Supreme Court of India
State (N.C.T. Of Delhi) vs Navjot Sandhu@ Afsan Guru on 4 August, 2005
Author: P V Reddi
Bench: P. Venkatarama Reddi, P.P. Naolekar

CASE NO.:
Appeal (crl.) 373-375 of 2004

PETITIONER:
STATE (N.C.T. OF DELHI)

RESPONDENT:
NAVJOT SANDHU@ AFSAN GURU

DATE OF JUDGMENT: 04/08/2005

BENCH:
P. VENKATARAMA REDDI & P.P. NAOLEKAR

JUDGMENT:

JUDGMENT WITH CRIMINAL APPEAL Nos. 376-378 OF 2004 STATE (N.C.T. OF DELHI) APPELLANT VERSUS SYED ABDUL REHMAN GILANI RESPONDENT CRIMINAL APPEAL Nos. 379-380 OF 2004 SHAUKAT HUSSAIN GURU APPELLANT VERSUS STATE (N.C.T. OF DELHI) RESPONDENT CRIMINAL APPEAL NO. 381 OF 2004 MOHD. AFZAL APPELLANT VERSUS STATE (N.C.T. OF DELHI) P. VENKATARAMA REDDI, J.

1. The genesis of this case lies in a macabre incident that took place close to the noon time on 13th December, 2001 in which five heavily armed persons practically stormed the Parliament House complex and inflicted heavy casualties on the security men on duty. This unprecedented event bewildered the entire nation and sent shock waves across the globe. In the gun battle that lasted for 30 minutes or so, these five terrorists who tried to gain entry into the Parliament when it was in session, were killed. Nine persons including eight security personnel and one gardener succumbed to the bullets of the terrorists and 16 persons including 13 security men received injuries. The five terrorists were ultimately killed and their abortive attempt to lay a seize of the Parliament House thus came to an end, triggering off extensive and effective investigations spread over a short span of 17 days which revealed the possible involvement of the four accused persons who are either appellants or respondents herein and some other proclaimed offenders said to be the leaders of the banned militant organization known as "Jaish-E-Mohammed". After the conclusion of investigation, the investigating agency filed the report under Section 173 Cr.P.C. against the four accused persons on 14.5.2002. Charges were framed under various sections of Indian Penal Code (for short 'IPC'), the Prevention of Terrorism Act, 2002 (hereinafter referred to as 'POTA') and the Explosive Substances Act by the designated Court. The designated Special Court presided over by Shri S.N. Dhingra tried the accused on the charges and the trial concluded within a record period of about six months. 80 witnesses were examined for the prosecution and 10 witnesses were examined on behalf of the accused S.A.R. Gilani. Plethora of documents (about 330 in number) were exhibited. The three accused, namely, Mohd. Afzal, Shaukat Hussain Guru and S.A.R. Gilani were convicted for the offences under Sections 121, 121A, 122, Section 120B read with Sections 302 & 307 read with Section

120- B IPC, sub-Sections (2), (3) & (5) of Section 3 and Section 4(b) of POTA and Sections 3 & 4 of Explosive Substances Act. The accused 1 & 2 were also convicted under Section 3(4) of POTA. Accused No.4 namely Navjot Sandhu @ Afsan Guru was acquitted of all the charges except the one under Section 123 IPC for which she was convicted and sentenced to undergo R.I. for five years and to pay fine. Death sentences were imposed on the other three accused for the offence under Section 302 read with Section 120-B IPC (it would be more appropriate to say Section 120-B read with Section 302 IPC) and Section 3(2) of POTA. They were also sentenced to life imprisonment on as many as eight counts under the provisions of IPC, POTA and Explosive Substances Act in addition to varying amounts of fine. The amount of Rs.10 lakhs, which was recovered from the possession of two of the accused, namely, Mohd. Afzal and Shaukat Hussain, was forfeited to the State under Section 6 of the POTA.

2. In conformity with the provisions of Cr.P.C. the designated Judge submitted the record of the case to the High Court of Delhi for confirmation of death sentence imposed on the three accused. Each of the four accused filed appeals against the verdict of the learned designated Judge. The State also filed an appeal against the judgment of the designated Judge of the Special Court seeking enhancement of life sentence to the sentence of death in relation to their convictions under Sections 121, 121A and 302 IPC. In addition, the State filed an appeal against the acquittal of the 4th accused on all the charges other than the one under Section 123 IPC. The Division Bench of High Court, speaking through Pradeep Nandrajog, J. by a well considered judgment pronounced on 29.10.2003 dismissed the appeals of Mohd. Afzal and Shaukat Hussain Guru and confirmed the death sentence imposed on them. The High Court allowed the appeal of the State in regard to sentence under Section 121 IPC and awarded them death sentence under that Section also. The High Court allowed the appeals of S.A.R. Gilani and Navjot Sandhu @ Afsan Guru and acquitted them of all charges. This judgment of the High Court has given rise to these seven appeals two appeals preferred by Shaukat Hussain Guru and one appeal preferred by Mohd. Afzal and four appeals preferred by the State/Government of National Capital Territory of Delhi against the acquittal of S.A.R. Gilani and Navjot Sandhu.

It may be mentioned that the accused Mohd. Afzal and Shaukat Hussain Guru are related, being cousins. The 4th accused Navjot Sandhu @ Afsan Guru is the wife of Shaukat Hussain. The third accused S.A.R. Gilani is a teacher in Arabic in Delhi University. It is he who officiated the marriage ceremony of Shaukat Hussain Guru and Navjot Sandhu who at the time of marriage converted herself to Islam.

3.(i) Now, let us make a brief survey of the incident and the investigation that followed, which led to the filing of the charge-sheet, as apparent from the material on record.

(ii) There is practically no dispute in regard to the details of actual incident, the identification of the deceased terrorists and the recoveries and other investigations made at the spot.

(iii) Five heavily armed persons entered the Parliament House complex in a white Ambassador Car. The said five persons (hereinafter referred to as the 'slain' or 'deceased terrorists') were heavily armed with automatic assault rifles, pistols, hand and rifle grenades, electronic detonators, spare

ammunition, explosives in the form of improvised explosive devices viz., tiffin bombs and a sophisticated bomb in a container in the boot of the car made with enormous quantity of ammonium nitrate. The High Court observed: "The fire power was awesome enough to engage a battalion and had the attack succeeded, the entire building with all inside would have perished."

(iv) It was a fortuitous circumstance that the Vice President's carcade, which was awaiting departure from Gate No.11 was blocking the circular road outside the Parliament building, with the result the deceased terrorists were unable to get free and easy access to the Parliament House building. The attack was foiled due to the immediate reaction of the security personnel present at the spot and complex. There was a fierce gun-battle lasting for nearly 30 minutes. As mentioned earlier, nine persons including eight security personnel and one gardener lost their lives in the attack and 16 persons including 13 security personnel, received injuries. The five assailants were killed.

(v) From the evidence of PW5 who was the ASI in-charge of Escort-I vehicle of the Vice-President, we get the details of the origin of the incident. He stated that at about 11.30 a.m. one white Ambassador car having red light entered the Parliament complex and came to the point where the carcade of the Vice-President was waiting near Gate No.11. Since the escort vehicle was blocking the way, the car turned towards left. He got suspicious and ordered the vehicle to stop. Then, the driver of the Ambassador car reversed the vehicle and while doing so struck the rear side of the car of the Vice-President. When the car was about to move away, he and the driver of the Vice- President's car ran towards the car and caught hold of the collar of the driver. As he was trying to drive away, PW5 took out his revolver. At that juncture, the five persons in the car got out of it and quickly started laying wires and detonators. Then PW5 fired a shot, which struck on the leg of one of the terrorists. The terrorist also returned the fire as a result of which he received a bullet injury on his right thigh. There was further exchange of fire. The evidence of other witnesses reveal that there was hectic movement of the terrorists from gate to gate within the complex firing at the security men on duty and the latter returning the fire.

(vi) The Station House Officer of Parliament Street Police Station, Shri G.L. Mehta (PW1) along with his team of police personnel reached the spot after receiving a wireless message. By that time, the firing spree was over. PW1 cordoned off the area. He found one deceased terrorist lying opposite Gate No.1 of the Parliament building, one deceased terrorist at the porch of Gate No.5 and three deceased terrorists lying in the porch of Gate No.9. The Bomb Disposal Squad of NSG, a photographer and a crime team were summoned to the spot. PW1 then deputed three Sub-Inspectors (PWs2 to 4) to conduct investigation at the three gates. PW1 then examined the spot of occurrence, prepared a rough sketch of the scene of occurrence and seized various articles including arms and ammunition, live and empty cartridges and the car and the documents found therein. Blood samples were also lifted from various spots. The photographs of the five slain terrorists were caused to be taken. Then, he sent the dead bodies to the mortuary in the hospital for postmortem.

(vii) After the Bomb Disposal Squad had rendered the area safe and his preliminary observations were over, PW1 recorded the statement of S.I. Sham Singh (PW55) who was in the security team of Vice-President. On the basis of this statement, 'Rukka' (Ext.PW1/1) was prepared and PW1

despatched the same to the police station at about 5 p.m. This formed the basis for registration of First Information Report. The FIR was registered for offences under Sections 121, 121A, 122, 124, 120-B, 186, 332, 353, 302, 307 IPC, Sections 3, 4 & 5 of the Explosive Substances Act and Sections 25 & 27 of the Arms Act by the Head Constable (PW14) of the Parliament Street Police Station. The copy of FIR was sent to the Court on the same day, as seen from the endorsement on the document (PW 14/1). The further investigation was, taken up by the special cell of Delhi Police.

(viii) Investigations conducted by PW1 and his team of officers led to the recovery and seizure of the following articles inter alia: A white ambassador car, DL3CJ1527, with a VIP red light. The car had a sticker of the Home Ministry (subsequently found to be fake) on the windshield (Ex. PW 1/8) containing an inscription at the rear denigrating India and reflecting a resolve to 'destroy' it. Certain papers relating to the car were found inside the car.

Six fake identity cards purportedly issued by Xansa Websity, 37, Bungalow Road, New Delhi to different students with their address as 120-A, Adarsh Nagar, Delhi and the telephone number as 9811489429. These identity cards were in the names of Anil Kumar, Raju Lal, Sunil Verma, Sanjay Koul, Rohail Sharma and Rohail Ali Shah (which were subsequently found to be fake names of the deceased terrorists).

One fake identity card of Cybertech Computer Hardware Solutions in the name of Ashiq Hussain which was being carried by the deceased terrorist Mohammed.

Two slips of paper bearing five domestic mobile phone numbers, which were related to the instruments found on the deceased terrorists and two UAE numbers. Three SIM cards corresponding to the mobile phone numbers noted on the slips were found inside the aforementioned three instruments Ext. P28, P37 & P27. In addition, three other SIM cards were recovered from the purse of the deceased terrorist Mohammad at Gate No.1.

One sheet of paper on which the topographical details regarding the Parliament House building and the compound were handwritten.

4.(i) So far, about the incident and the preliminary investigations at the scene of occurrence regarding which there is practically no dispute. We shall now narrate briefly the further factual details as unfolded by the prosecution:

(ii) While investigations were on at the spot, PW20 came to the Parliament Complex and met PW1. PW20 provided the first leads to the investigating officials by informing PW1 that he had sold the Ambassador car used in the attack (DL 3C J 1527) on 11.12.2001. He had come to the spot after seeing the said car on the television screen. PW20 had brought with him a delivery receipt dated 11.12.2001, photocopy of the identity card of one Ashiq Hussain etc. PW20 identified the deceased terrorist (Mohammad) at Gate No.1 as being the said Ashiq Hussain who had purchased the car.

(iii) Inspector Mohan Chand Sharma of special cell PW66 undertook the investigations pertaining to the mobile phones. Phone call details were obtained and analysed from the respective cellular

mobile service providers. Analysis of the call records indicated that the number 9811489429 which was found on the I.D. cards, (subsequently discovered to be that of the accused Afzal) appeared to be integrally connected with the deceased terrorists and this number had been in frequent contact with the cell phone No. 9810693456 (recovered from the deceased terrorist Mohammad at Gate No.1) continuously from 28.11.2001 till the date of the attack. It was further revealed that this number of Afzal, namely, 9811489429 was in contact with the above cell phone of Mohammad, just before the incident i.e. at 10.40 a.m., 11.04 a.m. and 11.22 a.m. It was also ascertained that the said number of Afzal was activated only on 6.11.2001 close to the attack.

Further analysis of the cell phone call records showed that another cell phone number i.e. 9811573506 (subsequently discovered to be that of Shaukat and recovered from the 4th accused Afsan Guru) appeared to be in close contact with Afzal's number namely 9811489429 and these numbers were in contact with each other a few minutes before the attack on the Parliament commenced. It was also found that the said number of Shaukat was activated only on 7.12.2001 just a week prior to the attack. An analysis of the call records relating to Shaukat's mobile phone further revealed that soon after the attack i.e at 12.12 hours, there was a call from Shaukat's number to the cell phone number 9810081228 (subsequently discovered to be that of SAR Gilani) and there was a call from Gilani's number to Shaukat's number 10 minutes later. Moreover, it was ascertained that Gilani's number was in constant touch with the other two accused namely Shaukat and Afzal. It transpired that Afzal's cell phone bearing number 9811489429 was reactivated on 7.12.2001 and the first call was from Gilani's number. With the recoveries of the cell phones and SIM cards and on an analysis of the details of phone numbers noted on the slips of papers in the light of the call records, the investigation narrowed down to three numbers, namely, 9811489429, 9811573506 and 9810081228 which belonged to Afzal, Shaukat and Gilani respectively. It was also found that the first two numbers were cash cards and hence the details regarding their ownership were not available. However, as regards 9810081228, the information was received from the service provider (AIRTEL) that SAR Gilani with the residential address 535, Dr. Mukherjee Nagar, Delhi was the regular subscriber.

PW66 then took steps on December 13th for obtaining permission from the Joint Director, I.B. as per the requirements of Indian Telegraph Act for keeping surveillance and tapping of the mobile phone Nos.9811489429, 9811573506 and 9810081228. On 14th December, at 12.52 hours, an incoming call to Gilani's No. 9810081228 was intercepted by S.I. Harender Singh (PW70). The call was in Kashmiri language. A Kashmiri knowing person (PW71) was requested to interpret the call recorded on the tape. He translated the call in Hindi which was recorded in Ext. PW66/4. That was a call from the brother of Gilani which was made from Srinagar. On the same day, at 8.12 P.M. a call was intercepted on the number 9811573506 which disclosed that one woman was talking in a state of panic to a male person whom she addressed as Shaukat. This conversation was transcribed by PW70 as per PW 66/3. The subsequent forensic analysis revealed that the male voice in the conversation was of the accused Shaukat Hussain and that the female voice was that of his wife accused No.4 who was the recipient of the call. The call came from Srinagar. Both the intercepted conversations were analysed and considered by PW 66 (Inspector M.C. Sharma) at about 10 P.M. on 14th December. PW 66 resultantly drew an inference that the persons who were conversing on the two mobile phones were having knowledge about the attack on Parliament and

that two persons namely, Shaukat and Chotu who were connected with the case were in Srinagar. The calling No. 0194 492160 was sent to the Central Agency of Srinagar Police for surveillance.

(iv) The next move was to arrest Gilani, which according to the prosecution was at about 10 A.M. on December 15th when he was entering his house at Mukherjee Nagar. Shri Gilani is alleged to have made disclosures to the investigating agency, the contents of which were recorded subsequently as Ex. PW 66/13. The disclosure statement implicated himself and the other accused in the conspiracy to attack the Parliament. According to the prosecution, he disclosed the facts on the basis of which further investigation was carried out, certain recoveries were effected and discovery of facts took place. The identity of the deceased terrorist Mohammad and others, the part played by Shaukat and Afzal and other details are said to have been given by him. According to the prosecution, Shri Gilani then led the Investigating Officer to the house of Shaukat which was also located at Mukherjee Nagar. The 4th accused Afsan Guru the wife of Shaukat was found there with cell phone No. 9811573506. The search of the premises resulted in the recovery of another cell phone 9810446375 which was in operation from 2nd November to 6th December. Accused Navjot, on interrogation, disclosed that Mohammad (deceased terrorist) gave Rs. 10 lac and laptop computer to Shaukat and asked him to go to Sri Nagar in the truck along with Afzal. The truck was registered in her name. The disclosure statement of Navjot is Ex.PW66/14. According to the prosecution, she was arrested at about 10.45 a.m. on 15th December. The truck number given by her was flashed to Srinagar. Srinagar police was successful in apprehending the two accused Afzal and Shaukat while they were in the truck belonging to Navjot. On their pointing out, the laptop computer and an amount of Rs. 10 lac were recovered from the truck by the SDPO, Srinagar (PW61). A mobile handset without any SIM card was also found. It transpired that this hand set was used in the operation i.e. No. 9811489429 which established contacts with deceased terrorists minutes before the attack. Mohd. Afzal and Shaukat Hussain, who were arrested by the Srinagar Police at about 11.45 A.M., were brought to Delhi in a special aircraft and were formally arrested in Delhi. The investigation was handed over the PW76 (Inspector Gill of Special Cell) on 16th December.

(v) It is the case of the prosecution that on interrogation, they made disclosure statements (Ex.PW 64/1 and PW 64/2) in relation to their role in the conspiracy. On December 16th, Afzal and Shaukat led the investigating team to the various hideouts, viz., Indira Vihar and Gandhi Vihar where the terrorists stayed. On the search of these places, the police recovered chemicals, prepared explosives, detonators, gloves, mixer grinder, motor cycles one belonging to Shaukat and the other purchased by the deceased terrorist Mohammad from PW29 which was allegedly used for reconnaissance (reccee). On December 17th , the investigating officer took Mohd. Afzal to the mortuary at the L.H. Medical College Hospital where Afzal identified the bodies of the five deceased terrorists as Mohammad (dead body found at Gate No.1), Raja, Rana, Hamza (dead bodies found at Gate No.9) and Haider (dead body found at Gate No.5). From December 17th to December 19th, Afzal led the police to various shops from where the chemicals and other materials required for preparing explosives were purchased and also the shops from where red light found on the seized car, motor cycle, dry fruits, mobile phones etc. were purchased. From December 17th onwards, the laptop was analysed by the IO with the assistance of an expert PW72. PW72 submitted a report narrating the results of his examination. The laptop was also sent to BPR&D Office in Hyderabad and another report from PW73 was obtained. The forensic analysis revealed that the documents found at the

spot with the deceased terrorists including various identity cards and sticker of the Home Ministry, were found stored in that laptop.

(vi) On 19th December, the important development was that the provisions of Prevention of Terrorism Ordinance were invoked and the offences under the said Ordinance were also included in the relevant columns of crime documents. According to the prosecution, this was done after due consideration of the material collected by then and upon getting definite information about the involvement of a banned terrorist organization Jaish e- Mohammad. The investigation was then taken over by the Assistant Commissioner of Police Shri Rajbir Singh (PW80). He recorded a supplementary disclosure statement being Ext. PW64/3.

(vii) On the same day i.e. 19th December, there was another crucial development. According to the prosecution, the three accused Afzal, Shaukat and Gilani expressed their desire to make confessional statements before the authorized officer.

On 20th December, PW80 made an application before the DCP (Special Cell) (PW60) for recording the confessional statements of these three accused. PW60 gave directions to PW18 to produce the three accused at the Officers Mess, Alipur Road, Delhi. On the next day i.e. 21st December, the accused Gilani was first produced before PW60 at the Mess building. However, Shri Gilani refused to make a statement before PW60 and the same was recorded by him. Thereafter, Shaukat Hussain was produced before PW60 at 3.30 P.M. Shaukat Hussain expressed his desire to make the confessional statement and the same was recorded by PW60 in his own handwriting which according to him was to the dictation of Shaukat. The confessional statement recorded purportedly in compliance with Section 32 is marked as Ex. PW60/6. The other accused Afzal was also produced before PW60 at 7.10 P.M. on 21st December. After he expressed the desire to make the confession, his statement was recorded by PW60 in his own handwriting allegedly as per the dictation of the said accused. This is Ex.PW60/9. PW80 obtained copies of the confessional statements in sealed envelopes. In substance, both Afzal and Shaukat confessed having been parties to the conspiracy to launch an attack on the Parliament House. The details of the confessions will be adverted to later. On 22nd December PW80 produced the accused persons before the Addl. Chief Metropolitan Magistrate (PW63) in compliance with Section 32 of POTA. The learned Magistrate conducted the proceedings in respect of each of the accused persons in order to satisfy himself that the statements recorded by PW60 were not the result of any inducements or threats. No complaint of any such threat or inducement was made to PW63. Shaukat Hussain and SAR Gilani were remanded to judicial custody on 22nd December itself. However, the police custody of Mohd.Afzal was allowed for the purpose of conducting certain investigations in the light of the supplementary disclosure statement made by him to PW80.

(viii) On 4.5.2002 sanction was accorded by the Lt. Governor of Delhi in view of the requirements of Section 50 POTA and Section 196 Cr.P.C. Sanction was also accorded by the Commissioner of Police on 12th April for prosecution under Explosives Substances Act. On conclusion of the investigations, the Investigating Agency filed the report under Section 173 Cr.P.C. against the four accused. By the time the charge sheet was filed and the charges were framed, the Prevention of Terrorism Act, 2002 was enacted and brought into force with effect from 28th March, 2002. By the same Act, the

Prevention of Terrorism (2nd) Ordinance, 2001 was repealed subject to a saving provision. The charges were framed on 4th June, 2002 and the trial before the designated Judge commenced on 4th July. An Advocate was nominated by the court at State's expense for providing legal assistance to the accused Afzal as he did not engage any counsel on his own. Subsequently, the counsel was changed. Before the trial started, an order was passed by the learned designated Judge that certain documents viz. post-mortem reports and documents relating to recoveries of arms, explosives etc. from the scene of occurrence shall be treated as undisputed evidence in view of the consent given by the accused persons and there was no need for formal proof of those documents. After the trial commenced, an application was moved on behalf of Gilani, Shaukat and Navjot challenging the admissibility of the intercepted conversations in evidence. The learned Judge of the designated Court rejected their contention by his order dated 11.7.2002. Assailing this order, the accused moved the High Court. The High Court set-aside the order of the designated court and allowed the applications of the accused. The SLP filed against that order was disposed of by this Court on 9.5.2003 during the pendency of the appeals in the High Court holding inter alia that the order passed by designated Judge was in the nature of an interlocutory order against which appeal or revision was barred under Section 34 POTA. Without expressing any opinion on the merits, the parties were permitted to urge the point at issue before the Division Bench of the High Court. The decision is reported in (2003) 6 SCC 641. The verdict of the trial court was given on 16th and 18th December, 2002. The details of conviction and sentences have already been referred to. As noticed earlier, the High Court allowed the appeals of A3 and A4 and dismissed the appeals of A1 and A2 and their death sentences were confirmed.

5. Preliminary submissions:

(i) There are certain issues which arise at the threshold viz., validity of sanction orders, non-addition of POTA offences at the beginning and framing of charges which need to be addressed before we embark on a discussion of other questions.

Sanction:

(ii) Section 50 of POTA enjoins that no Court shall take cognizance of offences under the Act "without the previous sanction of the Central Government or as the case may be, the State Government". So also, Section 196 of the Code of Criminal Procedure enacts a bar against taking cognizance of any offence punishable under Chapter VI of the Indian Penal Code except with the previous sanction of the Central Government or the State Government. Some of the offences charged in the present case are under Chapter VI of IPC.

(iii) It is first contended by the learned senior counsel Mr. Ram Jethmalani, that the sanctions were not given, nor signed by the competent authority. It is submitted that in relation to the Union Territory, only Central Government is competent. Delhi being a Union Territory known as the National Capital Territory of Delhi with effect from the date of commencement of the Constitution (69th Amendment Act), the Central Government alone is the competent authority to accord sanction. In the present case, both under POTA and Cr.P.C. sanctions have been accorded 'by order and in the name of the Lt. Governor of the National Capital Territory of Delhi'. The Lt. Governor did

not act on behalf of the Central Government nor did he act as Administrator of U.T. He acted as the Constitutional head of the Government of NCT of Delhi and played the role assigned to him under Section 41 of NCT of Delhi Act, as the authentication in the order shows. Therefore, it is submitted that the sanction purportedly granted under Section 50 of POTA is a nullity.

(iv) We find no substance in these contentions. Section 2(h) of POTA read with Articles 239 & 239AA of the Constitution of India furnish complete answers to these arguments and that is what the learned senior counsel for the State has highlighted.

'State Government' is defined in Section 2(h) of POTA and it says that "in relation to a Union Territory, 'State Government' means the Administrator thereof". The expression 'Administrator' finds place in Article 239 of the Constitution of India. Article 239(1) reads "Save as otherwise provided by Parliament by law, every Union Territory shall be administered by the President acting to such an extent as he thinks fit through an Administrator to be appointed by him with such designation as he may specify". Article 239AA inserted by the Constitution (69th Amendment Act, 1991) effective from 1.2.1992 lays down that from that date, the Union Territory of Delhi shall be called the NCT of Delhi and "the Administrator thereof appointed under Article 239 shall be designated as the Lt. Governor." By such designation as the Lt. Governor, the constitutional functionary contemplated by Article 239, namely, the Administrator has not lost his status as Administrator. The designation of Administrator gets merged into the new designation of Lt. Governor in keeping with the upgraded status of this particular Union Territory. Thus, the Lt. Governor who continues to be the Administrator also derives his or her authority to grant sanction under Section 50 of POTA by virtue of the legislative fiction created by Clause (h) of Section 2 read with Article 239. The Administrator is deemed to be the State Government for the purpose of Section 50 of POTA. In effect and in substance, there is a clear delegation of power statutorily conferred in favour of the Administrator (designated as Lt. Governor) in respect of granting sanction under POTA. The fact that the sanction order carries the designation of the Lt.Governor is of no consequence and does not in any way impinge on the operation of Section 2(h) read with Article 239. POTA is a Parliamentary enactment. Sub-Clause (b) of Clause 3 of Article 239AA makes it explicit that notwithstanding the law making power conferred on the Legislative Assembly of NCT, the Parliament retains its power under the Constitution to make laws with respect to any matter for a Union Territory or any part thereof. The reliance sought to be placed on Goa Sampling Employees' Association Vs. G.S. Co. of India Pvt. Ltd. [(1985) 1 SCC 206] is rather misconceived. That case turned on the interpretation of the expression 'appropriate Government' occurring in Section 10 of the Industrial Disputes Act, 1947. The industrial dispute pertained to the workmen employed at Mormogao Port which is located in the then union territory of Goa, Daman and Diu. It was contended by the employer that the Central Government was not competent to refer the dispute to the Tribunal for adjudication. This contention found favour with the High Court of Bombay which held that the Administrator appointed under Article 239 of the Constitution is the State Government for the Union Territory of Goa and is the appropriate Government within the meaning of Section 2(a) of the Industrial Disputes Act. The judgment of the High Court was reversed by this Court after referring to Articles 239 and 239 A and the provisions of the Govt. of Union Territories Act, 1963 and the definitions of General Clauses Act and observed thus:

"On a conspectus of the relevant provisions of the Constitution and the 1963 Act, it clearly transpires that the concept of State Government is foreign to the administration of Union Territory and Article 239 provides that every Union Territory is to be administered by the President. The President may act through an administrator appointed by him. Administrator is thus the delegate of the President. His position is wholly different from that of a Governor of a State. Administrator can differ with his Minister and he must then obtain the orders of the President meaning thereby of the Central Government. Therefore, at any rate the administrator of Union Territory does not qualify for the description of a State Government. Therefore, the Central Government is the 'appropriate Government'.

That decision, in our view, has no relevance. This Court was not called upon to consider a specific provision like Section 50 or Section 2(h) of POTA. We are, therefore, of the view that by virtue of specific statutory delegation in favour of the Administrator who is constitutionally designated as Lt.Governor as well, the sanction accorded by the said authority is a valid sanction under Section 50 of POTA. It is of relevance to note that the order of sanction under POTA (Ext.P11/1) itself recites that the Lt.Governor acted in exercise of powers conferred by Section 50 read with Clause (h) of sub-Section (1) of Section 2 of POTA. We find on the perusal of relevant file that the Lt.Governor saw the file and he himself approved the proposed sanction. The grant of sanction was not an act done by a delegate of the Lt. Governor under the Business Rules. It may be noted that the sanction file was produced before the trial Court and was allowed to be perused by the defence counsel vide para 149 of the trial Court's judgment.

(v) As regards the sanction under Section 196 Cr.P.C. it is recited in the sanction order (Ext.P11/2) that the Lt. Governor acted in exercise of powers conferred by sub-Section (1) of Section 196 Cr.P.C. read with the Government of India, Ministry of Home Affairs notification dated 20th March, 1974. Under that notification, there was delegation of powers to the Lt. Governor to grant sanction. The said notification which finds place in the Annexures to the written submissions made on behalf of Gilani shows that it was issued under Article 239(1) of the Constitution enabling the Administrator of the Union Territory to discharge powers and functions of the State Government under the Cr.P.C. We accept the submission of the learned senior counsel for the State that the delegation of power contained in the said notification will continue to operate unless the Parliament by law provides otherwise. The Government of NCT of Delhi Act, 1991 does not in any way affect the validity of delegation contained in the Presidential Notification issued under Article 239.

We therefore hold that the sanctions under Section 50 of POTA and Section 196 of Cr.P.C. were accorded by a competent authority.

(vi) Touching on the validity of sanction, the next point urged by Mr. Ram Jethmalani was that there was no proper application of mind by the authority granting the sanction. There was no sanction for the offences under POTA whereas sanction was given for inapplicable offences under the Indian Penal Code. The facts constituting the offence have not been stated in the sanction order and no evidence has been adduced to show that the competent authority addressed himself to the relevant facts and material. The careless and inept drafting of the sanction order has given scope for some of these comments. Surprisingly, in the first para of the order containing recital as to the prima facie

satisfaction of the Lt.Governor the POTA offences are not specifically mentioned. They are however embraced within the residuary terminology "along with other offences". Instead of mentioning the POTA offences specifically and conspicuously in the order passed under Section 50 of the POTA, the drafter reversed that process by mentioning the POTA offences under the residuary expression "apart from other offences". However, in our view, this careless drafting cannot deal a fatal blow to the sanction order. Looking at the substance and reading the entirety of the order, we come to the irresistible conclusion that the sanction was duly given for the prosecution of the accused for the offences under POTA after the competent authority (Lt.Governor) had reached the satisfaction prima facie in regard to the commission of the POTA offences as well. A specific reference to the POTA offences mentioned in FIR is contained in the opening part of the order. The order then contains the recital that the Lt.Governor was satisfied that the four accused persons "have prima facie committed offences punishable under Sections 121, 121A, 122, 124 and 120B of the IPC being involved in criminal conspiracy to commit the said offences with intention of waging war against the Government of India along with other offences." In the context in which the expression 'along with other offences' occurs, it must be reasonably construed so as to be referable to POTA offences mentioned in the opening clause. The operative part of the order is more explicit inasmuch as the Lt.Governor granted sanction for the prosecution of the four accused in a competent Court "for committing the said offences punishable under Sections 3, 4, 5, 20 & 21 of the POTA". It is pertinent to notice that in the sanction order under Section 196 Cr.P.C. the POTA offences do not find specific mention at all. Thus, a distinction was maintained between the sanction under POTA and the sanction under Cr.P.C.

The other submission that the addition of the offence under Section 120B which does not require sanction, reveals total non-application of mind, does not appeal to us. Though the conspiracy to commit the offences punishable by Section 121 is covered by Section 121A, probably Section 120B was also referred to by way of abundant caution though the prosecution for the said offence does not require sanction. At any rate, the insertion of a seemingly overlapping provision does not and cannot affect the validity of the sanction order. Nor can it be said that the addition of Section 124 which has really no application to the present case by itself vitiates the sanction order. From the insertion of one inapplicable provision, a reasonable inference cannot be drawn that there was no application of mind by the competent authority. A meticulous and legalistic examination as to the offences applicable and not applicable is not what is expected at the stage of granting sanction. It was observed by the Privy Council in Gokulchand Dwarkadas Vs. The King [AIR 1948 Privy Council 82] that, "the charge need not follow the exact terms of the sanction, though it must not relate to an offence essentially different from that to which the sanction relates". In any case we do not think that the mention of an inapplicable Section goes to the root of the matter or otherwise makes it vulnerable to attack.

On the validity of sanction, we have to consider yet another contention of the learned senior counsel Mr. R. Jethmalani that in the absence of recital of facts to sustain prosecution or proof of consideration of such facts, the sanction order must be held to have been vitiated on the ground of non-application of mind. Relying on the dicta of the Privy Council in Gokulchand's case, it has been pointed out that no facts constituting the relevant offences were set out in the order nor any extraneous evidence was let in to show that the sanctioning authority was seized of the facts alleged

to constitute the relevant offence. In Gokulchand's case (supra), the sanction order of the Government was a bald order stating that the Government was "pleased to accord sanction under Clause 23 of Cotton Cloth and Yarn (Control) Order to the prosecution of Mr. Gokulchand Dwarkadas for breach of the provisions of Clause 18(2) of the said order". The Privy Council held that the sanction read with the evidence adduced at the trial was not in compliance with the provisions of Clause 23 of the said Control Order. The following observations in that judgment may be noted:

" In their Lordships' view, in order to comply with the provisions of clause 23, it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is plainly desirable that the facts should be referred to on the face of the sanction, but this is not essential, since clause 23 does not require the sanction to be in any particular form, nor even to be in writing. But if the facts constituting the offence charged are not shown on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority "

The ruling of the Privy Council was cited with approval by this Court in Jaswant Singh Vs. State of Punjab [AIR 1958 SC 124] and certain other cases. Ultimately, the test to be applied is whether relevant material that formed the basis of allegations constituting the offence was placed before the sanctioning authority and the same was perused before granting sanction. We are of the view that this test has been amply satisfied in the instant case. The sanction orders on their face indicate that all relevant material viz., FIR, disclosure statements, recovery memos, draft charge sheet and other material on record was placed before the sanctioning authority. The fact that the sanctioning authority perused all this material is also discernible from the recital in the sanction orders. The sanction orders make it clear that the sanctioning authority had reached the satisfaction that prima facie the accused committed or conspired to commit the offences mentioned therein. The elaborate narration of facts culled out from the record placed before the sanctioning authority and the discussion as to the applicability of each and every Section of the penal provision quoted therein is not an imperative requirement. A pedantic repetition from what is stated in the FIR or the draft charge-sheet or other documents is not what is called for in order to judge whether there was due application of mind. It must be noted that the grant of sanction is an executive act and the validity thereof cannot be tested in the light of principles applied to the quasi-judicial orders vide the decisions in State of Bihar Vs. P.P. Sharma [(1992) supp.1 SCC 222] and Superintendent of Police Vs. Deepak Chowdary [(1995) 6 SCC 225]. Apart from this, the oral evidence of PW11 Deputy Secretary, Home who dealt with the file also reveals that the notes prepared by himself and the Principal Secretary, Home had drawn the attention of the Lt. Governor to the role of individual accused and the Principal Secretary's note was approved by the Lt. Governor. Various documents placed before the sanctioning authority were also mentioned by PW11. PW11 brought the original sanction file and it is seen from the judgment of the trial Court that the learned trial Judge had gone through the file apart from making it available to the defence counsel. The oral evidence let in by the prosecution by examining PW11 dispels any doubt as to the consideration of the matter by the sanctioning authority before according the sanction. The decision of this Court in Rambhai Nathabhai Gadhvi & Ors. Vs. State of Gujarat [(1997) 7 SCC 744] which invalidated the sanction granted by the competent authority under the Terrorist and Disruptive Activities (Prevention) Act

does not come to the aid of the accused in the present case. The Bench consisting of A.S. Anand and K.T. Thomas, JJ., after referring to the infirmities in the sanction order, observed thus: "In such a situation, can it be said that the sanctioning authority granted sanction after applying its mind effectively and after reaching a satisfaction that it is necessary in public interest that prosecution should be launched against the accused under TADA. As the provisions of TADA are more rigorous and the penalty provided is more stringent and the procedure for trial prescribed is summary and compendious, the sanctioning process mentioned in Section 20-A(2) must have been adopted more seriously and exhaustively than the sanction contemplated in other penal statutes "

The above observations do not mean that different standards should be applied for judging the validity of a sanction made under the provisions of TADA or POTA and the sanctions under ordinary laws. That is not the ratio of the decision. The learned Judges were only pointing out that enough seriousness was not bestowed in the process of granting sanction for prosecution under a stringent law. The observations contained in para 10 turned on the facts of that case which are telling. It was noticed that the only document sent to the sanctioning authority, namely, the Director General of Police, was the FIR and the letter of the Superintendent of Police giving only skeletal facts. It was further noticed that the Director-General did not even grant sanction for the prosecution but what he did was to give permission to add certain Sections of TADA. Thus, it was a case of utter non-compliance with the elementary requirements governing sanction. The facts of the present case are vastly different.

No separate argument was addressed in relation to the sanction given under the Explosive Substances Act. Suffice it to say that we find no legal infirmity in the said order passed by the Commissioner of Police which is Ext. PW11/3.

Addition of POTO/POTA offences (6) (i) The next question is whether the addition of offences under Sections 3, 4 & 5 of POTO? was justified and whether POTO should have been invoked by the Investigating Officer on the very first day when the FIR was registered. This question will have a bearing on the admissibility of intercepted telephonic conversations which took place prior to 19th December and the compliance with the provisions of Section 52 of POTA which lays down certain safeguards from the point of view of the accused. Chapter V contains provisions relating to interception of communications. Section 45 which starts with a non-obstante clause lays down that the evidence collected through the interception of wire, electronic or oral communication under Chapter V shall be admissible as evidence against the accused during the trial of the case. There are two provisos to the Section and the 1st proviso reads as follows. "Provided that, the contents of any wire, electronic or oral communication intercepted pursuant to this Chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in any court unless each accused has been furnished with a copy of the order of the Competent Authority and accompanying application, under which the interception was authorized or approved not less than ten days before trial, hearing or proceeding:"

It is common ground that the embargo placed by the first proviso comes into operation in the instant case inasmuch as no orders were obtained for interception from a competent authority in compliance with the various provisions of Chapter V. The embargo under proviso to Section 45 is

equally applicable when the special Court tries along with the POTA offences, the offences under other enactments viz., IPC, Explosives Act and Arms Act. That is one aspect. Secondly, there are certain procedural safeguards that are laid down in Section 52 when a person is arrested for the offences under POTA. These safeguards were apparently introduced in keeping with the guidelines laid down in D.K. Basu's case. They are discussed in detail later on. The question arises whether there was deliberate failure on the part of the investigating agency to invoke POTA initially in order to circumvent the requirements of Sections 45 & 52.

(ii) Incidentally, another question raised is whether there was manipulation of FIR by not showing the POTA offences though in fact POTA was resorted to by that date. In regard to the latter aspect, the learned counsel for the accused has drawn our attention to the letter of AIRTEL (Cell phone service provider) addressed to the I.O. M.C. Sharma (PW66). In that letter (Ext.PW35/1), while giving the reference to the FIR dated 13.12.2001, the offences under various Sections of POTO were mentioned in addition to other offences. From this, an inference is sought to be drawn that the FIR was tampered with by deleting reference to POTO Sections so as to make it appear that on the 13th & 14th December when the interceptions took place, the investigation was not extended to POTO offences. We find it difficult to accept this contention. We find no basis for the comment that the FIR would have been manipulated by deleting the POTO offences. No such suggestion was ever put to the police officials concerned, namely, PWs 1, 9 & 14 connected with the registration of FIR and they were not even cross-examined. The original FIR register was produced by PW14. The trial Court perused the same while recording the depositions and returned it. In fact, this contention about the manipulation of FIR was not even raised in the trial Court. The High Court rightly found no substance in this contention. As regards the letter of AIRTEL, no question was put to PW35 the Security Manager of AIRTEL as to the basis on which the reference was given to the FIR mentioning various POTO offences. When the question was raised for the first time before the High Court, the High Court perused the case diaries and found that the addressee of the letter (Inspector M.C. Sharma) had sent up a written request on 25.12.2001 to furnish the requisite information to him. By that time, the POTO provisions were invoked. According to the High Court, there was every possibility that in that letter of 25.12.2001, the POTO provisions were mentioned and based on that, the same would have been noted in the AIRTEL's letter. The High Court also observed that the possibility of the date 17th being a mistake cannot be ruled out. Irrespective of the question whether the High Court was justified in observing that the date 17th noted in (Ext. PW35/1) could be a mistake, we do not consider it necessary to delve further into this aspect, in view of the fact that none of the witnesses pertaining to FIR were cross examined. By reason of the purported description of FIR given in the letter of AIRTEL (Ext.PW35/1) alone, we cannot reach the conclusion that POTO offences entered initially in the FIR were deleted for extraneous reasons. It is pertinent to note that the letters addressed by the Essar Cell phone provider (vide Exts.36/6 and 36/7, dated 13th and 18th December) do not contain any reference to POTO.

(iii) It was next contended by the learned counsel appearing for Shaukat and Gilani that from the beginning it was crystal clear that the persons who attempted to take control of the Parliament House were terrorists and there was no apparent reason why the offences under POTO were not entered in the FIR. Attention is drawn to the fact that the language used in the narration given by PW1 in the 'rukka', viz. "the terrorist organizations in order to disintegrate the unity and integrity of

India and to carry out destructive activities in a planned manner ." is a clear pointer that the investigating authority was conscious of applicability of POTO from the beginning, it is contended. Though we feel that POTO provisions could have been invoked on the very first day having regard to the nature and manifestations of this grave crime, we find no justification to characterize the action of the concerned police officers as malafide or motivated. It cannot be disputed that POTA contains drastic and stringent provisions both substantive and procedural, for dealing with special categories of offences which have bearing on the security and integrity of the country. In view of this special feature of the law, it is necessary to bestow sufficient care and thought before prosecuting an offender under this special law instead of proceeding under the ordinary law. This aspect has been emphasized in more than one decision of this Court dealing with TADA provisions. In Niranjan Singh Karam Singh Punjabi Vs. Jitendra Bhimraj Bijiaya [(1990) 4 SCC 76] this Court after noticing the views expressed in Usmanbhai Dawoodbhai Memon Vs. State of Gujarat [(1988) 2 SCC 271] observed thus:

" the provisions of the Act need not be resorted to if the nature of the activities of the accused can be checked and controlled under the ordinary law of the land. It is only in those cases where the law enforcing machinery finds the ordinary law to be inadequate or not sufficiently effective for tackling the menace of terrorist and disruptive activities that resort should be had to the drastic provisions of the Act. While invoking a criminal statute, such as the Act, the prosecution is duty-bound to show from the record of the case and the documents collected in the course of investigation that facts emerging therefrom prima facie constitute an offence within the letter of the law. "

In Usmanbhai's case it was said;

"Before dealing with the contentions advanced, it is well to remember that the legislation is limited in its scope and effect. The Act is an extreme measure to be resorted to when the police cannot tackle the situation under the ordinary penal law. The intendment is to provide special machinery to combat the growing menace of terrorism in different parts of the country. Since, however, the Act is a drastic measure, it should not ordinarily be resorted to unless the Government's law enforcing machinery fails."

Having regard to these observations, we cannot find fault with the Investigating Officers in going slow in bringing POTA into picture. At any rate, it may be a case of bona fide error or overcautious approach. Once the action of the police authorities in deferring the invocation of POTA is held to be not mala fide, it is not possible to countenance the contention that the provisions of POTA especially those contained in Chapter V and Section 52 ought to have been complied with even before 19th December. It is a different matter that D.K. Basu's guidelines were already there.

The learned counsel Mr. Gopal Subramanium has referred to the judgment of this Court in State of West Bengal Vs. Mohammed Khaleed [(1995) 1 SCC 684] to buttress his contention that the non-invocation of POTA on the first day cannot be faulted. The learned counsel also argued that POTA was invoked on 19th when further evidence came to light revealing a planned terrorist act at the behest of certain terrorist organizations. Be that as it may, we find nothing on record to hold that the investigating officials deliberately and without semblance of justification decided to bypass the

provisions of POTO.

Charges whether defective?

7 (i) We now turn to the next contention of the charges being defective. According to Shri Ram Jethmalani, the first charge which is a charge under Section 120B IPC is utterly confusing. It is pointed out that a conspiracy to wage war and to commit a terrorist act is punishable under Section 121A IPC and Section 3(3) of the POTA respectively. Therefore, according to the learned counsel, the charge under Section 120B is misplaced. It is also contended that the charge does not set out in clear terms, the exact period during which the conspiracy was allegedly hatched. The learned counsel further submits that the alleged confessional statements on which the prosecution relied would clearly show that the conspiracy started only in the first week of December, 2001, yet the period of offence was stated to be "on or before 13.12.2001".

(ii) It is settled law that a 'fundamental defect' should be found in the charges if the Court has to quash it. Whether the accused was misled and whether there was reasonable possibility of prejudice being caused to the accused on account of defective charges are relevant considerations in judging the effect of wrong or deficient charges. Section 215 of Cr.P.C. makes it clear that no error or omission in stating either the offence or the particulars required to be stated shall be regarded as material unless the accused was in fact misled by such error or omission and it has occasioned a failure of justice. The test of prejudice or reasonable possibility of prejudice was applied by this Court in William Slaney's case [AIR 1956 SC 116] in testing the argument based on the omission, error or irregularity in framing the charges. The same test was also applied in State of A.P. Vs. C. Ganeswar Rao [(1964) 3 SCR 297]. It has not been demonstrated in the instant case as to how the accused or any of them were misled or any prejudice was caused to them on account of the alleged defects in framing of charges. No such objection was even taken before the trial Court. As pointed out in William Slaney's case (para 45 of AIR), it will always be material to consider whether the objection to the nature of charge was taken at an early stage. To the same effect are the observations in Ganeswar Rao's case (supra). It is difficult to spell out with exactitude the details relating to the starting point of conspiracy. As pointed out in Esher Singh Vs. State of A.P. [(2004) (1 SCC page 585, 607], it is not always possible "to give affirmative evidence about the date of formation of the criminal conspiracy". We do not think that if instead of mentioning 'the first week of December, 2001' the wording 'before December, 2001' is employed, the prosecution should fail merely for that reason. The accused cannot be said to have been misled or prejudiced on that account. On the other hand, it is more than clear that the accused did understand the case they were called upon to meet. The question whether Section 120B applies to POTA offences or Section 3(3) alone applies is not a matter on which a definite conclusion should be reached ahead of the trial. It is not uncommon that the offence alleged might seemingly fall under more than one provision and sometimes it may not be easy to form a definite opinion as to the Section in which the offence appropriately falls. Hence, charges are often framed by way of abundant caution. Assuming that an inapplicable provision has been mentioned, it is no ground to set aside the charges and invalidate the trial. Other legal issues We shall, now, deal with certain legal issues, which have been debated before us in extenso. These issues have a bearing on the admissibility/relevancy of evidence and the evidentiary value or weight to be attached to the permissible evidence.

8. Law regarding confessions We start with the confessions. Under the general law of the land as reflected in the Indian Evidence Act, no confession made to a police officer can be proved against an accused. 'Confessions'-which is a terminology used in criminal law is a species of 'admissions' as defined in Section 17 of the Indian Evidence Act. An admission is a statement-oral or documentary which enables the court to draw an inference as to any fact in issue or relevant fact. It is trite to say that every confession must necessarily be an admission, but, every admission does not necessarily amount to a confession. While Section 17 to 23 deals with admissions, the law as to confessions is embodied in Sections 24 to 30 of the Evidence Act. 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. Section 24 lays down the obvious rule that a confession made under any inducement, threat or promise becomes irrelevant in a criminal proceeding. Such inducement, threat or promise need not be proved to the hilt. If it appears to the court that the making of the confession was caused by any inducement, threat or promise proceeding from a person in authority, the confession is liable to be excluded from evidence. The expression 'appears' connotes that the Court need not go to the extent of holding that the threat etc. has in fact been proved. If the facts and circumstances emerging from the evidence adduced make it reasonably probable that the confession could be the result of threat, inducement or pressure, the court will refrain from acting on such confession, even if it be a confession made to a Magistrate or a person other than police officer. Confessions leading to discovery of 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- a-vis confessions. The allied provision which needs to be noticed at this juncture is Section 162 of the Cr.P.C. It prohibits the use of any statement made by any person to a police officer in the course of investigation for any purpose at any enquiry or trial in respect of any offence under investigation. However, it can be used to a limited extent to contradict a witness as provided for by Section 145 of the Evidence Act. Sub-section (2) of Section 162 makes it explicit that the embargo laid down in the Section shall not be deemed to apply to any statement falling within clause (1) of Section 32 or to affect the provisions of Section 27 of the Evidence Act.

In the Privy Council decision of P. Narayana Swami vs. Emperor [AIR 1939 PC 47] Lord Atkin elucidated the meaning and purport of the expression 'confession' in the following words:

" . A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession."

Confessions are considered highly reliable because no rational person would make admission against his interest unless prompted by his conscience to tell the truth. "Deliberate and voluntary confessions of guilt, if clearly proved are among the most effectual proofs in law". (vide Taylor's Treatise on the Law of Evidence Vol. I). However, before acting upon a confession the court must be satisfied that it was freely and voluntarily made. A confession by hope or promise of advantage, reward or immunity or by force or by fear induced by violence or threats of violence cannot

constitute evidence against the maker of confession. The confession should have been made with full knowledge of the nature and consequences of the confession. If any reasonable doubt is entertained by the court that these ingredients are not satisfied, the court should eschew the confession from consideration. So also the authority recording the confession be it a Magistrate or some other statutory functionary at the pre-trial stage, must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, duress or hope of some advantage or reward induced by the persons in authority. Recognizing the stark reality of the accused being enveloped in a state of fear and panic, anxiety and despair while in police custody, the Indian Evidence Act has excluded the admissibility of a confession made to the police officer.

Section 164 of Cr.P.C. is a salutary provision which lays down certain precautionary rules to be followed by the Magistrate recording a confession so as to ensure the voluntariness of the confession and the accused being placed in a situation free from threat or influence of the police. Before we turn our attention to the more specific aspects of confessions under POTA, we should have a conspectus of the law on the evidentiary value of confessions which are retracted - which is a general feature in our country and elsewhere.

As to what should be the legal approach of the Court called upon to convict a person primarily in the light of the confession or a retracted confession has been succinctly summarized in Bharat vs. State of U.P. [1971 (3) SCC 950]. Hidayatullah, C.J., speaking for a three-Judge Bench observed thus:

"Confessions can be acted upon if the court is satisfied that they are voluntary and that they are true. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged in the context of the entire prosecution case. The confession must fit into the proved facts and not run counter to them. When the voluntary character of the confession and its truth are accepted, it is safe to rely on it. Indeed a confession, if it is voluntary and true and not made under any inducement or threat or promise, is the most patent piece of evidence against the maker. Retracted confession, however, stands on a slightly different footing. As the Privy Council once stated, in India it is the rule to find a confession and to find it retracted later. A court may take into account the retracted confession, but it must look for the reasons for the making of the confession as well as for its retraction, and must weigh the two to determine whether the retraction affects the voluntary nature of the confession or not. If the court is satisfied that it was retracted because of an after-thought or advice, the retraction may not weigh with the court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its user. All the same, the courts do not act upon the retracted confession without finding assurance from some other sources as to the guilt of the accused. Therefore, it can be stated that a true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires the general assurance that the retraction was an after-thought and that the earlier statement was true. This was laid down by this Court in an earlier case reported in Subramania Gounden v. The State of Madras (1958 SCR 428)."

The same learned Judge observed in Haroom Hazi Abdulla v. State of Maharashtra [1968 (2) SCR 641] that a "retracted confession must be looked upon with greater concern unless the reasons given for having made it in the first instance are on the face of them false." There was a further

observation in the same paragraph that retracted confession is a weak link against the maker and more so against a co-accused. With great respect to the eminent Judge, the comment that the retracted confession is a "weak link against the maker" goes counter to a series of decisions. The observation must be viewed in the context of the fact that the Court was concentrating on the confession of the co-accused rather than the evidentiary value of the retracted confession against the maker.

Dealing with retracted confession, a four-Judge Bench of this Court speaking through Subba Rao, J, in Pyare Lal v. State of Assam (AIR 1957 SC 216), clarified the legal position thus:

"A retracted confession may form the legal basis of a conviction if the court is satisfied that it was true and was voluntarily made. But it has been held that a court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only rule of prudence. It cannot even be laid down as an inflexible rule of practice or prudence that under no circumstances such a conviction can be made without corroboration, for a court may, in a particular case, be convicted of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars."

As to the extent of corroboration required, it was observed in Subramania Gounden's case (1958 SCR 428) that each and every circumstance mentioned in the retracted confession regarding the complicity of the maker need not be separately and independently corroborated. The learned Judges observed :

"it would be sufficient in our opinion that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession".

Then we have the case of Shankaria v. State of Rajasthan [1978 (3) SCC 435] decided by a three-Judge Bench. Sarkaria, J, noted the twin tests to be applied to evaluate a confession: (1) whether the confession was perfectly voluntary and (2) if so, whether it is true and trustworthy. The learned Judge pointed out that if the first test is not satisfied the question of applying the second test does not arise. Then the Court indicated one broad method by which a confession can be evaluated. It was said: "The Court should carefully examine the confession and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If on such examination and comparison, the confession appears to be a probable catalogue of events and naturally fits in with the rest of the evidence and the surrounding circumstances, it may be taken to have satisfied the second test."

In Parmanand Pegu v. State of Assam [2004 (7) SCC 779] this Court while adverting to the expression "corroboration of material particulars" used in Pyare Lal Bhargava's case clarified the position thus: "By the use of the expression 'corroboration of material particulars', the Court has not laid down any proposition contrary to what has been clarified in Subramania Goundan case as regards the extent of corroboration required. The above expression does not imply that there should

be meticulous examination of the entire material particulars. It is enough that there is broad corroboration in conformity with the general trend of the confession, as pointed out in Subramania Goundan case."

The analysis of the legal position in paragraphs 18 & 19 is also worth noting:

"Having thus reached a finding as to the voluntary nature of a confession, the truth of the confession should then be tested by the court. The fact that the confession has been made voluntarily, free from threat and inducement, can be regarded as presumptive evidence of its truth. Still, there may be circumstances to indicate that the confession cannot be true wholly or partly in which case it loses much of its evidentiary value.

In order to be assured of the truth of confession, this Court, in a series of decisions, has evolved a rule of prudence that the court should look to corroboration from other evidence. However, there need not be corroboration in respect of each and every material particular. Broadly, there should be corroboration so that the confession taken as a whole fits into the facts proved by other evidence. In substance, the court should have assurance from all angles that the retracted confession was, in fact, voluntary and it must have been true."

The use of retracted confession against the co-accused however stands on a different footing from the use of such confession against the maker. To come to the grips of the law on the subject, we do no more than quoting the apt observations of Vivian Bose, J, speaking for a three-Judge Bench, in Kashmira Singh v. State of Madhya Pradesh (AIR 1952 SC

159). Before clarifying the law, the learned Judge noted with approval the observations of Sir Lawrence Jenkins that a confession can only be used to "lend assurance to other evidence against a co-accused." The legal position was then stated thus:

"Translating these observations into concrete terms they come to this. The proper way to approach a case of this kind is, first to marshall the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not 'prepared set on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

The crucial expression used in Section 30 is "the Court may take into consideration such confession". These words imply that the confession of a co- accused cannot be elevated to the status of substantive evidence which can form the basis of conviction of the co-accused. The import of this expression was succinctly explained by the Privy Council in Bhuboni Sahu vs. King (AIR 1947 PC 257) in the following words:

"The Court may take the confession into consideration and thereby, no doubt, makes its evidence on which the Court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence".

(emphasis supplied) After referring to these decisions, a Constitution Bench of this Court in Haricharan Kurmi v. State of Bihar [1964 (6) SCR 623] further clarified the legal position thus:

" .In dealing with a case against an accused person, the Court cannot start with the confession of co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the confession of guilt which the judicial mind is about to reach on the said other evidence." (emphasis supplied) What is the legal position relating to CONFESSIONS UNDER THE POTA is the next important aspect.

Following the path shown by its predecessor, namely TADA Act, POTA marks a notable departure from the general law of evidence in that it makes the confession to a high ranking police officer admissible in evidence in the trial of such person for the offence under POTA. As regards the confession to the police officer, the TADA regime is continued subject to certain refinements. Now, let us take stock of the provisions contained in Section 32 of POTA. Sub-Section of (1) of this Section starts with a non obstante provision with the words "Notwithstanding anything in the Code of Criminal Procedure or in the Indian Evidence Act .." Then it says: "a confession made by a person before a 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 . shall be admissible in the trial of such person for an offence under the Act or the rules, subject to other provisions of the section". By this provision, the ban against the reception of confessional statements made to the police is lifted. That is why the non-obstante clause. This sub-section is almost identical to Section 15(1) of TADA excepting that the words "or co-accused, abettor or conspirator occurring after the expression "in the trial of such person" were omitted. The other four sub-sections (2) to (5) of Section 32 are meant to provide certain safeguards to the accused in order to ensure that the confession is not extracted by threat or inducement. Sub-section (2) says that the police officer, before recording a confession should explain in writing to the person concerned that he is not bound to make a confession and that the confession if made by him can be used against him. The right of the person to remain silent before the police officer called upon to record the confession is recognized by the proviso to sub-section (2). Sub-section (3) enjoins that the confession shall be recorded in a threat-free atmosphere. Moreover, it should be recorded in the same language as that used by the maker of the confession. The most important safeguard provided in sub-sections (4) & (5) is that the person from whom the confession was recorded is required to be produced before a Chief Metropolitan Magistrate or Chief Judicial Magistrate, within 48 hours, together with the original statement of confession in whatever manner it was recorded. The CMM or the CJM shall then record the statement made by the person so produced. If there is any complaint of torture, the police shall be directed to produce the person for medical examination and thereafter he shall be sent to the judicial custody.

9. Section 15 of TADA It is necessary to advert to the exposition of law on the probative quality of the confession recorded by the empowered police officer under Section 15 of TADA Act. We may recall that under Section 15, the confession is admissible in the trial of the person who made the confession or the co- accused/abettor/conspirator. In State vs. Nalini (supra), Thomas, J took the view that the confession coming within the purview of Section 15 is a substantive evidence as against the maker thereof but it is not so as against the co-accused/abettor or conspirator in relation to whom it can be used only as a corroborative piece of evidence. Wadhwa, J, held that the confession of an accused serves as a substantive evidence against himself as well as against the co-accused, abettor or conspirator. S.S.M. Quadri, J, broadly agreed with the view taken by Wadhwa, J. The following observations made by the learned Judge reflect his view-point:

"On the language of sub-section (1) of Section 15, a confession of an accused is made admissible evidence as against all those tried jointly with him, so it is implicit that the same can be considered against all those tried together. In this view of the matter also, Section 30 of the Evidence Act need not be invoked for consideration of confession of an accused against a co-accused, abettor or conspirator charged and tried in the same case along with the accused."

The learned Judge further observed that in view of the non obstante provision of Section 15(1), the application of Section 30 of the Evidence Act should be excluded and therefore the considerations germane to Section 30 cannot be imported in construing Section 15(1). Quadri, J, therefore dissented from the view taken by Thomas, J. At the same time the learned Judge was of the view that in so far as the use of confession against the co-accused is concerned, rule of prudence requires that it should not be relied upon "unless corroborated generally by other evidence on record". In paragraph 705, the learned Judge made the following observations:

"But I wish to make it clear that even if confession of an accused as against a co-accused tried with the accused in the same case is treated as 'substantive evidence' understood in the limited sense of fact in issue or relevant fact, the rule of prudence requires that the court should examine the same with great care keeping in mind the caution given by the Privy Council in Bhuboni Sahu case", keeping in view the fact that the confession of a co-accused is not required to be given under oath and its veracity cannot be tested by cross-examination is yet another reason given by the learned Judge for insisting on such corroboration. Thus the learned Judge struck a balance between two extreme arguments. The view taken by Quadri, J. does not seem to conflict with the view of Wadhwa, J. Though Wadhwa, J. observed that confession of the accused is admissible with the same force in its application to the co-accused and it is in the nature of substantive evidence, the learned Judge, however, qualified his remarks by observing thus:

`"Substantive evidence, however, does not necessarily mean substantial evidence. It is the quality of evidence that matters. As to what value is to be attached to a confession will fall within the domain of appreciation of evidence. As a matter of prudence, the court may look for some corroboration if confession is to be used against a co-accused though that will again be within the sphere of appraisal of evidence."

Thomas, J. was of the view that the non-obstante words in Section 15(1) of TADA were not intended to make it substantive evidence against the non- maker, and it can be used only as a piece of corroborative material to support other substantive evidence.

Reference is to be made to a recent decision of this Court in Jameel Ahmed & anr. V. State of Rajasthan [2003 (9) SCC 673] a case arising under TADA. After a survey of the earlier cases on the subject, this Court observed: "If the confessional statement is properly recorded satisfying the mandatory provisions of Section 15 of TADA Act and the rules made thereunder and if the same is found by the Court as having been made voluntarily and truthfully then the said confession is sufficient to base conviction of the maker of the confession." This proposition is unexceptionable. The next proposition, however, presents some difficulty. The learned Judges added: "Whether such confession requires corroboration or not, is a matter for the Court considering such confession on facts of each case." This Court observed that once the confessional statement becomes admissible in evidence then, like any other evidence, "it is for the Court to consider whether such statement can be relied upon solely or with necessary corroboration." The ratio behind the view taken by the learned Judges is perhaps discernible from the following passage:

"We have already noticed that this provision of law is a departure from the provisions of Sections 25 to 30 of the Evidence Act. As a matter of fact, Section 15 of the TADA Act operates independent of the Evidence Act and the Code of Criminal Procedure."

The Court then observed that the confession duly recorded under Section 15 of TADA Act becomes admissible in evidence by virtue of statutory mandate and if it is proved to be voluntary and truthful in nature there is no reason why such a statement should be treated as a weak piece of evidence requiring corroboration merely because the same is recorded by a police officer. We have to add a caveat here, while wholeheartedly accepting the view that the confession recorded by a police officer under Section 15(1) of TADA Act (corresponding to Section 32(1) of POTA) stand on the same footing as the confession recorded by a Magistrate and the Court can act upon it in spite of its retraction if it inspires confidence in the mind of the Judge, we feel that the rule of corroboration evolved by this Court as a matter of prudence in relation to a retracted confession recorded by a Magistrate under Cr.P.C. need not be dispensed with. Viewing the confession in the light of other evidence on record and seeking corroborative support therefrom is only a process of ascertaining the truth of the confession and is not extraneous to the first proposition laid down by their Lordships in paragraph 35. Viewed from another angle, we wonder whether a confession recorded by a police officer under the special enactment should have more sanctity and higher degree of acceptability so as to dispense with the normal rule of corroboration and leave it to the discretion of the court whether to insist on corroboration or not, even if it is retracted. The better view would be to follow the same rule of prudence as is being followed in the case of confessions under general law. The confessional statement recorded by the police officer can be the basis of conviction of the maker, but it is desirable to look to corroboration in a broad sense, when it is retracted. The non obstante provision adverted to by the learned Judges should not, in our considered view, affect the operation of the general rule of corroboration broadly.

As regards the confession being used against a co-accused, this Court in Jameel Ahmed's case (supra), laid down the following propositions: "(iii) In regard to the use of such confession as against a co- accused, it has to be held that as a matter of caution, a general corroboration should be sought for but in cases where the court is satisfied that the probative value of such confession is such that it does not require corroboration then it may base a conviction on the basis of such confession of the co-accused without corroboration. But this is an exception to the general rule of requiring corroboration when such confession is to be used against a co-accused.

(iv) The nature of corroboration required both in regard to the use of confession against the maker as also in regard to the use of the same against a co-accused is of a general nature, unless the court comes to the conclusion that such corroboration should be on material facts also because of the facts of a particular case. The degree of corroboration so required is that which is necessary for a prudent man to believe in the existence of facts mentioned in the confessional statement."

While we agree with the proposition that the nature of corroboration required both in regard to the use of confession against the maker and the co- accused is general in nature, our remarks made earlier in relation to the confession against the maker would equally apply to proposition No.(iii) in so far as it permits the Court in an appropriate case to base the conviction on the confession of the co-accused without even general corroboration. We would only add that we do not visualize any such appropriate case for the simple reason that the assurance of the truth of confession is inextricably mixed up with the process of seeking corroboration from the rest of the prosecution evidence. We have expressed our dissent to this limited extent. In the normal course, a reference to the larger Bench on this issue would be proper. But there is no need in this case to apply or not to apply the legal position clarified in proposition No.(iii) for the simple reason that the trial court as well as the High Court did look for corroboration from the circumstantial evidence relating to various facts narrated in the confessional statement. Perhaps, the view expressed by us would only pave the way for a fresh look by a larger Bench, should the occasion arise in future.

The learned senior counsel Mr. Ram Jethmalani severely criticised the view taken in Nalini, Jameel Ahmed and other cases decided after Nalini. He pointed out that the confession of a co-accused is held to be admissible in view of the expression "shall be admissible in the trial of such person or co-accused". But, the legislature did not intend that in deviation of the general law, the confession of a co-accused could become the sole basis of conviction irrespective of whether it is corroborated in relation to material particulars or not. The counsel commends the acceptance of the ratio laid down by Privy Council in Bhuboni Sahu in the context of a confession covered by Section 30 of Evidence Act. The counsel reminds us that admissibility is one thing, and the weight to be attached to the evidence is another. The learned counsel Mr. Ram Jethmalani repeatedly pointed that the crucial observations of the Constitution Bench in Kartar Singh's case (supra) were not noticed by this Court in Nalini's case and this error, according to the learned senior counsel, perpetuated. The learned counsel has drawn our attention to the categorical observation of this Court in paragraph 255 of the majority judgment to the effect that "the present position is in conformity with Section 30 of the Evidence Act." He has also drawn our attention to the submission of the learned Additional Solicitor General in Kartar Singh's case that the probative value of the confession recorded under Section 15 should be left to the Court to be determined in each case on its own facts and circumstances.

According to the learned counsel, the confession of co-accused should not have been elevated to the status of confession operating against the maker. The contention advanced by the learned senior counsel is not without force. However, we need not dilate further on this aspect as the terminology in POTA is different and the view which we hold is that Section 32 of POTA does not enable the Court to take into account the confession of the co-accused. We shall now advert to this aspect, on a comparative reference of the provisions of TADA Act and POTA.

10. Use of confession under POTA against co-accused Now, let us examine the question whether Section 32(1) of POTA takes within its sweep the confession of a co-accused. Section 32(1) of POTA which makes the confession made to a high ranking police officer admissible in the trial does not say anything explicitly about the use of confession made by co- accused. The words in the concluding portion of Section 32(1) are: "shall be admissible in the trial of such person for an offence under this Act or rules made thereunder." It is, however, the contention of the learned Senior Counsel Shri Gopal Subramanium that Section 32(1) can be so construed as to include the admissibility of confessions of co-accused as well. The omission of the words in POTA "or co-accused, abettor or conspirator" following the expression "in the trial of such person" which are the words contained in Section 15(1) of TADA does not make material difference, according to him. It is his submission that the words 'co-accused' etc. were included by the 1993 amendment of TADA by way of abundant caution and not because the unamended Section of TADA did not cover the confession of co-accused. According to the learned senior counsel, the phrase "shall be admissible in the trial of such person" does not restrict the admissibility only against the maker of the confession. It extends to all those who are being tried jointly along with the maker of the confession provided they are also affected by the confession. The learned senior counsel highlights the crucial words-"in the trial of such person" and argues that the confession would not merely be admissible against the maker but would be admissible in the trial of the maker which may be a trial jointly with the other accused persons. Our attention has been drawn to the provisions of Cr.P.C. and POTA providing for a joint trial in which the accused could be tried not only for the offences under POTA but also for the offences under IPC. We find no difficulty in accepting the proposition that there could be a joint trial and the expression "the trial of such person" may encompass a trial in which the accused who made the confession is tried jointly with the other accused. From that, does it follow that the confession made by one accused is equally admissible against others, in the absence of specific words? The answer, in our view, should be in the negative. 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. Such stretching of the language of law is not at all warranted especially in the case of a law which visits a person with serious penal consequences (vide the observations of Ahmadi, J (as he then was) in Niranjan Singh vs. Jitendra [(1990) 4 SCC 76] at page 86, which were cited with approval in Kartar Singh's case). We would expect a more explicit and transparent wording to be employed in the section to rope in the confession of the co-accused within the net of admissibility on par with the confession of the maker. An evidentiary rule of such importance and grave consequence to the accused could not have been conveyed in a deficient language. It seems to us that a conscious departure was made by the framers of POTA on a consideration of the pros and cons, by dropping the words "co-accused" etc.. These specific words consciously added to Section 15(1) by 1993

amendment of TADA so as to cover the confessions of co- accused would not have escaped the notice of Parliament when POTA was enacted. Apparently, the Parliament in its wisdom would have thought that the law relating to confession of co-accused under the ordinary law of evidence, should be allowed to have its sway, taking clue from the observations in Kartar Singh's case at paragraph 255. The confession recorded by the police officer was, therefore, allowed to be used against the maker of the confession without going further and transposing the legal position that obtained under TADA. We cannot countenance the contention that the words 'co-accused' etc. were added in Section 15(1) of TADA, ex majore cautela.

We are, therefore, of the view that having regard to all these weighty considerations, the confession of a co-accused ought not be brought within the sweep of Section 32(1). As a corollary, it follows that the confessions of the 1st and 2nd accused in this case recorded by the police officer under Section 32(1), are of no avail against the co-accused or against each other. We also agree with the High Court that such confessions cannot be taken into consideration by the Court under Section 30 of the Indian Evidence Act. The reason is that the confession made to a police officer or the confession made while a person is in police custody, cannot be proved against such person, not to speak of the co- accused, in view of the mandate of Sections 25 and 26 of the Evidence Act. If there is a confession which qualifies for proof in accordance with the provisions of Evidence Act, then of course, the said confession could be considered against the co-accused facing trial under POTA. But, that is not the case here. For these reasons, the contention of the learned senior counsel for the State that even if the confession of co-accused is not covered by Section 32(1), it can still be taken into account by the Court under Section 30 for the limited purpose of corroborating or lending assurance to the other evidence on record cannot be accepted.

Learned senior counsel appearing for the State submits that there is no conflict between Section 32 of POTA and Section 30 of the Evidence Act and therefore the confession recorded under Section 32(1) of POTA can be taken into consideration against the co-accused, at least to corroborate the other evidence on record or to lend assurance thereto. There is no difficulty in accepting the contention that Section 30 of the Evidence Act can also play its part in a case of trial under POTA, especially when the other offences under the IPC are also the subject matter of trial. But a confession to the police officer by a person in police custody is not within the realm of Section 30 of the Evidence Act and therefore such a confession cannot be used against the co-accused even under Section 30 of the Evidence Act.

While on the subject of confession made to a police officer under sub- section (1) of Section 32 of POTA, it would be apposite to refer in brief to the decision of this Court in Kartar Singh v. State of Punjab [1994 (3) SCC 569]. The constitutional validity of the provisions of TADA Act came up for consideration before the Constitution Bench. Section 15(1) of TADA Act was the main target of attack. The majority of Judges, with Ratnavel Pandian, J, leading them, upheld the provisions of the Act including Section 15(1). There was a weighty dissent by two learned Judges (K. Ramaswamy, J. and R.M. Sahai, J.) as regards the validity of Section 15(1). The constitutional issue of the vires of the impugned provisions of TADA, including Section 15(1), was examined from the perspective of Articles 14 and 21 of the Constitution, that is to say, from the standpoint of classification of offenders and justness and fairness of the procedural provisions. The three learned Judges did not find

Section 15(1) obnoxious to Article 14 or Article 21, though they took judicial notice of the inhuman treatment often meted out by overzealous police officers and the archaic, third degree methods adopted by them during the investigation of the cases. In upholding the validity, the Court took into account the legal competence of the legislature to make a law prescribing a different mode of proof, the meaningful purpose and object of the legislation, the gravity and consequences of terrorism and the reluctance of the public in coming forward to give evidence. How far these considerations are relevant in providing for the reception in evidence of the confessional statement recorded by a police officer has not been elaborated. Apparent hesitation of the learned Judges in upholding the most criticized provision, namely Section 15(1) of TADA, is reflected in the set of guidelines set out by their Lordships at paragraph 263 to ensure as far as possible that the confession obtained by the police officer is not tainted with any vice and to impart a process of fairness into the exercise of recording the confession. The Central Government was bidden to take note of the guidelines and incorporate necessary amendments to the Act. These guidelines, by and large, have become part of Section 32 of POTA to which we have already referred. There was also an exhortation at paragraph 254 to the high-ranking police officers empowered to record the confession that there should be no breach of the accepted norms of recording the confession which should reflect only a true and voluntary statement and there should be no room for hyper criticism that the authority has obtained an invented confession. Another interesting part of the discussion is the manner in which the Court gave its response to the critical comments made by the counsel as to the reprehensible methods adopted to extract the confession. The learned Judges said with reference to this comment: "if it is shown to the Court that a confession was extorted by illegal means such as inducement, threat or promise, the confession thus obtained would be irrelevant and cannot be used in a criminal proceeding against the maker." The Court thus merely emphasized the obvious and added a remark that the Court on several occasions awarded exemplary compensation to the victim at the hands of the police officials. The Court took the precaution of clarifying that the police officer investigating the case under TADA Act can get the confession or statement of the accused recorded under Section 164 Cr.P.C. by a Magistrate.

The Constitution Bench Judgement is binding on us. In fact, the ratio of that Judgment applies with greater force to the POTA, as the guidelines set out by the Constitution Bench are substantially incorporated into Section 32. It is perhaps too late in the day to seek reconsideration of the view taken by the majority of the Judges in the Constitution Bench. But as we see Section 32, a formidable doubt lingers in our minds despite the pronouncement in Kartar Singh's case (supra). That pertains to the rationale and reason behind the drastic provision, making the confession to police officer admissible in evidence in a trial for POTA offences. Many questions do arise and we are unable to find satisfactory or even plausible answers to them. If a person volunteers to make a confession, why should he be not produced before the Judicial Magistrate at the earliest and have the confession recorded by a Magistrate? The Magistrate could be reached within the same time within which the empowered police officer could be approached. The doubt becomes more puzzling when we notice that in practical terms, a greater degree of credibility is attached to a confession made before the judicial officer. Then, why should not the Investigating Officer adopt the straightforward course of having resort to the ordinary and age-old law? If there is any specific advantage of conferring power on a police officer to record the confession receivable in evidence, if the intendment and desideratum of the provision indisputably remains to be to ensure an

atmosphere free from threats and psychological pressures? Why the circuitous provision of having confession recorded by the police officer of the rank of S.P. (even if he be the immediate superior of the I.O. who oversees the investigation) and then requiring the production of the accused before the Chief Metropolitan or Judicial Magistrate within 48 hours? We can understand if the accused is in a remote area with no easy means of communications and the Magistrate is not easily accessible. Otherwise, is there real expediency or good reason for allowing an option to the I.O. to have the confession recorded either by the superior police officer or a Judicial Magistrate? We do not think that the comparative ease with which the confession could be extracted from the accused could be pleaded as justification. If it is so, should the end justify the means? Should the police officer be better trusted than a Magistrate? Does the magnitude and severity of the offence justify the entrustment of the job of recording confession to a police officer? Does it imply that it is easier to make an accused confess the guilt before a police officer so that it could pave the way for conviction in a serious offence? We find no direct answer to these questions either in Kartar Singh's case (supra) or the latest case of People's Union for Civil Liberties vs. Union of India [2004 (9) SCC 580].

The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law, as said by the eminent American jurist Schaefer. We may recall as well the apt remarks of Krishna Iyer, J. in Nandini Satpathy Vs. P.L. Dani [(1978) 2 SCC 424]: "The first obligation of the criminal justice system is to secure justice by seeking and substantiating truth through proof. Of course, the means must be as good as the ends and the dignity of the individual and the freedom of the human person cannot be sacrificed by resort to improper means, however worthy the ends. Therefore, 'third degree' has to be outlawed and indeed has been. We have to draw up clear lines between the whirlpool and the rock where the safety of society and the worth of the human person may co-exist in peace."

In People's Union for Civil Liberties case, a two Judge Bench of this Court upheld the constitutional validity of Section 32 following the pronouncement in Kartar Singh's case. The learned Judges particularly noted the 'additional safeguards' envisaged by sub-Sections (4) and (5) of Section 32. The court referred to the contention that there was really no need to empower the police officer to record the confession since the accused has to be in any case produced before the Magistrate and in that case the Magistrate himself could record the confession. This argument was not dealt with by their Lordships. However, we refrain from saying anything contrary to the legal position settled by Kartar Singh and People's Union for Civil Liberties. We do no more than expressing certain doubts and let the matter rest there. It has been pointed out to us that even in advanced countries like U.K. and U.S.A., where individual liberty is given primacy, there is no legal taboo against the reception of confessional statement made to police in evidence. We do not think that it is apt to compare the position obtaining in those countries to that in India. The ground realities cannot be ignored. It is an undeniable fact that the police in our country still resort to crude methods of investigation, especially in mofussil and rural areas and they suffer many handicaps, such as lack of adequate personnel, training, equipment and professional independence. These features, by and large, are not so rampant in those advanced countries. Considered from the standpoint of scientific investigation, intensity of training and measure of objectivity, the standards and approaches of police personnel are much different in those countries. The evils which the framers of the Indian Evidence Act had in mind to exclude confessions to the police, are still prevalent though not in the same degree. After

independence, no doubt, some positive steps have been taken to improve the working pattern, utility and image of the police force, but, much desires to be achieved in this direction. Complaints of violation of human rights by resorting to dubious methods of investigation, politicization of the police establishment and victimization of the straightforward and honest officers are some of the criticisms that are being heard day in and day out. Even many amongst the public tacitly endorse the use of violence by police against the criminals. In this scenario, we have serious doubts whether it would be safe to concede the power of recording confessions to the police officers to be used in evidence against the accused making the confession and the co-accused. The Law Commission of India in its 185th Report on review of the Indian Evidence Act has expressed strong views disfavouring the admission of confessions made to Police Officers. The Commission commented that the basis for introducing Sections 25 and 26 in the Evidence Act in 1872 holds good even today. The Commission observed "we are compelled to say that confessions made easy, cannot replace the need for scientific and professional investigation".

In England, even though the confessions to the police can be received in evidence the voluntariness of the confessions are tested by adopting stringent standards. Section 76 of the Police and Criminal Evidence Act, 1984, deals with confession in England. Sub-section (2) of Section 76 is important: "(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained-

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

Thus the prosecution has to prove beyond reasonable doubt that the confession was made voluntarily and was reliable.

The Court of Appeal decision in Regina vs. Middleton (1975 All E.R.

191) shows that whenever the admissibility of a confession is challenged "a trial within a trial" is conducted to test the voluntariness of such confession at the earliest. In England, in the light of the Human Rights Act of 1988, a fresh look is being taken into the existing provisions of the Police and Criminal Evidence Act and other allied laws including the Law of Confessions. In United States, according to the decisions of the Supreme Court viz., Miranda Vs. Arizona [384 US 436]; Escobedo Vs. Linnaeus [378 US 478], the prosecution cannot make use of the statements stemming from custodial interrogation unless it demonstrates the use of procedural safeguards to secure the right against self-incrimination and these safeguards include a right to counsel during such interrogation and warnings to the suspect/accused of his right to counsel and to remain silent. In Miranda case (decided in 1966), it was held that the right to have counsel present at the interrogation was indispensable to the protection of the V Amendment privilege against self- incrimination and to

ensure that the right to choose between silence and speech remains unfettered throughout the interrogation process. However, this rule is subject to the conscious waiver of right after the individual was warned of his right.

As the law now stands, the confession recorded by the police officer under Section 32(1) of POTA is admissible in evidence. The voluntariness and reliability of confession can of course be tested by the court. The admission of such confession would also be subject to the observance of the other provisions of Section 32 of POTA which are in the nature of procedural safeguards aimed at ensuring that the confessions are made by the accused in an atmosphere free from threat and inducement.

There is one argument of Mr. Sushil Kumar appearing for the accused Afzal which needs to be adverted to. His contention is that the word 'evidence' is not used either under Section 32(1) or Section 32(2) of POTA unlike Section 15(2) of TADA which requires the Police Officer to warn the person making the confession that it may be used as 'evidence' against him. He therefore argues that the only route through which the confession can be treated as evidence against the accused is by having recourse to Section 164 Cr.P.C. The contention, in our view, is devoid of merit. The mere fact that the expression 'admissible only' is used without being followed by the words 'in evidence', does not, by any canon of construction, deprive the confession recorded under Section 32 of POTA its evidentiary value; otherwise Section 32(1), more especially the expression 'admissible' contained therein will become ineffectual and senseless. We cannot, therefore, accept this extreme contention.

11. Section 10 of Evidence Act The next question is whether the confession of the accused which cannot be proved against a co-accused either under Section 32(1) of POTA or under Section 30 of the Evidence Act, would be relevant evidence against the co- accused involved in the conspiracy by reason of Section 10 of the Evidence Act. The section reads thus:

"10. Things said or done by conspirator in reference to common design.- Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

In Kehar Singh & ors. vs. State (Delhi Administration) [1988 (3) SCC 609], Jagannatha Shetty, J., has analysed the section as follows: "From an analysis of the section, it will be seen that Section 10 will come into play only when the court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence. There should be, in other words, a prima facie evidence that the person was a party to the conspiracy before his acts can be used against his co- conspirator. Once such prima facie evidence exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was first entertained, is relevant against the others. It is relevant not only for the purpose of proving the existence of conspiracy, but also for proving that the other person was a party to it."

Section 10 of Evidence act is based on the principle of agency operating between the parties to the conspiracy inter se and it is an exception to the rule against hearsay testimony. If the conditions laid down therein are satisfied, the act done or statement made by one is admissible against the co-conspirators (vide AIR 1965 SC 682).

The learned senior counsel Mr. Gopal Subramanium submits that Section 10, which is an exception to Section 30 of the Evidence Act, can be availed of by the prosecution to rely on the facts stated in the confessional statement of the accused to prove the existence of conspiracy and the co-conspirator being party to it. He contends that there is more than prima facie evidence in this case that there was a conspiracy to launch an attack on the Parliament building and therefore, the first ingredient of the reasonable ground of belief is satisfied. The next and more controversial part of the submission is that the statement of one of the conspirators who has made the confession throwing light on the common intention of all the accused can be used in evidence against the co-conspirators or the co-accused irrespective of the fact that such statements were made after the conclusion of the conspiracy and after the accused were arrested. As the law laid down by the Privy Council in Mirza Akbar vs. King Emperor (AIR 1940 PC 176) on the interpretation of Section 10 does not support the contention of the counsel for the State, the learned counsel was critical of the dictum laid down in that case and equally critical of the long line of authorities which accepted the ruling of the Privy Council. This is what Lord Wright said in Mirza Akbar's case: "This being the principle, their Lordships think the words of Section 10 must be construed in accordance with it and are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past. In their Lordships' judgment, the words 'common intention' signify a common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But it would be a very different matter to hold that any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference. In their Lordships' judgment Section 10 embodies this principle. That is the construction which has been rightly applied to Section 10 in decisions in India.

In these cases the distinction was rightly drawn between communications between conspirators while the conspiracy was going on with reference to the carrying out of conspiracy and statements made, after arrest or after the conspiracy has ended, by way of description of events then past."

In Sardul Singh Caveeshar vs. State of Bombay (1958 SCR 161), a three-Judge Bench of this Court approvingly referred to the decision of the Privy Council. However, the following observation made therein does not go counter to the submission of Mr. Subramanium:

"where the charge specified the period of conspiracy, evidence of acts of co-conspirators outside the period is not receivable in evidence".

But, the ultimate conclusion is not strictly in conformity with that remark. After referring to this and the other decisions, Thomas, J. observed in State of Gujarat vs. Mohammed Atik and ors. [1998 (4) SCC 351] thus: "Thus, the principle is no longer res integra that any statement made by an accused after his arrest, whether as a confession or otherwise, cannot fall within the ambit of Section 10 of the Evidence Act."

Referring to the decision in Mohammed Atik's case (supra) and Sardul Singh Caveeshar (supra), Arijit Pasayat, J., speaking for a three-Judge Bench in Mohd. Khalid vs. State of West Bengal [2002 (7) SCC 334], stated the legal position thus:

"We cannot overlook that the basic principle which underlies Section 10 of the Evidence Act is the theory of agency. Every conspirator is an agent of his associate in carrying out the object of the conspiracy. Section 10, which is an exception to the general rule, while permitting the statement made by one conspirator to be admissible as against another conspirator restricts it to the statement made during the period when the agency subsisted. Once it is shown that a person became snapped out of the conspiracy, any statement made subsequent thereto cannot be used as against the other conspirators under Section 10."

Ultimately, the test applied was whether any particular accused continued to be the member of the conspiracy after his arrest. Though the learned Judge stated that "similar view was expressed by this Court in State vs. Nalini", we find no such statement of law in Nalini's case. However, this accidental slip does not make any difference. The law is thus well settled that the statements made by the conspirators after they are arrested cannot be brought within the ambit of Section 10 of the Evidence Act, because by that time the conspiracy would have ended. If so, the statement forming part of the confessional statement made to the police officer under Section 32(1) of POTA cannot be pressed into service by the prosecution against the other co-accused. Thus, the endeavour to bring the confessional statement of co-accused into the gamut of evidence through the route of Section 10 is frustrated by a series of decisions, starting from Mirza Akbar's case (1940).

Learned senior counsel Mr. Gopal Subramanium argued that the view taken by the Privy Council runs counter to the language of Section 10, and moreover, if that interpretation is to be adopted, there would hardly be any evidence which could be admitted under section 10, the reason being that the statements would necessarily be made by the witnesses after the termination of conspiracy. The correct interpretation, according to the learned senior counsel is, whether the statements made by the conspirators testifying to the common plan, whether confessional or not, relate to the period of conspiracy or to the period post-termination. The relevance of such statements under Section 10 cannot be whittled down with reference to the point of time when the statement was made. The leaned senior counsel, therefore, submits that the exclusion of post-arrest statements of the conspirators, is not warranted by the language employed in the section and it makes Section 10 nugatory. Though, in our view, the Section can still play its role, we find some force in this contention. But, it is not open to us to upset the view reiterated in a long line of decisions.

The learned counsel Mr. Gopal Subramanium has also endeavoured to invoke precedential support for his argument. He referred to Bhagwan Swarup vs. State of Maharashtra (AIR 1965 SC 682)

(known as the 2nd Caveeshar case) in which Subba Rao, J., speaking for a three-Judge Bench analysed the ingredients of Section 10 as follows:-

"(1) There shall be a prima facie evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy, (2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other, (3) anything said, done or written by him should have been said, done or written by him after the intention was formed by any of them; (4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it; and (5) it can only be used against a co-conspirator and not in his favour."

The limitation inferred by the Privy Council that the acts or statements of the conspirator should have been made when the conspiracy was afoot was not imported in to the interpretation of the section. On the other hand, the proposition No.4 might indicate that even the statement made and acts done after a person left the conspiracy, could be proved against others. The Privy Council decision in Mirza Akbar's case was not referred to. The issue as raised now was not discussed. However, the 1st Caveeshar case (AIR 1957 SC 747) in which the Privy Council's decision was cited, was adverted to. In the 1st Caveeshar's case also decided by a three Judge Bench (supra), the ratio of the Privy Council decision in Mirza Akabar's case was approved and applied.

The learned counsel then referred to the case of Ammini & ors. vs. State of Kerala [1998 (2) SCC 301], wherein this Court referred to Section 10 of the Evidence Act and observed thus:

"The High Court held as there was reasonable ground to believe that Ammini and other accused had conspired together and, therefore, the confession made by A-1 could be used against other accused also."

There was no reference to the earlier cases which were binding on the Court. The view of the High Court was merely endorsed. The learned senior counsel Mr. Gopal Subramanium then submitted that in Nalini's case this Court admitted the confessional statement made by one of the accused after his arrest under section 10 of the Evidence Act. But we do not find anything in that judgment to support this statement. Wadhwa, J on whose judgment reliance is placed did not say anything contrary to what was laid down in Mirza Akbar's case. After referring to Mirza Akbar's case, Wadhwa, J. adverted to the contention that Section 10 becomes inapplicable once the conspirator is nabbed. The comment of the learned Judge was; "That may be so in a given case but is not of universal application. If the object of conspiracy has not been achieved and there is still agreement to do the illegal act, the offence of criminal conspiracy is there and Section 10 of the Evidence Act applies". (vide para 579 of SCC) Then follows the crucial finding that the prosecution in the present case has not led any evidence to show that any particular accused continued to be a member of the conspiracy after he was arrested. It shows that the ultimate conclusion accords with the view expressed in Mirza Akbar. At paragraph 581, there is further discussion on the scope of Section 10. One observation made by the learned Judge in that para needs to be clarified. The learned Judge observed thus:

"When two or more persons enter into a conspiracy any act done by any one of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written or done by any of the conspirators in execution of or in reference to their common intention is deemed to have been said, done or written by each of them".

(emphasis supplied) We do not find any such deeming provision in Section 10. No doubt, Section 10 rests on the principle of agency. But, it does not in terms treat the statements made and acts done by one conspirator as the statements or acts of all. Section 10 only lays down a rule of relevancy. It says that anything done or said by one of the conspirators in reference to the common intention is a relevant fact as against each of the conspirators to prove two things: (i) existence of the conspiracy and (ii) that they were parties to the conspiracy. As pointed out by the Privy Council in Mirza Akbar's case, the thing done, written or spoken in the course of carrying out the conspiracy "was receivable as a step in the proof of the conspiracy". This dictum was approvingly referred to in the 1st Caveeshar case (AIR 1957 SC 747). The learned senior counsel then referred to the decision of this Court in Tribhuwan vs. State of Maharashtra [1972 (3) SCC 511], in which the accused examined himself as a witness and his evidence was admitted under Section 10 of the Evidence Act, mainly on the ground that his deposition could be subjected to cross-examination. So also in the case of K. Hashim vs. State of Tamil Nadu, the evidence of co-accused who subsequently became approver, was admitted under Section 10. These two cases rest on a different principle and cannot be said to have differed with the view taken in Mirza Akbar's case.

However, there are two decisions of this Court rendered by two Judge Benches, which have taken the view that the facts stated in the confessional statement of one of the accused can be used against the other accused. The first one is Bhagwandas Keshwani & anr. vs. State of Rajasthan [1974 (4) SCC 611] decided by a two-Judge Bench (M.H. Beg and Y.V. Chandrachud, JJ), in which Beg, J. observed thus:

"It seems to us that the extreme argument that nothing said or done by Vishnu Kumar could be taken into account in judging the guilt of Keshwani when there is a charge for conspiracy under Section 120B IPC overlooks the provisions of Section 10 of the Evidence Act . At any rate, proof of the fact, even from admissions of Vishnu Kumar, that false and fictitious cash memos were prepared due to an agreement between the two accused, could be used against each accused."

None of the previous decisions were referred to by their Lordships. The other case is that of State of Maharashtra vs. Damu [2000 (6) SCC 269] which was also decided by a two Judge Bench. The learned Judges after analyzing the ingredients of Section 10, held thus:

"In this case there can be no doubt, relying on Ex.88 that there are reasonable grounds to believe that all the four accused have conspired together to commit the offences of abduction and murders of the children involved in this case. So what these accused have spoken to each other in reference to their common intention as could be gathered from Ex.88 can be regarded as relevant facts falling within the purview of Section 10 of the Evidence Act. It is not necessary that a witness should have deposed to the fact so transpired between the conspirators. A dialogue between them could be

proved through any other legally permitted mode. When Ex.88 is legally proved and found admissible in evidence, the same can be used to ascertain what was said, done or written between the conspirators. Al the things reported in that confession referring to what A-1 Damu Gopinath and A-3 Mukunda Thorat have said and done in reference to the common intention of the conspirators are thus usable under Section 10 of the Evidence Act as against those two accused as well, in the same manner in which they are usable against A-4 Damu Joshi himself."

Thus, the confessional statement (Ext.88) made by one of the parties to the conspiracy was made use of against the other parties/accused. It is interesting to note that the decision in State of Gujarat vs. Mohammed Atik (supra) rendered by one of the learned Judges, was noticed but the crucial part of the observation therein ruling out the applicability of Section 10 was not adverted to. The 2nd Caveeshar case (AIR 1965 SC 682) was also noticed. However much we are convinced of the arguments advanced by the learned senior counsel for the State, we are unable to give effect to the law laid down in these two cases which runs counter to the larger Bench decisions noticed supra, especially when the previous decisions bearing on the point were not discussed. No doubt the judgment in 2nd Caveeshar case was of three learned Judges but the 4th proposition laid down therein is not so categorical as to convey the idea that even the confessional statement recorded after the arrest, could be used against the co-conspirators. The case of Queen Vs. Blake decided in 1844 [115 ER 49] is illustrative of the parameters of the common law rule similar to Section 10 of the Indian Evidence Act. The Privy Council in the case of R Vs. Blake [AIR 1940 PC 176] referred to that case and observed thus:

" The leading case of (1844) 6 QB 126 : 115 ER 49 (E) illustrates the two aspects of it, because that authority shows both what is admissible and what is inadmissible. What, in that case, was held to be admissible against the conspirator was the evidence of entries made by his fellow conspirator contained in various documents actually used for carrying out the fraud. But a document not created in the course of carrying out the transaction, but made by one of the conspirators after the fraud was completed, was held to be inadmissible against the other It had nothing to do with carrying the conspiracy into effect."

In the light of the foregoing discussion, we have no option but to reject the contention of Mr. Gopal Subramanium on the interpretation of Section 10, though not without hesitation. However, in view of the fact that confessional statement is not being relied on, the question of applicability of Section 10 fades into insignificance.

12. Conspiracy As conspiracy is the primary charge against the accused, we shall now advert to the law of conspiracy its definition, essential features and proof. Section 120-A of IPC defines criminal conspiracy. It says: "when two or more persons agree to do or cause to be done (i) an illegal act or (ii) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy. Section 120-B prescribes the punishment to be imposed on a party to a criminal conspiracy. As pointed out by Subba Rao, J in Major E.G. Barsay Vs. State of Bombay (AIR 1961 SC 1762):

" the gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts".

Under section 43 of the IPC, an act would be illegal if it is an offence or if it is prohibited by law. Section 120-A and 120-B were brought on the statute book by way of amendment to IPC in 1913. The Statement of Objects and Reasons to the amending Act reveals that the underlying purpose was to make a mere agreement to do an illegal act or an act which is not illegal by illegal means punishable under law. This definition is almost similar to the definition of conspiracy, which we find in Halsbury's Laws of England. The definition given therein is:

"Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indictable offence at common law. The essence of the offence of conspiracy is the fact of combination by agreement. The agreement may be express or implied or in part express and in part implied .. and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be".

In America, the concept of criminal conspiracy is no different. In American Jurisprudence, 2nd Edn., Vol.16, Page 129, the following definition of conspiracy is given:

"A conspiracy is said to be an agreement between two or more persons to accomplish together a criminal or unlawful act or to achieve by criminal or unlawful means an act not in itself criminal or unlawful ... The unlawful agreement and not its accomplishment is the gist or essence of the crime of conspiracy."

Earlier to the introduction of Section 120-A and B, conspiracy per se was not an offence under the Indian Penal Code except in respect of the offence mentioned in Section 121-A. However, abetment by conspiracy was and still remains to be an ingredient of abetment under clause secondly of Section 107 of IPC. The punishment therefor is provided under various sections viz. Section 108 to 117. Whereas under Section 120A, the essence of the offence of criminal conspiracy is a bare agreement to commit the offence, the abetment under Section 107 requires the commission of some act or illegal omission pursuant to the conspiracy. A charge under Section 107/109 should therefore be in combination with a substantive offence, whereas the charge under Section 120-A/120-B could be an independent charge. In the Objects and Reasons to the Amendment Bill, it was explicitly stated that the new provisions (120-A & B) were "designed to assimilate the provisions of the Indian Penal Code to those of the English Law ." Thus, Sections 120-A & B made conspiracy a substantive offence and rendered the mere agreement to commit an offence punishable. Even if an overt act does not take place pursuant to the illegal agreement, the offence of conspiracy would still be attracted. The passages from Russell on Crimes, the House of Lords decision in Quinn vs. Leathem (1901 AC 495), and the address of Willes, J to the Jury in Mulcahy Vs. Queen (1868 3 HL 306) are often quoted in the decisions of this Court. The passage in Russell on Crimes referred to by Jagannatha Shetty, J in Kehar Singh's case [1988 (3) SCC at page 731] is quite apposite:

"The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se enough"

This passage brings out the legal position succinctly. In Nalini's case, S.S.M. Quadri, J, pointed out that the meeting of minds of two or more persons for doing an illegal act or an act by illegal means is a sine qua non of the criminal conspiracy. Judge L. Hand, in Van Riper vs. United States (13 F 2d. 961) said of conspiracy: "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another and have made a partnership in crime."

In Yashpal Mittal vs. State of Punjab [1977 (4) SCC 540], Goswami, J, speaking for a three-Judge Bench analysed the legal position relating to criminal conspiracy. At pages 610-611, the learned Judge observed that "the very agreement, the concert or league is the ingredient of the offence." and that "it is not necessary that all the conspirators must know each and every detail of the conspiracy". It was then observed that "there must be unity of object or purpose but there may be plurality of means, sometimes even unknown to one another, amongst the conspirators." Dr. Sri Hari Singh Gour in his well known 'Commentary on Penal Law of India', (Vol.2, 11th Edn. page 1138) summed up the legal position in the following words:

"In order to constitute a single general conspiracy there must be a common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be general plan to accomplish the common design by such means as may from time to time be found expedient."

In State of H.P. Vs. Krishan Lal Pradhan [1987 (2) SCC page 17], it was reiterated that every one of the conspirators need not take active part in the commission of each and every one of the conspiratorial acts. In the case of State Vs. Nalini [1999 (5) SCC 253], S.S.M. Quadri, J, after a survey of case law made the following pertinent observations: (at paragraph 662) "In reaching the stage of meeting of minds, two or more persons share information about doing an illegal act or a legal act by illegal means. This is the first stage where each is said to have knowledge of a plan for committing an illegal act or a legal act by illegal means. Among those sharing the information some or all may form an intention to do an illegal act or a legal act by illegal means. Those who do form the requisite intention would be parties to the agreement and would be conspirators but those who drop out cannot be roped in as collaborators on the basis of mere knowledge unless they commit acts or omissions from which a guilty common intention can be inferred. It is not necessary that all the conspirators should participate from the inception to the end of the conspiracy; some may join the conspiracy after the time when such intention was first entertained by any one of them and some others may quit from the conspiracy. All of them cannot but be treated as conspirators. Where in pursuance of the agreement the conspirators commit offences individually or adopt illegal means to do a legal act which has a nexus to the object of conspiracy, all of them will be liable for such

offences even if some of them have not actively participated in the commission of those offences.

There is exhaustive reference to various cases by Arijit Pasayat, J, in Mohd. Khalid Vs. State of W.B. [2002 (7) SCC 334]. In Mohammed Usman Vs. State of Maharashatra [1981 (2) SCC 443] it was observed that the agreement amongst the conspirators can be inferred by necessary implication.

There is one particular observation made by Jagannadha Shetty in Kehar Singh's (supra) case which needs to be explained. The learned Judge observed:

"It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved nor is it necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient".

The expression 'physical manifestation' seems to be the phraseology used in the Article referred to by the learned Judge. However, the said expression shall not be equated to 'overt act' which is a different concept. As rightly stated by the learned senior counsel, Mr. Gopal Subramanium, the phrase has reference to the manifestation of the agreement itself, such as by way of meetings and communications.

Mostly, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair. Usually both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused. (Per Wadhwa, J. in Nalini's case (supra) at page

516). The well known rule governing circumstantial evidence is that each and every incriminating circumstance must be clearly established by reliable evidence and "the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible." G.N. Ray, J. in Tanibeert Pankaj Kumar [1997 (7) SCC 156], observed that this Court should not allow the suspicion to take the place of legal proof. As pointed out by Fazal Ali, J, in V.C. Shukla vs. State [1980 (2) SCC 665], " in most cases it will be difficult to get direct evidence of the agreement, but a conspiracy can be inferred even from circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence." In this context, the observations in the case Noor Mohammad Yusuf Momin vs. State of Maharashtra (AIR 1971 SC 885) are worth nothing:

" in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material."

A few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused in the offence of criminal conspiracy. The circumstances before, during and after the occurrence can be proved to decide about the complicity of the accused. [vide Esher Singh vs. State of A.P., 2004 (11) SCC 585].

Lord Bridge in R. vs. Anderson [1985 (2) All E.R. 961] aptly said that the evidence from which a jury may infer a criminal conspiracy is almost invariably to be found in the conduct of the parties. In (AIR 1945 PC 140), the Privy Council warned that in a joint trial care must be taken to separate the admissible evidence against each accused and the judicial mind should not be allowed to be influenced by evidence admissible only against others. "A co- defendant in a conspiracy trial", observed Jackson, J, "occupies an uneasy seat" and "it is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together." [vide Alvin Krumlewitch vs. United States of America, (93 L.Ed. 790). In Nalini's case, Wadhwa, J pointed out, at page 517 of the SCC, the need to guard against prejudice being caused to the accused on account of the joint trial with other conspirators. The learned Judge observed that "there is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy". The pertinent observation of Judge Hand in U.S. vs. Falcone (109 F. 2d,579) was referred to: "This distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders." At paragraph 518, Wadhwa, J, pointed out that the criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. The learned Judge then set out the legal position regarding the criminal liability of the persons accused of the conspiracy as follows: "One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with the other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime."

One more principle which deserves notice is that cumulative effect of the proved circumstances should be taken into account in determining the guilt of the accused rather than adopting an isolated approach to each of the circumstances. Of course, each one of the circumstances should be proved beyond reasonable doubt. Lastly, in regard to the appreciation of evidence relating to conspiracy, the Court must take care to see that the acts or conduct of the parties must be conscious and clear enough to infer their concurrence as to the common design and its execution. K.J. Shetty, J, pointed out in Kehar Singh's case that "the innocuous, innocent or inadvertent events and incidents should not enter the judicial verdict." Before we close the discussion on the topic of conspiracy in general, we must note the argument of the learned senior counsel for the State Mr. Gopal Subramanium who in his endeavour to invoke the theory of agency in all its dimensions so as to make each of the conspirators constructively liable for the offences actually committed by others pursuant to the conspiracy, relied on the dictum of Coleridge, J. in Regina vs. Murphy (173 ER 502), which will be referred to later on. The learned senior counsel submits that where overt acts have been committed, all conspirators will have to be punished equally for the substantive offence irrespective of non-participation of some of them in such overt acts. The observations made by Wadhwa, J in Nalini at paragraph 583 and by Mohapatra, J, in Firozuddin Basheeruddin vs. State of Kerala [2001 (7) SCC 596], are pressed into service to buttress his argument that all the conspirators would be liable for all the offences committed pursuant to the conspiracy on the basis of the principle of agency where the conspiracy results in overt acts constituting distinct offences. 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 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. We have to explain the decision in Ferojuddin's case at length in view of heavy reliance placed on it. The Court observed thus at para 25: " Thus, one who enters into a conspiratorial relationship is liable for every reasonably foreseeable crime committed by every other member of the conspiracy in furtherance of its objectives, whether or not he knew of the crimes or aided in their commission "

In para 26, the discussion was on the point of admissibility of evidence i.e. whether declaration by one conspirator made in furtherance of a conspiracy and during its subsistence is admissible against each co-conspirator. In other words, the question of applicability of the rule analogous to Section 10 of the Evidence Act was the subject matter of discussion. The following passage from Van Riper Vs. United States [13 F 2d 961 at page 967] was quoted. "Such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of crime. When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime'. What one does pursuant to their common purpose, all do, and as declarations may be such acts, they are competent against all."

Then, in the immediately following paragraph, this Court observed as follows: "Thus conspirators are liable on an agency theory for statements of co-conspirators, just as they are for the overt acts and crimes committed by their confreres."

The conclusion at paragraph 27 that the conspirators are liable for the overt acts and crimes committed by their associates on the theory of agency is not in conformity with the discussion "Regarding admissibility of evidence" which is the opening phraseology of paragraph 26. It was made clear in the second sentence of para 26 that contrary to the usual rule, any declaration by one conspirator made in furtherance of a conspiracy and during its pendency is admissible against each co-conspirator. Thus, the gist of Section 10 of the Evidence Act is implicit in that observation. Nothing is stated in paragraph 26 to indicate that their Lordships were discussing the larger question of culpability of all the conspirators for the criminal acts done by some of them pursuant to the conspiracy. However, the view expressed in paragraph 27 that on the theory of agency, the conspirators are liable for the statements and overt acts of the co-conspirators is at variance with the tenor of discussion in the earlier para. The apparent reason which influenced their Lordships seem to be the observations of Judge Hand in the case of Van Riper Vs. United States (supra). Those observations were in the context of the discussion on the liability of the 'defendants' for conspiracy to defraud. The ratio of the decision is evident from the concluding observation: "For this reason, all that was done before he entered may be used against him, but obviously not what was done after he left." The joint liability for the overt acts involved in the actual crime did not come up for

consideration. That apart, the statement of law that "such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of crime" does not hold good under Indian law. The reason is that the declarations contemplated by Judge Hand are made admissible under Section 10 of the Indian Evidence Act but not under the substantive law of crimes. Thus, the conclusion reached at paragraph 27 overlooked the difference in legal position between what was obtaining in USA in the year 1926 and the statutory rule of evidence contained in the Indian Evidence Act. The proposition in the earlier para i.e. paragraph 25 (quoted supra) was too widely stated, probably influenced by the observations in Van Riper's case. In fact, in Ferojuddin's case, some members of the group who conspired were convicted only under Section 120B whereas the other members who accomplished the objective of conspiracy by committing the planned offence were convicted for the substantive offence as well as for the conspiracy. Thus, the observations made therein are no more than obiter dicta. The very decision of Maj. E.G. Barsay referred to by their Lordships make it clear that "for individual offences, all the conspirators may not be liable though they are all guilty for the offence of conspiracy." In Ajay Aggarwal vs. Union of India [1993 (3) SCC 609], while discussing the question whether the conspiracy is a continuing offence, the following pertinent observations were made by K. Ramaswamy, J, speaking for the Bench at para 11:

"Conspiracy to commit a crime itself is punishable as a substantive offence and every individual offence committed pursuant to the conspiracy is separate and distinct offence to which individual offenders are liable to punishment, independent of the conspiracy."

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, 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 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 (AIR 1957 SC 747) and Nalini's case at page 517. In the former case, Jagannadhadas, J, after referring to the passage in Roscoe's Criminal Evidence (16th Edn.) 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". 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 120B does not convey that idea.

Learned senior counsel Mr. Gopal Subramanium placed reliance on the summary of legal position as to proof of conspiracy by Coleridge, J in Regina vs. Murphy [(1837) 173 E.R. 502] which is as under:

" I am bound to tell you, that although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have this common design and to pursue it by common means, and so to carry it into execution. This is not necessary, because in many cases of the most clearly established conspiracies there are no means of proving any such thing and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, 'Had they this common design, and did they pursue it by these common means the design being unlawful? .... "If you are satisfied that there was concert between them, I am bound to say that being convinced of the conspiracy, it is not necessary that you should find both Mr. Murphy and Mr. Douglas doing each particular act, as after the fact of conspiracy is already established in your minds, whatever is either said or done by either of the defendants in pursuance of the common design, is, both in law and in common sense, to be considered as the acts of both."

We do not find anything in Murphy's case which supports the argument that all the conspirators are equally liable for the offence committed by some of them in execution of the common design. The Court was only considering whether the offence of conspiracy was made out and whether the acts or declarations of co-conspirators can be relied on against others. The crucial question formulated is: "Had they this common design and did they pursue it by these common means the design being unlawful? The learned Judge was only explaining the ingredients of conspiracy and as to the principle on which anything said or done by either of the conspirators in pursuit of common design can be put against the other. In other words, the principle analogous to Section 10 was being highlighted.

The other decision relied upon by the learned counsel for the State is Babu Lal vs. Emperor (AIR 1938 PC 130) at page 133. What was held in that case was that if several persons conspire to commit the offences and commit overt acts pursuant to the conspiracy, such acts must be held to have been committed in the course of the same transaction, which embraces the conspiracy and the acts done under it. The Privy Council was concerned with the interpretation of the expression "in the course of the same transaction" occurring in Section 239(d) of the old Criminal Procedure Code which dealt with joinder of charges. It does not support the argument based on the agency theory.

One point raised by Shri Ram Jethmalani based on the decision of House of Lords in R Vs. Anderson [1985 2 All ER Page 961] remains to be considered. The principle laid down in that case is discernible from the following summary in the head note.

"Beyond the mere fact of agreement, the necessary mens rea for proving that a person is guilty of conspiring to commit an offence under Section 1(1) of the Criminal Law Act 1977 is established if, and only if, it is shown that he intended when he entered into the agreement to play some part in the

agreed course of conduct involving the commission of an offence. Furthermore, a person may be guilty of conspiring even though he secretly intended to participate in only part of the course of conduct involving the commission of an offence."

The learned counsel submits that in order to sustain a charge of conspiracy under Section 120A, the same test could be usefully applied. That means, there must be evidence to the effect that the accused who entered into the agreement in the nature of conspiracy had intended to play and played some part in the agreed course of conduct involving the commission of an offence. But, if there is no evidence attributing any role to the accused in the course of conduct involving the commission of offence, he or she cannot be held guilty under Section 120A. However, as rightly pointed out by the learned counsel for the State Mr. Gopal Subramanium, the provision dealt with by the House of Lords, namely, Section 1(1) of the Criminal Law Act, 1977 is different from the wording of Section 120A. It reads as follows:

"Subject to the following provisions of this Part of this act, if a person agrees with any other person or persons that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions, he is guilty of conspiracy to commit the offence or offences in question."

It may be noted that by the 1977 Act, the offence of conspiracy at common law was abolished and a statutory definition of 'conspiracy to commit the offence' was enacted. The provision that was interpreted by the House of Lords is not in pari materia with the provision in the Indian Penal Code. However, one clarification is needed. If there is proof to the effect that the accused played a role, attended to certain things or took steps consistent with the common design underlying the conspiracy, that will go a long way in establishing the complicity of the accused, though it is not a legal requirement that the conspirator should do any particular act beyond the agreement to commit the offence.

13. The interpretation of Section 27 of the Evidence Act has loomed large in the course of arguments. The controversy centered round two aspects:-

(i) Whether the discovery of fact referred to in Section 27 should be confined only to the discovery of a material object and the knowledge of the accused in relation thereto or the discovery could be in respect of his mental state or knowledge in relation to certain things concrete or non-concrete.

(ii) Whether it is necessary that the discovery of fact should be by the person making the disclosure or directly at his instance? The subsequent event of discovery by police with the aid of information furnished by the accused whether can be put against him under Section 27?

These issues have arisen especially in the context of the disclosure statement (Ex. PW 66/13) of Gilani to the police. According to the prosecution, the information furnished by Gilani on certain aspects, for instance, that the particular cell phones belonged to the other accused Afzal and Shaukat, that the Christian colony room was arranged by Shaukat in order to accommodate the slain

terrorist Mohammad, that police uniforms and explosives 'were arranged' and that the names of the five deceased terrorists were so and so are relevant under Section 27 of the Evidence Act as they were confirmed to be true by subsequent investigation and they reveal the awareness and knowledge of Gilani in regard to all these facts, even though no material objects were recovered directly at his instance.

The arguments of the learned counsel for the State run as follows:- The expression "discovery of fact" should be read with the definition of "fact" as contained in Section 3 of the Evidence Act which defines the "fact" as 'meaning and including anything, state of things or relation of things, capable of being perceived by the senses and also includes any mental condition of which any person is conscious' (emphasis supplied). Thus, the definition comprehends both physical things as well as mental facts. Therefore, Section 27 can admit of discovery of a plain mental fact concerning the informant- accused. In that sense, Section 27 will apply whenever there is discovery (not in the narrower sense of recovery of a material object) as long as the discovery amounts to be confirmatory in character guaranteeing the truth of the information given the only limitation being that the police officer should not have had access to those facts earlier.

The application of the Section is not contingent on the recovery of a physical object. Section 27 embodies the doctrine of Confirmation by subsequent events. The fact investigated and found by the police consequent to the information disclosed by the accused amounts to confirmation of that piece of information. Only that piece of information, which is distinctly supported by confirmation, is rendered relevant and admissible U/S 27. The physical object might have already been recovered, but the investigating agency may not have any clue as to the "state of things" that surrounded that physical object. In such an event, if upon the disclosure made such state of things or facts within his knowledge in relation to a physical object are discovered, then also, it can be said to be discovery of fact within the meaning of Section 27.

The other aspect is that the pointing out of a material object by the accused himself is not necessary in order to attribute the discovery to him. A person who makes a disclosure may himself lead the investigating officer to the place where the object is concealed. That is one clear instance of discovery of fact. But the scope of Section 27 is wider. Even if the accused does not point out the place where the material object is kept, the police, on the basis of information furnished by him, may launch an investigation which confirms the information given by accused. Even in such a case, the information furnished by the accused becomes admissible against him as per Section 27 provided the correctness of information is confirmed by a subsequent step in investigation. At the same time, facts discovered as a result of investigation should be such as are directly relatable to the information. Reliance is placed mainly on the decisions of this Court in Inayatullah Vs. State of Maharashtra [(1976) 1 SCC 828] and State of Maharashtra Vs. Damu [(2000) 6 SCC 269]. Referring to the land-mark decision of Privy Council in Pulukuri Kotayya Vs. Emperor [AIR 1947 PC 67] the learned counsel Mr. Gopal Subramanium tried to distinguish it and explain its real ratio. The learned senior counsel appearing for the defence have contended that the scope of Section 27 should not be unduly stretched by having resort to the second part of the definition of 'fact' in Section 3 of the Evidence Act. According to Mr. Ram Jethmalani, it is too late in the day to contend that the 'fact' discovered within the meaning of Section 27 could either be the physical object or the mental fact of

which the accused giving the information is conscious. The learned counsel submits that on a true understanding of the ratio of the opinion of the Privy Council in Kotayya's case, the word 'fact' shall be construed as being a combination of both the elements. The fact discovered, it was ruled by the Privy Council, was the physical fact of hidden spear and the mental fact was that the accused knew that he had so hidden it at a particular place. Great reliance was placed on the fact that in Kotayya's case, the full Bench decision of the Lahore High Court in Sukhan Vs. Emperor [AIR 1929 Lahore 344] and the division Bench decision of the Bombay High Court in Ganuchandra Vs. Emperor [AIR 1932 Bombay 286] were specifically approved by the Privy Council. It is pointed out that Section 27 is virtually borrowed from Taylor's treatise on the Law of Evidence as pointed out by the full Bench of the Allahabad High Court in the vintage decision in Queen Empress Vs. Babu Lal [1884, Indian Decisions, 6 Allahabad 510]. The passage in Taylor's Evidence (which is found in paragraph 902 of Volume 1 of 1931 Edition) is as follows:

"902. (i). When, in consequence of information unduly obtained from the prisoner, the property stolen, or the instrument of the crime, or the body of the person murdered, or any other material fact, has been discovered, proof is admissible that such discovery was made conformably with the information so obtained. The prisoner's statement about his knowledge of the place where the property or other article was to be found, being thus confirmed by the fact, is shown to be true, and not to have been fabricated in consequence of any inducement. It is, therefore, competent to prove that the prisoner stated that the thing would be found by searching a particular place, and that it was accordingly so found, but it would not, in such a case of a confession improperly obtained, be competent to inquire whether he confessed that the had concealed it there. So much of the confession as relates distinctly to the fact discovered by it may be given in evidence, as this part at least of the statement cannot have been false."

It is therefore contended that the fact discovered must basically be a concrete or material fact but not mental fact. The learned counsel Mr. Ram Jethmalani further submits that the word 'discovery' had two shades of meaning: one is 'find and detect' and the other is 'to uncover or reveal' vide 'Dictionary of Modern Legal Usage' by Bryan A. Garner. Though the first of the meanings viz., 'to uncover or reveal' has become obsolete according to Garner, still, the expression 'discover' should be construed according to its original sense when the Indian Evidence Act was framed. It is therefore submitted that the discovery of a physical thing by the accused is a must. The doctrine of confirmation by subsequent events which is the expression used in some of the cases and text books only means that the discovery of the material object is subsequent to the information leading to discovery. The learned counsel reinforces his argument by stating that in the context and setting of Section 27 and in the company of the word 'discover', fact only means the object, its location and concealment. The entire definition of 'fact' should not be bodily lifted into Section 27. The fact discovered is the concealment or disposal of the object which is brought to light by the accused, but not anything relating to the object in general. All the learned counsel for the defence then stressed on the expression 'thereby discovered' which means discovered pursuant to information which he himself supplied. Countering the argument of the learned senior counsel for the State, the learned counsel for the accused then contend that the information and the discovery of fact should be intimately and inextricably connected and the confirmation by means of subsequent investigation cannot be considered to be discovery of fact as a direct result of information furnished by the

accused. Apart from Kotayya's case, heavy reliance is placed on the judgment of Privy Council in Kotayya's case. We have noticed above that the confessions made to a police officer and a confession made by any person while he or she is in police custody cannot be proved against that person accused of an offence. Of course, a confession made in the immediate presence of a Magistrate can be proved against him. So also Section 162 Cr.P.C. bars the reception of any statements made to a police officer in the course of an investigation as evidence against the accused person at any enquiry or trial except to the extent that such statements can be made use of by the accused to contradict the witnesses. Such confessions are excluded for the reason that there is a grave risk of their statements being involuntary and false. Section 27, which unusually starts with a proviso, lifts the ban against the admissibility of the confession/statement made to the police to a limited extent by allowing proof of information of specified nature furnished by the accused in police custody. In that sense Section 27 is considered to be an exception to the rules embodied in Sections 25 and 26 (vide AIR 1962 SC 1116). Section 27 reads as follows:

27. How much of information received from accused may be proved Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. The history of case law on the subject of confessions under Section 27 unfolds divergent views and approaches. The divergence was mainly on twin aspects: (i) Whether the facts contemplated by Section 27 are physical, material objects or the mental facts of which the accused giving the information could be said to be aware of. Some Judges have gone to the extent of holding that the discovery of concrete facts, that is to say material objects, which can be exhibited in the Court are alone covered by Section 27. (ii) The other controversy was on the point regarding the extent of admissibility of a disclosure statement. In some cases a view was taken that any information, which served to connect the object with the offence charged, was admissible under Section 27. The decision of the Privy Council in Kotayya's case, which has been described as a locus classicus, had set at rest much of the controversy that centered round the interpretation of Section 27. To a great extent the legal position has got crystallized with the rendering of this decision. The authority of Privy Council's decision has not been questioned in any of the decisions of the highest Court either in the pre or post independence era. Right from 1950s, till the advent of the new century and till date, the passages in this famous decision are being approvingly quoted and reiterated by the Judges of this apex Court. Yet, there remain certain grey areas as demonstrated by the arguments advanced on behalf of the State. The first requisite condition for utilizing Section 27 in support of the prosecution case is that the investigating police officer should depose that he discovered a fact in consequence of the information received from an accused person in police custody. Thus, there must be a discovery of fact not within the knowledge of police officer as a consequence of information received. Of course, it is axiomatic that the information or disclosure should be free from any element of compulsion. The next component of Section 27 relates to the nature and extent of information that can be proved. It is only so much of the information as relates distinctly to the fact thereby discovered that can be proved and nothing more. It is explicitly clarified in the Section that there is no taboo against receiving such information in evidence merely because it amounts to a confession. At the same time, the last clause makes it clear that it is not the confessional part that is admissible but it is only such information or part of it, which relates distinctly to the fact discovered by means of the information

furnished. Thus, the information conveyed in the statement to police ought to be dissected if necessary so as to admit only the information of the nature mentioned in the Section. The rationale behind this provision is that, if a fact is actually discovered in consequence of the information supplied, it affords some guarantee that the information is true and can therefore be safely allowed to be admitted in evidence as an incriminating factor against the accused. As pointed out by the Privy Council in Kotayya's case, "clearly the extent of the information admissible must depend on the exact nature of the fact discovered and the information must distinctly relate to that fact". Elucidating the scope of this Section, the Privy Council speaking through Sir John Beaumont said "normally, the Section is brought into operation when a person in police custody produces from some place of concealment, some object, such as a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is the accused". We have emphasized the word 'normally' because the illustrations given by the learned Judge are not exhaustive. The next point to be noted is that the Privy Council rejected the argument of the counsel appearing for the Crown that the fact discovered is the physical object produced and that any and every information which relates distinctly to that object can be proved. Upon this view, the information given by a person that the weapon produced is the one used by him in the commission of the murder will be admissible in its entirety. Such contention of the Crown's counsel was emphatically rejected with the following words: " If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the 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 "

Then, their Lordships proceeded to give a lucid exposition of the expression 'fact discovered' in the following passage, which is quoted time and again by this Court:

" 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." (emphasis supplied).

The approach of the Privy Council in the light of the above exposition of law can best be understood by referring to the statement made by one of the accused to the police officer. It reads thus:

" About 14 days ago, I, Kotayya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Beddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya, Kotayya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulukuri Kotayya."

The Privy Council held that "the whole of that statement except the passage 'I hid it' (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come" is inadmissible. There is another important observation at paragraph 11 which needs to be noticed. The Privy Council explained the probative force of the information made admissible under Section 27 in the following words:

" Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law."

In paragraph 11, their Lordships observed that they were in agreement with the view taken by the High Courts of Lahore and Bombay in Sukhan Vs. Emperor [AIR 1929 Lahore 344] and Ganuchandra Vs. Emperor [AIR 1932 Bombay 286]. The contrary view taken by the Madras High Court in Attappa Goundan Vs. Emperor [ILR 1937 Madras 695] was not accepted by the Privy Council. In Attappa Goundan's case, the High Court held that even that part of the confessional statement, which revealed the connection between the objects produced and the commission of murder was held to be admissible under Section 27 in its entirety. This approach was criticized by the Privy Council. To complete the sequence, we may refer to another decision of the Madras High Court in Emperor Vs., Ramanuja Ayyangar [AIR 1935 Madras 528]. In that case, the majority of learned Judges had disagreed with the view taken in Sukhan's case that the expression 'fact' in Section 27 should be restricted to material objects or something which can be exhibited as material object. It was held that the facts need not be self-probatory and the word 'fact' as contemplated by Section 27 is not limited to "actual physical material object". Emphasis was laid on the wording 'any fact'. In this respect, the view taken in Sukhan's case (supra) was dissented from. The minority view was that the discovery of a witness to the crime or the act of the accused in purchasing the incriminating material cannot be proved by invoking Section

27. We have referred to this decision in Ramanuja Ayyangar's case for the reason that the expression 'fact' was given a wider meaning in this case which is the meaning now sought to be given by Mr. Gopal Subramnium. In Attappa Goundan's case, the connotation of the word 'fact' i.e. whether it can be restricted to a material object was not specifically dealt with. The reason for referring to these two decisions of Madras High Court rendered before Kotayya's case becomes evident when we advert to the decision of this Court in Omprakash [(1972) 1 SCC 249] a little later.

We retrace our discussion to Kotayya's case for a while. Sir John Beaumont who gave the opinion of the Privy Council in that case, was the Judge who spoke for the Division Bench in Ganuchandra's

case [AIR 1932 Bombay 286]. In that case, the learned Judge observed "the fact discovered within the meaning of that Section must I think be some concrete fact to which the information directly relates, and in this case, such fact is the production of certain property which had been concealed". This is also the view taken by Shadi Lal, CJ who expressed the opinion of the majority in Sukhan's case wherein the learned Judge held that the phrase 'fact discovered' refers to a material and not to a mental fact. It was further elucidated by saying that "the fact discovered may be the stolen property, the instrument of the crime, a corpus of a person murdered or any other material thing; or it may be a material thing in relation to the place or locality where it is found". On the facts of the case, it was pointed out that "the fact discovered is not the 'karas' simplicitor but the 'karas' being found in the possession of Alladin. The information to be admitted must relate distinctly to the latter. Thus, both in Sukhan's case and Ganuchandra's case which were approved by the Privy Council, two questions arose for consideration (a) whether Section 27 was confined to physical objects and (b) as to the extent of information that was admissible under Section 27. Mr. Gopal Subramanium is right in his submission that the only point of controversy in Kotayya's case related to the extent of information that becomes admissible under Section 27 and it was with reference to that aspect the view taken in Sukhan and Ganuchandra were approved, though it was not said so in specific words. The other question as regards the exact meaning and import of the expression 'discovery of fact' was not considered. Where a physical object was discovered in consequence of the information furnished, which part of that information/statement becomes relevant was the line of inquiry before the Privy Council. No doubt, the illustrations given coupled with the fact that the same learned Judge took a particular view on this aspect in Ganuchandra's case may lead to an impression that the learned Judges of the Privy Council understood the expression 'fact' primarily in the sense of material object but, as observed already, the illustrations given are not exhaustive. We are of the view that Kotayya's case is an authority for the proposition that 'discovery of fact' cannot be equated to the object produced or found. It is more than that. The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place. We now turn our attention to the precedents of this Court which followed the track of Kotayya's case. The ratio of the decision in Kotayya's case reflected in the underlined passage extracted supra was highlighted in several decisions of this Court.

The crux of the ratio in Kotayya's case was explained by this Court in State of Maharashtra vs. Damu. Thomas J. observed that "the decision of the Privy Council in Pulukuri Kotayya vs. Emperor is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect". In Mohmed Inayatullah vs. The State of Maharashtra [(1976) 1 SCC 828], Sarkaria J. while clarifying that the expression "fact discovered" in Section 27 is not restricted to a physical or material fact which can be perceived by the senses, and that it does include a mental fact, explained the meaning by giving the gist of what was laid down in Pulukuri Kotayya's case. The learned Judge, speaking for the Bench observed thus:

"Now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see Pulukuri Kotayya v. Emperor; Udai Bhan v. State of Uttar Pradesh)"

So also in Udai Bhan vs. State of Uttar Pradesh [AIR 1962 SC 1116]. Raghubar Dayal, J. after referring to Kotayya's case stated the legal position as follows:

"A discovery of a fact includes the object found, the place from which it is produced and the knowledge of the accused as to its existence."

The above statement of law does not run counter to the contention of Mr. Ram Jethmalani, that the factum of discovery combines both the physical object as well as the mental consciousness of the informant-accused in relation thereto. However, what would be the position if the physical object was not recovered at the instance of the accused was not discussed in any of these cases.

There is almost a direct decision of this Court in which the connotation of the expression "fact" occurring in Section 27 was explored and a view similar to Sukhan's case was taken on the supposition that the said view was approved by the Privy Council in Kotayya's case. That decision is Himachal Pradesh Administration vs. Om Prakash [(1972) 1 SCC 249]. In that case, on the basis of information furnished by the accused to the Police Officer that he had purchased the weapon from a witness (PW11) and that he would take the Police to him, the Police went to the Thari of PW11 where the accused pointed out PW11 to the Police. It was contended on behalf of the accused that the information that he purchased the dagger from PW11 followed by his leading the Police to the Thari and pointing him out was inadmissible under Section 27 of the Evidence Act. This argument was accepted. Jaganmohan Reddy, J. speaking for the Court observed thus:

"In our view there is force in this contention. A fact discovered within the meaning of Section 27 must refer to a material fact to which the information directly relates. In order to render the information admissible the fact discovered must be relevant and must have been such that it constitutes the information through which the discovery was made. What is the fact discovered in this case?. Not the dagger but the dagger hid under the stone which is not known to the Police (see Pulukuri Kotayya and others v. King Emperor). But thereafter can it be said that the information furnished by the accused that he purchased the dagger from PW11 led to a fact discovered when the accused took the police to the Thari of PW11 and pointed him out"

The learned Judge then referred to the decision of Madras High Court in Emperor vs. Ramanuja Ayyangar [AIR 1935 Mad 528] which held that the information relating to the purchase from the pointed shop and its carriage by a witness pointed out was admissible. Reference was then made to the law laid down in Athappa Goundan's case [AIR 1937 Mad 618] and observed that "this view was overruled by the Privy Council in Pulukuri Kotayya's case" (supra).

The passage in Sukhan's case was then approvingly referred to and the law was enunciated as follows:

"In the Full Bench Judgment of Seven Judges in Sukhan vs. the Crown, which was approved by the Privy Council in Pulkuri Kotayya's case, Shadi Lal, C.J., as he then was speaking for the majority pointed out that the expression 'fact' as defined by Section 3 of the Evidence Act includes not only the physical fact which can be perceived by the senses but also the psychological fact or mental

condition of which any person is conscious and that it is in the former sense that the word used by the Legislature refers to a material and not to a mental fact. It is clear therefore that what should be discovered is the material fact and the information that is admissible is that which has caused that discovery so as to connect the information and the fact with each other as the 'cause and effect'. That information which does not distinctly connect with the fact discovered or that portion of the information which merely explains the material thing discovered is not admissible under Section 27 and cannot be proved".

The following observations are also crucial.

"As explained by this Court as well as by the Privy Council, normally Section 27 is brought into operation where a person in police custody produces from some place of concealment some object said to be connected with the crime of which the informant is the accused. the concealment of the fact which is not known to the police is what is discovered by the information and lends assurance that the information was true. No witness with whom some material fact, such as the weapon of murder, stolen property or other incriminating article is not hidden sold or kept and which is unknown to the Police can be said to be discovered as a consequence of the information furnished by the accused. These examples however are only by way of illustration and are not exhaustive. What makes the information leading to the discovery of the witness admissible is the discovery from him of the thing sold to him or hidden or kept with him which the police did not know until the information was furnished to them by the accused. A witness cannot be said to be discovered if nothing is to be found or recovered from him as a consequence of the information furnished by the accused and the information which disclosed the identity of the witness will not be admissible".

Then follows the statement of law:

"But even apart from the admissibility of the information under Section 27, the evidence of the Investigating Officer and the panchas that the accused had taken them to PW11 and pointed him out and as corroborated by PW11 himself would be admissible under Section 8 of the Evidence Act as conduct of the accused".

In an earlier paragraph, the Court stressed the need to exercise necessary caution and care so as to be assured of the credibility of the information furnished and the fact discovered.

Confronted with this decision which affirms the law laid down in Sukhan's case (supra), and which militates against the contention advanced by the prosecution, the learned senior counsel Mr. Gopal Subramanium has questioned the correctness and the binding authority of this judgment. Firstly, according to him, the judgment was based on certain wrong assumptions and, secondly, it is pointed out that in the light of the later decisions, the enunciation of law in Om Prakash case does not hold good. In regard to the first point of criticism, the learned counsel Mr. Gopal Subramanium contended as follows:

"OM PRAKASH was delivered on the basis that Sukhan had been approved in Pulukuri Kotayya, and the contrary view had been rejected by the Privy Council. It is submitted that the very basis of the

decision in Om Prakash was incorrect. It is submitted that a reading of para 13 of the judgment indicates that the ratio in Athapa Goundan and Ramanuja Ayyangar were perceived to be similar and it is on this assumption this Court held that mental facts are not admissible in evidence under Section 27. The Court failed to note that Ramanuja Ayyangar dealt with the admissibility of mental facts which was not under consideration before the Privy Council in Pulukuri Kottaya. Athapa Goundan which dealt with the question of extent of admissibility was considered by the Privy Council and overruled."

We find considerable force in this criticism. However, this criticism does not justify a departure from the view taken by a coordinate Bench of this Court, unless we categorize it as a decision rendered per incuriam. It is not possible to hold so. In fact, as pointed out by Mr. Ram Jethmalani, the said interpretation of expression 'fact' placed in Om Prakash (supra) and in some other decisions of the pre-independence days, is in conformity with the opinion of TAYLOR (quoted supra) which had apparently inspired the drafters of the Indian Evidence Act. But that is not to say that the legal position canvassed by Mr. Gopal Subramanium is not a reasonably possible one. However, we are handicapped in approaching the issue independently, unfettered by the decision in OM PRAKASH case.

We may add that in the case of Eerabhadrappa Vs. State of Karnataka [(1983) 2 SCC 330] A.P. Sen, J. speaking for the Bench observed that the word 'fact' in Section 27 "means some concrete or material fact to which the information directly relates". Then his Lordship quoted the famous passage in Kotayya's case. However, there was no elaboration. The next endeavour of Mr. Gopal Subramanium was to convince us that the precedential force of the judgment in OM PRAKASH has been considerably eroded by the subsequent pronouncements. Two decisions have been cited to substantiate his contention. They are: Mohd. Inayatullah vs. State of Maharashtra (supra) and State of Maharashtra vs. Damu (supra). We do not think that in any of these decisions 'discovery of fact' was held to comprehend a pure and simple mental fact or state of mind relating to a physical object dissociated from the recovery of the physical object. Let us revert back to the decision in Mohd. Inayatullah's case. The first sentence in paragraph 13 of the following passage which has already been referred to is relied on by the learned senior counsel for the State. "At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact (see Sukhan V. Crown; Rex V. Ganee). Now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see Palukuri Kotayya v. Emperor; Udai Bhan v. State of Uttar Pradesh)"

The first sentence read with the second sentence in the above passage would support the contention of Mr. Ram Jethmalani that the word 'fact' embraces within its fold both the physical object as well as the mental element in relation thereto. This ruling in Inayatullah does not support the argument of the State's counsel that Section 27 admits of a discovery of a plain mental fact irrespective of the discovery of physical fact. The conclusion reached in Inayatullah's case is revealing. The three fold fact discovered therein was: a) the chemical drums, (b) the place i.e. the musafir khana wherein they lay in deposit and (c) the knowledge of the accused of such deposit. The accused took the police to the place of deposit and pointed out the drums. That portion of the information was found

admissible under Section 27. The rest of the statement namely "which I took out from the Hazibundar of first accused" was eschewed for the reason that it related to the past history of the drums or their theft by the accused.

Let us see how far Damu's case supports the contention of Mr. Gopal Subramanium. At the outset, we may point out that Damu's case did not lay down any legal proposition beyond what was said in Kotayya's case. The statement of law in Kotayya that the fact discovered "embraces the place from which the object is produced and the knowledge of the accused as to it and the information given must relate distinctly to this fact" was reiterated without any gloss or qualification. In that case, A3 disclosed to the investigating officer that "Deepak's dead body was carried by me and Guruji (A2) on his motor cycle and thrown in the canal". The said statement of A3 was not found admissible in evidence by the High Court as the dead body was not recovered pursuant to the disclosure made. This Court however took a different view and held that the said statement was admissible under Section

27. It was held so in the light of the facts mentioned in paragraphs 34 & 37. These are the facts: when an offer was made by A3 that he would point out the spot, he was taken to the spot and there the I.O. found a broken piece of glass lying on the ground which was picked up by him. A motor cycle was recovered from the house of A2 and its tail lamp was found broken. The broken glass piece recovered from the spot matched with and fitted into the broken tail lamp. With these facts presented to the Court, the learned Judges after referring to Kotayya's case, reached the following conclusion in paragraph 37. "How did the particular information lead to the discovery of the fact? No doubt, recovery of dead body of Dipak from the same canal was antecedent to the information which PW44 obtained. If nothing more was recovered pursuant to and subsequent to obtaining the information from the accused, there would not have been any discovery of any fact at all. But when the broken glass piece was recovered from that spot and that piece was found to be part of the tail lamp of the motorcycle of A2 Guruji, it can safely be held that the investigating officer discovered the fact that A2 Guruji had carried the dead body on that particular motorcycle up to the spot". (emphasis supplied) The events highlighted in the case speak for themselves and reveal the rationale of that decision. The view taken in Damu's case does not make any dent on the observations made and the legal position spelt out in Om Prakash case. The High Court rightly distinguished Damu's case because there was discovery of a related physical object at least in part. The decision in Pandurang Kalu Patil Vs. State of Maharashtra [(2002) 2 SCC 490] was also cited by the counsel for the State. We do not think that the prosecution can derive assistance from what was laid down in that judgment. The legal position enunciated in P. Kotayya's case was only reiterated in a little different language. It was observed that "recovery, or even production of object by itself need not necessarily result in discovery of a fact. That is why Sir John Beaumont said in Pulukuri Kotayya that it is fallacious to treat the 'fact discovered' within the Section as equivalent to the object produced".

We need not delve further into this aspect as we are of the view that another ingredient of the Section, namely, that the information provable should relate distinctly to the fact thereby discovered is not satisfied, as we see later. When we refer to the circumstances against some of the accused. There is one more point which we would like to discuss i.e. whether pointing out a material object by

the accused furnishing the information is a necessary concomitant of Section 27. We think that the answer should be in the negative. Though in most of the cases the person who makes the disclosure himself leads the Police Officer to the place where an object is concealed and points out the same to him, however, it is not essential that there should be such pointing out in order to make the information admissible under Section 27. It could very well be that on the basis of information furnished by the accused, the Investigating Officer may go to the spot in the company of other witnesses and recover the material object. By doing so, the Investigating Officer will be discovering a fact viz., the concealment of an incriminating article and the knowledge of the accused furnishing the information about it. In other words, where the information furnished by the person in custody is verified by the Police Officer by going to the spot mentioned by the informant and finds it to be correct, that amounts to discovery of fact within the meaning of Section 27. Of course, it is subject to the rider that the information so furnished was the immediate and proximate cause of discovery. If the Police Officer chooses not to take the informant- accused to the spot, it will have no bearing on the point of admissibility under Section 27, though it may be one of the aspects that goes into evaluation of that particular piece of evidence.

How the clause "as relates distinctly to the fact thereby discovered" has to be understood is the next point that deserves consideration. The interpretation of this clause is not in doubt. Apart from Kotayya's case, various decisions of this Court have elucidated and clarified the scope and meaning of the said portion of Section 27. The law has been succinctly stated in Inayatullah's case (supra). Sarkaria, J. analyzed the ingredients of the Section and explained the ambit and nuances of this particular clause in the following words:

"..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."

In the light of the legal position thus clarified, this Court excluded a part of the disclosure statement to which we have already adverted. In Bodhraj Vs. State of J & K [(2002) 8 SCC 45] this Court after referring to the decisions on the subject observed thus: " The words "so much of such information", as relates distinctly to the fact thereby discovered are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate "

14. Joint disclosures Before parting with the discussion on the subject of confessions under Section 27, we may briefly refer to the legal position as regards joint disclosures. This point assumes

relevance in the context of such disclosures made by the first two accused viz. Afzal and Shaukat. The admissibility of information said to have been furnished by both of them leading to the discovery of the hideouts of the deceased terrorists and the recovery of a laptop computer, a mobile phone and cash of Rs. 10 lacs from the truck in which they were found at Srinagar is in issue. Learned senior counsel Mr. Shanti Bhushan and Mr. Sushil Kumar appearing for the accused contend, as was contended before the High Court, that the disclosure and pointing out attributed to both cannot fall within the Ken of Section 27, whereas it is the contention of Mr. Gopal Subramanium that there is no taboo against the admission of such information as incriminating evidence against both the informants/accused. Some of the High Courts have taken the view that the wording "a person" excludes the applicability of the Section to more than one person. But, that is too narrow a view to be taken. Joint disclosures to be more accurate, simultaneous disclosures, per se, are not inadmissible under Section 27. 'A person accused' need not necessarily be a single person, but it could be plurality of accused. It seems to us that the real reason for not acting upon the joint disclosures by taking resort to Section 27 is the inherent difficulty in placing reliance on such information supposed to have emerged from the mouths of two or more accused at a time. In fact, joint or simultaneous disclosure is a myth, because two or more accused persons would not have uttered informatory words in a chorus. At best, one person would have made the statement orally and the other person would have stated so substantially in similar terms a few seconds or minutes later, or the second person would have given unequivocal nod to what has been said by the first person. Or, two persons in custody may be interrogated separately and simultaneously and both of them may furnish similar information leading to the discovery of fact. Or, in rare cases, both the accused may reduce the information into writing and hand over the written notes to the police officer at the same time. We do not think that such disclosures by two or more persons in police custody go out of the purview of Section 27 altogether. If information is given one after the other without any break almost simultaneously, and if such information is followed up by pointing out the material thing by both of them, we find no good reason to eschew such evidence from the regime of Section 27. However, there may be practical difficulties in placing reliance on such evidence. It may be difficult for the witness (generally the police officer), to depose which accused spoke what words and in what sequence. In other words, the deposition in regard to the information given by the two accused may be exposed to criticism from the stand point of credibility and its nexus with discovery. Admissibility and credibility are two distinct aspects, as pointed out by Mr. Gopal Subramanium. Whether and to what extent such a simultaneous disclosure could be relied upon by the Court is really a matter of evaluation of evidence. With these prefaratory remarks, we have to refer to two decisions of this Court which are relied upon by the learned defence counsel.

In Mohd. Abdul Hafeez vs. State of Andhra Pradesh [AIR 1983 SC 367], the prosecution sought to rely on the evidence that the appellant along with the other two accused gave information to the IO that the ring (MO 1) was sold to the jeweller PW3 in whose possession the ring was. PW3 deposed that four accused persons whom he identified in the Court came to his shop and they sold the ring for Rs.325/- and some days later, the Police Inspector accompanied by accused 1, 2 and 3 came to his shop and the said accused asked PW3 to produce the ring which they had sold. Then, he took out the ring from the showcase and it was seized by the Police Inspector. The difficulty in accepting such evidence was projected in the following words by D.A. Desai, J. speaking for the Court:

"Does this evidence make any sense? He says that accused 1 to 4 sold him the ring. He does not say who had the ring and to whom he paid the money. Similarly, he stated that accused 1 to 3 asked him to produce the ring. It is impossible to believe that all spoke simultaneously. This way of recording evidence is most unsatisfactory and we record our disapproval of the same. If evidence otherwise confessional in character is admissible under Section 27 of the Indian Evidence Act, it is obligatory upon the Investigating Officer to state and record who gave the information; when he is dealing with more than one accused, what words were used by him so that a recovery pursuant to the information received may be connected to the person giving the information so as to provide incriminating evidence against the person".

There is nothing in this judgment which suggests that simultaneous disclosures by more than one accused do not at all enter into the arena of Section 27, as a proposition of law.

Another case which needs to be noticed is the case of Ramkishan vs. Bombay State [AIR 1955 SC 104]. The admissibility or otherwise of joint disclosures did not directly come up for consideration in that case. However, while distinguishing the case of Gokuldas Dwarkadas decided by Bombay High Court, a passing observation was made that in the said case the High Court "had rightly held that a joint statement by more than one accused was not contemplated by Section 27". We cannot understand this observation as laying down the law that information almost simultaneously furnished by two accused in regard to a fact discovered cannot be received in evidence under Section 27. It may be relevant to mention that in the case of Lachhman Singh vs. The State [1952 SCR 839] this Court expressed certain reservations on the correctness of the view taken by some of the High Courts discountenancing the joint disclosures.

15. CALL RECORDS PROOF AND AUTHENTICITY It is contended by Mr. Shanti Bhushan, appearing for the accused Shaukat that the call records relating to the cellular phone No. 919811573506 said to have been used by Shaukat have not been proved as per the requirements of law and their genuineness is in doubt. The call records relating to the other mobile numbers related to Gilani and Afzal are also subjected to the same criticism. It is the contention of the learned counsel that in the absence of a certificate issued under sub-Section (2) of Section 65B of the Evidence Act with the particulars enumerated in clauses (a) to (e), the information contained in the electronic record cannot be adduced in evidence and in any case in the absence of examination of a competent witness acquainted with the functioning of the computers during the relevant time and the manner in which the printouts were taken, even secondary evidence under Section 63 is not admissible.

Two witnesses were examined to prove the printouts of the computerized record furnished by the cellular service providers namely AIRTEL (Bharti Cellular Limited) and ESSAR Cellphone. The call details of the mobile No. 9811573506 (which was seized from Shaukat's house) are contained in Exhibits 36/1 to 36/2. The covering letters signed by the Nodal Officer of Sterling Cellular Limited are Ext.P36/6 and P36/7 bearing the dates 13th & 18th December respectively. The call details of mobile No. 9811489429 attributed to Afzal are contained in Ext.P36/3 and the covering letter addressed to the Inspector (Special Cell) PW66 signed by the Nodal Officer is Ext.36/5. The call details of 9810081228 belonging to the subscriber SAR Gilani are contained in Exts. 35/8. The

above two phones were obtained on cash card basis. The covering letter pertaining thereto and certain other mobile numbers was signed by the Security Manager of Bharti Cellular Limited. The call details relating to another cellphone number 9810693456 pertaining to Mohammed is Ext.35/5. These documents i.e. Ext.35 series were filed by PW35 who is the person that signed the covering letter dated 17th December bearing Ext.35/1. PW35 deposed that "all the call details are computerized sheets obtained from the computer". He clarified that "the switch which is maintained in the computer in respect of each telephone receives the signal of the telephone number, called or received and serves them to the Server and it is the Server which keeps the record of the calls made or received. In case where call is made and the receiver does not pick up the phone, the server which makes a loop of the route would not register it". As far as PW36 is concerned, he identified the signatures of the General Manager of his Company who signed Ext.P36 series. He testified to the fact that the call details of the particular telephone numbers were contained in the relevant exhibits produced by him. It is significant to note that no suggestion was put to these two witnesses touching the authenticity of the call records or the possible tampering with the entries, although the arguments have proceeded on the lines that there could have been fabrication. In support of such argument, the duplication of entries in Exts.36/2 and 36/3 and that there was some discrepancy relating to the Cell I.D. and IMEI number of the handset at certain places was pointed out. The factum of presence of duplicate entries was elicited by the counsel appearing for Afsan Guru from PW36 when PW36 was in the witness box. The evidence of DW10 a technical expert, was only to the effect that it was possible to clone a SIM by means of a SIM Programmer which to his knowledge, was not available in Delhi or elsewhere. His evidence was only of a general nature envisaging a theoretical possibility and not with reference to specific instances. According to Section 63, secondary evidence means and includes, among other things, "copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies". Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the Court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service providing Company can be led into evidence through a witness who can identify the signatures of the certifying officer or otherwise speak to the facts based on his personal knowledge. Irrespective of the compliance of the requirements of Section 65B which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely Sections 63 &

65. It may be that the certificate containing the details in sub-Section (4) of Section 65B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely Sections 63 & 65.

The learned senior counsel Mr. Shanti Bhushan then contended that the witnesses examined were not technical persons acquainted with the functioning of the computers, nor they do have personal knowledge of the details stored in the servers of the computers. We do not find substance in this argument. Both the witnesses were responsible officials of the concerned Companies who deposed

to the fact that they were the printouts obtained from the computer records. In fact the evidence of PW35 shows that he is fairly familiar with the computer system and its output. If there was some questioning vis-`-vis specific details or specific suggestion of fabrication of printouts, it would have been obligatory on the part of the prosecution to call a technical expert directly in the know of things. The following observations of House of Lords in the case of R Vs. Shepard [1993 AC 380] are quite apposite:

" The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly."

Such a view was expressed even in the face of a more stringent provision in Section 69 of the Police and Criminal Act, 1984 in U.K. casting a positive obligation on the part of the prosecution to lead evidence in respect of proof of the computer record. We agree with the submission of Mr. Gopal Subramanium that the burden of prosecution under the Indian Law cannot be said to be higher than what was laid down in R Vs. Shepard (supra). Although necessary suggestions were not put forward to the witnesses so as to discredit the correctness/genuineness of the call records produced, we would prefer to examine the points made out by the learned counsel for the accused independently. As already noted, one such contention was about the presence of duplicate entries in Ext.36/2 and 36/3. We feel that an innocuous error in the computer recording is being magnified to discredit the entire document containing the details without any warrant. As explained by the learned counsel for the State, the computer, at the first instance, instead of recording the IMEI number of the mobile instrument, had recorded the IMEI and cell ID (location) of the person calling/called by the subscriber. The computer rectified this obvious error immediately and modified the record to show the correct details viz., the IMEI and the cell I.D. of the subscriber only. The document is self-explanatory of the error. A perusal of both the call records with reference to the call at 11:19:14 hours exchanged between 9811489429 (Shaukat's) and 9811573506 (Afzal's) shows that the said call was recorded twice in the call records. The fact that the same call has been recorded twice in the call records of the calling and called party simultaneously demonstrates beyond doubt that the correctness or genuineness of the call is beyond doubt. Further, on a comparative perusal of the two call records, the details of Cell I.D. and IMEI of the two numbers are also recorded. Thus, as rightly pointed out by the counsel for the State Mr. Gopal Subramanium, the same call has been recorded two times, first with the cell ID and IMEI number of the calling number (9811489429). The same explanation holds good for the call at 11:32:40 hours. Far from supporting the contention of the defence, the above facts, evident from the perusal of the call records, would clearly show that the system was working satisfactorily and it promptly checked and rectified the mistake that occurred. As already noticed, it was not suggested nor could it be suggested that there was any manipulation or material deficiency in the computer on account of these two errors. Above all, the printouts pertaining to the call details exhibited by the prosecution are of such regularity and continuity that it would be legitimate to draw a presumption that the system was functional and the output was produced by the computer in regular use, whether this fact was specifically deposed to by the

witness or not. We are therefore of the view that the call records are admissible and reliable and rightly made use of by the prosecution.

16. Interception of Phone Calls The legality and admissibility of intercepted telephone calls arises in the context of telephone conversation between Shaukat and his wife Afsan Guru on 14th December at 20:09 hrs and the conversation between Gilani and his brother Shah Faizal on the same day at 12:22 hrs. Interception of communication is provided for by the provisions contained in Chapter V of the POTO/POTA which contains Sections 36 to 48. The proviso to Section 45 lays down the pre-requisite conditions for admitting the evidence collected against the accused through the interception of wire, electronic or oral communication. Chapter V governing the procedure for interception and admission of the intercepted communications pre-supposes that there is an investigation of a terrorists act under the POTA has been set in motion. It is not in dispute that the procedural requirements of Chapter V have not been complied with when such interceptions took place on 14th December, 2001. But, as already noticed, on the crucial date on which interception took place (i.e. 14th December), no offence under POTA was included whether in the FIR or in any other contemporaneous documents. We have already held that the non- inclusion of POTO offences even at the threshold of investigation cannot be legally faulted and that such non-inclusion was not deliberate. The admissibility or the evidentiary status of the two intercepted conversations should, therefore, be judged de hors the provisions of POTO/POTA. On the relevant day, the interception of messages was governed by Section 5(2) of the Indian Telegraph Act read with Rule 419-A of the Indian Telegraph Rules. The substantive power of interception by the Government or the authorized officer is conferred by Section 5. The modalities and procedure for interception is governed by the said Rules. It is contended by the learned senior counsel appearing for the two accused Shaukat and Gilani, that even the Rule 419A, has not been complied with in the instant case, and, therefore, the tape- recorded conversation obtained by such interception cannot be utilized by the prosecution to incriminate the said accused. It is the contention of learned counsel for the State, Mr. Gopal Subramanium, that there was substantial compliance with Rule 419A and, in any case, even if the interception did not take place in strict conformity with the Rule, that does not affect the admissibility of the communications so recorded. In other words, his submission is that the illegality or irregularity in interception does not affect its admissibility in evidence there being no specific embargo against the admissibility in the Telegraph Act or in the Rules. Irrespective of the merit in the first contention of Mr. Gopal Subramanium, we find force in the alternative contention advanced by him.

In regard to the first aspect, two infirmities are pointed out in the relevant orders authorizing and confirming the interception of specified telephone numbers. It is not shown by the prosecution that the Joint Director, Intelligence Bureau who authorized the interception, holds the rank of Joint Secretary to the Government of India. Secondly, the confirmation orders passed by the Home Secretary (contained in volume 7 of lower Court record, Page 447 etc.,) would indicate that the confirmation was prospective. We are distressed to note that the confirmation orders should be passed by a senior officer of the Government of India in such a careless manner, that too, in an important case of this nature. However, these deficiencies or inadequacies do not, in our view, preclude the admission of intercepted telephonic communication in evidence. It is to be noted that unlike the proviso to Section 45 of POTA, Section 5(2) of the Telegraph Act or Rule 419A does not

deal with any rule of evidence. The non-compliance or inadequate compliance with the provisions of the Telegraph Act does not per se affect the admissibility. The legal position regarding the question of admissibility of the tape recorded conversation illegally collected or obtained is no longer res integra in view of the decision of this Court in R.M. Malkani Vs. State of Maharashtra [(1973) 1 SCC 471]. In that case, the Court clarified that a contemporaneous tape record of a relevant conversation is a relevant fact and is admissible as res gestae under Section 7 of the Evidence Act. Adverting to the argument that Section 25 of the Indian Telegraph Act was contravened the learned Judges held that there was no violation. At the same time, the question of admissibility of evidence illegally obtained was discussed. The law was laid down as follows:

" There is warrant for the proposition that even if evidence is illegally obtained it is admissible. Over a century ago it was said in an English case where a constable searched the appellant illegally and found a quantity of offending article in his pocket that it would be a dangerous obstacle to the administration of justice if it were held, because evidence was obtained by illegal means, it could not be used against a party charged with an offence. See Jones V. Owen (1870) 34 JP 759. The Judicial Committee in Kumar, Son of Kanju V. R [1955 1 All E.R. 236] dealt with the conviction of an accused of being in unlawful possession of ammunition which had been discovered in consequence of a search of his person by a police officer below the rank of those who were permitted to make such searches. The Judicial Committee held that the evidence was rightly admitted. The reason given was that if evidence was admissible it matters not how it was obtained. There is of course always a word of caution. It is that the Judge has a discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. That caution is the golden rule in criminal jurisprudence."

We may also refer to the decision of a Constitution Bench of this Court in Pooranmal Vs. Director of Inspection [1974 2 SCR 704] in which the principle stated by the Privy Council in Kurma's case was approvingly referred to while testing the evidentiary status of illegally obtained evidence. Another decision in which the same approach was adopted is a recent judgment in State Vs. NMT Joy Immaculate [(2004) 5 SCC 729]. It may be mentioned that Pooranmal's case was distinguished by this Court in Ali Musfata vs. State of Kerala [(1994) 6 SCC 569] which is a case arising under NDPS Act on the ground that contraband material seized as a result of illegal search and seizure could by itself be treated as evidence of possession of the contraband which is the gist of the offence under the said Act. In the instant case, the tape recorded conversation which has been duly proved and conforms to the requirements laid down by this Court in Ramsingh Vs. Ramsingh [(1985) Suppl. SCC 611] can be pressed into service against the concerned accused in the joint trial for the offences under the Indian Penal Code as well as POTA. Such evidence cannot be shut out by applying the embargo contained in Section 45 when on the date of interception, the procedure under Chapter V of POTA was not required to be complied with. On the relevant date POTA was not in the picture and the investigation did not specifically relate to the offences under POTA. The question of applying the proviso to Section 45 of POTA does not, therefore, arise as the proviso applies only in the event of the communications being legally required to be intercepted under the provisions of POTA. The proviso to Section 45 cannot be so read as to exclude such material in relation to POTA offences if it is otherwise admissible under the general law of evidence.

17. Procedural safeguards in POTA and their impact on confessions As already noticed, POTA has absorbed into it the guidelines spelt out in Kartar Singh's case and D.K.Basus's case in order to impart an element of fairness and reasonableness into the stringent provisions of POTA in tune with the philosophy of Article 21 and allied constitutional provisions. These salutary safeguards are contained in Section 32 and Section 52 of POTA. The peremptory prescriptions embodied in Section 32 of POTA are:

(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).

The mandate of sub-sections 2 & 3 is not something new. Almost similar prescriptions were there under TADA also. In fact, the fulfillment of such mandate is inherent in the process of recording a confession by a statutory authority. What is necessarily implicit is, perhaps, made explicit. But the notable safeguards which were lacking in TADA are to be found in sub-sections 4 & 5.

The lofty purpose behind the mandate that the maker of confession shall be sent to judicial custody by the CJM before whom he is produced is to provide an atmosphere in which he would feel free to make a complaint against the police, if he so wishes. The feeling that he will be free from the shackles of police custody after production in the Court will minimize, if not remove, the fear psychosis by which he may be gripped. The various safeguards enshrined in Section 32 are meant to be strictly observed as they relate to personal liberty of an individual. However, we add a caveat here. The strict enforcement of the provision as to judicial remand and the invalidation of confession merely on the ground of its non-compliance may present some practical difficulties at times. Situations may arise that even after the confession is made by a person in custody, police custody may still be required for the purpose of further investigation. Sending a person to judicial custody at that stage may retard the investigation. Sometimes, the further steps to be taken by the investigator with the help of the accused may brook no delay. An attempt shall however be made to harmonize this provision in Section 32(5) with the powers of investigation available to the police. At the same time, it needs to be emphasized that the obligation to send the confession maker to judicial custody cannot be lightly disregarded. The police custody cannot be given on mere asking by the police. It shall be remembered that sending a person who has made the confession to judicial custody after he is produced before the CJM is the normal rule and this procedural safeguard should be given its due primacy. The CJM should be satisfied that it is absolutely necessary that the confession maker shall be restored to police custody for any special reason. Such a course of sending

him back to police custody could only be done in exceptional cases after due application of mind. Most often, sending such person to judicial custody in compliance with Section 32(5) soon after the proceedings are recorded by the CJM subject to the consideration of the application by the police after a few days may not make material difference for further investigation. The CJM has a duty to consider whether the application is only a ruse to get back the person concerned to police custody in case he disputes the confession or it is an application made bona fide in view of the need and urgency involved. We are therefore of the view that the non- compliance with the judicial custody requirement does not per se vitiate the confession, though its non-compliance should be one of the important factors that must be borne in mind in testing the confession.

These provisions of Section 32, which are conceived in the interest of the accused, will go a long way to screen and exclude confessions, which appear to be involuntary. The requirements and safeguards laid down in sub-sections 2 to 5 are an integral part of the scheme providing for admissibility of confession made to the police officer. The breach of any one of these requirements would have a vital bearing on the admissibility and evidentiary value of the confession recorded under Section 32(1) and may even inflict a fatal blow on such confession. We have another set of procedural safeguards laid down in Section 52 of POTA which are modelled on the guidelines envisaged by D.K. Basu (supra). Section 52 runs as under:

"52 (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."

Sub-sections 2 & 4 as well as sub-Section (3) stem from the guarantees enshrined in Articles 21 and 22(1) of the Constitution. Article 22(1) enjoins that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. They are also meant to effectuate the commandment of Article 20(3) that no person accused of any offence shall be compelled to be a witness against himself.

The breadth and depth of the principle against self-incrimination imbedded in Article 20(3) was unravelled by a three Judge Bench speaking through Krishna Iyer, J. in Nandini Satpathy Vs. P.L. Dani [(1978) 2 SCC 424]. It was pointed out by the learned Judge that the area covered by Article 20(3) and Section 161(2) of Cr.P.C. is substantially the same. "Section 161(2) of the Cr.P.C. is a parliamentary gloss on the constitutional clause" it was observed. This Court rejected the contention advanced on behalf of the State that the two provisions, namely, Article 20(3) and Section 161, did not operate at the anterior stages before the case came to Court and the incriminating utterance of the accused, previously recorded, was attempted to be introduced. Noting that the landmark decision in Miranda Vs. Arizona [1966, 384 US 436] did extend the embargo to police investigation also, the Court observed that there was no warrant to truncate the constitutional protection underlying Article 20(3). It was held that even the investigation at the police level is embraced by Article 20(3) and this is what precisely Section 161(2) means. The interpretation so placed on Article 20(3) and Section 161, in the words of the learned Judge, "brings us nearer to the Miranda mantle of exclusion which extends the right against self-incrimination, to police examination and custodial interrogation and takes in suspects as much as regular accused persons". The observations in M.P. Sharma Vs. Satish Chandra [AIR 1954 SC 300] to the effect that "the protection afforded to an accused insofar as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him" were cited with approval. In the same Judgment, we find lucid exposition of the width and content of Article 22(1). Krishna Iyer, J. observed " The spirit and sense of Article 22(1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near- custodial interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice."

Article 22(1) was viewed to be complementary to Article 20(3). It was observed "we think that Article 20(3) and Article 22(1) may, in a way, be telescoped by making it prudent for the police to permit the advocate of the accused, if there be one to be present at the time he is examined". It was pointed out that lawyer's presence, in the context of Article 20(3), "is an assurance of awareness and observance of the right to silence". It was then clarified "we do not lay down that the police must secure the services of a lawyer but all that we mean is that if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied", without being exposed to the charge of securing involuntary self-incrimination. It was also clarified that the police need not wait more than for a reasonable while for an advocate's arrival. But they must invariably warn and record that fact about the right to silence. It was aptly and graphically said "Article 20(3) is not a paper tiger but a provision to police the police and to silence coerced crimination". Based on the observations in Nadini Satpathy's case, it is possible to agree that the constitutional guarantee under Article 22(1) only implies that the suspect in the police custody shall not be denied the right to meet and consult his lawyer even at the stage of interrogation. In other words, if he wishes to have the presence of the lawyer, he shall not be denied that opportunity. Perhaps, Nandini Satpathy does not go so far as Miranda in establishing access to lawyer at interrogation stage. But, Section 52(2) of POTA makes up this deficiency. It goes a step further and casts an imperative on the police officer to inform the person arrested of his right to consult a legal practitioner, soon after he is brought to the police station. Thus, the police officer is bound to

apprise the arrested person of his right to consult the lawyer. To that extent, Section 52(2) affords an additional safeguard to the person in custody. Section 52(2) is founded on the MIRANDA rule.

A discussion on the raison d'etre and the desirability of the provision enacted in Section 52(1) read with Section 52(4) can best be understood by referring to the seminal case of Miranda Vs. Arizona which is an oft-quoted decision. The privilege against the self-incrimination was expressly protected by the V amendment of the U.S. Constitution. It provides, as Article 20(3) of Indian Constitution provides, that no person ."shall be compelled in any criminal case to be a witness against himself". Such privilege lies at the heart of the concept of a fair procedure and such norm is now recognized to be an international standard. The V amendment also guarantees a right akin to Article 21 of our Constitution by enjoining that no person shall be deprived of life, liberty or property without due process of law. Another notable safeguard to the accused is to be found in the VI amendment which inter alia provides that in a criminal prosecution, the accused shall have the assistance of counsel for his defence. The safeguard is substantially similar to Article 22(1) of the Indian Constitution. It is in the context of exposition of these constitutional provisions that the U.S. Supreme Court handed down the significant ruling in Miranda. The core principles underscored in Miranda have withstood the judicial scrutiny in the subsequent rulings, though the straight jacketed warning procedures and the effect of technical non-compliance of Miranda procedures evoked critical comments and set a process of debate. Miranda is often referred to as "the marriage of the V&VI amendments" and it is seen as the natural outgrowth of V Amendment guarantees, spread over a century or more. Prior to Miranda ruling, confessions were only required to meet the 'voluntariness' test. In the post Miranda era, police have to prove that they read specific Miranda warnings and obtained an 'intelligent waiver'. The purpose of Miranda it is said, is to neutralize the distinct psychological disadvantage that suspects are under when dealing with police. The proposition laid down in the majority opinion in Miranda case was that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self- incrimination". To ensure tht the exercise of the right will be scrupulously honoured, the Court laid down the following measures:

"He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a Court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him".

On the content of the right to consult a counsel not merely at the stage of trial, but also at the interrogation stage, Chief Justice Warren observed thus:

"In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the

admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent the person most often subjected to interrogation the knowledge that he too has a right to have counsel present."

At the same time it was clarified "This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person, they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation."

It was aptly pointed out that "the modern practice of 'in custody interrogation' is psychologically rather than physically oriented". 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.

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-`-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.

18. CASE OF MOHD. AFZAL (A1)

(i) Legal Assistance :

The first point raised by Mr. Sushil Kumar, appearing for the accused Afzal, was that he was denied proper legal aid, thereby depriving him of effective defence in the course of trial. In sum and substance, the contention is that the counsel appointed by the Court as 'amicus curiae' to take care of his defence was thrust on him against his will and the first amicus appointed made concessions with regard to the admission of certain documents and framing of charges without his knowledge. It is further submitted that the counsel who conducted the trial did not diligently cross-examine the witnesses. It is, therefore, contended that his valuable right of legal aid flowing from Articles 21 and 22 is violated. We find no substance in this contention. The learned trial Judge did his best to afford effective legal aid to the accused Afzal when he declined to engage a counsel on his own. We are unable to hold that the learned counsel who defended the accused at the trial was either inexperienced or ineffective or otherwise handled the case in a casual manner. The criticism against the counsel seems to be an after thought raised at the appellate stage. It was rightly negatived by the High Court.

Coming to the specific details, in the first instance, when Afzal along with other accused was produced before the special Judge, he was offered the assistance of a counsel. One Mr. Attar Alam was appointed. However, the said advocate was not willing to act as amicus. On 14.5.2002, the charge sheet was filed in the Court. On 17.5.2002, the trial Judge appointed Ms. Seema Gulati who agreed to defend Afzal. She filed Vakalatnama along with her junior Mr. Neeraj Bansal on the same day on behalf of the accused Afzal. On 3.6.2002, the arguments on charges were heard. Afzal was represented by Ms. Seema Gulati. The counsel conceded that there was prima facie material to frame charges. The Court framed charges against all the accused on 4.6.2002 and the accused pleaded not guilty. True, the appellant was without counsel till 17.5.2002 but the fact remains that till then, no proceedings except extending the remand and furnishing of documents took place in the Court. The next date which deserves mention is 5.6.2002. On that date, all the counsel appearing for the accused agreed that postmortem reports, MLCs, documents related to recovery of guns and explosive substances at the spot should be considered as undisputed evidence without formal proof which resulted in dropping of considerable number of witnesses for the prosecution. The learned senior counsel for the appellant by referring to the application filed by Ms. Seema Gulati on 1.7.2002 seeking her discharge from the case, highlights the fact that she took no instructions from Afzal or discussed the case with him and therefore no concession should have been made by her. The contention has no force. Assuming that the counsel's statement that she took no instructions from the accused is correct, even then there is nothing wrong in the conduct of the advocate in agreeing for admission of formal documents without formal proof or in agreeing for the framing of charges. The counsel had exercised her discretion reasonably. The appellant accused did not object to this course adopted by the amicus throughout the trial. No doubt, some of the documents admitted contained particulars of identification of the deceased terrorists by the appellant Afzal, but, the factum of identification was independently proved by the prosecution witnesses and opportunity of cross- examination was available to the accused. In the circumstances, we cannot say that there was a reasonable possibility of prejudice on account of admission of the said documents without formal proof.

Coming to the next phase of development, on 1.7.2002, Ms. Seema Gulati filed an application praying for her discharge from the case citing a curious reason that she had been engaged by

another accused Gilani to appear on his behalf. An order was passed on 2.7.2002 releasing her from the case. Mr. Neeraj Bansal who filed Vakalat along with Ms. Seema Gulati was then nominated as amicus to defend Afzal and the brief was handed over to him. NO objection was raised by Afzal on that occasion. Inspection of record by the counsel was allowed on 3.7.2002 and on subsequent occasions. On 8.7.2002, the accused Afzal filed a petition stating therein that he was not satisfied with the counsel appointed by the Court and that he needed the services of a senior advocate. He named four advocates in the petition and requested the Court to appoint one of them. On 12th July, the trial Judge recorded that the counsel named by the accused were not willing to take up the case. Mr. Neeraj Bansal was therefore continued especially in view of the fact that he had experience of dealing with TADA cases. Afzal was also given the opportunity to cross- examine the prosecution witnesses in addition to the amicus. In fact, he did avail of that opportunity now and then. On several occasions, there was common cross-examination on behalf of all the accused. No indicia of apparent prejudice, is discernible from the manner in which the case was defended. Though the objection that he was not satisfied with his counsel was reiterated on 12.7.02 after PW15 was cross examined, we do not think that the Court should dislodge the counsel and go on searching for some other counsel to the liking of the accused. The right to legal aid cannot be taken thus far. It is not demonstrated before us as to how the case was mishandled by the advocate appointed as amicus except pointing out stray instances pertaining to cross- examination of one or two witnesses. The very decision relied upon by the learned counsel for the appellant, namely, Strickland Vs. Washington [466 US 668] makes it clear that judicial scrutiny of a counsel's performance must be careful, deferential and circumspect as the ground of ineffective assistance could be easily raised after an adverse verdict at the trial. It was observed therein:

"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defence after it has proved unsuccessful, to conclude that a particular act of omission of counsel was unreasonable. Cf. Engle Vs. Isaac [456 US 107, 133-134] (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; "

The learned senior counsel for the State Mr. Gopal Subramnium has furnished a table indicating the cross examination of material prosecution witnesses by the counsel Mr. Neeraj Bansal as Annexure 16 to the written submissions. Taking an overall view of the assistance given by the Court and the performance of the counsel, it cannot be said that the accused was denied the facility of effective defence.

(ii) Evidence against Mohd. Afzal Now let us analyze the evidence against Afzal that is sought to be relied upon by the prosecution. It consists of confessional statement recorded by the DCP, Special Cell PW60 and the circumstantial evidence.

(iii) Confession First, we shall advert to the confession. It is in the evidence of PW80 Rajbir Singh (ACP), Special Cell that he took over investigation on 19.12.2001 on which date the offences under POTA were added. Then, he further interrogated the accused Afzal on 20.12.2001 and recorded his supplementary disclosure statement Ext. PW64/3. According to him, the three accused Afzal, Shaukat and Gilani, expressed their desire to make confessional statements before the Deputy Commissioner of Police. Accordingly, he apprised the DCP, Special Cell (PW60) of this fact. PW60 directed him to produce the accused persons at Gazetted Officers' Mess, Alipur Road, Delhi on the next day. First, PW80 produced Gilani before PW60 at 11.30 a.m. but he declined to give the confessional statement. Then he produced Mohd. Afzal before the DCP, Special Cell in the evening. The recording of the confession by PW60 DCP started at 7.10 pm on 21.12.2001 and ended at 10.45 pm. It is recorded in the preamble of the confession that he had asked ACP Rajbir Singh to leave the room and after that he warned and explained to the accused that he was not bound to make the confessional statement and that if he did so, it can be used against him as evidence. Thereupon, it was recorded that Afzal was not under any duress and he was ready to give the confessional statement. The signature of Afzal is found beneath that endorsement. There is a recital to the effect that PW60 was satisfied that the accused was not under duress or pressure. PW60 also deposed that the accused were 'comfortable' in English language and he kept on writing as they narrated their versions. He (PW60) denied the suggestion that Afzal was not produced before him and he did not express his willingness to make confession. The DCP(PW60) handed over a sealed envelope containing the confessional statements to PW80 the I.O. who produced the accused Afzal and two others before the Addl. Chief Metropolitan Magistrate (ACMM), Delhi on 22.12.2001 together with an application Ext. PW63/1. The ACMM was examined as PW63. The ACMM stated that he opened the sealed envelope containing Exts.PW60/9 & PW60/6 which are the confessional statements of Afzal and Shaukat, and Ext.PW60/3 which is the statement of Gilani and perused them. The ACMM then recorded the statements of the accused persons. The two accused Afzal and Shaukat confirmed having made the confessional statement without any threat or pressure. The proceedings drawn by him is Ext.PW63/2. The accused signed the statements confirming the confession made to the DCP. The statement of Mohd. Afzal and his signature are marked as Exts.PW63/5 & 63/6. PW63 stated that he made enquiries from the accused persons and none of them made any complaint of use of force or threat at the time of recording confession. He also deposed that he gave a warning that they were not bound to make the statement before him. A suggestion that Mohd. Afzal did not appear before him nor did he make the statement, was denied. The ACMM, after drawing up the proceedings, sent the accused Afzal to police custody for a week at the instance of I.O. PW80 for the reason that he was required to be taken to certain places in Kashmir for further investigation. We shall now give the gist of the confessional statement of Mohd. Afzal which is Ext.PW60/9 read with Ext.PW60/7. First, he mentions about joining JKLF, a militant outfit during the year 1989-90, receiving training in Pak Occupied Kashmir in insurgent activities and coming back to India with arms, his arrival in Delhi with his cousin Shaukat for studies, coming into contact with SAR Gilani A3 while studying in Delhi University, surrendering before BSF in 1993 on the advice of his family members, returning back to his native place Sopore and doing commission agency business, coming into contact with one Tariq of Anantanag at that time, who motivated him to join 'Jihad' for liberation of Kashmir and assured him of financial assistance, Tariq introducing him to one Ghazibaba (proclaimed offender) in Kashmir who further exhorted him to join the movement and apprised him of the mission to carry out attacks on important institutions in India like Parliament

and Embassies and asked him to find a safe hideout for the 'Fidayeens' in Delhi.

During that meeting, he was introduced to Mohammed and Haider, Pak nationals and militants. In the month of October, 2001, he rang up to Shaukat and asked him to rent out accommodation for himself and Mohammed. In the first week of November, he and Mohammed came to Delhi. Mohammed brought with him a laptop and Rs.50,000. Shaukat took them to the pre- arranged accommodation in Christian Colony Boys' Hostel. He revealed to Shaukat that Mohammed was a Pak militant of Jaish-E-Mohammed and came to Delhi to carry out a Fidayen attack. After a week, he arranged another safe hideout at A-97, Gandhi Vihar. Mohammed collected money through 'hawala' and gave Rs.5 lakhs to be handed over to Tariq in Srinagar. Accordingly, he went to Srinagar and gave the money to Tariq. At the instance of Tariq, he brought two other militants Raja and Hyder to Delhi and both were accommodated at the hideout in Gandhi Vihar. In order to complete the task assigned by Ghazibaba, he along with Mohammed went to the shops in old Delhi area and purchased 60 KGs of Ammonium Nitrate, 10 KGs of Aluminum powder, 5 KGs of Sulpher and other items in order to facilitate preparation of explosives by Mohammed. After a week or so, Mohammed gave another 5 lakhs of rupees to be handed over to Tariq. Tariq asked him to take along with him two other militants, Rana and Hamza. They were carrying two holdalls which contained rifles with loaded magazines, grenade launcher, pistols, hand grenades and shells, electric detonators and other explosives. They also stayed in Gandhi Nagar hideout initially. After reaching Delhi, he arranged for another accommodation at 281, Indira Vihar. Mohammed purchased mobile phones and SIM cards from the markets and received directions from Ghazibaba from a satellite phone. He used to meet Shaukat and Gilani and motivate them for Jihad. Shaukat provided his motorcycle for conducting 'recce'. Meetings were also arranged in the house of Shaukat for deciding future course of action. In those meetings, Gilani and Shaukat's wife Afsan also used to be present. At the meetings, various targets such as Delhi Assembly, Parliament, UK & US Embassy and Airport were discussed. Then, after conducting survey of all the targets, Mohammed informed Ghazibaba that they should strike at the Indian Parliament. A final meeting was held in the house of Shaukat in which all were present and plans for attack on Parliament House were finalized. As per the plan, he along with Mohammed went to Karolbagh and bought a second hand Ambassador car on 11th December. They also purchased a magnetic VIP red light. Mohammed got prepared a sticker of MHA and identity cards through his laptop. Mohammed and other militants prepared IEDs with the use of chemicals. This IED was fitted in the car for causing explosion. On the night of 12.12.2001, he along with Shaukat and Gilani went to the hideout in Gandhi Vihar, where all the five Pak militants were present. Mohammed gave him the laptop and Rs.10 lakhs. He asked him to reach the laptop to Ghazibaba and also told him that Rs.10 lakhs was meant for him and his friends Shaukat and Gilani. Mohammed told him that they were going to conduct a Fidayeen attack on Parliament House on 13.12.2001. They were in touch with each other on mobile phones. On 13.12.2001, he received a call on his mobile No. 98114-89429 from Mohammed's phone No. 98106-93456. He was asked to watch the TV and inform him about the presence of various VVIPs in Parliament House. As there was no electricity, he could not watch TV and therefore he contacted Shaukat and asked him to watch TV and convey the information. Then Mohammed called him (Afzal) and told him that he was going ahead with the attack on the Parliament. He then called Shaukat and told him that the mission had started. Shaukat then came and met him at Azadpur mandi and both went to Gilani's house and gave him Rs.2 lakhs. Gilani in turn asked him to give the money at his house in Kashmir. Then he

and Shaukat left for Srinagar in Shaukat's truck. They were apprehended by the Srinagar police on 15th. The police recovered from them laptop with the accessories and Rs.10 lakhs. They were then brought to Delhi and at Delhi he got recovered explosives and other materials from the hideouts. The crucial question that remains to be considered is whether the confessional statement of Mohd. Afzal recorded by the DCP (PW 80) could be safely acted upon. Certain common contentions applicable to the confessions of both Afzal and Shaukat were raised in an attempt to demonstrate that the confession would not have been true and voluntary. Firstly, it is pointed out that the alleged confession was substantially the same as the alleged disclosure statements (Exts. 64/1 & 64/2) which were recorded on the 16th December itself. Even their signatures were obtained on these disclosure statements. If so, when the accused were inclined to make a full-fledged confession on the 16th December and most of the investigation relating to hideouts and shops and the recovery of incriminating materials was over by the next day, there was no perceptible reason why the accused should not have been produced before a Judicial Magistrate for recording a confession under the provisions of Cr.P.C. The only reason, according to learned counsel for the appellants, is that they were really not prepared to make the confession in a Court and, therefore, the investigating authorities found the ingenuity of adding POTA offences at that stage so as to get the confession recorded by a Police officer according to the wishes of the investigators. It is also submitted that it is highly incredible that Afzal, who is a surrendered militant, and who is alleged to have maintained close contact with hard-core terrorists, could have, immediately after the arrest by police, developed a feeling of repentance and come forward voluntarily to make a confession implicating himself and others including a lady who had nothing to do with the terrorists. Another comment made is that the alleged meetings at Shaukat's place to discuss and finalize the plans to attack Parliament with persons whose advice or association had nothing or little to do with the execution of conspiracy is a highly improbable event. The terrorists who came to Delhi on a Fidyaeen mission with a set purpose could not have thought of going about here and there to evolve the strategies and plans with persons like Gilani and Navjot (Shaukat's wife), risking unnecessary publicity. It was not a natural, probable or reasonable conduct. It is also contended that the language and tenor of the confessional statement gives enough indication that it was not written to the dictation of appellants, but it was a tailor made statement of which they had no knowledge.

Though these arguments are plausible and persuasive, it is not necessary to rest our conclusion on these probabilities.

We may also refer to the contention advanced by Shri Ram Jethmalani, learned senior counsel appearing for SAR Gilani with reference to the confession of Afzal. Shri Jethmalani contended that Afzal in the course of his interview with the TV and other media representatives, a day prior to recording of a confession before the DCP, while confessing to the crime, absolved Gilani of his complicity in the conspiracy. A cassette (Ext.DW4/A) was produced as the evidence of his talk. DW-4, a reporter of Aaj Tak TV channel was examined. It shows that Afzal was pressurized to implicate Gilani in the confessional statement, according to the learned counsel. It is further contended by Shri Jethmalani that the statement of Afzal in the course of media interview is relevant and admissible under Section 11 of the Evidence Act. Learned counsel for Afzal, Shri Sushil Kumar did not sail with Shri Jethmalani on this point, realizing the implications of admission of the statements of Afzal before the TV and press on his culpability. However, at one stage he did argue

that the implication of Gilani in the confessional statement conflicts with the statement made by him to the media and therefore the confession is not true. We are of the view that the talk which Afzal had with TV and press reporters admittedly in the immediate presence of the police and while he was in police custody, should not be relied upon irrespective of the fact whether the statement was made to a Police Officer within the meaning of Section 162 Cr.P.C. or not. We are not prepared to attach any weight or credibility to the statements made in the course of such interview pre-arranged by the police. The police officials in their over- zealousness arranged for a media interview which has evoked serious comments from the counsel about the manner in which publicity was sought to be given thereby. Incidentally, we may mention that PW60 the DCP, who was supervising the investigation, surprisingly expressed his ignorance about the media interview. We think that the wrong step taken by the police should not enure to the benefit or detriment of either the prosecution or the accused.

(iv) Procedural Safeguards Compliance:

Now we look to the confession from other angles, especially from the point of view of in-built procedural safeguards in Section 32 and the other safeguards contained in Section 52. It is contended by the learned senior counsel Mr. Gopal Subramanium that the DCP before recording the confession, gave the statutory warning and then recorded the confession at a place away from the police station, gave a few minutes time for reflection and only on being satisfied that the accused Afzal volunteered to make confession in an atmosphere free from threat or inducement that he proceeded to record the confession to the dictation of Afzal. Therefore, it is submitted that there was perfect compliance with sub-Sections (2)&(3). The next important step required by sub-Section (4) was also complied with inasmuch as Afzal was produced before the Additional Chief Metropolitan Magistrate PW63 on the very next day i.e. 22.12.2001 along with the confessional statements kept in a sealed cover. The learned Magistrate opened the cover, perused the confessional statements, called the maker of confession into his chamber, on being identified by PW80 ACP and made it known to the maker that he was not legally bound to make the confession and on getting a positive response from him that he voluntarily made the confession without any threat or violence, the ACMM recorded the statement to that effect and drew up necessary proceedings vide Exts.PW63/5 and PW63/6. It is pointed out that the accused, having had the opportunity to protest or complain against the behaviour of police in extracting the confession, did not say a single word denying the factum of making the confession or any other relevant circumstances impinging on the correctness of the confession. It is further pointed out that Afzal and the other accused were also got medically examined by the police and the Doctor found no traces of physical violence. It is therefore submitted that the steps required to be taken under sub-Sections (4)&(5) were taken. However, the learned counsel for the State could not dispute the fact that the accused Afzal was not sent to judicial custody thereafter, but, on the request of the I.O. PW80, the ACMM sent back Afzal to police custody. Such remand was ordered by the ACMM pursuant to an application made by PW80 that the presence of Afzal in police custody was required for the purpose of further investigation. Thus, the last and latter part of sub-Section (5) of Section 32 was undoubtedly breached. To get over this difficulty, the learned counsel for the State made two alternative submissions, both of which, in our view, cannot be sustained.

Firstly, it was contended that on a proper construction of the entirety of sub-Section (5) of Section 32, the question of sending to judicial custody would arise only if there was any complaint of torture and the medical examination prima facie supporting such allegation. In other words, according to the learned counsel, the expression 'thereafter' shall be read only in conjunction with the latter part of sub-Section (5) beginning with 'and if there is any complaint' and not applicable to the earlier part. In our view, such a restrictive interpretation of sub-Section (5) is not at all warranted either on a plain or literal reading or by any other canon of construction including purposive construction. The other argument raised by the learned counsel is that the provision regarding judicial custody, cannot be read to be a mandatory requirement so as to apply to 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 direct judicial custody. Having regard to the circumstances of this case, there was nothing wrong in sending back Afzal to police custody. This contention cannot be sustained on deeper scrutiny.

The clear words of the provision do not admit of an interpretation that the judicial custody should be ordered by the Chief Judicial Magistrate only when there is a complaint from the 'confession maker' and there appears to be unfair treatment of such person in custody. As already stated, the obligation to send the person whose alleged confession was recorded to judicial custody is a rule and the deviation could at best be in exceptional circumstances. In the present case, it does not appear that the ACMM (PW63) had in mind the requirement of Section 32(5) as to judicial custody. At any rate, the order passed by him on 22.12.2001 on the application filed by PW80 does not reflect his awareness of such requirement or application of mind to the propriety of police remand in the face of Section 32(5) of POTA. Compelling circumstances to bypass the requirement of judicial custody are not apparent from the record. The more important violation of the procedural safeguards lies in the breach of sub-Section (2) read with sub-Section (4) of Section 52. It is an undisputed fact that the appellants were not apprised of the right to consult a legal practitioner either at the time they were initially arrested or after the POTA was brought into picture. We may recall that the POTA offences were added on 19th December and as a consequence thereof, investigation was taken up by PW80 an Asst. Commissioner of Police, who is competent to investigate the POTA offences. But, he failed to inform the persons under arrest of their right to consult a legal practitioner, nor did he afford any facility to them to contact the legal practitioner. The opportunity of meeting a legal practitioner during the course of interrogation within closed doors of police station will not arise unless a person in custody is informed of his right and a reasonable facility of establishing contact with a lawyer is offered to him. If the person in custody is not in a position to get the services of a legal practitioner by himself, such person is very well entitled to seek free legal aid either by applying to the Court through the police or the concerned Legal Services Authority, which is a statutory body. Not that the police should, in such an event, postpone investigation indefinitely till his request is processed, but what is expected of the police officer is to promptly take note of such request and initiate immediate steps to place it before the Magistrate or Legal Services Authority so that at least at some stage of interrogation, the person in custody would be able to establish contact with a legal practitioner. But, in the instant case, the idea of apprising the persons arrested of their rights under sub- Section (2) and entertaining a lawyer into the precincts of the police station did not at all figure in the mind of the investigating officer. The reason for this refrain or crucial omission could well be perceived by the argument of the learned senior counsel for the State that the

compliance with the requirements of Section 52(2) of POTA did not arise for the simple reason that at the time of arrest, POTA was not applied. But this argument ignores the fact that as soon as POTA was added and the investigation commenced thereunder, the police officer was under a legal obligation to go through all the procedural safeguards to the extent they could be observed or implemented at that stage. The non- invocation of POTA in the first instance cannot become a lever to deny the safeguards envisaged by Section 52 when such safeguards could still be extended to the arrested person. The expression 'the person arrested' does not exclude person initially arrested for offences other than POTA and continued under arrest when POTA was invoked. The 'person arrested' includes the person whose arrest continues for the investigation of offences under POTA as well. It is not possible to give a truncated interpretation to the expression 'person arrested' especially when such interpretation has the effect of denying an arrested person the wholesome safeguards laid down in Section 52. The importance of the provision to afford the assistance of counsel even at the stage of custodial interrogation need not be gainsaid. The requirement is in keeping with the Miranda ruling and the philosophy underlying Articles 21, 20(3) & 22(1). This right cannot be allowed to be circumvented by subtle ingenuities or innovative police strategies. The access to a lawyer at the stage of interrogation serves as a sort of counterweight to the intimidating atmosphere that surrounds the detenu and gives him certain amount of guidance as to his rights and the obligations of the police. The lawyer's presence could pave the way, to some extent, to ease himself of the mental tension and trauma. In the felicitous words of Finlay, CJ of Ireland in The People Vs. Healy [(1990) 2 IR 73]:

"The undoubted right of reasonable access to a solicitor enjoyed by a person who is in detention must be interpreted as being directed towards the vital function of ensuring that such a person is aware of his rights and has the independent advice which would be appropriate in order to permit him to reach a truly free decision as to his attitude to interrogation or to the making of any statement, be it exculpatory or inculpatory. The availability of advice must, in my view, be seen as a contribution, at least, towards some measure of equality in the position of the detained person and his interrogators."

The Parliament advisedly introduced a Miranda ordained safeguard which was substantially reiterated in Nandini Satpathy by expressly enacting in sub-Sections (2)&(4) of Section 52 the obligation to inform the arrestee of his right to consult a lawyer and to permit him to meet the lawyer. The avowed object of such prescription was to introduce an element of fair and humane approach to the prisoner in an otherwise stringent law with drastic consequences to the accused. These provisions are not to be treated as empty formalities. It cannot be said that the violation of these obligations under sub- Sections (2) & (4) have no relation and impact on the confession. It is too much to expect that a person in custody in connection with POTA offences is supposed to know the fasciculus of the provisions of POTA regarding the confessions and the procedural safeguards available to him. The presumption should be otherwise. The lawyer's presence and advice, apart from providing psychological support to the arrestee, would help him understand the implications of making a confessional statement before the Police Officer and also enable him to become aware of other rights such as the right to remain in judicial custody after being produced before the Magistrate. The very fact that he will not be under the fetters of police custody after he is produced before the CJM pursuant to Section 32(4) would make him feel free to represent to the CJM about

the police conduct or the treatment meted out to him. The haunting fear of again landing himself into police custody soon after appearance before the CJM, would be an inhibiting factor against speaking anything adverse to the police. That is the reason why the judicial custody provision has been introduced in sub-Section (5) of Section 32. The same objective seems to be at the back of sub-Section (3) of Section 164 of Cr.P.C., though the situation contemplated therein is somewhat different. The breach of the obligation of another provision, namely, sub-Section (3) of Section 52 which is modelled on D.K.Basu's guidelines has compounded to the difficulty in acting on the confession, Section 52(3) enjoins that the information of 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. PW80 the I.O. under POTA merely stated that "near relatives of the accused were informed about their arrest as I learnt from the record". He was not aware whether any record was prepared by the Police Officer arresting the accused as regards the information given to the relatives. It is the prosecution case that Afzal's relative by name Mohd. Ghulam Bohra of Baramulla was informed through phone. No witness had spoken to this effect. A perusal of the arrest memo indicates that the name of Ghulam Bohra and his phone number are noted as against the column 'relatives to be informed'. Afzal's arrest memo seems to have been attested by Gilani's brother who according to the prosecution, was present at the police cell. But, that does not amount to compliance with sub- Section (3) because he is neither family member nor relation, nor even known to be a close friend. We are pointing out this lapse for the reason that if the relations had been informed, there was every possibility of those persons arranging a meeting with the lawyer or otherwise seeking legal advice. Another point which has a bearing on the voluntariness of confession is the fact that sufficient time was not given for reflection after the accused (Afzal/Shaukat) were produced before PW60 recording the confession. He stated in the evidence that he gave only 5 to 10 minutes time to the accused for thinking/reflection in reply to the question by the counsel for Shaukat Hussain. It is true as contended by the learned counsel Mr. Gopal Subramanium that there is no hard and fast rule regarding grant of time for reflection and the rules and guidelines applicable to a confession under Section 164 Cr.P.C. do not govern but in the present case, the time of 5 or 10 minutes is, by all standards, utterly inadequate. Granting reasonable time for reflection before recording a confession is one way of ensuring that the person concerned gets the opportunity to deliberate and introspect once again when he is brought before the prescribed authority for recording the confession. That it is one of the relevant considerations in assessing the voluntariness of the confession is laid down in Sarwan Singh Vs. State of Punjab [1957 SCR 953].

All these lapses and violations of procedural safeguards guaranteed in the statute itself impel us to hold that it is not safe to act on the alleged confessional statement of Afzal and place reliance on this item of evidence on which the prosecution places heavy reliance.

The learned senior counsel for the State has laid considerable stress on the fact that the appellants did not lodge any protest or complaint; on the other hand, they reaffirmed the factum of making confession when they were produced before the ACMM on the next day. It is further pointed out that as far as Afzal is concerned, it took nearly seven months for him to refute and retract the confession. After giving anxious consideration, we are unable to uphold this contention. The omission to challenge the confessional statement at the earliest before the Magistrate shall be viewed in the light

of violation of procedural safeguards which we have discussed in detail earlier. As regards the delay in retracting, the first fact to be taken note of is that the appellant Afzal was evidently not aware of the contents of the confessional statement on the day on which he was produced before the ACMM because the learned Magistrate did not make it available to him for perusal nor the gist of which was made known to him. We find nothing in the proceedings of the ACMM to that effect. It was only after the charge sheet was filed in the Court on 14th May and a copy thereof was served to him that he became aware of the details of the confessional statement. Then Afzal filed a petition before the trial Court on 2.7.2002 stating that "I have given a statement in front of police during custody and not before the DCP or ACP as mentioned in the charge sheet. I found that my statement has been grossly manipulated and twisted in a different form and formation by the police, especially my statements regarding Afsan Guru and SAR Gilani. Therefore, I am requesting to your honour to record my statement in the Court." This was followed by another petition filed on 15th July, the main purpose of which was to highlight that Mr. Gilani and the other accused had no direct or indirect connection. Thus, we cannot hold that there was abnormal delay in disowning the confession, the effect of which would be to impart credibility to the confessional statement.

It is then pointed out that the grounds on which the confessional statement was refuted by Afzal, are not consistent. Whereas Afzal stated in the petition dated 2.7.2002 as above, in the course of his examination under Section 313, Afzal stated that he signed on blank papers. We do not think that this so-called discrepancy will give rise to an inference that the confessional statement was true and voluntary. We have to look to the substance of what the accused said while refuting the statement rather than building up a case on the basis of some inconsistencies in the defence plea.

(v) Circumstances against Afzal We shall now consider the circumstantial evidence against Afzal independent of and irrespective of the confession.

The first circumstance is that Afzal knew who the deceased terrorists were. He identified the dead bodies of the deceased terrorists. PW76 (Inspector HS Gill) deposed that Afzal was taken to the mortuary of Lady Harding Medical College and he identified the five terrorists and gave their names. Accordingly, PW76 prepared an identification memo Ext.PW76/1 which was signed by Afzal. In the postmortem reports pertaining to each of the deceased terrorists, Afzal signed against the column 'identified by'. On this aspect, the evidence of PW76 remained un-shattered. In the course of his examination under Section 313, Afzal merely stated that he was forced to identify by the police. There was not even a suggestion put to PW76 touching on the genuineness of the documents relating to identification memo. It may be recalled that all the accused, through their counsel, agreed for admission of the postmortem reports without formal proof. Identification by a person in custody of another does not amount to making a statement falling within the embargo of Section 162 of Cr.P.C. It would be admissible under Section 8 of Evidence Act as a piece of evidence relating to conduct of the accused person in identifying the dead bodies of the terrorists. As pointed out by Chinnappa Reddy, J. in Prakash Chand Vs. State (Delhi Admn.) [AIR 1979 SC 400]; "There is a clear distinction between the conduct of a person against whom an offence is alleged, which is admissible under Section 8 of the Evidence Act, if such conduct is influenced by any fact in issue or relevant fact and the statement made to a Police Officer in the course of an investigation which is hit by Section 162 Criminal Procedure Code. What is excluded by Section 162 Criminal Procedure Code

is the statement made to a Police Officer in the course of investigation and not the evidence relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a Police Officer during the course of an investigation. For example, the evidence of the circumstance, simpliciter, that an accused person led a police officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under Section 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the EvidenceAct (vide Himachal Pradesh Administration Vs. Om Prakash [AIR 1972 SC 975]).

The second circumstance is the frequent telephonic contacts which Afzal had established with Mohammed. Even minutes before the attack, as many as three calls were made by Mohammed to Afzal from his phone No. 9810693456 which was operated with the instrument having IMEI No. 35066834011740(2) that was recovered from Mohammed's body, as seen from Ext. PW 35/2. The SIM Card relating thereto was also found in Mohammed's purse. Not only that, there is clear evidence to the effect that the mobile instruments were being freely exchanged between Afzal and Mohammed and other terrorists. This is the third circumstance.

Before going into the details on these aspects, it may be noted that the handset found in the truck in which Afzal was travelling and which he pointed out to the police was having IMEI No. 350102209452430. It was a mobile phone instrument of Nokia make and it was being used for the operation of phone No. 9811489429. It is Ext.P-84. The evidence as to recovery was furnished by PW61 and PW62. Its IMEI number and the cell phone number with which it was being operated is established by the evidence of investigating officer coupled with the call records filed by the witnesses. It is also clear from the call record that it was the last instrument on which the said number 89429 had been operated as late as 13.12.2001.

The fact that the instrument bearing number j430 was being carried by Afzal in the truck would give rise to a reasonable inference that the cell-phone number with which the instrument was being operated was that of Afzal and the said phone number was under his use. The appellant, Afzal, apart from denying the recovery at Srinagar which denial cannot be said to be true, did not account for the custody of the phone. The said phone number cannot be related to Shaukat who was also travelling with Afzal because Shaukat was having his own phones which were seized from his residence on 15th December. In the circumstances, even a presumption under Section 114 can be drawn that the number 9811489429 was at all material times being used by the accused, Afzal.

The facts that the SIM card was not found in the mobile phone and that the IMEI number of the instrument was not noted by PW 61 cannot be the grounds to disconnect Afzal from the custody of the said phone. The IMEI number found on the phone was sent to trace the number of the cell phone. One more point has to be clarified. In the seizure memo (Ext. 61/4), the IMEI number of Nokia phone found in the truck was noted as j432. That means the last digit '2' varies from the call records wherein it was noted as j430. Thus, there is a seeming discrepancy as far as the last digit is concerned. This discrepancy stands explained by the evidence of PW 78 a computer Engineer working as Manager, Siemens. He stated, while giving various details of the 15 digits, that

the last one digit is a spare digit and the last digit, according to GSM specification should be transmitted by the mobile phone as '0'. The witness was not cross-examined.

This mobile number ..89429 was also used in the instrument No. IMEI 449269219639010 recovered from the deceased terrorist Raja and was then used in the handset having number 350102209452430(2) i.e. the instrument recovered from the truck at Srinagar, as pointed out by the High Court at paragraph 325 of the judgment. The instrument recovered from Raja was the one used by Afzal i.e. on phone No. 89429 between 6.11.2001 and 23.11.2001. The mobile instrument recovered from Rana (IMEI 449269405808650) (Cell phone No.9810302438) was used by Mohammed who in turn was using the phone of Afzal also. This was the phone that was purchased by Afzal from PW49 Kamal Kishore.

Now, we shall proceed to give further details of the phone calls and the instruments used, more or less in a chronological order insofar as they throw light on the close association of Afzal with the deceased terrorists. The SIM Cards related to the mobile phones bearing Nos. 9810693456 and 9810565284 were recovered from the purse of the deceased terrorist Mohammed. The first call from the first number was from Mohammed to a Delhi landline number on 21.11.2001. The first call to the second number was from Bombay on 24.11.2001. It shows that these two phones were activated by Mohammed in the third week of November, 2001 when he was in Delhi. It is established from the call records that the second call from the Bombay number to Mohammed was received when the said mobile number (9810565284) was being used in the handset having IMEI No. 449269219639010(2). This is the same handset which was used by Afzal with his phone number 9811489429 (vide Ext.P36/3). Thus, it is clear that on 24.11.2001, Mohammed was in control of the handset which was being used by Afzal which reveals the nexus between both. Evidence of the computer experts PWs 72 & 73 together with their reports (Ext.PW73/1 & 73/2) would reveal that a file named Radhika.bmp was created on the laptop (Ext.P83) on 21.11.2001 wherein an identity card in the name of Sanjay Sharma is found and it contains the address No.10, Christian Colony, where Mohammed was staying and the phone No. 9811489429 (belonging to Afzal). The other I.Cards recovered from the body of the deceased terrorist which were fake ones, were also prepared from the same laptop as established by the testimony of PW72 and PW59. Thus, together with the activation of phones, simultaneous activity on the laptop to create bogus I.Cards was going on at the same time i.e. 21.11.2001 onwards. On 28.11.2001, Afzal, having phone No. 9811489429 called Mohammed to his No. 9810693456. Then there was a lull from 30.11.2001 till 6.12.2001. This gap is explained by the prosecution by referring to the confessional statement of Afzal wherein he said that towards the end of November, he (Afzal) went to Kashmir and came back to Delhi along with two other terrorists in the first week of December. But as the confessional statement is not taken into account, we cannot take note of that explanation. On 5th December, 2001, Mohammed called two Dubai numbers from his mobile phone No. 9810565284 and the call record Ext.PW35/4 would show that Mohammed made those calls to Dubai by using the same handset which was being used by Afzal for his number 9811489429. PW49, who identified Afzal in the Court, testified to the fact that Afzal had purchased Motorola mobile phone of model 180 from his shop on 4.12.2001 which tallies with the description of the phone bearing the IMEI number referred to above.

The next point to be noted is that the said phone instrument bearing IMEI No. +9010 was finally recovered from the deceased terrorist Raja as per the seizure memo (Ext.PW2/2). A perusal of the call record discloses that the said instrument was being used by the accused Afzal (with his number ...89429) till the noon of 12.12.2001. It shows that such interchange of phones would not have been possible, but for the meeting of the Afzal with the slain terrorists on 12th December. There were calls to the mobile number 9810693456 the SIM Card of which was recovered from the body of Mohammed vide Ext.PW4/8 and which was being operated from the instrument IMEI No. 449269405808650 (Ext.PW35/5). On 7th & 8th December, Afzal called Mohammed seven times from his phone No. 9811489429 to Mohammed's No. 9810693456 and the said mobile of Mohammed was being used in IMEI No. 808650 (Ext.PW35/5). Thus Mohammed used the same Motorola phone (Ext.P28) which was finally recovered from the deceased Raja vide seizure memo (Ext.PW2/2) on the SIM card (described as 'Magic Card') for the No. 9810693456 and the said card was recovered from Mohammed vide Ext.PW4/8. As per the testimony of PW49, the said Ext.P28 was purchased by Afzal. It is pertinent to note that the said instrument was never used by Afzal though it was purchased by him but it was being used by Mohammed and it ultimately reached Raja.

The deposition of PW44 discloses that Afzal, who was identified by him in the Court, came to his shop on 7th or 8th December and purchased a mobile phone of J70 model of Sony make which he identified as Ext.P-37 seized under Ext.PW4/14 from the body of Mohammed. Its IMEI number was 35066834011747/2 and its cell-phone number was found to be 9810511085. This fact would only lead to the inference that contemporaneous to the crucial incident of 13th December, Afzal met Mohammed and supplied the handset of the mobile phone. That apart, we find the exchange of calls between them. From the call records in Parts VI & IX, it is evident that Afzal was in touch with Mohammed over phone on seven occasions on 7th and 8th December and they were using the two phones with the Cell numbers referred to supra, though, two or three calls of them were of very short duration. It may also be noticed that a satellite phone contacted Afzal for a short-while on his number 9811489429 and the same satellite phone contacted Mohammed on his phone No. 9810693456 on 10th December for five minutes. On 12th December, Mohammed contacted Raja for 83 seconds and thereafter a satellite phone contacted Mohammed for 11 minutes and the same satellite phone contacted Raja twice for about 3= minutes. This is borne out by call records at volume VI. The phone number of Raja was 9810510816 as discovered from the phone instrument recovered from his body.

Then we come to the crucial day i.e. 13.12.2001. Mohammed called Afzal thrice at 10.43, 11.08 and 11.25 a.m., i.e. just before the attack on the Parliament. This is borne out by the call records of 9810693456 and 9811489429 (phones traceable to Mohammed and Afzal, respectively). At about the same time, there was exchange of calls between Afzal and Shaukat on their phone numbers . .89429 and .73506. The call records at Part IX, Page 20 pertaining to 9811489429 the user of which can be traced to Afzal and the instruments recovered would reveal that the SIM Card pertaining to the said mobile number (89429) was activated on 6th November and was used on the handset bearing IMEI No. 449269219639010 recovered from the deceased terrorist Raja as per Ex. PW2/2. The call record would further show that its user was discontinued on 29th November till 7th December, when, again, it was put to use on 12th December. The last call was at 12 noon. Thereafter, the SIM Card pertaining to this number (i.e. .89429) was used in the handset No.

350102209452430, which is the instrument (Ext.P84) recovered from the truck at Srinagar, on being pointed out by Afzal. The picture that emerges is this: The fact that an instrument used by Afzal (with the phone number 9811489429) till 12.12.2001 was recovered from one of the deceased terrorists on the date of incident, reveals that Afzal would have necessarily met the deceased terrorist between the afternoon of 12th December and the morning of 13th December.

One point urged by Shri Sushil Kumar is that although the sanction order authorized the interception of Phone No. ..06722, there is no evidence regarding the details of investigation of the calls made or received from that number. No question was put to the witnesses on this point. It is quite probable that the investigator would have entertained some suspicion in this regard and would have, by way of caution sought permission to intercept. That does not cast a cloud on the prosecution case built up on the basis of the call records pertaining to the phones used by the accused. We can draw no adverse inference from the fact that the details of aforementioned number was not given.

(vi) Hideouts and recoveries The other circumstances which prominently shed light on the involvement of the accused Afzal relate to the discovery of the abodes or hideouts of the deceased terrorists and the recovery of various incriminating articles therefrom as well as the identification of certain shops from where the appellant and one or the other deceased terrorist purchased various items used for preparation of explosives etc. These are spoken to by PW76 Inspector Gill, the landlords of the concerned premises and the shopkeepers. The informations furnished to the Investigating Officers leading to the discovery of facts and the conduct of the accused in pointing out the places where the terrorists stayed are admissible either under Section 27 or Section 8 of the Evidence Act and they supplement the evidence furnished by the I.Os., the landlords and the shopkeepers.

Before proceeding further, we may advert to Section 8 of the Evidence Act. Section 8 insofar as it is relevant for our purpose makes the conduct of an accused person relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. It could be either previous or subsequent conduct. There are two Explanations to the Section, which explains the ambit of the word 'conduct'. They are:

Explanation 1 : The word 'conduct' in this Section does not include statements, unless those statements accompany and explain acts other than statements, but this explanation is not to affect the relevancy of statements under any other Section of this Act.

Explanation 2 : When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

The conduct, in order to be admissible, must be such that it has close nexus with a fact in issue or relevant fact. The Explanation 1 makes it clear that the mere statements as distinguished from acts do not constitute 'conduct' unless those statements "accompany and explain acts other than statements". Such statements accompanying the acts are considered to be evidence of res gestae. Two illustrations appended to Section 8 deserve special mention.

(f) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence "the police are coming to look for the man who robbed B", and that immediately afterwards A ran away, are relevant.

(i) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

We have already noticed the distinction highlighted in Prakash Chand's case (supra) between the conduct of an accused which is admissible under Section 8 and the statement made to a police officer in the course of an investigation which is hit by Section 162 Cr.P.C. The evidence of the circumstance, simplicitor, that the accused pointed out to the police officer, the place where stolen articles or weapons used in the commission of the offence were hidden, would be admissible as 'conduct' under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct, falls within the purview of Section 27, as pointed out in Prakash Chand's case. In Om Prakash case (supra) [AIR 1972 SC 975], this Court held that "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". Coming to the details of evidence relating to hideouts and recoveries, it is to be noted that the accused Afzal is alleged to have made a disclosure statement to PW66 Inspector Mohan Chand Sharma on 16th December, 2001. It is marked as Ext.PW64/1. In the said disclosure statement, all the details of his involvement are given and it is almost similar to the confessional statement recorded by the DCP. The last paragraph of the statement reads thus: "I can come along and point out the places or shops of Delhi wherefrom I along with my other associates, who had executed the conspiracy of terrorist attack on the Parliament, had purchased the chemicals and containers for preparing IED used in the attack, the mobile phones, the SIM Cards and the Uniforms. I can also point out the hideouts of the terrorists in Delhi. Moreover, I can accompany you and point out the places at Karol Bagh wherefrom we had purchased the motorcycle and Ambassador car. For the time being, I have kept the said motorcycle at Lal Jyoti Apartments, Rohini with Nazeer and I can get the same recovered. "

This statement has been signed by Mohd. Afzal. In fact it is not required to be signed by virtue of the embargo in Section 162(1). The fact that the signature of the accused Afzal was obtained on the statement does not, however, detract from its admissibility to the extent it is relevant under Section 27.

We shall now consider the details of evidence on these aspects. PW76 I.O. deposed that the two accused persons, namely, Afzal / Shaukat led him to the following places:

(i) Hideout at 2nd floor, A-97, Gandhi Vihar (PW34)

(ii) Hideout at 2nd floor, 281, Indira Vihar (PW31 & PW32)

(iii) Shop of PW40 Anil Kumar from where Ammonium Nitrate was purchased.

(iv) Shop of PW42 Ramesh Advani from where Silver powder was purchased.

(v) Shop of PW41 Ajay Kumar Sawan Dry Fruits from where dry fruits were purchased.

(vi) Shop of PW43 Sunil Kumar Gupta at Fatehpuri where Sujata Mixer was purchased.

(vii) Shop at Hamilton Road from where red light was purchased.

(viii) Shop of PW29 Gupta Auto Deals from where motorcycle HR51E5768 was purchased.

(ix) Shop of PW44 Sandeep Chaudhary at Ghaffar Market from where Sony cellphone was purchased.

(x) Shop of PW20 Harpal Singh at Karol Bagh from where Ambassador Car bearing DL 3CJ 1527 was purchased.

(xi) Shop of PW49 Kamal Kishore from where Motorola cell phone and a SIM card were purchased.

Now, we shall refer to the specific details of evidence in this regard. PW76 I.O. deposed to the fact that Afzal and Shaukat pointed out the 2nd floor of A97, GANDHI VIHAR as the place where the deceased terrorists stayed. This is recorded by PW76 in the memo marked as Ext.PW34/1. PW76 deposed that on his request, the landlord of the house PW34 accompanied him to the 2nd floor and the lock of the house was broken and the premises searched in the presence of PW34. The various articles recovered and seized consequent upon the search of the premises are recorded in Ext.PW34/1. They are: (a) 3 electronic detonators (Ext.P60/1, 60/2 & 60/3). (b) two packets of silver powder bearing the address 'Tola Ram & Sons, 141, Tilak Bazar, Delhi' (Ext.P61). (c) A bucket (Ext.P62) of prepared explosive material. Sample of explosive material is Ext.P63. (d) two boxes containing Sulphur (Ext.P64 & P65). (e) two cardboard cartons (Ext.P66 & P67) containing 20 jars each of Ammonium Nitrate of 500 grams each (Ext.P68/1 to Ext.P68/38) (one jar was taken out from each carton as a sample). (f) Yamaha motorcycle bearing No.DL-1S-K-3122 (Ext.P76) found at the gate of the house and seized as per Ext.PW34/2. (g) Maps of Delhi city and Chanakyapuri area found in the room vide Ext.P34/3. (h) Police uniforms and police beret caps (P73 series). (i) Sujata Mixer Grinder with three jars (Ext.P72) seized as per Ext.PW34/4. PW34 confirmed this fact in his deposition. In addition, PW34 identified Afzal and Shaukat in the Court and stated the following facts: That Afzal had introduced himself under an assumed name of Maqsood and took the 2nd floor on rent in the first week of November, 2001. That Shaukat and three or four boys used to visit Afzal at that premises quite often and on the crucial day i.e. 13.12.2001, at 10 am, Afzal, Shaukat and four more persons left in an Ambassador car and Afzal had returned a shortwhile later and then left the premises subsequently. That the deceased terrorist Mohammed, whose photograph he identified, was also residing with Afzal sometime after the premises was taken on rent.

The High Court accepted the testimony of PW34 including the identification of the deceased Mohammed by photograph (Ext.PW1/20). He could not identify the remaining four terrorists.

Next, we come to the evidence in regard to the premises at INDIRA VIHAR and the recoveries therefrom. Mohd. Afzal, while being examined under Section 313 Cr.P.C. admitted that the house at 281, Indira Vihar was taken on rent by him after his return to Delhi after Eed. PW76 deposed to the fact that Afzal and Shaukat led him and the police party to the premises at 281, Indira Vihar as the place where Afzal and the five slain terrorists stayed. The memo of pointing out is Ext.PW32/1. PW32, who is the landlord, stated that on 16th December, 2001, the accused Afzal and Shaukat whom he identified correctly, were brought to his house by the police and Afzal told the police that he was the landlord. Thereafter, the police took him and the two accused to the 2nd floor which was found locked and as there was no key, the police broke the lock. PW32 then stated that on a search of the premises, a number of articles as recorded in the memo of seizure Ext.PW32/1 were found. The articles recovered as a result of search were, (i) three electric detonators attached with a wire kept in a box, (ii) six pressure detonators fitted in a plastic box, (iii) two silver powder packets of thousand grams each with the slips containing the name of 'Tolaram and Sons, Tilak Bazar', (iv) two boxes of sulphur, (v) a motorcycle of Yamaha make parked near the gate of the house, (vi) household articles etc. PW 32 attested the seizure memo.

The motorcycle was seized as per the seizure memo Ext.PW32/2. It transpires from the evidenc eof PW53 who is an official of the Road Transport Department read with Ext.PW53/1 that the said motorcycle was registered in the name of Shaukat Hussain.

In connection with the renting of the house at Indira Vihar, PW31 who is a property dealer, was examined. He stated that Mohd. Afzal approached him and on 9.12.2001 he fixed up the house of PW32 at Indira Vihar on a rent of Rs.4000 p.m. He identified Mohd. Afzal. PW32 the landlord confirmed in his deposition that the 2nd floor of the house was taken on rent by Mohd. Afzal through PW31. He further stated that he imposed a condition that the tenant should reside with his family only. Having found some five or six other persons on 11.12.2001, he questioned Afzal on which he replied that they were his friends and they would leave soon and thereafter he would be bringing his family. On 12.12.2001, Afzal left the premises locking the door informing him that he would bring his family and children after Eed. Then he speaks to the details of search and seizure. He was a signatory to the seizure memos Exts.PW32/1 and PW32/2.

The High Court held that the factum of Mohd. Afzal taking the premises on tenancy, the recovery of articles and detonators on 16.12.2001 and the fact that five or six persons were visiting the premises were found to be established by the testimony of PWs 31 & 32. Though PW32 is supposed to have identified the persons found with Afzal by the photographs of dead bodies of terrorists, we do not attach any weight to this part of the evidence because the police showed the photos and told him that they were the photographs of deceased terrorists. He also did not take into account this part of testimony of PW32. At this stage, we may refer to the evidence of the experts of Forensic Science Laboratory, Chandigarh. PW22 testified in regard to the explosives contained in I.E.D. and the car bomb which was recovered from the scene of offence on 13th December, 2001. From his report Ext.PW21/1 and PW21/2, it is evident that Ammonium Nitrate, Aluminum/Silver powder

and Sulphur was found in the explosives. The testimony of PW24 establishes that the samples of chemicals (collected from the hideouts) were Aluminum Nitrate, Sulphur and Silver powder. The same were found in the unused explosives.

Amongst the hideouts furnishing the links of association between the accused Afzal and the deceased terrorist Mohammed is the one in the Boys' hostel, Christian Colony. It is in the evidence of PW38 who was running an STD booth at Christian Colony that Afzal and Shaukat met him and made enquiries about the availability of rented accommodation. Then on 6.11.2001 he took him to PW37 who was running a hostel at B-41, Christian Colony. PW38 identified Afzal and Shaukat. PW37 deposed that he let out a room on the Ground Floor and when he went to the hostel on 26th November, he found one Kashmiri boy in the room who disclosed his name as Ruhail Ali Shah. It may be noted that the witness identified the said Ruhail Ali Shah as the deceased terrorist Mohammed by reference to his photograph (Ext.PW29/5) in the presence of police and in the Court. The identity card of Ruhail Ali Shah (Ext.PW4/4) shown to him was also identified and it is the card that was found at the spot of offence. PW37 also stated that he had seen Afzal and Shaukat visiting the so called Ruhail Ali Shah. It may be noted that the said room in Christian Colony was taken on rent at about the same time when the premises at Gandhi Vihar was hired. The testimony of this witness was found to be reliable by the High Court. We see no good reason to discard his evidence on the ground that he did not produce the record of their stay. Now we turn our attention to the evidence given by the shopkeepers in regard to the purchase of various things by the accused Afzal himself or in the company of others.

(vii) Purchases from shops The next circumstance which provides important links in the chain of circumstantial evidence is that the accused Afzal led the Investigating Officer to various places from where the incriminatory articles found in the premises at Gandhi Vihar and Indira Vihar and at the scene of offence were purchased. Now we shall briefly refer to the evidence in regard to the purchase of chemicals used in explosives and the Mixture-Grinder utilized for preparing the explosive substance. PW-76 recorded in Ex. 40/1 dated 17.12.01 that Afzal furnished information that he had visited the shop of PW-40 along with deceased accomplice Hamza at Tilak Bazar and purchased 50kg of ammonium nitrate packed in = kg. boxes and that he would show the shop. Accordingly, Afzal led the Police to the shop of PW-40 and identified the proprietor which fact is relevant and admissible under Section 8 of the Evidence Act. PW-40 identified the accused Afzal, in the Court and stated that he came to his shop on 6.12.01 to purchase ammonium nitrate and that he placed an order for 50kg, paid an advance of Rs. 800/- and came the next day to take delivery of the same. On 7.12.01, he came with one more person, paid the balance and took the delivery of 50kg ammonium nitrate which was packed in = kg plastic bags.

In view of the short time gap and the order for a large quantity, there is no reason to doubt the identification of Mohd. Afzal PW 40. We have already seen that ammonium nitrate was one of the chemicals recovered from the premises at Gandhi Vihar. PW-40 also identified the deceased Hamza by his photograph - Ext.40/2. According to PW-40, it is he who accompanied Afzal the next day. However, in the memo of pointing out which is Ext.40/1, it was recorded that Afzal disclosed that he visited the shop with Haider. This discrepancy or mistake in recording the name does not make a dent on the veracity of evidence of PW-40 on the point of identification of photograph in Ext. 40/2.

The High Court accepted the evidence of PW-40. Then, about the purchase of silver powder, PW-76 recorded in Ex. 42/1 that Afzal disclosed having purchased the silver powder from the shop of PW-42. It may be stated that on the packets of silver powder (Ex.P/51), the name and address 'Tolaram & Sons, 141, Tilak Bazar' was written. Thus, the name and address of the shop was already known to the Police. Therefore, Section 27 cannot be pressed into service. However, the conduct of Afzal in pointing out the shop and its proprietor (PW42) would be relevant under Section 8 of the Evidence Act. PW- 42 in his deposition testified to the factum of purchase of 50 kgs of silver powder by Afzal on 11.12.01. The witness identified the seized samples as having been sold by him. He also identified Afzal. He specifically stated that the quantity purchased by him being large, Afzal's presence was very much there in his memory. It may be recalled that silver powder was recovered from the premises at Indira Vihar. The samples seized from Indira Vihar were identified by PW-42. It is to be noted that Aluminium powder was one of the ingredients used in the IEDs found in the possession of the deceased terrorists at the Parliament complex.

Another item of purchase was dry fruits. Three polythene packets of dry fruits bearing the name of 'Sawan Dry Fruits' (Ex. P/10) and having the address 6507, Fatehpuri Chowk were recovered at the scene of offence near the bodies of the deceased. PW-76 stated that Afzal led them to the shop of Sawan Dry Fruits. PW41 the salesman, gave evidence regarding the transaction of sale on 11.12.01. He identified the accused Afzal as the person who had purchased the dry fruits. The witness also identified the photograph of Rana even as that of the person who accompanied Afzal. PW41 also stated that Afzal was in the shop for nearly half an hour. The High Court, while observing that there was nothing to discredit the evidence of PW-41, it, however, ignored his testimony on a tenuous ground that the Police were already aware of the source of purchase of the dry fruits. Though there was no discovery within the meaning of Section 27, there is no reason why the evidence of PW-41 should be eschewed on that account. However, in regard to the identification of the pfotograph of deceased terrorist, his evidence does not inspire confidence, in view of the time lag of 8 months and the manner in which the answer was sought to be elicited from him. Then, we have the evidence of purchase of Sujata Mixer-Grinder (Ext.P72) which was found in the hideout at Gandhi Vihar. PW-76 deposed that Afzal took the investigating team to an electrical shop at Fatehpuri from where the Mixer-Grinder was purchased. The memo of pointing out is Ex. 76/2. The pointing out of the shop and the identification of the owner of the shop wherefrom the purchase was made are relevant facts to show the conduct of the accused referred to in Section 8 of the Evidence Act. In any case, the evidence of PW-43 establishes the fact that Afzal bought the Mixer-Grinder of Sujata make on 7.12.01. The relevant cash memo was filed by him. The witness identified Afzal in the Court and also the Mixer-Grinder. The High Court has accepted the testimony of this witness. Thus, the nexus between the Mixer-Grinder which was recovered from the premises at Gandhi Vihar and the one purchased by Afzal from the shop of PW-43 stands established by the evidence on record. The evidence of the report of the experts, namely PWs 22 & 24 establish, as held by the High Court, that the composition of chemicals found sticking to the jar of the mixer grinder and the chemicals in the bucket were of the same composition as was the composition of the chemicals in the explosives seized from the deceased terrorists at Parliament House.

Another item of purchase was a motorcycle of the Yamaha make bearing registration No.HR-51-E-5768. PW76 stated that on 18.12.2001 the accused Afzal took the investigating team to

Gupta Auto Deals at Karol Bagh from where the said motorcycle was purchased and he pointed out the shop owner PW29. The memo of pointing out is Ext.PW29/1. This conduct of Afzal is relevant under Section 8 of the Evidence Act. PW29 deposed that four persons including a lady came to his shop in the noon time to see the motorcycle. After taking trial run, they went away and in the evening two persons came and purchased the motorcycle for Rs.20,000/-. As already noticed, the said motorcycle was found at A-97, Gandhi Vihar and the same was seized by the I.O. The witness handed over the book containing the delivery receipt (Ext.29/2 & 29/3) to the police, which were filed in the Court as PW29/2 & PW29/3. The witness identified Afzal and Shaukat in the Court and the deceased terrorist Mohammed from the photograph (Ext.29/5). He was however unable to identify the lady in view of the fact that she was at a distance. The High Court rightly took the view that in view of what was narrated by the witness, the identification of the accused and the deceased terrorist was quite probable. It was not a case of 'fleeting glance'. This is a discrepancy between the seizure memo (PW29/4) dated 19.12.2001 and the statement of PW29 under Section 161 Cr.P.C. that he handed over the papers on 18.12.2001. This apparent contradiction was not pointed out to the witness and no question was asked about it. The next important circumstance against the accused Afzal is his association with Mohammed in purchasing the Ambassador car with registration No.DL-3CJ-1527 from PW20. The fact that the said car was used by the slain terrorists for entering the Parliament with arms and explosives, is not in dispute. PW20 after hearing the news that the car with the said number was used by the terrorists, he straight went to the Parliament Street Police Station along with the copies of documents. Having learned that his SHO was at the Parliament House, he went there and met the SHO at the gate and passed on information to him that the car was sold by him on 11.12.2001 to one Ashiq Hussain Khan. He identified the car, which was lying at gate No.11, then he handed over the documents pertaining to the car which were seized under the memo Ext.PW1/7. The documents were later filed in the Court. PW20 correctly identified the accused Afzal as the person who had come with Ashiq Hussain Khan for the purchase of car. The delivery receipt of the car issued by Ashiq Hussain Khan is Ext.PW1/6. The delivery receipt was signed by Afzal as a witness. The signature of Afzal on the delivery receipt is proved by the analysis of his handwriting by the expert PW23. This is apart from the testimony of PW20. In the course of examination under Section 313 Cr.P.C., Afzal admitted that on 11.12.2001 he accompanied Mohammed to the shop of PW20 for purchasing a secondhand car but later he denied it. It is also worthy to note that Afzal did not let the amicus to put a suggestion that he had not visited the shop of PW20. PW20 deposed that he had taken photocopy of the I.Card and a coloured photo of Ashiq Hussain Khan, which are Exts.PW25/4 & PW20/3. PW20 further deposed that the dead body lying at Gate No.1 was of the same person who had introduced himself as Ashiq Hussain Khan while purchasing the car. When he was shown Ext.PW4/3 which is the I.Card in the name of Ashiq Hussain Khan recovered from the deceased terrorist Mohammed, PW20 confirmed that it was the same I.Card that was shown to him. The High Court held that the evidence of PW20, who was an independent witness, was in no manner tainted and held that Afzal was involved in the purchase of the car used by the terrorists to enter the Parliament House. This conclusion was reached by the High Court even after excluding the evidence of PW23, Principal Scientific Officer who confirmed that the signatures on the delivery receipt Ext.PW1/6 tallied with his specimen signatures. In this context, a contention was raised before the High Court that in view of Section 27 of POTA, specimen signature should not have been obtained without the permission of the Court. In reply to this contention urged before the High Court, Mr. Gopal Subramanium, the learned senior counsel for the

State clarified that on the relevant date, when the specimen signatures of Afzal were obtained, the investigation was not done under the POTA provisions and de hors the provisions of POTA, there was no legal bar against obtaining the handwriting samples. The learned counsel relied upon by the 11 Judge Bench decision of this Court in State of Bombay Vs. Kattikalu Oghad [1962 (3) SCR 10] in support of his contention that Article 23 of the Constitution was not infringed by taking the specimen handwriting or signature or thumb impressions of a person in custody. Reference has also drawn to the decision of this Court in State of U.P. Vs. Boota Singh [(1979) 1 SCC 31]. We find considerable force in this contention advanced by Mr. Gopal Subramanium. In fact this aspect was not seriously debated before us.

The purchase of mobile cellular phone instruments by Afzal in the shops of PW44 and PW49, accompanied by Shaukat, is another important circumstance that can be put against him. As already noticed, these mobile instruments found their way to one or the other deceased terrorists and they were being interchangeably used by Afzal, Mohammed and Rana. The evidence of PW76 coupled with Ext.PW44/1 (pointing out memo) reveals that the accused Afzal took the police party to shop No.26, Gaffar Market and pointed it out as the shop from which he purchased the mobile phone handset of Sony make. The conduct of the accused in pointing out the shop and identifying the shop owner is relevant under Section 8 of the Evidence Act. PW44 - the shop owner identified Afzal and the mobile phone (Ext.P37) sold to him on 7/8.12.2001. The said instrument (Ext.P37) was recovered from the body of the deceased terrorist Mohammed vide Ext.PW4/14. He was confronted with some discrepancy as to the exact date of purchase, which does not appear to us to be very material. The fact that the transaction was unaccounted is also not a ground to eschew his evidence especially when the High Court found that his evidence was trustworthy. There is no warrant for the further observation of the High Court that independent corroboration of his testimony was lacking and therefore the evidence was liable to be ignored. Regarding the purchase of Motorola mobile phone (Ext.P28), PW76 deposed that on 19.12.2001, the accused Afzal led the investigating officials to the shop of PW49 at B-10, Model Town from where the said mobile phone was purchased. The memo of pointing out is Ext.PW49/1. The conduct of the accused in leading the I.O. to the shop of PW49 and identifying him as the shop owner becomes relevant under Section 8 of the Evidence Act. PW49, while identifying Afzal and Shaukat in the Court deposed about the sale of the phone and one SIM Card to the said persons. The said phone which was sold by PW49 to the accused was recovered from the deceased terrorist Rana vide Ext.PW2/2. This statement of the witness was assailed on the ground that the SIM Card pertaining to the No. 9811489429 was stated to have been sold on 4.12.2001. However, the call records pertaining to this number show that the phone was active since 6.11.2001. The High Court refuted this criticism by observing thus:

" The conclusion to which the defence has jumped is, in our opinion, based on an assumption that when PW49 said that he sold a SIM card to Mohd. Afzal on 4.12.2001, this was the SIM card. In his testimony, PW49 did not say that he sold this SIM to Mohd. Afzal on 4.12.2001, he only said that he sold one SIM card (without identifying it) to Mohd. Afzal on 4.12.2001. It could be any card. The witness may have sold the particular card to Mohd. Afzal or any other person on 6.12.2001. The witness does not stand discredited.

In the very next sentence, the High Court however observed that in the absence of independent corroboration of the testimony of PW49, his evidence ought not to be taken into account. Here also, just as in the case of PW44, the High Court fell into error in discarding the evidence on an untenable ground. It is to be noted that the handset (Ext.P84) which was used for operating 9811489429 on the date of incident, was recovered from Afzal at Srinagar. The call records Ext. PW36/3 would reveal that the said number was activated on 6.11.2001 itself and that even prior to 4th December, the SIM card was held by the same person or persons who operated it after 4.12.2001. The SIM card should have been necessarily sold to Afzal prior to 4.12.2001. It is contended that the test identification should have been conducted to assure credibility to the evidence of identification of Afzal by the shopkeepers. It is also contended that the photograph of the deceased Mohammed should have been mixed up with the other photographs in order to impart credibility to the version of witnesses who claimed to have seen him. We find no substance in these contentions.

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 & Ors. Vs. State of M.P. [(2003) 5 SCC 746] B.P. Singh, J. speaking for a three Judge Bench observed thus:

"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 "

The earlier observation at paragraph 10 is also important:

"It is no doubt true that much evidentiary value cannot be attached to the identification of the accused in court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in Court."

In the present case, the accused persons themselves led the witnesses to the concerned shops and the places and pointed out the witnesses. Therefore, the question of holding TIP thereafter does not arise. The evidence of the prosecution witnesses who could identify the two accused persons can be safely relied upon for more than one reason. Firstly, the time lag between the date of first and next meeting was not much, it was just a few days or at the most two weeks. Secondly, there was scope for sufficient interaction so that the identity of the accused could be retained in their memory. It was not a case of mere 'fleeting glimpse'. For the same reasons, they could identify Mohammed by photograph which was quite clear, though. If the step was taken by the I.O. to have the test identification of photographs of dead bodies, it would have given better assurance of the reliability of identification. However, the failure to do so cannot be a ground to eschew the testimony of the witnesses whose evidence was concurrently accepted by the trial and the appellate Court. It is not the case of the appellant or any of the accused that the identification by photographs is not permissible under law.

(ix) Laptop The recovery of 'laptop' from the truck in which Afzal and Shaukat travelled on being pointed out by them is a highly incriminating circumstance against them. It is established from the evidence that the said laptop was used for the preparation of I.Cards and the I.Cards found at the spot on the dead bodies and the MHA sticker found on the car were those produced from the same laptop. It admits of no doubt that the laptop, which must have been with the deceased terrorist Mohammed and others came into the custody of Afzal (and Shaukat) soon after the incident on 13th December and such possession has not been accounted for.

Now let us delve into further details, excluding from consideration the confessional statements, according to which the laptop was given to Afzal and Shaukat by Mohammed to be handed over to Ghazibaba.

PW61 Dy. S.P., Srinagar speaks to the recovery of the laptop in a briefcase with attachments from the truck pursuant to the disclosure made by Afzal and Shaukat when the truck was intercepted at Srinagar. Ext.PW61/4 is the seizure memo. PW62 the Head Constable, corroborates what PW61 stated. PWs 64 & 65, who are the Sub-Inspectors of Special Cell, speak to the fact that the laptop along with the accessories was handed over to them as the property recovered by PW61. The laptop is Ext.P83. The laptop and other articles seized at Srinagar were deposited in the malkhana of the police station in sealed condition as per PW66. Then it was the job of PW80 ACP, who took over investigation on 19th December, to have the laptop examined by experts. The experts, namely, PW72 a computer engineer and PW73 Assistant Government Examiner of Questioned Documents, Bureau of Police Research, Hyderabad submitted their reports which are Exts.PW72/1 and PW73/1. PW79, who was associated with PW73, was also examined by the prosecution. The laptop contained files relating to identity cards recovered from the deceased terrorists wherein the address was mentioned as Christian Colony or Gandhi Vihar. PW72 testified that he took printouts from the laptop which are Exts.PW59/1 to PW59/7 and PW72/2 to PW72/13 and these documents were compared to the original identity cards and the MHA sticker (Ext.PW1/8). The forensic expert PW59 submitted a report according to which the laptop (PW83) was in fact used for the creation of I.Cards and the MHA sticker found at the spot. The analysis and conclusions reached by PWs73 & 79 match with those of PW72. Thus, two different sets of experts have come to the same conclusion about the contents of the laptop. PW72 gave a detailed account of various softwares that were found installed in the laptop and he gave a chronological account. It was found that from November 2001 onwards, certain files were copied on to the system. The system was used for crating, editing and viewing .tmp files (most of which are identity cards) and viewing files stored in geo microchip. Editing of various identity cards took place close to the date of occurrence. Some records were edited as late as 12th December. The summary of important documents found on the laptop contains identity cards which were similar to those recovered from the deceased terrorists, ASF video files containing clippings of political leaders with Parliament in background shot from TV news channels and another file containing scanned images of front and rear view of I. Card and a .tmp file containing design of MHA sticker. The report also reveals that the game 'wolf pack' (sun) had registration details on the laptop which showed the user name as 'Ashiq' a name which was found in one of the identity cards shown to PW20 at the time of purchase of the car and to the landlord of the Christian Colony Hostel. The documents found in the laptop were the identity cards in the name of Ashiq Hussain Khan similar to Ext.4/3, the front side scanned image of Cybertech

Computer Hardware Solution identity card in the name of Ashiq Hussain Khan Similar to the one found at the spot of occurrence, the identity cards of Xansa Websity of Riyad Ahmad which contains the address of Gandhi Vihar and the phone number of Afzal, the identity card of Cybertech Computer Education of Ashif Mustafa, two identity cards of Xansa Websity of Neeraj Bakshi and Anil Kumar which were similar to the identity cards found at the spot, two identity cards of Xansa Websity with the name Sunil Verma and Raju Lal which were similar to the cards found at the spot, designed sticker of Ministry of Home Affairs found and the relative file containing the same text as was found on the sticker. All these documents were found created and last updated between 1st December and 12th December, one of them was on 21st November, 2001. The documents referred to above establish that various identity cards which were similar to those recovered at the scene of offence were found in the laptop. The I. Cards that were not used were also detected. Documents found at the spot ('Q' series) were sent for forensic examination in order to report the results of comparison of these documents with those found inside the laptop. Besides, the sample originals of the MHA sticker and the sample identity cards of Xansa Websity ('S' series) were sent for comparison and report. The analysis was done by PW59 Senior Scientific Officer, CFSL. He reported that the MHA sticker image and the images of identity cards found in the laptop match with those found at the spot in general size, design and arrangement of characters. As regards 'S' series (genuine sample documents), the finding was that they differed with the identity cards etc., found at the spot. It may be stated that the franchisees of Xansa Websity were examined as PWs 25 and 50 and they produced the genuine samples and also testified to the fake names and addresses printed on the identity cards. We agree with the High Court that the testimony of PWs 59, 72, 73 & 79 establish beyond doubt that fake documents were created from the laptop which was evidently in the possession of the deceased terrorists and eventually recovered from Afzal/Shaukat in Srinagar. We find that the evidence of these witnesses could not in any way be shattered in the cross examination. There was no cross examination of the witness PW59 by Afzal. The limited cross examination on behalf of Shaukat did not yield anything favourable to the accused. As regards PW72, most of the cross examination was in the nature of hypothetical questions. Though there was no suggestion of any tampering to this witness, the witness stated that there was no evidence of replacement of the hard disk upon a perusal of the reg file. There was no suggestion to PW72 that the documents (printouts) taken from the laptop were not the real ones. Two different experts recorded same conclusions without knowing the report of each other. One point of criticism levelled by the defence counsel is that in spite of the fact that the laptop was deposited in the malkhana on 16.1.2002, (after it was received back from PW72), the analysis by PW73 revealed that two of the files were last written on 21.1.2001 and one file was last accessed and last written on the same day. In this connection, it is to be noted that according to the case diary, the laptop was accessed by the independent agencies at the malkhana on 21.1.2002. It is clarified by the learned counsel for the State and as found by the High Court, the said files being self-generating and self- written, they reflected the date of writing as 21.1.2002, as the laptop would have been switched on by the investigating agencies on that date. While cross examining PW73, a question was put as to how a file could be written without it being accessed. The witness answered that the file cannot be written without being accessed by copying it on a different storage media. The learned counsel for the State is justified in his comment that the said answer was not a response pertaining to system files, which are self-generating and self-written. There was no suggestion to any witness that the date or time setting has been modified in the instant case so as to facilitate tampering. A mountain out of mole

hill is sought to be made out by reason of the observation of PW73 that some of the files were last written after the date of seizure and the answer given by PW73 with reference to a general, hypothetical question. The testimony of DW8 computer engineer, who was examined on behalf of the accused Gilani, does not in any way substantiate the point of criticism about the possible tampering of laptop or nor does it make a dent on the findings of the experts examined by the prosecution. The testimony of this witness was not with reference to any of the files on which certain doubts were raised. His testimony is, by and large, on hypothetical aspects and does not relate to the authenticity of the contents of laptop as reported by the other experts.

In the light of foregoing discussion, we hold that the laptop found in the custody of the appellants and the results of analysis thereof would amply demonstrate that the laptop was the one used by the deceased terrorists contemporaneous to the date of incident and it should have passed hands on the day of the incident or the previous day. The accused carrying the same with him soon after the incident furnishes cogent evidence pointing towards his involvement.

The circumstances detailed above clearly establish that the appellant Afzal was associated with the deceased terrorists in almost every act done by them in order to achieve the objective of attacking the Parliament House. He established close contacts with the deceased terrorists, more especially, Mohammed. Short of participating in the actual attack, he did everything to set in motion the diabolic mission. As is the case with most of the conspiracies, there is and could be no direct evidence of the agreement amounting to criminal conspiracy. However, the circumstances cumulatively considered and weighed, would unerringly point to the collaboration of the accused Afzal with the slain 'Fidayeen' terrorists. The circumstances, if considered together, as it ought to be, establish beyond reasonable doubt that Afzal was a party to the conspiracy and had played an active part in various acts done in furtherance of the conspiracy. These circumstances cannot be viewed in isolation and by no standards of common sense, be regarded as innocuous acts. His conduct and actions antecedent, contemporaneous and subsequent all point to his guilt and are only consistent with his involvement in the conspiracy. Viewed from another angle, the Court can draw a presumption under Section 114 of Evidence Act having regard to the natural course of events and human conduct that the appellant Afzal had nexus with the conspirators who were killed and all of them together hatched the conspiracy to attack the Parliament House and in that process to use explosives and other dangerous means. We are, therefore, of the view that there is sufficient and satisfactory circumstantial evidence to establish that Afzal was a partner in this conspired crime of enormous gravity.

(x) Punishment:

Identification of the appropriate provisions of POTA and IPC under which the accused Afzal becomes liable for punishment is the next important task before the Court.

In dealing with this aspect, the first question that arises for consideration is whether the appellant Afzal can be convicted under Section 120B of IPC read with Section 3(1) of POTA and be punished under Section 3(2) for the offence of criminal conspiracy to commit a 'terrorist act' or whether he is liable to be punished only under sub-Section(3) of Section 3 of POTA. Mr. Sushil Kumar, learned

senior counsel appearing for the appellant Afzal has contended, quite contrary to the stand taken by the other two senior counsel, that no offence under POTA is made out in the instant case and therefore POTA offences were not included in the beginning. He submits that the actions of the deceased terrorists and the alleged conspirators can all be brought within the scope of Section 121 and 121A of IPC. As the unauthorized interception of communications and inadmissible joint disclosures were found to be insufficient to make out the offence under Section 121, the police thought of adding POTA after 19th December, so that the confession to the police officer could be made the basis of conviction. We find it difficult to appreciate this argument. The propriety by or otherwise of the action of the investigating agency in adding POTA at a later stage is one thing; whether the offence under POTA is made out, in addition to the offences under IPC, is a distinct point, one shall not be mixed up with the other. As far as the non- applicability of Section 3 of POTA is concerned, the learned senior counsel appearing for Afzal has not given any particular reason as to why the acts done by the deceased persons did not amount to terrorist acts within the meaning of Section 3(1) of POTA. Whether the appellant has committed the terrorist act himself or not is a different matter but to say that POTA as a whole does not govern the situation is to take an extreme stand unsupported by reasoning.

We shall now consider the contentions of Mr. Shanti Bhushan and Mr. Ram Jethmalani that the conspiracy to commit a terrorist act is punishable only under sub-Section (3) of Section 3 of POTA and Section 120B IPC will have no application in relation to a terrorist act as defined by Section 3(1) of POTA. Though this contention raised by the learned counsel does not really arise for determination in the cases of the accused whom they represent in view of the conclusions reached by us as regards their culpability, we feel that the correctness of this contention has to be tested in so far as Afzal is concerned.

The stand taken by Mr. Gopal Subramanium is that on the commission of overt criminal acts by the terrorists pursuant to the conspiracy hatched by them and the accused, even the conspirators will be liable under Section 3(1)/3(2) of POTA. It is his contention that where overt acts take place or the object of the conspiracy is achieved, then all the conspirators are liable for the acts of each other and with the aid of Section 120B read with Section 3(2), all the conspirators are punishable under Section 3(2). The liability of mere conspirators is coequal to the liability of the active conspirators according to him. Alternatively, it is contended that on account of the perpetration of criminal acts by the deceased terrorists pursuant to conspiracy, the appellant is liable to be punished under Section 120B of IPC read with Section 3(1) of POTA and the punishment applicable is the one prescribed under sub-Section (2) of Section 3 of POTA. According to the learned counsel, sub-Section (3) of Section 3 does not come into play in the instant case because of the overt acts that have taken place in execution of the conspiratorial design. As far as the first contention of Mr. Gopal Subramanium is concerned, we have already rejected his argument that on the principle of 'theory of agency', the conspirators will be liable for the substantive offences committed pursuant to the conspiracy. When once the application of the theory of agency is negatived, there is no scope to hold that the appellant, in spite of not having done any act or thing by using the weapons and substances set out in sub- Section(1)(a), he, as a conspirator, can be brought within the sweep and ambit of sub-Sections (1) & (2). The wording of clause (a) of Section 3(1) is clear that it applies to those who do any acts or things by using explosive substances etc., with the intention referred to in clause (a),

but not to the conspirators who remained in the background.

We must now deal with the alternative contention of Mr. Gopal Subramanium that Section 120B of IPC can be combined with Sections 3(1) and 3(2) of POTA.

The contention of Mr. Shanti Bhushan and Mr. Ram Jethmalani is straight and simple. POTA is a special law dealing with terrorist activities and providing for punishment therefor. Conspiring to commit a terrorist act, among other things, is specifically brought within the fold of sub-Section (3) and is clearly covered by that sub-Section. Therefore, the learned counsel submit that the punishment as prescribed by sub-Section (3) alone could be applied even if the appellant is held guilty of the offence of conspiring to do a terrorist act with others. The question whether the conspiracy resulted in the commission of offences in order to achieve the objective of the conspirators is immaterial according to the concerned counsel. As a corollary to this argument, it is contended that Section 120B IPC, which is contained in the general law of crimes, cannot be brought into the picture so as to attract higher punishment especially in view of Section 56 of POTA, which gives overriding effect to the provisions of POTA. The learned counsel therefore submits that the maximum punishment that can be imposed is life imprisonment as per Section 3(3) of POTA.

The relevant part of Section 120B reads as follows:

"120B. Punishment of criminal conspiracy. (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, (imprisonment for life) or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

Thus a party to criminal conspiracy shall be punished in the same manner as if he had abetted the relevant offence i.e. an offence punishable with death, imprisonment for life etc. Mr. Gopal Subramanium then referred to the definition of 'offence' in Section 40 of IPC which in the context of Chapter VA (of which Sections 120A & 120B form part) denotes a thing punishable under the Code or under any special or local law. A special law is defined to mean a law applicable to a particular subject. POTA is one such law. Then he had taken us through Section 2(1)(i) of POTA. Sections 2(n) and 2(y) of Cr.P.C. that submit that Section 120B embraces within its fold the offences under any special law and that Section 120B can be related to the offence under Section 3(1) of POTA. According to the learned counsel, Section 120B should be applied wholly or in part pursuant to the conspiracy, if the criminal acts in the nature of terrorist acts take place. According to the learned counsel, the conspiracy contemplated by Section 3(3) of POTA should be confined only to situations where no overt acts in the direction of commission of planned offence takes place.

The final question is about the sentence whether the capital punishment awarded by the trial Court and the High Court is justified? The endeavor of the learned counsel for the State to invoke the punishment under Section 3(2) of POTA through the media of Section 120B is in our opinion a futile exercise. The argument of the learned counsel proceeds on the basis that the punishment provided in the abetment provisions of IPC, that is to say, Section 109, will be attracted. This argument is built up on the basis of the phraseology of the concluding clause of Section 120B which says "be

punished in the same manner as if he had abetted such offence". Let us take it that the word 'offence' in Section 120B includes the offence under special law, namely POTA. Then, if the offence under Section 3(1) of the POTA is abetted, what is the punishment that is attracted is the point to be considered. Undoubtedly, it is Section 3(3) of POTA which says: "whoever 'conspires' or 'abets' a terrorist act shall be punishable with imprisonment which shall not be less than five years but which may extend to imprisonment for life". Taking resort to the abetment provisions in the IPC in order to locate the punishment for conspiracy to commit terrorist act would be wholly inappropriate when the abetment of the terrorist act is made punishable under Section 3(3) of POTA itself which prescribes the minimum and maximum punishment. In other words, invocation of Section 109 IPC is wholly unwarranted when POTA itself prescribes the punishment for conspiracy as well as abetment in a single sub- section. Therefore, even if Section 120B is applied, it does not make any different as regards the quantum of punishment. In either case i.e. whether Section 120B IPC is applied or Section 3(3) of POTA is applied, the maximum sentence is life imprisonment but not death sentence. This is apart from the question whether Section 120B IPC can at all be projected into Section 3 of POTA when there is specific provision in the very same Section for the offence of conspiring to commit a terrorist act and other allied offences. The contention that it would not have been the intention of the Parliament to visit conspiracies involving terrorist acts with less severe punishment than what could be inflicted under Section 120B does not appeal to us. The other argument addressed that having regard to the setting and associated words such as 'advices', 'advocates' etc., the conspiracies of lesser magnitude, that is to say, those which were not put into action will only be covered by sub- Section (3), does not also appeal to us. There is no set pattern in which the various expressions are used in sub-Section (3) of Section 3. More serious acts as well as less serious acts involving various degrees of criminality related to terrorist acts are all encompassed in Section 3(3). They need not be uniformity in the matter of punishment in respect of all these prohibited acts. The range of punishment varies from five years to life imprisonment and depending upon the gravity of the offence, appropriate punishment could be given. We are also not impressed by the finding of the High Court that "by reason of the words 'or thing' occurring in Section 3(1) (as a part of the clause 'does any act or thing' by using bombs, dynamite or other explosive substances or firearms etc"), the definition of a terrorist act need not be restricted to a physical act of using explosives etc. The High Court observed that the actions of Afzal in procuring explosives and chemicals and "participating in the preparation of explosives would be action amounting to doing of a thing using explosives", cannot be supported on any principle of interpretation. Moreover, it rests on a finding that the accused Afzal and Shaukat participated in the preparation of explosives for which there is no evidentiary support. Even their confession (which is now eschewed from consideration) does not say that.

The net result of the above discussion is that the conspiracy to commit terrorist acts attracts punishment under sub-Section (3) of Section 3. The accused Afzal who is found to be a party to the conspiracy is therefore liable to be punished under that provision. Having regard to the nature, potential and magnitude of the conspiracy with all the attendant consequences and the disastrous events that followed, the maximum sentence of life imprisonment is the appropriate punishment to be given to Mohd. Afzal under Section 3(3) of POTA for conspiring to commit the terrorist act. Accordingly, we convict and sentence him.

The conviction under Section 3(2) of POTA is set aside. The conviction under Section 3(5) of POTA is also set aside because there is no evidence that he is a member of a terrorist gang or a terrorist organization, once the confessional statement is excluded. Incidentally, we may mention that even going by confessional statement, it is doubtful whether the membership of a terrorist gang or organization is established.

We shall then consider whether the conviction of Afzal under Section 120B read with Section 302 IPC is justified. The High Court upheld the conviction and gave death sentence to the two appellants under this Section. We are of the view that the conviction and sentence on this count is in accordance with law. The conspiracy has many dimensions here. It is implicit in the conspiracy to attack the Parliament that it extends to all the offensive acts intimately associated with that illegal objective. Indulgence in terrorist acts, killing and injuring persons who are most likely to resist the attackers, using explosive devices, firearms and other dangerous things in the course of attack, 'waging war' against the Government of the country are all various manifestations of the conspiracy hatched by the deceased terrorists in combination with the appellant Afzal. The mere fact that no particular person is the target of attack of the conspirators, does not make any difference in regard to the applicability of Section 300 IPC. The intention to cause death or the intention of causing bodily injury as would in all probability cause death is writ large in the conspiracy directed towards the indiscriminate attack on the Parliament of the nation when it is in session. The opening clause of Section 300 says that "except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death". Clause fourthly says: "if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid" (vide clause fourthly). These clauses squarely apply to the case on hand. Illustration (d) to Section 300 is instructive. It reads thus:

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

The conspiracy to commit the offence of murder in the course of execution of conspiracy is well within the scope of conspiracy to which the accused Afzal was a party. Therefore, he is liable to be punished under Section 120B read with Section 302 IPC. The punishment applicable is the one prescribed under Section 109 IPC in view of the phraseology of Section 120B "be punished in the same manner as if he had abetted such offence". Section 109 IPC lays down that "if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, a person abetting the offence shall be punished with the punishment provided for the offence." Thus the conspirator, even though he may not have indulged in the actual criminal operations to execute the conspiracy, becomes liable for the punishment prescribed under Section 302 IPC. Either death sentence or imprisonment for life is the punishment prescribed under Section 302 IPC.

In the instant case, there can be no doubt that the most appropriate punishment is death sentence. That is what has been awarded by the trial Court and the High Court. The present case, which has no parallel in the history of Indian Republic, presents us in crystal clear terms, a spectacle of rarest of rare cases. The very idea of attacking and overpowering a sovereign democratic institution by using powerful arms and explosives and imperiling the safety of a multitude of peoples' representatives, constitutional functionaries and officials of Government of India and engaging into a combat with security forces is a terrorist act of gravest severity. It is a classic example of rarest of rare cases.

The gravity of the crime conceived by the conspirators with the potential of causing enormous casualties and dislocating the functioning of the Government as well as disrupting normal life of the people of India is some thing which cannot be described in words. The incident, which resulted in heavy casualties, had shaken the entire nation and the collective conscience of the society will only be satisfied if the capital punishment is awarded to the offender. The challenge to the unity, integrity and sovereignty of India by these acts of terrorists and conspirators, can only be compensated by giving the maximum punishment to the person who is proved to be the conspirator in this treacherous act. The appellant, who is a surrendered militant and who was bent upon repeating the acts of treason against the nation, is a menace to the society and his life should become extinct. Accordingly, we uphold the death sentence.

Before we go to the next provision under which the appellant is liable to be convicted, we shall deal with the contention of Mr. Shanti Bhushan, appearing for the appellant Shaukat, which becomes relevant in the case of Afzal. His arguments run as follows:

The acts committed by the deceased terrorists causing death of several security personnel by using firearms and explosives in order to gain entry into the Parliament House fall within the definition of 'terrorist act' punishable under Section 3(2) of POTA. If POTA had not been there, the offence committed by them would have been the offence of murder punishable under Section 120B read with Section 302 IPC. In view of the overriding provision contained in Section 56 of POTA, the conspiracy to commit terrorist act is punishable only under Section 3(3) of POTA. Merely because the same criminal acts also fall within the definition of murder, the accused cannot be convicted of conspiracy to commit murder under Section 120B read with Section 302 IPC in addition to Section 3(3) of POTA. The accused cannot be punished for the offence of conspiracy to cause death when he is liable to be punished for the same act of causing death under the General Penal Law. It is only the punishment provided by the appropriate provision in the special law that can be imposed on the conspirator. That provision being Section 3(3) and it provides for the maximum sentence of life imprisonment, death sentence cannot be given.

The learned counsel, apart from placing reliance on Section 56 of POTA, has also drawn our attention to Section 26 of General Clauses Act and Section 71 of IPC. His contention, though plausible it is, has no legal basis. We do not think that there is anything in Section 56 of POTA which supports his contention. That provision only ensures that the conspiracy to commit the terrorist act shall be punishable under POTA. As the appellant is being punished under that Section, irrespective of the liability to be punished under the other laws, Section 56 ceases to play its role. Then, we shall turn to Section 26 of the General Clauses Act, which lays down: Where an act or omission

constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

It becomes at once clear that the emphasis is on the words 'same offence'. It is now well settled that where there are two distinct offences made up of different ingredients, the bar under Section 26 of the General Clauses Act or for that matter, the embargo under Article 20 of the Constitution, has no application, though the offences may have some overlapping features. The crucial requirement of either Article 20 of the Constitution or Section 26 of the General Clauses Act is that the offences are the same or identical in all respects. It was clarified in State of Bihar Vs. Murad Ali Khan [(1988) 4 SCC 655].

"Though Section 26 in its opening words refers to 'the act or omission constituting an offence under two or more enactments', the emphasis is not on the facts alleged in the two complaints but rather on the ingredients which constitute the two offences with which a person is charged. This is made clear by the concluding portion of the section which refers to 'shall not be liable to be punished twice for the same offence'. If the offences are not the same but are distinct, the ban imposed by this provision also cannot be invoked The same set of facts, in conceivable cases, can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under the IPC and at the same time constitute an offence under any other law. The same set of facts, in conceivable cases, can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under the IPC and at the same time constitute an offence under any other law."

We accept the argument of the learned counsel for the State Mr. Gopal Subramanium that offences under Section 302 IPC, Section 3(2) and Section 3(3) of POTA are all distinct offences and a person can be charged, tried, convicted and punished for each of them severally. The analysis of these provisions show that the ingredients of these offences are substantially different and that an offence falling within the ambit of Section 3(1) may not be squarely covered by the offence under Section 300 IPC. The same set of facts may constitute different offences. The case of State of M.P. Vs. Veereshwar Rao Agnihotri [1957 SCR 868] is illustrative of this principle. In that case, it was held that the offence of criminal misconduct punishable under Section 5(2) of the Prevention of Corruption Act is not identical in essence, import and content with an offence under Section 409 IPC. The bar to the punishment of the offender twice over for the same offence would arise only where the ingredients of both the offences are the same. Section 71 of IPC does not in any way advance the contention of the appellant's counsel. The relevant part of Section 71 IPC reads: Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences.

The argument based on Section 71 IPC is no different from the argument advanced with reference to Section 26 of the General Clauses Act. For the same reasons, we reject this argument. The case of Zaverbhai Vs. State of Bombay [AIR 1954 SC 752] does not lay down any different principle. In fact that case is concerned with question of repugnancy of the State and Central laws.

The next question we have to answer is whether the conviction of the appellant Mohd. Afzal under Sections 121 and 121A can be sustained. This raises the question whether the acts of the deceased terrorists amount to waging or abetting or attempting to wage war punishable under Section 121 IPC and Mohd. Afzal, being a party to conspiracy to attack the Parliament House, is punishable either under Section 121 or under Section 121A or both. To answer this question, we have to explore the concept and nuances of the expression 'waging war' employed in Section 121.

(xi) Waging War In interpreting the expression 'waging war', the Indian cases of pre- independence days, though few they are, by and large cited with approval the 18th and 19th century English authorities. The term 'wages war' was considered to be a substitute for 'levying war' in the English Statute of High Treason of 1351 i.e Statute 25, Edward III, c.2. In the famous book of Sir James F. Stephen "A History of the Criminal Law of England" (1883 publication), it was noted that the principal heads of treason as ascertained by that Statute were: (1) 'imagining'? the King's death" (2) levying war and (3) adhering to the King's enemies.

The speech of Lord Mansfield, CJ addressed to the Jury in Lord George Gordon's case (1781) is often quoted to unfold the meaning of the expression 'levying war against the King'. To quote the words of Mansfield, C.J.: "There are two kinds of levying war: one against the person of the King: to imprison, to dethrone, or to kill him; or to make him change measures, or remove counsellors : the other, which is said to be levied against the majesty of the King or, in other words, against him in his regal capacity; as when a multitude rise and assemble to attain by force and violence any object of a general public nature; that is levying war against the majesty of the King; and most reasonably so held, because it tends to dissolve all the bonds of society, to destroy property, and to overturn Government ; and by force of arms, to restrain the King from reigning, according to law".

"No amount of violence, however great, and with whatever circumstances of a warlike kind it may be attended, will make an attack by one subject on another high treason. On the other hand, any amount of violence, however insignificant, directed against the King will be high treason, and as soon as violence has any political objects, it is impossible to say that it is not directed against the king, in the sense of being armed opposition to the lawful exercise of his power".

The learned Chief Justice then referred to the observations of Lord Holt, C. J. in a case reported in Holt's reports (1688-1700) at 681-682: "Holt L. C.J. in Sir John Friend's case says, 'if persons do assemble themselves and act with force in opposition to some law which they think inconvenient, and hope thereby to get it repealed, this is a levying war and treason". "I tell you the joint opinion of us all, that, if this multitude assembled with intent, by acts or force and violence, to compel the legislature to repeal a law, it is high treason" ..The question always is, whether the intent is, by force and violence, to attain an object of a general and public nature, by any instruments; or by dint of their numbers".

In 1820 Lord President Hope in his summing up speech to the jury in Rex Vs. Andrew Hardie, (1820, 1 State Trials N.S., 610) explained the distinction between levying a war and committing a riot in the following words: "Gentlemen, it may be useful to say a few words on the distinction between levying war against the King and committing a riot. The distinction seems to consist in this,

although they may often run very nearly into each other. Where the rising or tumult is merely to accomplish some private purpose, interesting only to those engaged in it, and not resisting or calling in question the King's authority or prerogative then the tumult, however numerous or outrageous the mob may be, is held only to be a riot. For example, suppose a mob to rise, and even by force of arms to break into a particular prison and rescue certain persons therein confined, or to oblige the Magistrates to set them at liberty or to lower the price of provisions in a certain market, or to tear down certain enclosures, which they conceive to encroach on the town's commons. All such acts, though severely punishable, and though they may be resisted by force, do not amount to treason. Nothing is pointed against either the person or authority of the King".

"But, gentlemen, wherever the rising or insurrection has for its object a general purpose, not confined to the peculiar views and interests of the persons concerned in it, but common to the whole community, and striking directly the King's authority or that of Parliament, then it assumes the character of treason. For example, if mobs were to rise in different parts of the country to throw open all enclosures and to resist the execution of the law regarding enclosures wheresoever attempted, to pull down all prisons or Courts of justice, to resist all revenue officers in the collecting of all or any of the taxes; in short, all risings to accomplish a general purpose, or to hinder a general measure, which by law can only be authorized or prohibited by authority of the King or Parliament, amount to levying of war against the King and have always been tried and punished as treason. It is, therefore, not the numbers concerned, nor the force employed by the people rising in arms, but the object which they have in view that determines the character of the crime, and will make it either riot or treason, according as that object is of a public and general, or private and local nature".

Then in 1839, Tindal, C. J. while summing up the Jury in the trial of John Frost in the year 1839 [All ER Reprint 1835-1842 P.106 at P.117] stated that it was "essential to the making out of the charge of high treason by levying war, there must be an insurrection, there must be force accompanying that insurrection; and it must be for the accomplishment of an object of a general nature".

The following statement of law by Sir Michael Foster is instructive: "There is a difference between those insurrections which have carried the appearance of an army formed under leaders, and provided with military weapons, and with drums, colours etc., and those other disorderly tumultous assemblies which have been drawn together and conducted to purposes manifestly unlawful, but without any of the ordinary shew and apparatus of war before mentioned." "I do not think any great stress can be laid on that distinction. It is true, that in case of levying war the indictments generally charge, that the defendants were armed and arrayed in a warlike manner; and, where the case would admit of it, the other circumstances of swords, guns, drums, colours, etc., have been added. But I think the merits of the case have never turned singly on any of these circumstances".

We find copious reference to these English authorities in the Judgments of various High Courts which we will be referring to a little later and in the 'Law of Crimes' authored by Ratanlal and Dhirajlal (25th Edition). In fact, they were referred to in extenso by this Court in Nazir Khan Vs. State of Delhi [(2003) 8 SCC page 461].

Whether this exposition of law on the subject of levying war continues to be relevant in the present day and in the context of great socio-political developments that have taken place is a moot point. Our comments may be found a little later.

Coming to the Indian decisions, the earliest case in which the conviction under section 121 and 121A IPC was sustained is the decision of a Division Bench of Madras High Court in AIR 1922 Mad. 126. The accused was seen in a crowd of people which attacked the police and military forces with deadly weapons, when the forces under the supervision of the District Magistrate started searching for war-knives. The mob retreated after the police opened fire and the accused who was arrested told the mob to disperse. The accused earlier exhorted the people who attended a meeting to subvert the British Raj and establish the Khilafat Govt. and to destroy the Govt. properties. The High Court agreeing with the District Judge found him guilty under section 121, IPC while observing thus :

"We have then that the accused was taking part in an organized armed attack on the constituted authorities, that attack having for its object, in the words of his own speech, the subversion of British Raj and the establishment of another Government. That being so, we concur without hesitation in the lower Court's conclusion that the accused was guilty of the offence of waging war against the King."

The next case which is an oft-quoted authority is the decision of a special Bench of Rangoon High Court in AIR 1931 Rang 235, Page CJ speaking for the special Bench prefaced his discussion with the statement that the words "waging war in Section 121 are synonymous with 'levying war' in the Statute 25, Edward 3, clause 2 which offence is declared to be treason. After referring to the observations of Mansfield, CJ, Lord President Hope, Tindal, CJ and the commentaries of Sir Michael Foster, the High Court concluded thus : "The natural and reasonable inference to be drawn from the conduct and acts of insurgence was that they intended to overcome and destroy the forces of the Crown at all events and regardless of any pretended grievance in connection with capitation tax." The learned Judges referred to the incidents that took place in the course of preparing for an encounter with the forces of the Crown and observed that they were consistent only with an intention on the part of the insurgents to wage war against the King Emperor. The raiding of headmen's houses for guns and ammunition, the looting of stores, the drilling of the rank and file, the supply of dahs and spears and uniforms to the combatants, the enforced tattooing of certain reluctant villagers "all point to an intention to wage war and nothing else".

It was then observed that :

"a deliberate and organized attack upon the Crown forces such as that which took place on 7th January clearly would amount to a waging of war if the object of the insurgents was by armed force and violence to overcome the servants of the Crown and thereby to prevent the general collection of the capitation tax".

The incident was described as a battle which was the result of a rebellion. Those who were parties to it were held guilty of waging war within Section 121 IPC.

In the case of Maganlal Radhakrishan [AIR 1946 Nagpur 173] there was an elaborate discussion on the scope of Section 121 with reference to the old English cases on the subject of 'levying-war' and high treason. Certain decisions of Indian Courts e.g., AIR 1931 Rangoon 235 were also referred to and the following principles were culled out :

(i) No specific number of persons is necessary to constitute an offence under S.121, Penal Code.

(ii) The number concerned and the manner in which theyare equipped or armed is not material.

(iii) The true criterion is quo animo did the gathering assemble?

(iv) The object of the gathering must be to attain by forceand violence an object of a general public nature, thereby striking directly against the King's authority.

(v) There is no distinction between principal and accessory and all who take part in the unlawful act incur the same guilt."

The accused in that case was found to have connections with Hindustan Red Army and to have designs for the elimination of the existing Government. Arms and explosives were found concealed in his house. He was found involved in the destruction of Police Station and shooting of a police constable. The learned Judges felt that the raid on the Maudha Station House was part of the design 'to attain by force and violence an object of a general public nature" the test laid down by Mansfield, CJ. The Nagpur High Court concluded that all this was a pre-determined plan for the overthrow of Government at a time when it was involved in a world-wide conflict. The conviction of Maganlal under section 121 was thus upheld. The decision of a Division Bench of Patna High Court in AIR 1951 Patna 60 (Mir Hasan Khan vs. the State) is illustrative of what acts do not constitute waging of war. That was a case in which there was a mutiny among certain sections of the Police forces on account of the indignation aroused by the punishment given to one of their colleagues. The conviction under section 121, IPC was mainly based on the fact that the accused were among those who took possession of the armory and also took part in the resistance which was put up to the troops. The conviction was set aside and the following pertinent observations were made by Shearer, J. "The expression "waging war" means & can, I think, only mean "waging war in the manner usual in war". In other words, in order to support a conviction on such a charge, it is not enough to show that the persons charged have contrived to obtain possession of an armoury & have, when called upon to surrender it, used the rifles & ammunition so obtained against the King's troops. It must also be shown that the seizure of the armoury was part & parcel of a planned operation & that their intention in resisting the troops of the King was to overwhelm & defeat these troops & then to go on & crush any further opposition with which they might meet until either the leaders of the movement succeeded in obtaining possession of the machinery of Govt. or until those in possession of it yielded to the demands of their leaders".

Support was drawn from the Digest of Criminal Law by Sir James Stephens. In the Digest, one of the meanings given to the expression to levy-war is : "attacking in the manner usual in war the King himself or his military forces, acting as such by his orders, in the execution of their duty." It was

concluded "it is, I think, quite impossible to say that any of these appellants waged-war in the sense in which that expression, as it occurs in Section 121, Penal Code, was used". "The appellants or some of them were in possession of the armory at Gaya for several days and it is perfectly clear that they never intended to use it as a base for further operations". The next question is whether the dare devil and horrendous acts perpetrated by the slain terrorists pursuant to the conspiracy, amount to waging or attempting to wage war punishable under Section 121 IPC and whether the conspirators are liable to be punished under Section 121 or 121A or both.

Section 121 and 121A occur in the Chapter 'Offences against the State'. The public peace is disturbed and the normal channels of Government are disrupted by such offences which are aimed at subverting the authority of the Government or paralyzing the constitutional machinery. The expression 'war' preceded by the verb 'wages' admits of many shades of meaning and defies a definition with exactitude though it appeared to be an unambiguous phraseology to the Indian Law Commissioners who examined the draft Penal Code in 1847. The Law Commissioners observed:

"We conceive the term 'wages war against the Government' naturally to import a person arraying himself in defiance of the Government in like manner and by like means as a foreign enemy would do, and it seems to us, we presume it did to the authors of the Code that any definition of the term so unambiguous would be superfluous."

The expression 'Government of India' was substituted for the expression 'Queen' by the Adaptation of Laws Order of 1950. Section 121 now reads "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". The conspiracy to commit offences punishable under Section 121 attracts punishment under Section 121A and the maximum sentence could be imprisonment for life. The other limb of Section 121A is the conspiracy to overawe by means of criminal force or the show of criminal force, the Central Government or any State Government. The explanation to Section 121-A clarifies that it is not necessary that any act or illegal omission should take place pursuant to the conspiracy, in order to constitute the said offence. War, terrorism and violent acts to overawe the established Government have many things in common. It is not too easy to distinguish them, but one thing is certain, the concept of war imbedded in Section 121 is not to be understood in international law sense of inter-country war involving military operations by and between two or more hostile countries. Section 121 is not meant to punish prisoners of war of a belligerent nation. Apart from the legislative history of the provision and the understanding of the expression by various High Courts during the pre-independence days, the Illustration to Section 121 itself makes it clear that 'war' contemplated by Section 121 is not conventional warfare between two nations. Organizing or joining an insurrection against the Government of India is also a form of war. 'Insurrection' as defined in dictionaries and as commonly understood connotes a violent uprising by a group directed against the Government in power or the civil authorities. "Rebellion, revolution and civil war are progressive stages in the development of civil unrest the most rudimentary form of which is 'insurrection' vide Pan American World Air Inc. Vs. Actna Cas & Sur Co. [505, F.R. 2d, 989 at P. 1017]. An act of insurgency is different from belligerency. It needs to be clarified that insurrection is only illustrative of the expression 'war' and it is seen from the old English authorities referred to supra that it would cover situations analogous to insurrection if they tend to undermine

the authority of the Ruler or Government.

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 tranquility of a civilized society is, in each of the cases mentioned, disturbed either by actual force or at least by the show and threat of it".

To this list has to be added 'terrorist acts' which are so conspicuous now- a-days. 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.

It is seen that the first limb of Section 3(1) of POTA "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 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 act 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, 121A.

It needs to be noticed that even in international law sphere, there is no standard definition of war. Prof. L.Oppenheim in his well-known treatise on International Law has given a definition marked by brevity and choice of words. The learned author said: "war is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases". Yoram Dinstein an expert in international law field analyzed the said definition in the following words:

"There are four major constituent elements in Oppenheim's view of War: (i) there has to be a contention between at least two States (ii) the use of the armed forces of those States is required,

(iii) the purpose must be overpowering the enemy (as well as the imposition of peace on the victor's terms); and it may be implied, particularly from the words 'each other' and (iv) both parties are expected to have symmetrical, although diametrically opposed, goals."

The learned author commented that Oppenheim was entirely right in excluding civil wars from his definition. Mr. Dinstein attempted the definition of 'war' in the following terms:

"War is a hostile interaction between two or more States, either in a technical or in a material sense. War in the technical sense is a formal status produced by a declaration of war. War in the material sense is generated by actual use of armed force, which must be comprehensive on the part of at least one party to the conflict."

In international law, we have the allied concepts of undeclared war, limited war, war-like situation the nuances of which it is not necessary to unravel.

There is no doubt that the offence of waging war was inserted in the Indian Penal Code to accord with the concept of levying war in the English Statutes of treason, the first of which dates back to 1351 A.D. It has been said so in almost all the Indian High Courts' decisions of the pre-independence days starting with AIR 1931 Rangoon 235. In Nazir Khan's case [2003 (8) SCC 461] this Court said so in specific terms in paragraph 35 and extensively quoted from the passages in old English cases. Sir Michael Foster's discourses on treason and the passages from the decisions of the High courts referred to therein are also found in Ratanlal's Law of Crimes. We should, therefore, understand the expression "wages war" occurring in Section 121 broadly in the same sense in which it was understood in England while dealing with the corresponding expression in the Treason Statute. However, we have to view the expression with the eyes of the people of free India and we must modulate and restrict the scope of observations too broadly made in the vintage decisions so as to be in keeping with the democratic spirit and the contemporary conditions associated with the working of our democracy. The oft-repeated phrase 'to attain the object of general public nature' coined by Mansfield, LCJ and reiterated in various English and Indian decisions should not be unduly elongated in the present day context.

On the analysis of the various passages found in the cases and commentaries referred to above, what are the high-lights 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 war-like 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 contra-distinction 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 tranquility. Though the modus operandi of preparing for the offensive 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 fire arms. 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 war like 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.

While these are the acceptable criteria of waging war, we must dissociate ourselves from the old English and Indian authorities to the extent that they lay down a too general test of attainment of an object of general public nature or a political object. We have already expressed reservations in adopting this test in its literal sense and construing it in a manner out of tune with the present day. The Court must be cautious in adopting an approach which has the effect of bringing within the fold of Section 121 all acts of lawless and violent acts resulting in destruction of public properties etc., and all acts of violent resistance to the armed personnel to achieve certain political objectives. The moment it is found that the object sought to be attained is of general public nature or has a political hue, the offensive violent acts targeted against armed forces and public officials should not be branded as acts of waging war. The expression 'waging war' should not be stretched too far to hold that all the acts of disrupting public order and peace irrespective of their magnitude and repercussions could be reckoned as acts of waging war against the Government. A balanced and realistic approach is called for in construing the expression 'waging war' irrespective of how it was viewed in the long long past. An organized movement attended with violence and attacks against the public officials and armed forces while agitating for the repeal of an unpopular law or for preventing burdensome taxes were viewed as acts of treason in the form of levying war. We doubt whether such construction is in tune with the modern day perspectives and standards. Another aspect on which a clarification is called for is in regard to the observation made in the old 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. This was said by Lord President Hope in R Vs. Hardie in 1820 and the same statement finds its echo in many other English cases and in the case of Maganlal Radha Krishan Vs. Emperor [AIR 1946 Nagpur 173 at page 186]. But, in our view, these are not irrelevant factors. They will certainly help the Court in forming an idea whether the intention and design to wage war against the established Government exists or the offence falls short of it. For instance, the fire power or the devastating potential of the arms and explosives that may be carried by a group of persons may be large or small, as in the present case, and the scale of violence that follows may at times become useful indicators of the nature and dimension of the action resorted to. These, coupled with the other factors, may give rise to an inference of waging war.

The single most important factor which impels us to think that this is a case of waging or attempting to wage war against the Government of India is the target of attack chosen by the slain terrorists and conspirators and the immediate objective sought to be achieved thereby. The battle-front selected was the Parliament House Complex. The target chosen was the Parliament a symbol of sovereignty of the Indian republic. Comprised of peoples' representatives, this supreme law-making body steers the destinies of vast multitude of Indian people. It is a constitutional repository of sovereign power that collectively belongs to the people of India. The executive Government through the Council of Ministers is accountable to Parliament. Parliamentary democracy is a basic and inalienable feature of the Constitution. Entering the Parliament House with sophisticated arms and powerful explosives with a view to lay a siege of that building at a time when members of Parliament, members of Council of Ministers, high officials and dignitaries of the Government of India gathered to transact Parliamentary business, with the obvious idea of imperilling their safety and destabilizing the functioning of Government and in that process, venturing to engage the security forces guarding the Parliament in armed combat, amounts by all reasonable perceptions of law and common sense, to

waging war against the Government. The whole of this well planned operation is to strike directly at the sovereign authority and integrity of our Republic of which the Government of India is an integral component. The attempted attack on the Parliament is an undoubted invasion of the sovereign attribute of the State including the Government of India which is its alter ego. The attack of this nature cannot be viewed on the same footing as a terrorist attack on some public office building or an incident resulting in the breach of public tranquility. The deceased terrorists were roused and impelled to action by a strong anti-Indian feeling as the writings on the fake Home Ministry sticker found on the car (Ext. PW 1/8) reveals. The huge and powerful explosives, sophisticated arms and ammunition carried by the slain terrorists who were to indulge in 'Fidayeen' operations with a definite purpose in view, is a clear indicator of the grave danger in store for the inmates of the House. The planned operations if executed, would have spelt disaster to the whole nation. A war-like situation lingering for days or weeks would have prevailed. Such offensive acts of unimaginable description and devastation would have posed a challenge to the Government and the democratic institutions for the protection of which the Government of the day stands. To underestimate it as a mere desperate act of a small group of persons who were sure to meet death, is to ignore the obvious realities and to stultify the wider connotation of the expression of 'war' chosen by the drafters of IPC. The target, the obvious objective which has political and public dimensions and the modus operandi adopted by the hard-core 'Fidayeens' are all demonstrative of the intention of launching a war against the Government of India. We need not assess the chances of success of such an operation to judge the nature of criminality. We are not impressed by the argument that the five slain terrorists ought not to be 'exalted' to the status of warriors participating in a war. Nor do we endorse the argument of the learned senior counsel Mr. Sushil Kumar that in order to give rise to the offence of waging war, the avowed purpose and design of the offence should be to substitute another authority for the Government of India. According to learned counsel, the deprivation of sovereignty should be the pervading aim of the accused in order to bring the offence under Section 121 and that is lacking in the present case. We find no force in this contention. The undoubted objective and determination of the deceased terrorists was to impinge on the sovereign authority of the nation and its Government. Even if the conspired purpose and objective falls short of installing some other authority or entity in the place of an established Government, it does not in our view detract from the offence of waging war. There is no warrant for such truncated interpretation.

The learned senior counsel Mr. Ram Jethmalani also contended that terrorism and war are incompatible with each other. War is normative in the sense that rules of war governed by international conventions are observed whereas terrorism is lawless, according to the learned counsel. This contention presupposes that the terrorist attacks directed against the institutions and the machinery of the Government can never assume the character of war. The argument is also based on the assumption that the expression 'war' in Section 121 does not mean anything other than war in the strict sense as known in international circles i.e. organized violence among sovereign States by means of military operations. We find no warrant for any of these assumptions and the argument built up on the basis of these assumptions cannot be upheld. In the preceding paras, we have already clarified that concept of war in Section 121 which includes insurrection or a civilian uprising should not be understood in the sense of conventional war between two nations or sovereign entities. The normative phenomenon of war as understood in international sense does not fit into the ambit and reach of Section 121.

The learned senior counsel Mr. Ram Jethmalani argued that in a case of war, the primary and intended target must be combatants as distinguished from civilians, though the latter may be incidentally killed or injured and that feature is lacking in the present case. This contention, though plausible it is, does not merit acceptance. When an attack on the Parliament was planned, the executors of this plan should have envisaged that they will encounter resistance from the police and other armed security personnel deployed on duty fairly in large numbers at the Parliament complex. The slain terrorists and other conspirators should have necessarily aimed at overpowering or killing the armed personnel who would naturally come in their way. Inflicting casualties on the police and security personnel on duty as well as civilians if necessary would have been part of the design and planning of these hard-core terrorists and the criminal conspirators. It is not necessary that in order to constitute the offence of waging war, military or other forces should have been the direct target of attack. There is no such hard and fast rule and nothing was said to that effect in the long line of cases referred to supra. The act laying siege of Parliament House or such other act of grave consequences to the Government and the people is much more reflective of the intention to wage war rather than an attack launched against a battalion of armed men guarding the border or vital installations.

Another point urged by Mr. Ram Jethmalani is that no violence or even military operations can become war unless it is formally declared to be such by the Central Government. So long as the Government does not formally declare an operation to be war, it is contended that a state of peace is supposed to exist however badly it may be disturbed. It is further contended that the participants in the war are to be treated as the prisoners of war and they are not amenable to the jurisdiction of domestic criminal Courts. It is pointed out that the Hague convention and other international covenants which are embodied in Schedule III of the Geneva Convention Act, 1960 lay down the rules as to who the prisoners of war are and how they should be treated. In substance, it is contended that Section 121 IPC cannot be invoked against the participants in an undeclared 'war'. These arguments proceed on the assumption that the expression 'war' occurring in the Penal Code is almost synonymous with war in international law sense. The question of formal declaration of war by the Government would only arise in a case of outbreak of armed conflict with another country or a political group having the support of another nation. It may be, in a case of civil war and a rebellion spreading through the length and breadth of the country, the Government will have to control it on war footing and it might even consider it expedient to declare that a state of war exists, but, this theoretical possibility cannot be a guiding factor in construing the expression 'waging war' in Section 121 especially when there is no legal provision mandating the Government to make such declaration. It was next contended that foreign nationals who intrude into the territory of India and do not owe even temporary allegiance to the Government of India cannot be charged of the offence of waging war. In other words, the contention is that a person who is not a citizen nor a resident alien cannot be accused of high treason. The decisions of House of Lords in Joys vs. DPP [1946 All ER page 186] and of Privy Council in Lodewyk Johannes vs. AG of Natal [1907 AC 326] have been referred to. The dicta in Anthony Crammer Vs. USA [325 US pages 1-77] and in the case of United States vs. Villato [1797 CC Pennsylvania Page 419] have also been referred to in support of his proposition. The learned counsel has also placed reliance on Sec. 13 of the 2nd Report of the Law Commissioners on the Indian Penal Code, the excerpts of which are given in Nazir Khan's case [(2003) 8 SCC 461 at 486]. The Law Commissioners observed thus:

"The law of a particular nation or country cannot be applied to any persons but such as owe allegiance to the Government of the country, which allegiance is either perpetual, as in the case of a subject by birth or naturalization &c. or temporary, as in the case of a foreigner residing in the country. They are applicable of course to all such as thus owe allegiance to the Government, whether as subjects or foreigners, excepting as excepted by reservations or limitations which are parts of the law in question."

We find it difficult to sustain the argument of learned Senior Counsel. The word 'whoever' is a word of broad import. Advisedly such language was used departing from the observations made in the context of Treason statute. We find no good reason why the foreign nationals stealthily entering into the Indian territory with a view to subverting the functioning of the Government and destabilizing the society should not be held guilty of waging war within the meaning of Section 121. The section on its plain terms, need not be confined only to those who owe allegiance to the established Government. We do not have the full text of the Law Commissioners' Report and we are not in a position to know whether the Law Commissioners or the drafters of Indian Penal Code wanted to exclude from the ambit of Section 121 the unauthorized foreigners sneaking into Indian territory to undertake war like operations against the Government. Moreover, we have no material before us to hold that the views of Law Commissioners on this aspect, were accepted. Those views, assuming that they are clearly discernible from the extracted passage, need not be the sole guiding factor to construe the expression 'waging war'. Though the above observations were noticed in Nazir Khan's case, the ultimate decision in the case shows that the guilt of the accused was not judged from that standpoint. On the other hand, the conviction of foreigners (Pakistani militants) was upheld in that case.

Another contention advanced by the learned counsel is that war including civil war must have a representative character and the persons participating in the war should represent a political entity, which has the objective of overthrowing the Government and securing the sovereign status. This contention too has no force in view of what we have said above regarding the scope and ambit of the expression 'war'.

Thus, the criminal acts done by the deceased terrorists in order to capture the Parliament House is an act that amounts to waging or attempting to wage war. The conspiracy to commit either the offence of waging war or attempting to wage war or abetting the waging of war is punishable under Section 121A IPC with the maximum sentence of imprisonment for life. In the circumstances of the case, the imposition of maximum sentence is called for and the High Court is justified in holding the appellant Afzal guilty under Section 121A IPC and sentencing him to life imprisonment. In addition, the High Court has also held the appellant guilty of the offence under Section 121 IPC itself on the premise that he abetted the waging of war. The sentence of life imprisonment imposed by the trial Court was enhanced to death sentence by the High Court. We feel that the conclusion reached by the High Court both in regard to the applicability of Section 121 IPC and the punishment, is correct and needs no interference. 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 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 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. The trial Court as well as the High Court also convicted the appellant Afzal under Section 3 of Explosive Substances Act (for short 'E.S. Act') and sentenced him to life imprisonment and to pay a fine of Rs.25000/-. Under Section 4 of E.S. Act, he was sentenced to 20 years R.I. and to pay a fine of Rs.25000/-.

We are of the view that Clause (a) of Section 4 of E.S.Act is attracted in the instant case and the appellant Afzal is liable to be punished under the first part of the punishment provision. The relevant part of Section 4 of E.S. Act is as follows:

4. Punishment for attempt to cause explosion, or for making or keeping explosive with intent to endanger life or property. Any person who unlawfully and maliciously

(a) does any act with intent to cause by an explosive substance or special category explosive substance, or conspires to cause by an explosive substance or special category explosive substance, an explosion of a nature likely to endanger life or to cause serious injury to property; or (emphasis supplied)

(b) shall, whether any explosion does or does not take place and whether any injury to person or property has been actually caused or not, be punished

(i) in the case of any explosive substance, with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;

The expression 'explosive substance' according to Section 2(a) shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance.

The planned attack on the Parliament House, by the use of explosives and fire power, was evidently a part of the conspiracy to which Afzal was a party. The preparation of explosives meant to be used by terrorists (co- conspirators) in the course of the planned attack of the Parliament House was well within the knowledge of Afzal. He, in fact, procured the materials i.e. chemicals etc., for facilitating

the preparation of explosive substances at the hideouts. This is what the evidence on record clerly points out. He is, therefore, liable to punished under clause (a) read with (i) of Section 4 of POTA and accordingly he shall be sentenced to the maximum sentence of imprisonment for life and a fine of Rs.10000/-, in default of which, he shall undergo R.I. for six months.

However, the conviction under Section 3 of the Explosive Substances Act is set aside as we are of the view that the ingredients of the said Section are not satisfied in order to find Afzal guilty under that Section. Thus, Afzal will have life sentence on three counts. However, as he is sentenced to death, the sentence of life imprisonment will naturally get merged into the death sentence.

The appeal of Afzal is accordingly dismissed, subject to the setting aside of convictions under Section 3(2) of POTA and Section 3 of Explosive Substances Act.

19. CASE OF SHAUKAT (A2) As in the case of Mohd. Afzal, the evidence against Shaukat Hussain consists of confessional statement made to the Deputy Commissioner of Police and the circumstantial evidence.

(i) Confession The confessional statement said to have been recorded by PW60 the DCP, Special Cell at 3.30 p.m. on 21.12.2001 is marked as PW60/6. As per Ext.PW60/11, the DCP administered the statutory warning and obtained an endorsement from Shaukat that he was not under any duress and he was ready to give the statement. We shall briefly refer to the contents of the confessional statement.

Shaukat spoke about his graduation in 1992 in Delhi, his acquaintance with SAR Gilani of Baramulla who was doing his post-graduation in Arabic language, starting fruit business in 1997 and disbanding the same, his marriage with a Sikh girl named Navjot Sandhu @ Afsan Guru (A4) in the year 2000, purchase of truck in her name in June, 2000 and starting transport business, his cousin Afzal of Sopore studying in Delhi University in 1990 and his friendship with Gilani at that time. Then he stated about Afzal motivating him to join the jihad in Kashmir and in October, 2001, Afzal calling him from Kashmir and asking him to arrange a rented house for himself and another militant, accordingly arranging rented accommodation in Boys' Hostel at Christian Colony and Afzal accompanied by the militant Mohammed coming to Delhi and meeting him at his house in Mukherji Nagar and Afzal disclosing to him that he was a Pak national of Jaish-e-Mohammad militant outfit and had come to Delhi for carrying out a 'fidayeen' attack. He then stated that during that period, he discussed about jihad with SAR Gilani who also offered help in carrying out the attack and Afzal thereafter going to Srinagar and bringing some other militants who were Pak nationals and who brought with them arms and explosives and they being accommodated at A-97, Gandhi Vihar and Afzal and Mohammed making preparations for the attacks. He then stated about the change of his mobile number as a precautionary measure and about his talks with Ghazibaba, Mohammed and Afzal from his previous number and lending his motorcycle. Then he stated that meetings were also held at his house for discussion and execution of the plans and his wife was also in the knowledge of their plans. Then he stated about the purchase of a second hand Ambassador car by Afzal and Mohammed, taking another rented accommodation in Indira Vihar. He then stated that on the night of 12.12.2001, he along with Afzal and Gilani met Mohammed and other militants at their Gandhi

Vihar hideout and Mohammed gave Laptop computer and Rs.10 lakhs to Afzal with a direction to handover the Laptop to Ghazibaba and the money to be distributed among Afzal, Gilani and himself. Mohammed told them that the next day i.e. 13.12.2001, they were going to carry out 'fidayeen' attack on the Parliament House. He then stated that Afzal called him from his mobile phone number .89429 and asked him to watch TV and report about the latest position of the movement of VIPs in Parliament. By the time he switched on the TV, he received another call from Afzal that the mission was on. Thereafter, he met Afzal at Azadpur Mandi and both of them went to Gilani's house to give him Rs.2 lakhs. However Gilani wanted them to hand it over at his house in Kashmir. Finally, he stated that he along with Afzal left for Srinagar in his truck on the same day and they were apprehended at Srinagar on 15th December, 2001 and the Laptop and cash recovered by the police and later they were brought to Delhi.

Shaukat was produced before the ACMM by PW80 the next day along with the other accused and the ACMM recorded his statement. The ACMM had gone through the same procedure as in he case of Afzal and recorded the statement that there was no complaint against the police personnel and that Shaukat confirmed making the confessional statement before DCP any police pressure.

The first date on which Shaukat retracted the confession was on 19.1.2002 when he filed an application before the Designated Court expressing certain doubts about the 'verbal confession made before Special Cell'. He expressed that the Delhi Police would have twisted the confession 'in a different way and different formation'. He further stated that he was made to sign blank papers and was not allowed to read the confessional statement before he signed it. Therefore, he requested the Court to record his statement afresh. Another application was filed on 3rd June, 2002 i.e. after the charge- sheet was filed disputing the proceedings recorded by the ACMM when he was produced before the Magistrate on 22nd December and also stating that he gave verbal confessional statement before a Special Cell Officer and not before DCP or ACP. He maintained that he was forced to sign some blank papers. The difference between the case of Afzal and Shaukat in regard to confessional statement is that the retraction was done by Shaukat much earlier i.e. within a month after it was recorded by the DCP. The other point of difference is that Shaukat was sent to judicial custody unlike Afzal who was sent to police custody after they were produced before the ACMM. The same reasons which we have given in regard to the confessional statement of Afzal, hold good in the case of Shaukat as well except with respect to the breach of requirement as to judicial custody. The procedural safeguards incorporated in Sections 50(2), 50(3) & 50(4) are violated in this case also. True, Shaukat was sent to judicial custody after his statement was recorded by the Magistrate. But in the absence of legal advice and the opportunity to interact with the lawyer, there is reason to think that he would not have been aware of the statutory mandate under Section 32(5) and therefore the lurking fear of going back to police custody could have been present in his mind. The learned ACMM did not apprise him of the fact that he would no longer be in police custody. There is also nothing to show that the confessional statement was read over to him or at least a gist of it has been made known to him.

On the point of truth of the confessional statement, we have, while discussing the case of Afzal, adverted to certain comments made by the learned counsel for the appellants in order to demonstrate that the alleged confession cannot be true judged from the standpoint of probabilities

and natural course of human conduct. Of course, we have not rested our conclusion on these submissions, though we commented that they were 'plausible and persuasive'. However, in the case of Shaukat, there is one additional point which deserves serious notice. According to his version in the confession statement, his wife Afsan Guru (A4) was also having knowledge of their plans. Is it really believable that he would go to the extent of implicating his pregnant wife in the crime. It casts a serious doubt whether some embellishments were made in the confessional statement. We are not inclined to express a final opinion on this point as we are in any way excluding the confession from consideration on the ground of violation of procedural safeguards and the utterly inadequate time given by PW 60 for reflection. The other point which was harped upon by the learned counsel Mr. Shanti Bhushan was that Shaukat and Afzal were not produced before the DCP in the forenoon on 21st December, 2001 as directed by him. In the first instance, Gilani was produced and when he was not prepared to give the statement, the learned counsel suggests that Shaukat and Afzal were taken back to police cell and subjected to threats and it was only after ensuring that they would make the confession, they were produced before the DCP late in the evening. It is contended that the reason given for not producing them at the appointed time is not convincing. Though the possibility pointed by the learned counsel cannot be ruled out, yet, the argument is in the realm of surmise and we are not inclined to discredit the confession on this ground. Excluding the confession from consideration for the reasons stated supra, we have to examine the circumstantial evidence against Shaukat and assess whether he joined in conspiracy with Afzal and the deceased terrorists to attack the Parliament House or whether he is guilty of any other offence. The circumstances analyzed by the High Court and put against the accused Shaukat Hussain in the concluding part of the judgment, apart from the confession, are the following:

1. He along with Afzal took on rent room No.5, Boys' Hostel, B- 41, Christian Colony on 7.11.2001 in which room the deceased terrorist Mohammed had stayed.

2. Cell phone No. 9810446375 which was recovered from the house of Shaukat was for the first time made operational on 2nd November, 2001. This conincides with the period when Afzal acquired a mobile phone and the first hideout was procured. This number was in contact with the satellite phone No. 8821651150059 and was also in communication with the mobile No. 9810693456 recovered from the deceased terrorist Mohammed, on which number Mohammed had received calls from the same satellite phone No. 8821651150059, and even Afzal had received phone calls from this number. This establishes that Shaukat was in touch with Afzal and Mohammed during the period November-December, 2001 and all the three were in contact with the same satellite phone No. 8821651150059.

3. Shaukat's motorcycle was recovered form the hideout and was used for recee by the terrorists.

4. Shaukat along with Afzal had left the premises A-97, Gandhi Vihar along with 4/5 other boys in the morning of 13.12.2001 at about 10 a.m. in an Ambassador Car.

5. When the Parliament was under attack, Afzal was in touch with Mohammed. Shaukat was in touch with Afzal. He was thus in contact with the co-conspirators and the deceased terrorists at the time of attack.

6. Shaukat had been visiting Afzal at A-97, Gandhi Vihar and 281, Indira Vihar. He had also accompanied him when the room at the Boys' Hostel at Christian Colony was taken on rent. It cannot be inferred that Shaukat was merely moving around with his cousin. Keeping in view the totality of the evidence, Shaukat was equally liable for what was happening at the hideouts.

7. Shaukat was present in Delhi till the forenoon of 13.12.2001 when Parliament was under attack and he absconded along with Afzal when both of them were arrested at Srinagar. His conduct, post attack, is incriminating.

8. The laptop recovered from the truck belonging to wife of Shaukat was the one which was used by the terrorists to create the identity cards of Xansa Websity and the fake Home Ministry stickers.

The High Court then commented at paragraph 402 "Shaukat's role in the conspiracy was clearly that of an active participant. Evidence on record does not show that he has been brought within the sweep of the dragnet of conspiracy by merely being seen associated with Afzal. There is more than mere knowledge, acquiescence, carelessness, indifference or lack of concern. There is clear and cogent evidence of informed and interested co-operation, simulation and instigation against accused Shaukat. Evidence qua Shaukat clearly establishes the steps from knowledge to intent and finally agreement".

Taking into account the confessional statement which stands corroborated by various circumstances proved, the High Court reached the inevitable conclusion that Shaukat was a party to the agreement constituting conspiracy. Once the confessional statement is excluded, the evidence against Shaukat gets substantially weakened and it is not possible to conclude beyond reasonable doubt on the basis of the other circumstances enumerated by the High Court, that Shaukat had joined the conspiracy to attack the Parliament House and did his part to fulfill the mission of the conspirators. Apart from the confession, the High Court seems to have been influenced by the fact that Shaukat was in touch with his cousin as well as the deceased terrorist Mohammed through cell phone. But this finding, as far as telephonic contact with Mohammed is concerned, is not borne out by the cell phone records on which the prosecution relied. There was no occasion on which Shaukat contacted Mohammed or any other terrorist. To this extent, there seems to be an error in the High Court's finding in the last sentence of circumstance No.2. The inference drawn in relation to circumstance No.6 that Shaukat "was equally liable for what was happening at the hideouts", cannot also be accepted. He may have knowledge of what was going on but it could not be said that he was equally liable for the acts done by the deceased terrorists and Afzal, unless there is enough material apart from the confession, to conclude that he was a party to the conspiracy.

With these comments on the findings of the High Court, let us see what could and could not be put against the appellant Shaukat. We undertake the exercise of referring in brief to the evidence touching on each of the circumstances adverted to by the High Court while noting the comments of Mr. Shanti Bhushan wherever necessary.

(ii) Circumstance No.1 Shaukat in the company of Afzal seeking the assistance of PW38 who was running STD booth in Christian Colony to get a room on rent and approaching the proprietor of

Boys' Hostel (PW37) and taking a room in the hostel on rent is established by the evidence of PW37 the propretor. Both PWs 37 & 38 identified Shaukat apart from Afzal. The more important piece of evidence is the fact revealed by PW37 that he saw one Ruhail Ali Shah staying in the room who showed his I.Card to him on enquiries. The identity card (Ext.PW4/4) which was shown to PW38 was identified when the two accused led the police to the hostel on 19.12.2001 itself. He also identified the accused Afzal and Shaukat, both before the police as well as in the Court. The fact that Shaukat and Afzal were coming to see Ruhail Ali Shah, who was no other than Mohammed, was also spoken to by him. The photograph Ext.PW29/5 of Ruhail Ali Shah, whose real name was Mohammed, was also identified by him. The contention of the learned counsel appearing for Shaukat that test identification parade ought to have been held, cannot be accepted having regard to the legal position clarified by us in the earlier part of the judgment. The fact that PW37 did not produce the register expected to be maintained by him, does not also discredit his testimony which has been believed by both the Courts.

(iii) Circumstance Nos.2 & 5 (phone contacts) The evidence of the investigating officer PW 66 and PW67 reveals that two mobile phone instruments were recovered on 15th December, 2001 from the house of Shaukat. One of them, namely, Ext.PW36/1 with the phone No.9811573506 was recovered from the hand of Afsan Guru. This was after the telephonic conversation over this number at 20.09 hours was intercepted on the night of 14th December. It transpired that the said conversation was between her and her husband Shaukat speaking from Srinagar. Another cell phone instrument with the number 9810446375 which was operated upto 7th December, 2001 was also found in the house and the same was seized. The call records indicate frequent contacts between Shaukat and Gilani and Shaukat and Afzal from the first week of November, 2001 upto 13th December, 2001. On the crucial day i.e. 13th December, 2001 just before the Parliament attack, Mohammed spoke to Afzal at 10.43 and 11.08 hours and then Afzal spoke to Shaukat at 11.19 hours and thereafter Mohammed spoke to Afzal at 11.25 hours and Afzal in turn called Shaukat at 11.32 hours. Mr. Shanti Bhushan has challenged the truth of recoveries of phones on the ground that no independent witnesses were required to witness the recovery. The learned counsel has relied on the decisions in Sahib Singh Vs. State of Punjab [(1996) 11 SCC 685, paras 5 & 6] and Kehar Singh Vs. State (Delhi Administration) [(1988) 3 SCC 609 at page 654, para 54] to show that in the absence of independent witnesses being associated with search the seizure cannot be relied upon. We do not think that any such inflexible proposition was laid down in those cases. On the other hand we have the case of Sanjay v. NCT [(2001) 3 SCC 190], wherein it was observed at para. 30, that the fact that no independent witness was associated with recoveries is not a ground and that the Investigation Officers evidence need not always be disbelieved. Of course, closer scrutiny of evidence is what is required. Having regard to the fact situation in the present case, the police officers cannot be faulted for not going in search of the witnesses in the locality. There is no law that the evidence of police officials in regard to seizure ought to be discarded. They took the help of Gilani who by then was in police custody to locate the house of Shaukat and that Gilani was with the police, was mentioned by Afsan Guru in her Section 313 statement.

The next point urged by the learned counsel for the appellant that the details regarding sales of mobile phones and SIM cards was not checked up from the distributors of AIRTEL or ESSAR does not also affect the credibility of recoveries. Such omissions in investigation cannot be magnified. The

learned counsel Mr. Shanti Bhushan as well as Mr. Sushil Kumar contended that it was quite likely that all the deceased terrorists were having one mobile phone each, but only three were shown to have been recovered and the other two must have been foisted on the accused giving the colour of recovery from them. We find no justification for this comment. Another point urged is that the recovery of phones shown to be after 10.45 a.m. on 15th December cannot be true as Afsan Guru was arrested on the night of 14th December, as held by the trial Court on the basis of testimony of Srinagar police witnesses that the information about the truck given by Afsan Guru was received early in the morning of 15th December. It is therefore pointed out that the prosecution did not come forward with the correct version of the search and recovery of the articles in the house of Shaukat. In this context, it must be noted that Afsan Guru (A4) was not consistent in her stand about the time of arrest. Whereas in her statement under Section 313, she stated that she was arrested on 14th December between 6.00 & 7.00 p.m. In the course of cross examination of PW67, it was suggested that she was arrested at 6 or 6.30 a.m. on 15th December, 2001. Her version in the statement under Section 313 cannot be correct for the reason that the intercepted conversation was at 8.12 p.m. on 14th December, 2001 and the police could have acted only thereafter. Though the time of arrest, as per the prosecution version, seems to be doubtful, from that, it cannot be inferred that the search and recovery was false. One does not lead to the other inference necessarily. The search and recovery of phones having been believed by both the Courts, we are not inclined to disturb that finding. In any case, the fact that the phone No. {506 was in the possession of Afsan Guru stands proved from the intercepted conversation and the evidence regarding the identification of voice.

Next, it was contended that the printouts/call records have not been proved in the manner laid down by Section 63, 65A & 65B of the Evidence Act. This point has been dealt with while dealing with the case of Afzal and we have upheld the admissibility and reliability of the call records. The point concerning the duplicate entries has already been considered in the case of Afzal and for the same reasons we find no substance in this contention in regard to some of the duplicate entries in the call records.

(iv) Circumstance No.3 (Recovery of motorcycle of Shaukat from 281, Indira Vihar) The fact that the Yamaha Escorts motorcycle with the registration No.DL1SA3122 belonged to Shaukat Hussain, is borne out by the registration records produced by PW53. In fact, in the course of Section 313 examination, he did not deny that fact. This motorcycle was found at 281, Indira Vihar as seen from the evidence of PW76 and PW32. Shaukat together with Afzal led the police to the said premises at Indira Vihar as seen from the 'pointing out and seizure memo' (Ext.PW32/1) coupled with the evidence of PW76. PW32/1 was attested by PW32 also who was present at the time of search. As per the evidence of PW32, Mohd. Afzal whom he identified in the Court, had taken the 2nd Floor on rent on 9.12.2001 through the property dealer PW31. PW32 stated that five or six persons were found in the upstairs on 11th December, 2001. When enquired as to why they were in the flat instead of his family, Afzal stated that they would be leaving soon. On 12th December, 2001 Afzal left the premises after putting the lock which was broken open by the police on 16th December. We have already noticed that the chemicals used for preparation of the explosives which were purchased by Afzal were recovered from the premises in the presence of PW32. Six detonators in a plastic container were also found. Though PW32 claimed to have identified the photographs of the deceased terrorists as those who were found in the premises, this part of the evidence is not entitled

to any weight as rightly contended by Mr. Shanti Bhushan. PW32 stated that the police showed him some photographs and told him that those were the photos of the slain terrorists who attacked the Parliament. Thus, the so called identification by PW32 on the revelation by the police cannot be relied upon. In fact, the High Court did not believe this witness on the point of identification of photos (vide paragraph 326 of judgment). However it is quite clear from the chemicals and explosive materials found there that this hideout was taken by Afzal to accommodate the deceased terrorists who stayed there to do preparatory acts. The fact that Shaukat's motorcycle was also found there, would give rise to a reasonable inference that Shaukat kept it for use by Afzal and his companions. It also reinforces the conclusion that Shaukat was aware of the Indira Vihar abode of these persons.

(v) Circumstance No.4 & 6 (Shaukat's visits to Gandhi Vihar hideout) The evidence of PW34 who let out the 2nd Floor of his house at A-97, Gandhi Vihar to the accused Afzal through PW33 the property dealer, reveals that Shaukat used to come to meet Afzal who was staying there under a false name of Maqsood and that Shaukat used to meet Afzal at that place. PW34 identified Afzal and Shaukat. From the house in Gandhi Vihar, sulphur packets (purchased by Afzal), Sujata Mixer grinder in which traces of explosive material were detected, were found. PW34 identified the photograph of the terrorist Mohammed (Ext.PW1/20) as the person who stayed with Afzal for a few days in the premises. He stated that he could only identify the photograph of Mohammed but not rest of them when the police showed him the photographs. His evidence on the point of identification of Mohammed's photograph inspires confidence as Mohammed stayed in the premises for a few days. The witness also deposed to the fact that on 13th December, 2001, Afzal, Shaukat and four more persons left the premises around 10 a.m. and all excepting Afzal got into an Ambassador car and Afzal came back to the premises. However, he did not mention that one of the accompanying persons was Mohammed. His evidence establishes that Shaukat was a frequent visitor to Gandhi Vihar hideout and he was with Afzal and some others even on the crucial day.

That after the attack on 13th December, Afzal and Shaukat left for Srinagar in the truck owned by the wife of Shaukat and that the laptop, mobile phone and cash of Rs. 10 lacs was recovered, is established by unimpeachable evidence. In her examination under Section 313 Cr.P.C. Afsan admitted that her husband left Delhi in the truck to Srinagar on 13th December though she expressed her ignorance about Afzal going with him. There is the evidence of PW 61, DSP at Srinagar that they stopped the truck near the police station at Parampura and on the pointing out of Afzal and Shaukat they recovered the laptop, mobile phone and Rs. 10 lacs from the truck and the two accused were arrested at 11.45 a.m. on 15th December. Evidence of PW 61 was corroborated by PW 62, another police officer. There is a controversy on the question as to when the Srinagar police received the information, i.e., whether at 10.30 or so on 15th December or in the early morning hours of 15th December. But the fact cannot be denied that Srinagar police acted on the information received from Delhi about the truck number which was conveyed by Afsan (A4). PWs 64 and 65, the police officers of Delhi also testified that Afzal and Shaukat were handed over to them along with the seized articles on 15th December at 1 P.M. as they reached Srinagar by a special aircraft. The stand taken by Shaukat was that he was arrested in Delhi from his house on 14th December which is obviously false in view of the plethora of evidence referred to supra. As regards the truck, he stated in the course of Section 313 examination that the truck loaded with bananas was sent to Srinagar on the night of 13th December. The falsity of Shaukat's version of arrest in Delhi on 14th is established

by the fact that on the night of 14th, Shaukat did call up from Srinagar and spoke to his wife Afsan, the receiving number being {506 which was later recovered from the house of Shaukat. The Conversation was taped and PW48 the Senior Scientific Officer in CFSL, Delhi compared the voice samples of Shaukat and Afsan Guru sent to him with the voice on the cassette which recorded intercepted conversation. He made auditory and spectrographic analysis of voice samples. He submitted a report Ext. PW 48/1. PW 48 testified that on comparison the voice was found to be the same. The High Court doubted the authenticity of the intercepted conversation on the ground that duration noted by the expert in his report was two minutes and 16 seconds was at variance with the duration of 49 seconds noted in the call records. The High Court laboured under the mistaken impression that the duration was 2 minutes and 16 seconds which was the duration of conversation between Gilani and his brother. Even then there is some discrepancy (between 49 and 74 seconds which according to PW48 was approximate) but no question was put to PW 48 in this regard nor any suggestion was put to PW 48 that the voice was not the same. If any such challenge was made the trial Court would have heard the conversation from the tape and noted the duration. We are, therefore, of the view that the finding as regards interception of truck, recovery of laptop etc. from the truck and the arrest of Shaukat along with Afzal on 15th December at about 11.45 A.M. at Srinagar cannot be doubted. As already discussed, the laptop computer stored highly incriminating material relating to the identity cards found with the deceased and the Home Ministry stickers pasted on the car used by them.

In addition to the above circumstances, the prosecution has placed reliance on the evidence of PW45 who is the landlord of Shaukat to prove that not only Afzal but also the deceased terrorists used to come to Shaukat's residence on the first floor a few days before the incident. In addition, PW45 stated that he had seen the persons, whose photographs he identified going to Shaukat's residence often two or three days prior to 13th December. The photographs were those of the deceased terrorists. He stated that he was running a printing press in the ground floor from where he could see the people going to the first floor. He also stated that he was called by police in the Special Cell at Lodi Road on 17th December and he was shown some photographs which he identified as those relating to the persons visiting Shaukat and Navjot. But, we find no evidence of his identification before he was examined in the Court. It is difficult to believe that he would be in a position to identify (in the Court) after a lapse of eight months the casual visitors going to the first floor of Shaukat by identifying their photographs. In fact, in some of the photographs, the face is found so much disfigured on account of injuries that it would be difficult to make out the identity on seeing such photographs. Yet, he claimed to have identified the photographs of all the five deceased terrorists as those visiting Shaukat's residence. He stated that he could not identify Gilani as the person who was visiting Shaukat's residence at that crucial time but after a leading question was put, he identified Gilani in the Court. The High Court did not attach any weight to his evidence regarding identification of the deceased terrorists. Though the trial Court referred to his evidence inextenso, no view was expressed by the trial Court on the point of reliability of his evidence regarding identification. Moreover, we find considerable force in the argument of the learned counsel for the appellant that it is hard to believe that the terrorists would take the risk of going to Shaukat's place for the so called meetings thereby exposing to the risk of being suspected, especially, at a place where two police sub-inspectors were staying as stated by PW 45. Even according to the prosecution case, by that time, the deceased terrorists had settled down at their respective hide-outs with the

help of Afzal. In the normal course, the terrorists would not have ventured to go out frequently and if necessary they would call Shaukat for a meeting at their place of stay instead of the whole gang going to Shaukat's place frequently. For all these reasons we have to discard the evidence of PW 45 insofar as he testified that the deceased terrorists were the frequent visitors of Shaukat's residence before the incident.

In addition to the above circumstances, the prosecution has placed reliance on the evidence of PW45 who is the landlord of Shaukat to prove that not only Afzal but also the deceased terrorists used to come to Shaukat's residence on the first floor a few days before the incident. The prosecution also relied on another circumstance, namely, that Shaukat had accompanied Afzal to the shop of PW49 on 4th December, 2001 to purchase a Motorola make mobile phone which was ultimately recovered from the deceased terrorist Rana at the spot. No doubt PW49 stated that when Afzal came to purchase telephone from the shop, the accused Shaukat present in the Court was also with him. We are not inclined to place reliance on the testimony of PW41 regarding Shaukat's presence. It would be difficult for any one to remember the face of an accompanying person after a considerable lapse of time. The High Court did not place reliance on this circumstance. There are, however, two circumstances which can be put against the accused Shaukat. The secondhand motorcycle No. HR 51E-5768 was sold to Mohd. Afzal on 8th December. He identified Afzal and Shaukat in the Court as the persons who came to his shop on that day in the company of two others including a lady. He also identified them at the Special Cell on 19th December. He could not identify the lady as Afsan. However, he identified the photograph of the deceased terrorist Mohammed at the Special Cell on 19th December and also in the Court. This motorcycle of Afzal was recovered from the hideout at A-97, Gandhi Vihar which Shaukat used to visit frequently. His presence at the shop with Mohammed apart from Afzal would show that he had acquaintance with Mohammed also. The evidence of this witness has been criticized on the ground that test identification parade could have been held and that there was discrepancy in regard to the date of seizure memo of the bill book. These are not substantial grounds to discredit the testimony of an independent witness PW29. The High Court was inclined to place reliance on this witness in regard to the identification of the deceased terrorist having regard to the fact that they would have been in the shop for taking trial etc., and that the witness would have had enough opportunity to observe the buyer's party for quite some time.

Another circumstance that ought to be taken into account against Shaukat is the telephonic conversation between him and his wife Afsan on the night of 14th December. We have already held that the intercepted conversation recorded on the tape is reliable and the High Court should not have discounted it. The conversation shows that Shaukat was with another person at Srinagar, by name Chotu (the alias name of Afzal, according to the prosecution) and that panic and anxiety were writ large on the face of it. In the light of the above discussion, can it be said that the circumstances established by satisfactory evidence are so clinching and unerring so as to lead to a conclusion, unaffected by reasonable doubt, that the appellant Shaukat was a party to the conspiracy along with his cousin Afzal? We find that there is no sufficient evidence to hold him guilty of criminal conspiracy to attack the Parliament. The gaps are many, once the confession is excluded. To recapitulate, the important circumstances against him are:

1. Taking a room on rent along with Afzal at Christian Colony hostel into which Afzal inducted the terrorist Mohammed about a month prior to the incident. Shaukat used to go there.

2. The motorcycle of Shaukat being found at Indira Vihar, one of the hideouts of the terrorists which was hired by Afzal in the 1st week of December 2001.

3. His visits to Gandhi Vihar house which was also taken on rent by Afzal in December 2001 to accommodate the terrorists and meeting Afzal there quite often, as spoken to by PW34.

4. Accompanying Afzal and Mohammed for the purchase of motorcycle by Afzal.

5. His frequent calls to Afzal especially on the date of attack,

6. His leaving Delhi to Srinagar on the date of attack itself in his truck with Afzal who carried a mobile phone, laptop used by terrorists and cash of Rs.10 lakhs.

7. The fear and anxiety with which he and his wife conversed over phone on the night of following day.

These circumstances, without anything more, do not lead to the conclusion that Shaukat was also a party to the conspiracy in association with the deceased terrorists. The important missing link is that there was no occasion on which Shaukat ever contacted any of the deceased terrorists on phone. Shaukat was not shown to be moving with the deceased terrorists at any time excepting that he used to go with Afzal to the Boys' hostel where Mohammed was staying initially and he once accompanied Afzal and Mohammed to the mobile phone shop. He did not accompany Afzal at the time of purchases of chemicals etc. used for preparation of explosives and motor car used by terrorists to go to Parliament House. In the absence of any evidence as regards the identity of satellite phone numbers, the Court cannot presume that the calls were received from a militant leader who is said to be the kingpin behind the operations. The frequent calls and meetings between Shaukat and Afzal should be viewed in the context of the fact that they were cousins. Though his inclination and willingness to lend a helping hand to Afzal even to the extent of facilitating him to flee away from Delhi to a safer place soon after the incident is evident from his various acts and conduct, they are not sufficient to establish his complicity in the conspiracy as such. Certain false answers given by him in the course of examination under Section 313 are not adequate enough to make up the deficiency in the evidence relating to conspiracy as far as Shaukat is concerned. At the same time, the reasonable and irresistible inference that has to be drawn from the circumstances established is that the appellant Shaukat had the knowledge of conspiracy and the plans to attack the Parliament House. His close association with Afzal during the crucial period, his visits to the hideouts to meet Afzal, which implies awareness of the activities of Afzal, the last minute contacts between him and Afzal and their immediate departure to Srinagar in Shaukat's truck with the incriminating laptop and phone held by Afzal would certainly give rise to a high degree of probability of knowledge on the part of Shaukat that his cousin had conspired with others to attack the Parliament and to indulge in the terrorist acts. He was aware of what was going on and he used to extend help to Afzal whenever necessary. Having known about the plans of Afzal in collaborating with terrorists, he refrained from

informing the police or Magistrate intending thereby or knowing it to be likely that such concealment on his part will facilitate the waging of war. In this context, it is relevant to refer to Section 39 Cr.P.C.:

39. Public to give information of certain offences (1) Every person, aware of the commission of, or of the intention of any other person to commit, any offence punishable under any of the following Sections of the Indian Penal Code (45 of 1860), namely:--

(i) Sections 121 to 126, both inclusive, and Section 130 (that is to say offences against the State specified in Chapter VI of the said Code);

shall, in the absence of any reasonable excuse, the burden of proving which excuse shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police officer of such commission or intention;

Thus, by his illegal omission to apprise the police or Magistrate of the design of Afzal and other conspirators to attack the Parliament which is an act of waging war, the appellant Shaukat has made himself liable for punishment for the lesser offence under Section 123 IPC. If he had given the timely information, the entire conspiracy would have been nipped in the bud. The fact that there was no charge against him under this particular Section, does not, in any way, result in prejudice to him because the charge of waging war and other allied offences are the subject matter of charges. We are of the view that the accused Shaukat is not in any way handicapped by the absence of charge under Section 123 IPC. The case which he had to meet under Section 123 is no different from the case relating to the major charges which he was confronted with. In the face of the stand he had taken and his conduct even after the attack, he could not have pleaded reasonable excuse for not passing on the information. Viewed from any angle, the evidence on record justifies his conviction under Section 123 IPC.

In the result, we find Shaukat Hussain Guru guilty under Section 123 IPC and sentence him to the maximum period of imprisonment of 10 years (rigorous) specified therein. He is also sentenced to pay a fine of Rs.25000/- failing which he shall suffer R.I. for a further period of one year. The convictions and sentences under all other provisions of law are set aside. His appeal is allowed to this extent.

20. CASE OF S.A.R. GILANI The High Court set aside the conviction of S.A.R. Gilani and acquitted him of the various charges.

There is no evidence to the effect that Gilani was maintaining personal or telephonic contacts with any of the deceased terrorists. There is no evidence of any participative acts in connection with or in pursuance of the conspiracy. He was not connected with the procurement of hideouts, chemicals and other incriminating articles used by the terrorists. Speaking from the point of view of probabilities and natural course of conduct there is no apparent reason why Gilani would have been asked to join conspiracy. It is not the case of the prosecution that he tendered any advice or gave important tips/information relevant to the proposed attack on Parliament. None of the

circumstances would lead to an inference beyond reasonable doubt of Gilani's involvement in the conspiracy. There is only the evidence of PW 45, the landlord of Shaukat, that he had seen the deceased terrorists and Gilani visiting the house of Shaukat two or three days prior to 13th December. We have already discussed his evidence. His version of identification of visitors by means of the photographs of the deceased terrorists was held to be incredible. As regards Gilani, in the first instance, he frankly stated that he could not identify the person who was sitting in the Special Cell i.e. Gilani, but, on a leading question put by the Public Prosecutor, on the permission given by the Court, PW 45 pointed out towards Gilani as the person that was in the Special Cell. It is noted in the deposition that initially the witness stated that he had not said so to the police about Gilani. In this state of evidence, no reliance can be placed on the testimony of PW 45 in regard to the alleged visits of Gilani to the house of Shaukat a few days prior to 13th December. The High Court observed that in any case PW 45 did not state that he had seen Gilani visiting the house of Shaukat in the company of five terrorists. Therefore, the case of the prosecution that Gilani participated in the meetings at Shaukat's place where the conspiracy was hatched does not stand substantiated.

The High Court after holding that the disclosure statement of Gilani was not admissible under Section 27 of the Evidence Act and that the confession of co-accused cannot also be put against him, observed thus: "We are, therefore, left with only one piece of evidence against accused S.A.R. Gilani being the record of telephone calls between him and accused Mohd. Afzal and Shaukat. This circumstance, in our opinion, do not even remotely, far less definitely and unerringly point towards the guilt of accused S.A.R. Gilani. We, therefore, conclude that the prosecution has failed to bring on record evidence which cumulatively forms a chain, so complete that there is no escape from the conclusion that in all human probabilities accused S.A.R. Gilani was involved in the conspiracy."

The High Court concluded that "the evidence on record does not bring out a high level of consciousness qua S.A.R. Gilani in the conspiracy." We are in agreement with the conclusion reached by the High Court. However, we would like to enter into a further discussion on the incriminatory circumstances which, according to the prosecution, would have bearing on the guilt of the accused Gilani.

The fact that Gilani was in intimate terms with Shaukat and Afzal and was conversing with them through his mobile phone No. 9810081228 frequently between the first week of November and the date of the crucial incident is sought to be projected by the prosecution prominently as an incriminating circumstance against Gilani. Incidentally, it is also pointed out that there were contemporaneous calls between Gilani, Afzal and Shaukat and Afzal and Mohammed. It is particularly pointed out that after Shaukat acquired mobile phone 9810446375, the first call was to Gilani on 2.11.2001 for 22 seconds. Gilani in turn called him up and spoke for 13 seconds. Thereafter, there was exchange of calls between Shaukat and Gilani on seven occasions in the month of November. In the month of November, there was a call from Shaukat through his phone No. 9811573506 to Gilani on 7th December, 2001 and on the 9th December, 2001, Gilani spoke to Shaukat for 38 seconds. There was a call on the midnight of 13th December for 146 seconds from Gilani's number to Shaukat. There is a controversy about this call which we shall refer to in the next para. Then, soon after the attack on Parliament on 13th December, 2001, there was a call from Shaukat to Gilani and thereafter from Gilani to Shaukat. As regards the calls between Gilani and

Afzal are concerned, the call records show that two calls were exchanged between them in the morning of 12th November, 2001. Then, Gilani called up Afzal on 17.11.2001 for 64 seconds and again on 7th December & 9th December, 2001. It is pointed out that on the reactivation of the telephone of Afzal i.e. 89429 on 7.12.2001, Gilani spoke to Afzal on the same day. The High Court observed that on the basis of these calls, it is not possible to connect Gilani to the conspiracy, especially having regard to the fact that Gilani was known to Shaukat and his cousin Afzal. Shaukat and Gilani lived in the same locality i.e. Mukherjee Nagar. It is not in dispute that Gilani played a part at the marriage ceremony of Shaukat (A2) and Afsan Guru (A4) in the year 2000. It is also not in dispute that they hail from the same District and were the students of Delhi University. The calls between them do not give a definite pointer of Gilani's involvement in the conspiracy to attack the Parliament. As far as the calls between Afzal and Gilani are concerned, there was no call too close to the date of incident. One call was on 7th December, 2001 and another was on 9th December, 2001. On the date of incident, there was exchange of calls between Shaukat and Gilani twice about half-an-hour after the incident. Not much of importance can be attached to this, as it is not unusual for friends talking about this extraordinary event. The phone calls between these three persons, if at all, would assume some importance if there is other reliable and relevant evidence pointing out the accusing finger against Gilani. That is lacking in the instant case. Gilani had invited problem for himself by disowning the friendship with Shaukat and the contacts with Afzal. In the course of examination under Section 313, he took the plea that Shaukat was a mere acquaintance and he had not visited him. When asked questions about the telephonic contacts giving the numbers thereof, Gilani feigned ignorance of the telephone numbers of Shaukat and Afzal by giving evasive answers - 'I do not remember'. Of course, a wrong question was also put with reference to the calls at 11.19 and 11.32 hours on 13th which were between Afzal and Shaukat as if Gilani had called them up at that time. Still, the fact remains that he did give false answers probably in his over anxiety to wriggle out of the situation. That does not make an otherwise innocuous factor on incriminating circumstance.

There was a debate on the question whether the call from Gilani's number to Shaukat's number at 00.41 hours on 12th December i.e. just on the eve of the Parliament attack was made by Gilani. The call lasted for 146 seconds. The defence of Gilani was that Gilani's brother called Shaukat to wish him on that night which happened to be shab-e-qadr festival night and that it was not unusual for the friends to exchange the greetings on that night. It is pointed out by the learned counsel for the State that the testimony of DW5 Gilani's wife, exposes the falsity of this defence. She stated that no one in the family used cell phone that night. She stated that namaz was performed on the night of 12th December, by all the family members together from 9.30 p.m. onwards. It was closed at 7.00 a.m. on 13th December, 2001 and then they slept. She further stated that during namaz, her husband did not move out of the room nor talked to anybody. She also stated that the cell phone was switched off and kept aside. She denied that any call was made by her husband on the cell phone at 00.45 hours on the intervening night of 12th / 13th December, 2001. It was contended before us that Gilani was not questioned on this point in his Section 313 examination. If a question was put, a clarification would have been given that in fact, the brother of Gilani had contacted Shaukat to convey good wishes. Comment was also made in regard to the role, assumed by the learned trial Judge, of putting questions to DW5. Though it appears that DW5's evidence is inconsistent with the defence version, as no specific question was put to Gilani on this aspect, we are not inclined to go so far as to hold that it is undoubtedly a false plea. Yet, it raises a grave suspicion that the accused was

trying to hide something which might turn out to be adverse to him. Even if there was such a call on the 13th midnight between Shaukat and Gilani, undue importance ought not to be attached to this fact, having regard to the state of other circumstantial evidence on record.

Then, the prosecution relied on the evidence of PW39 who is the landlord of Gilani. He merely stated in general terms that he had seen Shaukat and Afzal visiting the house of Gilani two or three times during the period Gilani stayed in his house i.e. during a period of more than two years. PW39 did not say anything about visits of Afzal or Shaukat a few days or weeks before the incident.

Then, the prosecution relied on the disclosure statement Ext.PW66/13 to establish that Gilani was well aware of the names of the deceased terrorists, the change of hideouts by Afzal and the material such as police uniforms which were procured for the purpose of conspiracy. It is contended that the relevant portions in the disclosure statement amount to informations leading to the discovery of facts within the meaning of Section 27 of the Evidence Act. According to the learned counsel for the State Mr. Gopal Subramnium, the statement of Mr. Gilani disclosing the names of five deceased terrorists who had come from Pakistan, Shaukat taking a room on rent for Mohammed in Christian Colony and the terrorists securing explosives, mobile phones and police uniforms are all admissible inasmuch as these facts led the investigating agencies to further investigations which confirmed the information furnished by Gilani. In this connection, we may recapitulate the contention of the learned counsel that Section 27 rests on the principle of confirmation by subsequent events and that the facts discovered need not necessarily relate to material objects. We have already discussed the legal position in regard to the scope and parameters of Section 27 and we have not accepted the contention of the learned counsel for the State. We are of the view that none of the statements can be put against Gilani. It may be noted that Gilani was not taken to any places such as the hideouts where the incriminating articles were found. He only pointed out the house of Shaukat who was in the same locality on the 15th December, 2001 which is an innocuous circumstance. Though there is some dispute on this aspect, we are inclined to believe the evidence of the investigating officers because Afsan Guru, in her statement under Section 313, stated that Gilani was with the police when they came to her house. One more important aspect that deserves mention is that there is nothing to show that the information furnished by Gilani led to the discovery of facts such as identification of the deceased terrorists, recovery of chemicals, police uniforms etc., at the hideouts. That was all done on the basis of informations furnished by other accused. There is no inextricable link between the alleged informations furnished by Gilani and the facts discovered. None of the investigating officers deposed to the effect that on the basis of information furnished by Gilani, any incriminating articles were recovered or hideouts were discovered. On the other hand, the evidence discloses the supervening informations which led the I.Os. to discover the things. The disclosure memo has also been assailed (Ext.PW66/13) on the ground that the arrest of Gilani was manipulated and therefore no credence shall be given to the police records. Whereas according to Gilani, the time of arrest was at 1.30 p.m. on 14th December, 2001 while he was going in a bus, according to the I.O., the arrest was effected at about 10 a.m. on 15th December, when he was about to enter his house. Though the time of arrest at 10 a.m. does not appear to be correct in view of the information which was already passed on to Srinagar regarding the truck of Shaukat there are certain doubtful features in the version of Gilani too that the arrest was effected on the afternoon of 14th December, 2001. It is not necessary to delve into this question further for the purpose of disposal of this appeal.

The last circumstance which needs to be discussed is about the telephonic conversation between Gilani and his brother Shah Faizal on the 14th December 2001 at 12.22 hours. His brother Shah Faizal examined as D.W. 6, spoke from Baramullah/Srinagar, which was intercepted and recorded on tape, Ex. P.W. 66/1, which conversation was admitted. The dispute is only about the interpretation of certain words used in that phone conversation. The conversation was in Kashmiri language, which was translated into Hindi by P.W. 71, a young man whose educational qualification was only V standard. As it was an ordinary colloquial conversation, there is no difficulty in the speech being translated by a less educated person. As against this translation, the defense version of translation was given by D.Ws. 1 & 2. The relevant portion of the speech as translated by P.W. 71 is as follows:

Caller: (Bother of Gilani) What have you done in Delhi? Receiver: (Gilani) It is necessary to do (while laughing) (Eh che zururi). Caller: Just maintain calm now.

Receiver: O.K. (while laughing)Where is Bashan?

This portion of the conversation appears almost towards the end of talk. The defence version of translation is as follows:

Caller: (Brother of Gilani) What has happened?

Receiver: (Gilani) What, in Delhi?

Caller: What has happened in Delhi?

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Receiver: Ha! Ha! Ha! (laughing)
Caller:     Relax now.
Receiver:  Ha! Ha! Ha!, O.K. Where are you in Srinagar?
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The controversy is centered on the point, whether the words "Eh che zururi" were used by Gilani or not. According to the prosecution these words indicate the state of mind of Gilani in relation to the atrocious incident in Delhi the previous day. The High Court commented thus in paragraph 346: "During the hearing of the appeal, we had called for the tape from Malkhana and in the presence of the parties played the same. Indeed the voice was so inaudible that we could not make head or tail of the conversation. We tried our best to pick up the phonetical sounds where there was a dispute as to what words were used, but were unable to do so. Testimony of PW 48 reveals that he could not analyse the talk as it was highly inaudible. PW 48 is a phonetic expert. If he could not comprehend the conversation in a clearly audible tone, the probability of ordinary layman picking up the phonetic sounds differently cannot be ruled out. The prosecution witness, PW 71, Rashid, who prepared a transcript of the tape is fifth class pass and it was not his profession to prepare transcript of taped conversation. The possibility of his being in error cannot be ruled out. Benefit of doubt must go to the defence."

However the trial Court took the view that the translation by PW 71 appeared to be correct. The learned Counsel for the State submits that the High Court should not have discarded this piece of

evidence on the ground of inaudibility, when two of the defence witnesses could hear and translate it. However, the fact remains that the High Court was not able to make out the words used nor the phonetic expert PW 48. Moreover, there are different versions of translation. The defence version having been translated by persons proficient in Kashmiri and Hindi, the view taken by the High Court seems to us to be reasonable. At any rate, there is room for doubt. No doubt, as per the deposition of DW 6, the brother of Gilani and the version of Gilani in his statement under Section 313, the relevant query and answer was in the context of quarrel between him and his wife with regard to the Kashmir trip during Eid appears to be false in view of the tenor of the conversation. At the same time, in view of the discrepant versions, on an overall consideration, we are not inclined to disturb the finding of the High Court. However, we would like to advert to one disturbing feature. Gilani rejoiced and laughed heartily when the Delhi event was raised in the conversation. It raises a serious suspicion that he was approving of the happenings in Delhi. Moreover, he came forward with a false version that the remark was made in the context of domestic quarrel. We can only say that his conduct, which is not only evident from this fact, but also the untruthful pleas raised by him about his contacts with Shaukat and Afzal, give rise to serious suspicion at least about his knowledge of the incident and his tacit approval of it. At the same time, suspicion however strong cannot take the place of legal proof. Though his conduct was not above board, the Court cannot condemn him in the absence of sufficient evidence pointing unmistakably to his guilt. In view of the foregoing discussion we affirm the verdict of the High Court and we uphold the acquittal of S.A.R. Gilani of all charges.

21. CASE OF AFSAN GURU @ NAVJOT SANDHU The trial Court convicted her of the offence under Section 123 IPC imputing her the knowledge of conspiracy and concealing the evidence of design to wage war by reason of her illegal omission to inform the police. The High Court acquitted her of the charge. We are of the view that the High Court is fully justified in doing so. The prosecution case against this accused, who is the wife of Shaukat Hussain, is weak, especially, in the light of the exclusion of confessional statements of co-accused Shaukat and Afzal. The High Court held the confessions inadmissible against the co-accused and we have expressed the same view. Incidentally, we may mention that even the confessions of co-accused do not attribute to her in clear terms the role of conspirator, though on the basis of confessions it could perhaps be held that she was in the know of things well before the planned attack on the Parliament. In fact, there was no earthly reason for inviting her to join the conspiracy. She was pregnant by then. Then it is to be noted that no recoveries were effected at her instance coming within the purview of Section 27 of the Evidence Act as interpreted by us and the High Court. Practically there is no evidence left to bring her within the purview of Section 123 IPC much less within the net of conspiracy to wage war and to commit terrorist act. Indisputably, no positive or participatory role has been attributed to her and as rightly observed by the High Court, "she provided no logistics; she procured no hideouts; she procured no arms and ammunition; she was not even a motivator." She could have had some knowledge of the suspicious movements of her husband with Afzal who is his cousin and a surrendered militant. Of course, she was aware of the fact that Shaukat accompanied by Afzal left in her truck on the day of Parliament attack in post-haste; but, the involvement of Afzal, direct or indirect, and the attitude of her husband in relation to the Parliament attack could have come to her knowledge after the attack when they abruptly left for Srinagar in the truck.

The prosecution sought to rely on her disclosure memo Ex. PW 66/14 but nothing was recovered as a direct result of the information given by her. Of course, as far as passing on the information regarding the truck by which Shaukat left for Srinagar, there is no dispute. But the recovery of laptop etc. from the truck is not distinctly relatable to the information contained in the alleged disclosure statement. The articles in the truck were recovered at the instance of Afzal and Shaukat when it was intercepted at Srinagar. We find no link between the disclosure and the recoveries as a cause and effect. The next piece of evidence relied against her is the telephonic conversation she had with her husband Shaukat on the night of 14th December which was taped. We have held that the High Court erred in doubting the authenticity of the said intercepted conversation recorded on the tape. The call was received by Afsan on the Phone No. 9811573506 and the caller was her husband. The voice of both has been identified by the expert, as already noted. The conversation reads thus:

14.12.2001 Time: 2013 hrs 9811573506 Caller: Hello I am! Was there any telephonic call?

(Shaukat) Receiver: Shaukat where are you?

(Afsan) Caller: I am in Srinagar.

Receiver: Reached there.

Caller: Yes.

Receiver: Some person had come just now.

Caller: From where?

Receiver: I don't know. Don't say anything.

Caller: O.K.

Receiver: I don't know they are with the lady of ground floor. Some vehicle is still parked outside.

Caller: O.K.

Receiver: I don't know. I did not speak anything.

Caller: O.K. Alright.

Receiver: Tell more, don't speak anything now and tell me. I am much afraid.

Caller: No, No nothing dear, O.K.

Receiver: Are you fine?

Caller: Yes, Yes.

Receiver: Reached safely?

Caller: Yes, Yes.

Receiver: And Chotu?

Caller: Yes, Yes.

Receiver: Do you know?

Caller: Yes, Yes alright you may make a call.

Receiver: When?

Caller: In the night right now. I am calling from outside Receiver: Alright I will call up tomorrow (while weeping) Caller: O.K.

As rightly observed by the High Court it shows that "Shaukat and Afsan were talking between the lines. Afsan was scared." An inference can be drawn that she was concerned about the safety of Shaukat and that she was aware that Shaukat and Afzal did something that attracted police surveillance. But from this circumstance alone, no inference can be drawn with a reasonable degree of certainty that she was having knowledge of the plan to attack the Parliament before it happened. The scanty evidence on record does not justify her conviction either on the charges framed against her or under Section 123 IPC for which she was held guilty by the trial Court. The High Court's view is unexceptionable.

22. IN THE RESULT, we dismiss the appeal filed by Mohd. Afzal and the death sentence imposed upon him is hereby confirmed. The appeal of Shaukat is allowed partly. He stands convicted under Section 123 IPC and sentenced to undergo RI for 10 years and to pay a fine of Rs. 25,000/- and in default of payment of fine he shall suffer RI for a further period of one year. His conviction on other charges is hereby set aside. The appeals filed by the State against the acquittal of S.A.R. Gilani and Afsan Guru are hereby dismissed.