

**Premkumar Vs. State of Karnataka and Others**

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**Court :** Karnataka

**Decided On :** Dec-10-1993

**Reported in :** 1994(2)ALT(Cri)155; 1994CriLJ3641; ILR1994KAR580

**Judge :** S. Rajendra Babu, J.

**Appeal No. :** W.P. No. 13998 of 1993

**Appellant :** Premkumar

**Respondent :** State of Karnataka and Others

**Advocate for Def. :** Satish M. Doddamani, HCGP and Mukunda Menon, Central Govt. Standing Counsel

**Advocate for Pet/Ap. :** Hasmath Pasha, Adv.

**Judgement :**

ORDER

1. The petitioner has been charge sheeted in C.C. No. 93 of 1992 before the Designated Court under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as the TADA Act) and under section 309 of the Indian Penal Code (hereinafter referred to as the IPC). On the allegation that on 21-5-1991 at Sriperumbudur in Tamil Nadu State Sri Rajiv Gandhi was killed in a bomb blast and the Central Bureau of Investigation (hereinafter referred to as the CBI) which conducted the investigation into the death of Sri Rajiv Gandhi suspected

one Shivarasan and Smt. Subha stated to be Sri Lankan citizens, were involved in the said offence and the local police received some information on 18-8-1991 that the said Shivarasan and Smt. Shubha were hiding in a house at Konankunte village within the jurisdiction of Second Respondent. On the basis of that information it is stated that the police were keeping a watch at Konankunte village and on that very night they saw two persons entering a particular house with some bag and after few minutes they went back. Thereafter on 19th August, 1991 at about 7 a.m. when the police were keeping a watch over the village, they saw two persons coming by walk after getting down from an auto-rickshaw and coming towards the said house and while they were coming towards the said house on seeing the police persons both of them started running away from them. Of them, one person ran away and the other person was apprehended who is none other than the petitioner. It is stated that while the petitioner was running away, he consumed some capsule said to be poisonous substance. As he was about to chew the said capsule it was removed from the mouth of the petitioner and he was taken to Bowring hospital for treatment and he was treated as an inpatient till 22-8-1991. The petitioner is said to have harboured the said Shivarasan and Smt. Shubha who were accused of involvement in the assassination of Sri Rajiv Gandhi. On discharge from the hospital the petitioner was arrested for an offence of attempt to commit suicide under section 309, I.P.C. and he was released on bail by the II Additional Chief Metropolitan Magistrate, Bangalore, on 2-9-1991. The Second Respondent registered another case on 2-9-1991 for offences under sections 3 and 5 of the TADA Act and thereafter he was produced before the Sessions Judge, Bangalore, on 4th Sept. 1991 and thereafter before the District and Sessions Judge, Bangalore Rural District, and since then he is in judicial custody. On 23-3-1992 a charge sheet was filed for offences under sections 3(3), 3(4) and 4 of the TADA Act. The Principal City Sessions Judge, Bangalore, was designated as the Court for the purpose of TADA Act by a notification and the petitioner was produced before the said Court on 30-6-1992.

2. It is urged on behalf of the petitioner that he had been falsely implicated in the case and sought for his discharge as there was no material to frame charge for offences under TADA Act. However, the Designated Court proceeded to frame charges by its order dated 16-7-1992 for offences under sections 3(3) and 3(4) of

the TADA Act and under Section 309, IPC and on the same day the plea of the petitioner was also recorded. An application for grant of bail was also rejected 16-7-1992.

3. The CBI which investigated into the circumstances leading to the death of Sri Rajiv Gandhi interrogated the petitioner and his statement was also recorded on 24-8-1991 and apprehended one Ranganath who was stated to be along with the petitioner in the autorickshaw when the petitioner was apprehended by the police at Konankunte village on 19-8-1991. The said Ranganath has been arrayed as Accused No. 34 before the Designated Court under the TADA Act. However, the petitioner was only cited as a witness at serial No. 969 in the charge sheet and he was not arrayed as an accused there. The entire investigation has been conducted by the CBI authorities in respect of petitioner also.

4. It is urged that when the CBI is fully seized of the investigation into the incident relating to the assassination of Sri Rajiv Gandhi no other authority or police have got power to investigate regarding the said offence. It is also urged that parallel investigation could not be carried on by the respondents and therefore the proceedings initiated against the petitioner in pursuance of the said illegal investigation and charge sheet before the Designated Court in C.C. No. 93 of 1992 is liable to be quashed.

4.1 It is contended even if the entire material relied upon by the prosecution is accepted to be correct, it does not disclose any offence and therefore the proceedings of the Court below is liable to be quashed as an abuse of the process of law.

4.2 It is urged that the charges framed against the petitioner for offences under sections 3(3) and 3(4) of the TADA Act and under section 309, IPC are without any basis as none of the ingredients of those offences are available in the materials produced before the Court. The Designated Court is alleged to have committed a serious error in framing charges under sections 3(3) and 3(4) of the TADA Act.

4.3 It is contended that in order to fulfil the ingredients of the said offences under the TADA Act the act of person who bets, advises or facilitates must be prior to the commission of terrorist act. The case as put forth by the prosecution in the charge sheet is that the terrorist act is said to have been committed on the night of 21-5-1991 at Sriperumbudur when Sri Rajiv Gandhi was assassinated. But the allegation against the petitioner is that he was supplying essential articles like food to those persons who were hiding after the commission of terrorist act on 18-8-1991 and on 19-8-1991 and therefore the charge framed under Section 3(3) of the TADA Act is liable to be quashed.

4.4 It is submitted that the charge under section 3(4) of the TADA Act is absolutely without any basis of the only material relied upon by the prosecution is that on the night of 18-8-1991 some persons saw two persons entering a house with a bag and after few minutes they came out and thereafter on the next day morning the petitioner and another were coming on the road which is near the house where Shivarasan and Smt. Shubha were stated to be hiding. These statements do not fulfil the ingredients of the offence harbouring or concealing the territories within the meaning of Section 3(4) of the TADA Act. It is submitted that the materials relied upon by the prosecution do not prima facie indicate the commission of an offence which fulfil the ingredients of the offence alleged.

4.5 It is urged that the third charge arising under Section 309, IPC that when the petitioner was apprehended he consumed some poisonous capsule and thereby he attempted to commit suicide is absolutely devoid of material as to petitioner consuming cyanide or any poisonous capsule and the doctor who treated the petitioner had not stated that the petitioner had consumed cyanide poison or any other kind of poison in an attempt to commit suicide and therefore the charge under section 309, IPC ought not to have been framed by the Designated Court at all.

4.6 It is further contended that Section 309, IPC is violative of Article 21 of the Constitution inasmuch as the right to live includes the right to die. Even if the allegation made by the respondents in the charge sheet is correct that he attempted to commit suicide, he had a fundamental right to end his life and

therefore the petitioner could not have been (charged) under S. 309, IPC. The petitioner seeks for a declaration that Section 309, IPC is invalid and unconstitutional.

4.7 It is contended that the proceedings in C.C. 93/1992 initiated against the petitioner for the offence of harbouring Shivarasan and Smt. Shubha are premature and liable to be stopped until completion of trial before the Designated Court at Madras pending against the said Shivarasan and Smt. Shubha in C.C. 3/1992 and the application filed by the petitioner in that behalf having been rejected he has filed this petition.

4.8 Elaborating these contentions it is stated that in order to frame a charge for an offence under section 3(4) of the TADA Act against the petitioner it is a precondition that the persons who are alleged to have been harboured by the petitioner must be found guilty for the commission of terrorist act and merely because Shivarasan and Smt. Shubha hail from Sri Lanka by itself would not prove that they were terrorists. A terrorist is a person who commits an offence as defined under Section 3(1) of the TADA Act. That aspect is pending consideration before the Designated Court at Madras in C.C. 3/1992 and that the view of the Designated Court at Bangalore that the Designated Court can give a finding whether Shivarasan and Smt. Shubba are terrorists is perverse and fallacious.

4.9 On the basis of this and other submissions it is urged that the proceedings pending in C.C. 93 of 1992 should be quashed or, in the alternative, petitioner seeks for a writ of mandamus directing the Principal City Civil and Sessions Judge, Bangalore to stop trial in C.C. 93/1992 pending against the petitioner as premature till the completion of trial in C.C. 3/1992 and to declare the provisions of Section 309, I.P.C. as unconstitutional and violative of Arts. 19 and 21 of the Constitution and to quash the order framing charges against the petitioner and to give such incidental reliefs.

5. The learned Government Pleader who appeared for the respondents submitted that the offence of harbouring an accused person is a separate and distinct offence and can certainly be enquired into and decided by the Designated Court at Bangalore and need not wait until disposal of the case filed before the Designated

Court at Madras in C.C. 3 of 1992. The contentions urged before the trial Court were reiterated in this petition.

6. The contention urged by the petitioner that Section 309, IPC be declared as unconstitutional or violative of Arts. 19 and 21 of the Constitution, need not be considered at this stage of proceeding. The basic contention of the petitioner that he has not committed the offence of attempt to commit suicide and if those facts are established it would be academic to consider the constitutionality of the said provisions of law. Therefore, notwithstanding the decision that has been cited before me in *Maruti Shripati Dubal v. State of Maharashtra*, (1987 Cri LJ 743) wherein the Bombay High Court held that the fundamental rights guaranteed under Arts. 19 and 21 of Constitution have positive as well as negative aspects and if that is so it must follow that right to live as recognised by Art. 21 also includes the right not to live and in other words it includes the right to die or to terminate one's life. As it would be academic to deal with the question of constitutionality of the said provisions of law at this stage, I shall defer the consideration of the same after trial.

7. The learned counsel for the petitioner urged that Section 3(4) of the TADA Act is in pari materia with Section 212 of IPC. For the purpose of proper understanding the contention the two provisions may be set out in juxtaposition with each other as follows :

Section 212 IPC Section 3(4) of TADA Act  
When an offence has been committed,  
(i) whoever harbours or conceals a (i) Whoever harbours or person, conceals; (ii)  
whom he knows or has reason to (ii) or attempts to harbour believe to be the  
offender, or conceal; (iii) with the intention of screening (iii) any terrorist.  
from legal punishment.

Harbouring has been defined under section 52A of IPC to (except in case of a spouse) include the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person by any means, whether of the same kind as those mentioned in that section or not, to evade apprehension. The term 'conceals' has been used in its usual epigraphically meaning. To conceal is to keep away a person or a thing from being either noticed

or apprehended. Attempts to do either of the above two things or both is also an offence under section 3(4) of the TADA Act.

7.1 The learned counsel for the petitioner relied upon the decision in *Kuriakose Chacko v. State* (AIR 1951 Trav Co 90) : (52 Cri LJ 470 to contend that under section 212, IPC until the offender referred to in section therein has been convicted of the offence the question of launching a prosecution under section 212, IPC for harbouring him would not arise. He also relied upon in *Palani Goundan v. Emperor*, (1937 Mad WN 21 : Cr.R.C. No. 461 of 1936, Cr.R.P. No. 47 of 1936) that until the main case is disposed of, a trial under Section 212, IPC must be stayed.

7.2 A careful analysis of the ingredients of Section 212, IPC and Section 3(4) of TADA Act would make it clear that there is a clear distinction between Section 212, IPC and Section 3(4) of the TADA Act. Under section 212, IPC an offence must be alleged to have been committed and the offender must be alleged to have committed that offence, whereas under section 3(4) of the TADA Act what is made an offence is harbouring or concealing or attempt to harbour or conceal any terrorist and no more. If a person is alleged to be a terrorist and ultimately he is proved to be so, it is enough. It is not necessary to have established that even at the time of filing of the charge sheet the offence must have been proved to have been committed. The further ingredient that persons who are harboured are known to the harbored or has reason to believe to be the offenders with the intention of screening them from legal punishment is also absent. Therefore, the two Sections 212, IPC and 3(4) of TADA Act being different and not identical, the decision relied on by the learned counsel can have no application to the case.

7.3 The contention of the learned counsel for the petitioner is even so a person can be charged under section 3(4) of the TADA Act only when the accused is a terrorist and has actually been convicted of that offence and therefore until such an event occurs the accused cannot at all be tried on the charge of harbouring those terrorists. This argument appears to me to be altogether fallacious. Persons concerned may ultimately be found not terrorists but at this stage when they are suspected to have committed certain terrorist activities as referred to earlier

cannot be stated to be not terrorists at all nor can it be stated that the Designated Court cannot give a finding after trial as to whether they are terrorists or not. May be when a thorough investigation has been made by the CBI and a charge sheet has been lodged before the Designated Court in C.C. 3/1992 the outcome thereof, may have an impact on the present case and it may be advisable to put off the trial of this case until the disposal of that case. But that does not mean that the petitioner cannot be charged at all under the said provision or that the charge itself is premature. In the circumstances, the application filed by the petitioner for stay of the trial of the charge against him till C.C. 3/1992 on the file of the Designated Court at Madras had been finally disposed of on irrelevant grounds. Ultimately if it is found in that case that no offence has been committed or the persons whom the petitioner is alleged to have harboured had not committed the offence, if any, there may be no offence under section 3(4) of the TADA Act. It may be relevant to note here that the petitioner has been cited as a witness in the comprehensive investigation done by the CBI and the charge sheet filed culminating in C.C. 3/1992 before the Designated Court at Madras, while in the case with which we are concerned the petitioner has been accused of an offence. Undoubtedly there is great force in the contention urged on behalf of the petitioner that this position is anomalous. In these circumstances, I think it would be appropriate to stay the trial before the Designated Court at Bangalore until disposal of the case by the Designated Court at Madras. But what is stayed is only the trial of the case and not consideration of an application for grant of bail or reconsideration of framing of charges to be dealt with hereinafter.

8. I shall now consider the contention urged by the petitioner that he has not committed the offences; that there is no material before the Designated Court to frame charges for offences under sections 3(3) and 3(4) of the TADA Act. The Designated Court merely stated that a perusal of the charge sheet, the FIR and the statement of witnesses and other materials on record, prima facie, show that the petitioner was supplying essential articles to the members of the gang who were terrorists and some of them were accused of involving in the assassination case and the accused had a duty to inform the police when they came to know the hiding of the terrorists. Therefore, the material on record is sufficient to attract Section 3(3) and Section 3(4) of TADA Act. The allegation against the petitioner is

not he has conspired or advocated any terrorist act, but is merely stated to have abetted in the facilitating of the commission of terrorist act. It is difficult to understand from the order made by the learned Judge of the Designated Court which of the acts alleged in the material on record could be treated as abetting the commission of a terrorist act.

9. In order to constitute a terrorist act there must be, as provided under section 3(1) of TADA Act, acts :

(1) to overawe the Government as by law established; or

(2) to strike terror in the people or any section of the people; or

(3) to alienate any section of people; or

(4) to adversely affect the harmony amongst different sections of the people;

(5) does any act or thing by using any lethal weapons mentioned therein any any manner to cause death or injury to any person.

The Designated Court should refer to the statements made either in the charge sheet or in the FIR or witnesses or other materials and correlate the same to any act attributable to the petitioner, which can be said to be an act of abetment of a terrorist act or amount to harbouring under section 3(4) of TADA Act. Therefore, there is hardly any application of mind by the Designated Court to the material on record and to the provisions of law in this regard to draw any inference one way or other. At the stage of framing of charges the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom disclose all the ingredients constituting the alleged offence. The Court may for this limited purpose sift the evidence as it cannot be expected to accept all that the prosecution states as gospel truth even if it is opposed to common sense or broad probabilities as held in *Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijja* (1990 Cri LJ 1869).

The approach of the Designated Court is plainly opposed to the principles in regard to framing of charges even in matters arising under TADA as stated by the

Supreme Court in Niranjana Singh's case. Sufficient to say that appropriate evaluation of the material and documents placed before the Court must be made to find out whether the facts emerging therefrom disclose the existence of all the ingredients of the alleged offence. Particularly when the consequences of framing a charge under TADA Act are more drastic than under IPC, the Designated Court must apply its mind to different ingredients in the provisions of law and find out whether any facts alleged in FIR or statement of witnesses can be attracted to the same. That exercise has not been done at all in the present case. In the circumstances, the order made by the learned Judge before framing the charges stands quashed and consequently the framing of charges also stands quashed. The matter shall stand remitted to the Designated Court for fresh consideration of the question whether there is prima facie material to frame charges against the petitioner or not. In the view I have taken even if the charges are sought to be framed against the petitioner that proceeding before the Designated Court will have to be stayed until termination of the proceedings in C.C. 3/1992 before the Designated Court at Madras.

10. In the event the Designated Court comes to the conclusion that charges either under section 3(3) or 3(4) of the TADA Act or under Section 309, IPC are to be framed, then it shall consider the application filed for grant of bail and deal with it as provided under Section 20(8) of the TADA Act. It is not an inexorable rule that a person accused of an offence under the TADA Act cannot be released on bail at all. But limitations are placed on the grant of bail as specified in Section 20(8) of the TADA Act in addition to the limitations provided under the Code of Criminal Procedure and no more. Petition is allowed and Rule made absolute accordingly.

11. Petition allowed.