

State of Punjab v. Piara Singh (M. M. Punchhi, J.)

(8) For the reasons aforementioned, this Regular Second Appeal is allowed and the judgments and the decrees of the Courts below are set aside, and the suit of the appellant stands decreed as prayed. The parties to bear their own costs throughout.

Surinder Singh, J.—I agree.

H.S.B.

Before M. M. Punchhi, J.

STATE OF PUNJAB,—Petitioner.

versus

PIARA SINGH,—Respondent.

Criminal Revision No. 1292 of 1984

September 21, 1984

Terrorist Affected Areas (Special Courts) Ordinance, 1984—Sections 2(h), 3, 7, 8, 10, 15 and 16—Code of Criminal Procedure (II of 1974)—Sections 438, 439 and 439-A—Person accused of an offence specified in the schedule to the Ordinance—Such person not falling within the ambit of a 'terrorist' as defined in section 2(h)—Court of Sessions—Whether has jurisdiction to release such a person on bail—Jurisdiction of such Court—Whether barred by the Ordinance—Special Courts alone—Whether to try scheduled offences committed by terrorists or non-terrorists.

Held, that though the word 'terrorist' has been defined in section 2(h), the word, in plural terms, has been employed only once in the Terrorist Affected Areas (Special Courts) Ordinance, 1984 and that too in section 3 and not thereafter, for the term outlives its utility thereafter. Section 3(1) operates when the Central Government holds the opinion that the offences of the nature specified in the Schedule are being committed in any area by people who can be termed as terrorists. Further such commission is on such a scale and in such a manner that it becomes expedient for the purpose of coping with the activities of such terrorists to have recourse to the provisions of the Ordinance and to achieve the object it may by notification (a) declare such area to be terrorist affected area; and (b) constitute such area into a single judicial zone or into as many judicial zones as it may deem fit. It is obvious from the language of this provision that when activities of criminals are of such kind and result-oriented in a particular area so as to term them as terrorists

within the meaning of section 2(h), the Central Government takes stock of the situation and declares such area to be a terrorist affected area and constitutes in it judicial zone or zones for the purpose of coping with the activities of such terrorists. In plain language it means that the purpose is to successfully deal with the uncommon situation arising from the activities of such terrorists in areas declared as terrorist affected areas divided into a zone or zones, wherein Special Courts are established under Section 4 for the speedy trial of scheduled offences. The scheme is in keeping with the jurisprudential principle of criminal law that the Courts take cognizance of offences and not of offenders. The distinction brought about under the Ordinance to term a criminal as a terrorist is only for the limited purpose of identifying the area which might engage the attention of the Central Government for its being declared as a terrorist affected area. But in no case can such a declaration have the effect that Special Courts set up for the purpose are only to try terrorists and not others. It is a fallacy to say that Special Courts are set up to try special offenders. They have been set up rather to try scheduled offences committed by offenders, whether terrorists or non-terrorists. Thus, the Special Courts set up for the purpose under section 7 of the Ordinance have alone to take cognizance of scheduled offences and to determine the offenders for being punished without distinction.

(Para 6).

Held, that a Special Court as a Court of Sessions alone has the power to entertain applications for bail in the exercise of its powers under section 438, 439 and 439-A of the Code of Criminal Procedure in so far as those provisions are not inconsistent with that of the Ordinance. Section 438 of the Code has specifically under section 15(4) been provided to be inoperative in relation to scheduled offences in a terrorist affected area. Thus the Court of Session, as is the Special Court such a Court, precluded from employing section 438 of the Code in relation to any case involving the accusation of a scheduled offence committed in a terrorist affected area, but the Special Court as a Court of Session is entitled under sections 439 and 439-A of the Code read with sub-section (5) of section 15 of the Ordinance to grant in appropriate cases bail even in scheduled offences. Thus, the distinction between a terrorist and a non-terrorist is totally out of tune with the setting up of Special Courts, which are set up to try scheduled offences and so claims of bail of offenders charged of those offences have only to be entertained by the Special Courts who have their powers regulated under sub-section (5) of section 15 of the Ordinance, section 439-A (wherever applicable) and section 439 of the Code and other laws applicable limiting the scope and the scope of the ordinance cannot be confined to terrorists accused of scheduled offences.

(Paras 9 & 10).

Petition for revision under Section 401 of Cr. P. C. for the revision of the order of the Court of Shri J. S. Sekhon, Sessions Judge, Jalandhar dated 8th August, 1984, holding that the Court of

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Sessions had the jurisdiction to entertain applications for anticipatory bail under section 438 of the Code of Criminal Procedure, or those bail under Section 439 of the Criminal Procedure Code, of those persons whose cases does not fall within the ambit of the word 'terrorist' though charge of the offences specified in the Schedule of the Ordinance committed during the relevant period.

B. S. Sandhu, A.G. Punjab and H. S. Riar, Advocate,—for the Petitioner.

H. S. Sandhu, Sr. Advocate and B. S. Randhawa, Advocate with him,—for the Respondent.

JUDGEMENT

M. M. Punchhi, J. (Oral)

(1) The causes in Criminal Revision No. 1292 of 1984 and Criminal Misc. No. 5033-M of 1984 being conglomerated would require a common judgment. Accordingly they shall be disposed of together.

(2) In the wake of the Terrorist Affected Areas (Special Courts) Ordinance, 1984 (for short, the Ordinance) which now stands replaced by an Act of the same name (having received the assent of the President of India on 31st August, 1984), Shri J. S. Sekhon, Sessions Judge, Jalandhar, was required to deal with a number of bail applications. The question being of jurisdiction, affecting the power of the Court of Sessions Under Sections 438, 439 and 439-A (as applicable to the State of Punjab and extended to the Union Territory, Chandigarh) of the Code of Criminal Procedure, he dealt with it in the application '*Piara Singh v. The State*', holding that the Court of Session had the jurisdiction to entertain applications for anticipatory bail under Section 438 of the Code of Criminal Procedure, and bail under section 439 of the said Code, of those persons whose description does not fall within the ambit of the word 'terrorist' though charged of the offences specified in the Schedule of Ordinance committed during the relevant period. That order is the subject matter of Criminal Revision No. 1292 of 1984 preferred by the State of Punjab, though accused Piara Singh by a sequential order was not granted bail. Since the order aforesaid had the effect of interpreting the law and was the governing factor in bail applications pending before him and to be instituted thereafter, the aggrieved State of Punjab prayed for revision of that order. And in Criminal Misc. No. 5033-M of 1984, the complainant has

prayed for cancellation of bail of the accused-respondents in F.I.R. No. 100 dated 15th July, 1984, Police Station Division No. 2, Jalandhar, which is sequentially based on the aforesaid order of the Sessions Judge. So facts only of the latter need to be noticed.

The prosecution alleges that on 15th July, 1984 at about 12.30 p.m. four accused-persons, namely, Toti alias Jaspal Singh, Harjit Singh, Bhajan Singh and Harbans Singh quarreled with Harvinder Pal Singh (since deceased) over the distribution of 'Langer' at the Gurdwara of Ramgarhias, Jalandhar. Thereafter when Harvinder Pal Singh (since deceased) and Randhir Singh P.W. reached near their house while returning from the Gurdwara at about 2.30 p.m. all the four accused waylaid them. Harbans Singh accused was armed with a spade and rest of them with sticks (*dangs*). The attack was opened by Harbans Singh accused who gave a spade blow on the head of Harvinder Pal Singh which by itself proved fatal as the victim died on 18th July, 1984, while admitted in a hospital. Harjit Singh accused gave a stick blow on his left leg. Bhajan Singh and Toti accused gave two injuries each on the person of Randhir Singh when the latter tried to rescue his companion. Toti and Harbans Singh accused had also received some minor injuries due to the altercation in the Gurdwara. The accused, other than Harbans Singh, filed an application for bail before the Sessions Judge, Jalandhar. The learned Judge declined bail to Harjit Singh accused on the ground that it could well be inferred that he shared the common intention with his co-accused Harbans Singh for killing Harvinder Pal Singh deceased and having waylaid him for the purpose. However, he observed that the case of Bhajan Singh and Toti accused stood on a different footing as they had given simple injuries to Randhir Singh injured. No comment was passed by the learned Sessions Judge with regard to their pervading common intention *vis-a-vis* the deceased or the injured P.W. Straightaway, it was observed that the act of Bhajan Singh and Toti accused did not fall within the definition of 'terrorist' as defined in clause (h) of section 2 of the Ordinance and accordingly they were ordered to be released on bail. Thus the conglomerated view of the learned Session Judge in both cases is that the Special Courts created under the Ordinance in the Judicial zones which cover up the entire State of Punjab, have jurisdiction only over those accused which would be tried before them for scheduled offences, if they were terrorists and not otherwise. According to him, scheduled offences committed by persons other than terrorists are triable by the ordinary Courts and thus the Court of Session of a Division had the

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jurisdiction to grant bail or anticipatory bail to an accused other than a terrorist.

(3) A situation arose in Northern Indian States in particular, necessitating the President of India to promulgate the Terrorist Affected Areas (Special Courts) Ordinance, 1984, which as said before is now an Act of the same name, with effect from 31st August, 1984. The preamble thereto suggests that the measure adopted is to provide for the speedy trial of certain offences in terrorist affected areas and for matters connected therewith. Section 3 empowers the Central Government to declare terrorist affected areas. Section 3 is in the following terms :—

“3(1) If the Central Government is of the opinion that offences of the nature specified in the Schedule are being committed in any area by terrorists on such a scale and in such a manner that it is expedient for the purpose of coping with activities of such terrorist to have recourse to the provisions of this Ordinance, it may, by notification,—

- (a) declare such area to be a terrorist affected area; and
- (b) constitute such area into a single judicial zone or into as many judicial zones as it may deem fit.

(2) A notification issued under sub-section (1) in respect of an area shall specify the period during which the area shall, for the purposes of this Ordinance, be a terrorist affected area, and where the Central Government is of the opinion that terrorists had been committing in that area, from a date earlier than the date of issue of the notification, offences of the nature specified in the Schedule on such a scale in such a manner that it is expedient to commence the period specified in the notification from such earlier date, the period specified in the notification may commence from that date :

Provided that—

- (a) no period commencing from a date earlier than six months from the date of publication of the notification shall be specified therein; and

- (b) so much of the period specified in such notification as is subsequent to the date of publication of the notification shall not, in the first instance exceed six months, but the Central Government may, by notification, extend such period from time to time by any period not exceeding six months at any one time, if the Central Government, having regard to the activities of terrorists in such area, is of the opinion that it is expedient so to do."

The word 'terrorist' has been defined in section 2(h) in the following manner :—

- (h) "terrosist" means a person who indulges in wanton killing of persons or in violence or in the disruption of services or means of communications essential to the community or in damaging property with a view to—
- (i) putting the public or any section of the public in fear;
or
 - (ii) affecting adversely the harmony between different religious, racial language or regional groups or castes or communities; or
 - (iii) coercing or overawing the Government established by law; or
 - (iv) endangering the sovereignty and integrity of India;"

(4) In pursuance of the provision under sub-section (2) of section 3, the Central Government issued notification No. GSR-56(F), dated 23rd July, 1984, declaring the entire territory of the State of Punjab as a terrorist affected area, besides stating that the notification shall come into force from 28th January, 1984, and shall remain in force till 23rd July, 1985. Thereby three Judicial Zones viz. Jalandhar, Patiala and Ferozepore were constituted. This notification was modified,—*vide* another notification dated 28th July, 1984.

Under the latter notification, the Central Government established Special Courts to try the scheduled offences in all the three Judicial Zones. And further it was notified that the ordinary place of sitting of the Special Courts shall be at Jalandhar, Patiala and Ferozepore, as the case may be. By latter notifications, the Special Courts stand

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manned, with the concurrence of the Acting Chief Justice of this Court, by some senior members of the Punjab Superior Judicial Service. The Schedule to the Ordinance/Act comprises of some offences under the Indian Penal Code. The Explosive Act, 1984, The Indian Telegraph Act, 1885, The Indian Railways Act, 1890, The Explosives Substances Act, 1908, The Arms Act, 1959 The Anti-Hijacking Act, 1982, The Suppression of Unlawful Acts against Safety of Civil Aviation, and The Prevention of Damage to Public Property Act, 1984.

(5) On the side of the accused, it was contended, as was successfully done before the Sessions Judge, that those offences in the Schedule would be triable by the Special Courts only if committed by 'terrorists' and not otherwise, despite the fact that there was no specific provision in the Ordinance/Act giving a clear pointer. It was contended that the scheme of the Ordinance/Act suggested this course inevitably, as suggested by it was not intended that cases of all i.e. terrorists as also non-terrorists involved in scheduled offences shall go to the Special Courts, which were less in number and covered a large area otherwise manned by a number of Sessions as also Additional Sessions Judges. These contentions have to be tested on the anvil of the provisions of the Ordinance/Act.

(6) It is significant that though the word 'terrorist' has been defined in section 2(h), the word, in plural terms, has been employed only once in the Ordinance/Act and that too in section 3 afore-quoted and not thereafter, for the term outlives its utility thereafter. To recall the language, section 3(1) operates when the Central Government holds the opinion that offences of the nature specified in the Schedule are being committed in any area by people who can be termed as terrorists. Further such commission is on such a scale and in such a manner that it becomes expedient for the purpose of coping with the activities of such terrorists to have recourse to the provisions of the Ordinance/Act. And to achieve the object it may by notification (a) declare such area to be a terrorist affected area; and (b) constitute such area into a single judicial zone or into as many judicial zones as it may deem fit. It is obvious from the language of the said provision that when activities of criminals are of such kind and result-oriented in a particular area, so as to term them as terrorists within the meaning of section 2(h), the Central Government takes stock of the situation and declares such area to be a terrorist affected area and constitutes in it judicial zone or zones for the purpose of coping with the activities of such terrorists. In

plain language it means that the purpose is to successfully deal with the uncommon situation arising from the activities of such terrorists in areas declared as terrorist affected areas and divide it into a zone or zones, wherein Special Courts are established under section 4 for the speedy trial of scheduled offences. The scheme is in keeping with the jurisprudential principle of criminal law that the Courts take cognizance of offences and not of offenders. The distinction brought about under the Ordinance/Act to term a criminal as a terrorist is only for the limited purpose of identifying the area which might engage the attention of the Central Government for its being declared as a terrorist affected area. But in no case can such a declaration have the effect that Special Courts set up for the purpose are only to try terrorists and not others. It is a fallacy to say that Special Courts are set up to try special offenders. They have been set up rather to try scheduled offences committed by offenders, whether terrorists or non-terrorists. For the polluted air of terrorism and combat of an uncommon situation the Special Courts have been set up, so that the offenders are brought to trial speedily for, when justice can be speeded up it meets the clamour of the society to bring the offenders to book. Thus it seems to me, that the Special Courts set up for the purpose under section 7 of the Ordinance/Act have alone to take cognizance of scheduled offences and to determine the offenders for being punished without distinction.

(7) Section 7 of the Ordinance/Act provides that notwithstanding anything contained in the Code of Criminal Procedure or in any other law, a scheduled offence committed in a judicial zone in a State, at any time during the period during which such judicial zone is, or is part of, a terrorist affected area shall be triable, whether during or after the expiry of such period, only by the Special Court established for such judicial zone in the State. The provisos thereto envisage that cases involving scheduled offences committed in an area and pending before any court immediately before the date of issue of notification under section 3(2) shall stand transferred to the Special Court having jurisdiction under this section, and the said Court to which such proceedings stand transferred shall proceed with such cases from the stage at which they were pending at that time; the only exception being when the whole of the evidence for the prosecution has been taken before the date of issue of such notification, in which case the trial can conclude before the Court of its initiation. Section 8(1) authorises a Special Court to also try any offence other than the scheduled offence with which the accused may, under the Code, be charged at the same trial if the offence is

connected with the scheduled offence, Section 8(2) provides that if, in the course of any trial, it is found that the accused person has committed any offence, whether such offence is or is not a scheduled offence, the Special Court can convict such person of such offence and pass any sentence authorised by law for the punishment thereof. These provisions are a pointer to show that in the trial of scheduled offences, the Special Court can try even non-scheduled offences if they are connected with the scheduled offences and even record conviction solely for non-scheduled offences, in the course of the trial and punish the offenders accordingly.

(8) Section 10(1) provides that a Special Court may take cognizance of any Scheduled offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitutes such offence or upon a police report of such facts. This provision envisages that a Special Court may change colours at its convenience. While trying those scheduled offences which normally are triable by a Magistrate 1st Class, it can hold a summary trial under sub-section (2) thereof, besides trying them as a regular court in place of that of a Magistrate. A Special Court is even entitled under section 10(3) to tender a pardon to any person, and the pardon so tendered shall, for the purposes of section 308 of the Code, be deemed to have been tendered under section 307 thereof. And finally subject to the other provisions of the Ordinance/Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session, as envisaged in sub-section (4) of section 10. Section 13 warrants a Special Court where, after taking cognizance of any offence, it is of the opinion that the offence is not a scheduled offence, it shall, notwithstanding that it has no jurisdiction to try such offence, transfer the case for trial of such offence to any Court having jurisdiction under the Code, and the Court to which the case is transferred may proceed with the trial of the offence as if it has taken cognizance of the offence.

(9) These provisions put the Special Court undoubtedly at a higher pedestal. Cases involving scheduled offences, or apparently scheduled offences, have to be brought to the Special Court and it is that Court alone which has the jurisdiction to opine whether the offence which it has taken cognizance of, is or is not a scheduled offence. Such an exercise cannot be undertaken before any Court other than the Special Court for a scheduled offence or an apparently

scheduled offence. Cases cannot be thus brought before the Sessions Court for him to exercise the choice in that regard. And as is known, Court of Session try offences only on committal of cases before them, but significantly in that regard there is no impediment with the Special Court. The Special Courts are otherwise Courts of Criminal justice set up for a special purpose. That is the reason that section 16 provides that the provisions of the Ordinance/Act shall have effect notwithstanding anything contained in the Code or any other law, but save as expressly provided in the Ordinance, the provisions of the Code shall, in so far as they are not inconsistent with the provisions of the Ordinance, apply to the proceedings before a Special Court, and for the purpose of the said provisions of the Code, the Special Court shall be deemed to be a Court of Session. In other words, it means that the provisions of the Ordinance/Act have a paramount character over the Code in so far as the provisions of the Code are inconsistent with those of the Ordinance. To other provisions to which there is no inconsistency, the provisions of the Code apply. And thus the Special Court for those purposes, is to be deemed to be the Court of Session. It becomes deducibly clear that proceedings envisaged under section 16 are all proceedings under the Code, necessarily including that of bail, save as those touched by the Ordinance, and for such proceedings the Special Court is the Court of Session. Thus, it seems to me, clear that a Special Court as a Court of Session alone has the power to entertain applications for bail in the exercise of its powers under sections 438, 439 and 439-A of the Code of Criminal Procedure in so far as those provisions are not inconsistent with that of the Ordinance/Act. Section 438 of the Code has specifically under section 15(4) been provided to be inoperative in relation to scheduled offences in a terrorist affected area. Thus, the Court of Session, as is the Special Court such a court, is precluded from employing section 438 of the Code in relation to any case involving the accusation of a scheduled offence committed in a terrorist affected area. But the Special Court as a Court of Session is entitled under sections 439 and 439-A read with sub-section (5) of section 15 of the Ordinance/Act to grant in appropriate cases bail even in scheduled offences. The latter provision of Section 15(5) is of paramount importance which provides that notwithstanding anything contained in the Code, no person accused of a scheduled offence shall, if in custody, be released on bail or on his own bond unless (a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and (b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such

offence and that he is not likely to commit any offence while on bail. Sub-section (6) of the section 15 of the Ordinance/Act specifically curtails the power of the Court by providing that the limitations on grant of bail specified in sub-section (5) of section 15 are in addition to the limitations under the Code or any other law for the time being in force on granting of bail. And as is now noticeable section 439-A of the Code of Criminal Procedure in Punjab and Chandigarh overshadows section 439 (section 438 being out of picture) and permits the Court to grant bail only on the existence of grounds enumerated therein, which are (i) that the Court of Session for reasons to be recorded in writing is satisfied that there are reasonable grounds for believing that such person is not guilty of any of the specified offences; and (ii) that the Court of Session for reasons to be recorded in writing is satisfied that there are exceptional and sufficient grounds to release the accused on bail; cases of women, children, etc. apart.

(10) Thus in view of the above discussion, I am of the considered view that the distinction between a terrorist and a non-terrorist is totally out of tune with the setting up of Special Courts, which are set up to try scheduled offences and so claims of bail of offenders charged of those offences have only to be entertained by the Special Courts who have their powers regulated under sub-section (5) of section 15 of the Ordinance/Act, section 439-A (wherever applicable) and section 439 of the Code of Criminal Procedure and other laws applicable limiting the scope. I am also of the considered view that the view taken by the learned Sessions Judge in confining the scope of the Ordinance/Act to terrorists accused of scheduled offences, is uncalled for in the scheme of things. Thus I have no hesitation in upsetting the impugned order of the learned Sessions Judge, dated 8th August, 1984, subject matter of Criminal Revision No. 1292 of 1984. It is accordingly so ordered.

(11) As a sequel to the reasoning afore-stated, the orders of the Sessions Judge in granting bail to the accused-respondent would have to be set aside, cancelling the bail of the accused-respondents, leaving them open in the first instance to approach the Special Court of the judicial zone for the purpose, of bail which, if approached for the purpose, shall apply its mind in that connection in the light of the observations afore-made. Accordingly, Cr. Misc. No. 5033-M of 1984, is allowed and the bail of the accused-respondent is cancelled.

(12) Before closing the judgment, I must, in fairness of the learned counsel for the respondents in Criminal Misc. No. 5033-M of 1984, notice that he made an effort to justify the maintenance of the bail order on merits on the anvil of the provisions of the Ordinance/Act, but as said earlier, it would be appropriate for the respondents to approach the Special Court for the purpose in the first instance. Ordered accordingly.

N.K.S.

Before J. M. Tandon, J.

JOGINDER PAL,—Petitioner.

versus

STATE OF PUNJAB,—Respondent.

Criminal Miscellaneous No. 2090-M of 1984

September 25, 1984

East Punjab Children Act (XXXIX of 1949),—Sections 3(c), 34, 35, 42 and 43—Child found guilty of murder—Court reporting his case to the State Government for orders—State Government under section 34(2), ordering detention of the child in a Certified School till the age of 18 years—Child also ordered to be detained in the Borstal School after he attained the age of 18 years—Detention of the child after the age of 18 years—Whether legal—Proviso to Section 43(2)—Whether applicable.

Held, that the limit of 18 years for detention of a child prescribed under Section 43(2) read with Section 42 of the East Punjab Children Act, 1949 cannot be extended to a child transferred to the Borstal School in pursuance of an order passed by the State Government under Section 34(2). The proviso to Section 43(2) shall apply only where the child had been sent to the Certified School by the Court under Section 35(e). The power of the State Government under section 34(2) of the Act to order the detention of the child beyond the age of 18 years in a Borstal School does not stand curtailed by ordering his detention in a Certified School till he attained the age of 18 years. The Court trying a child can direct that he be detained in a Certified School under section 35(e) of the Act. The child can be detained in a Certified School by the Court till he attains the age of 18 years. After the child so detained