(2002) 10 SC CK 0079

Supreme Court of India

Case No: Crl.A. No.-000480-000480 / 2001

Sarwan Singh		APPELLANT
	Vs	
State of Punjab		RESPONDENT

Date of Decision: Oct. 7, 2002

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 162, 6
- Penal Code, 1860 (IPC) - Section 302, 307, 34
- Terrorist and Disruptive Activities (Prevention) Act, 1985 - Section 12, 12(1), 14(1), 14(3), 19(1)
- Terrorist

Citation: (2003) 1 ACR 845 : AIR 2002 SC 3652 : (1995) CriLJ 3630 : (2002) 8 JT 114 : (2003) 1 LW(Cri) 224 : (2002) 7 SCALE 351 : (2003) 1 SCC 240 : (2002) 3 SCR 128 Supp

Hon'ble Judges: Y. K. Sabharwal, J; U. C. Banerjee, J

Bench: Division Bench

Advocate: Mohit Mathur, Abhay Kumar and S.N. Jha, for Subramonium Prasad, for the Appellant; Monika Gusain, for Rajeev Sharma, for the Respondent

Final Decision: Allowed

Judgement

Banerjee, J.

On the backdrop of escalation of terrorist activities in thecountry, Parliamentary wisdom prompted it to introduce inthe Statute Book the Terrorist and Disruptive Activities (Prevention) Act, 1985 and since there was an expectation that theactivities concerned would be curbed within a period of two years,life of the said Act of 1985 was restricted to a period of two yearsfrom the date of its commencement. But unfortunately, theterrorist violence continued unabated and resultantly theGovernment thought it prudent to extend the life of the legislationfrom time to time. In one of the earliest pronouncements of thisCourt after the introduction of the said Act, this Court in 293753 in no uncertain terms stated that the intendmentof the legislation is to provide special machinery to combat

thegrowing menace of terrorism in different parts of the country.This court also did emphasise that since the legislation is a drasticone, the same should not ordinarily be resorted to unless thegovernment''s law enforcing machinery fails. In paragraphs 17 and18 of the Report this Court observed:

"17. The legislature by enacting the law has treatedterrorism as a special criminal problem and created aspecial court called a Designated Court to deal with thespecial problem and provided for a special procedurefor the trial of such offences. A grievance was madebefore us that the State Government by notificationissued u/s 9(1) of the Act has appointedDistrict and Sessions Judges as well as AdditionalDistrict and Sessions Judges to be judges of suchDesignated Courts in the State. The use of ordinarycourts does not necessarily imply the use of standardprocedures. Just as the legislature can create a specialcourt to deal with a special problem, it can also createnew procedures within the existing system.Parliament in its wisdom has adopted the framework ofthe Code but the Code is not applicable. The Act is aspecial Act and creates a new class of offences calledterrorist acts and disruptive activities as defined inSections 3(1) and 4(2) and provides for a specialprocedure for the trial of such offences. UnderSection 9(1), the Central Government or a StateGovernment may by notification published in theOfficial Gazette, constitute one or more DesignatedCourts for the trial of offences under the Act for sucharea or areas, or for such case or class or group ofcases as may be specified in the notification. Thejurisdiction and power of a Designated Court in derivedfrom the Act and it is the Act that one must primarilylook to in deciding the question before us. UnderSection 14(1), a Designated Court has exclusivejurisdiction for the trial of offences under the Act andby virtue of Section 12(1) it may also try any otheroffence with which the accused may, under the Code,be charged at the same trial if the offence is connectedwith such other offence. Where an enactmentprovides for a special procedure for the trial of certainoffence, it is that procedure that must be followed andnot the one prescribed by the Code.

18. No doubt, the legislature by the use of the words''as if it were'' in Section 14(3) of the Act vested aDesignated Court with the status of a Court of Session.But, as contended for by learned counsel for the StateGovernment, the legal fiction contained therein mustbe restricted to the procedure to be followed for thetrial of an offence under the Act i.e. such trial must bein accordance with the procedure prescribed under theCode of the trial before a Court of Session, insofar asapplicable. We must give some meaning to theopening words of Section 14(3) ''Subject to the otherprovisions of the Act'' and adopt a construction infurtherance of the object and purpose of the Act. Themanifest intention of the legislature is to take away thejurisdiction and power of the High Court under theCode with respect to offences under the Act. No otherconstruction is possible. The expression ''HIgh Court''is defined in Section 2(1)(e) but there are no functionsand duties vested in the High Court. The onlymention of the High Court is in Section 20(6) whichprovides that Sections 366-371 and Section 392 of theCode shall apply in relation to a case involving anoffence triable by a Designated Court, subject to themodifications that the references to

''Court of Session''and ''High Court'' shall be construed as references to''Designated Court'' and ''Supreme Court'' respectively.Section 19(1)of the Act provides for a direct appeal, asof right, to the Supreme Court from any judgment ororder of the Designated Court, not being aninterlocutory order. There is thus a total departurefrom different classes of criminal courts enumerated inSection 6 of the Code and a new hierarchy of courts issought to be established by providing for a directappeal to the Supreme Court from any judgment ororder of a Designated Court not being an interlocutoryorder, and substituting the Supreme Court for the HighCourt by Section 20(6) in the matter of confirmation ofa death sentence passed by a Designated Court.''

2. In a subsequent decision in Niranjan Singh 273784 , it has been stated that while extra care must be taken to ensurethat those of whom the legislature did not intend to be covered bythe express language of the statute are not to be roped in bystretching the language of the Act in question but that however,does not mean and imply adaptation of a negative attitude if thematerials so justify. In this context, reference may be made to thedecision of this Court in Anil Sanjeev Hegde v. State of Maharashtra .

3. One other aspect of the special statute (Terrorist andDisruptive Activities (Prevention) Act) ought to be noted in orderto give credence to the legislative wisdom by reason of theincorporation of Section 12 therein. For convenience sake Section12 is noticed hereinbelow:

''12. Power of Designated Courts with respect toother offences. - (1) When trying any offence, aDesignated Court may also try any other offence withwhich the accused may, under the Code, be charged atthe same trial if the offence is connected with such otheroffence.

(2) If, in the course of any trial under this Act of anyoffence, it is found that the accused person hascommitted any other offence under this Act or any rulemade thereunder or under any other law, the DesignatedCourt may convict such person of such other offenceand pass any sentence authorised by this Act or suchrule or, as the case may be, such other law, for thepunishment thereof.''

4. Obviously, the effort on the part of the legislature is not tohave two sets of trial, one under general law and the other underspecial statute and availability of such a power cannot but beascribed to be in tune with the jurisprudence of the country. Be itnoted that the instant appeal is statutory in nature in terms of theprovisions of Section 19 of the Terrorist and Disruptive Activities(Prevention) Act, 1987 and arises against the judgment anddecision of the Designated Court of Ferozepur in Sessions TrialNo. 28 of 2000.

5. At this juncture, it would be convenient to briefly advert tothe prosecution case, which runs as below:

6. Darshan Singh, a resident of village Yareshah Wala has beenthe complainant in the instant matter. They were five brothers:Mukhtiar Singh @ Kali was the eldest. Piara Singh

@ Murli wasyounger to Mukhtiar Singh and Sukha Singh was the youngest.Mohinder Singh and Sukha Singh were unmarried ones whereasDarshan Singh (complainant) along with Mukhtiar Singh andPiara Singh were the married ones. Piara Singh @ Murli wasresiding separately. The complainant along with Mukhtiar Singhwere residing jointly. Mohinder Singh and Sukha Singh wereresiding with their father Wazir Singh. Houses of all the brotherswere in the same complex. On 12.10.1990, at about 3.00 AMMukhtiar Singh and his wife Rano were sleeping on the roof of the house ofMukhtiar Singh and somebody from the outside called Kala anddirected to open the door. Complainant and his brother MukhtiarSingh replied in the negative and by reason wherefore the personspresent outside the door stated that in the event of the door remainclosed, their house would be set on fire. Out of fear, thecomplainant and his brother Mukhtiar Singh opened the doctor andupon coming outside the house, signed Sarwan Singh son ofKashmir Singh armed with 12 bore gun (SB) of their village andone Bagicha Singh son of Joginder Singh resident of Karmoowala,who used to visit the house of Sarwan Singh; Bagicha Singh wasknown to them earlier because he used to visit Sarwan Singh andwas armed with 12 bore double barrel gun with butt and barrel cut.It was a moonlit night and both the accused tied the arms ofMukhtiar Singh. In the same manner arms of Piara Singh werealso tied. The complainant along with his brother startedimploring the accused, but Sarwan Singh accused replied that theyshould be taught a lesson for quarrelling with him. With the helpof gun the complainant was directed to return. Mukhtiar Singh andPiara Singh were taken away by the accused towards the field ofShabeg Singh. After 15 minutes there was firing from the fieldsof Shabeg Singh. Out of fear, the complainant remained standingin the courtyard and after about half-an-hour, Mukhtiar Singharrived with profuse bleeding. There were injuries on hands andhead of Mukhtiar Singh and he disclosed that Sarwan Singhand Bagicha Singh had murdered Piara Singh in the fields ofShabeg Singh, and fire arm injuries were also inflicted to MukhtiarSingh and with Butt blows on the head of Mukhtiar Singh. Theaccused persons however fled away from the spot with theirrespective weapons towards the side of village Sher Khan. Out offear and darkness of the night outside, Mukhtiar Singh andDarhsan Singh remained in their house. In the morning MukhtiarSingh was shifted to Civil Hospital, Ferozepur on the tractortrolley of Piara Singh. Mohan Singh son of Jaimal Singh wasdeputed to guard the dead body of Piara Singh. Darshan Singh,complainant had gone to lodge the report and while near the flour-millof Jagir Singh in the area of village Chugte Wala, met thepolice party headed by Jaspal Singh ASI when the statement ofDarshan Singh was taken upon compliance with the requiredformalities. Subsequently, however the statement was sent to thePolice Station, on the basis of which formal FIR was recorded at11.15 AM on 12.10.1990.

7. On the further factual score, it appears that the Police partyhad gone to the spot. Inquest report (Ex.PC) was prepared and theplace of occurrence was duly inspected. Blood stained earth andsample earth was lifted and made into a parcel sealed withthe seal bearing impressions "JS". Both the sealed parcels weretaken into police possession vide separate recovery memo.Cartridge Ex.P-1 to P-4 were also lifted from the spot and

weretaken into police possession vide memo attested by witnesses.Phatti of the gun too was taken into possession from the spot.After making sealed parcels, the dead body was sent to the hospitalfor post-mortem examination through HC Lakhbir Singh.

8. It is on this factual backdrop the Charge was framed underSections 302/307/34 IPC and 3 of TADA Act on 23.4.1993 towhich the accused pleaded not guilty and claimed trial.

9. Undisputedly, Piara Singh and Mukhtiar Singh were takentowards the fields of Shabeg Singh. Piara Singh was murdered inthe fields and arm injuries were caused to Mukhtiar Singhwhereas contention of the accused is that due to previous enmity,he was named falsely - the evidence available on record howevernegates such a plea: Human behavior also runs counter to such aplea since it is absurd to suggest that an injured person would takerecourse to implicate someone against whom there was enmityleaving aside the real assassin. In any event on the state ofevidence the factum of Sarwan Singh together with Bagicha Singhcalled out the deceased and Mukhtiar Singh and compelled them toaccompany them to the fields of Shabeg Singh does not seem tostand contradicted at any point of time. The evidence to that effectstands out to be credit-worthy and thus acceptable. On the wake ofthe aforesaid the contention as regards false implication fails.

10. Incidentally, in early nineties, terrorist activities were onpeak in the border districts of Punjab and it has practically been anaxiomatic truth in the area in question that no-one would in factcome out of the residential houses after dusk unless perforce at3"o clock in the morning. There exists no other evidence nor eventhere being any suggestion of existence of any other factor for suchperforce outing at 3 a.m. It is a rule of essential justice thatwhenever the opponent has declined to avail himself of theopportunity to put his case in cross-examination it must follow thatthe evidence tendered on that issue ought to be accepted. Adecision of the Calcutta High Court lends support to theobservation as above. (See in this context 26375 (P.B. Mukherjee, J. as he thenwas)].

11. Learned Advocate in support of the appeal next contendedthat accused were in fact already in the custody of police as suchinvolvement in the case in hand does not and cannot arise.Incidentally on 13.10.1990 another FIR was registered against theaccused persons on the allegations that accused attempted tomurder the police officials but subsequently the accused personswere acquitted regarding the occurrence dated 13.10.1990.Acquittal of accused in FIR dated 13.10.1990 promoted the learnedAdvocate to state with emphasis that the same has falsified theprosecution story. The contention of the defence counsel ishowever without any force or merit. In this case, occurrence tookplace at 3.00 a.m. on 12.10.1990 and the prosecutor stated thatafter committing the crime, accused fled away from the spot. On13.10.1990 there was possibility of firing upon police officials.Thus acquittal of accused in FIR dated 13.10.1990 is not sufficientto ignore the prosecution story because evidence is to be readindependently in both the FIRs.

12. Further contentions in support of the appeal are as below:

(i) Weapons were not sent to ballistic expert;

(ii) Only interested witnesses were examined;

(iii) No expert opinion connecting the gun with the emptycartridges;

(iv) Accused was identified for the first time in Court and inthe absence of test identification parade statement of theinterested witnesses are without any evidentiary value.

13. We shall come to deal with the interested witnesses slightlylater in this judgment but adverting to the other counts, be it notedthat there is no evidence on record that the weapon recovered inFIR dated 13.10.1990 was the same weapon which was used by theaccused while committing the crime on 12.10.1990. Much couldhave been argued or stated if there was availability of such anevidence, but unfortunately there being none, question of reliancethereon would not arise and in our view the Designated Court hasdealt with the issue in a manner proper and effective which doesnot call for any interference.

14. As regards the examination of independent persons orwitnesses, we would do well to note a decision of this Court in 281144 , wherein this Court in paragraph 12 observed:

"12. It is next contended that despite the fact that 20to 25 persons collected at the spot at the time of theincident as deposed by the prosecution witnesses, not asingle independent witness has been examined and,therefore, no reliance should be placed on the evidenceof PW5 and PW7. This submission also deserves to berejected. It is known fact that independent persons arereluctant to be witnesses or to assist the investigation.Reasons are not far to seek. Firstly, in cases whereinjured witnesses or the close relative of the deceasedare under constant threat and they dare not depose thetruth before the court, independent witnesses believethat their safety is not guaranteed. That belief cannotbe said to be without any substance. Another reasonmay be the delay in recording the evidence ofindependent witnesses and repeated adjournment in thecourt. In any case, if independent persons are notwilling to cooperate with the investigation, theprosecution cannot be blamed and it cannot be a groundfor rejecting the evidence of injured witnesses.Dealing with a similar contention in 292746 , this Court observed:(SC pp. 691-92, para 15)

"In some cases, the entire prosecution caseis doubted for not examining all witnesses to theoccurrence. We have recently pointed out thein different attitude of the public in theinvestigation of crimes. The public are generallyreluctant to come forward to depose before theCourt. It is, therefore, not correct to reject theprosecution version only on the ground that allwitnesses to the occurrence have not beenexamined. Nor it is proper to reject the case forwant of corroboration by independent witnesses ifthe case made out is otherwise true andacceptable."

15. The test of creditworthiness and acceptability in our view,ought to be the guiding factors and if so the requirements asabove, stand answered in the affirmative, question of raising aneyebrow on reliability of witness would be futile. The test is thecredibility and acceptability of the witnesses available - if they areso, the prosecution should be able to prove the case with theirassistance.

16. Coming to the contextual facts once again, while it is truethat there is no independent witness but the evidence availableon record does inspire confidence and the appellant has not beenable to shake the credibility of the eye-witnesses: There is noteven any material contradiction in the case of the prosecution.

17. The other allied issue pertains to the identification of theaccused in Court for the first time: there is no manner of doubt asit stands well settled that ordinarily identification of an accused forthe first time in court by a witness should not be relied upon for thepurpose of passing the order of conviction without a definitecorroboration since identification for the first time in court cannotpossibly be termed to be non-admissible but it is a matter ofprudence and jurisprudential requirement that the same should beupon proper corroboration otherwise the justice delivery systemmay stand affected. The Designated Court herein has in factrecorded a positive finding that the witnesses knew the appellantfrom before and they were acquainted with each other by reasonwherefore the names could be mentioned in the FIR itself and inview of such a state of affairs question of decrying the evidence ofall the so-called interested witnesses on a first time identification incourt would not arise. We however, hasten to add that therequirement of the concept of justice is - acceptability andcredibility of the evidence tendered by the witnesses. Once thatstand completed, it will be difficult if not an impossibility tochallenge a conviction only on the ground of the failure to holdprior test identification parade. The law seems to be well settledand the decisions are galore but we think it fit to refer to only oneearlier judgment of this Court in the case of 278487 wherein this Court stated inparagraph 7 as below:

"7. .....The evidence in order to carryconviction should ordinarily clarify as to how and underwhat circumstances he came to pick out the particularaccused person and the details of the part which theaccused played in the crime in question with reasonableparticularity. The purpose of a prior test identification,therefore, seems to be to test and strengthen thetrustworthiness of that evidence. It is accordinglyconsidered a safe rule of prudence to generally look forcorroboration of the sworn testimony of witness incourt as to the identify of the accused who are strangersto them, in the form of earlier identification proceeding.There may, however, be exceptions to this general rule,when for example, the court is impressed by a particularwitness, on whose testimony it can safely rely, withoutsuch or other corroboration. The identification paradesbelong to the investigation stage. They are generallyheld during the course of investigation with the primaryobject of enabling the witnesses to identify personsconcerned in the offence, who were not previouslyknown to them. This serves to satisfy the investigatingofficers of the bona fides of the prosecution witnessesand also to furnish evidence to corroborate

theirtestimony in court. Identification proceedings in theirlegal effect amount simply to this: that certain personsare brought to jail or some other place and makestatements either express or implied that certainindividuals whom they point out are persons whom theyrecognise as having been concerned in the crime. Theydo not constitute substantive evidence. These paradesare essentially governed by Section 162, CriminalProcedure Code....."

18. The law laid down as above has since been accepted as awell settled principle and has stood the test of time. We also dorecord our concurrence therewith. The factum of recognition andplacement of the names in the FIR practically do away with therequirement of the test identification parade - someone knowsthem: someone deals with them and someone talks to themregularly - does it mean and imply that without the testidentification parade at an earlier stage and an identification in thecourt would have the effect of a sullied prosecution? The answercannot possibly be in the affirmative. It is the concept of justicewhich predominates and if we reiterates this, the witness seems tobe creditworthy and the acceptability would do away with theminor lapses. As such we do not find any merit or substance in theissue raised in support of the appeal.

19. As regards (i) and (iii) above, it was contended that theweapons were not sent to the ballistic expert and no expert opinionis available connecting the gun with the empty cartridge. Asnoticed above, in the case in hand, no weapon was recovered, assuch question of having any ballistic expert opinion as regards thegun and the empty cartridges would not arise.

20. The preponderance of evidence available on record, in ourview, does justify the view taken by the Designated Court and thesame cannot and ought not to be interfered with.

21. In that view of the matter, this appeal fails and is dismissed.