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BALBIR SINGH

v.

STATE

SEPTEMBER 26, 1996

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[DR. A.S. ANAND AND K.T. THOMAS, JJ.]

*Terrorist and Disruptive Activities (Prevention) Act, 1987 :*

C

*S.5—Accused found in possession of unauthorised rifle and 161 live cartridges in notified area—Trial by Special Court—Conviction and sentence of 8 years R.I. awarded—Appeal—Conviction challenged on the grounds that identity of rifle found in possession of accused was rendered doubtful in as much as some witnesses described the rifle as AK 47 whereas other described it as AK 56 and that the police did not examine any independent witness—Held, describing the rifle as AK 47 or AK 56 is not of much consequence—There is no doubt from the prosecution evidence that the rifle which was recovered from the possession of the accused was the rifle marked as Ext. D-1 bearing no. 516275—Witnesses relating to recovery identified the weapon—Besides, accused was found in possession of 161 live cartridges and this recovery would itself attract provisions of s.5—Evidence of witnesses cannot be said to be tainted merely because they belong to police force—They had no reason to falsely implicate the accused—They have stood the test of cross examination—Report of Central Forensic Science Laboratory lends enough corroboration to their evidence—Accused was arrested from the park and some persons who were looking from a distance did not come at the spot—In the circumstances not joining any of these persons as witnesses cannot affect the credit worthiness of prosecution case—There is ample evidence that accused was in conscious possession of unauthorised rifle and 161 live cartridges in notified area—Conviction upheld—Accused being 20 years of age, sentence reduced to 6 years' R.I.*

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*Sanjay Dutt v. State, [1994] 5 SCC 410, followed.*

*Paras Ram v. State of Haryana, [1992] 4 SCC 662, held no longer a good law on interpretation of "arms and ammunition".*

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 641 of 1996.

From the Judgment and Order dated 14.2.96 of the Designated Court in Session Case No. 14 of 1993. A

Goodwill Indeevar, Sant Lal Nayar and P.S. Sharma for the Appellant.

Mrs. K. Amareshwari, Shambhu Pd. Singh and B. Krishna Prasad for the Respondent. B

The following Order of the Court was delivered :

This appeal under section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter called the 'TADA') is directed against the Judgment and order dated 14th February, 1996 by which the appellant has been convicted for an offence under section 5 of TADA and sentenced to undergo rigorous imprisonment for eight years and to pay a fine of Rs. 1,000 and in default to undergo simple imprisonment for six months. C D

The prosecution case against the appellant is that on 6th April, 1992, PW.1 H.C. Maru Ram, who was incharge of PCR Van No. Victor 79, Maruti Gypsy bearing registration No. DDV 6920 based in Kailash Colony, alongwith constable Chander Pal and driver constable Raj Kumar, received a wireless message at about 2.05 p.m. to the effect that a person wearing green coloured pant, green coloured shoes and having a green coloured bag was present in suspicious circumstances and that if his bag was searched it might show presence of some contraband. On receipt of this information PW.1 alongwith the other members of the police party proceeded towards Relax Restaurant. On reaching Relax Restaurant, an enquiry was made from the owner of the Restaurant if he had seen any person with that description but he replied in the negative. In the meantime it was noticed that the appellant was sitting in a park at a short distance. He was wearing green coloured shoes, green coloured pant and had a green coloured bag with him. The police party reached near him. He became perplexed and tried to open the bag. He was however overpowered. Constable Chander Pal, PW.2 snatched the bag from the appellant. On checking the bag, a rifle and some cartridges besides and empty megazine and megazine containing live cartridges, fitted with the rifle were recovered. The appellant alongwith the seized articles was proceeded towards P.S. Greater Kailash and at the gate of the Police Station, S.I. E F G H

- A Sukhbir Singh and Constable Pankaj met the police party. The bag containing 137 live cartridges and the magazine fitted with the rifle containing 24 live cartridges were taken into possession alongwith the rifle. Inside the green coloured bag there were two other bags. There was one patka also in the bag besides one white coloured bed sheet and a pink coloured bed sheet. Certain printed papers containing the name of Khalistan Armed Forces (Udhoke) were also recovered. On the rifle there was a sticker with the inscription in Gurmukhi "Naam Khummari Nanaka Charri Rahe Din Raat". On the magazine also there was a sticker with the inscription "Raj Karega Khalsa" in Gurmukhi. The rifle Ex.P1 alongwith two magazines Ex.P2 and P3 and the live cartridges numbering 161 (24 live cartridges in one magazine besides 137 cartridges) were taken into possession and were sealed into different parcels and sealed with the seal of SBS. The other articles, found from the personal search and from the search of the bags were also sealed into separate parcels and sealed with the seal of SBS. The sealed parcels were deposited with Moharror Malkhana and were later on sent to the Central Forensic Science Laboratory. The report of the Central Forensic Science Laboratory PW9/F shows that the sealed parcels containing the arms and ammunitions with seal of SBS intact were received in the laboratory and on testing the rifle it was found to be in a working order. The ballistic expert opined that the rifle was an arm within the meaning of the Arms Act. One test cartridge was fired from the rifle and it was opined that 161 cartridges which had been recovered were live cartridges. On completion of the investigation, the appellatant was tried for the offence under section 5 of TADA and convicted and sentenced as noticed above.

- F The prosecution with a view to connect the appellatant with the crime examined nine witnesses. It produced in evidence the affidavit of Moharror Malkhana as also the reports from the CFSL. Various documents including the seizure memos etc. were also produced at the trial. The appellatant in his statement recorded under section 313 Cr.P.C. denied the prosecution allegations against him. He examined DW.1, Manjit Singh, in his defence who had given a certificate to the effect that the appellatant was bearing a good moral character.

We have perused the evidence with the assistance of learned counsel for the parties and examined the record.

- H Learned counsel for the appellatant submitted that there was a serious

flaw in the prosecution case in as much as while PW.1 deposed that what had been recovered from the appellant was rifle AK-47, PW.7 in his evidence deposed that the weapon recovered was AK-56 and that in question No. 1 put to the appellant under Section 313 Cr.P.C. he was told that he had been found in possession of an AK-56 rifle besides the live cartridges. On this basis it is argued that the identity of the weapon has been rendered doubtful. There is indeed this variance in the evidence of PW.1 and PW.7. That, however, in our opinion is not of much consequence. The rifle which was recovered from the appellant bore No. 516275. That number was mentioned in the seizure memo prepared at the spot. It was that weapon which was sent to the CFSL and in its report Ext.PW.9/F the CFSL found that rifle No. 516275, Ex.P1, was in working order and conformed to the description of an arm under the Arms Act. All the prosecution witnesses relating to recovery of the arms and ammunitions including PW.1 and PW.7 in the Court identified rifle bearing No. 516275, Ex.P1, as the rifle which had been recovered from the appellant at the time of his apprehension. PW.7 also identified rifle Ex.P1 as that weapon. Nothing therefore turns on as to whether the rifle was described as AK-47 by PW.1 and AK-56 by PW.7. During his cross-examination, PW.7 stated that he had never seen an AK-56 rifle before and that he had never operated any such rifle. He did not even know how the magazine is fitted to an AK-56 rifle or whether AK-56 is the only rifle which is made in China. It, therefore, appears to us that describing of the rifle Ex.P.1, bearing No. 516275 as AK-47 or AK-56, is not of much consequence and does not create any doubt about the identity of the weapon. There is no doubt from the prosecution evidence that the rifle which was recovered from the possession of the appellant was rifle Ex.P1 bearing No. 516275.

Learned counsel for the appellant then submitted that though the appellant was arrested from the park where a number of witnesses were present, the prosecution had not examined any independent witnesses and, therefore, the prosecution case had been rendered doubtful. We cannot agree. None of the prosecution witnesses who have been examined bore any ill will or malice against the appellant. Of course, they all belong to the police force but merely on that account their evidence cannot be said to be tainted. Since the departmental witnesses would be interested in the success of the prosecution case prudence requires that their evidence be scrutinized with more care. We have critically and carefully analysed the evidence of all the prosecution witnesses and find that despite lengthy cross

- A examination nothing has been brought out which may in any way discredit their testimony at all. These witnesses had no reason to falsely implicate the appellant. They have stood the test of cross-examination. The report of the CFSL lends enough corroboration to their evidence. It is in the evidence of PW.1 that when the appellant was over-powered, some persons were looking from a distance but none of them came at the spot.
- B Under these circumstances not joining any of those witnesses cannot affect the credit-worthiness of the prosecution case.

- With a view to convict an accused under section 5 of TADA, the Constitution Bench in *Sanjay Dutt v. State*, [1994] 5 SCC 410 laid down that
- C the prosecution is required to prove that the accused was in conscious 'possession', 'unauthorisedly', in "a notified area" of any of the arms and ammunition specified in Columns 2 and 3 of Category I or Category III(a) of Schedule I to the Arms Rules, 1962 or of bombs, dynamite or other explosive substances and that no further nexus with any terrorist or disruptive activity is required to be proved by the prosecution, in view of the
- D statutory presumption and the conviction would be valid on the strength of the presumption.

- In the present case there is ample evidence on the record to show that the appellant was in conscious possession of rifle Ex.P1 bearing
- E No.516275 which weapon answered the description of an arm under the Arms Act as per the report of the CFSL. The appellant had no licence for such a weapon and was thus in an unauthorised possession of the same. There is no dispute that the recovery was made from the area which was a declared notified area. All the ingredients essential for proving of an
- F offence under section 5 of TADA stand established in the case and his conviction is well merited.

- Before parting with the case, it would be relevant to point out that even if it could be possible to say, for the sake of arguments, though there is no basis for it, that the description of the weapon put to the appellant
- G in his statement under section 313 Cr.P.C as AK-56 had prejudiced him it would still not affect the prosecution case because there is nothing on the record to show that Rifle Ex.P1 was not an AK-56 rifle. Besides in answer to question No.4 put to the appellant in his statement under section 313 Cr.P.C. his attention was specifically invited to the recovery of rifle Ex.P1
- H besides the cartridges. Therefore, there could be no possibility of any

prejudice having been caused to the appellant by the mentioning of AK-56 in question No.1. Besides, 161 live cartridges were also recovered from his possession. The law laid down by this Court in *Paras Ram v. State of Haryana*, [1992] 4 SCC 662, that for an offence under Section 5, the recovery must be of "arms and ammunitions" and not of either "arm" or "ammunition" has been held to be not good law by the Constitution Bench in Sanjay Dutt's case (*supra*) wherein it was opined that while interpreting the expression "arms and ammunitions" in section 5 of TADA, the words have to be read *disjunctively* and not *conjunctively*. The appellant was found to be in possession of 161 lives cartridges consciously and unauthorisedly in a notified area. This recovery by itself would attract the provisions of Section 5 of TADA.

The next question, however, is with regard to the quantum of sentence.

The appellant has been awarded sentence of 8 years rigorous imprisonment besides a fine of Rs. 1,000. He was about 20 years of age. In the facts and circumstances of the case, in our opinion, it would meet the ends of justice if the substantive sentence of the appellant is reduced from 8 years rigorous imprisonment to six years rigorous imprisonment while maintaining the sentence of fine and the punishment in default thereof. We make an order accordingly. With the above modification in sentence the appeal is partly allowed.

R.P.

Appeal partly allowed.