

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(s). 1165 OF 2004

VAIKO & ORS. Appellant (s)

VERSUS

STATE OF TAMIL NADU Respondent(s)

(With office report)

Date: 06/03/2014 This Appeal was called on for hearing today.

CORAM :

HON'BLE MRS. JUSTICE RANJANA PRAKASH DESAI  
HON'BLE MR. JUSTICE MADAN B. LOKUR

For Appellant(s)

Mr. V. Ramasubramanian, Adv.  
Mr. M.S.M. Asai Thambi, Adv.  
Mr. V. Lakshmi Narayanan, Adv.

For Respondent(s)

Mr. M. Yogesh Kanna, Adv.  
Mr. A. Santha Kumaran, Adv.  
Ms. Vanita C. Giri, Adv.

UPON hearing counsel the Court made the following  
O R D E R

In the peculiar circumstances of the case, we permit the appellants to withdraw the present criminal appeal. The appellants, if they are so advised, may prefer an appeal against Order dated 3-9-2004 passed in Special C.C. No.1 of 2003 in the Madras High Court. If such an appeal is filed, we request the Madras High Court to consider the application for condonation of delay sympathetically in view of the fact that

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the counsel for the respondent-State has no objection for condonation of delay if all contentions of the respondent-State are kept open. While allowing the appellants to withdraw the appeal, we make it clear that we have not expressed any opinion on the merits of the case and all contentions of the appellants and the respondent-State are kept open.

The Criminal Appeal is disposed of as withdrawn in terms of the signed order.

|(Vishal Anand)  
|Court Master

|(Indu Pokhriyal)  
|Court Master

(Signed Order is placed on the file)

VAIKO & ORS.

Appellant (s)

VERSUS

STATE OF TAMIL NADU

Respondent(s)

O R D E R

1. Appellants 1 to 4 were arrested and charged in connection with offence under Section 21 (3) of the Prevention of Terrorism Act, 2002 (the POTA) for addressing a public meeting on 29-6-2002 in support of the Liberation Tigers of Tamil Eelam (LTTE) which is declared as a terrorist organization under the POTA. Appellants 5 to 9 were arrested and charged in connection with offence under Section 21 (2) of the POTA for arranging the said meeting. Appellants 2 to 9 filed an application for discharge on 15-7-2003. It may be stated here that appellant 1 did not file any discharge application. The Special Court dismissed the said application. The order was confirmed by the High Court. The Special Leave Petition filed against the High Court's Order was withdrawn by appellants 2 to 9.

2. In the meanwhile, the Central Government appointed a Review Committee under Section 60 of the POTA. By the Prevention of Terrorism (Amendment) Ordinance, 2003, sub-sections (4) to (6) were inserted in Section 60 of the POTA. The said Ordinance was replaced by the Prevention of Terrorism (Amendment) Act, 2003, which inserted sub-sections (4) to (6)

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and further sub-section (7) in Section 60 with retrospective effect from 27-10-2003. The amendment gave more powers to the Review Committee. Sub-section (4) stated that the Review Committee shall on an application made by an aggrieved person, review whether there is any prima facie case for proceeding against the accused under the POTA and to issue directions accordingly. Sub-section (7) stated that where the Review Committee is of opinion that there is no prima facie case for proceeding against the accused and issues directions under sub-Section (4) then, the proceedings against the accused shall be deemed to have been withdrawn from the date of such direction. The effect of the amended provision was to make any direction issued by the Review Committee about the existence of prima facie case for proceeding against the accused binding on the Government.

3. The constitutional validity of sub-sections (4) to (7) was challenged by the State of Tamil Nadu in the Madras High Court. On 4-2-2004 the Madras High Court upheld the validity. The Madras High Court, however, held that sub-section (7) of section 60 will have to be understood only in the context of Section 321 of the Code of Criminal Procedure (the Code). This meant that if the Review Committee forms an opinion that the prosecution under the POTA against the accused does not attract the provisions of the POTA, appropriate directions can be issued to the State which, in turn, has to instruct the Public Prosecutor to invoke Section 321 of the Code. The High Court

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held that the said direction is, however, not binding on the Public Prosecutor as under Section 321 of the Code, he has to formulate his opinion on his independent application of mind and even if an application under Section 321 of the Code is filed, the ultimate arbiter will be the Special Court which will consider whether the plea of the Public Prosecutor is to be accepted or not. This Court in Special Leave to Appeal (Crl.) No.868-870 of 2004 (Govt. of Tamil Nadu versus Union of India and Ors) on 8-3-2004 upheld the decision of the Madras High Court. The Order of this Court reads as under:-

"Heard parties.

The Special Leave Petitions are filed against the Judgment of the High Court challenging the amendments to the Prevention of Terrorism Act, 2002 which gives to the Review Committee Powers which earlier it did not have. By the amendment, the decision of the Review Committee is made binding on the Central Government, State Governments and the Police Officers investigating the offence. The High Court has held, in our view

correctly, that these amendments are based on the recommendations made by a Constitution Bench of this Court in Kartar Singh Versus State of Punjab reported in (1994) 3 SCC 569 and the judgment of this Court in R.M. Tewari, Advocate Versus State (NCT of Delhi) & Ors. reported in (1996) 2 SCC 610. These are the provisions which provide safeguards against misuse of the stringent provisions of such an Act. In our view, the High Court has correctly held that the challenge cannot be sustained. The High Court has also correctly held that the directions given by the Review Committee could only be subject to Section 321 of the Criminal Procedure Code.

We, therefore, see no reason to interfere. The Special Leave Petitions are, accordingly, dismissed."

4. The Review Committee by its Order dated 8-4-2004 held that there was no case to proceed against the appellants.

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5. Since the State Government did not issue any directions for withdrawal of prosecution, the 1st appellant filed Writ Petition No.11662 of 2004 in the Madras High Court praying for a Writ of Mandamus directing the State Government to implement the direction of the Review Committee dated 8-4-2004 by giving directions to the Public Prosecutor to withdraw the prosecution against the appellants. The State of Tamil Nadu also filed Writ Petition No.12300 of 2004 challenging order dated 8-4-2004 passed by the Review Committee. On 29-4-2004, the Madras High Court dismissed the petition filed by the State. The Madras High Court however held that the 1st appellant's writ petition was premature. The appellants filed Special Leave Petition (Crl.) Nos.2250-2252 of 2004 in this Court challenging the Madras High Court's Order dated 29-4-2004 holding that the Order of the Review Committee is not binding on the Public Prosecutor and the Special Court. Notice was issued in this petition on 7-5-2004 and proceedings in the Trial Court were stayed.

6. In the meanwhile, the Public Prosecutor filed an application under Section 321 of the Code for withdrawal of the prosecution. This Court by Order dated 13-8-2004 in Special Leave Petition(Crl.) No.2250-2252 of 2004 directed that pendency of Special Leave Petition and Order dated 7-5-2004 does not preclude the Trial Court from considering whether the prosecution be allowed to be withdrawn or not. The Special Court by order dated 3-9-2004 dismissed the application filed

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by the Public Prosecutor stating that the Public Prosecutor had not applied his mind properly; that it was doubtful whether all the materials that were placed before the Special Court were placed before the Committee; that the prosecution was given permission in various applications to file additional documents and these documents show that there is a prima facie case to proceed against the appellants. The appellants did not file any appeal against the said order but challenged the said order before this Court directly under Article 136 of the Constitution of India being Special Leave Petition (Crl.) No.4801 of 2004. On 8-10-2004, this Court granted leave, issued notice and stayed the proceedings. We are dealing with the said Appeal.

7. Meanwhile, the POTA was repealed by the Prevention of Terrorism (Repeal) Act, 2004 (for short "the Repealing Act') on 21-12-2004 retrospectively from 21-9-2004. Section 2 (2) of the Repealing Act is as follows:-

"2. Repeal of Act 15 of 2002 and saving. - (1) The Prevention of Terrorism Act, 2002 (hereinafter referred to as the principal Act) hereby repealed.

(2) The repeal of the principal Act shall not affect-

(a) The previous operation of, or anything duly done or suffered under the principal Act, or

(b) any right, privilege or obligation or liability acquired, accrued or incurred under the principal Act, or

(c) any penalty, forfeiture or punishment incurred in respect of any offence under the principal Act, or

(d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation,

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liability, penalty, forfeiture or punishment as aforesaid,

and, any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the principal Act had not been repealed;

Provided that notwithstanding anything contained in this sub-section or in any other law for the time being in force, no court shall take cognizance of an offence under the principal Act after the expiry of the period of one year from the commencement of this Act.

Section 2 (3) of the Repealing Act is as follows:-

(3) Notwithstanding the repeal of Section 60 of the Principal Act, the Review Committee constituted by the Central Government under sub-section (1) of that section, whether or not an application under sub-section (4) of that section has been made, shall review all cases registered under the Principal Act as to whether there is a prima facie case for proceeding against the accused thereunder and such review shall be completed within a period of one year from the commencement of this Act and where the Review Committee is of the opinion that there is no prima facie case for proceeding against the accused then, -----

(a) in cases in which cognizance has been taken by the Court, the cases shall be deemed to have been withdrawn: and;

(b) in cases in which investigation are pending, the investigations shall be closed forthwith;"

8. It is the case of the appellants that in terms of Section 2(2) (b) of the Repealing Act, they have an accrued right under Section 34 of the POTA to prefer an appeal against the Order dated 3-9-2004 of the Special Court. It is submitted that the appellants did not prefer appeal because Special Leave Petitions (Crl.) No.2250-2252 of 2004 filed by the appellants challenging the Madras High Court's Order holding that the order of the Review Committee is not binding

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on the Public Prosecutor and the Special Court was pending at that time. We may note here that the said Special Leave Petitions were dismissed as infructuous by this Court on 3-5-2011.

9. The provisions of sub-sections (3) and (5) of Section 2 of the Repealing Act were challenged before the Gujarat High Court. The Gujarat High Court upheld the constitutional validity of the said provisions. The High Court was of the view that the provisions of Section 2 (3) of the Repealing Act were similar to the provisions of Section 60 (4) to (7) of the POTA. Therefore, following the decision of the Madras High Court relating to the validity of Sections 60 (4) to (7) of the POTA, it held that Section 2 (3) of the Repealing Act did not dispense with the requirements of Section 321 of the Code. The said decision of the Gujarat High Court was challenged in this Court. This Court observed that the provisions of Section 60 of the POTA were different from the provisions of Section 2 of the Repealing Act. This Court noticed its order dated 8-3-2004 which we have quoted hereinabove and which arose from a Madras High Court judgment holding that the opinion rendered by the Review Committee would not result in automatic withdrawal of cases pending in court; that as the opinion was binding on the State Government, the State Government was bound to instruct the public prosecutor to withdraw the prosecution under Section 321 of the Code; that the public prosecutor should apply his mind and then

file application and, only on consent being given

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by the Court, the prosecution shall stand withdrawn. This Court observed that to accept the submission of the appellants before it, it would have to hold that the provisions of the Repealing Act relied upon by the appellants override the provisions of Section 321 of the Code. This Court observed that in view of its order dated 8-3-2004, it would be appropriate to place the matters before a larger Bench for consideration. Accordingly, the matters were placed before a larger Bench.

10. The said Reference was heard and in Mahmudhusen Abdulrahim Kalota Shaikh (2) Versus Union of India and Others (2009) 2 SCC 1 this Court resolved the conflict. We may quote the paragraphs of the said Judgment which are relevant for the present case:-

"49. Section 2 (3) of the repealing Act also contains clear indications which exclude section 321 of the Code. They are: (i) The review is by the Review Committee with a sitting or retired Judge of the High Court as the Chairman, having the power of a civil court in respect of discovery and production of documents and requisitioning records; (ii) All cases registered under POTA are required to be reviewed irrespective of whether any application was made by an aggrieved person or not, so as to find out whether there is a prima facie case for proceeding against the accused under POTA; (iii) The sub-section clearly provides that where a Review Committee opines that there is no prima facie case for proceeding against the accused, cases pending in court also shall be deemed to have been withdrawn with effect from the date of issuance of such direction by the Review Committee. The wording is clear and unambiguous and does not contemplate or provide for a further application of mind by the Public Prosecutor or grant of consent by the court under Section 321 CrPC. We are therefore of the view that the High Court was not right in assuming that the decision of the Madras High Court approved by this Court with reference to Sections 60 (4) to (7) of POTA will apply in regard to Section 2 (3) of the repealing Act.

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51. We, therefore, hold that once the Review Committee on review under Section 2 (3) of the repealing Act, expresses the opinion that there is no prima facie case for proceeding against the accused, in cases in which cognizance has been taken by the court, such cases shall be deemed to have been withdrawn. The only role of the Public Prosecutor in the matter is to bring to the notice of the court, the direction of the Review Committee. The court on satisfying itself as to whether such an opinion was rendered, will have to record that the case stands withdrawn by virtue of Section 2 (3) of the repealing Act. The court will not examine the correctness or propriety of the opinion nor exercise any supervisory jurisdiction in regard to such an opinion of the Review Committee. But we make it clear that if the opinion of the Review Committee is challenged by any aggrieved party in writ proceedings and is set aside, the court where the proceedings were pending, will continue with the case as if there had been no such opinion."

11. Learned counsel for the appellants submitted that the order dated 3-9-2004 passed by the Special Court was not challenged by the appellants because of the pendency of the Special Leave Petition (CrI.) No.2250-2252 of 2004. He submitted that considering the fact that larger Bench of this Court has now crystallized the law on the point and considering the fact that they have an accrued right under Section 2 (2) (b) of the Repealing Act to prefer an appeal against the order dated 3-9-2004 of the Special Court before the Madras High Court under Section 34 of the POTA, they may be permitted to withdraw the present criminal appeal. Learned counsel further submitted that in the peculiar facts of this case, this Court may condone the delay and request the High Court to hear the appellants'

appeals on merits. Learned counsel for the respondent-State submitted that if all contentions of the respondent - State are kept open, the respondent-State has no

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objection to such an order being passed.

12. In the peculiar circumstances of the case, we permit the appellants to withdraw the present criminal appeal. The appellants, if they are so advised, may prefer an appeal against Order dated 3-9-2004 passed in Special C.C. No.1 of 2003 in the Madras High Court. If such an appeal is filed, we

request the Madras High Court to consider the application for condonation of delay sympathetically in view of the fact that the counsel for the respondent-State has no objection for condonation of delay if all contentions of the respondent-State are kept open. While allowing the appellants to withdraw the appeal, we make it clear that we have not expressed any opinion on the merits of the case and all contentions of the appellants and the respondent-State are kept open.

13. The criminal appeal is disposed of as withdrawn.

.....J  
(RANJANA PRAKASH DESAI)

.....J  
(MADAN B. LOKUR)

NEW DELHI,  
MARCH 6, 2014.