REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1383 OF 2007

SRI INDRA DAS .. Appellant (s)

VERSUS

STATE OF ASSAM .. Respondent(s)

J U D G M E N T

MARKANDEY KATJU, J.

1. Heard learned counsel for the appellant. Service of Notice of Lodgment of petition of Appeal is complete, but no one has entered appearance on behalf of the sole respondent-State.

2. The facts of the case are similar to the facts in ***Arup Bhuyan vs. State of Assam*** Criminal Appeal No.889 of 2007, which we allowed on 3.2.2011.

3. As in the case of **Arup Bhuyan** (supra), the only evidence against the appellant in this case is his alleged confession made to a police officer, for which he was charged under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short 'TADA').

4. The facts of the case are that one Anil Kumar Das went missing from the evening of 6.11.1991, and his dead body was recovered after two months on 19.1.1992 from the river Dishang. Five persons including the appellant were charged for his death. The appellant was not named in the FIR. No prosecution witness has attributed any role to the appellant. The charge sheet in the case was filed after a gap of nine years from the date of the commission of the offence, and charges were framed more than four years after filing of the charge sheet. There is no evidence against the appellant except the confessional statement.

5. The alleged confession was subsequently retracted by the appellant. The alleged confession was not corroborated by any other material. We have held in **Arup Bhuyan's** case (supra) that confession is a very weak type of evidence, particularly when alleged to have been made to the police, and it is not safe to convict on its basis unless there is adequate corroborative material. In the present case there is no corroborative material.

6. However, the appellant has been convicted under Section 3(5) of TADA which makes mere membership of a banned organization a

criminal act, and sentenced to five years rigorous imprisonment and Rs.2000/- fine.

7. In **Arup Bhuyan's** case (supra) we have stated that mere membership of a banned organization cannot incriminate a person unless he is proved to have resorted to acts of violence or incited people to imminent violence, or does an act intended to create disorder or disturbance of public peace by resort to imminent violence. In the present case, even assuming that the appellant was a member of ULFA which is a banned organization, there is no evidence to show that he did acts of the nature above mentioned. Thus, even if he was a member of ULFA it has not been proved that he was an active member and not merely a passive member. Hence the decision in **Arup Bhuyan's** case (supra) squarely applies in this case.

8. In our judgment in **State of Kerala** vs. **Raneef** 2011(1) Scale 8 we had referred to the judgment of the U.S. Supreme Court in **Elfbrandt** vs. **Russell** 384 US 17(1966) which rejected the doctrine of 'guilt by association'.

9. In **Elfbrandt**'s case (supra) Mr. Justice Douglas, speaking for the Court observed :

> "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat. This Act threatens the cherished freedom of association protected by the First Amendment, made applicable to the States by the Fourteenth Amendment. ……A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here."

10. The decision relied on its earlier judgments in **Schneiderman** vs. **U.S.** 320 US 118(136) and **Schware** vs. **Board of Bar Examiners** 353 US 232(246). The judgment in **Elfbrandt's** case (supra) also referred to the decision of the U.S. Supreme Court in **Scales** vs. **U.S.** 367 US 203 (229) which made a distinction between an active and a passive member of an organization.

11. In **Scales** case (supra) Mr. Justice Harlan of the U.S. Supreme Court observed :

> "The clause (in the McCarran Act, 1950) does not make criminal all associations with an

> organization which has been shown to engage in illegal advocacy. There must be clear proof that a defendant 'specifically intends to accomplish the aims of the organization by resort to violence'. A person may be foolish, deluded, or perhaps merely optimistic, but he is not by this statute made a criminal."
>
> (emphasis supplied)

12. **Elfbrandt**'s case (supra) also relied on the U.S. Supreme Court decisions in **Apthekar** vs. **Secretary of State** 378 US 500, **Baggett** vs. **Billit** 377 US 360, **Cramp** vs. **Board of Public Instructions** 368 US 278, **Gibson** vs. **Florida** 372 US 539, etc.

13. In **Noto** vs. **U.S.** 367 US 290(297-298) Mr. Justice Harlan of the U.S. Supreme Court observed :

> "……The mere teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend colour to the otherwise ambiguous theoretical material regarding Communist Party teaching."

14. In **Noto's** case (supra) Mr. Justice Hugo Black in a concurring judgment wrote :

"In 1799, the English Parliament passed a law outlawing certain named societies on the ground that they were engaged in 'a traitorous Conspiracy …….. in conjunction with the Persons from Time to Time exercising the Powers of Government in France …….' One of the many strong arguments made by those who opposed the enactment of this law was stated by a member of that body, Mr. Tierney :

'The remedy proposed goes to the putting an end to all these societies together. I object to the system, of which this is only a branch; for the Right Hon. gentleman has told us he intends to propose laws from time to time upon this subject, as cases may arise to require them. I say these attempts lead to consequences of the most horrible kind. I see that government are acting thus. Those whom they cannot prove to be guilty, they will punish for their suspicion. To support this system, we must have a swarm of spies and informers. They are the very pillars of such a system of government.'

The decision in this case, in my judgment, dramatically illustrates the continuing vitality of this observation.

The conviction of the petitioner here is being reversed because the Government has failed to produce evidence the Court believes sufficient to prove that the Communist Party presently advocates the overthrow of the Government by force."

(emphasis supplied)

15. In **Communist Party vs. Subversive Activities Control Board**, 367 US 1 (1961) Mr. Justice Hugo Black in his dissenting

judgment observed :

> "The first banning of an association because it advocates hated ideas – whether that association be called a political party or not — marks a fateful moment in the history of a free country. That moment seems to have arrived for this country…… This whole Act, with its pains and penalties, embarks this country, for the first time, on the dangerous adventure of outlawing groups that preach doctrines nearly all Americans detest. When the practice of outlawing parties and various public groups begins, no one can say where it will end. In most countries such a practice once begun ends with a one party government."

16. In **Joint Anti-Fascist Refugee Committee vs. McGrath**, 341 US 123, 174 (1951) Mr. Justice Douglas in his concurring judgment observed :

> "In days of great tension when feelings run high, it is a temptation to take short cuts by borrowing from the totalitarian techniques of our opponents. But when we do, we set in motion a subversive influence of our own design that destroys us from within."
>
> (emphasis supplied)

17. In **Keyishian vs. Board of Regents of the University of the State of New York**, 385 US 589, 606 (1967) the U.S. Supreme Court struck down a law which authorized the board of regents to prepare a

list of subversive organizations and to deny jobs to teachers belonging to those organizations. The law made membership in the Communist Party prima facie evidence for disqualification from employment. Mr. Justice Brennan, speaking for the Court held that the law was too sweeping, penalizing "mere knowing membership without a specific intent to further the unlawful aims."

18. In **Yates vs. U.S.**, 354 US 298 (1957), Mr. Justice Harlan of the U.S. Supreme Court observed :

> "In failing to distinguish between advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end, the District Court appears to have been led astray by the holding in Dennis that advocacy of violent action to be taken at some future time was enough. The District Court apparently thought that Dennis obliterated the traditional dividing line between advocacy of abstract doctrine and advocacy of action."

19. In **Brandenburg vs. Ohio**, 395 US 444(1969), which we have referred to in our judgment, the U.S. Supreme Court by a unanimous decision reversed its earlier decision in **Whitney vs. California**, 274 US 357 (1927) and observed :

> "The Constitutional guarantees of free speech

and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

20. In **Whitney vs. California** (supra) Mr. Justice Brandeis, the celebrated Judge of the U.S. Supreme Court in his concurring judgment (which really reads like a dissent) observed :

> "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of free speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent… ….. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind."
>
> (emphasis supplied)

21. Mr. Justice Brandeis in the same judgment went on to observe :

> "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of

> the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."

22. In **Gitlow vs. New York**, 268 US 652 (1925) Mr. Justice Holmes of the U.S. Supreme Court (with whom Justice Brandeis joined) in his dissenting judgment observed :

> ……."If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this Manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence my set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.
>
> If the publication of this document had been laid as an attempt to induce an uprising against government at once, and not at some indefinite time

> in the future, it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result; or, in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more."

23. In **Terminiello vs. Chicago**, 337 US 1 (1949) Mr. Justice Douglas of the U.S. Supreme Court speaking for the majority observed :

> "….[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute,…is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest….There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."

24. In **DeJonge vs. Oregon**, 299 US 353 (1937) Chief Justice Hughes of the U.S. Supreme Court wrote that the State could not punish a person making a lawful speech simply because the speech was sponsored by a subversive organization.

25. In **Abrams vs. U.S.**, 250 US 616 (1919) Mr. Justice Holmes of the U.S. Supreme Court in his dissenting judgment wrote :

> "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more then they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas, -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and

> believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the government that the 1st Amendment left the common law as to seditious libel in force. History seems to me against the notion."
>
> (emphasis supplied)

26. It has been submitted by the learned counsel for the Government before the TADA Court that under many laws mere membership of an organization is illegal e.g. Section 3(5) of Terrorists and Disruptive Activities, 1989, Section 10 of the Unlawful Activities (Prevention) Act 1967, etc. In our opinion these statutory provisions cannot be read in isolation, but have to be read in consonance with the Fundamental Rights guaranteed by our Constitution.

27. The Constitution is the highest law of the land and no statute can violate it. If there is a statute which appears to violate it we can either declare it unconstitutional or we can read it down to make it constitutional. The first attempt of the Court should be try to sustain the validity of the statute by reading it down. This aspect has been discussed in great detail by this Court in **Government of Andhra**

Pradesh vs. P. Laxmi Devi 2008(4) SCC 720.

28. In this connection, we may refer to the Constitution Bench decision in **Kedar Nath Singh vs. State of Bihar** AIR 1962 SC 955 where the Supreme Court was dealing with the challenge made to the Constitutional validity of Section 124A IPC (the law against sedition).

29. In **Kedar Nath Singh**'s case this Court observed(vide para 26):

> ……."If, on the other hand, we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create disaffection or feelings of enmity against the Government, the offence of sedition is complete, then such an interpretation of the sections would make them unconstitutional in view of Article 19(1)(a) read with clause (2). It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction. The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence."…….

30. Section 124A which was enacted in 1870 was subsequently

amended on several occasions. This Court observed in **Kedar Nath's** case (supra) observed that now that we have a Constitution having Fundamental Rights all statutory provisions including Section 124A IPC have to be read in a manner so as to make them in conformity with the Fundamental Rights. Although according to the literal rule of interpretation we have to go by the plain and simple language of a provision while construing it, we may have to depart from the plain meaning if such plain meaning makes the provision unconstitutional.

31. Similarly, we are of the opinion that the provisions in various statutes i.e. 3 (5) of TADA or Section 10 of the Unlawful Activities (Prevention) which on their plain language make mere membership of a banned organization criminal have to be read down and we have to depart from the literal rule of interpretation in such cases, otherwise these provisions will become unconstitutional as violative of Articles 19 and 21 of the Constitution. It is true that ordinarily we should follow the literal rule of interpretation while construing a statutory provision, but if the literal interpretation makes the provision unconstitutional we can depart from it so that the provision becomes

constitutional.

32. As observed by this Court in **Government of Andhra Pradesh vs. P. Laxmi Devi** (supra) every effort should be made by the Court to try to uphold the validity of the statute, as invalidating a statute is a grave step. Hence we may sometimes have to read down a statute in order to make it constitutional.

33. This principle was examined in some detail by the Federal Court in In re Hindu Women's Right to Property Act, AIR 1941 F.C 12 in considering the validity of the Hindu Women's Right to Property Act, 1937. The Act, which was passed by the Council of State after commencement of Part III of the Government of India Act, 1935, when the subject of devolution of agricultural land had been committed exclusively to Provincial Legislatures, dealt in quite general terms with the 'Property' or 'separate property' of a Hindu dying intestate or his 'interest in joint family property'. A question, therefore, arose whether the Act was *ultra vires* of the powers of the Central Legislature. The Federal Court held the Act *intra vires* by construing the word 'property' as meaning 'property other than agricultural land'. In the aforesaid decision Gwyer, CJ. observed : "If

that word (property) necessarily and inevitably comprises all forms of property, including agricultural land, then clearly the Act went beyond the powers of the Legislature; but when a Legislature with limited and restricted powers makes use of a word of such wide and general import, the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other." The learned Chief Justice further observed: "There is a general presumption that a Legislature does not intend to exceed its jurisdiction, and there is ample authority for the proposition that general words in a statute are to be construed with reference to the powers of the Legislature with enacts it**.**"

34. The rule was applied by the Supreme Court in **Kedar Nath Singh vs. State of Bihar** (we have already referred to this decision earlier) in its construction of Section 124A of the IPC. The Section which relates to the offence of sedition makes a person punishable who 'by words, either spoken or written or by sign or visible representations, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law'. The Section, as construed by the

Privy Council in **Bal Gangadhar Tilak vs. Queen Empress** ILR 22 Bom 528 (PC); **Annie Besant vs. A-G of Madras** AIR 1919 PC 31; and **Emperor vs. Sadasiv Narain** AIR 1947 PC 84; did not make it essential for an activity to come within its mischief that the same should involve intention or tendency to create disorder, or disturbance of law and order or incitement to violence. The Federal Court in **Niharendra Dutta vs. Emperor** AIR 1942 FC 22 had, however, taken a different view. In the Supreme Court when the question came up as to the Constitutional validity of the Section, the Court differing from the Privy Council adopted the construction placed by the Federal Court and held that on a correct construction, the provisions of the Section are limited in their application "to acts involving intention or tendency to create disorder or disturbance of law and order or incitement to violence; and one of the reasons for adopting this construction was to avoid the result of unconstitutionality in view of Articles 19(1)(a) and 19(2) of the Constitution.

35. In **Sunil Batra vs. Delhi Administration** AIR 1978 SC 1675 the Supreme Court upheld the validity of Section 30(2) of the Prisons

Act, 1894, which provides for solitary confinement of a prisoner under sentence of death in a cell and Section 56 of the same Act, which provides for the confinement of a prisoner in irons for his safe custody, by construing them narrowly so as to avoid their being declared invalid on the ground that they were violative of the rights guaranteed under Articles 14, 19 and 21 of the Constitution.

36. In **New India Sugar Mills vs. Commissioner of Sales Tax** AIR 1963 SC 1207, a wide definition of the word 'sale' in the Bihar Sales Tax Act, 1947, was restricted by construction to exclude transactions, in which property was transferred from one person to another without any previous contract of sale since a wider construction would have resulted in attributing to the Bihar Legislature an intention to legislate beyond its competence.

37. In Section 6(a) of the Hindu Minority and Guardianship Act, 1956 which provides that the natural guardian of a minor's person or property will be 'the father and after him, the mother', the words 'after him' were construed not to mean 'only after the lifetime of the father' but to mean 'in the absence of', as the former construction would have made the section unconstitutional being violative of the

constitutional provision against sex discrimination vide **Githa Hariharan vs. Reserve Bank of India** AIR 1999 SC 1149.

38. In **Govindlalji vs. State of Rajasthan** AIR 1963 SC 1638, where a question arose as to the Constitutional validity of the Rajasthan Nathdwara Temple Act (13 of 1959), the words'affairs of the temple' occurring in Section 16 of the said Act were construed as restricted to secular affairs as on a wider construction the Section would have violated Articles 25 and 26 of the Constitution.

39. This Court in **R.L. Arora vs. State of U.P.** AIR 1964 SC 1230 applied the same principle in construing Section 40(1), clause (aa) of the Land Acquisition Act, 1894, as amended by Act 31 of 1962 so as to confine its application to such 'building or work' which will subserve the public purpose of the industry or work in which the company, for which acquisition is made, is engaged. A wider and a literal construction of the clause would have brought it in conflict with Article 31(2) of the Constitution and would have rendered it unconstitutional.

40. In **Indian Oil Corporation vs. Municipal Corporation** AIR 1993 SC 844 Section 123 of the Punjab Municipal Corporation Act,

1976 which empowered the Corporation to levy octroi on articles and animals 'imported into the city' was read down to mean articles and animals 'imported into the municipal limits for purposes of consumption, use or sale' only, as a wide construction would have made the provision unconstitutional being in excess of the power of the State Legislature conferred by Entry 52 of List II of Schedule VII of the Constitution.

41. A further illustration, where general words were read down to keep the legislation within permissible constitutional limits, is furnished in the construction of Section 5 of the Lotteries (Regulation) Act, 1998 which reads: 'A State Government may, within the State prohibit the sale of tickets of a lottery organized conducted or promoted by every other State'. To avoid the vice of discrimination and excessive delegation, the Section was construed to mean that a State can only ban lotteries of other States, when it decides as a policy to ban its own lotteries, or in other words, when it decides to make the State a lottery free zone vide **BR Enterprises vs. State of U.P.** AIR 1999 SC 1867.

42. It may be mentioned that there were Constitutions in our

country even under British Rule e.g. the Government of India Act, 1935, and the earlier Government of India Acts. These Constitutions, however, did not have fundamental right guaranteed to the people. In sharp contrast to these is the Constitution of 1950 which has fundamental rights in Part III. These fundamental rights are largely on the pattern of the Bill of Rights to the U.S. Constitution.

43. Had there been no Constitution having Fundamental Rights in it then of course a plain and literal meaning could be given to Section 3 (5) of TADA or Section 10 of the Unlawful Activities (Prevention) Act. But since there is a Constitution in our country providing for democracy and Fundamental Rights we cannot give these statutory provisions such a meaning as that would make them unconstitutional.

44. In **State of of Maharashtra & Ors.** Vs. **Bhaurao Punjabrao Gawande**, (2008) 3 SCC 613 (para 23) this Court observed :

> "...Personal liberty is a precious right. So did the Founding Fathers believe because, while their first object was to give unto the people a Constitution whereby a government was established, their second object, equally important, was to protect the people against the government. That is why, while conferring extensive powers on the government like the power to declare an

emergency, the power to suspend the enforcement of fundamental rights or the the power to issue ordinances, they assured to the people a Bill of Rights by Part III of the Constitution, protecting against executive and legislative despotism those human rights which they regarded as fundamental. The imperative necessity to protect these rights is a lesson taught by all history and all human experience. Our Constitution makers had lived through bitter years and seen an alien Government trample upon human rights which the country had fought hard to preserve. They believed like Jefferson that "an elective despotism was not the Government we fought for". And, therefore, while arming the Government with large powers to prevent anarchy from within and conquest from without, they took care to ensure that those powers were not abused to mutilate the liberties of the people. (vide A.K. Roy Vs. Union of India (1982) 1 SCC 271, and Attorney General for India Vs. Amratlal Prajivandas, (1994) 5 SCC 54." [emphasis supplied]

In **M. Nagaraj & Ors.** Vs. **Union of India &Ors.** (2006) 8 SCC 212, (para 20) this Court observed :

"It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race."

In **I.R. Coelho (dead) By LRs.** Vs. **State of T.N.,** (2007) 2 SCC 1 (vide paragraphs 109 and 49), this Court observed :

"It is necessary to always bear in mind that fundamental rights have been considered to be heart and soul of the Constitution.....Fundamental rights occupy a unique place in the lives of civilized societies and have been described in judgments as "transcendental", "inalienable", and primordial".

45. The appeal is consequently allowed and the impugned judgment is set aside.

…….....J.
(MARKANDEY KATJU)

.....J.
(GYAN SUDHA MISRA)

NEW DELHI;
FEBRUARY 10, 2011.