

(2014) 10 MAD CK 0324

Madras High Court

Case No: Crl.A. No. 290 of 2014

Vaiko

APPELLANT

Vs

Deputy
Superintendent of
Police

RESPONDENT

Date of Decision: Oct. 13, 2014

Acts Referred:

- Constitution of India, 1950 - Article 136
- Criminal Procedure Code, 1973 (CrPC) - Section 321, 321(b)
- Prevention of Terrorism (Repeal) Act, 2004 - Section 2(3), 3(1)
- Prevention of Terrorism Act, 2002 - Section 20, 21, 21(3), 22, 23

Citation: (2014) 4 MLJ(Cri) 636

Hon'ble Judges: T. Mathivanan, J; S. Rajeswaran, J

Bench: Division Bench

Judgement

S. Rajeswaran, J.

The above appeal has been preferred by the appellants challenging the order made in M.P. No. 33/2004 dated 03.09.2004 in Special C.C. No. 1/2003 on the file of the learned Judge, Special Court under the Prevention of Terrorism Act, 2002. The brief facts of the case are as follows:

"(a) On 29.06.2002, between 8.45 p.m., and 11.30 p.m. at Thirumangalam in Madurai District, the members belonging to Madurai District Wing of MDMK Party conducted a public meeting under the Presidentship of Veera Ilavarasan, who is the Madurai District Secretary of MDMK. Mr. Vaiko, the first appellant herein, was the special Speaker in the said meeting. It was alleged that the first appellant herein delivered objectionable speech, encouraging support for the terrorist Organisation, i.e., LTTE. Since the speech attracts commission of offence u/s. 21(3) of the Prevention of Terrorism Act, 2002 (hereinafter called POTA), a complaint was lodged against the

first appellant herein and 8 others which was registered in Cr. No. 280 of 2002 on the file of the Inspector of Police, Thirumangalam Town Police Station, Madurai District, on 30.12.2002. A final report was filed by them stating that the appellants herein were accused of committing the offences punishable under section 21 of POTA and the Special Court constituted under section 23 of POTA took cognizance in Special CC. No. 1/2003, framed the charges and proceeded with the trial.

(b) In the meantime, the Central Government nominated a Review Committee under section 60 of POTA. On the application filed by the appellants herein, the Review Committee enquired the matter in detail, analysed the speeches made by the appellants herein and found that the speeches made cannot be said to be speeches made for the purpose of encouraging support for LTTE or to further its activities. With regard to speech of the first appellant, the Review Committee, in due consideration of the materials made available, found that there is nothing to suggest that the first appellant, has, at any time, been involved in any act of violence, much less acts of terrorism. It was further observed by the Review Committee that sympathy or oral support for the cause of Eelam Tamils does not mean support for the ideology or methodology adopted by LTTE. Thus, the Committee concluded that the speech of the first appellant would not fall within the ambit of section 21(3) of POTA. Finally, the Review Committee concluded in its order dated 08.04.2004 that there was no prima facie case for proceeding against the appellants herein in Crime No. 280/2002, registered before the Thirumangalam Town Police Station under POTA. Consequently, the Review Committee directed the State of Tamil Nadu to take suitable steps forthwith, including giving of instructions to Public Prosecutor to seek appropriate orders from the concerned courts in this case, in accordance with law.

(c) Therefore, in pursuance of the said directions issued by the Review Committee by its order dated 08.04.2004, the Public Prosecutor filed an application in M.P. No. 33/2004 under section 321(b) Cr.P.C. seeking sanction of the Special Court to withdraw from prosecution of all the accused, the appellants herein, as empowered under section 321(b) Cr.P.C., in the light of the order passed by the Review Committee on POTA dated 08.04.2004. But, the Special Court, by its order dated 03.09.2004, dismissed the said M.P. No. 33/2004. Aggrieved by the order made in M.P. No. 33/2004 dated 03.09.2004 in Special CC. No. 1/2003 passed by the Special Court, the appellants herein approached the Apex Court under Article 136 of the Constitution of India in SLP (Crl.) No. 4801/2004. On 08.10.2004, the Hon"ble Supreme Court granted leave to issue notice and stayed the trial court's proceedings. The SLP (Crl.) No. 4801/2004 has been numbered as Crl.A. No. 1165/2004. After about 9 years, the above said criminal appeal came up for final hearing on 05.03.2014. The Hon"ble Supreme Court, during the course of the hearing, orally observed that against the impugned order made in M.P. No. 33/2004 dated 03.09.2004 there is an appeal provided under section 34 of POTA. Therefore, the learned counsel for the appellants in Crl.A. No. 1 165/2004 decided to withdraw

the appeal before the Apex Court, so as to file an appeal under section 34 of POTA. Accordingly, on 06.03.2014, the appeal was withdrawn.

(d) The Hon'ble Supreme Court, while granting special leave on 08.10.2004, was pleased to order staying of the trial proceedings and the appellants herein had the benefit of stay till the Criminal Appeal 1165/2004 was disposed on 06.03.2014. Thus, the trial proceedings against the appellants were admittedly stayed for over 10 years.

(e) With regard to the filing of an appeal under section 34 of POTA, there was a delay of 3334 days in filing the appeal before this Court and hence, an application Cr.M.P. No. 1/2014 was filed to condone the delay of 3334 days in preferring the appeal, against the order made in M.P. No. 33/2004 by the Special Court in Special CC. No. 1/2003 and this Court, by its order dated 29.04.2014 allowed the Miscellaneous Petition in M.P. No. 1/2014, thereby the delay in preferring the appeal was condoned and the appeal is posted today for final hearing."

2. Mr. Yashod Varadhan, the learned Senior Counsel appearing for the appellants herein would mainly contend that the order passed by the Special Court in M.P. No. 33/2004 on 03.09.2004 is contrary to law and against the provisions of section 321 Cr.P.C. It is his further case that the Special Court had erred in rejecting the request of the Public Prosecutor holding that the Public Prosecutor had failed to exercise his independent opinion. Further, he adds that the Special Court erred in holding that the Review Committee has not considered the other materials, i.e., the evidence of the officers covering the speech and the documents like shorthand note books etc. But, according to him, the entire speech made by all the accused/the appellants herein was admitted on its face value and considered by the Review Committee. Therefore, the Special Court ought to have accepted the same and given the consent to Public Prosecutor to withdraw the proceedings.

3. Further, he assailed sections 21 and 22 mainly on the ground that there was no requirement of mens rea for the offences provided. He specifically points out that section 21 would not cover any expression or activity which does not have element or sequence of furthering or encouraging the terrorists activities or facilitating its commission. Merely speaking or addressing a gathering without any intention per se would not have the effect to further the activities of any terrorist organization and that would not come within the mischief of section 21.

4. It is his further case that as rightly found out by the Review Committee, that there was nothing to suggest that the first appellant herein had at any time been involved in any act of violence, much less, act of terrorism. He adds that it is a trite law that sympathy or oral support for the cause of Eelam Tamils does not mean support for ideology or methodology adopted by the LTTE. A perusal of the speech made by the first appellant would not certainly fall within the ambit of section 21(3) of POTA. So also, the case registered against the other appellants, nothing available in the text

of speeches to show the support for LTTE. Certainly, the text of their speeches would not render the appellants herein culpable under section 21 of POTA. Therefore, according to the learned senior counsel appearing for the appellants, when the Review Committee/competent committee has gone into the question in detail and after evaluating the text of speeches made by the appellants herein, came to the conclusion that there was no prima facie case for proceeding against the appellants herein in Cr. No. 280/2002, the Special Court ought to have accepted the same and allowed the application filed by the Special Public Prosecutor under section 321(b) Cr.P.C. to withdraw the prosecution.

5. According to the learned Senior counsel, the failure on the part of the Special Court, vitiates the order warranting interference by this Court. In support of his contentions, he relied upon the Judgment made in [People's Union for Civil Liberties and Another Vs. Union of India \(UOI\)](#), in which the Hon'ble Supreme Court has held as follows:

"...46. The petitioners assailed sections 20, 21 and 22 mainly on the ground that no requirement of mens rea for offences is provided in these sections and the same is liable to misuse, therefore, it has to be declared unconstitutional. The learned Attorney General argued that section 21 and its various subsections are penal provisions and should be strictly construed both in their interpretation and application; that on a true interpretation of the Act having regard to the well-settled principles of interpretation, section 21 would not cover any expression or activity which does not have the element or consequence of furthering or encouraging terrorist activity or facilitating in commission; that support per se or mere expression of sympathy or arrangement of a meeting which is not intended or designed and which does not have the effect to further the activities of any terrorist organization or the commission of terrorist acts are not within the mischief of section 21 and hence, is valid.

(emphasis supplied)

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76. So far as the second question is concerned, we have heard Shri F.S. Nariman and Shir Anil B. Divan, learned Senior Counsel appearing for the petitioner, apart from Shri Rajinder Sachar and Shir B.S. Malik, the learned senior Counsel appearing for the petitioner in concerned matters, on the interpretation of Section 21 of POTA. Shri P.P. Rao, appearing for the State of Tamil Nadu, has made elaborate submissions and adverted to various affidavits filed by the Union of India. However, it is not necessary for us to examine any of these aspects in these proceedings. We have carefully considered the arguments advanced by the learned counsel and that of the learned Attorney General for India on this aspect of the matter. We think, the proper course that has to be adopted in a case of this nature where a criminal case has already been lodged and the same is pending consideration before the Special

Court, it would not be appropriate for us to express our views on the question of facts arising in this case. We are sure that the Special Court will decide the matter in the light of decision pronounced by us in Writ Petition (C) No. 389 of 2002 above."

6. The learned senior counsel while bringing to our notice the amendment, i.e., the Prevention of Terrorism (Repeal) Act, 2004 (26/2004), brought in, would add that in the amended Act, section 2(3) stipulates that when the Review Committee opines that there is no prima facie case for proceeding against the accused, on review or the pending POTA cases, such cases, even though cognizance has been taken by the Court, shall be deemed to have been withdrawn without anything further to be done.

7. Therefore, according to the learned Senior Counsel, in view of the clear expression of the legislative intention in the Repealing Act, the proceedings before the Special Court are deemed to have been withdrawn in view of the clear and categorical opinion offered by the Review Committee. Hence, he prayed for the setting aside of the order passed by the Special Court made on 03.09.2004 in M.P. No. 33/2004 in this ground also.

8. Per Contra, Mr. Shanmugavelayutham, the learned Public Prosecutor, while referring to the provisions of law, would state that action was taken to initiate proceedings against the appellants because of their close association with LTTE and their speeches made in furtherance thereof. However, the learned Public Prosecutor would add that the opinion of the Review Committee is only recommendatory in nature and therefore, when a petition was filed by the Prosecutor before the Special Court for withdrawal, the Special Court passed an order, by independently analyzing the entire fact and law, dismissing the petition. But, the learned Public Prosecutor could not able to counter the arguments of the learned Senior Counsel for the appellants made in respect of the provisions available under the POTA (Repeal) Act, 2004, with particular reference to section 2(3), i.e., the deeming provision.

9. We have heard the rival submissions carefully with regard to the facts and citation.

10. As rightly contended by the learned Senior Counsel appearing for the appellants herein, the offence under 3(1) of POTA will be constituted only if it is done with an "intent". Therefore, the offence under section 201 or 21 or 22 needs positive inference that a person acted with interest of furthering or encouraging terrorist activity or facilitating its commission. In other words, these sections are limited only to those activities that have the intent of encouraging or furthering or promoting or facilitating the commission of terrorist activities. Nothing of this kind has been pointed out by the prosecution against the accused herein. Therefore, we have to necessarily hold that there was nothing on record to show that the appellants herein committed the offence warranting initiation of proceedings in Crime No. 280/2002 at Thirumangalam Town Police Station under POTA.

11. Besides that, section 2(3) of the Repealing Act in Prevention of Terrorism (Repeal) Act, 2004, contemplates or provides for compliance with section 321 Cr.P.C. before withdrawal comes into effect. The clear intention of section 2(3) of the Repealing Act is that when the Review Committee opines that there is no prima facie case for proceeding against the accused, on review of the pending POTA cases, such cases, even though cognizance had been taken by the Court, shall be deemed to have been withdrawn without anything further to be done. In view of the expression of such a clear legislative intent under section 2(3) of the Repealing Act, there is no question of bringing of section 321 Cr.P.C. into play.

12. Moreover, POTA Repeal Act, 2004 is a special Act and therefore, that would prevail the Code of Criminal Procedure which is a General Act.

13. In the light of the above clear provision, we are of the view that once the Review Committee held that there was no prima facie case to continue the proceedings against the accused, the case should, by virtue of section 2(3) of the Repealing Act, be deemed to have been withdrawn with effect from the date of issuance of the direction of such Review Committee. That in such cases, section 321 Cr.P.C. would have no application and there was neither any need for the Public Prosecutor to file any application for withdrawal from prosecution, nor any need or occasion for the Court to consider whether consent should be given for such withdrawal from prosecution. In the result, the judgment rendered by the Special Court in M.P. No. 33/2004 in Special C.C. No. 1/2003 dated 03.09.2004 is set aside and the appeal filed by the appellants stands allowed in the light of the aforesaid facts and law.