

SUNDER
v.
STATE (N.C.T. OF DELHI)

JULY 23, 2002

[Y.K. SABHARWAL AND H.K. SEMA, JJ.]

Penal Code, 1860: Ss. 399 and 402—Five persons prosecuted for these offences and for offences under Terrorist and Disruptive Activities (Prevention) Act as also under Arms Act—Designated Court convicting two appellants herein u/ss. 399 and 402 IPC and 25 Arms Act—Other three convicted of all the charges—However, in a separate appeal the said three persons acquitted by Supreme Court of charges u/ss. 399 and 402—Held, for the reasons stated in the appeal, conviction and sentence of the two appellants herein for offences u./ss. 399 and 402 deserves to be set aside.

Suleman and Ors. v. State of Delhi, [1999] 4 SCC 146, relied on

Sukhbir Singh and Ors. v. State of Haryana, JT (1997) 8 SC 379, cited.

Arms Act, 1959: s.25—Appellants along with three others convicted of the charge—Conviction and sentence of other three affirmed by Supreme Court in a separate appeal—Contention by State that since recovery against other three was held to be proved it was not open to appellants herein to urge to the contrary, rejected—Since recovery of knives from the appellants herein has not been proved, their conviction u/s. 25 cannot be maintained.

Suleman and Ors. v. State of Delhi, [1999] 4 SCC 146, referred to

Criminal Trial:

Examination of witnesses—Appellants prosecuted u/s. 25 Arms Act—Recovery of knives from their possession alleged—Three persons witnessed the recovery—Only one of them (PW 2) examined, who turned hostile—Held, despite the fact that PW 2 was declared hostile prosecution did not think it appropriate to examine the other two witnesses of recovery memo, or at least one of them—There are matters of contradictions in the testimony of PW 2 and PW 6—On examination of the testimony of PW 2 and PW 6 it is not possible and safe to place any reliance on testimony of PW 2—Resultantly,

A *seizure of knives from appellants has not been proved.*

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 450 of 2002.

B Form the Judgment and Order dated 5/6.5.98 of the Designated Court, Delhi in S.C. No. 29/97, F.I.R. No. 24 of 1991.

WITH

Crl. A. No. 602 of 2002.

C R.K. Maheshwari, Mohd. Nasir, Rishi Maheshwari, Jana Kalyan Das for the Appellant.

Ashok Bhan, R.K. Rathore and D.S. Mahra for the Respondent.

The following Order of the Court was delivered :

D Criminal Appeal No. 450/ 2002 has been filed by Sunder and Criminal Appeal No. 602/2002 by Satbir Singh under Section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA in short) against the judgment and order dated 5th and 6th May, 1998 passed by the Designated Court, Delhi. By the said judgment the appellants have been convicted for offences under Sections 399 and 402 I.P.C. as also Section 25 of the Arms Act. Besides these two appellants, the three other accused who were convicted by the Designated Court by common Judgment were Suleman , Chiman and Sadhu Ram. Suleman and Sadhu Ram were also convicted under Section 5 of the TADA Act. We are, however, not concerned with their cases since the appeals filled by the said three were decided by this Court in case reported in [1999] 4 SCC 146, *Suleman's Ors. v. State of Delhi*, and their conviction under Section 399 and 402 I.P.C. was set aside. The conviction and sentence under TADA Act was, however, maintained and also the Conviction and sentence for offence under Section 25 of the Arms Act. For offence under Section 25 of the Arms Act, the Designated Court has imposed on each of the appellants Sentence of one year and fine of Rs. 400

It is not in question that for reasons stated in *Suleman's* case (supra) the conviction and Sentence of the appellants as well for offences under Section 399 and 402 IPC deserves to be set aside.

H That leaves the question in respect of conviction and sentence of the

two appellants before us for offence under Section 25 of the Arms Act. A

Challenging the aforesaid, learned counsel for the appellants have made two submissions: (1) Designated Court had no jurisdiction to try the case against the appellants, and (2) Recovery of knives from the appellants has not been proved and therefore the appellants deserve to be acquitted of the offence under Section 25 of the Arms Act. B

The basis of the first submission is the non-framing of charge under any provision of TADA Act against the appellants. Learned counsel for the appellants submits that in view of the non-framing of charge against the appellants under TADA Act, the Designated Court had no jurisdiction to try them for offences under Section 399 and 402 IPC and under Section 25 of the Arms Act as Sections 11 and 12 of the TADA Act only confer power on the Designated Court to try offences under TADA Act and under other penal laws only when there is also a charge under the TADA Act. The submission is that if there is no charge against the accused under TADA Act the only course open to the Designated Court is to transfer the case under Section 18 of the TADA Act for trial of other offences by a court having Jurisdiction under the Code of Criminal Procedure. In support, reliance has been placed on the decision of this Court in *Sukhbir Singh's Ors. v. State of Haryana*, (JT) [1997] 8 SC 379. C D

In support of the second contention, learned counsel for the parties have taken us through the testimony of PWs 2,3 and 6, PW2 is a Head Constable Chand Singh, PW3 is Inspector Ram Pal Sharma and PW6 is S.I. Om Prakash. The testimony of PW3 has no relevance in so far as the recovery from the appellants is concerned. According to the case of the prosecution, knives were recovered from the appellants. The recovery of knives is evidenced by recovery Memos. PW2/P (in respect of Sunder) and PW2/Q (in respect of Satbir Singh). The recoveries were sought to be proved in the testimony of PW2 Chand Singh. The said witness was, however, declared hostile. We have examined his testimony. It is not possible and safe to place any reliance on testimony of PW2. The aforesaid two documents of recovery are witnessed by Head Constable Prakash Chand and ASI Rajbir Singh besides PW2. Despite the fact that PW2 was declared hostile, prosecution did not think it appropriate to examine the aforesaid other two witnesses of Recovery Memos, or at least one of them. Out of three witnesses of recovery, the senior most was ASI, other being two Head Constables. We have also examined the testimony of PW6 S.I. Om Prakash. There are material contradictions in the testimony of E F G H

- A PW2 and PW2 and PW6. Under these circumstances we have no option but to hold that the seizure of knives from the appellants has not been proved.

- Learned counsel for the State submits that in view of the decision in *Suleman's* case (supra) the recovery against the appellants also stands proved. In the said decision the Court relying on the aforesaid prosecution witnesses held that the seizure of the fire arms against the appellants before the Court in *Suleman's* case stood proved. We are not concerned with the seizure of the fire arms. Regarding recovery of knives except a passing reference there is no discussion in *Suleman's* case. In any event, we are not concerned in these appeals with the question of recovery of fire arms or knives from *Suleman*, *Chiman* or *Sadhu Ram*, the appellants in *Suleman's* case. In the present appeals, we are concerned with the recovery of the knives from the two appellants. It cannot be said that since the recovery against the three appellants in *Suleman's* case was held to be proved, it is not open to the appellants in the present appeals, to urge to the contrary. These appellants were not parties in *Suleman's* case and factual finding therein cannot bind them. Keeping in view *Suleman's* judgment, with the assistance of learned counsel for the parties, we minutely examined the original case record since the State had not filed the record as was required by it under the Rules. On examination thereof, we have no doubt that the recovery from the appellants of the knives has not been proved and, therefore, their conviction under Section 25 of the Arms Act cannot be maintained.

In view of the aforesaid, it is not necessary to decide the first submission regarding the jurisdiction of the Designated Court.

- For the aforesaid reasons, we allow these appeals, set aside the conviction and sentence of the appellants under Sections 399 and 402 IPC and under Section 25 of the Arms Act and acquit them. Appellant-Satbir Singh shall be set at liberty forthwith, if not required in any other case. Appellant-Sunder is on bail. Bail bonds executed by him will stand cancelled.

R.P.

Appeals allowed.