

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRIMINAL APPEAL No. 299/2011**

Reserved on : 20th December, 2012
& 20th March, 2013¹

% **Date of Decision: 03rd May, 2013**

NOOR MOHD TANTRAY @ PEER BABA @ GULZAR AHMED
BHAT @ UWAIS

...Appellant
Through Mr. M.S. Khan, Ms. Pooja Uppal and Mr.
Akram Khan, Advocates.

Versus

THE STATE (NCT OF DELHI) ...Respondent
Through Mr. Sidharth Luthra, ASG with Mr. Pawan
Sharma, Standing Counsel, Ms. Sarpreet Singh, Mr.
Sachin Chopra, Ms. Supriya Juneja & Mr. Arjun
Dewan, Advocates.

CRIMINAL APPEAL No. 308/2011

FAROOZ AHMED @ FAROOQ AHMED & ANR. ...Appellants
Through Mr. M.S. Khan, Ms. Pooja Uppal and Mr.
Akram Khan, Advocates.

Versus

STATE NCT OF DELHI ...Respondent

¹ The judgment in these appeals was originally reserved on 20.12.2012, but appeals were fixed for clarification and arguments on the question of consent and the judgment was finally reserved on 20.3.2013.

Through Mr. Sidharth Luthra, ASG with Mr. Pawan Sharma, Standing Counsel, Ms. Sarpreet Singh, Mr. Sachin Chopra, Ms. Supriya Juneja & Mr. Arjun Dewan, Advocates.

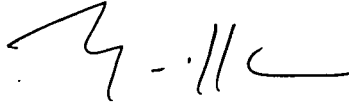
CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE S.P. GARG

SANJIV KHANNA, J.:

For detailed order see Criminal Appeal No.166/2011, *Raees-Uz-Zama and Another Vs. State NCT of Delhi* pronounced today.


(SANJIV KHANNA)
JUDGE


(S.P. GARG)
JUDGE

May 3rd, 2013
VKR/KKB/NA

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRIMINAL APPEAL No. 166/2011

Reserved on : 20th December, 2012
& 20th March, 2013¹

% Date of Decision: 3rd May, 2013

RAEES-UZ-ZAMA AND ANR. Appellants
Through Mr. Imtiaz Ahmed, Ms. Naghma Imtiaz
and Mohd. Asad Khan, Advocates.

Versus

STATE NCT OF DELHI ...Respondent
Through Mr. Sidharth Luthra, ASG with Mr. Pawan
Sharma, Standing Counsel, Ms. Sarpreet Singh, Mr.
Sachin Chopra, Ms. Supriya Juneja & Mr. Arjun
Dewan, Advocates.

CRIMINAL APPEAL No. 299/2011

NOOR MOHD TANTRAY @ PEER BABA @ GULZAR AHMED
BHAT @ UWAIS

...Appellant
Through Mr. M.S. Khan, Ms. Pooja Uppal and Mr.
Akram Khan, Advocates.

Versus

THE STATE (NCT OF DELHI) ...Respondent
Through Mr. Sidharth Luthra, ASG with Mr. Pawan
Sharma, Standing Counsel, Ms. Sarpreet Singh, Mr.
Sachin Chopra, Ms. Supriya Juneja & Mr. Arjun
Dewan, Advocates.

¹ The judgment in these appeals was originally reserved on 20.12.2012, but appeals were fixed for clarification and arguments on the question of consent and the judgment was finally reserved on 20.3.2013.
Crl. A. Nos. 166/2011, 299/2011 & 308/2011

29

CRIMINAL APPEAL No. 308/2011

FAROOZ AHMED @ FAROOQ AHMED & ANR. ...Appellants
Through Mr. M.S. Khan, Ms. Pooja Uppal and Mr.
Akram Khan, Advocates.

Versus

STATE NCT OF DELHI ...Respondent
Through Mr. Sidharth Luthra, ASG with Mr. Pawan
Sharma, Standing Counsel, Ms. Sarpreet Singh, Mr.
Sachin Chopra, Ms. Supriya Juneja & Mr. Arjun
Dewan, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE S.P. GARG

SANJIV KHANNA, J.:

1. These three appeals have been preferred by Noor Mohd. Tantray, Parvez Ahmed Mir, Farooz Ahmed, Raees-uz-Zama, and Atique-uz-Zama, who for the sake of convenience have been referred to as A1, A2, A3, A4 and A5. A4 and A5 are brothers. The appellants, i.e., the five accused, have been convicted under Sections 3(3), 3(5) and 4 of Prevention of Terrorism Act, 2002 (hereinafter referred to as, POTA) and sentenced to life imprisonment and fine of Rs.5,000/- for each offence. The appellants have been convicted under

Section 20 of POTA and sentenced to Rigorous Imprisonment for 10 years and fine of Rs.5,000/- each. The appellants have also been convicted under Sections 121, 121A and 122 of the Indian Penal Code, 1860 (IPC, for short) and sentenced to life imprisonment and fine of Rs.5,000/- each and Section 123 IPC and sentenced to Rigorous Imprisonment for 10 years and fine of Rs.5,000/- each. The appellants have been convicted under Sections 4 and 5 of the Explosive Substances Act, 1908 and have been sentenced to life imprisonment and Rigorous Imprisonment for 10 years, respectively, with fine of Rs.5,000/- on each count.

2. In the charge sheet, one Rajender Prasad Goel was arraigned as an accused, but in view of exculpatory findings of the POTA Review Committee an application was moved by him before the Sessions Court and the case against him, was withdrawn vide order dated 18th February, 2005.

3. The prosecution case in nut-shell is that on 30th August, 2003, accused A1 to A3 were apprehended in a raid on Truck No. JK 03 0153 at Qutub Road parking lot and 10 hand grenades, 10 grenade shells and a grenade launcher was recovered. They were arrested. On the same night at about 9.15 P.M. in a police encounter at Indraprastha Park two persons Zahoor and Habib were killed. The said encounter

23

and alleged recoveries were subject of a separate FIR No. 445/2003, Police Station Nizamuddin which is not the subject matter of the present impugned judgment and the appeal before us. A1 (Noor Mohd. Tantray) disclosed about involvement of A4 and A5 and a raid was conducted at their residence in Sikandrabad, U.P. on 14th August, 2003 morning. From A4, eighteen (18) electronic detonators and from A5 five (5) electronic detonators and three (3) remote controlled detonating devices were recovered. The allegation is that the five appellants were members of Jaish-e-Mohammad (JeM) a banned organization under the Unlawful Activities (Prevention) Act, 1967. The prosecution further alleges that at the pointing out of A1, hawala money of Rs.19.20 lacs was recovered from House No. A-44, Mohindra Park, Azadpur, Delhi. It is alleged that this money was to be delivered to Zahoor and Habib.

Recovery of hand grenades/shells/launcher.

4. To prove and establish recovery of 10 hand grenades, 10 grenade shells and one grenade launcher on 30th August, 2003 from A1 to A3, the prosecution relies upon the testimonies of police officers SI Umesh Barthwal (PW-33), Inspector Hridey Bhushan (PW-43), ASI Rakesh Ahluwalia (PW-39), Inspector Arvind Kumar (PW-35) and Inspector Govind Sharma (PW-49). The prosecution also relies upon

the statement of public witness Sanjay Rai (PW-41), a parking attendant at the Qutub Road parking.

5. SI Umesh Barthwal (PW-33) has deposed that he was briefed by the then ACP Rajbir Singh regarding information received from Central Intelligence Agency that terrorists belonging to JeM were using fruit laden trucks from Kashmir to Delhi to carry arms, ammunitions and explosives. As per the computer records, one such truck with registration No. JK 03 0153 had entered Azadpur Mandi, New Delhi on 28th August, 2003 at 10.55 P.M. but, thereafter, could not be located. Different teams were sent to trace the truck and he, along with ASI Rishi Pal, was sent to Central District. ASI Rishi Pal spotted the truck at Qutub Road parking, Sadar Bazar, Delhi, at about 2.00 P.M. and he immediately informed the senior officers. A team comprising of Inspector Hridey Bhushan (PW-33), Inspector Lalit Mohan and others reached Qutub Road parking at 3.15 P.M. Sanjay Rai (PW-41) joined the proceedings but other public persons refused. A watch was kept on the truck and, at 7.45 P.M., a short height person (A1) came there and went to the truck to converse with the driver and the conductor A2 and A3, who were sitting in the truck. Thereafter, all the three climbed on top, to reach the tool box of the truck. From there A2 and A3 took out three wooden boxes, contents of one of which

were shown to A1. When they started climbing down, the police team reached the truck and apprehended them. They revealed their names. PW-33 identified the three, A1 to A3. On examination of the wooden boxes, it was found to contain *baboogosha* (*Pyrusmalus*) fruit but underneath it, one grenade launcher, 10 hand grenades and 10 grenade shells were recovered. The 10 hand grenades, which had the marking ARGES SPL 84 HG, were kept in separate plastic jars. Cotton was used and these jars were given marks HG-1 to HG-10. Ten hand grenade shells were kept in 10 separate plastic jars and marked GS-1 to GS-10. The grenade launcher was converted in a cloth parcel and marked as GL-1. CFSL form was filled by Inspector Hridey Bhushan (PW-43) with the seal of HB and seizure memo (Exhibit PW-33/A) was prepared and signed by PW-33. The wooden boxes were closed, given marks WB-1 to WB-3 and seized vide seizure memo (Exhibit PW-33/B). In the meantime, ACP Rajbir Singh along with team reached the spot and interrogated A1 to A3. A1 disclosed that he had to deliver the consignment to Zahoor, a resident of Pakistan and Aslam, (also known as Habib and Rafiq-uz-Zama) resident of Sikandrabad, U.P. at Indraprastha Park, Outer Ring Road, Delhi. These two persons to whom delivery was to be made were expected to be there in a white Maruti car bearing No. DL 3 CN 8749. A-1, ACP

Rajbir Singh, PW-33 and other staff left the spot at 9.15 P.M. and they reached Indraprastha Park at about 9.45 P.M. Police team deployed themselves at strategic locations. A1 was kept at a safe distance in Head Constable Vikram and Satinder's custody. At about 10.45 P.M. a white Maruti car with the said number came from the Nizamuddin side and stopped at Indraprastha Park, Outer Ring Road, Delhi. When ACP Rajbir Singh disclosed his identity and asked Zahoor and Habib to surrender, PW-33 has claimed that there was an encounter. The police fired in self defence and in order to apprehend the two persons. Zahoor and Habib were killed. He has claimed that one AK-56 rifle, two magazines and ammunitions were found in their possession.

6. At this stage, we accept the contention of the appellants and the respondents that the incident at Millennium Park is not the subject matter of the present appeal or the FIR No. 70/2003, Police Station Special Cell. It was rather a subject matter of separate FIR, i.e., FIR No. 445/2003, Police Station Nizamuddin. Neither the car nor the alleged arms and ammunitions, recovered in the said encounter, were produced at the trial of this case. The extent to which the prosecution can rely upon the said incident has been examined in the subsequent portion of the judgment. At this stage, what is pertinent is that SI Umesh Barthwal (PW-33) has deposed regarding the recovery of the

10 hand grenade, 10 hand grenade shells and one grenade launcher, which were given Exhibit Nos. PX-1 to PX-21 and the three wooden boxes, which were given Exhibit Nos. PX-22 to PX-24, respectively.

7. Inspector Hridey Bhushan (PW-43) has deposed on almost identical lines that he was posted as an Inspector in Special Cell, Lodhi Colony at the time when they received intelligence reports that terrorists belonging to JeM were hiding arms, ammunitions and explosives in the trucks, coming to Delhi from Jammu and Kashmir, which supplied fruits. These trucks were also being used to take hawala money from Delhi to Jammu and Kashmir to promote terrorism. On the basis of this information, Central Intelligence Agencies were keeping a watch and sources were deployed at Azadpur fruit market. Information was received that a truck with J&K number and digits 153, had entered Delhi with huge quantity of arms and explosives. A team of Special Cell led by SI Govind Sharma (PW-49) was sent to Azadpur Mandi and on verification it was found that Truck No. JK 03 0153 had entered Azadpur fruit market on 28th August, 2003 at 22.55 hours but could not, thereafter, be located inside the market. Since no records were kept at the exit gate, it could not be ascertained when the truck had left the market. Teams were sent to locate the truck at Sanjay Gandhi Transport Nagar and adjoining areas but the truck

35

could not be located. On 30th August, 2003, various teams were disseminated to different parts of Delhi and, at 2 P.M., PW-33 informed him that the said truck had been located at Qutub Road parking. PW-33 was directed to keep surveillance on the truck and its occupants. Inspector Lalit Mohan and others left at about 2.45 P.M. for the spot. They reached Qutub Road parking at 3.15 P.M. PW-43 met PW-33 and they saw the truck. Sanjay Rai (PW-41) was persuaded to join the raiding party while other public witnesses expressed their unwillingness. Staff was deployed and the truck was kept under surveillance. At 7.15 P.M. a short man came to the truck and talked to the driver and the cleaner. Thereafter, the three of them climbed the truck and took out three wooden boxes from the tool box area. They opened one of the boxes and the contents were inspected by the short statured man. While they were getting down from the truck, along with the boxes, they were apprehended. On checking the boxes, it was found to contain fruit baboogosha with the ten hand grenades, ten grenade shells and the one grenade launcher concealed in the fruits. PW-43's deposition is similar to PW-33 regarding the sealing of the contents and the related procedure.

8. ASI Rakesh Ahluwalia (PW-39) has also deposed on identical lines. PW-39 has stated that at about 2.45/2.55 P.M. he had gone to

Qutub Road parking near Sadar Bazar along with others, including PW-43, and met PW-33 there. They were briefed and Sanjay Rai (PW-41) joined the raid team. At about 7.45 P.M., a short statured person came to the truck and spoke to the driver and cleaner. Thereafter, three of them climbed on to the truck, took out three wooden boxes from the tool box and off loaded them. The police immediately came into action and, on inspection of the wooden cartons containing fruit baboogosha, ten hand grenades, ten grenade shells and one grenade launcher were recovered. They were sealed. PW-39 has testified to the seizure and the markings given on the containers, boxes etc.

9. Inspector Govind Sharma (PW-49) has stated that he was a part of the team headed by ACP Rajbir Singh and had reached Qutub Road parking at 8.45 P.M. whereupon ACP Rajbir Singh interrogated A1, who disclosed that arms and ammunitions were to be delivered at IP Estate to Aslam and Habib. (sic, should be Aslam @ Habib and Zahoor).

10. Arvind Kumar (PW-35) has stated that on 30th August, 2003 he was posted at Special Cell, Lodhi Colony and, along with ACP Rajbir Singh and others, he had left Lodhi Colony Special Cell at 8.15 P.M. He reached Qutub Road parking at about 8.45 P.M. There, ACP Rajbir

Singh interrogated A1 to A3 and A1 disclosed that the arms and ammunitions recovered were to be delivered to Zahoor and Habib at Millennium Park near Nizamuddin Bridge.

11. Sanjay Rai (PW-41), the parking attendant, has supported the prosecution version. He has deposed that on 30th August, 2003 at about 3.30 P.M. he was present in the parking of Tonga Stand Qutub Road, Sadar Bazar when Inspector Hridey Bhushan asked him if vehicle No. JK 03 0153 was parked there and also informed him that some terrorists had come in the said vehicle. The police officials surrounded the parking lot and, at about 7.30 or 7.45 P.M., a short statured person (A1) came there and spoke to A2 and A3, who were sitting in the truck. The short statured person sat with them in the truck and they climbed on to the truck and took out one carton which looked like a fruit 'petty' from the tool box. They were surrounded by the police and on opening the fruit carton fruit baboogosha was found but underneath bomb like items, shells and probably one grenade launcher were found. The said recoveries were separated and kept in different plastic jars. Pulandas were prepared and sealed with HB mark. He identified the seizure memo which was signed by him at point 'B' as Exhibit PW-33/A. He identified the grenades (Exhibit PX-1 to PX-10), the grenade shells (Exhibit PX-11 to PX-20) and the grenade

launcher (Exhibit PX-21) and the wooden boxes (Exhibit PX-22 to PX-24). PW-41 was cross-examined but hardly anything in the cross-examination perforates his testimony. In the cross-examination PW-41 has deposed that he was working in the parking and he used to issue receipts to the vehicles entering to park there. He denied the suggestion that he was an informer of the police and was impersonating as Sanjay Rai. He was a summoned witness though his address was not mentioned on the summons issued by the court. He deposed that A1 to A3 were taken away by the police immediately after the sealing of the material and his statement was recorded. At the time of occurrence the parking lot was full with vehicles. Till the arrival of A1, he kept on moving around the parking, as he was keeping a watch on the movements of the persons in the truck. There was only one entry to the parking lot. A1 had entered the parking after alighting from a cycle rickshaw and had directly headed towards the truck. He was, however, not in the truck when the truck had entered the parking lot for the first time. PW-41 had seen A1 coming to the parking lot, twice or thrice earlier. He could not tell the portion of the truck where the wooden boxes were kept in but has averred that the wooden boxes were searched immediately after apprehending the

39

accused. 15-20 pulandas were prepared and his statement was recorded, after A1-A3 were apprehended.

Seizure of Gadgets or Arms Explosive, their deposit in the Malkhana and the arrest of A1 to A3.

12. ; Learned counsel for the appellants A1 to A3 painstakingly took us through the evidence of the public witness Sanjay Rai (PW41) and different police officers Umesh Barthwal (PW33), Rakesh Ahluwalia (PW39), Dharmender Kumar (PW42), Hridey Bhushan (PW-43) and Govind Sharma (PW49). It was submitted that there was difference in the time as to when police team led by ACP Rajbir Singh reached the spot; when they left the spot to go to Millennium Park; when Insp. Arvind Kumar (PW35), SI Dharmendra Kumar (PW42) and Govind Sharma (PW49) came back to the Qutub Road parking and their final departure from there. It is highlighted that the truck was seized not on 30th August, 2003 but on 31st August, 2003. It has been further submitted that the POTA was invoked at 6.00 PM but, as per the police version, ACP Rajbir Singh and Insp. M.C. Sharma at that time had already proceeded to Sikandrabad, U.P. Our attention was specifically drawn to the Malkhana Registrar i.e. Register No. 19 (Ex. PW38/A) wherein it has been recorded that deposits of case property were made by ACP Rajbir Singh, Insp. Hridey Bhushan (PW-43) and

Govind Sharma (PW-49) on 30th August, 2003. Our attention was drawn to column No. 4 of the said register with reference to entries made by ASI Paramjit Singh (PW-38), the Malkhana Incharge, on 16th January, 2004. It was submitted that this entry was made after the entry recorded on 27th February, 2004 and, hence, *ex facie* back-dated. The sanctity and caution required was missing. Thus, the recovery was doubtful and the possibility that seized material was tampered with cannot be ruled out.

13. Statement of S.I. Umesh Barthwal (PW33) that he had located the truck at Qutub Road Parking, Sadar Bazar at about 2.00 PM is corroborated by the contemporaneous Daily Diary entries No. 7 & 8 dated 30th August, 2003 (marked Ex. PW15/A & PW15/B). The said entries have been proved by SI Om Wati (PW15) who was working as a duty officer on 30th August, 2003 in Special Cell Unit, Lodhi Colony. She has deposed that at 2.00 PM, but immediately corrected as 2.45 PM., she had recorded that Umesh Barthwal (PW-33) had informed on telephone about Truck No. JK 03 0153 at Qutub Road Parking at 2.00 PM and thereafter the matter was discussed with senior officers. Thereafter, DD No. 8 records that Insp. Hridey Bhushan along with his team left for Qutub Road Parking. We do not think that accused A1 to A3 can derive any benefit from the statement made by Sanjay Rai

91

(PW41) to the effect that he was asked to join as a public witness at 3.30 PM. In operation of this nature, the police team had to maintain utmost secrecy and avoid being identified. Selection of a public witness had to be undertaken with utmost care and caution so as not to reveal the presence or interfere in the raid which police team wanted to undertake.

14. Sanjay Rai (PW41), in his cross-examination, has stated that the accused were taken away by the police team after sealing of the material and his statement was recorded at that juncture. Our attention was specifically drawn to the following portion of his cross-examination:

“....Insp. Hridey Bhushan recorded my statement. The police party left the spot at 8.45/9.00 PM. Thereafter, I never met the police...”

15. It was pointed out that the statement of Sanjay Rai (PW41) under Section 161 Cr. P.C. is purportedly recorded by Govind Sharma (PW-49) and not by Insp. Hridey Bhushan (PW-43) but this as discussed in paragraphs below is not a sufficient ground to disbelieve the substantive testimony of PW-41. The presence of Sanjay Rai (PW41) is natural and normal since he was a parking attendant at the Tonga Stand, Qutub Road Parking, Sabzi Mandi. The said averment according to us is true and correct and is hardly dented by the cross-

42

examination of PW-41. His presence is proved from the statement of Sunil Tyagi PW-17 who had attested copy of the parking ticket, as also from the statement of Ratan Singh (PW34) who has deposed that he was working as Incharge, Qutub Road Railway Truck parking, Sadar Bazar, Delhi, the contract for which was awarded to Hindustan Trading Company. The parking ticket which mentions the truck number and the date 30th August, 2003, was identified by him and marked Ex. PW34/A. He has deposed that there were 18 persons/attendants in the parking lot. The truck's presence, in Delhi is further established from the statement of Sunil Kumar Tyagi, Clerk, Agricultural Produce Marketing Committee, Azadpur, Sabzi Mandi, Delhi (PW17). He has deposed that the truck bearing number plate JK. 03 0153 belonging to State of Jammu and Kashmir, was issued an Entry Pass dated 28th August, 2003 (Ex. PW17/A). The said pass was issued when the truck entered the Sabzi Mandi at 10.55 PM. Therefore, the truck's presence at the parking lot is clear from the statements of police officers, parking attendant (PW41) and stands corroborated by the parking ticket (Ex. PW34/A).

16. The statement of the police witnesses mentioned above reveal that prompt and swift action was undertaken after the three accused A1 to A3 were apprehended and the explosives were recovered. A police

team led by ACP Rajbir Singh left for Millennium Park leaving behind some police officers including ASI Rakesh Ahluwalia (PW39) and Insp. Hridey Bhushan (PW43). The seizure memos were prepared by the then Investigating Officer Insp. Hridey Bhushan (PW43) and have been marked Ex. PW33/A and PW33/B. The said seizure memos bears signatures of A1 to A3, SI Umesh Barthwal (PW33) and Sanjay Rai (PW41). In the seizure memo Ex. PW33/A, it is specifically recorded that CFSL form was filled in and seal of HB was affixed over it. Further all the articles i.e. 10 hand grenade, 10 grenade shells, one grenade launcher, were kept in separate sealed parcels and sealed with the seal of HB. The said seal was given to Sanjay Rai (PW41). The statement of Sanjay Rai (PW41) in the court was recorded in the year 2009, nearly 7 years after the occurrence. His statement in the court has to be construed and examined keeping in mind the time gap and the fact that human memory may not be able to recollect minute or precise details after such a considerable period. Sanjay Rai (PW41) has deposed that his statement was recorded by Hridey Bhushan (PW43) whereas in fact Section 161 statement of PW41 is under the signature of Govind Sharma (PW49). Insp. Hridey Bhushan (PW43) in his testimony had stated that at about 11.00 PM on 30th August, 2003, he was asked to hand over investigation to SI Govind Sharma (PW-49)

54

and in fact at 12.00 midnight, he handed over investigation to SI Govind Sharma. Similar statement has been made by Insp. Govind Sharma (PW49). However Govind Sharma (PW49) has clarified that he recorded the statement of public witness Sanjay Rai (PW41) and prepared site plan (Ex. PW43/DA) at the instance of Insp. Hridey Bhushan. Thus, Insp. Hridey Bhushan (PW-43) remained at the spot throughout and we do not, therefore, think that there is contradiction in the statement of Sanjay Rai (PW41) as to who recorded his statement. His presence cannot be doubted. It is difficult to hold that PW41 is a planted witness who never saw the incidence and what had happened at Qutub Road parking. His statement that police party left the spot at 8.45/9.00 PM, is being read out of context. The police officers had deposed that the police team led by ACP Rajbir Singh had left the spot i.e. Qutub Road parking at 8.45 PM. It is not their averment that the entire police team left the spot at that time. The prosecution case, which has been established, is that the police officers had interrogated A1 to A3 at the spot itself and then one police party had proceeded to Millennium Park with only one accused A1, while the two accused A2 and A3 remained in the custody of the police team which stayed at the parking. Sanjay Rai (PW41) obviously was not a witness to the interrogation and the interrogation of A1 to A3 did not take place in his

45

presence. In these circumstances, we do not find any discrepancy or reason to disbelieve the statement of Sanjay Rai (PW41) or the police witnesses.

17. Rakesh Ahluwalia (PW39) has deposed that ACP Rajbir and Insp. M.C. Sharma, after the seizures were effected vide Ex. PW33/A and PW33/B, took accused A1 with them. Insp. Hridey Bhushan (PW43) prepared the rukka and he took it to the Special Cell for registration of the case. After the registration of the FIR, he came back to the spot and handed over the same to SI Govind Sharma (PW4). In the cross-examination, he has stated that after the completion of proceedings, they came back to office of Special Cell at 2.45/3.00 AM at night. The case property was taken to police station Lodhi Colony by the police officers. He has deposed that three accused were apprehended at about 8.00 PM and he came back after recording of the FIR, to the spot, at 2.00 AM. They left the spot at 2.15 AM after completing all the proceedings. Thus PW-49 has given two different timings as to when they left the spot. At one place he has stated that they left for Special Cell at 2.15 AM and another place he stated that they had concluded all the proceedings at 2.45 AM. It is but obvious that the time 2.45 /3.00 AM, in fact refers to the time when police team reached back the police station with the accused A1 to A3

and the time 2.15 AM refers to the time when the proceedings were actually concluded. Even otherwise this is relatively a minor discrepancy when we analyze PW-39's deposition and depositions of other police officers.

18. The FIR in question was registered by ASI Raj Kumar (PW1) on 30th August, 2003 at 1.30 P.M. and has been marked Ex. PW1/A. The Daily Diary entry was recorded vide entry No. 1 and 11A at 11.30 PM and 12.30 AM. It is noticeable that FIR is very detailed. It specifically refers to the stray intelligence inputs and information that truck with registration of Jammu and Kashmir bearing No. 153 carrying explosives had reached Delhi. Police team headed by S.I. Govind Sharma was formed to locate the truck and on 29th August, 2003, SI Govind Sharma informed that truck bearing No. JK-03 – 0153 had entered the Azadpur fruit market at 2255 hours, as per records maintained at the entry gate, but the truck could not be located inside the market. Since no record was maintained of the exit details of the trucks, therefore, it could not be ascertained whether the truck had left. Subsequently, the truck was located, at the Qutub Road Parking lot, by SI Umesh Barthwal (PW-33) at 2.00 PM and the information was passed on to the senior officers. A police team headed by Insp. Hridey Bhushan (PW-43) was formed and reached the parking. A watch was

u1

kept on the truck. One Sanjay Rai (PW-41) voluntarily agreed to join the police party. At about 7.45 P.M. a short man approached the said truck and spoke to its driver and cleaner. Thereafter, they climbed the said truck and from the tool box on the roof of the truck, took out 3 wooden boxes. One box opened by the driver and the cleaner was inspected by the short person. Thereafter, all the three boxes were brought down. At this stage, three of them were apprehended. They revealed their names and identity as A1, A2 and A3. Ammunition, as stated above, were found under the 'babugoshas'. The seizure was effected. In the meanwhile, the police team led by ACP Rajbir Singh along with staff reached the spot and on cursory interrogation, A1 gave some clues and information that the consignment was to be delivered to two persons at Indraprastha Park, outer Ring Road, Nizamuddin. Driver and cleaner i.e. A2 and A3 revealed that they were given explosives by the owner of the truck, one Khursheed and the consignment was meant to be delivered to A1, whom they had contacted as directed by Khursheed. In view of the urgency, the team led by ACP Rabjir Singh was constituted and custody of A1 was handed over to Insp. M.C. Sharma. They, along with the police team, departed from the spot for Indraprastha Park. The seal HB which was put on the explosives and boxes were handed over to the public witness

Sanjay Rai and the rukka was sent for registration of the case through Rakesh Ahluwalia (PW39). Further investigation of the case was to be handed over to SI Govind Sharma (PW49) who had been informed.

19. 'Strenuous challenge has been made regarding the entries in Malkhana Register No. 19 (Ex. PW38/A1 to A-9). The entries in this register were made by ASI Paramjit Singh at Sl. No. 255. PW-38 in his testimony has in clear and categorical terms stated that SI Govind Sharma (PW-49) had handed over to him 21 sealed parcels with seal of HB. These contained 10 hand grenades, 10 grenade shell and one grenade launcher. He has deposed that 3 unsealed boxes containing 'babbugoshas' fruit and packing materials were deposited. However, the date of deposit is mentioned by him in his statement as 30th August, 2003 and the same date is reflected and mentioned in the Malkhana register (Ex. PW38/A-1 to A-9). We have earlier referred to the contention of the counsel for the appellant regarding the dates mentioned in the Malkhana Register and the backdating of an entry in the Malkhana Register dated 16th January, 2004, which is after the entry dated 27th February, 2004. As far as the date 30th August, 2003 and the names of ACP Rajbir Singh, Insp. Hridey Bhushan (PW-43) being recorded are concerned, these are obvious lapses but can be explained. ACP Rajbir Singh and Insp. Hridey Bhushan were

certainly connected with the case and involved with the investigation. PW-38, in his examination in chief, clarified that Insp. Govind Sharma (PW49) had handed over to him 21 sealed parcels and 3 unsealed wooden boxes. The occurrence had taken place in the evening/night of 30th and 31st August, 2003 and this explains the error made by PW-38 while making the entry in the Malkhana Register (Ex. PW38/A-1 to A-9), wherein he has mentioned the date as 30th August, 2003. It would not be right to disregard the Malkhana Register because the date mentioned is 30th August, 2003, as the date when the seized articles were deposited. This was an error made by PW38. PW38, in his cross-examination, has stated that the names of ACP Rajbir Singh and Insp. Hridey Bhushan (PW-43) were inadvertently mentioned in Ex. PW38/A1 at point 'A'.

20. Regarding the entry dated 16th January, 2004, PW38 was not cross-examined and confronted. Hence, explanation was not sought. It is plausible that the said entry was made after the entry on 27th February, 2004. This is a lapse which should not have happened. We notice that there are other entries dated 28th January, 2004 and 21st February, 2004 and then entry dated 27th February, 2004 occurs. After 27th February, 2004 entry there is an entry dated 16th January, 2004 which reads as under:-

"Today on 16th January, 2004, 10 sealed containers with seal of GS, which are above hand grenades, are taken out of Malkahna in custody of police team from Haryana, and after defusing thereof, the same are entered in Malkhana and now they are under the seal KC."

21. The 10 hand grenade, which were seized vide Ex. PW33/A were sealed with the seal of HB and were deposited in the Malkhana vide entries in the Register No. 19. Thereafter, as per the statement of V.B. Bardhan (PW4) on 6th October, 2003, the sealed parcels, which included 10 hand grenades, were opened by him. On physical inspection of the hand grenades, PW-4 found them to be live. He advised the Investigating Officer to send all the exhibits including hand grenades to laboratory for detailed examination. PW4 gave his report dated 9th October, 2003, marked Ex. PW4/A which was signed by him at point 'A'. The said report records that on 6th October, 2003, ballistic expert from CFSL, CBI, in Delhi had inspected the exhibits and these were resealed with the seal of 'GS' in the presence of Ballistic Expert on the same day for further examination in the laboratory. The ballistic team of CFSL, CBI consisted of PW-4 and Ravinder Chauhan, SA (Ball.). PW-4 has stated that examination of 10 hand grenades could be undertaken after they were deactivated by the competent authority as they were live. The report with regard to the other 16 articles is Ex. PW4/B. This consisted of 10 grenade shells which were opined to be ammunitions as defined in the Arms Act.

51

Similarly the electric detonators and electrical gadgetry systems were examined and opined upon. The aforesaid examination on 6th October, 2003, resulting in reports dated 9th October, 2003 (Ex. PW4/A and B), is before the date 16th January, 2004. PW4, in his report, has clearly stated that hand grenades were live ones. Thereafter the hand grenades were defused by the officers of Technical Wing, CID, Haryana, Madhuban, Karnal. It has been deposed by Har Bhagwan (PW48), that they visited the office of Delhi Police, Special Cell and defused the said grenades vide report Ex. PW48/A. The said report records that 10 sealed parcels, with the seal of GS on them followed with the specimen seal, were handed over to the Bomb Disposal Team by ASI Paramjit Singh (PW38). The grenades were marked HD1 to HG-1 to HG-10 and seal of HB on a piece of cloth was also contained in each parcel. The firing assembly of each grenade was unscrewed and separated from the body of grenade. Detonator assembly was further removed from the firing mechanism of each grenade. The grenade were separated from the detonator assembly and rendered safe for examination and transport. Thereafter the grenades, with separate parts, were put back in different parcels with seal of KC put on two places. The same parcels were returned to incharge Malkhana for necessary action. PW49 was not asked any specific question and only

52

a vague query suggesting that the proceedings were wrong was put forth. The aforesaid report (PW48/A) shows that the grenades were live ammunitions and were explosive substance. Thus, even if we disregard the FSL report on or after 16th January, 2004, there are forensic reports given by PW4 and PW48 that 10 hand grenades recovered were live. The hand grenades thereafter were sent for examination and report dated 16th February, 2004 was received with the seal of A. Dey, (Ex. PW44/A). A. Dey, Principal Scientific Officer, Govt. of India, CBI, Delhi appeared as PW-44. In his separate report (Ex. PW44/A), PW-44 has stated that the 10 parcels with the seal of 'KV' were examined by him. The seals on the parcels were intact and tallied with the specimen seal received. He examined the 10 grenades which were olive green in colour with marking of 'ARGES'. On examination of the components in the received parcel, he declared them to be 10 defused live hand grenades. In the cross-examination, PW-44 has stated that PETN was detected in hand grenades but this fact was not mentioned in the report. In these circumstances, in spite of the lapse on the part of PW38, we do not find any reason to hold that the prosecution has not been able to show that the 10 hand grenades were explosive substance or live. We note that the markings on the hand grenades that they were olive green in colour,

53

with the marking of ARGES, stands corroborated throughout. The grenades, in the present case, were examined by three scientific officers namely V.B. Bardhan (PW4), A. Dey (PW44) and Har Bhagwan (PW48).

22. The 10 hand grenade, 10 grenade shells and the grenade launcher were subjected to forensic examination report at C.F.S.L., CBI, Lodhi Road, New Delhi. Their report (Ex. PW4/B) discloses that the grenade launcher was a fire arm as defined in the Arms Act, 1959 and the firing mechanism was in working order. Similarly, the physical examination of the 10 hand grenade was made and it was observed that they were arms as defined in the Arms Act, 1959. The grenade could be smoothly launched in grenade launcher and were live. 18 and 5 detonators were also examined. On the physical examination of 3 electrical gadgetry systems it was observed that these could form components of three Remote Controlled Devices and they were in working order. (Detonators and remote control devices were recovered from residence of A4 and A5. See the next heading involvement of A4 and A5, raid and recovery.) FSL report Ex. PW4/B further records that 23 electronic detonators and the 3 electric gadgetry systems could form components of Improvised Explosive Devices (IEDs). The IEDs are 'explosive substances' as defined in

54

Explosive Substances Act, 1908. The author of the report, V.B. Bardhan had appeared as PW4. He had proved his report dated 9th October, 2003 Ex. PW4/A and stated that it was true and correct. He was initially cross-examined on behalf of A4 and A5 on 11th January, 2005. In the cross-examination he affirmed that remote control devices are ordinarily used for exploding IEDs but he could not say whether these could be used for operating TV, car locking, operating Air conditioners or other electronic devices. PW-4 has categorically observed that in his long experience of 22 years, he had not come across these devices being utilized for any purpose other than exploding IEDs. RCD mechanism had two parts i.e. receiver and transmitter which were used to activate the IEDs. PW4 was further cross-examined on behalf of the accused on 30th November, 2009. He has deposed that he had not mentioned seal impression on the exhibit examined by him in his report (Ex. PW4/A). But, in his official worksheet, he had recorded the impression as HB and MCS. PW-4 mentioned that the worksheet did not record impression of resealing and neither has it been mentioned in the inspection report. PW4 volunteered and stated that the inspection was carried out in the presence of the Investigating Officer and denied the suggestion that Exhibits did not reach him in time or they were tampered with.

SS

Involvement of A-4 and A-5, raid and recovery

23. The encounter at Millennium/Indraprastha Park resulting in the death of two, was made subject matter of FIR No. 445/2003 under Sections 186/353/307/411 IPC and 25/27 Arms Act and 3/4/20 POTA Act, registered at Police Station, Nizamuddin. As per the FIR two persons, namely Mumtaz Shaid @ Zahoor resident of Pakistan and Rafiq Ahmed @ Guddu @ Habib resident of Sikandrabad, U.P. were killed in the encounter between 10.15 to 11.00 PM at Indraprastha Park, Ring Road, Sarai Kale Khan, Delhi.

24. As noticed above, A4 and A5 are brothers: Habib @ Aslam, who as per the prosecution case was killed in the encounter at Millennium Park, was brother of A4 and A5. The prosecution claims that A4 and A5 were arrested from their house at 390, Kaziwada, Sikandrabad, U.P., by ACP Rajbir Singh and Insp. M.C. Sharma. ACP Rajbir Singh and Inspector M.C. Sharma had expired and did not enter the witness box. To prove their case, the prosecution has relied upon the testimonies of SI Ranjan Kumar Sharma (PW31) and Insp. Ambesh Chand Tyagi (PW32). Both of them have stated that on 31st August, 2003, they were posted at P.S. Sikandrabad, U.P. PW-32 was the S.H.O. On the said date, ACP Rajbir Singh along with other staff reached the Police Station at 6.00 AM and narrated the facts to Insp.

Ambesh Chand Tyagi (PW32). Insp. Ambesh Chand Tyagi (PW32) and Umesh Barthwal (PW33) and other staff then joined the investigation with ACP Rajbir Singh and went to the house of A4 and A5 at Kaziwada. A4 and A5 were interrogated by ACP Rajbir Singh. SI Ranjan Kumar Sharma (PW31) and Insp. Ambesh Chand Tyagi (PW32) have deposed that on interrogation, A4 and A5 had confessed on certain aspects. We ignore the said confession as it is not covered by Section 27 of the Evidence Act. What will be covered by Section 27 of the Evidence Act, is recovery of 18 electronic detonators kept in a plastic jar with the help of cotton on parchhatti of the room, pursuant to the disclosure statement made by A4; and recovery of 5 electronic detonators, 3 R.C.D.S. and Rs.85,000/- in cash on the basis of disclosure statement made by A5, from the ground floor of the house from the iron almirah in the room, adjacent to the kitchen. The said articles had been kept in a grey colour printed cloth bag. The 5 detonators were kept in a plastic jar with the help of cotton. SI Ranjan Kumar Sharma (PW31) and Insp. Ambesh Chand Tyagi (PW32) have deposed that the articles were sealed with the seal of "M.C.S." and the 3 R.C.D.S. were covered into a cloth parcel and were marked AR1, AR2 and AR3. The cash was taken into possession vide seizure memo Exhibit PW31/A and the articles recovered from A4 were seized vide

51

seizure memo Ex. PW31/A. A4 and A5 were searched and their personal search memos are Ex. PW31/C and PW31/D. These were signed by SI Ranjan Kumar Sharma (PW31) and Insp. Ambesh Chand Tyagi (PW32), at points A & B respectively. The accused along with the case property were brought to P.S. Sikandrabad, U.P. and their statements were recorded by the Investigating Officer. SI Ranjan Kumar Sharma (PW31) and Insp. Ambesh Chand Tyagi (PW32) recognized 18 electronic detonators which were marked Ex. P1 (Colly.). The plastic jar was marked PW2 and white cloth piece was marked Ex. P3. 5 electronic detonators recovered pursuant to disclosure by A5, were correctly recognized by P5 and are given Exhibit nos. P-4 (Colly.). The 3 R.C.D.S. were given Exhibit no. P-5, P-6 and P-7. The cloth bag containing Rs.85,000/- was opened and the money was collectively marked Ex. P-8 (colly.). In the cross-examination, SI Ranjan Kumar Sharma (PW31) has averred that there were no specific duty hours and they remained in the Police Station for 24 hours. About 5-6 police officials and other staff members had come to the Police Station Kotwali on the said date. Initially SI Ranjan Kumar Sharma (PW31) could not recollect how long the police officials remained at the Police Station, and later on he corrected himself stating that they remained in the Police Station for 15 minutes.

58

SI Ranjan Kumar Sharma (PW31) has deposed that he did not remember whether any general diary entry was made but the said entry was required to be made on arrival of outside police. PW31 has deposed that, in the appellant A4- A5's house, another brother, mother and sister were present. They came back to the Police Station at 9.00 AM. PW-31 did not remember whether any departure entry was made at Sikandrabad Police Station by the Delhi Police but it took 1 - 2 hours to complete the proceedings in the house of A4 and A5. PW-31 has further deposed that A4 and A5 had not made any disclosure statement in writing to the Investigating Officer, in his presence, but they were interrogated verbally. No public persons were joined in the said proceedings. PW31 has stated that he had not seen detonators earlier, ACP Rajbir Singh had told him about the detonators after recovery. No proceedings against A4 and A5 were pending at their Police Station. It is apparent that PW31 was extensively cross-examined but there is nothing to create a doubt or discredit his statements.

25. Insp. Ambesh Chand Tyagi (PW32) too was cross-examined, at length, and has stated that arrival entry of Delhi Police team was recorded at Sikandrabad P.S., but he did not remember its number. He has deposed that 1-2 public persons were requested by the I.O. to join

59

the proceedings but they refused. PW32 did not remember the exact number of police officials who had visited Sikandrabad P.S., U.P. but they were 8-10 officers. No site plan was prepared by the Investigating Officer regarding the location of the house etc. and no property papers, regarding ownership and occupation, were collected. A4 and A5 were verbally interrogated by the Investigating Officer at the spot.

26. Regarding the arrest of A4 and A5, and the recoveries from their residence at Sikandrabad, the learned counsel for the appellants 4 and 5 submitted that no contemporaneous DD entries were recorded at Police Station, Sikandrabad, U.P. This is factually correct. However, this we feel does not merit ignoring testimonies of PW-31 – SI Ranjan Kumar Sharma and PW-32 – Insp. Amresh Chandra Tyagi, who were posted at the said Police Station and had participated in the team effort under ACP Rajbir Singh by going to the house of A4 and A5 at 390, Sikandrabad, U.P. PW-32 was S.H.O. of P.S. Sikandrabad, U.P. We do not think that recoveries of the electrical detonators, the remote control devices and the money i.e. Rs.85,000/- should be disbelieved and disregarded. However, the question to what extent, the appellants 4 and 5 were involved and were part of the conspiracy with A1 to A3 or others, is a separate matter and has to be examined.

60

27. At the same time, recovery of Rs.85,000/- from the residence of A-4 and A-5 at Sikandrabad is not substantial. We do not agree with the prosecution that recovery of money by itself shows that it was meant for facilitating or indulging in terrorist activities. The case of the prosecution is that A-4 and A-5 had received 'hawala' money of Rs.2 lacs, for which there is no material or evidence except the confessional statements Ex.PW-13/O and 13/M. As per the prosecution version, A-4 and A-5 had used Rs.1,15,000/- out of the said amount. There is no evidence or material to show where and how this money was allegedly spent. Neither is it the case of the prosecution that the detonators or remote control devices seized were purchased out of this money.

Raid and seizures at Mahindra Park

28. It has been submitted and, in our opinion, rightly that Inspector Govind Sharma (PW-49) was not a member of the raiding team, which had gone to premises A-44, Mahindra Park, Azadpur, Delhi. The seizure memo Ex.PW-49/D is signed by ACP Rajbir Singh, Inspector M.C. Sharma and Sub Inspector Mehtab at points A, B and C, respectively. It is not signed by PW-49, but the said witness had identified their signatures. ACP Rajbir Singh, Inspector M.C. Sharma and Sub Inspector Mehtab did not depose before the court because they

had expired. PW-49's deposition, to this effect, was after the cross-examination, was closed on 26th April, 2010. Thereafter, the prosecution filed an application under Section 311 Cr.P.C., which was allowed and further examination-in-chief and cross-examination was conducted on 26th July, 2010. In his examination-in-chief, on the said date, PW-49 has stated that he was associated with the investigation with ACP Rajbir Singh. In the cross-examination he has stated that he was a part of the team led by ACP Rajbir Singh, which had gone to the aforesaid premises. However, this fact is not stated by PW-49 in his statement under Section 161 Cr.P.C. What is more important is the statement made by PW-49 in his cross-examination on 26th April, 2010, in which he had stated that he was not a member of the raiding party constituted on 31st August, 2003 and he was unable to give details of the investigation done by ACP Rajbir Singh. On 31st August, 2003, ACP Rajbir Singh had purportedly seized a computer and some cash at the instance of A-1.

29. However, the seizure memo Ex.PW-49/D and the recoveries made from the said premises cannot be disbelieved even if PW-49 was not a member of the raiding team. Veero (PW-10) and Mohd. Sultan (PW-11) partly supported the prosecution case on the said aspect. PW-10 has deposed that she had given on rent the ground floor of her house

62

i.e., A-44, Mahindra Park, Azadpur, Delhi to Abdul Jabbar and his relatives. She had seen Mohd. Sultan visiting the said house to meet Abdul Jabbar. She had also seen A-1 visiting Mohd. Sultan and Abdul Jabbar. She identified A-1 in the court. PW-11 has deposed that he was a tenant of the aforesaid house and knew Khurshid Ahmad, a resident of Jammu Kashmir, who had introduced him to A-1, present in the Court. He has deposed that on 24th August, 2003, A-1 came and informed that he had to purchase a computer for his brother and some decks for his shop. PW-11 remained with A-1 for two days and they had gone to Lajpat Rai Market to make these purchases and had also brought phones and decks.

30. Recovery of computer, phones, decks etc. is not really relevant or material. However, recovery of Rs.19.20 lacs at the instance of and on the basis of disclosure statement made by A-1 is a relevant consideration keeping in view the facts stated and proved against him. Terrorist activities and violence for which arms and ammunitions are used, require monetary support and backing. Money recovered i.e. Rs 19.20 lakhs is substantial. There is no explanation forthcoming from A-1 about the source and for what other purpose this substantial amount was to be utilized.

Disclosure statements and Confessional statements of A1 to A5
under Section 32 of POTA and whether they can be relied upon

31. As per the prosecution version, A1 had made two disclosure statements dated 31st August, 2003 and 1st September, 2003, (Ex. PW35/C and Ex. PW49/A). Statement Ex. PW35/C was witnessed by Inspector Arvind Kumar (PW35). In this disclosure statement A1 had disclosed about (1) the phone calls made to the Dubai resident on number 0097507151283; (2) his stay at Mirza Hotel and Seema Lodge; (3) purchase of computer etc.; (4) purchase of mobile phone and sim; and (5) purchase of truck JK-03-0153. The contents of the first disclosure statement can only be relied upon to the extent permitted under Section 27 of the Evidence Act. Further, the fact discovered should be relevant for the purpose of the present case. Evidence must have nexus and must be relevant to establish the guilt against the author.

32. In *State (NCT of Delhi) v. Navjot Sandhu* (2005)11 SCC 600, Section 27 of the Evidence Act was examined in great depth and the contentions of the prosecution that it should include within its scope and ambit of 'facts discovered', 'any mental condition of which any person is conscious' was not accepted. It was held that 'facts discovered' within the meaning of Section 27 would require recovery

64

of physical or material object which can be exhibited before the court. However, once recovery of a physical or material object is made, the inference drawn is not restricted to the recovery alone or the facts discovered but information or knowledge of the accused i.e. the psychological fact or mental condition that the accused was conscious and aware that the material or concrete object could be recovered from the said place. It is in this context, that the 'facts discovered' within the meaning of Section 27 of the Evidence Act is not treated as equivalent to the object produced. It would be appropriate to reproduce the following passage from *Pulukuri Kottaya vs. Emperor* AIR 1947 PC 67:

"If this be the effect of Section 27, little substances would remain in the ban imposed by the two preceding sections on confessions made to police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect.

xxx xxx xxx

"...In their Lordships' view it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given

must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant....."

33. : In *Mohd. Inayatullah vs. State of Maharashtra* (1976) 1 SCC 828, regarding the expression 'facts discovered', it was elucidated that no doubt Section 27 requires recovery of physical or material object but the same is not restricted to the production thereof. It includes the place from where it was produced and the knowledge of the accused as to this. It was further observed:-

"...The last but the most important condition is that only so much of the information as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word distinctly means directly, indubitably, strictly, unmistakably. The word has been advisedly used to limit and define the scope of the provable information. The phrase distinctly relates to the fact thereby discovered is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information

given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.”

34. In the present case, the disclosure statement Ex. PW35/C of A-1 is of limited use as the mobile phone with IMEI No. 350624899242906 and Hutch No. 9811489261 was recovered at the time of personal search vide memo Ex. PW35/P but the call details which could have been easily collated, collected or ascertained, were not looked into. The fact that A-1 had stayed at Mirza Lodge and Seema Lodge, is not really incriminating per se but use of a fake name or identity is. Neither is purchase of computer by itself an incriminating fact. Regarding the purchase of truck No. JK 03 0153, it was already stationed at Qutub Road parking lot. Thus, according to us, the disclosure statement Ex. PW35/C is hardly relevant as far as Section 27 of the Evidence Act is concerned. However, the prosecution is certainly entitled to rely upon the leads or the clues given upon interrogation of A1 under Section 8 of the Evidence Act since admissibility and relevance, under the said section, is independent of and not circumscribed by Section 27 of the Evidence Act. Again in *Navjot Sandhu's case (supra)*, Section 8 of the Evidence Act was elucidated and it was explained that the conduct of

the accused was relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. This can be either previous or subsequent conduct of the appellant. In explanation 1 to Section 8 Evidence Act, it was explained that mere statements as distinguished from acts do not constitute conduct unless those statements "accompany and explain acts other than statements". The illustrations appended to Section 8 were thereafter referred to and distinction was drawn between a statement made to a police officer during the course of an investigation which is hit by Section 162 Cr.P.C and Section 8 Evidence Act. Reference was made to the following passage from *Prakash Chand vs. State (Delhi Admn.)* (1979) 3 SCC 90, wherein it has been observed:

"Even apart from the admissibility of the information under Section, the evidence of the Investigating Officer and the Panchas that the accused had taken them to PW11 (from whom he purchased the weapon) and pointed him out and as corroborated by PW11 himself would be admissible under Section 8 as 'conduct' of the accused".

35. This brings us to the contentious issue of the confessional statements made by the appellants A-1 to A-5 being Ex.PW-13/F, 13/J, 13/H, 13/L and 13/M, respectively. These confessional statements were recorded under Section 32 of POTA by Ujjwal Mishra (PW-13), Additional Commissioner of Police on 9th September, 2003. PW-13

has deposed that on 8th September, 2003, when he was working as Deputy Commissioner of Police, Special Branch, New Delhi in the rank of Superintendent of Police, he had received a request from Joint CP, Special Cell to record confessional statements of the appellants A-1 to A-5. The said appellants were brought to his office by ACP Rajbir Singh, the Investigating Officer. ACP Rajbir Singh was asked to leave the room and directed to send each accused one by one individually. A-1 to A-5 came inside his chamber separately and he spoke to them. PW-13 warned them in Hindi, i.e. the language which they understood, and informed them that the statement should be voluntary and not under any compulsion, threat or coercion. He warned them that the statement could be read against them subsequently at the time of trial. He asked them to come after one day, thus, giving them time to ponder over and decide whether they wanted to make a confessional statement. Whatever he spoke to the appellants A-1 to A-5 was recorded simultaneously on the computer. The warning administered, advice given and the time of one day granted to A-1 to A-5 on 8th September, 2003 were proved by PW-13 and reflected in Ex.PW-13/A, 13/B, 13/C, 13/D and 13/E. These exhibits were signed by PW-13 and the appellants A-1 to A-5. The appellants A-1 to A-5 were produced on the next day i.e. 9th September, 2003 and on that occasion again PW-13

followed the same procedure by calling them one by one and asked them whether they would be willing to make confessional statement and that their statement should be free from pressure, compulsion or coercion. The appellants A-1 to A-5 separately and individually stated that they were willing to make confessional statement on their own without any pressure, threat or coercion. Before recording the statements, the appellants A-1 to A-5 had given their declarations in writing that they were making statement voluntarily without any threat, pressure or coercion. These declarations marked Ex.PW13/F, 13/H, 13/J, 13/L and 13/N were duly signed by the five appellants. Thereafter, PW-13 recorded confessional statements of A-1 to A-5 marked Ex.PW-13/G, 13/I, 13/K, 13/M and 13/O, respectively. The five appellants had signed the said statements at point A and PW-13 had signed the statements at point B.

36. The contention on behalf of the appellants is that the aforesaid confessional statements have been recorded under threat, coercion and pressure; the confessions were not recorded by PW-13 himself in his handwriting but by SI Vinod Kumar of Special Branch and, therefore, there is violation of Section 32(2) of POTA; A-1 to A-5 were not sent to the judicial custody by Mr. T.S. Kashyap (PW-36), the then ACMM, Tis Hazari, after the appellants A-1 to A-5 were produced in the

70

Court; A-1 to A-5 were not provided legal assistance before their confessional statements were recorded; procedural safeguard mentioned in sub-section 1 to 4 to Section 52 were violated; the confessional statements have not been recorded verbatim as mandated and required by law in the language or the words used by the appellants A-1 to A-5 and this can be gauged from several words like Atankwadi, Gatiwidhiya, Dainik, Chalak, Uplabdh etc. which have been used in the confessional statements though this were not a part of parlance of persons conversant with Urdu or Kashmiri language as they are Hindi words derived from Sanskrit language.

37. Before we examine the said contentions, it is relevant to mention and examine the legal position on the statements recorded under Section 32 of POTA. Sections 32 and 52 of POTA read as under:-

"Section 32. Certain confessions made to police officers to be taken into consideration.-

(1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical or electronic device like cassettes, tapes or sound tracks from out of which sound or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or the rules made thereunder.

(2) A police officer shall, before recording any confession made by a person under sub-section (1), explain to such person in writing that he is not bound to make a confession

71

and that if he does so, it may be used against him: Provided that where such person prefers to remain silent, the police officer shall not compel or induce him to make any confession.

(3) The confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes it.

(4) The person from whom a confession has been recorded under sub-section (1), shall be produced before the Court of a Chief Metropolitan Magistrate or the Court of a Chief Judicial Magistrate along with the original statement of confession, written or recorded on mechanical or electronic device within forty-eight hours.

(5) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate, shall, record the statement, if any, made by the person so produced and get his signature or thumb impression and if there is any complaint of torture, such person shall be directed to be produced for medical examination before a Medical Officer not lower in rank than an Assistant Civil Surgeon and thereafter, he shall be sent to judicial custody.

Section 52: Arrest.-

(1) Where a police officer arrests a person, he shall prepare a custody memo of the person arrested.

(2) The person arrested shall be informed of his right to consult a legal practitioner as soon as he is brought to the police station.

(3) Whenever any person is arrested, information of his arrest shall be immediately communicated by the police officer to a family member or in his absence to a relative of such person by telegram, telephone or by any other means and this fact shall be recorded by the police officer under the signature of the person arrested.

(4) The person arrested shall be permitted to meet the legal practitioner representing him during the course of interrogation of the accused person: Provided that nothing in this sub-section shall entitle the legal practitioner to remain present throughout the period of interrogation."

38. In *Navjot Sandhu* (supra), the Supreme Court examined the law regarding "confessions" and held that terminology "confessions" is a species of "admission" as defined in Section 17 of the Evidence Act. Section 24 of the said Act lays down that a confession made under any inducement, threat or promise need not be proved to the hilt. Thus, when it appears to the Court that making of confession was caused by inducement, threat or promise, from a person in authority, the confession is liable to be excluded. The expression "appears" does not carry the same meaning as proved but it refers to a reasonable probability that the confession could be a result of threat, inducement or pressure. Confessions are considered highly reliable as no rational person will make an admission against his interest unless prompted by his conscience to tell the truth. Therefore, the court should be satisfied that confession was made freely and voluntarily and not under hope or promise of advantage, reward or immunity or by force or by fear induced by violence or threats of violence. The maker of the statement should be made fully aware about the nature and consequences of making such a confession.

39. However, under general law a true confession made voluntarily can be acted upon with slight evidence to be corroborated. (See *Bharat Vs. State of U.P.*, (1971) 3 SCC 950). To elucidate, a case where

accused has confessed about his wrong doings in a letter to his close relative or where the confession is made to the Magistrate, it should be treated as highly incriminating evidence against the accused. Retracted confessions, on the other hand, require assurances that the retraction was an afterthought and the earlier statement was true. (see *Subramania Goundan Vs. State of Madras, 1958 SCR 428*). Voluntary nature of a confession and whether it is true and trustworthy are two separate aspects and the second aspect need not be applied/examined where confession fails because it was not voluntary.

40. For the second test to be tenable i.e. "whether the confession is true and reliable", it requires comparison of the confession with the rest of the evidence in the light of the surrounding circumstances and probabilities. The court should be satisfied that the confession is credible, truthful and whether it naturally fits in with the rest of the evidence and surrounding circumstances i.e. probable catalogue of events. (See *Shankaria Vs. State of Rajasthan, (1978) 3 SCC 435*). However, corroboration of material particulars does not imply that there should be meticulous examination of the entire material. Broad corroboration with the general trend of confession is sufficient. (See *Parmananda Pegu Vs. State of Assam, (2004) 7 SCC 779*).

74

41. The Supreme Court, thereafter, examined the provisions of Terrorist and Disruptive Activities (Prevention) Act, (TADA) and the judgment in the case of *State Vs. Nalini*, (1995) 5 SCC 253 and the opinion expressed by the three Judges Bench of the Supreme Court. Reference was also made to *Jameel Ahmed Vs. State of Rajasthan*, (2003) 9 SCC 673 and it was observed that terminology used in POTA was different from TADA and Section 32 of POTA postulates that the confession recorded under the said Section would be only admissible against the maker and not against a third person/co-accused. This was a significant departure made in the provisions POTA viz. TADA. It was accordingly held that confession made under Section 32(1) of POTA is admissible in evidence, but the Court must test voluntariness and reliability of the confession. The other provisions of Section 32 POTA are in the nature of procedural safeguards and are aimed to ensure that confessions made by the accused are free from threat, coercion and pressure. The Supreme Court rejected the contention, after due deliberation, that Section 10 of the Evidence Act can be invoked in respect of the confessions made under Section 32 of POTA by one co-accused against the other observing that once it is shown that the accused snapped out of the conspiracy, the accused's confessional statement cannot be used against the other co-accused.

75

Referring to Section 32 of POTA, the Supreme Court held that the following peremptory prescriptions should be satisfied:-

“(a) The police officer shall warn the accused that he is not bound to make the confession and if he does so, it may be used against him (vide sub-section (2)). (b) The confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes it (vide sub-section (3)). (c) The person from whom a confession has been recorded under sub-section (1) shall be produced before the Chief Metropolitan Magistrate or Chief Judicial Magistrate along with the original statement of confession, within forty-eight hours (vide sub-section (4)). (d) The CMM/CJM shall record the statement, if any, made by the person so produced and get his signature and if there is any complaint of torture, such person shall be directed to be produced for medical examination. After recording the statement and after medical examination, if necessary, he shall be sent to judicial custody (vide sub-section (5)).”

42. It was observed that these provisions go a long way to screen and exclude confessions, which appeared to be involuntary. Breach of any of these requirements would have vital bearing on the admissibility and evidentiary value of the confession and in some cases may inflict a fatal blow on confession which does not follow these mandatory procedures. However, with regard to the provisions of Section 52 of POTA, it was observed as under:-

“163. Now the question remains as to what is the effect of non-compliance of the obligations cast on the police officer by sub-Sections (2) to (4) of Section 52. This question becomes relevant as we find the non-

observance of the requirements of sub-Section (2) read with sub-Section (4) as well as sub-Section (3) or one of them in the instant cases. Does it have a bearing on the voluntariness and admissibility of the confession recorded under Section 32(1)? Should these safeguards envisaged in Section 52(1) be telescoped into Section 32? These are the questions which arise.

164. In our considered view, the violation of procedural safeguards under Section 52 does not stand on the same footing as the violation of the requirements of sub-Sections (2) to (5) of Section 32. As already observed, sub-Sections (2) to (5) of Section 32 have an integral and inseparable connection with the confession recorded under Section 32(1). They are designed to be checks against involuntary confessions and to provide an immediate remedy to the person making the confession to air his grievance before a judicial authority. These safeguards are, so to say, woven into the fabric of Section 32 itself and their observance is so vital that the breach thereof will normally result in eschewing the confession from consideration, subject to what we have said about the judicial custody. The prescriptions under Section 52, especially those affording an opportunity to have the presence of the legal practitioner, are no doubt supplemental safeguards as they will promote the guarantee against self-incrimination even at the stage of interrogation; but these requirements laid down in Section 52 cannot be projected into Section 32 so as to read all of them as constituting a code of safeguards of the same magnitude. To hold that the violation of each one of the safeguards envisaged by Section 52 would lead to automatic invalidation of confession would not be in consonance with the inherent nature and scheme of the respective provisions. However, we would like to make it clear that the denial of the safeguards under sub-Sections (2) to (4) of Section 52 will be one of the relevant factors that would weigh with the Court to act upon or discard the confession. To this extent they play a role vis-a-vis the confessions recorded under Section 32, but they are not as clinching as the provisions contained in sub-Sections (2) to (5) of Section 32."

43. Now we turn to the factual matrix of the present case to satisfy ourselves whether confessions by the appellants A-1 to A-5 were voluntary and to what extent can they be considered credible and true. On the question of voluntariness of the confession it is significant that the appellants A-1 to A-5 did not at any time retract from their confessions though the proceedings continued from 2003 onwards till the pronouncement of judgment on 3rd January, 2011. The appellants A-1 to A-5 have been ably assisted by the counsels, indeed the two counsels appearing before this Court have been thorough in terms of preparation and arguments. We do not think that the factum that A-1 to A-5 had agreed to make confessions by itself can be a ground or reason to hold that the confessions made by them were involuntary, made under pressure, coercion or threat. PW-13, Ujjwal Mishra was cross-examined, but there is nothing in the cross-examination to suggest that there was any inducement, threat, pressure or coercion or the statement made by PW-13, in examination-in-chief, was factually wrong and incorrect.

44. We do not agree with the contention that a Psychologist should have been called to examine the mental status of the five accused before their confessional statements were recorded. More importantly after the confessions recorded on 9th September, 2003, the appellants

A-1 to A-5 were produced before Mr. T.S. Kashyap (PW-36), the then ACMM, Tis Hazari on 10th September, 2003. PW-36 has deposed that ACP Rajbir Singh was asked to leave the chamber. From a sealed envelope five typed confessional statements recorded by PW-13 were taken out and separately read over to each of the appellant concerned. PW-36 enquired from each of the appellant whether they were tortured or compelled to make confessional statement but they denied torture or compulsion. PW-36 thereafter recorded statement of the appellants A-1 to A-5 that there was no torture or compulsion. A-1 to A-5 signed the proceedings recorded by PW-36 marked Ex.PW36/B.

45. PW-36, when cross-examined has stated, that he had not informed the appellants A-1 to A-5 that after recording of statement they would be sent to judicial custody and he had also not warned them that the statements made by them would be used against them or they were not bound to make the said statement.

46. In *Navjot Sandhu's case* (supra) the alleged confession made by Afzan Guru/Shokat was disregarded since only 5-10 minutes time was given to the accused to think/reflect before his confession. It was observed that this was an utterly inadequate time to reflect before making a confession as an accused person must be given an opportunity to deliberate and introspect. In the said case, there was a

retraction though the State pleaded that it came after considerable delay. We may note that the accused Afzan was sent to police custody for a week, at the instance of Investigating Officer, after the ACMM had drawn up the proceedings for the reason that he was required to be taken to certain places in Kashmir for further interrogation. However with reference to Section 32(5) of POTA, it was observed, that the provision regarding judicial custody cannot be read to be mandatory so as to apply in all situations. If the Magistrate is satisfied that the confession appears to have been made voluntarily and the person concerned was not subjected to any torture or intimidation, he need not be directed to be taken in judicial custody.

47. In the present case, PW-36 has stated that, after the proceedings were over, the appellants A-1 to A-5 were handed over to ACP Rajbir Singh for sending to the Court of the Additional Sessions Judge, Special Court, POTA. The appellants A-1 to A-5 were produced before the Additional Sessions Judge on 19th September, 2003 and thereafter they were sent to judicial custody. The ACMM could not have directly sent the appellants A-1 to A-5 to judicial custody as the earlier order of police remand was passed the Additional Sessions Judge.

48. Examination of Trial Court record reveals that the appellants A1 to A5 were remanded to police custody for 10 days by Additional Sessions Judge vide order dated 31st August, 2003. They were directed to be produced on 10th September, 2003. On 10th September, 2003, the appellants A1 to A5 were produced before the Additional Sessions Judge, Designated Court, Patiala House, where ACP Rajbir Singh had filed an application that the said appellants A1 to A5 should be sent to judicial custody. On this application itself, Additional Sessions Judge, Designated Court, passed an order recording that a request was made for sending the appellants to judicial custody but it was 6.20 PM and the jail would be closed at 7.00 PM, hence A1 to A5 should be produced on 11th September, 2003. Investigating Officer ACP Rajbir Singh, as the order records, had furnished a sealed envelope bearing seal of T.S. Kashyap, Metropolitan Magistrate, which was taken on record. On 11th September, 2003, the accused were sent to judicial custody.

49. The trial court record further reveals that A4 and A5, through their mother Shakila Begum, had engaged services of Malviya & Co., Advocates, vide Vakalatnama executed by them on 2nd September, 2003. On the basis of this Vakalatnama, an application had also been filed for conducting post mortem of body of Habib @ Rafeek Uzzma.

The cause title of the said application refers to FIR No. 70/2003 and to the name of Atik & Rais i.e. A5 and A4. The said application mentions that on 31st August, 2003, at about 6.00 AM, three persons had come to Shakila Begum's residence at Sikandrabad and informed that Habib @ Rafeek Uzzma had died and three other sons A4, A5 and Laiq Uzzama were taken to local Police Station, Bulandshahr, U.P. Laiq Uzzama was made to sign some blank papers and other two sons were taken away by ACP Rajbir Singh. There are other grounds of grievance in that application.

50. Referring to the famous U.S. Supreme Court case *Miranda vs. Arizona*, 384 US 436, in *Navjot Sandhu (supra)*, the Supreme Court emphasized on the importance of assistance of a counsel, even at the stage of custodial interrogation. It referred to *Nandini Satpathy vs. P.L. Dani* (1978) 2 SCC 424, and observed that it would be too much to expect the person in custody to know the fasciculus of POTA provisions regarding confession and provisional safeguards available to him. It was further highlighted that Section 52(3) of POTA enjoins that information of arrest should be immediately communicated by the police officer to the family members or in their absence to their relative. It was observed that Section 52(3) of POTA was on the model of guidelines issued in *D. K. Basu vs. State of West Bengal*

82

1997(1) SCC 416 and it was pointed out that failure to inform the relatives leads to the accused not being provided a meeting with the lawyer or otherwise seeking legal help. In *Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid Vs. State of Maharashtra*, AIR 2012 SC 3565, the question of admissibility and procedural requirements mandated before the confession is admissible, under Articles 21 and 22(1) of the Constitution were examined scrupulously.

It was observed as under:-

“484. We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a magistrate. We, accordingly, hold that it is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.

485. It needs to be clarified here that the right to consult and be defended by a legal practitioner is not to be construed as sanctioning or permitting the presence of a lawyer during police interrogation. According to our system of law, the role of a lawyer is mainly focused on

court proceedings. The accused would need a lawyer to resist remand to police or judicial custody and for granting of bail; to clearly explain to him the legal consequences in case he intended to make a confessional statement in terms of Section 164 Code of Criminal Procedure; to represent him when the court examines the charge sheet submitted by the police and decides upon the future course of proceedings and at the stage of the framing of charges; and beyond that, of course, for the trial. It is thus to be seen that the right to access to a lawyer in this country is not based on the Miranda principles, as protection against self-incrimination, for which there are more than adequate safeguards in Indian laws. The right to access to a lawyer is for very Indian reasons; it flows from the provisions of the Constitution and the statutes, and is only intended to ensure that those provisions are faithfully adhered to in practice."

51. Thereafter, the Supreme Court examined the legal effect of failure to provide legal aid to an indigent who was not in a position, on account of indigence or any other similar reasons, to engage a lawyer. It was held that every accused unrepresented by a lawyer must be provided a counsel at the commencement of a trial unless he voluntarily makes an informed decision in unequivocal words that he does not want assistance of an advocate and/or would personally defend himself. This is fundamental to the principle of fair trial and a failure in this regard would vitiate the trial and the result, in quashing the conviction and sentence. However, it was observed that failure to provide a lawyer to an accused at a pre-trial stage would not have the same consequence of vitiating the trial, unless it was shown that this

failure had resulted in prejudice to the accused in the course of the trial, for which the facts have to be judged on case to case basis.

Supreme Court, however, cautioned that failure at pre-trial stage is not to be taken lightly and the Magistrate who fails to take notice of the said fact may be liable to disciplinary proceedings. The accused may

claim compensation for failure of the State to provide him legal aid.

52. On the question of language used while recording the confession, we would like to refer to a Division Bench judgment of this court in *Harbans Singh & Ors. Vs. State* (2006) 3 RCR (Cri) 23, wherein the contention raised was that the statements were not recorded in first person and the warning was given in English, the confession was recorded in Hindi, whereas the accused could only comprehend Urdu. This contention was rejected, after noticing that the DCP in question (Ujjawal Misra) was not questioned or cross-examined whether the warning was given in English. It was observed that Hindi and Urdu were akin to each other and the words of spoken Hindi are understood by an Urdu speaking person. The requirement of Section 32(3) of POTA is that the confession should be recorded in a free atmosphere and in the language which the person understands. The confessions have been recorded in Devnagari script on a computer. The choice of words used does not indicate that the

confession was not recorded in the same language which was used by the person making the confession. Use of same language/words cannot by itself suggest that the actual words by the appellants were not recorded.

53. In the present case, PW-13 was not specifically cross-examined on the said aspect and no questions were put to him. The requirement of sub-section (1) to Section 32 of POTA is that the police officer not lower than the Superintendent of Police should record the confession in writing or in any other mechanical or electronic device. We do not think that the Section postulates that the police officer cannot take help or assistance of a third person to record the said confession in writing or on mechanical or electronic device. There is no such bar or prohibition. Thus the fact that PW-13 had taken assistance of a typist to record the confession cannot be a ground to throw out the same from our consideration.

54. The Division Bench judgment of this Court in *Harbans Singh (surpa)* was made subject matter of challenge before the Supreme Court but the appeal was rejected in the decision reported as *Harbans Singh vs. State (Govt. of NCT of Delhi)* (2007) 12 SCC 535. In the said case, the following contention was raised and answered:-

"12. She stated that she did not tell the accused persons that at this stage they could call their counsel and consult them and that she did not tell them that they could be provided with an advocate on that day at government expense. She said that she herself made no attempt to provide any advocate to the accused. Admittedly, the two accused persons were sent to judicial custody immediately after the confession. The CMM, however, stated that she did not tell the accused persons that they would not be sent to police custody even if they did not confirm the statements. She stated that she had completely satisfied herself that the accused persons were free from all duress and coercion and had not conducted the proceedings in a mechanical way. She stated that she had gone through the provisions of POTA and only thereafter conducted the proceedings.

13. The High Court has recorded a finding that the prosecution has sufficiently proved that the confession of the accused was genuine and it was made and confirmed by the Chief Metropolitan Magistrate as per the provisions of Section 32 of POTA. As seen from the record, the recovery of the money immediately after the transaction in question has been sufficiently proved...."

55. At this stage, we may go back in point of time and refer to another decision of the Supreme Court in *Mohmed Amin Alias Amin Choteli Rahim Miyan Shaikh and Anr. vs. Central Bureau of Investigation* (2008) 15 SCC 49. The appellants/accused therein were facing prosecution under TADA. The Supreme Court made reference to their earlier decisions in *Gurdeep Singh vs. State (Delhi Admn.)* (2000) 1 SCC 498, *S.N. Dube vs. N.B. Bhoir* (2000) 2 SCC 254, *Lal*

Singh vs. State of Gujarat (2001) 3 SCC 221, *Jayawant Dattatraaya*

Suryarao vs. State of Maharashtra (2001) 10 SCC 109, *Jameel*

Ahmed vs. State of Rajasthan (2003) 9 SCC 673, and other cases and

it was opined:

“31. The ratio of the above noted judgments is that if a person accused of an offence under the Act makes a confession before a police officer not below the rank of Superintendent of Police and the same is recorded by the officer concerned in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which, sounds or images can be reproduced, then such confession is admissible in the trial of the maker as also the co-accused, abettor or conspirator not only for an offence under the Act but also for offence(s) under other enactments, provided that the co-accused, abettor or conspirator is charged and tried in the same case along with the accused and the court is satisfied that requirements of the Act and the Rules have been complied with. Whether such confession requires corroboration depends on the facts of the given case. If the court is convinced that the probative value of the confession is such that it does not require corroboration then the same can be used for convicting the maker and/or the co-accused under the Act and/or the other enactments without independent corroboration.

32. If a person accused of committing an offence under the Act challenges his confession on the ground that it was not made voluntarily, the initial burden is on the prosecution to prove that all requirements under Section 15 of the Act and Rule 15 of the Rules have been complied with. Once this is done, the burden shifts on the accused person and it is for him to prove that the confession was not made voluntarily or that the same is not truthful and if he adduces evidence during the trial to substantiate his allegation that the confession was not voluntary then the court has to carefully scrutinise the entire evidence and surrounding circumstances and determine whether or not the confession was voluntary.

The confession made under Section 15 of the Act cannot be discarded only on the ground of violation of the guidelines laid down in *Kartar Singh case* [(1994) 3 SCC 569: 1994 SCC (Cri) 899] because the same have not been incorporated in the Act and/or the Rules.

57. At the cost of repetition, it deserves to be mentioned that before recording confession, each of the appellants was told by the officers concerned that he is not bound to make confession and that if he does so, it may be used as evidence against him. The officers concerned also recorded their satisfaction in writing that the accused was making confession voluntarily. The statements of the confessing appellants were recorded in a room where no one except the Superintendents of Police, CBI concerned and stenographers were present. After completion of recording, statement made by the individual accused was read over to him and he appended the signatures after finding that the recording was correct. Thereafter, the officers concerned again noted that the confessions have been made voluntarily, appended their signatures and sent confessional statements to the Chief Metropolitan Magistrate, Delhi for being forwarded to the Designated Court at Ahmedabad. Appellants A-4 to A-8 were not produced before the Chief Metropolitan Magistrate because their confessions were recorded before the judgment of *Kartar Singh case* [(1994) 3 SCC 569 : 1994 SCC (Cri) 899] but Appellant A-10 was so produced on 25-7-1996 as per the guidelines laid down in *Kartar Singh case* [(1994) 3 SCC 569 : 1994 SCC (Cri) 899] . It is thus evident that there was total compliance with the mandate of law in recording the confessions of six appellants."

56. In light of the aforesaid decisions, we accept and hold that the confessional statements of A1 to A5, Ex. PW13/F; H, J, L and N, can be relied upon as meeting the mandates of POTA. We are inclined to

hold that the provisions of Section 32 of POTA have been complied

with. The requirements of Section 52 have been also substantially complied with though there have been some lapses in the case of A1 to A3. We reject the submission of the appellants A1 to A5 that the confessional statements have been recorded under force, coercion or by way of inducement. As noticed above, the confessional statements were not retracted from at any time by the appellants. It is only in their Section 313 Cr.P.C statements, in response to question No. 83, it was stated that there was torture and pressure by the police to sign some papers which were prepared by the Investigating Officer himself and later on produced as confessional statements. A1 in his statement, under Section 313, has stated that PW36, ACMM, Tis Hazari, had only enquired about age and parentage (see answers to questions 84 to 92). Similarly A2 and A3, in response to question No. 84 and 85 have stated that they were tortured and pressurized by police to sign some papers which were prepared by the Investigating officer and later on produced as confessional statements. With regard to the proceedings before the ACMM, they stated that he had enquired about the age and parentage only. A4 and A5 in their statements under Section 313 Cr.P.C. have averred on similar lines. These statements were recorded in September, 2010, that is nearly 7 years after the confessional statements were recorded.

57. This brings us to the contents of the confessional statements and whether they were "sufficiently" corroborated by the evidence placed on record, in order to ensure that these can be relied upon for the purpose of deciding the question of guilt. As observed above, the averments/facts mentioned in the confession can be accepted or relied upon if the said facts are generally corroborated or can be supported by some other evidence or material. This is the safety test, which has to be applied.

58. A1, in his confessional statement had given names of some terrorists operating in Kashmir including those from across the border. He had crossed the line of control and visited Muzaffarabad and Queta for training before returning. He accepted his connection with Jaish-e-Mohammed and defined his primary role to be the facilitator in establishing contacts on both sides and to bring money to terrorists. In October, 2002, Khurshid Ahmed Butt had purchased the truck JK03 0153 from hawala money and the said truck was being used for carrying arms and money for terrorist activities. It was mainly driven by Khurshid himself. While in Delhi, A-1 stayed at Mirza Hotel and Seema Lodge at Jama Masjid area under the assumed name of Gulzar Ahmed Butt. In July, 2003, he had purchased a new sim card bearing No. 9811489261 and informed his contacts about his number. He had

91

called Habib and asked him to come to Azadpur fruit market. When he saw Habib, he recognized that Habib was the same person with whom he had taken training in Afghanistan but there he was known as Aslam. Later on he came to know that Habib's actual name was Rafique r/o Quaziwada, Sikandrabad, U.P. He and Khurshid had bought a big bag which contained rifles, magazines, pistols, detonators, RCDs and bullets etc. which was given to them along with Rs.10 lacs. The confession of A1 (Ex. PW13/F) further records that Rashid had contacted him and told him to bring a terrorist of Pakistani origin named Zahoor who had to execute terrorist activities in Mumbai, to Delhi. A-1 brought Zahoor to Delhi and introduced him to Habib and informed Rashid on phone. On 25th August, 2003, Rashid asked him to collect Rs.20 lacs. For this he got in touch with one Rahul in Dubai for the money, who asked him to wait. Rashid contacted A1 on his mobile phone on 26th August, 2003. A1 received a call from telephone No. 35888654 and asked him to come to Petrol Pump near Azadpur fruits market at 2.00 PM. He went there and collected Rs.10 lacs from a person sitting in a car. Thereafter, at 5 00'clock, he received another call from the same number and was asked to come to a location where remaining amount of Rs.10 lacs was given to him. Thereupon, he received a call from Rahul's wife for

verification regarding whether the money had been received. As directed by Rashid, he had purchased computer and electronic gadgets from Nehru Place for taking them to Kashmir. Long range cordless phones and few other purchases were made from Lajpat Rai Market. The remaining money and articles were lying at A-44, Mahindra Park, Delhi, the place provided by Khurshid. On 31st August, 2003, the aforesaid articles were recovered including remaining money of Rs.19, 20,000/- approximately. Remaining portions of the said confessional statements are not relevant as the said statements cannot be used to establish involvement of A4 and A5.

59. We accept the prosecution version that A-1 had adopted the name Gulzar. This is proved from the hotel registers (Ex. PW-5/B1 to B2). The telephone number 9811489261 obtained in the name of Gulzar by A-1 is also proved as telephone instrument with the said number was seized from him at the time of his arrest vide personal search memo Ex. PW-35/P.

60. The last part of the confession (Ex. PW13/J) states that Khurshid had directed A1 to remain in Delhi because consignment of arms and ammunitions were to reach on 28th August, 2003 and were to be handed over to Habib. Thereafter, the truck driver Parvez (A-2) contacted him on his mobile phone but A1 could not contact Habib

and, therefore, did not take delivery of the said consignment. Once again on 30th August, 2003, Parvez A-2 contacted and asked him to take delivery of the consignment from the truck which was parked at Sadar Bazar at Qutub Road. A1 spoke to Habib on his mobile No. 98914230992. Thereafter, he went to take delivery of the consignment but was arrested with Parvez and Firdaus @ Farooz A2 and A3. Consignment was to be handed over to Habib and Zahoor who were killed in the encounter at Indraprastha Park, Nizamuddin.

61. Parvez A-2, in his confession has stated that he had worked as bus conductor for four years before he started driving bus/trucks. He became acquainted with Khurshid Ahmed while he used to supply fruits in his truck JK 03 0153. On 26th August, 2003, Khurshid had come to his house with the consignment to be delivered at Delhi. On 30th August, 2003, Khurshid revealed to him that he worked for Jaish-e-Mohammed and his truck was used for terrorist activities. A-2 was implored to join for the cause of Jihad in Kashmir. After hearing Khurshid, A2 became passionate and agreed. However, he could not bring the consignment of arms to Delhi immediately as he had to attend a marriage in his relation. He spoke to Feroz (A3) who agreed to accompany him for the sake of Jihad and the community. On 27th August, 2003, Khurshid reached his house. After all the boxes were

95

loaded, he informed that three boxes had been kept in the tool box on the roof of the truck. They contained fruit babughosha and one of the boxes had arms and ammunitions in it along with babughosha. He informed that a short heighted person named Gulzar would come to take the aforesaid boxes at Azadpur Mandi. Khurshid gave mobile No. 811489261 of Gulzar and instructed him to speak to Gulzar after reaching Delhi. On 28th August, 2003, after he had crossed Karnal, A-2 spoke on telephone to Gulzar and informed him that they would be reaching Azadpur by 9.30 PM. Thereafter he informed Gulzar that he would not be able to reach the mandi in time. When they reached Azadpur, he again made a call to Gulzar who told them that he would come on the next day, but he did not come. They parked the truck at Qutub Road, Sadar Bazar with the three boxes. On 30th August, 2003, he made a call to Gulzar who informed him that he would come in the evening to take the articles. In the evening, a short height person came, who told his name as Gulzar, and talked about the articles after giving Khurshid's reference. They unloaded the box of arms and ammunition and two other boxes, when they were apprehended.

62. A3, Farooz Ahmed has stated in his confession that he started his work as an agricultural labour and helper for the trucks, in his village Shahbad, Payli, Kashmir. He had studied together with Parvez

in school for three years and knew Khurshid Ahmed from Darangbal village, Pampor as they worked on different trucks. On 26th August 2003 Parvez instigated him to work for jihad and take consignments of arms and ammunition for Jaish-e-Mohammad organization by concealing them in fruit boxes in the Truck No. JK-03-0153 with Parveez. On 27th August, 2003 Khurshid came to A-2 in his truck full of fruit boxes and told A-2 that three boxes are kept separately in the tool box on the roof of the truck in which 'baboghosas' were kept and out of them one box contained arms and ammunition which were to be given to a short height person named Gulzar (A-1), in Azadpur Mandi, Delhi. At that time Khurshid was with A-2. On 28th August 2003 truck was brought in Azadpur Mandi, Delhi. A-2 had called Gulzar near Karnal and was told that the box would be collected the next day. However, the next day box was not collected. Then, on 30th August Gulzar said he would collect the box in the evening and the location was told to him. In the evening, a short height person who, A-2 apprised him, was Gulzar, came and, with A-2's help; checked the box. The three were unloading the boxes when the police apprehended them.

63. As far as recovery of hand grenade etc. from the truck at Qutub Road Parking is concerned, there is corroborative evidence and

material. The statements made by A2 and A3. (Ex. PW13/H and PW13/J), to this extent, should be therefore, accepted. In fact, even in the confessional statements (Ex. PW13/H & J), there is sufficient evidence or material to show that two of them i.e. the truck driver and the cleaner had transported the ammunition and brought it to Delhi which were seized in the operation at Qutub Road Parking, Sadar Bazar on 30th August, 2003. The other portions of Ex. PW13/H and PW13/J, pertain to telephonic conversation between A2 and A1 and the fact that Khurshid, owner of the truck had given telephone number of A1 to A2. The factum relating to telephonic conversation is also proved and established. From the conduct of A2 and A3, when they climbed on the truck with A1, opening of the three boxes, thereafter when the contents thereof were shown to A1, it transpires that A2 and A3 were aware of and had knowledge about the contents and that these were arms and ammunition. Evidence discussed above proves that the truck had entered Azadpur Mandi with consignment of apples. Thereafter the truck was parked at Qutub Road Parking at Sadar Bazar. Apples were not found to be loaded at the time when the police party had conducted the operation on 30th August, 2003, but only three boxes of babughoshas were found. The said boxes were placed in the tool box. This shows that A2 and A3 knew and were aware that these

three boxes were not to be unloaded or sold to traders and this consignment was meant for a specific person i.e. A1. Other portion of the confession Ex. PW13/H and PW13/J elucidate that A2 and A3 were propelled and had agreed to carry the consignment after speaking to Khurshid, the owner of the truck who was also member of Jaish-e-Mohammad. The confessions do not show that A2 and A3 accepted involvement in other offences or had earlier transported arms and ammunition or were involved in transportation of hawala money. This is an indicator that there was no force/coercion and the statements were voluntarily and were not recorded under threat and coercion.

64. The confession made by A1 has several parts and is much expatiated. We need not refer to the earlier part of the confession which relates to his past activities and involvement in terrorist activities, hawala transactions etc. For the purpose of present prosecution, Ex. PW13/F by A1 is relevant to the extent it records that A1 knew Khurshid Ahmed, owner of the truck and he was aware that the truck was carrying ammunition. A1 was also in touch with Habib @ Rafique, brother of A4 and A5. He had purchased sim card 9811489261 and had made call to Rashid at Dubai and Rashid had spoken to him through satellite phone. He had stated that he had earlier given a big bag containing AK47 rifles and ammunitions etc. to

Habib @ Rafique and his brother Atik. It is pertinent to mention here that this portion of the confession cannot be used against Atik/A5, the co-convict/accused (see *Navjot Sandhu* supra). A1 has confessed that he was called by Parvez A-2 on his mobile phone, after the truck had reached Delhi on 28th August, 2003. However, at that time he could not get in touch with Rafique/Habib and, therefore, did not receive delivery of consignment. On 30th August, 2003, A2 had asked him to take the delivery and apprised that he had parked the truck at Sadar Bazar, Qutub Road Parking. In this regard, he had spoken to Habib @ Rafique on his mobile No. 9891423092 and had gone to receive the consignment at Qutub Road Parking, Sadar Bazar, when he was apprehended. Thereafter, there was encounter at Indraprastha Park, Ring Road, Nizamuddin, where Rafique @ Habib and Zahoor died. Thus, as per the version of A1, the consignment consisting of grenade etc. was to be given to Rafique @ Habib. A1 had not said from where and how and for what purpose the ammunition was to be used. A2 and A3 were completely silent about the same in their confessions. A1 had recognized dead bodies of Rafique @ Habib and Zahoor at the AIIMS Mortuary (see statement of PW2 Const. Arvind Singh, Ex. PW2/A and PW2/B and Identification Memo Ex. PW49/B).

100

Confessions of A-4 and A-5 and Conspiracy with A-1 to A-3/others.

65. This brings us to the involvement of A4 and A5 and their confessional statements and whether they were part of the conspiracy which included transportation and bringing of the consignment of ammunition to Delhi and its delivery to their brother Rafique @ Habib. It is accepted and admitted position that A4 and A5 are brothers and Rafique @ Habib was also one of their brothers. It has also been proved beyond doubt that A4 and A5 had gone to Pakistan in September, 2001 on valid passport and visa, but their passports did not have the requisite stamp of re-entry into India. This is proved from the statement of B.N. Dass (PW18), Jai Kishan Dahiya (PW19) and Hari Prakash Tyagi (PW-20). B. N. Dass (PW18), Superintendent Passport Office, Ghaziabad, U.P., has deposed that he had furnished passport details of A4 and A5 vide letter dated 29th September, 2003 (Ex. PW18/A). PW-19 has testified to the passport being issued to the said appellants. PW-20, Hari Prakash Tyagi from Bureau of Immigration, Attari, has deposed that they had furnished information vide letter dated 24th September, 2003 (Ex. PW19/B) regarding issue of passports to A4 and A5. PW-20 has deposed that he had worked at Immigration Counter at Attari Rail, Amritsar. The exit of Ateeq to Pakistan was

dated 13th September, 2001 but the register shows that the said person had not returned via rail through Attari from Pakistan. He had the details of passport, the visa and that A5 was to go to Karachi, Pakistan. Similarly A4, Mohd. Riaz had left India and entered into Pakistan on 13th September, 2001. But as per the entries in their original record, he had not returned. The entries in Register in question were marked Ex. PW20/A and PW20/C. A4 and A5 were confronted with the aforesaid factual position when their statements under Section 313 Cr.P.C. were recorded and they had accepted that they had gone to Pakistan to visit their maternal grandfather at Karachi, on a three months visa. In response to 'why there were no entries of their return to India' they i.e A-4 and A-5 had stated as under:-

"Ans. It is correct that we had gone to Pakistan on 13.9.2001, in the first week of December 2001 we had approached the Ministry of External affairs (Indian Division) Govt. of Pakistan for the extension of visa and had submitted passports and were to collect the passport on 13.12.2001. On 13.12.2001 when we went to the ministry, we found the division was closed and it was also informed to us because of attack on Indian Parliament no business was being transacted and we were asked to come after few days to collect the passport. Since we were not having passport and no intimation was given to the local police regarding our further stay, the local police raided the house of my maternal grandfather to apprehend us. We escaped from the back door of the house and our maternal grandfather managed our safe return to India through a smuggler who took us illegally from Pakistan and left

us at Bikaner and we came to our house in the 2nd week of February, 2002.”

66. The reply clearly indicates that they had stayed back in Pakistan much beyond 3 months and their re-entry into India was not registered and, was illegal.

67. Confessional statement of Atique (A-5), Ex.PW-13/O is more expatiated in comparison to A-4's confessional statement, (Ex.PW-13/M). A5 has stated that he went to Pakistan and undertook training in Jais-e- Mohammad organized camps. He ultimately returned to India through Bangladesh in January, 2003. He has purportedly also confessed that his deceased brother Rafiq @ Habib had apprised him and A-4 that terrorist would strike at Mumbai and for that all three of them had gone to that city to arrange for a hideout. Under the fake identity of Khalik a flat was purchased at Thane under the pretext of 'jari workshop' but in reality for concealing of arms and ammunitions and for stay of 'Fidayeen' terrorists from Pakistan. A-5 resided at that place, under the fake identity of Khalik, and maintained communication with some terrorists through e-mail, telephone and other modes of communication. He maintained contact with his brother Rafiq @ Habib on mobile numbers 9811759307, 9891469114 and 9891423092. On 14/15th July, 2003 he, along with Rafiq, had gone to Chandni Chowk and brought Hawala money of Rs.2 lacs with them.

On 19/20th July, 2003, A-5 and Rafiq had taken a bag containing 01 AK Rifle, 02 pistols, live cartridges in sufficient quantity, some detonators and 03 remote control devices from a person, namely, Gulzar. At that time there was another person, whose name he did not know. They had spent some money out of Rs.2 lacs. The remaining amount of Rs.85,000/- along with 03 detonators and 03 remote control devices was recovered from their house. On 5/6th August, 2003, Rafiq had shown A-5, the Mumbai Stock Exchange and informed that this building would be their target for 'Fidayeen' attack. Thereafter, Rafiq had gone to Sikandrabad and they talked regularly on the phone. Rafiq had apprised that a hideout has been arranged in Sangam Park, Rana Pratap Bagh, Delhi and a plan to purchase a truck in which arms, ammunitions and terrorists would be taken to Mumbai was disclosed. The source of funding would be Pakistan. On 26th August, 2003, Rafiq @ Habib informed him that Zahoor, a terrorist from Pakistan would meet him at Rana Pratap Bagh and in a few days consignment of arms and ammunitions would arrive and some more terrorists would join. Rafiq had called A-5 to Delhi to take the consignment of arms and ammunitions and terrorists to Mumbai. On 29th August, 2003, he had left Mumbai to reach Sikandrabad on 30th August, 2003. A-4 was present in the house at the time of arrest.

68. From the statement of A-4 and A-5, recorded under Section 313 Cr.P.C., it is apparent that they admit the position that they had gone to Pakistan on three months' visa on 13/14th September, 2001 and had continued to stay there. Their re-entry in India is not recorded. A-4 and A-5 accept that they did not return to India legally but clandestinely and surreptitiously. They claim that the said re-entry was in the second week of February, 2002 and not in January, 2003. Their reasons for overstay in Pakistan, as per the confessional statements, was to undertake training in terrorist camps after they had joined 'Jais-e-Mohammad'. In view of the statements made by A-4 and A-5, under Section 313 Cr.P.C., their over stay has to be accepted and the confessional statements stand corroborated. There is recovery of detonators and remote control devices from the house in Sikandrabad on 31st August, 2003. However, no fire arms or live explosives, which could be used for firing, were recovered or detected. Rafiq, brother of A-4 and A-5, had died in the firing in the night intervening 30-31st August, 2003.

69. At the same time, there is no evidence or material to show that A-4 and A-5, after their return to India, in February, 2002 or January, 2003 had directly been involved or were indulging in any specific terrorist act or operation. There is further no evidence to corroborate

the alleged planning of terrorist strikes in the city of Mumbai, Maharashtra. The prosecution has not placed on record any evidence that A-4 and A-5 were directly in touch with A-1 or were contacting A-1 on telephone. There is no evidence to show that A-4 and A-5 had rented a place at Thane, though in the expatiated confessional statement details of the said flats had been provided. There is no material to show that A-5 had assumed a fake identity of Khalik for taking the flat. There is no incriminating material or evidence placed on record viz. the mentioned flat, tenancy, fake identity etc..

70. In paragraph 57 above, we have referred to 'safety test' of sufficient corroboration of confessional statements. It requires comparison with surrounding circumstances and probabilities and does not imply meticulous examination of entire material. Broad and general trend may be sufficient (see paragraph 40). The 'safety test' cannot be put in a strait jacket. On some aspects by their very nature, evidence would be difficult or impossible to collect and produce. For example it would be willy-nilly impossible to collect evidence of terrorist camps or membership/instructions from terrorist organization based abroad, how they operate and other related information. But on other aspects, like fake identity adopted in India, tenancy right, telephone conversations in India etc. (direct and relevant evidence).

may be available. Investigation should endeavor to collect and produce the best and most reliable evidence. Complacency and lack of investigation/verification and reliance on confession alone may lead to difficulties for the prosecution. A practical and pragmatic approach is required but the Court should be satisfied that the confession and parts thereof relied upon are true and correct. Failure to investigate, collect and produce evidence which should be available, on the pretext that confession on the said aspect is relied upon, can raise suspicion and doubt viz. the prosecution case. Such doubt if raised, accrues/comes to the benefit of the accused, i.e., A-4 and A-5 in the present case.

71. The next question is whether A-4 and A-5 were part of the criminal conspiracy in transportation of the hand grenades etc. which were recovered and seized from A-1 to A-3. As discussed above, we do not find any material or evidence to prove and establish that hand grenades, devices and launcher recovered and seized on 30th August, 2003 from A-1 to A-3 were to be used in a pre-determined or verifiable terrorist attack, which had already been planned. The prosecution's claim that the movement of fire arms i.e. hand grenades etc. was for terrorist attacks at Mumbai/Bombay Stock Exchange is not supported by any evidence other than the confessional statements of A-4 and A-5. There is no evidence regarding adoption of fake identity of Khalik by

A5, acquisition of flat at Mumbai etc. for the terrorist strike. The said portion of the confessional statements, as we have recorded, does not inspire confidence and cannot be accepted in view of lack of slightest corroboration. We are not inclined to accept the prosecution version that A-4 and A-5 were part or members of the conspiracy, which had resulted in transportation and sending of hand grenades, grenade shells and grenade launcher to Delhi. A-4 and A-5 are entitled to benefit of doubt in view of lack of evidence to establish the said charge beyond the realm of suspicion. The fact that A-4 and A-5 were brothers of Rafiq @ Habib does not and cannot, in the absence of other material and evidence, prove or establish conspiracy amongst of A-4 and A-5 and A-1 to A-3 beyond doubt. No fire arms or live ammunition were recovered from the house. What happened to the fire arms and explosives allegedly delivered in a bag on 19/20th July, 2003 by Gulzar(A1) is not indicated. Investigation did not examine and verify the said facts or elaborate what happened to the said fire-arms and explosives.

72. Criminal conspiracy, as defined in Section 120A IPC, requires agreement between two or more persons to do or cause to do an illegal act or an act, which is not illegal, by illegal means. The gist of an offence is that an agreement is to break the law by doing an illegal act

or by indulging in illegal means. Parties will be guilty of criminal conspiracy even if the illegal act agreed to be done has not been done. Further, the illegal act may consist of series of illegal means or acts. The offence continues to be committed till the conspiratorial agreement is terminated by performance, abandonment, and frustration or otherwise. The agreement may be express or implied or partly so, but mere knowledge or even discussion of a plan is *per se* not enough. We are conscious that when there is unity of object and purpose, the offence of conspiracy is proved, though there may be plurality of means, sometimes even unknown to some of the members. It is not necessary that all conspirators must know each and every detail. It is not necessary to prove actual words of communication and evidence as to transmissions of thoughts. Sharing unlawful designs would be sufficient. Manifestation of agreement may be by way of meeting and communication. [see *Navjot Sandhu* (supra)]

73. In most cases it is difficult to get direct evidence on agreement to conspiracy and it has to be inferred from circumstances giving rise to a conclusive irresistible inference of an agreement to do an illegal act or legal act by illegal means. Surrounding circumstances, antecedents and subsequent conduct amongst other factors constitute relevant material, but one has to be cautious and not be swayed by the

belief that birds of the same feather flock together. Merely passive attitude towards an existing conspiracy or knowledge thereof is not sufficient. On the question of overt acts and rejecting invocation of theory of agency in *Navjot Sandhu* (supra) it was observed:-

“103. We do not think that the theory of agency can be extended thus far, that is to say, to find all the conspirators guilty of the actual offences committed in execution of the common design even if such offences were ultimately committed by some of them, without the participation of others. We are of the view that those who committed the offences pursuant to the conspiracy by indulging in various overt acts will be individually liable for those offences in addition to being liable for criminal conspiracy; but, the non-participant conspirators cannot be found guilty of the offence or offences committed by the other conspirators. There is hardly any scope for the application of the principle of agency in order to find the conspirators guilty of a substantive offence not committed by them. Criminal offences and punishments therefor are governed by the statute. The offender will be liable only if he comes within the plain terms of the penal statute. Criminal liability for an offence cannot be fastened by way of analogy or by extension of a common law principle.”

74. It was also observed as under:-

“108. Thus, a distinction was maintained between the conspiracy and the offences committed pursuant to the conspiracy. It is only in order to prove the existence of conspiracy and the parties to the conspiracy, that a rule of evidence is enacted in Section 10 based on the principle of agency. We may recall that Section 10 of the Evidence Act provides that anything said, done or written by one of the conspirators in reference to the common intention of all of them can be proved as a

110

relevant fact as against each of the conspirators, subject to the condition prescribed in the opening part of the section. Thus, the evidence which is in the nature of hearsay is made admissible on the principle that there is mutual agency amongst the conspirators. It is in the context of Section 10 that the relevant observations were made in the *first Caveeshar case* [1958 SCR 161: AIR 1957 SC 747: 1957 Cri LJ 1325] and *Nalini case* [(1999) 5 SCC 253: 1999 SCC (Cri) 691] at p. 517. In the former case, Jagannadhadas, J., after referring to the passage in *Roscoe's Criminal Evidence* (16th Ed.) that "an overt act committed by any one of the conspirators is sufficient, on the general principles of agency, to make it the act of all", observed that

"the principle underlying the reception of evidence under Section 10 of the Evidence Act of the statements, acts and writings of one co-conspirator as against the other is on the theory of agency" (SCR p. 205).

It was not held in those cases that the same principle of agency should be stretched further to make all the conspirators liable for the offensive acts done pursuant to the conspiracy, irrespective of their role and participation in the ultimate offensive acts. Whether or not the conspirators will be liable for substantive offences other than the conspiracy and, if so, to what extent and what punishment has to be given for the conspiracy and the other offences committed pursuant thereto, depend on the specific scheme and provisions of the penal law. The offence cannot be spelt out by applying the principle of agency if the statute does not say so. For instance, in the case of Section 34 IPC, the constructive liability for the crime is specifically fastened on each of those who participate in the crime in furtherance of the common intention. But Section 120-B does not convey that idea."

75. In the light of the aforesaid discussion, we do not think that there

is sufficient evidence to hold that A-4 and A-5 were part of the

111

conspiracy leading to seizure and recovery of the consignment from A-1 to A-3. However, they will be liable for having committed offences leading to recovery of the detonators and the remote control devices etc.

Provisions of IPC and POTA and their application.

76. The next aspect, which requires consideration and answer, relates to interpretation of sub-sections 3 and 5 to Section 3; Section 4 and Section 20 of POTA and Sections 121, 121A, 122 and 123 IPC and Sections 4 and 5 of the Explosive Substances Act. First, we will take up the provisions of IPC, which read as under:-

“121. Waging, or attempting to wage war, or abetting waging of war, against the Government of India.-- Whoever wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine.

Illustration. A joins an insurrection against the Government of India. A has committed the offence defined in this section.

121A. Conspiracy to commit offences punishable by section 121.-- Whoever within or without India conspires to commit any of the offences punishable by section 121, or conspires to overawe, by means of criminal force or the show of criminal force, the Central Government or any State Government, shall be punished with imprisonment for life, or with imprisonment of either description which may extend to ten years, and shall also be liable to fine.

Explanation. - To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.

122. Collecting arms, etc., with intention of waging war against the Government of India. -- Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Government of India, shall be punished with imprisonment for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

123. Concealing with intent to facilitate design to wage war. -- Whoever, by any act, or by any illegal omission, conceals the existence of a design to wage war against the Government of India, intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

77. Section 121 IPC provides for stringent punishment of death or imprisonment for life and fine, if a person wages war against Government of India or attempts or abets waging of such war. The expression "wages war against Government of India" requires elucidation and examination separately, but it is significant to note that attempt to wage war as well as actual waging of war both are covered under Section 121 IPC. However, preparation to wage war is not covered under the said section.

78. Section 121A is broader/wider than Section 121 and makes persons associated with the conspiracy to commit offences under Section 121 liable. The explanation to the said section states that to constitute conspiracy it is not necessary that an act or illegal omission

should have taken place. Offence under Section 121A is made out when the conspiracy is to overawe the Central Government by means of criminal force or show of criminal force. Under Section 121A IPC, the offender can be punished with imprisonment of life or with imprisonment of either description which may extend to ten years with fine.

79. Section 122 IPC makes a person liable if he collects men, arms or ammunitions or otherwise prepares to wage war with the intention of either waging war or being prepared to wage war against the Government of India. In such cases, the offender can be punished with imprisonment for life or imprisonment of either description for a term not exceeding 10 years and fine.

80. Section 123 IPC states that whoever by an act or illegal omission, conceals the existence of a design to wage war against the Government of India and intends by such concealment to facilitate or knows that such concealment is likely to facilitate waging war shall be punished with a term of either description which may extend to 10 years with fine.

81. The expression "waging war" or "waging of war" has been elucidated in the case of *Navjot Sandhu*:-

"282. On the analysis of the various passages found in the cases and commentaries referred to above, what are the highlights we come across? The most important is the intention or purpose behind the defiance or rising against the Government. As said by Foster, "The true criterion is *quo animo* did the parties assemble?" In other words the intention and purpose of the warlike operations directed against the governmental machinery is an important criterion. If the object and purpose is to strike at the sovereign authority of the Ruler or the Government to achieve a public and general purpose in contradistinction to a private and a particular purpose, that is an important indicia of waging war. Of course, the purpose must be intended to be achieved by use of force and arms and by defiance of government troops or armed personnel deployed to maintain public tranquillity. Though the *modus operandi* of preparing for the offensive act against the Government may be quite akin to the preparation in a regular war, it is often said that the number of force, the manner in which they are arrayed, armed or equipped is immaterial. Even a limited number of persons who carry powerful explosives and missiles without regard to their own safety can cause more devastating damage than a large group of persons armed with ordinary weapons or firearms. Then, the other settled proposition is that there need not be the pomp and pageantry usually associated with war such as the offenders forming themselves in battle line and arraying in a warlike manner. Even a stealthy operation to overwhelm the armed or other personnel deployed by the Government and to attain a commanding position by which terms could be dictated to the Government might very well be an act of waging war."

82. The Supreme Court disapproved with the view expressed in some authorities and in earlier decisions that "neither the number engaged, nor the force employed, nor the species of weapons with which they may be armed" is really material to prove the offence of levying/waging war. It was observed that these are not completely

irrelevant factors and they certainly help the Court in gauging whether the intention was to wage war or not. The Supreme Court held that fire power or devastating potentials of fire and explosives or the scale of violence that follows may at times become useful indicators as to the nature of the act. It further clarified that concept of war in these subsections includes rebellion or civil uprising and is not to be understood in the conventional sense as war between two nations or sovereign entities. The normative phenomenon of war does not fit into the ambit or breach of these sections. Pertinently, the Supreme Court highlighted that:

“290. ... The High Court observed: “If not acts of waging war, what they did would certainly be acts of abetting the waging of war.” In this connection, we may clarify that the expression “abetment” shall not be construed to be an act of instigating the other conspirators (*i.e.* the deceased terrorists). There is another shade of meaning to “abetment” given in Section 107 IPC. It is clause *secondly* of Section 107 which is attracted in the case of Afzal. We quote the relevant portion of Section 107 IPC, which reads as follows:

“107. A person abets the doing of a thing, who—

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing;”

As criminal acts took place pursuant to the conspiracy, the appellant, as a party to the conspiracy, shall be deemed to have abetted the offence. In fact, he took an active part in a series of steps taken to pursue the objective of conspiracy. The offence of abetting the

waging of war, having regard to the extraordinary facts and circumstances of this case, justifies the imposition of capital punishment and therefore the judgment of the High Court in regard to the conviction and sentence of Afzal under Section 121 IPC shall stand.”

83. Similarly, in the case of *Mohd. Ajmal Amir Kasab v. State of Maharashtra* (2012) 9 SCC 1 it was recapitulated that:-

“ 541. In *Navjot Sandhu* [(2005) 11 SCC 600 : 2005 SCC (Cri) 1715] , the issue of “waging war” against the Government of India has also been considered in relation to terrorist acts and in that regard the Court observed and held as follows: (SCC pp. 767-68, paras 275-78)

“275. War, terrorism and violent acts to overawe the established Government have many things in common. It is not too easy to distinguish them....

276. It has been aptly said by Sir J.F. Stephen:

‘... Unlawful assemblies, riots, insurrections, rebellions, levying of war are offences which run into each other and not capable of being marked off by perfectly definite boundaries. All of them have in common one feature, namely, that the normal tranquillity of a civilised society is, in each of the cases mentioned, disturbed either by actual force or at least by the show and threat of it.’ [*A History of the Criminal Law of England*, Vol. 3 at p. 242.]

277. To this list has to be added ‘terrorist acts’ which are so conspicuous nowadays. Though every terrorist act does not amount to waging war, certain terrorist acts can also constitute the offence of waging war and there is no dichotomy between the two. Terrorist acts can manifest themselves into acts of war. According to the learned Senior Counsel for the State, terrorist acts prompted by an intention to strike at the sovereign authority of the State/Government, tantamount to waging war irrespective of the number involved or the force employed.

278. It is seen that the first limb of Section 3(1) of POTA—

'3. (1)(a) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever....'

and the acts of waging war have overlapping features. However, the degree of animus or intent and the magnitude of the acts done or attempted to be done would assume some relevance in order to consider whether the terrorist acts give rise to a state of war. Yet, the demarcating line is by no means clear, much less transparent. It is often a difference in degree. The distinction gets thinner if a comparison is made of terrorist acts with the acts aimed at overawing the Government by means of criminal force. Conspiracy to commit the latter offence is covered by Section 121-A."

84. As far as A-1 to A-3 are concerned, recoveries of the explosives from them consisted 10 hand grenades, 10 grenades shell and a grenade launcher. The nature of the explosives recovered is a relevant and important circumstance. The said explosives cannot be used for 'smaller' offences and are deadly weapons, mostly used by armies in field operations. These can cause massive and mass destruction. It is obvious that the intent and purpose for transporting and bringing 10 hand grenades with grenade launcher to Delhi was with the ulterior motive and purpose. The ammunitions recovered were meant to be used for terrorist activities of devastating nature to shake up and strike

at the Government of India.

85. Counsel for the appellants A-1 to A-3 had argued that transportation of the hand grenades etc. to Delhi does not amount to attempt of waging war and at least A-2 and A-3 had no intention or *mens rea* to wage war against the Government of India.

86. The distinction between attempt and preparation can be subtle and thin, though text books and judgments have tried to demarcate and clearly elucidate the difference in the two stages. The word 'attempt' is nowhere defined in IPC. One often quoted and elaborate definition is in Stephen's Digest of Criminal Law which defines "an attempt to constitute a crime is an act done with intent to commit that crime and forming part of series of acts which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined; but depends upon the circumstances of each particular case. An act done with intent to commit a crime, the commission of which in the manner proposed was, in fact, impossible, is an attempt to commit that crime. The offence of attempting to commit a crime may be committed in cases in which the offender voluntarily desists from the actual commission of the crime itself." Jurist Livingston states that an 'attempt' is made punishable, because every 'attempt', although it fails of success, must create alarm, which of itself is an injury, and the moral guilt of the offender is the same as

if he had succeeded. (See Ratanlal Dhirajlal, *Law of Crimes*, 25th ed. 2002)

87. Through *R. MacCREA* ILR 15 All 173 came a paradigm shift in understanding of 'Attempt' as contemplated under Section 511 IPC which was held to cover not only penultimate act towards completion of offence but those acts done in the course of the attempt to commit the offence, with the intent to commit it. It laid down that "the acts whereby those preparation may be brought to bear upon the mind may be several in point of number, and yet the first act after preparation is completed, if criminal in itself, will be, beyond all doubt, equally an attempt with the ninety and ninth act in the series." Petitioner MacCrea argued that "beyond those acts there would necessarily have followed several other acts, some of them to be done by himself or by Asad Ali, extending over a period of time which might have amounted to two years" and hence it cannot be an 'attempt'. Reliance was placed on the English test, reverberated in host of Indian cases, to the effect that "attempt" amounts to 'taking of those steps which lead immediately to the commission of the offence' but the Court felt that 'the question is not one of mere proximity in time or place' as there could be very considerable interval of time. Differentiating between preparation and attempt it held that:

"There was a stage in which he was undoubtedly only making preparations, and had not got beyond the stage of preparation. There were such acts as those when he first commenced making inquiries from the Public Debt Office to find if the Note No.9764 was still outstanding; when he instituted inquiries at the Bahrampur Hospital as to the death of Hussain Ali Khan, and the disposal of his bedding. There were acts in the preparation stage. But a majority of the jury have found, and I agree with them, that MacCrea committed a long series of acts subsequent to that which showed a distinct intention to cheat; acts committed for the purpose and with the intent to bring all his preparations to bear upon the mind of the person to be deceived; that with those acts, beginning with the procuring of letters of administration setting out Asad Ali Khan as the lawful owner of Government promissory note No. 9764, the forwarding of those false letters of administration and draft notice for publication in the Gazette, had begun an attempt to cheat; that in that attempt he had committed more than one act of distinct crime and sufficiently near towards completion to arouse apprehension and alarm that the attempt, if not interrupted, would end in the commission of the offence. I do not hold, and have no hesitation in saying, that s.511 was never meant to cover only the penultimate act towards completion of an offence and not acts precedent, if those acts are done with the intent to commit it and done towards its commission."

88. Blair J. added that definition under S. 511 IPC of attempt is of wider nature and implies that such an attempt may be made up of series of acts. "It may have been that preliminary inquiries and steps of other kinds must have intervened between the act of deception and its entire success" but that still amounts to attempt.

121

89. *Abhayanand Mishra v. State of Bihar* AIR 1961 SC 1698

resounded this approach and laid down that 'the moment one commences to do an act with the necessary intention he commences his attempt'. It elucidated that:

"24. We may summarise our views about the construction of Section 511 IPC, thus: A person commits the offence of "attempt to commit a particular offence when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.

25. In the present case, the appellant intended to deceive the University and obtain the necessary permission and the admission card and, not only sent an application for permission to sit at the university examination, but also followed it up, on getting the necessary permission, by remitting the necessary fees and sending the copies of his photograph, on the receipt of which the University did issue the admission card. There is therefore hardly any scope for saying that what the appellant had actually done did not amount to his attempting to commit the offence and had not gone beyond the stage of preparation. The preparation was complete when he had prepared the application for the purpose of submission to the University. The moment he despatched it, he entered the realm of attempting to commit the offence of "cheating". He did succeed in deceiving the University and inducing it to issue the admission card. He just failed to get it and sit for the examination because something beyond his control took place inasmuch as the University was informed about his being neither a graduate nor a teacher."

90. However, though *Malkiat Singh v. State of Punjab* (1969) 1 SC C157 the Supreme Court illustrated and expressed that:

“In order that a person may be convicted of an attempt to commit a crime, he must be shown first to have had an intention to commit the offence, and secondly to have done an act which constitutes the actus reus of a criminal attempt. The sufficiency of the actus reus is a question of law which had led to difficulty because of the necessity of distinguishing between acts which are merely preparatory to the commission of a crime, and those which are sufficiently proximate to it to amount to an attempt to commit it. If a man buys a box of matches, he cannot be convicted of attempted arson, however clearly it may be proved that he intended to set fire to a haystack at the time of the purchase. Nor can he be convicted of this offence if he approaches the stack with the matches in his pocket, but, if he bends down near the stack and light a match which he extinguishes on perceiving that he is being watched, he may be guilty of an attempt to burn it.”

91. It went on to hold that it is quite possible that appellants therein might have been warned that carrying the paddy was impermissible and they could have changed their minds between where they were caught and the border:

“7. The test for determining whether the act of the appellants constituted an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless. In the present case it is quite possible that the appellants may have been warned that they had no license to carry the paddy and they may have changed their mind at any place between Samalkha Barrier and the Delhi-Punjab boundary and not have proceeded further in their journey. Section 8 of the Essential Commodities Act states that “any person who attempts to contravene, or abets a contravention of, any order made under Section 3 shall

be deemed to have contravened that order". But there is no provision in the Act which makes a preparation to commit an offence punishable. It follows therefore that the appellants should not have been convicted under Section 7 of the Essential Commodities Act. "

(emphasis supplied)

92. In *State of Maharashtra v. Mohd. Yakub* (1980) 3 SCC 57, silver was being transported in a jeep and a truck towards the creek for alleged illegal exporting and at a point the vehicles halted and bundles were unloaded. A pistol was found and false names were given by the accused. Sarkaria J. distinguished *Malkiat Singh case* (Supra) and held that there the offender had ample opportunity to change his mind which was not present in this case and the test was case specific. It reiterated, the application of English test to be too narrow and held that attempt is a mixed question of law and facts, depending on the circumstances of the case. Sarkaria J. held as under:

" 13. Well then, what is an "attempt"? Kenny in his OUTLINES OF CRIMINAL LAW defined "attempt" to commit a crime as the "last proximate act which a person does towards the commission of an offence, the consummation of the offence being hindered by circumstances beyond his control". This definition is too narrow. What constitutes an "attempt" is a mixed question of law and fact, depending largely on the circumstances of the particular case. "Attempt" defies a precise and exact definition. Broadly speaking, all crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may

be divided into three stages. The first stage exists when the culprit first entertains the idea or intention to commit an offence. In the second stage, he makes preparations to commit it. The third stage is reached when the culprit takes deliberate overt steps to commit the offence. Such overt act or step in order to be "criminal" need not be the penultimate act towards the commission of the offence. It is sufficient if such act or acts were deliberately done, and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence. As pointed out in *Abhayanand Mishra v. State of Bihar* [AIR 1961 SC 1698 : (1962) 2 SCR 241 : (1961) 2 Cri LJ 822] there is a distinction between "preparation" and "attempt". Attempt begins where preparation ends. In sum, a person commits the offence of "attempt to commit a particular offence" when (i) he intends to commit that particular offence and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence."

Chinnappa Reddy J. clarified the position of law as under:

"31. In *Malkiat Singh v. State of Punjab* [(1969) 1 SCC 157, 160 : (1969) 2 SCR 663, 667 : 1970 Cri LJ 750] a truck which was carrying paddy, was stopped at Samalkha 32 miles from Delhi and about 15 miles from the Delhi-Punjab boundary. The question was whether the accused were attempting to export paddy from Punjab to Delhi. It was held that on the facts of the case, the offence of attempt had not been

125

committed. Ramaswami, J., observed: (SCC p. 160, para 7)

"The test for determining whether the act of the appellants constituted an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless. In the present case it is quite possible that the appellants may have been warned that they had no licence to carry the paddy and they may have changed their mind at any place between Samalkha Barrier and the Delhi-Punjab boundary and not have proceeded further in their journey."

We think that the test propounded by the first sentence should be understood with reference to the facts of the case. The offence alleged to be contemplated was so far removed from completion in that case that the offender had yet ample time and opportunity to change his mind and proceed no further, his earlier acts being completely harmless. That was what the court meant, and the reference to the appellants' in the sentence where the test is propounded makes it clear that the test is propounded with reference to the particular facts of the case and not as a general rule. Otherwise, in every case where an accused is interrupted at the last minute from completing the offence, he may always say that when he was interrupted he was about to change his mind."

93. This is the present position of law. However, in offences against the national security, both attempt and preparation are chargeable (but under different sections), though "preparation" under other provisions/offences as expounded in IPC may not be an offence.

94. In these circumstances and by applying the above stated ratio to A1 to A3, it has to be held that such a preparation had obliterated in the background and attempt had started. The reason is that the attempts itself can have different stages. Preparation precedes attempt and manifests itself into the second stage i.e. the attempt stage when the 1st step itself has already been taken. Attempt can consist of multiple stages and does not refer to last or the final stage. An attempt will not become preparation merely because the offender still has time to think over and may not actually execute the criminal act for any reason and has opportunity of time to retrace the final execution. The actual attempt in commission of the offence is not necessary, but the first step in the direction to actually commit the offence should be made.

95. In the present case, the first step was taken as grenades and grenade launcher etc. were transported by A2 and A3 for being delivered to A1. The transportation from Kashmir to Delhi was on the instructions from Khursheed and A1 was to collect them in Delhi. A1 got in touch with A2 and A3 and came to collect the consignment from them. A1 was to then deliver the consignment to third persons, i.e., Zahoor and Habib, who were supposed to take the delivery the same night at Milleunium Park. The nature and type of the explosives, the clandestine manner in which they were transported from Kashmir to

Delhi and delivered to A1, and the subsequent encounter, justify the finding that the first step and beyond had occurred. It was not just mere preparation. With the delivery, A2 and A3 had completed their part. They had handed over or were about to hand over the consignment. Thus, from that point they could not have retraced or controlled the use or rather misuse of the explosives. Use of hand grenades, grenade launcher etc. is well established and a matter of common knowledge, can result in prodigious loss of human lives and have a knock out or crushing effect on the morale and sentiments of the general public. They are explosives or weapons which can cause annihilation, massacre and massive/large scale destruction of human lives and property. In these circumstances, A1, A2 and A3 are guilty under Section 121 IPC and the said Section is attracted. Even otherwise a person who abets waging of war is covered and can be punished under Section 121 IPC. A1 to A3 will be equally guilty and liable under Section 121A IPC because the said transportation, delivery of hand grenades, grenade launcher etc. was a part of conspiracy. By the same reasoning and logic, A4 and A5 cannot be punished under Section 121 IPC. 23 detonators and 3 remote control devices were seized from their residence but no live ammunition, explosive or fire arms were seized. The material seized was stored at their residence but had not

been attached to active substance; no active substance was found and, therefore, were not ready for use. By themselves, the devices could not be used for waging war or to cause injuries or destroy property. It has not been established or proved that the detonators or the 3 remote control devices were to be used for carrying out any particular strike or were likely to be moved and utilized by third person in possession or who had access to active substance. In law and on facts, A4 and A5 could have stopped and not gone any further. Therefore, in our view, the first step had not occurred. Prosecution has not been able to prove that A4 and A5 were in conspiracy with A1 to A3. A4 and A5 would not, therefore, be guilty under Section 121A IPC, though it has wider ampute, and includes within its ambit, conspiracy to commit an offence under Section 121 or conspiracy to overawe the Government of India by means of criminal force or show of criminal force, inasmuch as the conspiracy as alleged should be established. As noticed, to constitute conspiracy under the said Section, it is not necessary that any illegal act or illegal action should have taken place in pursuance thereof but conspiracy to commit the offence, under Section 121 IPC as per the charge sheet, should be proved beyond doubt. Once the charge of conspiracy against A4 and A5 fails, they cannot be convicted under Section 121A IPC.

96. Sections 122 and 123 would be equally attracted and A-1 to A-5 have committed offences under the said Sections. Their application and violation by A1 to A3 is obvious for the reasons and considerations mentioned above. A4 and A5 are guilty of having committed offence under the said sections in view of the recoveries of remote control devices, electronic detonators etc.. The section 122 IPC is applicable to preparation to wage war or preparation with intention to wage war. The said apparatus, the quantity thereof and the devastation and destruction that could have been caused reflect the motive/object behind the collection. Visit of A4 and A5 to Pakistan, overstay and their clandestine return to India are strong and good indicators and proof of the intention behind the collection. Section 123 is also attracted to A4 and A5 as there was concealment.

97. Sub-sections 3 and 5 to Section 3 of POTA read as under:-

“(3) Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(5) Any person who is a member of a terrorist gang or a terrorist organisation, which is involved in terrorist acts, shall be punishable with imprisonment for a term which may extend to imprisonment for life or with fine which may extend to rupees ten lakh or with both.

130

Explanation.—For the purposes of this sub-section, "terrorist organisation" means an organisation which is concerned with or involved in terrorism."

98. Section 3 (3) includes within its ambit conspiracy or attempt to commit, abet, advise or incite or knowingly facilitation of commission of a terrorist act or any act preparatory to a terrorist act. Advocating of terrorist act is punishable under this Section. In view of the aforesaid discussion and factual findings, it is held that A-1 to A-5 have committed offence under Section 3(3) of POTA.

99. Section 3(5) makes a person offender when he is a member of the terrorist squad or terrorist organization involved in such terrorist acts. The terrorist organization means an organization, which is concerned with or involved in terrorist activities. As far as A-1 is concerned, there is ample material and evidence to show his involvement as a member of terrorist organization. However, as far as A-2 and A-3 are concerned, their confessional statements show that it was one of instance in which they had participated though they had been working with the truck owner Khurshid, who as per the prosecution, was a member of the terrorist organization. There may be therefore some merit that there may not sufficient evidence that A2 and A3 were members of a terrorist organization but Section 3(5) of POTA

is equally attracted when a person becomes a member of a terrorist

gang. Their conduct, nature and quantum of recoveries made and their interaction with A1 without doubt makes them a member of a terrorist gang involved in terrorist acts. Thus in the case of A2 and A3 we need not give a firm and conclusive opinion of they being members of a terrorist organization. In respect of A-4 and A-5 no specific terrorist are attributed to them. But there is evidence that they went to Pakistan, overstayed and then without recording their return re-entered India. Recoveries made from their house also speak. In their confessional statements that they have stated that they were members of "Jaish-e-Mohammad" and had participated and were trained. The apparatus recovered was to be used for terrorist acts. Thus there is sufficient evidence that A4 and A5 were members of a terrorist organization or group. We are, therefore, not inclined to give benefit of doubt to A-4 and A-5. Their conviction under Section 3(5) of POTA is upheld. For the same reasoning, the conviction of the appellants under section 20 of POTA is maintained.

100. Section 4 of POTA reads as under:-

"4. Possession of certain unauthorized arms, etc.-

Where any person is in unauthorised possession of any-

- a. arms or ammunition specified in columns (2) and (3) of Category I or Category III (a) of Schedule I to the Arms Rules, 1962, in a notified area,

- 132
- b. bombs, dynamite or hazardous explosive substances or other lethal weapons capable of mass destruction or biological or chemical substances of warfare in any area, whether notified or not, he shall be guilty of terrorist act notwithstanding anything contained in any other law for the time being in force, and be punishable with imprisonment for a term which may extend to imprisonment for life or with fine which may extend to rupees ten lakh or with both.

Explanation.-In this section, "notified area" means such area as the State Government may, by notification in the Official Gazette, specify."

101. The said provision has been clearly violated by A1 to A3 and they have been rightly convicted under Section 4(b). However, conviction of A4 and A5 under the said Section cannot be maintained as they were not found to be in possession of any arm or ammunition, bombs, dynamite or hazardous explosive substances or lethal weapons. They were found to be in possession of remote control devices and electronic detonators which by themselves without explosive substance are not covered under Section 4(b) of POTA.

Explosives Substances Act

102. Section 7 of the Explosive Substances Act reads as under:-

"7. Restriction on trial of offences. - No Court shall proceed to the trial of any person for an offence against this Act except with the consent of the District Magistrate."

103. A reading of the said Section makes two aspects lucid. The said Section uses the word "consent" and not "sanction" but this does not appear to be significant as Section 196(2) Cr.P.C. also uses the same expression. The purport behind Section 7 and the expression 'consent' is apparently identical and similar as mandated by the expression 'sanction'. Secondly, it stipulates that no Court shall proceed with the trial except when there is consent of the District Magistrate for offences under the Explosive Substances Act, 1908. It does not bar or prohibit the Court from taking cognizance, a stage prior in point of time and before the Court proceeds with trial. (see *Ramjani Vs. State of Rajasthan*, 1993 Cri. L.R.179). This is a significant and important departure from provisions relating to sanction in several enactments including Cr.P.C. Earlier, consent of the Central Government was required but by way of amendment through Act 54 of 2001 brought into force with effect from 1st February, 2002, District Magistrate has been assigned the power to give consent. The said amendment probably was in view of the decision of the Supreme Court in *State of M.P. Vs. Bhupindra Singh*, (2000) 1 SCC 555.

104. In respect of prosecution under Sections 4 and 5 of the Explosive Substances Act, we have two consents under Section 7. The first consent is dated 25th November, 2003 (Exhibit PW-16/A), which is

executed by the Deputy Commissioner of Police, Headquarters, Delhi and refers to the power conferred under the Explosive Substances Act, 1908 vide notification No.65 dated 12th December, 2001 read with HMA Gazette Notification No.131E dated 31st January, 2002. The said consent is by order and in the name of Commissioner of Police.

105. Question is whether this consent Exhibit PW-16/A is a valid consent under Section 7 of the Explosive Substances Act. On behalf of the appellants it is submitted that Commissioner of Police/Deputy Commissioner of Police is not District Magistrate and, therefore, was incompetent to issue the said consent.

106. The term 'District Magistrate' has not been defined in the Explosive Substances Act or the General Clauses Act. Section 20 of Cr.P.C. states that in every district and in every metropolitan area, the State Government may appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate. Sub-Section (2) stipulates that State Government may appoint any Executive Magistrate to be an Additional District Magistrate and such Magistrate shall have such of the powers of a District Magistrate under the Code or under any other law for the time being in force as may be directed by the State Government.

107. Sub-Section (5) to Section 20 states that notwithstanding anything contained in other sub-sections, the State Government shall not be precluded from conferring under any law for the time being in force on the Commissioner of Police any or all powers of an the Executive Magistrate in relation to a metropolitan area.

108. With the enactment of Delhi Police Act, 1978 Commissioner of Police became Head of the police force in Delhi with the stipulation that superintendence of the Delhi Police shall vest in and the shall be exercised by the Administrator i.e. the Administrator of Delhi appointed under Article 239 of the Constitution. The Administrator appoints the Commissioner of Police who is authorized to exercise and perform all powers and duties specified in the Delhi Police Act.

109. We may now refer to the provisions of Section 8 of the Delhi Police Act, 1978 which reads as under:

"8. Deputy, Additional Deputy and Assistant Commissioners of Police. -(1) The Administrator may appoint one or more Deputy Commissioners of Police or Additional Deputy Commissioners of Police or Assistant Commissioners of Police for the purposes of this Act.

(2) Without prejudice to the other provisions of this Act and subject to any general or special orders made by the Administrator in this behalf, every Deputy Commissioner of Police or Additional Deputy Commissioner of Police or Assistant Commissioner of Police shall, under the orders of the Commissioner of Police, exercise such of the powers (except the power to make regulations) and perform such of the

duties of the Commissioner of Police and within such local limits as may be specified in such orders.”

110. Section 8 of the Delhi Police Act states that the Administrator may appoint one or more Deputy Commissioner of Police, Additional Deputy Commissioner of Police or Assistant Commissioner of Police for the purpose of this Act. Sub-section (2) to Section 8 stipulates that without prejudice to the other provisions and subject to general or special orders by the Administrator, every Deputy Commissioner of Police etc., shall under the order of the Commissioner of Police, exercise such of the powers and perform said duties of Commissioner of Police and within such local limits as may be specified in such orders. This power, however, does not include power to make regulations.

11. It would be now appropriate to reproduce Section 146 and Schedule 1 of the Delhi Police Act, which read as under:

“146. Powers of Commissioner of Police under other Acts.- (1) The Commissioner of Police shall exercise all powers and discharge all functions which may be exercised or discharged by a District Magistrate under the Acts mentioned in Schedule I including the rules made thereunder.

(2) The Commissioner of Police may authorise any Additional Commissioner of Police, Deputy Commissioner of Police or Additional Deputy Commissioner of Police to exercise any of the powers or discharge any of the functions of the Commissioner of Police mentioned in sub-section (1) in accordance with the general or special orders of the Administrator.

137

(3) The powers and functions of a District Magistrate under the Sarais Act, 1867 (22 of 1867), shall be exercised and discharged by the Administrator or such officer as the Administrator may, by notification in the Official Gazette, authorise in this behalf.

XXXXXXX

SCHEDULE I

[See section 146 (1)]

Part I

CENTRAL ACTS

1. The Press and Registration of Books Act, 1867.
2. The Indian Explosives Act, 1884.
3. The Indian Lunacy Act, 1912.
4. The Poisons Act, 1919.
5. The Police (Incitement to Disaffection) Act, 1922.
6. The Cinematograph Act, 1952.
7. The Suppression of Immoral Traffic in Women and Girls Act, 1956.
8. The Arms Act, 1959.
9. The Prevention of Cruelty to Animals Act, 1960."

12. Schedule I of the Delhi Police Act, therefore, includes the Explosives Act.

113. The term 'District Magistrate' has been defined in Section 4(c) of the Explosive Act which enumerates

"(c)"District Magistrate", in relation to any area for which a Commissioner of Police has been appointed, means the Commissioner of Police thereof and includes –

(a) and such Deputy Commissioner of Police, exercising jurisdiction over the whole or any part such area, as may be specified by the State

Government in this behalf in relation to such area or part; and

(b) an Additional District Magistrate”

114. Thus, for the purpose of Explosives Act, the term “District Magistrate” includes Commissioner of Police so appointed for any area and also the Deputy Commissioner of Police exercising jurisdiction over whole or any part of the area. The Explosives Act and Explosive Substances Act are cognate or pari materia statutes. The Explosive Act was enacted in the year 1884 to provide a comprehensive law regulating manufacture, keeping, sale, transport, import and export of explosives. It consists of 18 sections and has various Schedules. Explosive Substances Act was enacted in 1908 and consists of merely 7 sections. The statement of objects and reasons for enactment of the Explosive Substances Act records that inadequacy in existing law, i.e. the Explosives Act, had been noticed while dealing with crimes committed by means of explosive substances. The relevant portion of objects and reasons for enacting Explosive Substances Act reads as under:

“INTRODUCTION

Crimes by means of explosive substances were on the increase and to combat such crimes the provisions of the Indian Explosives Act, 1884, which was framed to prevent accidents rather than to prevent crime, were found to be inadequate. The Indian Arms Act, 1878, though it applied to the possession of explosives as well as arms, was also found to be inadequate. The Penal

Code does not provide any penalty for making or possessing explosive substances with unlawful intent and it does not in other cases always provide such severe penalties as were requisite to meet the increasing number of crimes. The Governor-General-in-Council considered it necessary to supplement the then existing law by an Act on the lines of English Explosive Substances Act, 1883, which was enacted for the express purposes of dealing with anarchist crimes. Accordingly the Explosive Substances Bill was introduced in the Legislature.

STATEMENT OF OBJECTS AND REASONS

.....The Governor-General-in-Council therefore considers it necessary to supplement the existing law by an Act on the lines of the English Explosive Substances Act, 1883, which was enacted for the express purpose of dealing with anarchist crimes. The Bill which has been drafted to give effect to this decision provides for the punishment of any person who causes an explosion likely to endanger life or property, or who attempts to cause such an explosion, or makes or has in his possession any explosive substance with intent to endanger life or property. It further makes the manufacture or possession of explosive substances for any other than a lawful object a substantive offence and throws on the person who makes or is in possession of any explosive substance the onus of proving that the making or possession was lawful. It also provides adequately for the punishment both of principals and accessories."

115. The heading of Explosive Substances Act, 1908, states that "it is an Act further to amend the law relating to explosive substances". It is clear to us that Explosive Act and Explosive Substances Act are *pari materia* enactments. They are statutes dealing with the same subject matter and form part of the code relating to explosive substances.

116. The principle of *pari materia* is based on the idea that there is continuity of legislative approach in such acts and common terminology is used. No change in meaning should be attributed unless

this was intended. In *Timmins v. Rowllison* (1764) 1 Wm B1 533, Lord Mansfield observed that "Statutes in pari materia are to be all taken as one system to suppress the mischief The two laws are only parts of the same provision". In Bennion on Statutory Interpretation, Fifth Edition, after the above quote at page 709 under the minor heading "definitions" has opined that "Where a term is used without definition in one Act, but is defined in another Act which is in pari materia with the first Act, the definition may be treated as applicable to the use of the term in the first Act. This may be done even where the definition is contained in a later Act." An example is given. If Acts are pari materia, it is assumed that uniformity of language and meaning is intended, attracting the same considerations as arise from the linguistic canon of construction that an Act is to be construed as a whole. In the same text, it has been opined :

"The sole question is whether, in borrowing the word, Parliament also intended to borrow its previous processing. This can be a very difficult matter to determine. One test is whether the two Acts are in pari materia.

Acts in pari materia. The following are in pari materia.

- (a) Acts which have been given a collective title. This is a recognition by Parliament that the Acts have a single subject matter.
- (b) Acts which are required to be construed as one. Again there is parliamentary recognition of a single subject matter.

141

(c) Acts having short titles that the identical (apart from the calendar year).

(d) Other Acts which deal with the same subject matter on the same lines. Here it must be remembered that the Latin word *pari* or *paris* means equal, and not merely similar. Such Acts are sometimes described as forming a code. This does not mean that the Acts are codifying Acts however.

If the Acts are in *pari materia* it is assumed that uniformity of language and meaning was intended, attracting the same considerations as arise from the linguistic canon of construction that an Act is to be construed as a whole. This principle governing Acts in *pari materia* was thus expressed by twelve judges: such Acts 'are to be taken together as forming one system, and as interpreting and enforcing each other. In other words they are to be construed as one, whether or not the relevant enactment expressly requires this. This has been applied even to repealed Acts within a group.'

117. The above principle is not alien to Indian context and has been referred to in *Principles of Statutory Interpretation* by G.P. Singh, 13th Edition at page 301 onwards. Several judgments and decisions relating on the said principle have been referred to and it has been observed that this rule of construction has merit of avoiding any apparent contradiction between a series of statutes dealing with the same subject. It allows use of an earlier statute to throw light on the meaning or phrase used in the later statute in the same context. In *State of Madhya Pradesh vs. M.V. Narasimhan*, (1975) 2 SCC 377, it has been observed as under:-

142

“17. It seems to us that even if Section 2 of the Act had not applied the provisions of the Penal Code and had not defined public servant, then the provisions of the Penal Code would have come into operation by implied reference because the Act was a supplemental Act to the Penal Code. It was only by way of abundant caution that Section 2 of the Act incorporated the definition of "public servant" as mentioned in Section 21 of the Penal Code and in that sense alone the Act can be treated as being pari materia with the Penal Code. For these reasons, therefore, we are clearly of the opinion that the judgment of the High Court holding that the respondent was not a public servant is legally erroneous and cannot be allowed to stand.”

118. In view of the aforesaid legal position, we have to examine whether the expression “District Magistrate” used in Section 7 of the Explosive Substances Act should be given the same meaning as defined in Section 4 (c) of the Explosive Act. There appears to be merit in the said contention as often provisions of both Explosives Act and Explosive Substances Act would be violated. The two Acts, as noticed above, are pari materia dealing with the single or common subject matter and are part of the same code. The question really is of the intention of the legislature and when two interpretations are possible, we should accept the interpretation which promotes the legislative intent. Purpose and objective behind the legislative provision becomes relevant and important. Sanction or consent is required to ensure that criminal prosecutions under the provisions of Explosive Substances Act are not lightly invoked on mere pretence and

suspicion without there being evidence. The facts should be first examined by higher or superior officers who should be satisfied that prosecution should be filed. Principle of casus omissus should not be supplied by the court except in case of clear necessity and when the reason for it is found in the four corners of the statute itself but at the same time, a casus omissus should not be readily inferred (see *Padmasundara Rao v. State of Tamil Nadu* (2002) 3 SCC 533).

119. We clarify that the aforesaid observations do not imply and mean that the expression "District Magistrate" when used in any enactment applicable to Delhi, would include and mean the Commissioner of Police or Deputy Commissioner of Police. The interpretation given by us is specific to the Explosive Substances Act as it is pari materia or cognate Act and part of the same Code, viz., the Explosives Act. The contention/problem raised could have been easily avoided in case care and caution had been taken by the draftsmen at the time of amendment of the Explosive Substances Act in 2002.

120. It appears and it is so stated in the impugned judgment dated 3rd January, 2011 that this Consent dated 25th November, 2003 was never challenged or questioned on the ground that it was invalid or improper and did not meet the mandate of Section 7 of the Explosive Substances Act, till the stage of the final arguments. Thus during "trial" no

objection was taken that the consent (Ex.PW-16/A) was not by the District Magistrate, but at the stage of final arguments, the authority of the Deputy Commissioner of Police to issue Consent under Section 7 of the Explosive Substance Act was questioned. At that stage, the prosecution was permitted and allowed to place on record fresh order of consent dated 25th June, 2009, Ex.PW47/A executed by J.K. Dadoo (PW-47), who was then working as District Magistrate cum Secretary (Revenue)-cum-Deputy Commissioner of Delhi.

121. The prosecution has submitted that the challenge to the first consent and the second consent should not be accepted in view of Section 465 Cr. P.C. It is stated that if the first consent was invalid, it was an irregularity which has been cured by the second consent.

122. The appellants claim that the second consent Ex.PW-47/A dated 25th June, 2009 cannot resurrect and validate the trial i.e. the evidence, which was recorded earlier. The Trial Court rejected the said contention holding that the technical lacuna had been taken care of.

123. Section 465 Cr.P.C. reads as under:

“465. Finding or sentence when reversible by reason or error, omission or irregularity.

(1) Subject to the provisions hereinbefore contained, on finding sentence or order passed by a court of competent

145

jurisdiction shall be reversed or altered by a court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution unless in the opinion of that court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

124. In *Central Bureau of Investigation Vs. V.K. Sehgal and Another*, (1998) 8 SCC 501 conviction was set aside by the High Court for want of sanction by appropriate/competent authority. The Supreme Court set aside the said judgment without deciding the question whether sanction was issued by the competent authority relying upon Section 465, observing as under:

“10. A court of appeal or revision is debarred from reversing a finding (or even an order of conviction and sentence) on account of any error or irregularity in the sanction for the prosecution, unless failure of justice had been occasioned on account of such error or irregularity. For determining whether want of valid sanction had in fact occasioned failure of justice the aforesaid sub-section (2) enjoins on the court a duty to consider whether the accused had raised any objection on that score at the trial stage. Even if he had raised any such objection at the early stage it is hardly sufficient to conclude that there was failure of justice. It has to be determined on the facts of each case. But an accused who did not raise it at the trial stage cannot possibly sustain such a plea made for the first time in the appellate court. In *Kalpna Rai v. State (through CBI)* [(1997) 8 SCC 732 : 1998 SCC (Cri) 134] this Court has observed in para 29 thus:

146

“29. Sub-section (2) of Section 465 of the Code is not a carte blanche for rendering all trials vitiated on the ground of the irregularity of sanction if objection thereto was raised at the first instance itself. The sub-section only says that ‘the court shall have regard to the fact’ that objection has been raised at the earlier stage in the proceedings. It is only one of the considerations to be weighed but it does not mean that if objection was raised at the earlier stage, for that very reason the irregularity in the sanction would spoil the prosecution and transmute the proceedings into a void trial.”

11. In a case where the accused failed to raise the question of valid sanction the trial would normally proceed to its logical end by making a judicial scrutiny of the entire materials. If that case ends in conviction there is no question of failure of justice on the mere premise that no valid sanction was accorded for prosecuting the public servant because the very purpose of providing such a filtering check is to safeguard public servants from frivolous or mala fide or vindictive prosecution on the allegation that they have committed offence in the discharge of their official duties. But once the judicial filtering process is over on completion of the trial the purpose of providing for the initial sanction would bog down to a surplusage. This could be the reason for providing a bridle upon the appellate and revisional forums as envisaged in Section 465 of the Code of Criminal Procedure.”

Learned counsel for the appellants have submitted that the Supreme Court had relied upon Section 19(3)(a) of the Prevention of Corruption Act, 1988, which is wider and broader and includes the question of competence of authority, and not mere irregularity. The Supreme Court did rely upon the said provision including the Explanation, but this was a second reason or ground as is apparent from the use of the words “now another trammel on the appellate powers” used in paragraph 12 of the said judgment.

125. Recently in *Ratriram Vs. State of M.P.*, (2012) 4 SCC 516, a question arose whether the trial was vitiated as committal of proceedings had not taken place before the matter was tried by the special court. Purported conflict or discord between the view expressed in *Moly Vs. State of Kerala*, (2004) 4 SCC 584, *Vidyadharan Vs. State of Kerala*, (2004) 1 SCC 215 on one side and *State of M.P. Vs. Bhoorajit*, (2001) 7 SCC 679 was considered and it was observed that ultimately the test and question is whether there has been miscarriage of justice or failure of justice. Fair trial includes fair and proper opportunity allowed by law to the accused to prove his innocence, but ultimately one should look at substance and not technicalities and camouflage should not be allowed. Paragraph 11 of *V.K. Singhal* (supra) was referred to and it was observed that Magistrate was required to hold inquiry and proceed with committal proceeding, but keeping in view the nature and character of criminal proceedings in the said case, there was no miscarriage of justice.

126. In *Deepak Khinchi Vs. State of Rajasthan*, (2012) 5 SCC 284, the consent order granted by the District Magistrate purportedly under Section 7 was held to be invalid by the Additional Sessions Judge. The said order was not challenged, but an application under Section 311 was moved enclosing therewith a fresh consent/sanction issued by

the District Magistrate. This application was allowed by the Sessions Judge and the order was upheld both by the High and the Supreme Court. There was delay of about 3 years in moving the said application. Reference was also made to *Rajendra Prasad Vs. Narcotic Cell*, (1999) 6 SCC 110, where it was observed that oversight in the prosecution case cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare which of the parties performed better. Decision in *State of H.P. Vs. Nishant Sareen*, (2010) 14 SCC 527 was distinguished on the ground that when sanction had been earlier refused, Vigilance Department took up the matter again with Principal Secretary for grant of sanction, though no fresh material was available for further consideration. Therefore, fresh trial was directed.

127. On the question of quantum of punishment we maintain the sentences awarded to A1 to A3. We have as reflected in the table below reduced and not awarded the maximum permissible sentence to

A4 and A5 after some deliberations and thought. The primary reason why we have awarded less than the maximum sentence to A4 and A5 is that before their arrest, they individually did not undertake or participate in any terrorist attack or action. A4 and A5 did go to Pakistan and, as per their confession, attended training camps and clandestinely re-entered India, but at the time of search/arrest, no fire arm or live explosive substance like bomb, etc. were recovered on their behest and from their residence. Sentence of 10/11 years of Rigorous Imprisonment would meet the ends of justice with the hope and expectation that they would in future act as responsible citizens and not tread on the earlier path. Counselling required and necessary shall be imparted and given to the appellants specially A4 and A-5.

128. The convictions and sentences awarded under different offences by the trial court and this Court will be as under:-

Section	Punishment stipulated	Punishment awarded by trial court	Conviction/Sentence in first appeal
Section 3 (3) POTA	Not less than five years but which may extend to life imprisonment, and fine	A1-A5 – Life Imprisonment with fine of Rs 5,000/-	A1 to A3 – Sentence maintained. A4 and A5- Rigorous Imprisonment for a period of 11 years and fine of Rs.5,000/-
Section 3 (5) POTA	Imprisonment for a term which may extend to imprisonment for life, or with fine which may	A1-A5 – Life Imprisonment with fine of Rs 5,000/-	A1 to A3- Sentence maintained. A4 and A5- Rigorous Imprisonment for a period of 11 years with fine of

	extend to rupees 10 lakhs, or with both		Rs.5,000/-.
Section 4 POTA	Punishable with imprisonment for a term which may extend to life imprisonment, or with fine which may extend to rupees ten lakh, or with both.	A1-A5- Life Imprisonment with fine of Rs 5,000/-	Conviction of A1 to A maintained. A4 and A acquitted.
Section 20 POTA	To imprisonment for a term not exceeding ten years, or with fine, or with both	A1-A5- Rigorous Imprisonment 10 Years with fine of Rs 5,000/-	Sentence awarded to A1 to A maintained.
121 IPC	Death or life and fine	A1-A5- Life Imprisonment with fine of Rs 5,000/-	Sentence awarded to A1 to A maintained. A4 and A acquitted.
121-A IPC	Life Imprisonment or imprisonment of 10 years and fine	A1-A5- Life Imprisonment with fine of Rs 5,000/-	Sentence awarded to A1 to A maintained. A4 and A acquitted.
122 IPC	Life imprisonment or imprisonment for 10 years and fine	A1-A5- Life Imprisonment with fine of Rs 5,000/-	Sentence of A1 to A maintained. A4 and A awarded 10 years Rigorous Imprisonment and fine of Rs.5,000/-.
123 IPC	Imprisonment for 10 years and fine	A1-A5- Rigorous Imprisonment 10 years with fine of Rs 5,000/-	A1 to A5- Sentence maintained.
Section 4 ESA	Any explosive substance- Life Imprisonment or imprisonment of a term which may extend to 10 years, and shall be liable to fine Special category	A1-A5- Life Imprisonment with fine of Rs 5,000/-	Sentence awarded to A1 to A maintained. A4 and A sentenced to 10 year Rigorous Imprisonment and fine of Rs.5,000/-.

	explosive substance- RI for life, or with RI for a term which may extend to 10 years, and shall be liable to fine.		
Section 5 ESA	Explosive substance- for a term which may extend to ten years, and shall be liable to fine Special category explosive substance- RI for life or with RI for a term which may extend to ten years, and fine	A1-A5- Rigorous Imprisonment of 10 years with fine of Rs 5,000/-	Sentence awarded to A1 to A maintained.
		In case of default of fine RI for six months under each head	In case of default of payment of fine, each accused will suffer Simple Imprisonment for a period of one month for each head.

24. A-1 has also been convicted under Section 22(2)(a) of POTA vide judgment dated 3rd January, 2011, but in the order on sentence dated 6th January, 2011, no punishment has been imposed. Punishment up to 14 years Rigorous Imprisonment can be imposed for offences under Section 22. Keeping in view the aforesaid position, we hold that the period of imprisonment already undergone by A-1 till the date of pronouncement of judgment will be treated as punishment imposed on the appellant under Section 22(2)(a) of POTA.

125. The sentences will run concurrently and Section 428 Cr.P.C. will apply.

126. The appeals filed by A1 to A3 are dismissed and appeals filed by A4 and A5 are partly allowed. A-4 and A-5 will be released after having undergone the period of sentence in accordance with law, unless required to be detained in any other case.

(SANJIV KHANNA)
JUDGE

(S.P. GARG)
JUDGE

May 3rd, 2013
VKR/KKB/NA