:

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.

31. There the words "in the course of any trial under this Act of any offence" pertain to the trial in respect of an offence for which sanction has been accorded by the authority as contemplated under Section 20A(2) of the TADA. Similarly, the words "any other offence under this Act or any rule made thereunder or under any other law" denote all offences other than those falling in the first category. The intention of the Parliament in conferring such a power on the Designated Court is to prevent unmerited, escape of offenders from the clutches of penal consequences even in cases where the Designated Court is satisfied during a valid trial that some other offence has been established beyond reasonable doubt. Once cognizance of any offence under TADA has been taken validly by the Designated Court with a proper sanction the court is not disabled from convicting an accused for any other offence proved during the trial, whether or not sanction has been accorded in respect of such other offence. The raison d'etre is that it is the court of law which after a judicial scrutiny is satisfied on the materials placed before it that another offence has been made out and such satisfaction is of a higher calibre than the satisfaction of a sanctioning authority. The sanction envisaged in Section 20A is, of course, a curb imposed on the prosecution agency to approach the Designated Court with a case. But once such approach is validly made with the proper sanction then the court gets a wider jurisdiction to deal with the offenders in respect of all offences made out in the trial.

32. A-1, A-2, A-3 and A-6 were convicted under Section 3(5) of TADA in addition to other offences. For convenience, we reproduce the sub-section here:

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 term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

33. The sustainability of the conviction thereunder is assailed before us from different angles. First is that the provision itself is invalid due to stark vagueness. Second is, to claw down to the tentacles

of the provision it is not enough that the accused concerned is a terrorist by himself, but he should have membership in a terrorists gang which is involved in terrorist acts. The third is that both ingredients i.e. membership of terrorists' gang and involvement of such gang in terrorist acts, must have taken place after the sub-section was enacted. According to the counsel there is utter lack of evidence in this case in that regard.

34. Sub-section 3(5) was inserted in TADA by Act 43 of 1993 which came into force on 23.5.1993. Under Article 20(1) of the Constitution "no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence". So it is not enough that one was member of a terrorists gang before 23.5.1993.

35. There are two postulates in Sub-section (5). First is that the accused should have been a member, of "a terrorists gang" or "terrorists organisation" after23.5.1993. Second is that the said gang or organisation should have involved in terrorist acts subsequent to 23.5.1993. Unless both postulates exist together Section 3(5) cannot be used against any person.

36. "Terrorist act" is defined in Section 2(h) as having the meaning assigned to it in Section 3(1). That sub-section reads thus:

Whoever with intent to overawe the Government as by law established or to strike terror in people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections 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 otherwise) 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 do or abstain from doing any act, commits a terrorist act,

37. The requirements of the sub-section are: (1) the person should have done an act in such a manner as to cause, or as is likely to cause death or injuries to any person or damage to any property, or disruption of any supplies; (2) doing of such act should have been by using bombs, dynamites etc.; (3) or alternatively he should have detained any person and threatened to kill or injure him in order to compel the Government or any other person to do or abstain from doing anything.

38. He who does a terrorist act falling within the aforesaid meaning is liable to be punished under Sub-section (2) of Section 3. But there are some other acts closely linked with the above but not included in Sub-section (1), such as entering into a conspiracy to do the above acts or to abet, advise, incite or facilitate the commission of such acts. Such acts are also made punishable under Sub-section (3) which reads thus:

(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 life and shall also be liable to fine.

39. Can it be said that a person who conspires, abets, advises or incites or facilitates the commission of the acts specified in Sub-section (1) was not committing a terrorist act? It would be illogical to delink the acts enumerated in Sub-section (3) from those specified in Sub-section (1) for the purpose of understanding the meaning of "terrorist act" indicated in Section 3(5).

40. It is a cardinal principle of interpretation of law that the definition given in a statute is not always exhaustive unless it is expressly made clear in the statute itself. The key words in the definition section (Section 2) themselves are clear guide to show that the definitions given thereunder are to be appropriately varied if the context so warrants. The key words are these: "In this Act, unless the context otherwise requires".

41. Therefore the meaningful understanding should be this. For the purpose of Sub-section (2) the terrorist acts are those specified in Sub-section (1) whereas for the purpose of Sub-section (5) the terrorist acts would embrace not only those enumerated in Sub-section (1) but those other acts closely linked to them and indicated in Sub-section (3) also.

42. When so understood, if there is any evidence to show that the gang to which A-1, A-2, A-3 or A-6 or any of them was a member, has done any such act after 23.5.1993 then the accused concerned is liable to be convicted under Section 3(5) of TADA.

43. But the fact is, in none of the charges framed against the above accused there is any specification that any terrorist act has been committed by a gang subsequent to 23.5.1993, nor has any evidence, whatsoever, been adduced to show that any terrorists gang (of which those accused are the members or not) has committed any terrorist act after the said date.

44. In the light of stark paucity of materials in evidence and in view of total want of any averment in the charges regarding any activity after the said date it would be an idle exercise to further probe into the width and amplitude of the expression "terrorists gang" or "terrorist organisation" or as to whether A-1, A-2, A-3 or A-6 were members of any such gang.

45. The result of the above discussion is that conviction of A-1 to A-6 for the offence under Section 3(5) of TADA cannot be sustained under law.

46. Now, we proceed to consider whether the offence under Section 3(4) of TADA has been made out against A-7 (Sabu V.Chako), A-8(SP Rai), A-9 (Kalpnath Rai) and A-12 (M/s. East West Travel Links). Before we take up the individual case against each one of them we may refer to the contentions severally made by the learned Counsel on a point of law as against the conviction under Section 3(4). Sub-section (4) of Section 3 of TADA reads thus:

Whoever harbors or conceals, or attempts to harbor 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 life and shall also be liable to fine.

47. The word "harbors" has not been defined in TADA. An endeavour was made, during arguments, to hook it with the meaning attached to the same word in the Indian Penal Code on the strength of Section 2(1)(i) of the TADA which reads thus:-

Words and expressions used but not defined in this Act and defined in the code shall have the meanings respectively assigned to them in the code.

48. The Word "Code" in TADA must be understood as referring to the CrPC, 1973, as per Section 2(1)(b) of TADA. But the word "harbor has not been defined in the Code. Section 2 of the Code which is a fasciculus of definition clauses contains an opening to the definition clauses in the Indian Penal Code by the following words in Clause 'Y' of Section 2 of the Code:

words and expressions used herein and not defined but defined in the Indian Penal Code (45 of 1860) have the meanings respectively assigned to them in that Code.

49. On the strength of the above provision learned Counsel contended that the word "harbor", which is not defined in TADA, must be understood in the same manner as it is understood in the Indian Penal Code.

50. There are two hurdles in the way to adopt the IPC definition of the word "harbor" as for TADA. First is that TADA permits reliance to be made only on the definitions included in the Procedure Code and not on the definitions in the IPC. Second is, the word "harbor" as such has not been used in the Procedure Code and hence the question of side-stepping to Penal Code definitions does not arise.

51. Be that as it may, we would refer to the expression "harbor" as understood in IPC, for, TADA is essentially a penal statute and hence the meaning attached to the words in the IPC can have a bearing on the words used in TADA, unless they are differently defined in the Code.

52. Section 52-A of Indian Penal Code defines the word "harbor" as including:

Supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person by any means, whether of the same kind as those enumerated in this section or not to evade apprehension.

53. Sections 136 and 312 of IPC are the provisions incorporating two of the offences involving "harbor" in which the common words used are "whoever knowing or having reason to believe. Another offence in the Penal Code involving "harbor" is Section 157 wherein also the words "whoever harbors knowing that such person etc." are available. It was contended that mens rea is explicitly indicated in the said provisions in the Penal Code whereas no such indication is made in

Section 3(4) of TADA and therefore, the element of mens rea must be deemed to have been excluded from the scope of Section 3(4) of TADA.

54. The word "harbors" used in TADA must be understood in its ordinary meaning as for penal provisions. In Black's Law Dictionary its meaning is shown as "to afford lodging to, to shelter, or to give a refuge to". Quoting from Susnjar v. U.S., CCA Ohio 27 F.2d 223, 224, the celebrated lexicographer has given the meaning of the word harbor as "receiving clandestinely and without lawful authority a person for the purpose of so concealing him that another having a right to the lawful custody of such person shall be deprived of the same." In the other dictionaries the meaning of the said word is delineated almost in the same manner as above. It is, therefore, reasonable to attribute a mental1 element (such as knowledge that the harboured person was involved in a terrorist act) as indispensable to make it a penal act. That apart, there is nothing in the Act, either expressly or even by implication, to indicate that mens rea has been excluded from the offence under Section 3(4) of TADA.

55. There is a catena of decisions which has settled the legal proposition that unless the statute clearly excludes mens rea in the commission of an offence the same must be treated as essential ingredient of the criminal act to become punishable. (State of Maharashtra v. Mayer Hans George , Nathulal v. State of M.P. ).

56. If Section 3(4) is understood as imposing harsh punishment on a person who gives shelter to a terrorist without knowing that he was a terrorist such an understanding would lead to calamitous consequences. Many an innocent person, habituated to offer hospitality to friends and relatives or disposed to zeal of charity, giving accommodation and shelter to others without knowing that their guests were involved in terrorist acts, would then be exposed to incarceration for a long period.

57. For all the above reasons we hold that mens rea is an essential ingredient for the offence envisaged in Section 3(4) of TADA.

58. On the above understanding of the legal position we may say at this stage that there is no question of A-12 - company to have had the mens rea even if any terrorist was allowed to occupy the rooms in Hotel Hans Plaza. The company is not a natural person. We are aware that in many recent penal statutes, companies or corporations are deemed to be offenders on the strength of the acts committed by persons responsible for the management or affairs of such company or corporations e.g. Essential Commodities Act, Prevention of Food Adulteration Act etc. But there is no such provision in TADA which makes the company liable for the acts of its officers. Hence, there is no scope whatsoever to prosecute a company for the offence under Section 3(4) of TADA. The corollary is that the conviction passed against A-12 is liable to be set aside.

59. A-7 (Sabu V. Chacko) the Regional Manager of A-12 company has been convicted of the offence under Section 3(4) on the strength of a finding that he had harboured A-6 Ahmed Mansoor in Hotel Hans Plaza, New Delhi on different days during a period between February and October 1993. For proving the said offence against him prosecution should have established four facts. They are: (1) A-6 Ahmed Mansoor had stayed in the Hotel; (2) Such stay was arranged at the behest of A-7; (3)

A-6 himself was a terrorist; and (4) A-7 knew that A-6 was a terrorist.

60. Shri Gopal Subramaniyam, learned senior counsel who argued for A-7 contended that even the first fact has not been established in this case and hence there is no need to proceed to the other essentials.

61. There is enough evidence in this case to show that a person called "Suhel Ahmed" had stayed in the said hotel during the said period. We do not think it necessary to refer to the evidence in that respect as it is not a disputed fact. However, there must be evidence to show that the said Suhel Ahmed is A-6 Ahmed Mansoor. Unfortunately no witness has stated so nor has any one identified the said Suhel Ahmed as one of the arraigned accused. An endeavour was, of course, made by the prosecution to show that A-6 had impersonated in other areas as Suhel Ahmed. Even if it was so, what should have been established is that A-6 had stayed in the hotel. But no witness said that fact during evidence.

62. Learned judge of the Designated Court has relied on two letters which he had received presumably from A-7 while the accused was languishing in jail during the pre-trial period. Learned judge while questioning A-7 under Section 313 of the Code whipped out those letters from his pocket, marked them as Ext. DA-7/1 and DA-7/2 and asked the following question:

Question:- You had submitted to this Court document Ex. DA-7/1 & DA-7/2 under your signatures. What have you got to say?

Before A-7 answered the question he wanted to go through them and after going through the letters he answered thus:

Both documents bear my signatures. They were prepared by my brother and my representatives but I had signed them without reading them. They were submitted to the court on my behalf but I was not having any knowledge whether these have been submitted to the court or not.

63. The above letters, read as a whole, were in substance a litany of his innocence. Such as:

My lord, Sir, I suffered all these 9 months for not being guilty. Sir, I have a family. I have only a small dream, to lead a good life with my family without any over ambitions.

With pain and sorry I request you to please take appropriate actions against the people who tell and spread the un-told story which you or CBI never told. Because that is an assassination of the character of a person who does not know anything or did not do anything wrong. My Lordship, I have never even heard the name of A1 to A6, or met them in my life before I came to jail. In the name of Jesus I can assure you these things. My Lordship, I am swearing in the name of God, I am an innocent man, and I look for your mercy and justice. Please relieve me from this agony and pain. If not, I do not think I can take all these things for long. Please have pity on me.

64. But the unfortunate aspect is, learned judge has extricated one sentence out of those letters and used it as though it was part of prosecution evidence against the accused and jettisoned the entire remaining bulk of the letters which are lengthy supplications for kindness and mercy.

65. It was illegal on the part of the learned judge of the Designated Court to have used any part of the said letters, especially when those letters were not adduced as evidence in the case through any procedure known to law. Not even an affidavit has been filed by any one atleast for formally proving those letters in evidence. Section 313 of the Code is intended to afford opportunity to an accused "to explain any circumstance appearing in the evidence against him." It is trite that an accused cannot be confronted during such questioning with any circumstance which is not in evidence. Section 313 of the Code is not intended to be used as an interrogation. No trial court can pick out any paper or document from outside the evidence and abruptly slap it on the accused and corner him for giving an answer favourable or unfavourable. The procedure adopted by the learned judge in using the said two letters is not. permitted by law. We, therefore, disapprove the said course and dispel the said letters book bell and candle.

66. What remains as against A-7 is that one person by name Suhel Ahmed had stayed in Hotel Hans Plaza - nothing more and nothing else. We need not, therefore, proceed further to the other three requirements necessary to fasten him with liability under Section 3(4) of TADA. The result is, conviction of A-7 in this case cannot be upheld.

67. The case against A-8 (S.P. Rai) and A-9 (Kalpnath Rai) can be considered together so that much overlapping and repetitions can be averted. A-8 was the Additional Personal Private Secretary of A-9 during the time when the latter was Union Minister of State for Power. The charge against them is that they have sheltered two terrorists (A-1 Subhash Singh Thakur and another person called "V.N. Rai") in the guest house attached to the National Power Transmission Corporation (NPTC for short), now known as Power Grid Corporation. V.N. Rai is said to be an accused in JJ shoot out case. The finding of the Designated Court is that A-8 had harboured A-1 Subhash Singh Thakur and A-9 has harboured V.N. Rai during certain period in 1992.

68. Shri Jaitly, learned senior counsel who argued for the accused has contended that even assuming that a person by name V.N. Rai had stayed in the NPTC Guest House there is no evidence that he was a terrorist and that there is no shred of evidence that A-9 knew that the said person was a terrorist.

69. There seems to be some evidence to show that a person by name "B.M. Rai" had stayed in the Guest House concerned. PW-21 was the Senior Manager (Admn.) in the Power Grid Corporation. He said that a person called V.N. Rai had to be accommodated in the guest house on the recommendation of A-8. This was corroborated by PW- 38 who was Addl. General Manager of the said corporation, though there is a little discrepancy in the name mentioned by the last two witnesses (one said it was one B.N. Rai, the other witness said that the name is B.M. Rai), but nobody has identified the person called B.N. Rai or B.M. Rai in the trial court. There is nothing to show that the said person had anything to do with any terrorist activity. Of course prosecution made an endeavour to show that the person called B.N. Rai is the same person arraigned in JJ shoot out

case by name "Vijendra Rai". Apart from the absence of any connecting nexus between Vijendra Rai in JJ shoot out case and B.N. Rai (or B.M. Rai) who stayed in the guest house, there is no legal evidence whatsoever to prove that Vijendra Rai himself was a terrorist.

70. It appears that there is some evidence in this case to show that A-1 had stayed in the NPTC Guest House but there is no evidence to show that his stay was at the instance of A-8 S.P. Rai. Hence it is unnecessary to proceed to consider the next aspect whether A-8 was having any knowledge then that A-1 was a terrorist.

71. The result of the above discussion is that A-8 and A-9 cannot be convicted of the offence under Section 3(4) of TADA.

72. Turning to the case against A-4 that he had harboured A-1, A-2 and A-3, we must observe that the only evidence on record on that score is the statement recorded from those three accused by the Superintendent of Police. Those statements are described as confessional statements. To what extent those confessional statements have involved A-4 need be considered only if the confession of one accused can be used against another accused.

73. Section 15 of TADA provides that "notwithstanding anything in the Code or in the Indian Evidence Act...a confession made by a person before a police officer not lower in rank than a Superintendent of Police...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". In this context we may point out that the words "or co-accused, abettor or conspirator" in the proviso were not in the section until the enactment of Act 43 of 1993 by which those words were inserted. By the same amendment Act Section 21 was also recast which, as it originally stood, enabled the Designated Court to draw a legal presumption that the accused had committed the offence "if it is proved that a confession has been made by a co-accused that the accused had committed the offence."

74. The legal presumption linked to an accused vis-a-vis a confession made by a co-accused has been deleted by Parliament through Act 43 of 1993 and as a package inserted the words mentioned above in Section 15.

75. What is the effect of such deletion from Section 21 and addition to Section 15 of TADA? It should be remembered that under Section 25 and 26 of the Evidence Act no confession made by an accused to a police officer, or to any person while he was in police custody could be admitted in evidence, and under Section 162 of the Code no statement made by any person during investigation to a police officer could be used in a trial except for the purpose of contradiction. In view of the aforesaid ban imposed by the legislature Section 15 of the TADA provides an exception to the ban. But it is well to remember that other confessions which are admissible even under the Evidence Act could be used as against a co-accused only upon satisfaction of certain conditions. Such conditions are stipulated in Section 30 of the Evidence Act, which reads thus:.

When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

76. The first condition is that there should be a confession i.e. inculpatory statement. Any exculpatory admission is not usable for any purpose whatsoever as against a co-accused. The second condition is that the maker of the confession and the co-accused should necessarily have been tried jointly for the same offence. In other words, if the co-accused is tried for some other offence, though in the same trial, the confession made by one is not usable against the co-accused. Third condition is that the confession made by one accused should affect himself as well as the co- accused. In other words, if the confessor absolves himself from the offence but only involves the co-accused in the crime, while making the confession, such a confession cannot be used against the co-accused.

77. Even if no conditions are satisfied the use of a confession as against a co-accused is only for a very limited purpose i.e. the same can be taken into consideration as against such other person. It is now well settled that under Section 30 of the Evidence Act the confession made by one accused is not substantive evidence against a co-accused. It has only a corroborative value, (vide Kashmira Singh v. State of Madhya Pradesh , Nathu v. State of Uttar Pradesh , Haricharan Kurmi v. State of Bihar )

78. A confession made admissible under Section 15 of the TADA can be used as against a co-accused only in the same manner and subject to the same conditions as stipulated in Section 30 of the Evidence Act.

79. In view of the above legal position the confession made by A-1(Subhash Singh Thakur), A-2(Jaynendra Thakur) and A-3(Shyam Kishore Garikapti) cannot be used against A-4(Chanderkant Patil), even as for corroborative purposes because the former set of accused were not tried for the offence under Section 3(4) of TADA. So the first condition set forth in Section 30 of the Evidence Act is nonexistent. Though under Section 15 of TADA such a confession is admissible in evidence even when the confessor and the co-accused are tried in the same case (no matter that they are not tried together for the same offence) the utility of such a confession as against the co-accused gets substantially impaired for all practical purposes unless both of them are tried for the same offence. Consequently in the present trial the confessions made by the first three accused would remain at bay so far as A-4(Chanderkant Patil) is concerned as for Section 3(4) of TADA. The further corollary is since there is no substantive evidence against A-4 regarding Section 3(4) of TADA he cannot be convicted under this Section.

80. Now we have to consider the case of prosecution that the police party conducted a raid during the wee hours of 23.7.1993 and rounded up A-1 to A-5 red-handed with illegal arms and ammunition while they were proceeding in a Toyota car.

81. We have to observe, at the outset on this point, that even if prosecution story is accepted by us and the finding of the Designated Court is upheld on this point we are unable to uphold the

conviction of A- 5(Paresh Mohan Desai) under Section 25 of the Arms Act. A-5 was found in possession of only a knife the length of which is 9.2". Possession of a knife, if that has to amount to an offence under the aforesaid provisions, must be of such a knife which should answer the description specified in the notification issued under Section 4 of the Arms Act. The notification which was in force at the relevant time was No.13/203/78-Home(G). What is prohibited under the notification is possession of a knife having a length of 7.62 cm. and a width of 7.2 cm. or above. In the charge framed against A- 5(Paresh Mohan Desai) there is no averment that he possessed a knife of the above description. Nor is there any indication in the document evidencing seizure of the knife regarding its width. In view of the total absence of anything in the evidence that A-5 possessed a knife of the description specified in the notification, he would be entitled to an acquittal of the said offence.

82. According to the evidence, the police party went to Gagan Vihar Extension, Vikas Marg, Delhi, in 6 motorcars and they reached the place by about 3 A.M. and they got divided themselves into four different squads and remained at four different spots within the proximity of the iron gate of the colony. When they spotted the Toyota car moving out of the colony the police party stopped it before the vehicle could cross the gate. It was surrounded by the police personnel and the lethal weapons which were found in the possession of the miscreants were seized.

83. PW-1 (Prithvi Singh, Inspector of Crime Branch) has said in his evidence that the first squad caught hold of A-4 (Chanderkant Patil) and seized a revolver and live cartridges from him. That version is fully supported by PW-8(Lalit Kumar, HC) and PW-9(Rajinder Gautam, Inspector) who were in that team. The second squad caught hold of A-2(Bhai Thakur) and seized one 0.38 pistol and 4 live cartridges from him. That version is supported, inter alia, by PW-4(Mehak Singh, SI) and PW- 5(Ashok Kumar, HC) who were in that team.

84. The third team consisted of PW-6(Roop Lal, SI), PW-7(Surendra Singh, Constable), PW-11 (Rajendra Singh, ASI) and PW-12(Mahabir Singh, HC) as well as others. They caught hold of A-3 (Shyam Kishore Garikapati) and seized a country-made pistol as well as a live cartridge from him. That version is spoken to by the aforesaid witnesses besides PW-1 (Prithvi Singh).

85. The fourth team consisted of PW-1 (Prithvi Singh, Inspector), PW-2(Jagdish, ASI), PW-3(Rakesh, Constable) and a few other policemen. They caught A-1 (Subhash Singh Thakur) Who had in his possession one hand- grenade wrapped in a raxine bag.. Immediately a requisition was sent to the Bomb Disposal Squad for defusing the grenade, which was promptly reciprocated. After it was defused the same was taken into custody. That version is fully supported by the aforesaid witnesses.

86. As against the said version of the prosecution the five accused had put forth a totally different version in their defence. According to them the police took them into custody from different places on 19.7.1993 and detained them under illegal custody and concocted the present version for the purpose of nailing them to a charge under TADA.

87. Learned Counsel, who argued for different accused amongst the first five, cited before us a fact which looms large in all the confessions recorded by PW-45 (Superintendent of Police, Special Task Force of CBI). On three dates during the second week of August 1993, the confessional statements of those accused have been recorded by PW-45. What has been highlighted by the counsel is that narration of the activities in all the confessional statements stopped with 18.7.1993 and none among those confessors mentioned anything beyond 18.7.1993.

88. As the first blush, we also felt that the said circumstance is a formidable one lending credence to the defence version. But a closer scrutiny of the evidence dissuaded us from attaching any such significance to the said circumstance. It cannot be assumed that PW-5 Superintendent of Police was unaware when he recorded the confessional statement that the police version was in favour of the arrest of those accused on 23.7.1993. Very probably the confessors had no significant activity to be narrated after 18.7.1993 and it cannot be believed that those confessors were unaware of what happened to themselves subsequent to that date.

89. The second point of attack was that the police party did not examine a single independent witness to support the case that the 5 accused were rounded up on the early hours of 23.7.1993, nor did they secure the signature of at least one such independent person in any of the documents prepared at the time of seizure of the arms and ammunition.

90. As a legal proposition it was argued that it would be unsafe to base a conclusion on the evidence of police officers alone without being supported by at least one independent person from the locality. To reinforce the said contention Shri V.S. Kotwal, Senior Advocate cited the decision of this Court in Pradeep Narayan Madgaonkar and Ors. v. State of Maharashtra wherein want of independent witnesses of the locality rendered suspicious a raid conducted by the police.

91. There can be no legal proposition that evidence of police officers, unless supported by independent witnesses, is unworthy of acceptance. Non-examination of independent witness or even presence of such witness during police raid would cast an added duty on the court to adopt greater care while scrutinising the evidence of the police officers. If the evidence of the police officer is found acceptable it would be an erroneous proposition that court must reject the prosecution version solely on the ground that no independent witness was examined. In Pradeep Narain Madgaonkar (supra) to which one of us (Mukherjee, J) is a party, the aforesaid position has been stated in unambiguous terms, the relevant portion 6f which is extracted below:

Indeed, the evidence of the official (police) witnesses cannot be discarded merely on the ground that they belong to the police force and are, either interested in the investigation or the prosecuting agency but prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible corroboration of their evidence in material particulars should be sought. Their desire to see the success of the case based on their investigation; requires greater care to appreciate their testimony.

92. In Balbir Singh v. State this Court has repelled a similar contention based on non-examination of independent witnesses. The same legal position has been reiterated by this Court time and again

vide Paras Ram v. State of Haryana , Same Alana Abdullla v. State of Gujarat , Anil alias Andy a Sadashiv Nandoskar v. State of Maharashtra , Tahir v. State (Delhi) JT 1996(3) SCC 338.

93. The factual position is also to be mentioned now. PW-1 Prithvi Singh has said in evidence that the police party had, in fact, tried to get one or two persons who came by that way to remain as witnesses for the action they were about to take but none of them obliged. We should not forget that the time of the raid was during the odd hours when possibly no pedestrian would have been trekking on the road nor any shopkeeper remaining in his shop nor a hawker moving around on the pavements.

94. Learned Counsel then pointed out from evidence that the Daily Diary which was maintained in the police station contained entries of all what happened on the early hours of the crucial date. They are not produced. Counsel, therefore, argued that an adverse inference can be made from the non-production of such diaries.

95. We do not find any force in the said contention. No doubt Daily Diary is a document which is in constant use in police station. But no prosecution is expected to produce such diaries as a matter of course in every prosecution case for supporting the police version. If such diaries are to be produced by prosecution as a matter of course in every case, the function of the police station would be greatly impaired. It is neither desirable nor feasible for the prosecution to produce such diaries in all cases. Of course it is open to the defence to move the court for getting down such diaries if the defence wants to make use of it.

96. Regarding the occurrence on the early hours of 23.7.1993, we have before us the consistent version of 11 witnesses, of course all of them police officers, who have participated in the action. To support their version we have before us in evidence Ext. PW-1/D Rukkha which reached the police station during the early hours of the same day itself which contains a narration of the events which took place at Gagan Vihar Extension, Delhi. There is no reason to doubt that the said Rukkha would have been concocted subsequently because an FIR was registered in the same police station on the strength of the facts revealed in the said Rukkha. The FIR is (Ext. PW-10/A). We put on record that nobody had argued before us that the said FIR was a subsequent creation or was ante-dated.

97. A reference to the evidence of PW-14 (Rajinder Kumar Jain) would be apposite in this context. He is the owner of premises No. 105 Gagan Vihar Extension, Delhi (which was in the name of his wife) which was rented out to A-4 (Chanderkant Patil). The witness has said in evidence that A-4 was staying in that apartment and in July 1993 he accommodated 4 or 5 friends in the same apartment with the permission of the landlord. The most important aspect of his testimony is, he had seen A-4 in the apartment till 23.7.1993. Of course a suggestion was put to him that he would have seen A-4 only till 18th or 19th of July 1993, but the witness had emphatically repudiated that suggestion. This evidence of PW-14 gives us almost a guarantee that A-4 was. not taken into police custody before 23.7.1993 and that his case in defence that he was actually nabbed by police on 19.7.1993 is not a true version.

98. Thus we can unhesitatingly concur with the finding of the trial court that the prosecution version regarding the rounding up of A-1 to A-5 during the wee hours of 23.7.1993 with arms and ammunition, is true.

99. The upshot is the following: Prosecution has not established any case against A-5 to A-9 and A-12. Hence they are entitled to acquittal. We therefore, set aside the conviction and sentence passed on them and acquit them. We also set aside the conviction and sentence passed on A-1 to A-3 under Section 3(5) of TADA and on A-4 under Section 3(4 of TADA. But A-1, A-2, A-3 and A-4 cannot escape conviction under Section 5 of TADA and Section 25 of the Arms Act. We confirm their conviction under the said offences.

100. However, we are not satisfied that the minimum sentence of imprisonment for 5 years awarded by the trial court to A-1 to A-4 for the offence under Section 5 of TADA is commensurate to the gravity of the offence. Perhaps the trial court would have been persuaded to award that sentence in view of the fact that those accused were sentenced to imprisonment under Section 3(5) of TADA. Now that we have set aside the conviction of those accused of the offence under Section 3(5) of TADA we think that the sentence of imprisonment awarded to A-1 to A-4 for the offence under Section 5 of TADA must be enhanced. We can consider that aspect only after hearing A-1 to A-4 on that point. Hence we direct the Registry to serve notice on the counsel for A-1 to A-4 on the proposal to enhance the sentence for the offence under Section 5 of TADA.