

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1092 of 2017

Arising Out of PS. Case No.-4 Year-2002 Thana- NAUHATTA District- Rohtas

-
-
1. Nitish @ Nitish Kumar @ Nitish Yadav @ Birbal Yadav Son of Horil Yadav
Resident of village - Rajpur, P.S. Pratappur, District - Chatra Jharkhand.
 2. Ram Bachan Yadav Son of Late Mahesh Yadav @ Mahendra Yadav
Resident of village - Babhan Talab, P.S. and District Rohtas.

... .. Appellant/s

Versus

1. The State of Bihar
2. C.B.I through S.P.(Special Crime-III), 3rd Floor, Lodhi Road, New Delhi.

... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 1077 of 2017

Arising Out of PS. Case No.-4 Year-2002 Thana- C.B.I CASE District- Rohtas

Nirala Yadav @ Raja Ram Yadav Son of Sita Yadav, R/o Village-
Banbisunpur, P.S.- Dhibra, District- Aurangabad.

... .. Appellant/s

Versus

The C. B. I., New Delhi

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 1092 of 2017)

For the Appellant/s	:	Mr. Gouranga Chatterjee, Advocate
		Mr. Arvind Kumar, Advocate
		Mr. Anirvan Choudhari, Advocate
		Mr. Sahil Kumar, Advocate
For the Respondent/s	:	Mr. Shivesh Chandra Mishra, Advocate
		Mrs. Nivedita Nirvikar, Senior Advocate (CBI)

(In CRIMINAL APPEAL (DB) No. 1077 of 2017)

For the Appellant/s	:	Mr. Vindhya Keshri Kumar, Senior Advocate
		Mr. Kamla Kant Pandey, Advocate
For the Respondent/s	:	Mrs. Nivedita Nirvikar, Senior Advocate (CBI)

CORAM: HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA
and
HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA



C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA)

Date : 02-04-2024

These two appeals have been preferred by the aforesaid appellants under Section 374(2) of the Code of Criminal Procedure against the judgment of conviction dated 21.06.2017 and order of sentence dated 05.07.2017 passed by learned Sessions Judge, Rohtas at Sasaram in R.C. Case No.04 (S) of 2002 whereby and whereunder appellants have been convicted and sentenced under Section 3(2)(a) of the Prevention of Terrorism Act, 2002 (hereinafter referred to as 'POTA') with imprisonment for life and fine of Rs.1 lac, under Section 22(5) of POTA with imprisonment of 14 years, under Section 148 of the Indian Penal Code R.I. for three years, under Section 302 read with 149 of the Indian Penal Code imprisonment for life and fine of Rs.1 lac, under Section 353 read with 149 of the Indian Penal Code rigorous imprisonment for two years, under Section 323/149 of the Indian Penal Code imprisonment for six months and under Section 27 of the Arms Act rigorous imprisonment for three years and fine of Rs.5000/-. All the sentences of the convicts/appellants Nitish alias Birbal Yadav and Ram Bachan shall run concurrently. So far convict/appellant Nirala Yadav is concerned, who was commander of the group,



he shall first undergo sentence under Sections 22(5) of the POTA, 27 of the Arms Act, 148, 353 read with Section 149 and 323 of the Indian Penal Code as stated above concurrently before commencement of life sentence i.e. imprisonment for life under Section 3(2)(a) of the POTA and under Section 302 read with Section 149 of the Indian Penal Code and both the sentences shall run concurrently. In default of payment of fine, convicts/appellants Nirala Yadav, Nitish alias Birbal Yadav and Ram Bachan Yadav have further to undergo R.I. for one year.

2. Since the above captioned appeals arise out of common factual matrix and common judgment of conviction and order of sentence, we are disposing them by this common judgment.

3. The prosecution case, as revealed from Exhibit 1, fardbeyan of PW-1, Kumar Narendra, Range Officer of Forest, recorded by S.I. Ajay Prasad, at Adhaura P.S. on 15.02.2002 at 14:00 hours, is that on 15.02.2002 at about 9:00 A.M. the informant Kumar Narendra along with Divisional Forest Officer (hereinafter referred to as 'D.F.O.') Sanjay Singh (deceased), Sahabad Forest Division, Foresters P.N. Singh, Ram Jeevan Pandit (PW-2), Ram Pravesh Choudhary, Shiv Murat Pandey (Bodyguard), Umesh Singh and driver of government gypsy



Mahboob Alam (PW-3) went by gypsy to check the road under construction running to Rehal and when at about 11:00 A.M. the group arrived near Forest Office at Rehal, they found a person in green uniform, heard from someone in the vehicle that perhaps he is a 'party wala'. All alighted from the vehicle and started proceeding towards range office but within a short time they realized that he is, in fact, party wala, they tried to come back but were surrounded by five to six armed persons in the similar uniforms and for about forty five minutes all interrogated them by different means and the group started to escape through their vehicle, the men in uniform whistled. Twenty five to thirty persons of their group including four to five females in civil dress arrive, one of them aged forty years having one child and other four were aged about twenty five to thirty years and their commander aged about forty years of a bit dark complex whereas remaining were also aged about twenty five to thirty years, lean and thin, and forced them to come out of the village, tied hands of D.F.O., Sanjay Singh from behind though a towel (*gamchhi*), kept him separated from the other companions and took the D.F.O. ahead. On objection raised by himself and his fellow men, they were assaulted by *lathi* and butt of gun. Ultimately, feeling helpless, the companions kept



themselves separated. Four to five terrorists brought the D.F.O. forcibly towards eastern forest and forced others to maintain silence. After sometime, they heard sound of seven firing and a few minutes thereafter four to five terrorists returned, and asked about their caste etc. and ultimately on being convinced that they belonged to poor section of people, returned the key of the vehicle and permitted to go. The terrorists left the place raising “*MCC Zindabad*” and the group anyhow arrived at Adhaura Police Station, apprehends that D.F.O. might have been killed.

4. On the basis of aforesaid fardbeyan of the informant, zero F.I.R. was lodged and the same was forwarded to Nauhatta Police Station because the place of occurrence was not under the jurisdiction of Adhaura Police Station. A formal First Information Report was registered as Nauhatta P.S. Case No.04 of 2002 under Sections 147, 148, 149, 341, 323, 353, 364, 302 of I.P.C. and Section 27 of the Arms Act as well as Section 17 of the Criminal Law Amendment Act against 25-30 unknown terrorists.

5. The police arrived near the place of occurrence and on search recovered the dead body of deceased from inside the forest. The Inquest Report was prepared. Dead body was brought to Rohtas and sent for post-mortem examination in the



hospital.

6. The aforesaid case was investigated by the police but subsequently, considering the gravity of situation, vide Notification No.228/9/2002-AVD/II dated 31.02.2002 issued by the Government of Bihar and vide Notification No.1/CBI/804/202-H(P)/2866 dated 15.02.2002 issued by the Government of India, the investigation was transferred to the Central Bureau of Investigation (hereinafter referred to as 'C.B.I.') where Case No.RC-04(S)/2002/SIC-IV/New Delhi dated 22.03.2002 was instituted and investigation was conducted. Accused Vinod Rajwar and Rupdev Yadav were arrested and Vinod Rajwar on 01.05.2002 made a voluntary confession before Metropolitan Magistrate, New Delhi in which he confessed his guilt and other accused persons for killing D.F.O. Sanjay Singh by the unlawful assembly of M.C.C. organization. During investigation, statements of various witnesses were recorded under Section 161 of Cr.P.C. and incriminating documents/materials were collected, the I.O. during investigation found that the provisions of POTA were also attracted and accordingly obtained sanction from Central Government for prosecution of accused under the provision of POTA.



7. After investigation, the C.B.I. submitted main charge sheet No.6 dated 11.10.2002 under Sections 147, 148, 149, 341, 323, 353, 302 of I.P.C., 27 of the Arms Act and 3 & 22 of POTA against 23 accused persons, out of them, two accused persons, namely, Vinod Rajwar and Rupdev Yadav who were arrested, sent up for trial along with the sanction order and the names of remaining 21 accused persons were mentioned in column no.2 of the charge sheet as they were absconding. The further investigation under Section 173(8) Cr.P.C. was kept pending against others and their case was separated subsequently. The cognizance of the offence was taken by the court on 17.10.2002 and further investigation was continued under Section 173(8) of Cr.P.C.

8. It appears from the certified copy of judgment of Trial Court dated 07.04.2004 (Ext.-19) that accused Vinod Rajwar and Rupdev Yadav were convicted under Sections 148, 302, 323, 353 read with Section 149 of I.P.C, Section 27 of Arms Act and Section 3(2) and 22(5) of POTA and respective sentences were awarded against them. The said convicts Rupdev Yadav and Vinod Yadav had preferred appeal vide Cr.Appeal No.329 of 2004 in this Court which was dismissed by the Division Bench of this Court vide judgment dated 11.02.2011.



The typing error in the said judgment was corrected vide order dated 19.10.2011 (Ext.20). The Special Leave Petition preferred against the said judgment and order dated 11.02.2011 of Division Bench of this Court in Cr. Appeal No.329 of 2004 was also dismissed by Hon'ble Supreme Court in Petition(s) for Special Leave to Appeal (Crl) No.(s) 6208 of 2013 vide order dated 23.08.2013 (Ext.21).

9. The appellants were arrested during further investigation and on conclusion of investigation, the I.O. submitted supplementary charge sheet on different dates along with sanction order against the accused, namely, Nirala Yadav, Nitish @ Birbal, Lalan Singh Kharwar, Ram Bachan Yadav and Sudama Uraon. The cognizance against the aforesaid accused persons was accordingly taken on different dates.

10. Thereafter the case was committed to the Court of Sessions and charges under Sections 3(2)(a), 22(5) of the POTA, Section 27 of the Arms Act, Sections 302/149, 148, 323 read with 149, 353 read with 149 of the I.P.C. were framed on 13.01.2010 against the said accused persons. The accused persons denied the allegations levelled against them and claimed to be tried.

11. The prosecution in support of its case adduced the



following documentary evidences as Exhibits 1 to 25:

- (i) Ext. 1 C.C. of fardbeyan
- (ii) Ext. 2 Signature of informant on C.C. of inquest report of deceased
- (iii) Ext. 3 Signature of informant on C.C. of poster seized by the police
- (iv) Ext. 4 Signature of informant on C.C. of memorandum of identification of photo of Nirala Yadav
- (v) Ext. 5 Signature of informant on C.C. of Log Book seized by C.B.I.
- (vi) Ext. 5/1 C.C. of seizure list of Log Book
- (vii) Ext.6 Signature of Ram Jeevan Pandit on C.C. of memorandum of seizure list of cloth
- (viii)Ext. 7 Proceeding of recording of confessional statement of Nirala Yadav dated 11.12.2006
- (ix)Ext. 7/1 Signature of witness Shri Vijay Kumar on every page (4) on confessional statement of Nirala Yadav dated 11.12.2006
- (x) Ext.7/2 Signature of accused Nirala Yadav on confessional statement
- (xi) Ext. 7/3 Proceeding of recording of confessional statement of accused Nirala Yadav dated 12.12.2006 from page 5 to 14
- (xii) Ext. 7/4 Signature of accused Nirala Yadav on confessional statement dated 12.12.2006 from page 5 to 14
- (xiii) Ext. 7/5 Signature of witness Shri Vijay Kumar on confessional statement of Nirala Yadav dated 12.12.2006 from page 5 to 14
- (xiv)Ext. 7/6 Signature of Shri Yashpal, P.A. of witness Shri Vijay Kumar on the last page no.14 of confessional statement of Nirala Yadav
- (xv) Ext. 8 Forwarding letter no.48/9/3/4(S)/02/CBI/SCR-III, New Delhi dated 05.12.2008 of witness Shri Vijay Kumar addressed to the Chief



- Metropolitan Magistrate, New Delhi with respect to confessional statement of accused Sudama Uraon.
- (xvi) Ext.8/1 Proceeding of recording of confessional statement of accused Sudama Uraon dated 03.12.2008 on four pages
- (xvii) Ext. 8/2 Signature of witness Shri Vijay Kumar on the proceeding of recording of confessional statement of accused Sudama Uraon dated 03.12.2008 on four page
- (xviii)Ext. 8/3 Proceeding of recording of confessional statement of accused Sudama Uraon dated 04.12.2008 on page 5 to 12
- (xix)Ext. 8/4 Signature of witness Shri Vijay Kumar on every pages 5 to 12 on proceeding of recording of confessional statement of accused Sudama Uraon dated 04.12.2008
- (xx)Ext. 8/5 Signature of accused Sudama Uraon on every page 5 to 12 on proceeding of recording of confessional statement of accused Sudama Uraon dated 04.12.2008
- (xxi) Ext.9 Certified copy of P.M. Report of Shri Sanjay Singh, the then D.F.O.
- (xxii) Ext. 10 Sanction order of Nitish Kumar @ Birbal Yadav
- (xxiii) Ext. 10/1 Sanction order of Nirala Yadav @ Ram Raj Yadav
- (xxiv) Ext. 11 Forwarding letter of sanction order (Ext.10)
- (xxv) Ext. 11/1 Forwarding letter of sanction order (Ext.11)
- (xxvi) Ext. 12 Confessional statement of Ram Bachan Yadav
- (xxvii) Ext. 13 Signature of S.P., Sri Haribansh Singh on F.I.R.
- (xxviii) Ext. 14 Thumb impression of accused Ram Bachan Yadav on carbon copy of proceeding dated 11.06.2005 recorded by M.M.,



	Delhi.
(xxix)Ext.15	Signature of S.C. Sharma on sanction order
(xxx)Ext.16	Signature of S.C. Sharma on sanction order of accused Lalan Singh Kharwar
(xxxi) Ext. 17	Signature of witness P.L. Meena on court proceeding of accused Sudama Uraon
(xxxii) Ext. 18	Signature of Shri V.S.Mani
(xxxiii) Ext. 19	C.C. of judgment dated 07.04.2004 of Trial Court.
(xxxiv)Ext.20	C.C. of judgment dated 11.02.2011 passed in Cr. Appeal No.329/2004 by Hon'ble Patna High Court.
(xxxv) Ext. 21	C.C. of order dated 19.10.2011 passed by Hon'ble High Court in Cr. Appeal No.329/2004.
(xxxvi) Ext.22	C.C. of order dated 23.08.2013 passed by the Hon'ble Supreme Court of India in S.L.P. No.6208 of 2013.
(xxxvii)Ext.23	C.C. of order dated 13.12.2006 of the Chief Metropolitan Magistrate, Seema Maini with respect to confessional statement of Nirala Yadav.
(xxxviii) Ext. 24	Carbon copy of T.I.P. Chart of Nitish Kumar @ Birbal Yadav
(xxxix) Ext.25	Carbon copy of T.I.P. Chart of Ram Bachan Yadav

12. The prosecution has proved the above exhibits besides other circumstances and its case by examining altogether following nine witnesses:

PW-1	Kumar Narendra (Informant/Range Officer)
PW-2	Ram Jeevan Pandit (Forest Guard)
PW-3	Mahboob Alam (vehicle driver of forest deptt.)
PW-4	Prithvi Nath Singh (Forester)
PW-5	Vijay Kumar (Retd. S.S.P., CBI, New Delhi)



- PW-6 Dr. Kanhai Mahto (who conducted postmortem on the dead body of deceased)
- PW-7 M.S. Kalaria (Dy. Secretary, Ministry of Labour and Employment, New Delhi)
- PW-8 Syed Javaid Mujtaba Gillani (IGP, Kashmir Zone, the then S.P., C.B.I., Delhi)
- PW-9 Pyare Lal Meena (Retd. S.P.) (one of the I.Os.)

12.1. Out of whom, PWs-1, 2, 3 and 4 are the witnesses of the occurrence. PW-5, Vijay Kumar, Retd. S.S.P. C.B.I., New Delhi was then S.P. C.B.I., New Delhi who recorded confessional statement of accused Nirala Yadav and Sudama Uraon and PW-8 Syed Javaid Mujtaba Gillani, I.G.P., Kashmir Zone was then S.P. C.B.I., New Delhi who recorded the confessional statement of accused Ram Bachan Yadav under Section 32 of POTA. PW-6 Dr. Kanhai Mahto, who has conducted postmortem examination and proved postmortem report as Ext.9. PW-7 M.S. Kalaria was then Under Secretary, Home Affairs, Internal Security Division at the relevant time, who proved sanction orders. PW-9 Pyare Lal Meena, Retd. S.P. C.B.I., was one of the I.Os.

13. After completion of evidence on behalf of the prosecution, the statements of accused persons under Section 313 of the Cr.P.C. were recorded and they claimed to be innocent.

14. The defence has not produced any evidence either



oral or documentary in support of its case. The case of the defence is complete denial of the involvement in the occurrence claiming to have been falsely implicated in this case.

15. At the conclusion of trial, the Trial Court convicted the appellants and co-accused Lalan Singh Kharwar and Sudama Uraon and sentenced them as aforesaid. Being aggrieved by the said judgment of conviction and order of sentence, the appellants filed these appeals.

16. Heard learned senior counsel Mr. Vindhya Keshri Kumar for appellant in Cr. Appeal (DB) No. 1077 of 2017 and learned counsel Mr. Gouranga Chatterjee for appellants in Cr. Appeal (DB) No. 1092 of 2017. Mr. Chatterjee has argued in the same line as contended by Learned Senior Counsel Mr. Vindhya Keshri Kumar. The Gist of the contention put forth by the learned Senior counsel is as under:

16.1. In view of adverse report about the misuse of provisions of POTA in some states, the parliament repealed POTA by Prevention of Terrorism (Repeal) Act, 2004 ('Repeal Act' in short) which came into force on 21.09.2004 and it provides in proviso to Section 2 that no Court shall take cognizance of an offence under the principal Act after expiry of the period of one year from the commencement of the Repeal



Act and in the present case the cognizance of the offence under POTA was taken much after one year of the commencement of the Repeal Act on 21.09.2004. Therefore, the cognizance taken under POTA against appellants were illegal since the Act did not exist on that day.

16.2. Section 3 of the Repeal Act provides that any pending case after commencement of the Act has to be sent to Review Committee for its opinion whether *prima facie* case is made out or not which is mandatory but in the instant case no review committee was constituted and it was not referred to the Review committee for its opinion. Therefore, it violates Section 3 of the said Act and the proceeding is vitiated and the appellants cannot be convicted under the POTA.

16.3. Section 50 of the POTA which provides that no court shall take cognizance of any offence under the said Act without previous Sanction for the Central Government or as the case may be, the State Government and in the present case sanction to prosecute the appellants was granted when the POTA has already been repealed and thus the prosecution and conviction against the appellant under POTA is not sustainable.

16.4. POTA in the present case is not applicable and, therefore, confession before police is not admissible in



evidence. Hence, the convictions on the basis of confession made by appellants is not sustainable.

16.5. Confession made before police even in POTA cannot be used against the co-accused. He placed reliance on the judgment of Hon'ble Supreme court in **Saquib Abdul Hameed Nachan v. State of Maharashtra** reported 2010 Cri LJ 4435 (SC).

16.6. The identification of the appellants was made by witnesses after the witnesses had seen the photographs of the appellants as such the identification of appellants is not at all trustworthy and no conviction can be based on such identification. He has place reliance on the decision of **Gireesan Nair and Ors. v. State of Kerala (2023) 1 SCC 180**, in which it was held that the police must take all precaution to avoid exposure of the accused before T.I.P. either by photograph, videograph or physical presence and if they fail to do so, the T.I.P. loses its value.

16.7. There are absence of concrete and substantial evidence, it may not be proper for the Court to hold the accused persons/appellants guilty. He has also referred the decision of Hon'ble Supreme Court reported in **Ravi @ Ravichandran v. State Represented by Inspector of Police 2007(15) SCC 372**.



wherein it was observed that the Test Identification Parade is required to be held as early as possible to exclude the possibility of the accused being identified at police station or some other place by the concerned witnesses or with reference to the photographs published in the newspaper. A conviction should not be based on a vague identification.

17. On the other hand, the learned senior counsel representing the C.B.I. has supported the findings of learned Trial Court. The gist of the contention put forth by the learned senior counsel is as under:

17.1. All the prosecution witnesses have supported the prosecution case and all legal requirements have been observed and all precautions have been taken in recording the confessional statements of the appellants.

17.2. The sanction to prosecute the appellants requires under Section 50 of the POTA was obtained from the Government of India, Ministry of Home Affairs and the same has been mentioned in the supplementary charge sheet.

17.3. The main charge sheet along with sanction order of Central Government for prosecution of those aforesaid accused persons under POTA was submitted on 11.10.2002 against two arrested accused persons and against these



appellants also in which they have been shown as absconders and the cognizance in the present case was taken for the offence under POTA also on 17.10.2002. Cognizance of an offence and prosecution of an offender are two different things.

17.4. On the basis of the cognizance of offence under POTA, two accused persons whose trial was separated were convicted by the Trial Court which was confirmed by this Court in appeal and by the Hon'ble Supreme Court in SLP in this case, the appellant contention that cognizance is bad is not tenable.

17.5. Even in the sanction orders to prosecute appellants it was stated that the Central Government has noted the Court has taken cognizance of the offence in the year 2002.

17.6. The Investigating Agency is competent to conduct further investigation and to file a supplementary report to its primary report even after the court took cognizance of any offence on the consideration of the police report first submitted.

17.7. T.I.P. was conducted in a fair manner and all necessary measures and precautions were taken before conducting T.I.P. The appellants had not been shown to the witnesses before T.I.P.

18. We have carefully perused the records and proceedings and considered the submissions advanced by



learned counsel for the parties.

19. The appellate Court is empowered to reappreciate the entire evidence on record for the purpose of ascertaining as to whether the prosecution has been able to substantiate the charges against the appellants beyond any shadow of reasonable doubt or findings of the Trial Court need interference.

20. Before we proceed to notice the rival submissions in order to have a clear understanding of the context in which the submissions on behalf of the parties have been made, it would be apposite to notice the testimony of the prosecution witnesses.

21. PW-1 Kumar Narendra, PW-2 Ram Jeevan Pandit, PW-3 Mahboob Alam and PW-4 Prithvi Nath Singh were companions of deceased D.F.O., who are witnesses to the occurrence.

22. PW-1 Kumar Narendra, informant of the case has deposed in his evidence that on 15.02.2002 he was posted in Rohtas Range Forest Department and his D.F.O. was late Sanjay Kumar Singh. On that day, they went from Rohtas Range to Rehal. Shri P.N. Singh (PW-4), Shri Shiv Murat Pandey, Ram Jeevan Pandit (PW-2), Ram Pravesh Choudhary, Mahboob Alam (PW-3), Umesh Singh and late Sanjay Kumar Singh, who was



killed, had gone with him. They reached there at 11:00 A.M. to 11:30 A.M. As soon as they went towards Guest House Rehal and one forester Ram Jeevan Pandit (PW-2) has told that it appears that there is a party man. At that time they had reached near the village and they proceeded towards the village then saw that one person was pasting a poster on the wall of office and other person rushed towards back side with rifle. In the meantime, they got down from the vehicle and started seeing the poster. The poster was with respect to POTA. Meanwhile, the driver of the vehicle turned the vehicle and they seated in the vehicle. In the meantime, one person, who was pasting the poster told them to stay for some talk on which the D.F.O. refused to talk. He asked three times to Sanjay Singh for stay on which they stayed there and got down from the vehicle. Thereafter 20-25 persons wearing military uniform came and asked for hands up then they raised their hands up. They also told them that they have no any arms and they were armed with rifle and gun. They came near and asked to D.F.O. regarding his name. The D.F.O. told his own name and said that he is a resident of Sitamarhi on which one person told Sanjay Singh, the D.F.O. that you are constructing the road in which there may be saving of money and he demanded the share. On which, he



(D.F.O.) told that the villagers are the labourers in constructing the road and the project is of a short amount and there is no saving. Thereafter they said to him that you are a D.F.O. *saheb* and you would earn a lot of money and asked to pay the money on which the D.F.O. said that there is no such thing. Thereafter 4-5 persons amongst them separated and they came back after ten minutes and demanded Rs.5 lakhs from Sanjay Singh, the D.F.O. and the person who was demanding the money was saying himself as a commander on which D.F.O. said that he is unable to pay. In the meantime, villagers came and requested them to get the officials free but they did not hear and forcibly they took them out of village for talking. When they reached near a *Charmuhani* outside the village where they (officials) asked them to talk here. In the meantime, villagers started coming from behind. Amongst them, one person said that villagers are coming, stop them then some persons amongst them stopped the villagers and in course of stopping, there was a sound of firing. Thereafter, the villagers returned and after that they asked them to go out of the village forcibly and they were asked to move in queue. They tied the hands of D.F.O. from back side and they started taking away ahead and some persons took away Sanjay Singh, D.F.O. towards the forest. Thereafter



they got them seated at *Tinmuhani* surrounding them. In the meantime, they heard the sound of 5-7 firing towards the forest and the persons who had taken away the D.F.O. towards forest came back to them. The commander after enquiry of name and caste ordered to set them free. Thereafter they (miscreants) went away towards the forest making slogan “MCC *Zindabad*”. This witness identified Nirala Yadav and Ram Bachan Yadav present in the Court.

23. Thereafter PW-1 further deposed that they reached Adhaura Police Station with the vehicle and told the entire incident to the Officer-in-Charge. The fardbeyan (Ext.1) of informant was recorded. Thereafter with the police force they came to Rehal and the police went towards from where the sound of firing was heard, where they saw the dead body of D.F.O. The dead body was taken by police and its paper (Ext.2) was prepared. The police also seized the poster and on seizure list, he had signed (Ext.3). The dead body of D.F.O. Sanjay Singh was brought to Rohtas P.S. During investigation by C.B.I., a photograph of Nirala Yadav and others was shown to him in which he identified the photo of Nirala Yadav for which memorandum was prepared by C.B.I. on which he signed and his signature was marked as Ext.4. Log-book of the vehicle was



seized by C.B.I. and proved the certified copy of log-book on which entry dated 15.02.2002 is his signature (Ext.5).

24. PW-2 Ram Jeevan Pandit and PW-4 Prithvi Nath Singh were companion of deceased D.F.O. Sanjay Singh, informant (PW-1) and PW-3 Mahboob Alam (driver of vehicle) have also stated the happening of the day in similar way with natural variations. PW-2 identified the accused Nirala Yadav and Nitish Kumar in the dock and further stated that T.I.P. was held at Bhagalpur where he also identified the accused Nitish Kumar. He also stated that the wearing clothes of the D.F.O. were also seized by the police and he signed over the seizure list and proved his signature (Ext.6). PW-3 Mahboob Alam, identified Nirala Yadav in the Court dock, who told himself as the Area Commander and he also identified one another accused Ram Bachan Yadav. He also deposed that he also identified Ram Bachan Yadav in T.I.P. and Nirala Yadav at the time of photo identification. PW-4 Prithvi Nath Singh, admitted that C.B.I. has shown some photographs in which he identified Nirala Yadav, who was said as commander. They were cross-examined but nothing material came to discredit these witnesses. The learned counsel for the appellants also could not point out anything otherwise from the statements of these prosecution witnesses.



25. PW-6 Dr. Kanhai Mahto, who conducted autopsy on 16th February, 2002 at 01:10 A.M. on the dead body of the deceased and found the following ante mortem injuries:

- (i) A bullet was found over right upper arm underneath the cloth when clothes were removed from the dead body. A circular lacerated wound measuring 1" in diameter with inverted charged margin x muscle deep over interoperable aspect of mid region of right upper arm (wound of entry communicating to injury no.ii).
- (ii) A circular lacerated wound 1½" x ½" in diameter x muscle deep with everted margin lying nearing the wound no. (i) separated by a thin strip of skin and subcutaneous tissue over right upper arm (wound of exit).
- (iii) A circular lacerated wound with blackened charged inverted margin 1/3" in diameter x chest cavity deep over left intrascapular region in its lower part (wound of entry).
- (iv) A lacerated wound with everted margin 1" in diameter over anterior aspect of right side of chest 2" above nipple (wound of exit).
- (v) A lacerated wound over left side of neck with blackened inverted margin slanting downwards, being deepened just above left clavicle measuring ½" x ½" x muscle deep into upper part and 1" x 1" x chest cavity deep in lower part (wound of entry).
- (vi) Lacerated wound over left axilla 1 ½" x 1" x chest cavity deep exudating dark fluid blood (wound of exit).
- (vii) Abrasion over right fore arm 5" x 4".
- (viii) Bruise over left arm anteriority ½" x ½".
- (ix) Abrasion over right lower 1/3rd of leg measuring 1" x ½".
- (x) Abrasion over left gluted region measuring 1" x ½".

25.1. In the opinion of doctor, the death was caused



within 12 to 24 hours and cause of death was haemorrhage and shock due to above mentioned injuries caused by firearm. He proved his certified copy of postmortem report (Ext.9).

25.2. Nothing pointed out from his evidence to show any inconsistency with the prosecution version. The deceased also sustained some injuries by hard and blunt substance as per prosecution version, also finds corroboration from postmortem report, indicating some injuries caused to him by means other than firearms.

26. PW-5 Vijay Kumar, retired S.S.P. C.B.I., New Delhi has deposed that during August, 2006 to April, 2009 he was posted as S.P. C.B.I. in SIC-IV, branch of C.B.I., New Delhi. Shri P.L. Mina the then Additional S.P., who was Investigating Officer of the case, had approached to him for recording the confessional statement of Nirala Yadav and Sudama Uraon, who were accused in R.C. 4(S)/2002, S.IC. IV, New Delhi. Shri P.L. Mina, Additional S.P., had submitted a request on 11.12.2006 for recording the statement of accused Ram Raj Yadav @ Nirala Yadav, who was in C.B.I. custody for the period from 06.12.2006 to 14.12.2006. Shri P.L. Mina was the Investigating Officer of the case. He (Additional S.P.) had explained to him about the details of the case relating to murder



of Sri Sanjay Kumar Singh, D.F.O., Rohtas. Accused Ram Raj Yadav @ Nirala Yadav was brought in his chamber by Shri Mina on 11.12.2006 and thereafter he had asked him to leave his chamber. It was also ensured that none else other than his P.A. Sri Yaspal Singh was present in the chamber. It was also ensured that the proceeding could neither be heard by any outsider or seen by anybody else. As he was competent to record the confessional statement under the provision of Section 32 of POTA. He further stated that he had enquired from the said Ram Raj Yadav @ Nirala Yadav, if he was willing to give confessional statement to which he informed that he was willing to give confessional statement narrating the full facts within his knowledge and that he had not been given any inducement for giving the confession. It was also explained to him that the confession so recorded can be used as evidence against him.

26.1. In order to give him sufficient time to re-think over the matter regarding giving of the confessional statement, it was considered appropriate to give him a time of 24 hours to re-think before recording his confession. These proceedings started at 16 hours and concluded at 18 hours on 11.12.2006. He identified his signature (Ext.7/1) on page-1, 2, 3 and 4 on proceeding. These proceedings were also read over and



explained to the accused Ram Raj Yadav @ Nirala Yadav, who after having admitted the correctness of the same signed as Nirala Yadav on all the pages from 1 to page 4 and he identified his signatures (Ext.7/2) which was signed in his presence. Accused Ram Raj Yadav @ Nirala Yadav was again produced before him on 12.12.2006 at about 18 hours. It was again ensured that non-else other than his P.A. was present in the chamber and also ensured that none else to see or hear the proceedings. Accused was again asked if he was willing to make the confession voluntarily and he was free from all influence/ inducement. Accused Ram Raj Yadav @ Nirala Yadav informed that he was willing to make true confession of all the events relating to the murder of Sri Sanjay Kumar Singh, D.F.O. at his own will. After ensuring that he was willing to make the confession, he recorded the confession in Hindi. The recording of confession started at 18.30 hours and concluded at 9 P.M. on 12.12.2006. The entire proceeding of confession was read over and explained in Hindi to him and after admitting the same to be correct appended his signature on each page i.e. 5 to 14 after giving signature (Ext.7/3). He identified his signature (Ext.7/4) and signature of Nirala Yadav on page 5 to 14 as he signed in his presence and he also identified his initial on page No.5 to 13



and signature on page 14 which marked as Ext.7/5. There is also endorsement in his hand writing on page 14 that entire proceeding has has been read over and explained in Hindi to Nirala Yadav, who after admitting the same to be correct appended his signature on each sheet page 14 and also contains the signature of Shri Yaspal, who was his P.A. at that time and also identified the signature of Shri Yaspal, P.A., who worked under him as P.A. His signature was marked as Ext.7/6 and he also identified the accused Nirala Yadav who was present in the Court whose statement has been recorded by him and he identified him.

26.2. The statement of accused Nirala Yadav was recorded on computer and same fact was as stated by him while recorded under his dictation. This statement was also forwarded to the Court of C.M.M., Delhi in sealed cover.

26.3. During cross-examination, he told that statement of Nirala Yadav was recorded in the language in which he stated, which was in Hindi and he recorded his statement in Hindi.

26.4. At the time of recording of statement of accused Nirala Yadav @ Ram Raj Yadav, he himself and P.A. Yashpal were present and none else. Mr. Yashpal is not a police official



but he was senior clerk Steno in C.B.I Department. The statement of Nirala Yadav was recorded in computer by Mr. Yashpal.

27. P.W.8 Syed Javaid Mujtaba Gillani, IGP, Kashmir Zone has deposed that in the year 2005 he was posted as S.P. CBI, Delhi and on 9th June,2005 he received request from Sandeep Khairwar, who was posted as S.P. in SC-III, Delhi wherein he had requested for recording confessional statement of accused Ram Bachan Yadav under Section 32 of POTA, who was under police remand in case of their branch. The accused was produced before him by Dy.S.P. Mina and after the identification of the accused which was ascertained by Mr. Mina. Mr. Mina was asked to go out after that he spoke to the accused to speak in Hindi and he made the accused aware of the fact that he is under no compulsion to make statement as the statement would be used against him. He was also asked if he had been ill treated during the police remand to which he replied in negative and accused also informed him that he was being taken for medical check up regularly and he further said that he was willing to make his statement on his own and no body had compelled or forced to make such statement. However, the accused was advised to think over the matter again for which he



was given a time 24 hours. Thereafter he called Dy.S.P. V. Chandu, who was working under him in SCB, Delhi and handed over the accused in his custody with direction that accused should be produced before him after 24 hours. On 10th June, 2005 Shri V. Chandu, Dy. S.P. produced the accused Ram Bachan Yadav, before him and Shri Chandu was asked to leave. Thereafter he again cautioned the accused and informed him that he was under no compulsion to get his statement recorded as it would be used against him. However, the accused stated that he wanted to get his statement recorded, thereafter his statement was recorded as stated by him in Hindi. Statement was recorded on computer by his P.A Miss Anita. Once the statement was completed it was read over to the accused who agreed with the contents and signed on every page of the proceeding. Copy of the statement was sent to S.P. Sandeep Kahirwar and the accused was sent back to the concerned branch. Confessional Statement of accused Ram Bachan Yadav which was recorded by his P.A. which bears his signature on all 12 pages of it which were marked as Ext.12.

28. P.W.7 M.S. Kalania, Deputy Secretary, Ministry of Labour and Employment, New Delhi has deposed that he was posted as under secretary Home Affairs, Internal Security



Division from February, 2006 to July, 2007. During that period prosecution sanction report against accused Vinita Kumari @ Sumitra Kumari @ Priyanka Kumari and Nitish Kumar @ Birbal Yadav was received in I.S. Division with relevant documents which was submitted to the Union Home Secretary. Union Home Secretary accorded sanction of Central Government approval under section 50 of the POTA against the above named accused and being authorized signatory signed each page on the sanction order No.13016/4/2002-1-S.7 dated 20.04.2006 and also put up stamp on last page under his signatures and sanction order marked as Ext.10 and signed the covering letter forwarding the sanction letter with the approval of the Home Secretary to Shri Pankaj Kumar Singh, DIG Police, C.B.I., New Delhi, the letter was marked as Ext.11. The documents received from the C.B.I. for prosecution sanction against the accused Nirala Yadav @ Ram Raj Yadav @ Deepak in the murder case of Shri Sanjay Kumar Singh, D.F.O was also submitted to the Union Home Secretary for prosecution sanction of the Central Government under section 50 of the POTA and Home Secretary also accorded approval of Central Government after examining the document for prosecution sanction to the aforesaid accused Nirala Yadav and his authorized Signatory



signed on each page of the sanction order No.13016/4/2002-1.S.7 dated 12.03.2007 for prosecution of the aforesaid accused and also put his stamp on last page of sanction order, which was marked as Ext.10/1 and also signed the forwarding letter of the above sanction order to Sri Pankaj Kumar Singh, D.I.G., CBI, New Delhi marked as Ext.11/1.

29. P.W.9 Pyare Lal Mina, retired S.P. has stated that in the year 2002 to 2009 he was posted as SIC-IV branch CBI, New Delhi, as Additional S.P in that branch. On the request of Bihar Government for the investigation of Police F.I.R. No.4/2002 was instituted for investigation and after instituting the F.I.R. in C.B.I. the investigation was handed over to him on 25.06.2003 and prior to him, the I.O. was Vaibhav Adase, the then police superintendent and the then S.P. Haribansh Singh has instituted this case in SI-V branch and he identified the signature of the then S.P. Haribansh Singh on F.I.R marked as Ext.13 and also said that he has worked with Haribansh Singh and has seen him in reading and writing. He further stated that he perused the document which were made available to him by earlier I.O. and he found that in the murder of Sanjay Singh 23 persons were involved in which charge sheet was submitted against two accused persons namely, Rupdeo Yadav and



Birendra Rajwar.

30. PW-9 further deposed that thereafter he started searching other 21 accused persons and has arrested seven accused persons with the help of police and they have taken on police remand. First of all Ram Bachan Yadav was arrested and during interrogation he desired to make statement by his own will. Then he informed CBI Special S.P. Shri Gillani and he handed over the accused to him, who recorded the confessional statement of this accused and his confessional statement was handed over to him. Then he taken the accused to the Chief Metropolitan Magistrate Tis Hajari where that accused accepted that he has given confessional statement by his own will and the Court has given carbon copy of the proceeding and on that proceeding he identified the signature of Chief Metropolitan Magistrate Shri Devi and his signature and also L.T.I. of Ram Bachan Yadav and that carbon copy of the proceeding is marked as Ext.14. Thereafter the accused was brought to the Sessions Court, Sasaram and was produced and was taken into judicial custody. Thereafter T.I. Parade of this accused was done and that accused was identified by the officials who were with the D.F.O. Thereafter he applied for sanction to prosecute under POTA which sanction was received with the signature of



Addl.Secretary S.C.Sharma, which was marked as Ext.15. After sanction order, the charge sheet was submitted against him.

31. He further deposed that accused Nitish @ Birbal was taken on police remand and after interrogation produced before the Sessions Court, Sasaram and was taken into judicial custody and was put on T.I.Parade at Bhagalpur jail who was identified by the witnesses and has procured sanction order (Ext.10) to prosecute under POTA and submitted charge sheet. Thereafter accused Nirala Yadav, Area Commander MCC was taken on police remand by C.B.I. and on his request his confessional statement was recorded by S.P. Vijay Kumar and was produced before the Chief Metropolitan Magistrate, Tis Hajari and accepted his voluntarily confessional statement and produced before the Sessions Court, Sasaram and the photo of the accused was got identified by the earlier I.O. and thereafter he procured the sanction report (Ext.10/1) for prosecution under POTA and thereafter submitted charge sheet.

32. In the instant case, it is admitted that sanction to prosecute the appellants had been accorded by the central Government being competent authority to accord sanction as envisaged under section 50 of POTA vide Ext. 10 (Sanction order to prosecute Nitish Kumar, @Birbal) Ext. 10/1 (Sanction



order to prosecute Nirala Yadav @ Ram Raj Yadav) and Ext. 15 (Sanction order to prosecute Ram Bachan Yadav). In the said sanction orders, it is stated that after fully and carefully examining the materials including the statement of witnesses, case diaries, copies of documents etc. before it is regard to allegations and circumstances of the case, the Central Government is satisfied that there is a *prima facie* case against the appellants and they should be prosecuted in the court of Law for the said offences.

33. The first and foremost preliminary issue arises in the present appeals is whether the cognizance and trial under POTA against the appellants is legally valid which needs to be addressed before we embark on a discussion on other issue.

34. The scheme of the Cr.P.C. is such that once the investigation stage is completed, the Court proceeds to the next stage, which is taking of cognizance and trial.

35. The Hon'ble Supreme Court in **State of Karnataka & Anr. vs. Pastor P. Raju, AIR 2006 SC 2825** observed as under:-

“Several provisions in Chapter XIV of the Code of Criminal Procedure use the word “cognizance”. The very first section in the said Chapter viz. Section 190 lays down how cognizance of offences will be taken by a Magistrate. However, the word “cognizance”



has not been defined in the Code of Criminal Procedure. The dictionary meaning of the word “cognizance” is — “judicial hearing of a matter”. The meaning of the word has been explained by judicial pronouncements and it has acquired a definite connotation. The earliest decision of this Court on the point is R.R. Chari v. State of U.P. [1951 SCC 250 : 1951 SCR 312 : AIR 1951 SC 207 : 1951 Cri LJ 775] wherein it was held :

“... ‘taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to the suspected commission of an offence’.”

36. Section 20A of TADA, 197, 132 of Cr.P.C., Section 50 of POTA and similar provisions are provided with respect to provision that no Court can take cognizance of any offence under the said Act without the previous sanction has been considered.

37. In **Darshan Singh Ram Kishan vs State of Mahrastra, AIR 1971 SC 2372**, while considering Section 190 of the Code of 1908, it was observed that taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police



officer.

38. In **Kishun Singh & Ors. vs. State of Bihar (1993)**

2 SCC 16 the Hon'ble Supreme Court observed that when the Magistrate takes notice of the accusation and applies his mind to the allegations made in the complaint or police report or information and on being satisfied that the allegations, if proved, would constitute an offence, decides to initiate judicial proceedings against the alleged offender, he is said to have taken cognizance.

39. In **State of W.B. vs. Mohammed Khalid, AIR**

1995 SC 785 the Hon'ble Supreme Court referred Section 190 of Cr.P.C. and observed:

“Section 190 of the Code talks of cognizance of offences by magistrates. This expression has not been defined in the Code. In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against an offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word ‘cognizance’ indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons.”

40. In **Paster Case** (supra) is observed that “it is



necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a *prima facie* case is made out.” In this case it was held that an order remanding an accused to judicial custody does not amount to taking cognizance of an offence. A limited role has to be performed by the Judicial Magistrate to whom the accused has been forwarded, viz to authorize his detention. This is anterior to Section 190 Cr.P.C.

40.1. A statement in the end of charge sheet that further investigation is pending/in progress would not make the charge sheet incomplete. Even otherwise, Investigating Officer is entitled to conduct further investigation to collect further evidence.

41. The Magistrate is not competent to order further investigation after taking cognizance of the offences and after accused appeared before him in pursuance of issuance of



process except giving formal permission to make further investigation to police when fresh facts come to light (when police informs and seeks permission of the Court).

42. The law is well settled that continuation of earlier investigation is further investigation and on completion of further investigation the investigating agency has to forward to the Magistrate a further report or reports as envisaged under Section 173(8) Cr.P.C. Sub-section 173(8) lays down that investigating agency can carry on further investigation in respect of the offence after a report under sub-section (2) has been filed. In the course of further investigation commission of some fresh offences also may be disclosed but connected with the transaction which is the subject matter of the earlier report. The police, after further investigation, can file supplementary report.

43. The Hon'ble Supreme Court in **Rama Chaudhari**

v. State of Bihar (2009) 6 SCC 346 observed as under:

“17. From a plain reading of sub-section (2) and sub-section (8) of Section 173, it is evident that even after submission of the police report under sub-section (2) on completion of the investigation, the police has a right to “further” investigation under sub-section (8) of Section 173 but not “fresh investigation” or “reinvestigation”. The meaning of “further” is additional, more, or supplemental. “Further” investigation, therefore, is the continuation of the earlier investigation and



not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether.

18. Sub-section (8) of Section 173 clearly envisages that on completion of further investigation, the investigating agency has to forward to the Magistrate a “further” report and not a fresh report regarding the “further” evidence obtained during such investigation.”

44. Even when charge sheet or *challan* has been filed by the police under sub-section (2) of Section 173, the police can undertake further investigation under sub-section (8) of 173 of Cr.P.C. It is well settled that the Magistrate takes cognizance of an offence not the offender. He does not take cognizance against individual accused person. In terms of Section 190 Cr.P.C., the Magistrate is the competent authority to take cognizance of an offence. The criminal investigation machinery is set into motion by lodging of a first information report in relation to commission of a cognizable offence. After the investigation has been completed by Investigating Officer he has to prepare report without unnecessary delay in terms of Section 173 of the Code and forward his report (charge sheet or *challan*) to a Magistrate who is empowered to take cognizance on police report. Upon receipt of the report, the empowered Magistrate shall proceed further in accordance with law. A very



wide power is vested in Investigating Officer to conduct further investigation after it has filed the report in terms of Section 173 (2). The Investigating Agency is competent to file a supplementary report to its primary report in terms of Section 173 (8). The supplementary report has to be treated by the court in continuation of primary report and the same provisions of law i.e. sub-section 2 to 6 of Section 173 shall apply when the Court deals with such report.

45. In **Rama Chaudhary vs. State of Bihar (2009) 6 SCC 346**, the Hon'ble Supreme Court held "further investigation" within the provision of Section 173(8) Cr.P.C. is additional; more supplement. "Further investigation" therefore is the continuation of the earlier investigation and not a fresh investigation or re-investigation to be started *ab initio* wiping out the earlier investigation altogether.

46. In **Sri Bhagwan Samardha Srepada Valiabha Vishwanandha Maharaj vs. State of A.P., (1995) 5 SCC 740**, the Hon'ble Supreme Court held that even after the Court took cognizance of any offence on the strength of the police report first submitted, it is open to the police to conduct further investigation.

47. In **Hasanbhai Valibhai Qureshi vs. State of**



Gujrat, (2004) 5 SCC 347, it was observed that the prime consideration for further investigation is to arrive at the truth and do real and substantial justice. The hands of Investigating Agency for further investigation should not be tied down on the ground of mere delay. In other words, the mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the court in arriving at the truth and do real and substantial and effective justice.

48. Whenever a final report forwarded by Investigating Officer to a Magistrate under Section 173 (2) (i) is placed before him, several situations may arise. The report may conclude that an offence appears to have been committed by a particular person and persons, and in such a case Magistrate may either-

- (1) accept the report and take cognizance of the offence and issue process,
- (2) may disagree with the report and drop the proceeding or to take or to take cognizance on the basis of report/material submitted by the Investigating Officer,
- (3) may direct further investigation under Section 156(3) and require police to make a report as per Section 178(3) of the Code,
- (4) may treat the protest complaint as a complaint, and proceed under Section 200 and 202 Cr.P.C.

49. Under Section 190 Cr.P.C. the learned Judge looks at the substance of the charge-sheet at the time he takes



cognizance. There is distinction between *prima facie* case for cognizance and *prima facie* case for proceedings against the accused, for the purpose of setting law in motion.

50. Admittedly the main charge sheet was submitted on 11.10.2002 against these appellants also in which they have been shown as absconder and cognizance in the present case was taken for the offence under POTA also on 17.10.2002. Once the cognizance of an offence is taken, it is not required to take cognizance again on filing supplementary report. The Investigating Agency may conduct further investigation and can file a supplementary report and prosecute the offender in accordance with law.

51. It appears from the record that appellants had filed a petition under Section 216 Cr.P.C. for alteration of charge framed under POTA on the ground that after repeal of POTA which came into force on 21.09.2004, the Review Committee shall have to complete the review of the case within period of one year of the date of commencement of the Repeal Act but the case of accused persons was never examined by any review committee and in view of non-examination by the Review Committee then such cases in which cognizance has been taken by the Court shall be deemed to have withdrawn as per



provision of Section 3(a) of the Repeal Act and accordingly cognizance and charge framed under POTA is bad in law.

52. It is relevant to note that the learned Trial Court vide reasoned order dated 11.01.2016 rejected the said petition and contention advanced on behalf of appellants, the relevant portion of the said order is as under:

“ ... From perusal of Section 2(2) of Prevention of Terrorism (Repeal) Act, 2004 it appears that the repeal of Principal Act shall not effect

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

(b) Any right, privilege or obligation or liability acquired, accrued or incurred under the Principal Act or

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

(d) any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the Principal Act had not been repealed. As per proviso to the said sub-section, no Court shall taken cognizance of an offence under the Principal Act after expiry of period of one year from commencement of this Act, i.e. 20.09.2005. It is settled principle of law that cognizance is taken against the offence and not against the offender or individuals. From perusal of the record it appears that the cognizance of the offence was taken on 17.10.2002, i.e. preceding to coming into force of Prevention of Terrorism (Repeal) Act, 2004 and when the Prevention of



Terrorism Act, 2002 was in vogue. The supplementary charge-sheet against the petitioner Ram Bachan Yadav was received in the Court on 23.08.2015, Lallan Singh Kharwar @ Subhash on 06.02.2006, Nitish Yadav @ Birbal Yadav on 16.05.2006, Nirala Yadav @ Ramraj Yadav @ Deepak Jee on 26.03.2007 and the aforesaid petitioners were remanded in this case on 15.06.2005, 17.09.2005, 16.09.2005 and 15.12.2006 respectively. The charge against the petitioners along with accused Sudama Uraon was framed under Section 3(2)(1), 22(5) of the Prevention of Terrorism Act, 2002 besides other Section of Indian Penal Code on 13.01.2010. Once the cognizance of the offence is taken by the Court and supplementary charge-sheet is submitted against any other accused person then fresh cognizance is not required to be taken against the said accused. The petitioner has not challenged the said order of framing charge under the Prevention of Terrorism Act, 2002....”

(emphasis supplied)

53. A three-Judge Bench of Hon’ble Supreme Court in

Sunil Bharti Mittal vs. Central Bureau of Investigation

reported in (2015) 4 SCC 609 held as under:

“49. Cognizance of an offence and prosecution of an offender are two different things. Section 190 of the Code empowered taking cognizance of an offence and not to deal with offenders. Therefore, cognizance can be taken even if offender is not known or named when the complaint is filed or FIR registered. Their names may transpire during investigation or afterwards.

50. Person who has not joined as accused in the charge-sheet can be summoned at the stage of taking cognizance under Section 190 of the Code. There is no question of applicability of Section 319 of the Code at this stage (see SWIL Ltd. v. State of Delhi [(2001) 6 SCC 670 : 2001 SCC



(Cri) 1205)]. It is also trite that even if a person is not named as an accused by the police in the final report submitted, the court would be justified in taking cognizance of the offence and to summon the accused if it feels that the evidence and material collected during investigation justifies prosecution of the accused (see Union of India v. Prakash P. Hinduja [(2003) 6 SCC 195 : 2003 SCC (Cri) 1314]). Thus, the Magistrate is empowered to issue process against some other person, who has not been charge-sheeted, but there has to be sufficient material in the police report showing his involvement. In that case, the Magistrate is empowered to ignore the conclusion arrived at by the investigating officer and apply his mind independently on the facts emerging from the investigation and take cognizance of the case. At the same time, it is not permissible at this stage to consider any material other than that collected by the investigating officer.”

54. A three-Judge Bench of Hon’ble Supreme Court in

Pradeep S. Wodeyar vs. State of Karnataka, (2021) 19 SCC

62 held as under:

“56.The purpose of taking cognizance of the offence instead of the accused is because the crime is committed against the society at large. Therefore, the grievance of the State is against the commission of the offence and not the offender. The offender as an actor is targeted in the criminal procedure to provide punishments so as to prevent or reduce the crime through different methods such as reformation, retribution and deterrence. Cognizance is thus taken against the offence and not the accused since the legislative intent is to prevent crime. The accused is a means to reach the end of preventing and addressing the commission of crime.”



55. In our view, the learned Trial Court has rightly given finding that the cognizance of this case was taken on 17.10.2002 and in that circumstances it cannot be held in the light of the provisions that POTA is not applicable to this case against the accused persons who are facing the trial and no any direction of Review Committee received in this regard that no *prima facie* case is made out against the accused persons. As such POTA is applicable in this case.

56. In the present case, the case was admittedly not reviewed by the Review Committee and as per learned senior counsel for appellants it is violation of Section 3 of the Repeal Act and accordingly proceeding under POTA is vitiated. The learned senior counsel for CBI resisted the said contention that it is founded on complete misreading of provisions of the Repeal Act. Going by the scheme of Repeal Act and construction of provisions of the Repeal Act, the argument on behalf of appellants cannot be countenanced.

57. The Division Bench of Hon'ble Bombay High Court in *Aatif Nasir Mulla and Others Vs. Central POTA Review Committee and Others* reported in **2010 SCC Online Bom 1379** on the similar issue whether on account of the provisions contained in the Prevention of Terrorism (Repeal)



Act, 2004 was it mandatory for the Review Committee constituted under Section 60 of the POTA to review the cases within one year from the commencement of the Repeal Act and failure to do so by the Review Committee would entail in withdrawal of the case, after taking consideration of the object and provisions of the POTA and Repeal Act, observed in paragraph 29 which is as under:

*“29. Notably, there is no express provision in the Repeal Act as to what would be the consequence if the Review Committee failed to review any case, of which cognizance has already been taken by the competent Court in relation to the offence under the Principal Act, within one year from coming into force of the Repeal Act in spite of the obligation to do so in terms of Section 2(3) of the Repeal Act. If the legislature intended that in cases where the Court has already taken cognizance before expiry of one year from the commencement of the Repeal Act, should be treated as withdrawn on account of failure of the Review Committee to review, would have made an express provision in that behalf. The purpose to review to be done by the Review Committee is only to ascertain whether prima facie, case is made out against the accused for offence punishable under the Principal Act. Even on liberal construction of the provisions of the Repeal Act **it is not possible to draw an inference that the cases in which cognizance is already taken by the court, but the Review Committee has failed to review that case before the expiry of one year, the case would lapse and stand withdrawn** or closed, whereas, a contrary position emerges on account of the sweep of Section 2(2) of the Repeal Act which saves the legal proceedings notwithstanding the repeal of the Principal Act.”*

(emphasis supplied)



58. The Hon'ble Supreme Court in **Mahmadhusen Abdulrahim Kalota Shaikh (2) Vs. Union of Indian & Others (2009)2 SCC**, observed that the Review Committee had to make a general review of all cases registered under POTA which were pending at the time of repeal. The purpose of such review was to identify the cases where there was no *prima facie* case for proceeding against the accused, so that they could be withdrawn. The opinion of the Review Committee under Section 2(3) of the repealing of the Repeal Act are limited in number and are required to be given as a one-time measure with reference to a repealed statute. It was further observed that if the opinion of the Review Committee is challenged by any aggrieved party in writ proceedings and is set-aside, the Court where the proceedings were pending, will continue with the case as if there had been no such opinion.

(emphasis supplied)

59. It is now clear that under POTA if the investigation was still bending even beyond one year, that would be no avail because the court would not be able to take cognizance of the offence under the principal Act after the expiry of one year from the commencement of the Repeal Act. But that would not affect the pending cases before the court in which cognizance has



already been taken.

60. The important legal provision which is of vital importance in the instant case needs consideration in Section 32 of POTA. Section 32 provides a self-contained scheme for recording of confession of an accused by specific police officer and its admissibility in trial of such a person i.e. the maker of the confession.

61. Under the Evidence Act, no confession made to a police officer can be proved against an accused. Section 24 lays down the rule that a confession made under any inducement, threat or promise becomes irrelevant in a criminal proceeding. Section 25 bars proof of a confession made to a police officer. Section 26 goes a step further and prohibits proof of confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate. Confessions leading to discovery of a fact which is dealt with under Section 27 is an exception to the rule of exclusion of confession made by an accused in the custody of a police officer. Consideration of a proved confession affecting the person making it as well as the co-accused is provided for by Section 30. Briefly and broadly, this is the scheme of the law of evidence vis-à-vis confessions.



62. The law is now well settled that a confession/statement made under Section 32 of POTA by an accused person cannot be used as a piece of evidence for any purpose against the other co-accused. This principle of law was clarified by the Hon'ble Supreme Court in **State (NCT of Delhi) vs. Navjot Sandhu (2005) 11 SCC 600** and the same was again reiterated by the Hon'ble Supreme Court in para 13 of the judgment in **Saquib Abdul Hameed Nachan vs. State of Maharastra** reported in **(2010) 9 SCC 93** which is as under:

“..... on a plain reading of Section 32(1), the confession made by an accused before a police officer shall be admissible against the maker of the confession in the course of his trial. It may be a joint trial along with some other accused; but, we cannot stretch the language of the section so as to bring the confession of the co-accused within the fold of admissibility. The confession of a co-accused ought not to be brought within the sweep of Section 32(1) of POTA....”

63. There is no room to import the requirements of Section 30 of the Evidence Act in Section 32 of POTA. In the phraseology used in Section 32(1) of POTA, Parliament used the expression *“shall be admissible in the trial of such person”* which is different from the language used in Section 30 of the Evidence Act. From the language of Section 32(1), it is clear that the intention of Parliament is to make such confession of accused substantive evidence in the trial of such accused only.



64. It is revealed from the evidence on record that during interrogation appellant Ram Bachan Yadav and appellant Nirala Yadav expressed their desire to reveal the true and complete facts. Consequently, they were produced before the concerned authority (PW-8), (PW-5) respectively who after giving sufficient opportunity and warning and on further verification about the accused making voluntary statement recorded the same and explained to them everything it was recorded.

65. Appellant Ram Bachan Yadav in his confessional statement disclosed that he was a member of Maoist Communist Centre (MCC) and Nirala Yadav was the Commander of MCC. On 15.02.2002, they along with 20-22 armed MCC activists headed by Nirala Yadav reached at village Rehal to break the marriage of the girl with Bilet Yadav of that village and to facilitate her marriage with him. In the meantime, the gypsy vehicle of Sri Sanjay Kumar Singh, DFO along with staff accompanying the DFO got down from Gypsy. He stated that one Gupta @ Shambhu Bhuyian was pasting poster on wall of Forest Department. He disclosed the event occurred on sudden arrival of DFO and others particularly the conservations, confrontations, demand of Rs.5 lakhs for MCC, refusal by DFO



to pay money, taking DFO towards forest where one of his associates, Virendra Yadav at the dictate of Nirala Yadav, DFO was shot dead inside the jungle at the outskirts of village Rehal. He further disclosed that he along with other members of MCC stood guard next to the villagers. Thereafter all the MCC activists raised slogans like MCC *Zindabad* and also threatened the villagers and officials of Forest Department with dire consequences. He returned his village and due fear of arrest he absconded from the village.

66. Exhibit-14 which is carbon copy of proceeding dated 11.06.2005 recorded by learned Metropolitan Magistrate, Delhi wherein learned Metropolitan Magistrate, Delhi enquired from accused Ram Bachan Yadav who stated that he had voluntarily made statement before other CBI senior official. The learned Metropolitan Magistrate, gone through the proceedings of both dates i.e. 9th and 10th June, 2005 recorded by S.P. Syed Juvaaid Mujtaba Gilani (PW-8) of CBI. He has read over all pages to accused who admits that he had made statement voluntarily and was told that this statement could be used against him as per law. It is further stated that he is therefore satisfied that while recording by S.P., no inducement, threat, coercion or force was used by CBI and the accused voluntarily



made statement about killing of Sanjay Singh, DFO.

67. Appellant Nirala Yadav @ Ram Raj Yadav @ Deepak also in his confessional statement narrated the entire sequence of events recorded under Section 32 of POTA which was confirmed by accused before Chief Metropolitan Magistrate, Delhi when he was produced before her.

68. It reveals from Exhibit 23 which is C.C. of order dated 13.12.2006 of Chief Metropolitan Magistrate, Delhi that the said voluntary confessional statement of Nirala Yadav recorded by Sri Vijay Kumar (PW-5) on 11.12.2006 and 12.12.2006 under Section 32 of POTA was forwarded to Chief Metropolitan Magistrate, Delhi who enquired from the accused as regard to the statement having been made by him to which he admitted to be correct stating that he has made the said statement to S.P. on 11.12.2006 and 12.12.2006 voluntarily and he was not subjected to any torture and harassment at the hands of any person whether from CBI or otherwise during the course of interrogation and making of the statement, which was made by him voluntarily without any pressure or coercion from any quarter. His statement to this effect has been recorded separately.

69. The aforesaid confessional statement of appellants



Ram Bachan Yadav and Nirala Yadav are admissible evidence and on compared with the statement of witnesses giving eye-witness account and medical evidence, it appears that all are consistent and supplementary to each other. The said appellants have not alleged application of force, torture or coercion or denial of any opportunity to rethink before making such statement. The said confessional statement is voluntarily and it can safely be relied upon.

70. It is essential to mention here that during investigation Test Identification Parade was conducted and it came on record in the evidence that witnesses PW-1 Kumar Narendra, informant and PW-3 Mehboob Alam had identified accused/ appellant Ram Bachan Yadav in Sub-divisional Jail, Sasaram and they also identified him in the Court at the time of examination stating his involvement in the offence. PW-2 Ram Jeevan Pandit and PW-4 Prithi Nath Singh had identified the accused/ appellant Nitish @ Birbal at Bhagalpur Jail and they also identified him in Court. PW-3 and PW-4 have identified Nirala Yadav through photo identification. All the witnesses of occurrence have identified accused/ appellant Nirala Yadav in the Court at the time of examination. The learned counsel for the appellants failed to point out any major discrepancies in the



manner in which TIP were conducted. The credibility of witnesses is not doubtful and all the precautions have been taken place in the process. The learned Trial Court has considered and relied on the evidence of TIP witnesses for convicting and sentencing the appellants. The principle with respect to identification parade is well settled.

71. The identification parades belong to the stage of investigation . They do not constitute substantive evidence and these parades are essentially governed by Section 162 of Cr.P.C. The logic behind T.I.P. , which will include photo identification lies in the fact that it is primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right line and to ensure that he has got the right person as an accused. The identification can only be used as corroborative of the statement in Court.

72. In case of **Gireesan Nair and Others vs. State of Kerala (2023) 1 SCC 180**, the Hon'ble Supreme Court held as under:

“28.The object of conducting a TIP is threefold. First, to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the crime. Second, to satisfy the investigating authorities that the suspect is



the real person whom the witnesses had seen in connection with the said occurrence. Third, to test the witnesses' memory based on first impression and enable the prosecution to decide whether all or any of them could be cited as eyewitnesses to the crime (Mulla v. State of U.P. [Mulla v. State of U.P., (2010) 3 SCC 508, paras 44, 45 & 55 : (2010) 2 SCC (Cri) 1150].

29. *TIPs belong to the stage of investigation by the police. It assures that investigation is proceeding in the right direction. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant (Matru v. State of U.P. [Matru v. State of U.P., (1971) 2 SCC 75, para 17 : 1971 SCC (Cri) 391] ; Mulla v. State of U.P. [Mulla v. State of U.P., (2010) 3 SCC 508, paras 41 & 43 : (2010) 2 SCC (Cri) 1150] and C. Muniappan v. State of T.N. [C. Muniappan v. State of T.N., (2010) 9 SCC 567, para 42 : (2010) 3 SCC (Cri) 1402]). The evidence of a TIP is admissible under Section 9 of the Evidence Act. However, it is not a substantive piece of evidence. Instead, it is used to corroborate the evidence given by witnesses before a court of law at the time of trial. Therefore, TIPs, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of an accused can be sustained (State of H.P. v. Lekh Raj [State of H.P. v. Lekh Raj, (2000) 1 SCC 247, para 3 : 2000 SCC (Cri) 147] and C. Muniappan v. State of T.N. [C. Muniappan v. State of T.N., (2010) 9 SCC 567, para 42 : (2010) 3 SCC (Cri) 1402].”*

30. *It is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that a TIP is held without avoidable and unreasonable delay after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the*



witnesses before the test identification parade....

32. If identification in the TIP has taken place after the accused is shown to the witnesses, then not only is the evidence of TIP inadmissible, even an identification in a court during trial is meaningless (Sk. Umar Ahmed Shaikh v. State of Maharashtra [Sk. Umar Ahmed Shaikh v. State of Maharashtra, (1998) 5 SCC 103 : 1998 SCC (Cri) 1276]). Even a TIP conducted in the presence of a police officer is inadmissible in light of Section 162 of the Code of Criminal Procedure, 1973 (Chunthuram v. State of Chhattisgarh [Chunthuram v. State of Chhattisgarh, (2020) 10 SCC 733 : (2021) 1 SCC (Cri) 9] and Ramkishan Mithanlal Sharma v. State of Bombay [Ramkishan Mithanlal Sharma v. State of Bombay, (1955) 1 SCR 903 : AIR 1955 SC 104].

34. It is for the prosecution to prove that a TIP was conducted in a fair manner and that all necessary measures and precautions were taken before conducting the TIP. Thus, the burden is not on the defence. Instead, it is on the prosecution (Rajesh Govind Jagesha v. State of Maharashtra [Rajesh Govind Jagesha v. State of Maharashtra, (1999) 8 SCC 428, para 4 : 1999 SCC (Cri) 1452].”

73. In case of **State (NCT of Delhi) (supra)**, the Hon’ble Supreme Court held in paragraph 227 as under:

“227. It is well settled that conducting the test identification parade relates to the stage of investigation and the omission to conduct the same will not always affect the credibility of the witness who identifies the accused in the court. In Malkhansingh v. State of M.P. [(2003) 5 SCC 746 : 2003 SCC (Cri) 1247] , B.P. Singh, J. speaking for a three-Judge Bench observed thus: (SCC p. 755, para 16)



“16. It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. In the instant case the courts below have concurrently found the evidence of the prosecutrix to be reliable....”

74. Having heard at length learned senior counsel for the appellants as well as learned senior counsel representing C.B.I. on rival contentions and materials on record as discussed above and we find that prosecution has been able to establish its case beyond reasonable doubt that deceased Sanjay Singh, D.F.O. was brutally killed by the activists of Maoist Communist Centre (MCC), which is a banned terrorist organization, as appear from Item No.25 of the Schedule, The Prevention of Terrorism Act, 2002, since he failed to part with money to such organization and the appellants besides others were the persons actively participated in such crime committed by the group of persons including themselves.

75. We, thus, find no merit in these appeals. Accordingly, both the appeals are dismissed.

76. In the result, the impugned judgment of conviction



to the appellants is confirmed.

77. The Trial Court records of the instant appeal be returned to the Trial Court forthwith.

78. Interlocutory Application, if any, stands disposed off, accordingly.

(Sunil Dutta Mishra, J)

I agree
Arvind Srivastava, J

(Arvind Srivastava, J)

Harish/-

AFR/NAFR	NAFR
CAV DATE	09.02.2023
Uploading Date	02.04.2024
Transmission Date	02.04.2024

