PETITIONER:
SURESH BUDHARMAL KALANI @ {A[[I LA;AMO

Vs.

RESPONDENT:
STATE OF MAHARASHTRA

DATE OF JUDGMENT: 15/09/1998

BENCH:
M.K.MUKHERJEE, SYED SHAH MOHAMMED QUADRI

ACT:

HEADNOTE:

JUDGMENT:
JUDGMENT
M.K.Mumherjee. J.
Leave granted in both the petitions.
2.Suresh Budharmal Kalani @ Puppu Kalani and Dr. Aken Kumar Gajendra Rai Desai, the appellants in these two appeals, figure as accused (besides others) in TADA Special Case No. 31 of 1993, pending before the Designated Court, Brihan Mumbai constituted under The Terrorists and Disruptive Activities (P) Act, 1987 (TADA for short). The case arises out of an incident of rioting, murder and other cognate offences that took place on September 12, 1992 at J.J. Hospital, Bombay. According to the prosecution case, on that day at or about 3.45 P.M. a group of persons armed with automatic fire arms, such as pistols, AK 47 assault rifles, stormed into Ward No. 18 of the hospital and opened fire upon Shailesh Haldankar, who was an accused in Crime No. 542/92 of V.P.Road Police Station and admitted there due to injuries earlier sustained. The indiscriminate firing by the miscreants resulted in the death of Haldankar and two policemen on guard duty and injuries to five others. Shri K.G.Thakur, Sub-Inspector of police attached to V.P.Road Police Station, who was then on duty at the hospital returned the fire causing injuries to some of the miscreants including one Shrikant Rai @ Pradhan. The miscreants, however, managed to escape carrying with them the injured associates in a car. It is the further prosecution case that the incident was the outcome of a conspiracy hatched by Dawood Ibrahim, a notorious gangster, and his men to avenge the murder of his brother-in-law, Ibrahim Ismail Parkar, who was eliminated by the members of his rival gang led by Arun Gowli of which Haldankar was a member.
3.Over the incident, a case was registered on a report lodged by Shri Thakur and on completion of investigation, charge sheet was submitted by the police after obtaining requisite sanction under Section 20A(2) of TADA to prosecute the appellants and others. On that charge sheet cognizance was taken by the Designated Court; and on consideration of the documents referred to under Section 173 (2) Cr.P.C. and, after hearing the parties, it passed orders for framing charges under Section 3 (3) of TADA and 120B I>P>C> against

Kalani and under Section 3 (4) of TADA and 212 I.P.C. against Dr. Desai. Assailing the above orders, the appellants have filed these appeals.

4.The gravamen of the charges to be framed against Kalani is that he hatched a criminal conspiracy to murder Haldankar and thereby abetted the commission of his murder. The above accusation is based on the following facts and circumstances :-

i)a meeting was held on September 2, 1992 in a holiday resort belonging to Kalani where the decision to kill Haldankar was taken;

ii)soon after the murder, Kalani had a telephonic talk with one of the accused persons regarding the arrangement to be made to remove injured Shrikant Rai in his car; and

iii)on September 13, 1992, Kalani threatened Jayawant Suryarao, (one of the accused) that in case he disclosed the removal of Shrikant Rai in his (Kalani's) car he and his family members would be liquidated.

To prove the above facts and circumstances, the prosecution seeks to rely upon:-

i)the evidence of Smt. Priti, wife of accused Jayawant Suryarao, and Shri Himmat Rawal;

ii)confessional statement of Dr. Bansal; and

iii)confessional statement of Jayawant Suryarao;

respectively.

5.On perusal of the statements of the above mentioned two witnesses recorded under Section 161 Cr. P.C. we find that they did not speak of any conspiracy, much less of a conspiracy to commit the murder in question. Their statements only disclose that on September 2, 1992 Kalani had a meeting with accused Jayawant Suryarao, the President of Bhiwandi Nizampura Municipal Council, and others in his holiday resort over a no confidence motion that was to be brought against the latter. It is pertinent to mention here that it is not the prosecution case that the murder of Haldankar was even remotely connected with the above no confidence motion. On the contrary, as noticed earlier, it is its positive case that the murder was the outcome of a gang rivalry. From the impugned order we find that the Designated Court, after having held that the discussion in the meeting was only over the no confidence motion observed 'that there is every possibility that they also must have discussed the planning above the killing of Shailesh Haldankar'. The above observation is to say the least, wholly unjustified. A presumption can be drawn only from facts - and not from other presumptions - by a process of probable and logical reasoning. The Designated Court could not have, there ore, drawn the presumption of a conspiracy to kill Haldankar as the statements of the two witnesses do not afford, by any stretch of imagination, any foundation for the same.

6.Thus said, we may turn our attention to the confession made by Dr. Bansal and Jayawant Suryarao. Under Section 30 of the Evidence Act a confession of an accused is relevant and admissible against a co-accused if both are jointly facing trial for the same offence. Since, admittedly Dr. Bansal has been discharged from the case and would not be facing trial with Kalani his confession cannot be used against Kalani. The impugned order shows that the Designated Court was fully aware of the above legal position but, surprisingly enough, it still decided to rely upon the confession on the specious ground that the prosecution was not in any way precluded from examining Dr. Bansal as a witness in the trial for establishing the facts disclosed in his confession. This again, was a perverse approach of the

Designated Court while dealing with the question of farming charges. At that stage the court is required to confine its attention to only those materials collected during investigation which can be legally translated into evidence and not upon further evidence (dehors those materials) that the prosecution may, adduce in the trial, which would commence only after the charges are framed and the accused denies the charges. The Designated Court was, therefore not at all justified in taking into consideration the confessional statement of Dr. Bansal for framing charges against Kalani.

7.So far as the confession of Jayawant Suryarao is concerned, the same (if voluntary and true) can undoubtedly be brought on record under Section 30 of the Evidence Act to use it also against Kalani but then the question is what would be its evidentiary value against the latter. The question was succinctly answered by this Court in Kashmira Singh V. State of Madhya Pradesh (1952 SCR 526) with the following words :

> "The proper way to approach a case of this kind is first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it sands even though if believed, it would be sufficient to sustain a conviction. In aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

The view so expressed has been consistently followed by this Court. Judged in the light of the above principle the confession of Suryarao cannot called in aid to frame charges against Kalani in absence of any other evidence to do so.

8.That brings us to the case of Dr. Desai, the other appellant. According to the prosecution case the injured accused Shrikant Rai was taken to the house of Dr. Desai by Shanti Lal Patil, Jagdish Chand and Hasmukh Bhai, three of the accused persons, for treatment. They told Dr. Desai that he (Shrikant) had sustained bullet injury in the stomach due to accidental firing from the licensed revolver of Shanti Lal. Dr. Desai told them that the injured could not be admitted in a Government hospital as it was a medico-legal case. They however, insisted that Shrikant should be treated in a private hospital and all expenses thereof would be paid by them. Dr. Desai then contacted one Dr. Kamble over phone and requested him to operate upon the patient. Accordingly, Shrikant was taken by the above three accused persons to Dr. Kamble who operated upon him. The prosecution alleges that knowing full well that it was a medicolegal case Dr. Desai entertained Shrikant and arranged for his operation by Dr. Kamble at his private hospital and thereby helped Shrikant to abscond after he recuperated.

9.To prove the above accusation and, for that matter, to substantiate the charges under Sections 3(4) of TADA and 212 I.P.C. to be framed against Dr. Desai, the prosecution intends to rely lupon the alleged confessional statement of Dr. Desai himself and three of the co-accused, namely Dr. Kamble, Jagdish Chand and Hasmukh Bhai. The relevant portion of the statement of Dr. Desai reads as under :

> "On 12.9.1992 at about II p.m. Jagdish along with

> one person, whom he introduced to me as Hasmukh Patel, Sarpanch of Dumas, called at my residence. Jagdish informed me that Hasmukh's elder brother owns a from at Silvasa and he is also a building contractor. Jagdish further informed me that on the same evening they had a party on the farm house, when accidently a shot was fired from the weapon and one of them was injured and he may require an operation. He further told me that they tried to contract a surgeon at Silvasa, but he was not available and they are bringing the injured to Surat for treatment and requested me to help them. I suggested to them to get the injured admitted in Govt. Hospital, Surat, when Jagdish told me that those people wanted the injured to be treated in a private hospital and were willing to pay any charges for the treatment. Jagdish also told me that they were prepared for the worst. I also came to know through Jagdish that the injured had an jinury over the abdomen. At about 12 midnight on 12.9.92, I contacted Dr. Kamble that the party was ready to pay any charges, as he thought fit, for the operation. I also told Dr. Kamble that the patient was not before me and enquired whether he was ready to operate such a case. For a while Dr. Kamble thought about it and asked me to send the patient to his hospital at Gopipura. Dr. Kamble then informed me that he would intimate his staff at the hospital about the arrival of the injured and ask them to be ready. I then informed Jagdish to take the injured to Dr. Kamble's hospital. Thereafter, Jagdish and Hasmukh went away."

10A bare perusal of the above statement makes it abundantly clear that it is self exculpatory and hence inadmissible in evidence as ' confession'. Once it is left out of consideration - as it should be - the confessional statements of the other three accused, for what they are worth, cannot be made - in absence of any other material to connect Dr. Desai with the accusation levelled against him a basis for impugned charges in view of the law laid down in Kashmira singh (supra).

11.On the conclusion as above, we allow these appeals and quash the charges framed against the two appellants. They are discharged from their respective bail bonds.