(1996) 07 AP CK 0054

Andhra Pradesh High Court

Case No: Writ Petition No. 6473 of 1996

Shakamuri Apparao and Others		APPELLANT
	Vs	
Government of Andhra Pradesh and Others		RESPONDENT

Date of Decision: July 1, 1996

Acts Referred:

- Arms Act, 1959 - Section 25, 27
- Constitution of India, 1950 - Article 14, 19, 21, 226
- Criminal Procedure Code, 1973 (CrPC) - Section 156(3), 161, 173, 190, 190(1)
- Penal Code, 1860 (IPC) - Section 120B, 121, 122, 123
- Terrorist and Disruptive Activities (Prevention) Act, 1987 - Section 14, 18, 2, 20A, 20A(2)

Citation: (1996) 3 ALD 493 : (1996) 2 ALD(Cri) 273 : (1996) 2 ALT 432 : (1996) CriLJ 3936

Hon'ble Judges: S.R. Nayak, J; M.N. Rao, J

Bench: Division Bench

Advocate: K.D. Kannabhiran, for R. Mahadevan and B. Konda Reddy, for the Appellant; Chalameshwar, Additional Advocate-General, for the Respondent

Judgement

M.N. Rao, J.

The two petitioners herein are A-1 and A-2 in S.C. No. 442 of 1993 on the file of the Additional Metropolitan Sessions Judge, Hyderabad, the designated Court under the Terrorist and Disruptive Activities (Prevention) Act, 1987, (for short "TADA Act"). By this application filed under Article 226 of the Constitution of India for issue of a writ of habeas corpus, they are seeking a declaration that their continued detention in jail is illegal, arbitrary and violative of Articles 14, 19 and 21 of the Constitution of India and consequential discharge from the provisions of the TADA Act and Sections 120-B, 121, 122 and 123 of the Indian Penal Code.

2. The Inspector of Police, Sanjeeva Reddy Nagar Police Station on 11-2-1993 arrested the two petitioners herein and seized from their possession, under panchanama, two fire arms - i) One A.K. 47 rifle with 60 rounds; and ii) one sten-gun and also 630.250 grams of gold worth about Rs. 2 lakhs, 330 rounds of different types of ammunition, gun powder, cameras, wrist watches and literature pertaining to a banned organisation - Peoples War Group. He arrested them under the provisions of Ss. 120-B, 121, 122 and 123 IPC., Sections 3(i)(iii), 4, 5 and 6 of TADA Act and Sections 25 and 27 of the Indian Arms Act. Apart from being members of banned organisation and in possession of fire arms, a further allegation against both the accused is that they were responsible for the murder of Sri Vyas, a former Deputy Inspector General of Police. After registering a case in Crime No. 78 of 1993 under the above sections, he took up investigation. Both the accused were produced before the Special Executive Magistrate, who remanded them in police custody for a period of thirty days and directed that they shall be produced before the designated Court on 15-3-1993. The police produced both the accused before the Metropolitan Sessions Judge, Hyderabad, the designated Court, on 4-3-1993 and requested for judicial custody for a period of 60 days pending further investigation. While granting judicial remand, the Metropolitan Sessions Judge made the following endorsement :
"Accused produced by Inspector Jaya Rao at 5-10 p.m., on 4-3-1993. Accused Appa Rao requested he is suffering from fever and affected with jaundice. The accused are directed to be produced on 5-3-1993 in the Court. Mr. Jaya Rao, Inspector, is directed to take the accused Appa Rao to the doctor for treatment."

3. Act No. 43 of 1993, by which the TADA Act was amended in certain respects, came into force on 22-5-1993. One of the amended provisions as incorporated in sub-section (2) of Section 20-A is to the effect that "no Court shall take cognizance of any offence under this Act without the previous sanction of the Inspector General of Police or as the case may be, the Commissioner of Police."

4. On 12-8-1993, sanction was accorded by the Commissioner of Police for prosecution of the accused under the Arms Act. The State Government by G.0.Ms.No. 395 dated 16-5-1994 accorded sanction for prosecution of the accused in respect of offences punishable under Sections 120-B, 121, 122 and 123 IPC. No previous sanction was accorded by the statutory authority - the Commissioner of Police - u/s 20-A(2) of the TADA Act to enable the Court to take cognizance of the offences under the TADA Act against the accused.

5. The charge-sheet was laid on 30th September, 1993. On 6th October, 1993, the Metropolitan Sessions Judge, Hyderabad, made the following endorsement on the charge-sheet :

"Taken on file under Sections 120-B, 121, 122 and 123 IPC and Sections 3, 4, 5 and 6 of TADA Act and Sections 25 and 27 of the Indian Arms Act against the accused. Sent

the records and the accused to the I Addl. Metropolitan Sessions Judge for disposal according to law. A-1 and A-2 are directed to be produced before that Court on 19-10-1993."

6. The contention urged by Sri Kannabhiran, learned senior counsel for the petitioners, is that as cognizance was taken only on 6-10-1993, long after 22-5-1993 when the amended Section 20-A of the TADA Act came into force, the failure to accord prior sanction by the Commissioner of Police for the purpose of enabling the Court to take cognizance of the offences under the TADA Act must result in the accused being discharged in respect of the offences relatable to the provisions of the TADA Act.

7. In opposition to this, the learned Additional Advocate-General, Sri Chalameshwar, says that the production of the accused before the Metropolitan Sessions Judge on 4-3-1993 and the "endorsement" of the learned Judge on 4-3-1993 itself must be deemed to be an act of taking cognizance and since that has been done prior to the coming into force of the amended provisions of Section 20-A(2) of the TADA Act, no further formal act of "according prior sanction" is warranted.

8. The question for consideration is : Whether the designated Court has taken cognizance of the case before or after the Amendment Act 43 of 1993 came into force ?

9. TADA Act, being a special enactment conceived of for the purpose of meeting grave emergent situations "created either by external forces particularly at the frontiers of the country or by antinationals throwing challenge to the very existence and sovereignty of the country in a democratic polity". See : Kartar Singh v. State of Pun , Per Ratnavel Pandian, J., incorporates special procedures and stringent punishments. It contemplates safeguards at three stages as held by a Division Bench of this Court to which one of us, M. N. Rao, J., was a party :

"The first stage is, at the recording of FIR. Sub-section (1) of Section 20-A of the TADA Act enjoins that no information about the commission of an offence shall be recorded under the Act without the prior approval of the District Superintendent of Police. This Court has held in K. Balagopal Vs. Government of Andhra Pradesh and Others, that the ''requirement of the prior approval is mandatory and the same should be in writing, and that it is all the more necessary to accord approval in writing since it is the application of mind on the material available on record and the reasons justifying such an accord are justiciable and open to judicial review."

The second safeguard is at the stage of taking cognizance. Sub-section (2) of Section 20-A of the TADA Act, in mandatory terms, lays down that the previous sanction of the Inspector-General of Police or the Commissioner of Police, as the case may be, is a necessary requirement for a Court to take cognizance of an offence under the TADA Act.

The third stage is found in Section 18 under which after taking cognizance of an offence, if a Designated Court is of the opinion that the offence is not triable by it, it shall transfer the case for the trial to any Court having jurisdiction under the Code of Criminal Procedure." See : Devireddy Venkata Chalama Reddy v. Govt. of AP 1995 (1) An WR 393.

Being a temporary legislation, the TADA Act lapsed on 24-5-1995 consequent on Parliament not extending its life.

10. Section 14 of the TADA Act, which incorporates the procedure and powers of the Designated Courts, lays down by sub-section (1) that the Court may take cognizance of any offence "without the accused being committed to it for trial upon receiving a complaint of facts which constitutes such offence or upon a police report of such facts". Clause (i) of Section 2 lays down that the words and expressions used but not defined in the Act shall have the meanings used but not defined in the Act shall have the meanings assigned to them in the definitions incorporated in the Code of Criminal Procedure (for short "Cr.P.C."). The expressions "complaint of facts" and "Police report" are not defined in the TADA Act. Chapter XII of Cr.P.C., contains the procedure as to how information has to be lodged with the police and their powers to investigate. Section 173 Cr.P.C., which is part of Chapter XII, lays down by sub-section (2) that as soon as the investigation is completed, the officer in-charge of the police station shall "forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government .....". Section 193 Cr.P.C., mandates that no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by the Magistrate under the Code. As Section 14 of the TADA Act dispenses with the requirement of the accused being committed for trial before the Designated Court, the requirement of Section 193 Cr.P.C., has no application in relation to offences triable by the Designated Court. "Police Report" is defined by clause (r) of Section 2 Cr.P.C., as a report "forwarded by a Police Officer to a Magistrate under sub-section(2) of Section 173". Section 190 Cr.P.C., which speaks of cognizance of offences by Magistrates, says that a Magistrate may take cognizance of any offence : a) upon receiving a complaint of facts which constitute such offence; b) upon a police report of such facts; and c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

11. The expression "police report" occurring in Section 14 of the TADA Act if interpreted in the light of the definition assigned to it by clause(r) of Section 2 Cr.P.C., leads to the conclusion that the police report, in order to constitute the foundation for taking cognizance by the TADA Court u/s 14 must he a report submitted by the police after the investigation is completed. It is also obligatory on the part of the police officer to submit to the Magistrate along with the police report, all documents or relevant extracts thereof on which the prosecution

proposes to rely and the statements recorded u/s 161 Cr.P.C., of all persons whom the prosecution proposes to examine as its witnesses. In other words, a police report is what is commonly called a "charge-sheet" in some States including Andhra Pradesh and "challan" in other States.

12. Viewed in the aforesaid perspective, the information in writing placed by the Inspector of Police, Sanjeeva Reddy Nagar Police Station before the Designated Court, based upon which judicial remand was ordered by the Metropolitan Sessions Judge, Hyderabad on 4-3-1993 with a direction that the accused should be produced on 5-3-1993 in the Court, cannot be called a "police report" within the meaning of Section 14 of the TADA Act. An information that an offence has allegedly been committed, based upon which the accused when produced was remanded in judicial or police custody, cannot approximated to a police report. Taking cognizance u/s 14 of the TADA Act is not automatic as the learned Additional Advocate-General sought to contend; but it is circumscribed by the limitations contained therein : a) upon receipt of a complaint of facts which constitute an offence; or b) a police report of such facts. Section 18 of the TADA Act which confers power on the Designated Court after it has taken cognizance of an offence, to transfer the same for trial to a regular Court, after forming the opinion that the offence is not triable under the TADA Act is not suggestive of the intention of Parliament that every information placed before the Designated Court automatically becomes a police report resulting in the offence being taken cognizance of without the Court applying its ''judicial mind'' in compliance with the limitations incorporated in Section 14 of the TADA Act. The contention urged in this behalf by the learned Additional Advocate-General that the order of the Designated Court on 4-3-1993 itself would amount to taking cognizance does not merit acceptance.

13. The Supreme Court in R.R. Chari Vs. The State of Uttar Pradesh, while expressing the view that the word ''cognizance'' is used in the Code of Criminal Procedure to indicate the point when the Magistrate or a Judge "first takes judicial notice of an offence" and that "it is a different thing from the initiation of proceedings", has approvingly referred to the view of the Calcutta High Court in Superintendent and Remembrancer of Legal Affairs Vs. Abani Kumar Banerjee, :

"What is taking cognizance has not been defined in the Cri.P.C. and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence u/s 190(1)(a) Cri.P.C., he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding, in a particular way as indicated in the subsequent provisions of this Chapter proceeding u/s 200 and thereafter sending it for inquiry and report u/s 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter but for taking action of some other kind, e.g., ordering investigation ... u/s 156(3) or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken

cognizance of the offence."

Whether a warrant of arrest could be issued by a Magistrate without having previously taken cognizance of the offence was one of the questions considered by the Supreme Court in Narayandas Bhagwandas Madhavdas Vs. The State of West Bengal, . Answering the question in the negative and after referring to the principle enunciated in R. R. Chary (52 Cri LJ 775) (3 supra). The Supreme Court ruled :

"As to when cognizance is taken of an offence will depend upon the facts and circumstances of each case and it is impossible to attempt to define what is meant by taking cognizance. Issuing of a search warrant for the purpose of an investigation or a warrant of arrest for that purpose cannot by themselves be regarded as acts by which cognizance was taken of an offence. Obviously, it is only when a Magistrate applies his mind for the purpose of proceeding under S. 200 and subsequent sections of Ch. XVI of the Code that it can be positively stated that he had applied his mind and therefore had taken cognizance."

Again in Ajit Kumar Palit Vs. State of West Bengal, , reiterating the aforesaid principles, the Supreme Court observed :

"The word ''cognizance'' has no esoteric or mystic significance in criminal law or procedure. It merely means become aware of and when used with reference to a Court or Judge, to take notice of judicially ..... Where the statute prescribes the materials on which alone the judicial mind shall operate before any step is taken, obviously the statutory requirement must be fulfilled."

14. Admittedly, either prior to or subsequent to the coming into force of Act 43 of 1993 on 22-5-1993, by which Section 20-A was inserted in the TADA Act, the previous sanction as mandated by sub-section (2) was not accorded by the statutory authority specified therein for the purpose of enabling the Court to take cognizance of the offences under the TADA Act.

15. Whether the Amendment Act No. 43 of 1993 was retrospective in operation was inter alia considered by the Supreme Court in Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others, , wherein it was held that "the Amendment of 1993 (Act No. 43 of 1993) would apply to the cases which were pending investigation on 22nd May, 1993 and in which the challan had not till then been filed in Court."

16. The challan (charge-sheet) in this case was filed only on 30-9-1993 and the case was taken on file by the Designated Court on 6-10-1993. We are, therefore, inclined to hold that the Designated Court had taken cognizance of the offences in this case only on 6-10-1993 long after the Amendment Act came into force. As there was no prior sanction as mandated by sub-section (2) of Section 20-A of the TADA Act, the Designated Court had no legal competence to take cognizance of the case.

17. Before closing this case, we feel it our duty, as a Constitutional Court, to advert to the tragedy that has befallen the State and the continuing traumatic situation into

which the State has been entrapped for more than one and half decades.

18. Statistics as to the number of police personnel killed by the Naxalites and the Naxalites perished in police encounters disclose a shocking state of affairs, which, if continued any longer, will push the society towards anomie - breaking down of the normative order. Between 1981 and May 1996, 242 police personnel had lost their lives at the hands of the Naxalites while the casualities among the civilian population attributed to Naxalite attacks as on 9-5-1996 is 1805. By May, 1996, a total of 1140 Naxalites died at the hands of the police. The authenticity of these statistics is not in doubt; it is stated that this information was given by the State Government to the National Human Rights Commission. A soft State cannot protect the political and democratic institutions and the representative bodies from which it receives sustenance.

19. We have ventured into this aspect, which although does not present itself for adjudication and a fact situation like this, does not admit of any discoverable judicial precepts for resolution. Our intention is only to highlight the immediate necessity for a solution to the current unrest. A legitimate expression of the anguish and anxiety of the judicial wing of the State is neither a foray into any forbidden aspect of judicial activism nor transgression of the limits of judicial restraint much less an act affecting institutional comity.

20. The petitioners herein, like thousands of others of their (like), are impatient youngsters owning allegience to extremist political organisations or parties which broadly go by the common label "Naxalites" comprising CPI (ML) and splinter groups, the Peoples War Group, the Jana Shakti etc., "which believe in armed struggle as the means of safeguarding the rights of the oppressed and achieving a communist revolution and constitute armed squads for this purpose" and it is an "admitted fact that the naxalites, especially the banned CPI-ML (Peoples War) Party do indulge in considerable violence such as killing of landlords, contractors and persons alleged to be police informers; kidnapping prominent persons and holding them hostage to demand the release of arrested naxalites; destroying government and private properties in protest against police repression etc." Extract from the representation submitted by Sri M. T. Khan, President, and Sri K. Balagopal, General Secretary, A. P. Civil Liberties Committee to the Chair Person of the National Human Rights Commission, New Delhi in 1995. (A copy of which was produced before us).

21. According to Prof. G. Parthasarathy, Emeritus Professor of the Andhra University, who studied the question critically, "the object of the movement (Naxalites) is socio-economic transformation through uncompromising struggles for land and liberty for the oppressed". While stating that "effective implementation of land reforms and changes in the character of polity provide only the necessary conditions for minimising violent eruptions in the society", Prof. Parthasarathy warned the naxalite leadership that "on its part (it) has to recognise that the capture of State power and socio-economic transformation through the barrel of gun is not a

feasibility; even if it is feasible in limited pockets, it cannot be sustained; even if sustained, the ultimate out-come, as the recent Soviet experience demonstrated, is uncertain. The naxalites have done a great service through their struggles and sacrifices in forcing the attention of the society on the land question. This benefit should not be lost by giving scope to the State to divert the attention of the society from the land question to law and order". While appreciating the attempts of the naxalites to bring about socio-economic and political transformation of the society, the learned professor condemned in clear terms the resort to acts of terrorism for the purpose of achieving these goals : "Naxals, who bemoan the loss of civil rights destroy the very democracy that provides them these rights. They carry illegal and unauthorised and sophisticated fire arms using them against police. In such a situation, it is argued, there is no scope for civil liberties and in dealing with Naxals, civilian population may have to suffer curtailment of civil liberties and even casualities". See : Paper on "Naxalism, the Land question and Law and Order" By Sri G. Parthasarathy, Emeritus Professor, Andhra University and Visiting Professor, NIRD.

22. A study team of the Centre for Public Policy and Systems of the Administrative Staff College of India, Hyderabad, headed by Prof G. R. S. Rao, in their report entitled "Left Wing Extremism in AP : Policy Issues and Directions" submitted to the Government of Andhra Pradesh in 1995 opined : "Paradoxically, it is the inadequacies in the functioning of the democratic process that have eroded the credibility of the democratic institutions. Democracy has no legitimate mechanism to deal with undemocratic processes, for democracy has to sustain itself. Democracy cannot afford to allow any space for extremism. Inadequately addressed socio-economic issues can lead to alienation providing the conditions for extremism, thereby posing problems of law and order and internal security. The police are placed in a situation of conflict between civil liberties and socio-economic justice on the one hand and extremism on the other. While left wing extremism is being viewed as a problem by the administration, it is increasingly being perceived as a solution to their problems by the alienated masses". The study team concluded :

"A consensual political process would enable harmonization of social values and interests in tune with such postulates as Rule of Law and due process. Field level partnership between the administrative leadership and the people will accelerate social transformation. Social harmony and development is a function of the consensual political process and represents the answer to social strife."

23. A knowledgeable and experienced senior police officer of the rank of Director-General of Police and a Padmashri awardee, Dr. S. Subramanian, after studying the Naxalite movement, its causes and the police response to the movement, has concluded :

"Two wrongs cannot make one right. Naxalite Killings cannot be an excuse for fake encounters and police excesses. Conversely, alleged police excesses cannot be the

rationale to support Naxal violence". See : Naxalism, Fact, Fiction and Future - By Dr. S. Subramanian, IPS.

24. We can neither take up the study of competing value choices the society should adopt, other than the objectives enshrined in the Constitution, nor exhibit inclination to any particular value choice without racking up theoretical values - political, economic and social - and engendering controversies as to the contours of the judicial power of the State. Despite its magnitude and menacing dimensions, the problem, we think, does not admit of no solutions. A peace commission, with a representative character inspiring confidence in all sections of the society including the Naxalites and the police and backed by the State power and consent, we believe, can bring about immediate cessation of police encounters and violence by Naxalites and then only, in the resultant peaceful atmosphere, a meaningful search for permanent solutions is possible.

25. Both Sri K. G. Kannabhiran, the learned senior counsel for the petitioners, and Sri Chalameshwar, the learned Additional Advocate-General, are at one with us that the present situation demands immediate action akin to this - a saner and safer course. We gratefully acknowledge and appreciate their candour and concern.

26. For these reasons, the writ petition is allowed. The petitioners herein shall be discharged from all the accusations relatable to the provisions of the TADA Act and they are liable to be prosecuted only in accordance with the provisions of the Criminal Procedure Code, 1973 for the offences under the penal statutes other than the TADA Act. The Additional Metropolitan Sessions Judge, Hyderabad, on whose file S. C. No. 442 of 1993 - in which the petitioners are A-1 and A-2-is pending, shall pass the relevant orders in this regard u/s 18 of the TADA Act transferring the case for trial to any Court of competent jurisdiction.

27. Petition allowed.