IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 36 OF 1995
(With Criminal Appeal Nos. 906 and 926 of 1994)

Pradeep Narayan Madgaonkar & Ors.
... Appellant(s)

VERSUS

State of Maharashtra
... Respondent(s)

BENCH / CORAM: Hon'ble Dr. Justice A.S. Anand & Hon'ble Mr. Justice M.K. Mukherjee
DATE OF JUDGMENT / ORDER: May 12, 1995
CITATIONS: (1995) 4 SCC 255 | AIR 1995 SC 1930 | 1995 CriLJ 3213 | JT 1995 (7) SC 350 | 1995 (3) SCALE 408 | 1995 SCC (Cri) 708
ACTS CONSTRUED: Section 5 of Terrorists and Disruptive Activities (Prevention) Act, 1987 (TADA); Sections 3 & 25 of Arms Act, 1959; Section 100(4) of Code of Criminal Procedure, 1973 (CrPC).

ORDER

A.S. Anand, J. (for himself and M.K. Mukherjee, J.)

1. The appellants were convicted by the Designated Court of offences punishable under Section 5 of the Terrorists and Disruptive Activities (Prevention) Act 1987 (hereinafter referred to as TADA) read with Section 3 and Section 25 of the Arms Act 1959 and sentenced to suffer rigorous imprisonment for five years each vide judgment dated 3.10.1994. They have questioned their conviction and sentence through these appeals under Section 19 of TADA.

2. We have heard learned Counsel for the parties and perused the record.

3. Shorn of details, the prosecution case is that on 2nd January 1991, the then Assistant Commissioner of Police (Crime Branch) telephonically informed Shri Lembhe, Senior Inspector of Police that two incidents of indiscriminate firing had taken place at Lal Vitachi Chawl situated at Byculla and on Sane Guruji Marg. He was also informed that the gang of one Chota Rajan was suspected to be behind the two firing incidents. In response to the telephonic information PW 1 Inspector Deshmukh accompanied by PW 4 Inspector Deshpande PW 6 Inspector Gadre and PSI Chate left the zonal office of the DCB CID in a police jeep for "combing operations". The hide out of the gang of Chota Rajan was reported to be at Tilak Nagar/Ghatkopar. After the police party reached near Tilak Nagar, PI Gadre PW 6 received secret information that some members of Chottey Rajan gang were hiding in a room on the ground floor of building No. 93 at Tilak Nagar. Room No. 3323 (stated by the prosecution to be 3334) is situated on the ground floor of building No. 93. At about 8.30 p.m. the members of the raiding party reached in front of room No. 3323 of building No. 93 after joining with them two independent panches PW 2 Ramji and PW 5, Tushar Niar. The door of the room was found closed. PW1 rang the door bell and knocked at the door but there was no response. Some whispers could, however, be heard by members of the raiding party. The police party disclosed their identity to the inmates but the door of the room was still not opened. The door was therefore forcibly broken open by the raiding party and they stormed into the room. The three appellants, along with one Ganesh Singh Bisht @ Danny (absconding accused) were found present in the room armed with fire arms and ammunition. They (the accused) initially pointed their weapons towards the police party but were advised by the raiding party to surrender at the point of stenguns etc. The

appellants and Danny tucked the weapons in their respective waists and raising their arms, surrendered before the police party. After the accused were disarmed, their search was conducted and the weapons alongwith ammunition were taken into possession from their personal search. From Pradeep Narain appellant a pistol, 6 live cartridges and one empty cartridge were found. The pistol bore making "BF-43-PO 38" with the number "4067" inscribed on the barrel. The live cartridges which were found loaded in the pistol bore making "9 mm LUCN WW". From Mahendra Anand Patil, appellant, one pistol with Chinese inscription and bearing No. "11006114-66-1964) with letters "A" and "M" on the trigger was found. Besides, he was also found in possession of five live cartridges and two empty cartridges. The markings "38-50 - 45L-762 MAUSER" were found inscribed on the live cartridges. From appellant Shrirang Baburao Pawar one revolver made by "Webley and Scott Ltd." made in England Mark III, besides jacketed cartridges bearing the markings "PEMUPC-32 58 WL" and two empty cartridges were found. After conducting the search and recovery of the weapons and cartridges, four separate FIRs were registered and the accused were after investigation and obtaining sanction, sent up for trial. After recording the evidence led by the prosecution, the appellants were convicted and sentenced as noticed above.

4. The prosecution with a view to connect the appellants with the crime, besides placing on record the report of the Ballistic Expert, examined the two panch witnesses PW 2 and PW 5 besides the police offices PW 1, PW4 and PW 6. The prosecution also relied upon the confessional statements of appellants 1 and 2, recorded by PW 3 Shri Hemant Karkare, Deputy Commissioner of Police.

5. The Designated Court, disbelieved the confessional statements of A1 and A2 and consequently ruled the same out of consideration. The Designated Court also did not find the evidence of PW 2 reliable and being of the opinion that PW 2 was 'available' and "amenable" to the police, did not rely upon the evidence of PW 2, but accepting the statements of PW 1, PW 4, PW 5 and PW 6 convicted and sentenced the appellants.

6. Section 100(4) of the Cr.P.C. requires that before making a search, the officer or other person about to make it, shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness, the search and may issue an order in writing to them or any of them so to do. The courts generally look for compliance of the aforesaid provisions, to the extent possible in the facts and circumstances of a given case. Do PW2 and PW5 satisfy the requirements of Section 100(4) supra? Can they be called independent respectable witnesses of the locality? If they did not belong to the locality where the search was conducted, what was the occasion from them to be present near building No. 93 at the crucial time to be joined as panch witnesses? Answer to these and some other questions, to be dealt with later on, would decide whether the conviction and sentence of the appellants is sustainable.

7. Admittedly, both PW 2 and PW 5 are not the witnesses from the locality where the search was being conducted. Explaining the reason for their presence near the place of search, PW 2 stated that he along with his friend Tushar Niar PW 5, had gone to building No. 92 at Tilak Nagar to meet one of the friends of Tushar Niar around 8.30 p.m. and while they were returning they were requested by some police men present there to act is panches. PW 2 admitted that his residential area falls within the jurisdiction of Motunga Police Station and that he does not live in the locality or even near about the area where the search was conducted. PW 5, on the other hand, deposed that "On that day I along with one of my friend Ramaji, had been to Tilak Nagar for some work. We both had been to building No. 92 to see whether there was any room vacant. As we found that no room was vacant we both started returning back. On the way two plain clothes police men met me on way near-by one circle which was about 50 meters away from building No. 91/92. The police men asked me to act as a panch witness to which I flatly refused. However, as my friend Ramaji had acceded to the request of the police. I accompanied him to get an experience of the work. The police men took myself and my friend Ramaji to bldg. No. 93, where PI Grade and other police officers and police mean were present".

8. Thus, it is seen that the explanation given by PW2 and PW 5 for their presence, in front of building No. 93 at the relevant time, is poles apart. Both PW 2 and PW 5 are at variance about the purpose of their visit and have not been able to satisfactorily justify their presence at the site of search, when admittedly they both belonged to and lived in different far of areas. PW 2 admitted that he had been joining police raids earlier also and had acted as a panch witness on various occasions. PW 5 is, on his own admission, a friend and associate of PW 2, for whom he used to work for 7 or 8 years, for payment, after meeting him at a gambling den. It appears to us rather strange that in a busy locality, where the search was to be conducted, the only two 'independent' panches associated by the police party were PW 2 and his friend PW 5, both not belonging to the locality. It appears to be too much of a co-incidence that the raiding party, who had left for "combing operations: in the area of Tilak Nagar on receipt of information regarding the two incidents of firing in that area should meet PW 2 and PW 5 only as the 'respectables' of the 'locality' and request them to join as "independent panches". For very cogent reasons. PW 2 has been disbelieved by the Designated Court itself as was found to be a person available and amenable to police. It appears to us that the services of PW 5 were made available to the police by his friend PW 2, who on the finding of the Designated Court was always available to the police and had been joining the police party during various raids. Obviously no serious attempt was made by the raiding party to associate with them two or more independent and respectable inhabitants of the locality in which the room was located, for reasons best known to them before conducting the search. It is not the case of the prosecution that either no independent respectable witness of locality was available or was otherwise willing to join the raid when contacted. The effort of the police party to paint and portray PW 2 and PW 5 as independent witnesses stands exposed by the Designated Court itself, which found PW 2 to be not a trustworthy witness and a person who was available at the beck and call of the police. In view of the inconsistent versions given by PW 2 and PW 5 regarding the purpose of their visit to justify their presence in the area at the time of search, we are doubtful whether the witnesses were at all joined with the raid in the manner alleged by the prosecution. While learned Counsel appearing for the State frankly conceded that he could not press into aid the statement of PW 2 to support the prosecution, he submitted that the evidence of PW 5 was worthy of credence. After going through the statement of PW 5, we have not been able to persuade ourselves to agree with the learned State Counsel.

9. PW 5, whose evidence found favour with the trial court, during his cross-examination conceded that he had not revealed his correct address to the police officers and had given them a fake address at the time when panchnama Ex.7 was prepared during the search and seizure of the weapons from the appellants from the room. He stated that during his stay in Bombay, he used to reside near one bridge on Flank Road, Gandhi Market and that Gandhi Market is near Kings Circle. He conceded that the room where he was putting up had no number. "However, had given a false address to the police because I was afraid of my life. I had apprehended danger from the police because they were armed. Hence in order to see that my genuine address is not revealed to the police and that they should not contact me on that address, I gave the fake address. I had given such fake address before the drawal of the panchnama Ex. 7". Thus, on his own admission, PW 5 had given a fake address to the police and had concealed his real address when he joined the raid. Thus, from the very start of his association in the raid, PW 5 on his own showing indulged in falsehood and gave false address on the panchnama, Ex.7 and in his statement recorded by the police. It appears that PW 5 has hardly any respect for truth. Can he be considered trustworthy? He is a person who admittedly was amenable to the influence of PW 2 and it was PW 2 who appears to have procured' his services for join as a panch witness. Recalling, his association with PW 2 and his influence upon him, Tushar Nair PW 5 stated that "since I started assisting PW 2 in his business, I stopped staying in the house of my parents. As I was indulging in gambling my parents were not on good terms with me. The parents might have considered me as a bad element. My parents wanted me to give up gambling and they had warned me on that score. My gambling activity was behind the back of my parents and I never informed it to them. My gambling activity came to the notice of my parents through some of my friends. During my gambling activity Ramaji PW 2 was my friend. As a gambling den was nearby Gandhi Market I came in contact with PW 2 Ramaji. PW 2 also used to come to the den for gambling. The gambling den

belonged to somebody else and was not my own. I do not know the name of the conductor of the gambling den. I was indulging in the gambling for over 2 to 3 years. I became a friend of PW 2 and started assisting him in his business after my parents threw me out from their house. The gambling den where I was gambling falls within the local jurisdiction of Motunga Police Station". He further admitted that "on 2.1.91 I had given my fake address to the police a the instance of PW 2", After the raid, he had left Bombay and settled at Raipur. He admitted that neither his mother nor any other relative knew his whereabouts and that except Ramaji PW 2, he had not left his Raipur address with anyone else and that it was Ramaji PW 2 who had given his address to the police, which enabled the police constables to trace him in Raipur and bring him to Bombay after covering a journey for 29 hours by train to give evidence in the case. He admitted that he was a member of a gambling gang and had come into contact with PW 2 during his gambling activities and that his association with PW 2 had started 7/8 years prior to the date of the occurrence and the friendship had developed. Even when he was brought by the police from Raipur to Bombay to give evidence in this case, he had contacted PW 2 Ramaji on 21.6.91 and had remained with him for about half an hour. His statement was recorded in the court on 22.6.91. He further admitted that "I was brought to the Court by the police from Raipur, two police constables named Patil and Shaikh, who were the members of the raiding party, had come to Raipur to bring me to Bombay. I am working as a Manager in one Hotel in Raipur. The name of the Hotel is Megha. I left Bombay some time during the month of April 1991". He admitted that the travel from Raipur to Bombay took about 29 hours and during this period and even after reaching Bombay from Raipur, he throughout remained in the company of the two police constables who had brought him from Raipur to Bombay till he met PW 2 in Bombay.

10. Of course, the mere fact that PW 5 had been a gambler at some point of time or may have been thrown out by his parents from the parental house, may not case a doubt about his "respectability", if he had later on settled down to work in Raipur but a careful perusal of his statement and particularly the glaring contradictions regarding the purpose of his visit to the place of occurrence on the date of the raid and the manner in which he was associated with the conduct of raid coupled with his conduct of giving false address to the police on occasions more than one and his deep association with PW 2, has created an impression on our minds that not only the evidence of PW 5 bristles with inconsistencies and contradictions but also that he cannot be termed as a trustworthy or a truthful witness. His evidence does not bear judicial scrutiny and he appears to as to be a got up witness. It would not be safe, therefore to rely upon his testimony.

11. Learned Counsel for the State, however, vehemently argued that there was no reason for the court to disbelieve the official witnesses PW 1, PW 4 and PW 6 who had no reason to falsely implicate any of the appellants. They are independent respectable persons. Indeed, the evidence of the officials (police) witnesses cannot be discarded merely on the ground that they belong to the police force and are, either interested in the investigating 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. We cannot loose sight of the fact that these police officials did not join any independent witnesses of the locality and made an attempt to create an impression on the courts that both PW 2 and PW 5 were witnesses of locality and were independent, knowing fully well that PW 2 was a witness who was under their influence and 'available' to them, as he had been joining the raids earlier also and PW 5 was a close associate of PW 2, their friendship having developed during the days of gambling when admittedly the police never conducted any raid at their gambling den.

12. The very fact that the police officers joined PW 2 and PW 5 in the raid creates a doubt about the fairness of the investigation. Coupled with this is the manner in which the confessional statement of A1 and A2 was recorded by Hemant Karkare PW 3, which has been rightly discarded by the Designated Court itself. Even if we were to ignore the tell tale discrepancy in the number of the room i.e. 3323 or 3334, from where the appellants were arrested, accepting the explanation of the prosecution that it was as a result of typographical error, it looks to us rather strange that the

discrepancy should have come to the notice of the investigating officer only when he filed his affidavit in the Supreme Court in the special leave petition filed by the absconding accused, yet in the totality of the circumstances of the case and after a careful analysis of the evidence on the record we find it rather unsafe to rely upon PW 1, PW 4 and PW 6 only without there being any independent corroboration of their testimony, to uphold the conviction and sentence of the appellants. We cannot loose sight of the fact that since the mere possession of an arm, as specified in the schedule, without a licence, in a notified area, attracts the provisions of Section 5 of TADA with stringent punishment, the quality of evidence on which the conviction can be based has to be of a much higher order than the one we find available in the present case. Our independent appraisal of the evidence on the record has created an impression on our minds that the prosecution has failed to bring home the charge to the appellants beyond a reasonable doubt.

13. Since, we find that it is not safe to rely upon the evidence relating to the alleged search and recovery, the appellants are entitled to the benefit of doubt. Their conviction and sentence cannot be sustained. We therefore accept these appeals and set aside the conviction and sentence of the appellants. They shall be released from custody forthwith if not required in any other case.

(Dr. A.S. Anand, J.)

(M.K. Mukherjee, J.)

New Delhi,
May 12, 1995.