Supreme Court of India
Jayendra Vishnu Thakur vs State Of Maharashtra on 11 May, 2009
Author: S Sinha
Bench: S.B. Sinha, Mukundakam Sharma

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 981 OF 2009
(Arising out of SLP (Crl.) No. 6374 of 2007)

Jayendra Vishnu Thakur .... Appellant

Versus

State of Maharahstra and another .... Respondents

JUDGMENT

S.B. SINHA, J.

1. Leave granted.

2. Interpretation of the provisions of Section 299 of the Code of Criminal Procedure, 1973 (for short `the Code'), Section 33 of the Indian Evidence Act, 1871 as also Section 14(5) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short `the TADA') is involved in this appeal which arises out of a common order dated 6th March, 2007 passed by the Designated Court (TADA), Pune, in Application Exh. 1118 and 1227 in TSC No. 2/1996, 1/1997and 2/1997.

3. The said question arises in the following fact situation.

One Suresh Narsinh Dube was shot dead at Nallasopara Railway Station in the suburbs of Mumbai on 9th October, 1989. The impleaded respondent herein, the brother of the deceased, filed a complaint petition with regard to the incident. Appellant absconded.

A proclamation under Section 82 of the Code was thereafter issued on 9th February, 1993 declaring the appellant as a proclaimed offender. Subsequently, the said proclamation was also published in different newspapers on various dates.

In connection with the said occurrence initially 12 persons were charge-sheeted upon completion of investigation on 27th August, 1993, wherein eight persons, including the appellant, were shown to

be absconding. Appellant and other accused were also booked under TADA.

Indisputably, in connection with a case arising out of FIR Nos. 140- 144 of 1993 the appellant was arrested in Delhi on 23rd July, 1993. By a letter dated 1st September, 1993 the Investigating Officer in the present case informed the Designated Judge, TADA Court at Mumbai in regard to the appellant's arrest in the Delhi case.

4. Appellant was arrested by the Maharahstra Police on 23rd October, 1993 in connection with FIR No.3/1992 and was produced before the Chief Judicial Magistrate, Thane on 24th October, 1993 and was remanded to police custody till 20th November, 1993. He was again shown to have been arrested on 20th November, 1993 in two cases ; one relating to FIR No. 237/1992 of Manikpur Police Station and the other in FIR No.161 of 1992 of Virar Police Station. He was in judicial custody till 21st December, 1993.

5. On a Special Leave Petition (Crl.) Nos. 643-646 having been filed before this Court by the appellant and others, this Court by its order dated 23rd November, 1993 inter alia directed splitting up of the case with regard to the absconding accused. Charges in the matter were framed by the Designated Judge on 30th December, 1993.

6. On an application filed by the Public Prosecutor under Section 299 of the Code, an order was passed by the Designated Judge on 1st January, 1994.

7. The State of Maharashtra filed a writ application before the High Court of Delhi for securing the presence of the appellant in the cases pending in the State of Maharashtra including the case in question, which by reason of an order dated 19th December, 1994 was dismissed.

On or about 11th July, 1995 an application under Section 83 of the Code was filed by the Investigating Officer through the Public Prosecutor wherein it was admitted that the appellant had not been absconding.

8. On an application moved by the State of Maharashtra to the Designated Judge, TADA, Delhi for transfer of the appellant to Maharashtra, the Designated Judge by his order dated 21st July, 1995 refused to do so in view of the order passed by the High Court on 19th December, 1994.

Appellant moved an application for production warrant for recording his plea against charges which was dismissed on 25th July, 1995.

Yet again he filed an application on 21st August, 1995 praying for issuance of transfer warrant.

9. Indisputably 10 witnesses were examined during the period 6th November, 1995 to 22nd January, 1997, who have since expired. Their names, respective dates of their deposition and dates of death, are as under:-

PW No.	Name of the Witness	Date of deposition	Date of death

36	Parhuram Sonu Kawale	6.11.1995	29.1.2004
60	Bharat Jaggubhai Rathod	18.12.1995	22.6.2004
42	Sakharam Samji Kadu	14.11.1995	13.2.2003
69	Madhukar Dattatraya Paradkar	18.1.1996	19.3.2001
25	Sitaram Dhari Yadav	17.10.1995	Dec. 2001
81	Aruta Malleshwar Rao	20.2.1996	1.5.2001
72	Hanumanta Raghunath Jadhav	20.1.1996	5.9.1997
77	Shivajirao Vithalrao Barawkar	14.2.1996	28.7.2003
88	Sham Maruti Bingawade	31.1.1997	25.4.1997
83	Sayajirao Bapusahab Dubal	22.1.1997	14.10.2002

Appellant was formally arrested in the present case on 4th August, 1997. A supplementary charge sheet was filed on 19th August, 1997. Charges were framed against six accused persons including the appellant on 15th November, 2003.

In the said proceeding two applications were filed by the Senior Public Prosecutor on 25th September, 1996 and 11th October, 2006 for exhibiting the depositions of PW-36 and nine other witnesses, who had since expired, which by reason of the impugned order have been allowed.

Aggrieved by the said order, the appellant is before us.

10. Mr. Manoj Goel, learned counsel appearing on behalf of the appellant, inter alia would submit :-

1. The impugned order is wholly unsustainable as the Designated Judge, TADA, in its order dated 1st January, 1994 on the application under Section 299 of the Code did not assign sufficient and cogent reasons which would satisfy the jurisdictional facts contained in first part thereof or the legal requirements contained in the second part.

2. Since the jurisdictional facts require proving of not only the abscondance of an accused but also a situation where immediate prospect of his arrest was absent and which being a condition precedent; and as in the facts and circumstances of this case the appellant's presence could have been obtained as he was under arrest in a Delhi case which fact was known to the prosecution, the impugned order cannot be sustained.

3. Right to confront a witness being a fundamental right in terms of Article 21 of the Constitution of India and Section 299 of the Code being an exception thereto, the same should be strictly construed.

4. Admittedly appellant having been arrested by the Delhi police on 23rd July, 1993 and in all subsequent applications as also in the letters the prosecution it having not been shown that the appellant had been absconding, the order of the learned Designated Judge dated 1st January, 1994 must be held to be illegal and without jurisdiction.

5. The legal requirements to attract the provisions of Section 33 of the Evidence Act having not been complied with by prosecution as no finding has been arrived at by the designated court that the materials brought on record were sufficient to attract the same.

6. The requirements of law for the purpose of issuance of a proclamation in terms of Section 82 of the Code being only `reason to believe' and the requirement for exercise of jurisdiction by the Court under Section 299 of the Code being "proved" and, thus, only because an accused had been absconding the same by itself could not have been a ground for invoking the jurisdiction under Section 299 of the Code in absence of any finding that not only the appellant was absconding but he has intentionally been avoiding arrest.

7. The purported evidence of the ten witnesses who had been examined in the first phase of trial having been collected illegally, the same was not admissible in evidence in the present case and in that view of the matter the impugned judgment cannot be sustained.

11. Mr. Nafade, learned counsel appearing on behalf of he State and Mr. Sanjay Jain, appearing on behalf of the respondents, on the other hand, would contend:

> 1) Section 299 of the Code, Section 33 of the Evidence Act and Section 14(5) of TADA being cognate provisions, each one of them has a distinct role to play, although the provisions thereof may have been overlapping to some extent.
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> 2) TADA being a special statute and having an overriding effect on other statutes as would appear from Section 25 thereof, sub-
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> section (5) of Section 14 thereof must also be held to have overriding effect over the provisions of Code of Criminal Procedure and/or the Indian Evidence Act and in that view of the matter the order dated 1st January, 1994 is unassailable
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> 3) Non Recording of reasons, in any event, being only an irregularity, the provisions of Section 465 of the Code would be attracted.

4) Appellant at all the material times being aware of the entire proceeding and having taken part therein from time to time, he cannot at this stage be permitted to turn around and allowed to raise a contention in regard to the applicability or otherwise of an order in the previous case.

5) Charges having been framed against the appellant in terms of an order dated 20th December, 1993 in respect whereof he despite being aware but having not availed the benefit of cross-examining the witnesses in terms of Section 14(5) of TADA at an appropriate stage, is estopped and precluded from questioning the legality or validity of the said order dated 1st January, 1994.

6) Sub-section (5) of Section 14 of TADA does not require proving of foundational facts beyond all reasonable doubts and in the event, the satisfaction arrived at by the Court on the basis of the material evidences on record, the legal requirements must be treated to have been satisfied.

7) Sub-section (5) of Section 14 of TADA imposes a reasonable restriction on the right of the accused and in any event as the constitutionality of the said provision is not in question, this Court should not exercise its discretionary jurisdiction Appellant is being prosecuted under TADA. The Act was enacted to make special provisions for the prevention of, and for coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto, Part II whereof provides punishments for, and measures for coping with, terrorist and disruptive activities.

Part III of TADA empowers the Central Government or the State Government to constitute one or more Designated Courts for such area or areas or such case or class or group of cases as may be specified therein.

12. A Designated Judge while holding trial under the Act indisputably has the power to determine all questions including the question as regards his own jurisdiction. Section 11 of TADA provides that every offence punishable under any provision of the said Act shall be triable only by the Designated Court within whose local jurisdiction it was committed. Section 12 empowers the Designated Court to try any other offence, at the same trial, with which the accused may be charged if the offence is connected with such other offence.

Section 14 provides for the procedure and powers of the Designated Court. Sub-section (5) of Section 14 provides for a non-obstante clause in terms whereof notwithstanding anything contained in the Code, a Designated Court may, if it thinks fit and for reasons to be recorded by it, proceed with the trial in the absence of the accused or his pleader and record the evidence of any witness, subject to the right of the accused to recall the witness for cross-examination. Section 25 of TADA also provides for a non obstante clause stating that the provisions thereof or any rule made thereunder or any order made under any such rule shall have effect notwithstanding anything inconsistent therewith contained in any enactment or in any instrument having effect by virtue of any enactment other than the Act.

13. We must at this stage also consider the effect of the relevant provisions of the Code.

Chapter XXIII of the Code provides for evidence in inquiries and trials. Section 273 of the Code mandates that all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader, which was specifically provided.

Section 299 of the Code expressly provides for the power of the court to record evidence in absence of the accused in the following term :- "299. Record of evidence in absence of accused:- (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial, such person for the offence complained of, may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be

unreasonable. (2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India."

It is neither in doubt nor in dispute that sub-Section (1) of the said provision is in two parts - the first part provides for proof of jurisdictional fact in respect of abscontion of an accused person and the second that there was no immediate prospect of arresting him.

In the event, an order under the said provision is passed, deposition of any witness taken in absence of an accused may be used against him if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without any amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

Now, we must also take notice of Section 33 of the Evidence Act, 1872, which reads as under :-

> 33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. - Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; Provided-- that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding. Explanation.--A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

The right of an accused to watch the prosecution witnesses deposing before a court of law indisputably is a valuable right.

The Sixth amendment of the United States Constitution explicitly provides therefor, which reads as under :-

> " In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him ; to have compulsory process for obtaining witnesses in his

favour, and to have the Assistance of Counsel for his defence."

We may, however, notice that such a right has not yet been accepted as a fundamental right within the meaning of Article 21 of the Constitution of India by the Indian courts. In absence of such an express provision in our constitution, we have to proceed on a premise that such a right is only a statutory one. The larger question, namely as to whether right to confront a witness by an accused is a fundamental right or not, in our opinion, need not be gone into by us in these proceedings as the appellant does not question the constitutionality of either Section 299 of the Code or Section 14(5) of TADA or Section 33 of the Evidence Act.

In the context of our constitutional scheme; fundamental rights are not absolute being subject to reasonable restrictions. There lies a distinction between Bill of Rights contained in the Constitution of the United States and the Fundamental Rights provided for in the Indian Constitution.

In Jack R. Goldberg v. John Kelly [25 L. Ed 2d 287] it was inter alia held that even in a civil proceeding the 6th Amendment is applicable, stating:-

> " The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394, 58 L Ed 1363, 1369, 34, S Ct 779 (1914). The hearing must be "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 14 L Ed 2d 62, 66, 85 S Ct 1187 (1965). In the present context, these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally."

The Court further relied on the following observations from Greene v. Mc Elorey [3 L Ed 2d 1377].

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that, where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."
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> Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department."

We may, however, notice that even in the United States of America, the accused's right under the Sixth Amendment is not absolute. The right of confrontment of an accused is subject to just exceptions, including an orderly behaviour in the courtroom. In case of disruptive behaviour an accused can be asked to go outside the court room so long he does not undertake to behave in an orderly manner. It was so held in State of Illinois v. William Allen reported in [397 US 337].

An accused is, however, always entitled to a fair trial. He is also entitled to a speedy trial but then he cannot interfere with the governmental priority to proceed with the trial which would be defeated by conduct of the accused that prevents it from going forward. In such an event several options are open to courts. What, however, is necessary is to maintain judicial dignity and decorum.

The question which arises for consideration is whether the same will take within its umbrage the said principle. We will examine the said question a little later. We will proceed on the premise that for invocation of the provisions of Section 299 of the Code the principle of natural justice is inbuilt in the right of an accused.

A right to cross-examine a witness, apart from being a natural right is a statutory right. Section 137 of the Evidence Act provides for examination- in-chief, cross-examination and re-examination. Section 138 of the Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief, subject of course to expression of his desire to the said effect. But indisputably such an opportunity is to be granted. An accused has not only a valuable right to represent himself, he has also the right to be informed thereabout. If an exception is to be curved out, the statute must say so expressly or the same must be capable of being inferred by necessary implication.

There are statutes like the Extradition Act, 1962 which excludes taking of evidence viz-a-viz opinion. (See - Sarabjit Rick Singh v. Union of India, [(2008) 2 SCC 417].

14. It is also beyond any cavil that the provisions of Section 299 of the Code must receive strict interpretation, and, thus, scrupulous compliance thereof is imperative in character.

It is a well known principle of interpretation of statute that any word defined in the statutory provision should ordinarily be given the same meaning while construing the other provisions thereof where the same term has been used. Under Section 3 of the Evidence Act like any other fact, the prosecution must prove by leading evidence and a definite categorical finding must be arrived at by the court in regard to the fact required to be proved by a statute. Existence of an evidence is not enough but application of mind by the court thereupon as also the analysis of the materials and/or appreciation thereof for the purpose of placing reliance upon that part of the evidence is imperative in character.

15. Keeping in view the aforementioned principles in mind we may notice at this stage the application filed by the prosecution on 1st January, 1994 and the order passed thereon on the same date, which are as under :-

" The application on behalf of the prosecution herein pray that :-

a. That this Hon'ble Court has framed the charge against the accused nos. 1 to 12 and absconding accused nos. 1 to 3 on 30.12.1993 and the case is postponed for hearing and recording of the evidence of the witnesses from today i.e. 1st January, 1994.

b. That the evidence which is to be led against the present accused nos. 1 to 12 is also in respect of the absconding accused nos. 1 to 8.

c. That it is proved that it has become necessary to record the evidence of the witnesses against the absconding accused in their absence.

It is, therefore, prayed that the order may be passed to record the evidence against the absconding accused nos. 1 to 8 in their absence.

Pune (Vijay Sawant)
Date - 1.1.1994 Special P.P."

" ORDER

After splitting up the case with regard to the absconding accused as per the directions of the Honourable Supreme Court in its order dated 23rd November, 1993 in petitions for Special Leave to Appeal Nos. 1643-46/93 with SLP (Crl.) No. 1972-73/93, 2230, 1936, 1900-01/93, this Court is proceeded with the present case and has framed the charge against accused Nos. 1 to 12. However, as these twelve accused have been charged along with the absconding accused, as shown in the charge-sheet, the prosecution can adduce evidence relating to the absconding accused so far relevant the charge and the decision of the case. Eight accused persons have been shown as absconding accused. As the absconding accused are not before the Court the question of their identity will also arise and it will be necessary to give them an opportunity to cross-examine the witnesses. Therefore, it would not be just and proper to use the evidence to be recorded in the present case against the absconding accused and he evidence will be required to be recorded separately as to enable them to cross-examine the witnesses.

However, if any deponent dies or becomes incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which under the circumstances of the case would be unreasonable then the evidence recorded in this matter may be used as per the provisions of Section 299 of the Criminal Procedure Code.

(D.S. Zonting)
Judge, Designated Court, Pune

Dated 1st January, 1994 "

16. The application having been filed by the Special Public Prosecutor and the order having been passed on the same date it is beyond any cavil that before the Court apart from the fact that a proclamation under Section 82 had been issued against the appellant, no other material was placed. It now stands accepted that even much prior thereto, i.e., as far back as 23rd July, 1993, the appellant was arrested. The said fact was known to the investigating officer. By a letter dated 1st September, 1993 the Investigating Officer himself had informed the Court in regard thereto.

It also now stands admitted that at least in two cases appellant had been arrested and produced before the Courts in Maharashtra and in fact had been remanded to the police custody. It is furthermore neither in doubt nor in dispute that whereas in one of those cases the appellant was arrested on 20th November, 1993 and on the same date he was shown to have been arrested and taken in police custody once again in another case.

These facts were required to be brought to the notice of the Court. The Court's attention should have also been drawn to the aforementioned letter dated 1st September, 1993.

Had these facts been brought to the notice of the court, could it pass the impugned order is the question?

We may assume that the court might have done so. But for the purpose of passing an order, be under Section 299 of the Code or sub-section (5) of Section 14 of TADA, it was required to apply its mind as regards the existence of the jurisdictional fact. The materials on record were required to be discussed, reasons therefor were required to be recorded. How despite the fact that the appellant had already been custody of the Delhi Police viz-a- iviz the Maharashtra Police, he could be termed to be an absconder and there was no prospect of securing his immediate presence, was required to be considered.

Indisputably both the conditions contained in the first part of Section 299 of the Code must be read conjunctively and not disjunctively. Satisfaction of one of the requirements should be not sufficient. It was thus, obligatory on the part of the learned court to arrive at a finding on the basis of the materials brought on record by bringing a cogent evidence that the jurisdictional facts existed so as to enable the court concerned to pass an appropriate order on the application filed by the Special Public Prosecutor.

Section 299 of the New Code corresponds to Section 512 of the Old Code. The applicability of the aforementioned provisions came up for consideration before some of the High Courts.

We will notice a few of them.

In Rustam v. Emperor, [AIR 1915 All 411], the Allahabad High Court held as under:-

"It is clear from the language of the section that the Court which records the proceedings under it,

must first of all record an order that in its opinion, it has been proved that the accused has absconded and that there is no immediate prospect of his arrest. No such finding appears on the file of 1897 ; in fact no evidence was taken in that year to show that the present appellant was absconding and that there was no immediate prospect of his arrest. The evidence of 1897 being in-admissible, the conviction of the appellant on the basis of such evidence cannot stand."

To the same effect is the decision of the Madras High Court in Mysore v. Sanjeeva, [AIR 1956 Mys. 1] wherein it was held :-

> "(14) The question also arises as to what constitutes absconding. The word `absconder' is not defined in the Code of Criminal procedure. It occurs in other provisions of criminal law e.g. Sections 87 and 90(a), Cr. P.C. and Section 172 I.P.C. From the context and object of these provisions an absconder may be said to be one who intentionally makes himself inaccessible to the processes of law. Hence it is not enough if it is shown that it was not possible to trace him soon after the occurrence.

It has also to be established that he was available at or about the time of the commission of the alleged offence and ceased to be available after the commission of the offence, before he can be treated as an absconder. Similarly, it has to be established that there is no immediate prospect of arresting the accused. Then the question arises, whether it is enough if the material on record shows that these conditions have been fulfilled or whether it is necessary that the recording Court should explicitly state that it has so satisfied itself before the deposition is actually recorded." Such jurisdictional facts must be existing on this date of passing of the order.

In Shiv Chander Kapoor v. Amar Bose, [(1990) 1 SCC 234] this Court held:-

> "12. We have no doubt that the language of Section 21 of the Act clearly forbids the Controller from embarking on an enquiry beyond the ambit of Section 21 itself which may impinge into the sphere of Section 14 of the Act or any other law. We have no hesitation in holding that it is the existence of the aforesaid jurisdictional facts at the time of grant of permission to create a limited tenancy which alone is required to be determined by the Controller, if and when, validity of his permission is assailed at a subsequent stage. This being the scope of his enquiry while granting permission, the scope of enquiry at the subsequent stage cannot be wider. For this reason any objection to the validity of the permission on a ground other than non-existence of the jurisdictional facts at the time of grant of permission is untenable and beyond the scope of the Controller's power to examine validity of his earlier permission before directing restoration of possession to the landlord under Section 21 of the Act."

In Manboth v. Emperor, [AIR 1944 Nag 274], Nazir Ahmad vs. Emperor [AIR 1936 PC 253: 17 Lah. 629] and Rustam (supra) was followed.

We must, however, notice that in Bhagwati v. Emperor, [AIR 1918 All 60], the Allahabad High Court held :-

" The section nowhere says that the Magistrate must record a finding. We wish to make it quite clear that in our opinion a Magistrate before recording evidence under S. 512 ought to be satisfied that the accused is absconding and that there is no immediate prospect of his arrest, and it is certainly advisable that he should recite in his order that he finds this to be the case. However, in this case we find that the Magistrate had clear evidence that the accused were absconding, and evidence from which the Magistrate might reasonably infer that there was no immediate prospect of their arrest. In his order he expressly states that he is taking the evidence under S. 512. The presumption is that the Magistrate did his duty and did not record the evidence under S. 512 unlawfully. In our opinion the mere fact that the learned Magistrate did not recite a finding that there was no immediate prospect of the arrest of the accused does not render the evidence inadmissible."

We, with utmost respect, do not agree. There is no such presumption in law. An order of that nature must exhibit total application of mind. A judicious approach is imperative. For the said purpose the courts must bear in mind that an accused has a Fundamental Right as also Human Right.

The term `proved' having been used in the Section, providing for an exception to the general rule, was required to be strictly construed. It was not an ipse dixit of the Magistrate that would be sufficient for attracting an extra ordinary provision.

The Magistrate was required to apply his mind to arrive at a definitive finding on the basis of the materials on record, in absence whereof, his order must be held to be arbitrary and, thus, without jurisdiction.

We may, however, notice that in Janu v. Emperor, [AIR 1947 Sind 122], a Division Bench of the Court held :-

> "Now, when the section says "if it is proved", we think, it must mean, if it is proved according to evidence, properly, admissible under Evidence Act."
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> Bhagwati (supra) has been distinguished stating :-
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> "But reference to that case itself shows that the Magistrate had recorded evidence under the provisions of S. 512. He actually put on the record a finding that the accused had absconded, but did not go on further to say that there was no immediate prospect of their arrest. There was, however, evidence on the record from which the Magistrate might have reasonably inferred that there was no immediate prospect of arrest. .....
>
> That case is, indeed, authority for the statement that if evidence is on record that the accused were absconding and there was no immediate prospect of their arrest the absence of a formal finding to that effect does not invalidate the proceedings.
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> Section 512, indeed does not state that there should be a formal finding. But obviously S.512 requires that there should be upon record evidence properly

admissible under the Evidence Act."

(See also Ghurbin Bind v. Queen Empress, [1884 (10) ILR Cal 1097 wherein it has been held that the fact of absconding to be alleged, tried and established). .

We may, at this stage, also notice a decision of this Court in Nirmal Singh v. State of Haryana, [(2000) 4 SCC 41] wherein it was held that Section 299 of the Code is in two parts. In that case the Magistrate, who had recorded the statements under Section 299 of the Code, was examined to indicate that in fact he had recorded the statements. Cross-examination of the said Magistrate was necessary as there was a dispute as to whether there was any material that the persons whose statements had been recorded were died or not. It was in that context this Court opined :-

> "The Magistrate who has recorded the statement under Section 299 of the Criminal Procedure Code, has been examined to indicate that in fact he has recorded the statements. He also further contended that the process-server did submit the report that the persons are dead, whereafter the statements recorded under Section 299 Cr PC were tendered in evidence in the course of trial. It is true that the learned Sessions Judge has not passed any order to that effect but non-passing of such order would at the most be an irregularity which is curable under Section 465 of the Code of Criminal Procedure, more so, when the accused had not raised any objection at any earlier stage of the proceeding."

This Court did not say as was contended by Mr. Nafade that non- compliance of Section 299 would be an irregularity. What was considered to be an irregularity was non recording of a statement that the persons concerned were dead. In fact the discussions on Section 299 of the Code and Section 33 of the Evidence Act starts from paragraph 4 wherein it was categorically held :-

> "Being an exception, it is necessary, therefore, that all the conditions prescribed, must be strictly complied with. In other words, before recording the statement of the witnesses produced by the prosecution, the court must be satisfied that the accused has absconded or sic (and) that there is no immediate prospect of arresting him, as provided under the first part of Section 299(1) of the Code of Criminal Procedure. In the case in hand, there is no grievance about non-compliance with any of the requirements of the first part of sub-section (1) of Section 299 Cr PC. When the accused is arrested and put up for trial, if any such deposition of any witness is intended to be used as evidence against the accused in any trial, then the court must be satisfied that either the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience, which would be unreasonable. The entire argument of Mr Gopal Subramanium, appearing for the appellant is that any one of these circumstances, which permits the prosecution to use the statements of such witnesses, recorded under Section 299(1) must be proved and the court concerned must be satisfied and record a conclusion thereon. In other words, like any other fact, it must first be proved by the prosecution that either the deponent is dead or is incapable of giving

> evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances would be unreasonable. In the case in hand, there is no order of the learned trial Judge, recording a conclusion that on the materials, he was satisfied that the persons who are examined by the Magistrate under Section 299(1) are dead, though according to the prosecution case, it is only after summons being issued and the process-server having reported those persons to be dead, their former statements were tendered as evidence in trial and were marked as Exhibits PW- 48/A to PW-48/E. As has been stated earlier, since the law empowers the court to utilise such statements of persons whose statements were recorded in the absence of the accused as an exception to the normal principles embodied in Section 33 of the Evidence Act, inasmuch as the accused has been denied the opportunity of cross- examining the witnesses, it is, therefore, necessary that the preconditions for utilising such statements in evidence during trial must be established and proved like any other fact. There possibly cannot be any dispute with the proposition of law that for taking the benefits of Section 299 of the Code of Criminal Procedure, the conditions precedent therein must be duly established and the prosecution, which proposes to utilise the said statement as evidence in trial, must, therefore, prove about the existence of the preconditions before tendering the evidence."

17. In this case moreover the appellant had not been absconding after he was arrested. The term `absconding' has been defined in several dictionaries. We may refer to some of them.

`Black's Law Dictionary - To depart secretly or suddenly, esp. to avoid arrest, prosecution or service of process. P. Ramanatha Aiyar - primary meaning of word is `to hide'. Oxford English Dictionary - `To bide or sow away'. Words and phrases - `clandestine manner/intent to avoid legal process' In Kartarey v. State of U.P., [(1976) 1 SCC 172 [this Court held :

> "43. Further it is wrong to say that Baljeet never absconded. Contrary to what Baljeet has said in his examination under Section 342 of the Cr PC, the Investigating Officer, PW 7, testified that Baljeet was found hiding in a chhappar in the village from where he was arrested. This account of Baljeet's arrest was not challenged in cross-examination. To be an "absconder" in the eye of law, it is not necessary that a person should have run away from his home, it is sufficient if he hides himself to evade the process of law, even if the hiding place be his own home. We therefore, do not find any ground to distinguish the case of Baljeet from that of Sitaram and to treat him differently."

Furthermore for the purpose of invoking Section 299 of the Code the learned Designated Judge was required to hold on the date of passing of the order, namely 1st January, 1994 that he had been absconding on that date.

In view of the nature of evidence which had been brought on record, it was not possible for him to hold so, namely -

a) Letter dated 1st September, 1993

b) Arrest of the petitioner by Thane Rural Police in FIR No.3/92.

c) I.O's letter dated 25th October, 1993.

d) Reply dated 1st November, 1993

e) Third arrest of the petitioner on 20th November, 1993 in FIR No.237/92 of Manikpur Police Station.

f) On 20th November, 1993 petitioner was arrested in another FIR No.161/92 in Virar Police Station.

The learned Designated Judge no doubt issued a proclamation but the same was done in February, 1993. Once a person is arrested and/or is otherwise capable of being brought to court, the proclamation ceases to have any effect.

Once a person is arrested, he cannot be considered as a proclaimed offender. It is not a law that once a proclaimed offender shall all along be treated to be so. If he had a right to take part in the trial, the trial court was duty bound to provide for the same. In any event the learned Designated Judge did not rely on the proclamation made under Section 82 of the Code.

It is in the aforementioned situation, we may consider as to whether sub-section (5) of Section 14 of the Act would be attracted.

No application has been filed under the aforementioned provision. For invocation of the said provision, materials were required to be brought on record so as to enable the court to arrive at a finding that it was necessary so to do. The condition precedent therefor was `if it thinks fit'. For the said purpose he was to record reasons. Such an order could be passed with a view to continue with the trial.

It may be for a day or for a few days. The accused ordinarily and subject to just exceptions must be facing the trial. In other words, the court was required to opine that recording of evidence is urgent or there existed certain and cogent reasons which would enable him to record evidence in absence of an accused or his pleader. Recording of reasons is imperative in character. It is the only safeguard which had been provided to check an arbitrary exercise of power. It expressly preserves the right of the accused to recall the witness for cross-examination. It does not contemplate a situation like the one under Section 299 of the Code. By reason of the said provision even the relevance of the evidence as envisaged under Section 33 of the Evidence Act is not taken away.

We must place on record that there are enough materials on the record to show that the appellant had made all attempts to be tried alongwith other accused persons. He in fact moved this Court under Article 32 of the Constitution of India for the aforementioned purpose wherein, on 23rd November, 1993 an order was passed stating :-

" Leave granted After hearing the learned Additional Solicitor General and Mr. P. Chidambram, senior counsel appearing on behalf of State and petitioner, accused respectively, we pass the following order with the consent of the parties.

The Presiding Judge of the Designated Court, Pune is directed to expedite the hearing of the case and consider the feasibility of framing of charges or otherwise before 13th December, 1993 after splitting up the case with regard to the absconding accused, if any, and commence the trial from 14th December, 1993 and examine witnesses on day to day basis. Both the parties have agreed that they will not be taking any adjournment on any ground and on the other, they will fully cooperate in the trial of the case. The Presiding Judge of the Designated Court is further directed to examine the material witnesses first in the order and thereafter the other remaining witness.

This order is without prejudice to the rights and contentions of the parties to urge any legal point including jurisdiction of the Designated Court."

The said order was passed in the case of the appellant himself. If he did not want to stand his trial at that stage, the question of issuance of the said direction did not arise. Even the question of splitting of the case with regard to the absconding accused did not arise. Appellant being agreeable not to take adjournment on any ground and his undertaking to fully cooperate in the trial of the case could not arise if he would not have been standing trial. The effort on the part of the appellant to be produced before the TADA Court is evident from the fact that not only he filed an application in that behalf before the Delhi High Court, he even filed several applications in the pending proceedings. The High Court by its order dated 19th December, 1994 directed :-

" The prayer made in this petition is that respondent No.4, who is required to face trial in a Court in Maharashtra should be transferred to that court. The petitioner forgets that respondent No.4 is facing a trial in a serious offences in Delhi. It is obvious that unless one trial is over, that other trial cannot take place. Respondent No.4 cannot be shifted from place to another so that trials can take place simultaneously. The interest of the petitioner, Maharashtra State are well protected by making entries in the challan of respondent No.4 in jail record as well as in record of court where respondent No.4 is facing trial in Delhi that has not to be released till any order is made by a competent court in Maharashtra with regard to the case pending in that Court. As soon as the trial at Delhi completes, respondent No.4 shall be transferred to the jurisdiction of the court at Maharashtra where he is to face the trial. The Delhi Court shall take expeditious steps to complete the trial at an early date. With these observations, we dispose of this petition.

Copy of this order be sent to Chief Metropolitan Magistrate, to TADA Court where respondent No.4 is facing the trial and also to Supdt. Jail and to Designated Court in Pune."

Thus, he, for all intent and purport, made subject to the jurisdiction of the Pune TADA Court as well.

Mr. Nafade would submit that having regard to the fact that the appellant having filed several applications before the TADA Court, could have also questioned the legality of the order dated 1st January, 1994. Such an occasion, in our opinion, did not arise particularly having regard to the nature of the order passed therein.

An accused ordinarily would not be presumed to have waived his right. The procedural principles like estoppel or waiver would not be attracted where an order is passed without jurisdiction as the same would be a nullity. An order which is a nullity cannot be brought into effect for invoking the principles like estoppel, waiver or res judicata. [See Chief Justice of Andhra Pradesh & anr. vs. L.V.A. Dikshitulu & ors. (AIR 1979 SC 193 at 198)] A bare perusal of the provisions of Section 299 of the Code and Section 14(5) of TADA it would be evident that they operate in different fields. The ingredients of the said provisions are different. Materials, which are, thus, required to be brought on record by the prosecution for application of the aforementioned provisions may be different, although they may be overlapping to some extent.

In this case the learned Public Prosecutor must be of the opinion that it was not a case where Section 14(5) of TADA shall apply, having regard to the fact that neither the accused nor his pleader was before the Court. Although we do not intend to pronounce finally on the point, but it appears to us that Section 14(5) of TADA would be attracted only when the accused is facing trial and/or otherwise represented through his advocate. If neither the accused nor his pleader had an occasion to be before the Court, sub- section (5) of Section 14 may not be held to have any application.

There is another aspect of the matter which cannot be lost sight of. No charge-sheet was filed against the appellant. In the charge-sheet dated 27th August, 1993, rightly or wrongly, he had been shown as absconding. In the absence of any charge-sheet no cognizance could have been taken against him in the sense that he could not have been directed to stand trial. . It is not the contention of the respondents that the learned Magistrate despite the said charge-sheet dated 27th August, 1993 had taken cognizance against him. Undoubtedly in the order dated 30th December, 1993, while framing charges his name had been shown as an absconding accused. He was, therefore, not before the Court. He could not have taken part in he trial. He was arrested formally only on 4th August, 1993 and charges were framed against him only on 15th November, 2003.

We have noticed hereinbefore the respective dates of death of the witnesses concerned. All the witnesses expired prior thereto. The question of his exercising his right to cross-examine the said witnesses would have arisen only after the said date and not prior thereto. It is, in our opinion, incorrect to contend that such a right could be exercised at any date prior thereto. Such a question could have arisen provided he was facing trial. In that view of the matter we are also of the opinion that it was not a case wherein sub-section (5) of Section 14 of the Act would have been attracted since the order of the TADA Court specifically invoked Section 299 of the Code.

We have proceeded on the basis that the right of confrontation is not a fundamental right or whereby accused's fundamental right has not been breached. Article 21, however, envisages a fair

trial ; a fair procedure and a fair investigation. By reason of such a right alone the appellant was entitled not only to be informed about his fundamental right and statutory rights but it was obligatory on the part of the Special Public Prosecutor to place on record of the requisite materials before the learned Designated Judge to show that the appellant, after his arrest in Delhi case on 23rd July, 1993 was not an absconder and thus the provisions of Section 299 of the Code was not attracted.

Mr. Nafade sought to place before us to the gravity of the offence. He has drawn our attention to the fact that this Court on an appeal preferred by the complainant reversed the judgment of acquittal passed by the TADA Court against other accused except six accused against whom there was no direct allegation of murder.

In Noor Aga v. State of Punjab [2008 (9) SCALE 691] this Court while dealing with a similar draconian statute, held :-

> "44. The Act contains draconian provisions. It must, however, be borne in mind that the Act was enacted having regard to the mandate contained in International Conventions on Narcotic Drugs and Psychotropic Substances. Only because the burden of proof under certain circumstances is placed on the accused, the same, by itself, in our opinion, would not render the impugned provisions unconstitutional.
>
> 45 A right to be presumed innocent, subject to the establishment of certain foundational facts and burden of proof, to a certain extent, can be placed on an accused. It must be construed having regard to the other international conventions and having regard to the fact that it has been held to be constitutional. Thus, a statute may be constitutional but a prosecution thereunder may not be held to be one. Indisputably, civil liberties and rights of citizens must be upheld.

46. A Fundamental Right is not absolute in terms.

47. It is the consistent view of this Court that `reason to believe', as provided in several provisions of the Act and as defined in Section 26 of the Indian Penal Code, on the part of the officer concerned is essentially a question of fact.

48. The procedures laid down under the Act being stringent in nature, however, must be strictly complied with.

It was further held :-

> "52. Enforcement of law, on the one hand and protection of citizen from operation of injustice in the hands of the law enforcement machinery, on the other, is, thus, required to be balanced.

> 53. The constitutionality of a penal provision placing burden of proof on an accused, thus, must be tested on the anvil of the State's responsibility to protect innocent citizens.
>
> "

This Court in Kartar Singh v. State of Punjab, (1994) 3 SCC 569 has held :-

> "278. ...It is the jurisprudence of law that cross- examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are :
>
> (1) to destroy or weaken the evidentiary value of the witness of his adversary;
>
> (2) to elicit facts in favour of the cross-
>
> examining lawyer's client from the mouth of the witness of the adversary party;
>
> (3) to show that the witness is unworthy of belief by impeaching the credit of the said witness;
>
> and the questions to be addressed in the course of cross-examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character."
>
> [See also Cholan Roadways Ltd. v. G. Thirugnanasambandam, (2005) 3 SCC 241].

In Vimalben Ajitbhai Patel v. Vatslaben Ashokbhai Patel and others, [(2008) 4 SCC 649, this Court observed :-

> "32. The provisions contained in Section 82 of the Code of Criminal Procedure were put on the statute book for certain purpose. It was enacted to secure the presence of the accused. Once the said purpose is achieved, the attachment shall be withdrawn. Even the property which was attached, should be restored. The provisions of the Code of Criminal Procedure do not warrant sale of the property despite the fact that the absconding accused had surrendered and obtained bail. Once he surrenders before the court and the standing warrants are cancelled, he is no longer an absconder. The purpose of attaching the property comes to an end. It is to be released subject to the provisions of the Code. Securing the attendance of an absconding accused, is a matter between the State and the accused. The complainant should not ordinarily derive any benefit therefrom. If the property is to be sold, it vests with the State subject to any order passed under Section 85 of the Code. It cannot be a subject-matter of execution of a decree, far less for executing the decree of a third party, who had no right, title or interest thereon."

Mr. Nafade would submit that the appellant did not suffer any prejudice. We do not agree. Infringement of such a valuable right itself causes prejudice. In S.L. Kapoor v. Jagmohan, [(1980) 4 SCC 379], this Court clearly held :-

> "In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced."

In A.R. Antulay v. R.S. Nayak and another, [(1988) 2 SCC 602] a seven Judge Bench of this Court has also held that when an order has been passed in violation of a fundamental right or in breach of the principles of natural justice, the same would be nullity. { See also State of Haryana v. State of Punjab, [(2004) 12 SCC 673] and Rajasthan State Road Transport Corporation and others v. Zakir Hussain, [(2005) 7 SCC 447] }

18. For the reasons aforesaid the impugned order cannot be sustained. It is set aside accordingly. The appeal is allowed. .....J.

[S.B. Sinha] .....J.

[Dr. Mukundakam Sharma] New Delhi;

May 11, 2009