

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Criminal Appeal No. 1073/2000

Arun Gulab Gawli

Appellant (s)

VERSUS

State of Maharashtra
(with appln.for bail and office report)

Respondent

Date : 22/02/2001 This matter was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE U.C. BANERJEE
HON'BLE MR. JUSTICE BRIJESH KUMAR

For Appellant(s) Mr. Rajender Singh,Sr.Adv.
Mr. Sushil Kumar,Sr.Adv.
Mr. Makrand D. Adkar,Adv.
Mr. S.D. Singh,Adv.
Mr. D.D. Ghadge,Adv.
Mr. Vishwajit Singh,Adv.

For respondent(s) Dr. R.B. Masodkar, Adv.
Mr. S.S. Shinde,Adv.
Mr. Arun Pednekar,Adv.
Mr. S.A. Desai, Adv.
Mr. S.V. Deshpande,adv

UPON hearing counsel the Court made the following
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The appeal is allowed in terms of the signed order.

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(Signed order is placed on the file)

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IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

recovery, were broken and the same was re-sealed - which is not to be usually found and serious criticism therefor has been levelled on that score by the learned senior counsel, Mr. Singh which cannot, however, be termed to be totally unjustified.

The core question, however, to be determined in this appeal is, whether the prosecution has proved without any reasonable doubt that the accused possessed the stengun on 21st July, 1990: and the TADA Court answered the same in the affirmative and hence this appeal.

Be noted that the TADA (P) Act has been made applicable to the recovery of the weapon having been effected on the notified area on 13th July, 1990 and the prosecution case proceeds thereafter to the effect that on 21st July, 1990, the accused was found in possession as per the disclosure statement made by him. The Notification dated 13th July, 1990 records that Bombay and Bombay Suburban District including the area of jurisdiction of the Commissioner of Police, Greater Bombay and entire Thane District including Thane Commissioner Area is to be treated as notified area for the purpose of Section 5 of the TADA (P) Act.

The contention raised in support of the appeal is that the possession of stengun has been deliberately foisted on to the accused on totally fake allegations and on that score it would be convenient at this juncture to analyse the evidence of inspectors who actually effected the recovery of the stengun. Mr. Singh drew our attention to the clear discrepancy appearing on the evidence of PW 1 and PW 4 and even between the oral testimony and the F.I.R. as lodged by one such inspector, who deposed before the court. A recapitulation of such discrepancy, however, would be convenient at this juncture. The F.I.R. records that during the interrogation, appellant divulged information that he concealed a stengun which was procured by him for attacking rival gang members at Dagdi Chawl near his office. The statement of the appellant before Panchas in the Panchnama is though however not exhibited at the trial but on even assumption of the same, having been made a part of the record which reads as below:

"I owned and possessed a stengun which I had concealed in Dagdi Chawl Byculla, I will point out the stengun and the place. Accompany me. (As per the English translation available on record)"

It is on this score that PW 1 stated that he joined the interrogation team in the morning and around 12.15 in the afternoon, Arun Gawli made a disclosure saying,

"I have concealed a stengun that I have owned and possessed in Dagdi Chawl, accompany me, I will point out the said place."

PW 4 on this account stated that the "appellant" made statement to him that he wanted to make some disclosure about the stengun. Admittedly, a variation which is worth noting and goes to a large extent to depict the credibility of the witnesses produced in support of the prosecution.

Another glaring discrepancy which was pointed out during the course of hearing, ought also be noticed: In the F.I.R. it has been stated that a handbag was recovered from unused passage adjacent to

office of the accused and the said handbag contained a stengun of U.K. make and also contained three empties, one deformed bullet and four cleaning rods. In the Panchnama it has been recorded as below :

"From a gangway-cum-store room, the accused picked up a bag kept behind baaja petti which contained articles like - a black colour stengun, four clearing rods with three brash, one clearing piece of cloth white in colour with red strips, one white colour cloth piece. These items were covered in a white and blue designed napkin."

PW 1 however in his deposition stated :

"In room for dumping articles, appellant took out rexin bag and also took out a stengun out of the bag. The bag was searched and we found one napkin with blue and white strips and on opening the napkin we found there were four cleaning rods, three brushes and two clothes."

Thus as regards empties and deformed bullets, we find no such mention in his deposition.

Further, be it noted that identification of the place of recovery also varies between witnesses and the F.I.R. and the Panchnama. The Panchnama records that the Police searched western side room, on the wall of which holes were seen and during the search, three empties and one deformed bullet were noticed. PW-1, however, on the core question stated that it is not the room but the passage from where the articles were produced. As a matter of fact, PW 1 stated that the entire team entered another room where three empty cartridge cases and three deformed bullets were found. The F.I.R. thus stands contradicted by both, the Panchnama and the oral testimony of PW 1. Significantly be it noted that during the course of trial before the TADA Court, lockup register was asked for, but the same was not produced and it is on this score that, Mr. Singh contended that the factum of non-production of the lockup register would only exhibit the hollowness of the prosecution case since the document being the only piece of evidence available to the effect that the appellant was taken out of the lockup and taken back to the lockup. The case of the accused as canvassed before us is that he had never been taken out of the lockup and the entire story stands cooked up in order to find support of the case initiated against him. A scrutiny of such a comment since the witnesses coming to depose before the court has been delightfully frank as to the non-production of the lockup register to the effect that the same is not available with the Police. Curious, however, it may seem that the lockup register, an important piece of evidence, would be lost by the Police Authorities, but the fact remains, it has not been produced. It is on this score, if we may recapitulate that not only the lockup register was not produced but even the witnesses have not been called to depose in the TADA Court alongwith some other infirmities, to which: the Panchnama has not been exhibited : the seizure memo has not been signed and the accused was not favoured with a copy - Do the oral evidence of constables only inspire so much of confidence of the Court, so as to place reliance thereon for convicting in terms of a very

stringent provision of law, i.e., Section 5 of the TADA (P) Act? It is on this score that Dr. Rajeev B. Masodkar, learned counsel appearing for the respondent herein contended that the requirement of the statute is illegal possession of a fire arm and if there is no discrepancy between the witnesses as regards the recovery of the stengun, question of coming to a different conclusion apart from what has been arrived at by the learned Judge of the TADA Court does not and cannot arise. The submission seems to be attractive undoubtedly, but the issue arises, as to whether, having regard to the provisions of the TADA (P) Act, the court would be otherwise justified in convicting the accused by reason of the available evidence, which cannot by any stretch be ascribed to be without any discrepancy - the answer cannot be in the negative. On this score however, Mr. Singh relies strongly on the decision of this Court in Pradeep Narayan@@

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Madgaonkar & Ors. -Vs.- State of Maharashtra (1995) 4@@
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SCC 255 and in paragraph 12 of this decision this Court has stated as below :

"Our independent appraisal of the evidence on record has created an impression on our minds that the prosecution has failed to bring home the charge to the appellants beyond a reasonable doubt.

We also do feel it necessary to record in the similar vein that an independent appraisal of the evidence does not inspire any confidence to record our concurrence with the submissions of the learned advocate for the respondent.

Admittedly, there has been, in possession of the Police Authorities, a stengun. As regards the disclosure statement, there is a variation not only on the degree of quality, even between the F.I.R. and the two witnesses as also the Panchnama. Why two Panchas were not available - when in fact they were available within a distance of about 20 kms. Admittedly, it is not a justifiable omission. We however, search in vain for an acceptable answer: In the facts of this case, we see that recovery memo has also not been signed. If we may ask ourselves, as to the reason for not having the signature, the same may not be very impertinent on our part. Something stands recovered said to be at the instance of a person but neither the person from whom it is recovered is asked to sign, nor the same has been exhibited, though a paper containing such a statement is marked "Y". The absence of signature or thumb impression of an accused on the disclosure statement, in our view, runs counter to the requirement of the Evidence Act. This Court in the case of State of@@

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Rajasthan -Vs.- Bhup Singh (1997) 10 SCC 675 has dealt@@
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with an issue as to the conditions prescribed under Section 27 of the Evidence Act, 1872 and this Court was pleased to lay down as below :

- (1) A fact should have been discovered in consequence of information received from the accused;
- (2) he should have been accused of an offence;
- (3) he should have been in the custody of a police officer when he supplied the information;
- (4) the fact so discovered should have been deposed to by the witness and this Court came to the conclusion that if these conditions are satisfied, that part of the

information given by the accused which led to such discovery gets denuded of the wrapper of prohibition and it becomes admissible in evidence. This Court further observed that it is immaterial whether the information was supplied in connection with the same crime or in a different crime.

In the contextual facts, if the aforesaid tests are applied, we have in fact only utter confusion and contradiction as noticed above. The factum of place of discovery and the person at whose instance it is discovered are rather sketchy and not a pointer of the credibility of the witnesses. Three different versions are available on record as to the place from where the stengun was recovered, three different versions are available as to the items recovered and two different versions are available as to the quantum of recovery. Can this evidence be termed to be an inspiring piece of evidence so as to justify the conviction as has been relied upon by the TADA Court? The answer, however, cannot but be in the negative.

Since we find that it is not very safe to rely upon the evidence relating to the alleged search and recovery, the appellants are thus entitled to the benefit of doubt and on that score the conviction cannot be sustained. We, therefore, allow this appeal, set aside the conviction and sentence of the appellant. He shall be released from the custody forthwith, if not required in any other case.

.....J.
(U.C. BANERJEE)

New Delhi,
February 22, 2001.

.....J.
(BRIJESH KUMAR)