

(2009) 04 DEL CK 0253

In the Delhi High Court

Case No : Criminal Appeal No. 811 of 2007

Mohd. Afzal Kumhar and Another

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 13-04-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 196, 313, 465
Evidence Act, 1872 — Section 114, 25, 26, 27, 28
Explosive Substances Act, 1908 — Section 4, 5
Penal Code, 1860 (IPC) — Section 121, 121A, 122, 123
Prevention of Terrorism (Second) Ordinance, 2001 — Section 21, 22, 3, 4, 5
Prevention of Terrorism Act, 2002 — Section 20, 22(2), 22(2)(5), 22(3)(5), 3
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 15, 15(1), 15(2)
Terrorist and Disruptive Activities (Prevention) Rules, 1987 — Rule 15

Citation : (2010) 6 RCR(Criminal) 1335

Hon'ble Judges : P.K. Bhasin, J;B.N. Chaturvedi, J

Bench : Division Bench

Advocate : Kamini Jaiswal, Nos. 1 and 2, Maninder Singh and Sanjeev Kumar, for the Appellant; Sunil Sharma, APP in Criminal Appeal No. 811 of 2007, M.N. Dudeja, APP in Criminal Appeal Nos. 89 and 90 of 2008, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Bhasin, J.—13th December, 2001 witnessed a terrorist attack on the Indian Parliament. The objective of the terrorists, who belonged to a militant organization called "JKLF", behind that attack was to capture the Parliament House. The brave security personnel posted there, however, had not only succeeded in saving the Parliament House from being captured and the Members of Parliament, who were inside, from being killed or held as hostages but also managed to kill all the terrorists who had launched the attack there. During that operation some of the security personnel also lost their lives while fighting for the honour of the country. The terrorists who have been causing havoc in different parts of the country could not take their defeat lying down and decided to commit more panic and fear in the Capital city by causing loss of human lives

and mass devastation of properties by exploding bombs on the occasion of Republic Day which was to be celebrated on 26th January, 2002. However, this time the intelligence agencies could catch hold of the terrorists belonging to another militant organization called Lashkar-e-Toiba (LeT) who had come from Kashmir for committing acts of terrorism in Delhi before they could convert their nefarious design into reality. On being apprehended by the police along with huge quantity of RDX and other explosive material and lacs of rupees in cash meant for being utilized for the said purpose they were prosecuted and tried for various offences and finally were convicted and now these appeals have been filed by four accused persons who have been convicted by the Designated Court under the Prevention of Terrorism Act, 2002 (POTA) vide judgment dated 30th October, 2007 for their having committed various offences including that of hatching a conspiracy to wage war against the Government of India. These four accused persons were charge-sheeted along with three other persons out of whom one Mehboob Karim Merchant was discharged by the Designated Court while in respect of accused Rajesh Bhai Prajapati the Designated Judge passed an order on 29-04-2005, when the case was at the stage of final arguments, for deleting his name from the array of accused persons in view of the decision of the POTA Review Committee exonerating him of the offence under POTA for which only he was being tried. In respect of accused Dilip Tribhuvan Das Barot, who was also being tried for an offence under POTA only, the Designated Court passed an order of his acquittal on 31-08-2005 since he had also been exonerated in the meanwhile by the POTA Review Committee. Thereafter, the trial of the four appellants continued and finally ended in their conviction. Hence, these appeals came to be filed and since the same arise out of a common judgment of the trial Court they are being disposed of by us by a common judgment.

2. The foundational facts of the prosecution case are described in the charges framed by the trial Court against the six accused and so at the outset we deem it appropriate to re-produce those charges. Against accused-appellant Mohd. Afzal Kumhar (appellant No. 1 in CrI.A. No. 811 of 2007) the following charges were framed:

1. That on 14.1.02, at about 8 p.m., near Kotla Mubarakpur, Karan Hostel, H.No. 1804/2, Room No. 3, Parsadi Gali, were found in possession of 2.280 kgs. of RDX/PETN capable of mass destruction, two live electronic detonators and Hawala amount of Rs. 5 lakhs, for the purpose of terrorist activities and thereby you committed an offence u/s 4(b) POTA 2002.

2. Secondly, that you disclosed in your confessional statement recorded u/s 32 POTA being member of Lashkar-e- Tayyaba (LeT), a militant organization declared as such under POTA and listed in schedule and having come to Delhi to fix explosives in Republic Day parade and you were found in possession of 2.280 kgs. RDX/PETN and two electronic detonators capable of causing mass destruction and thereby you committed offence u/s 3(b) of POTA and Section 3(5) of POTA and Section 20 of POTA.

3. Thirdly that in the company of your co-accused, you received hawala money of Rs. 28.25 lakhs from accused No. 5 at the instructions of accused No. 6, who had received further instructions from terrorist organizations, knowing fully well that this amount be utilized for the purposes of terrorism and thereby you committed offence u/s 22(3)(5) of POTA.

4. Fourthly, that by possessing the aforesaid quantity of RDX/PETN without any legal authority and licence, and maliciously capable of endangering life and causing serious injuries to persons and property in India and thereby you committed an offence u/s 4(b) and Section 5 of Explosives Substance Act, within the cognizance of this Court.. Accused-appellant Adil Nazir Keen (who is appellant No. 2 in Crl.A. No. 811 of 2007) was also similarly charged as under:

1. That on 14.1.02 at about 8 p.m. near Kotla Mubarakpur, Karan Hostel H.No. 1804/2, Room No. 3, Parsadi Gali, were found in possession of 2 kgs. RDX/PETN capable of mass destruction, two live electronic detonators and hawala amount of Rs. 5 lakhs, for the purpose of terrorist activities and thereby you committed an offence u/s 4(b) POTA 2002.

2. Secondly, that you disclosed in your confessional statement recorded u/s 32 POTA being member of Lashkar-e- Tayyaba (LeT), a militant organization declared as such under POTA and listed in schedule and having come to Delhi to fix explosives in Republic Day Parade and you were found in possession of 2 kgs. RDX/PETN and two electronic detonators, capable of causing mass destruction and thereby you committed offence u/s 3(b) of POTA and Section 3(5) and Section 20 of POTA.

3. Thirdly, that in the company of your co-accused, you received hawala money of Rs. 28.25 lakhs from accused No. 5 at the instructions of accused No. 6, who had received further instructions from terrorist organizations, knowing fully well that this amount shall be utilized for the purposes of terrorism and thereby you committed offence u/s 22(3)(5) of POTA.

4. Fourthly, that by possessing the aforesaid quantity of RDX/PETN, without any legal authority and licence and maliciously, capable of endangering life and causing serious injuries to persons and property in India and thereby you committed an offence u/s 4(b) and Section 5 of Explosive Substances Act, within the cognizance of this Court.

Against the accused-appellants Bilal Ahmed Mir (appellant in Crl. A. No. 89 of 2008) and Ansar Ahmed Dar (appellant in Crl. A. No. 90 of 2008) the following common charges were framed:

1. That on 14.1.02, at about 8 p.m., near Kotla Mubarakpur, from inside room No. 3 of Karan Hostel, both of you were found in possession of 3.9 kgs. of RDX/PETN, capable of mass destruction and Rs. 24.9 lakhs of hawala money and thereby you both committed an offence punishable u/s 4(b) of POTA.

2. Secondly that you both were the members of Lashkare-e-Tayyaba(LeT) a

militant organization declared as such under POTA and listed in schedule and were in possession of explosive substantial of mass destruction and thereby you both committed offence u/s 3(b), 3(5) and 20 of POTA, within the cognizance of this Court.

3. And thirdly, by possessing the aforesaid quantity of RDX/PETN, without any legal authority and licence and maliciously, capable of endangering life and causing serious injury to persons and property in India and thereby you both committed offence u/s 4(b) and Section 5 of Explosives Substances Act, within the cognizance of this Court.

Then, the following common charge was framed against accused-appellants Mohd. Afzal Kumhar, Ansar Ahmad Dar, Bilal Ahmed Mir and Adil Nazir Keen:

That you all collected 8.18 kgs. RDX/PETN, capable of mass destruction and 34.9 lakhs hawala money and conspired to overawe by means of criminal force, the Govt. of India and thereby you all committed offence u/s 121-A IPC and u/s 122 IPC, within the cognizance of this Court.

Against accused Dilip Tribhuvandas Barot @ Dalip Bhai and Rajesh Khoda Bhai Prajapati @ Raju Bhai, in respect whom the proceedings came to be terminated in the midst of the trial because of the decision of the POTA Review Committee, the following charge had been framed:

That you both knowing fully well that accused Mohd. Kumhar, Ansar Ahmed Dar, Bilal Ahmed Mir and Adil Nazir Keen were terrorists and members of Lashkar-e-Tayyaba(LeT), a militant organization, declared as such and listed under POTA, provided them hawala amount of Rs. 28.25 lakhs, having reasons to believe that it would be used for the purpose of terrorism and thereby you both committed offences u/s 22(2)(5) POTA, within the cognizance of this Court.

3. From these charges framed against the accused persons and a glance through the charge-sheet and the accompanying material submitted in Court after investigation it becomes clear that the prosecution case is that sometime in the last week of December 2001, some information was received by the Indian Intelligence Agencies that some militants belonging to a banned militant organization by the name of Lashkar-e-Toiba(LeT) had come to Delhi and were collecting huge quantity of explosives for being used to spread terror in the capital city of Delhi. Thereafter on 14/01/02, a specific input was received by the Intelligence Agencies that some Kashmiri boys having links with LeT were staying in a room in Karan Hostel in Kotla Mubarakpur and had collected explosive material for spreading terror in Delhi by exploding bombs during Republic Day celebrations. On receipt of that information a raid team under the leadership of PW-19 Inspector Mohan Chand Sharma was formed on 14/1/02 itself and at about 1.15 p.m. the raid team members left for Karan Hostel and reached there at 1.30 p.m. On secret enquiries made in that area it was confirmed that three Kashmiri boys had come few days ago were staying with one Bilal Ahmad Mir in room No. 3 in that Hostel. It was also informed that at that time only Bilal

Ahmad Mir and one other boy were present in the room and their other two companions had gone out somewhere. Thereafter, the raid team leader decided to wait for the other two boys also to reach there before starting their raid operation. In the meanwhile the owner of Karan Hostel PW-15 Ram Kumar had also been contacted and he also confirmed that one Bilal Ahmad Mir with three others was staying in his Hostel. PW-15 Ram Kumar was also joined in the raid operation as an independent witness since he knew the boys. At about 8 p.m. two boys were seen coming towards Karan Hostel and they were identified by Ram Kumar as the boys who were staying with Bilal. The police then apprehended them at the hostel gate itself. Their names were found to be Mohd. Afzal Kumhar and Adil Nazir Keen. At that time both of them were carrying separate bags with them. Thereafter, the raid team went to room No. 3 of the Karan Hostel where the bag which in the hand of Mohd. Afzal Kumhar was checked and was found containing a polythene bag on which "Mission Kashmir" was written and in that polythene bag 2.280 Kgs. of RDX and Indian currency to the tune of Rs. 5 lakhs and two electronic detonators with wires were recovered. The bag in the hand of Adil Nazir Keen was also checked and was found containing RDX weighing 2 Kgs. and rupees five lakhs in cash and two electronic detonators with wires.

4. In room No. 3 accused-appellants Bilal Ahmed Mir and Ansar Ahmed Dar were found present when the raid team had gone there with Mohd. Afzal Kumhar and Adil Nazir Keen. They were also apprehended and interrogated and it is also the case of the prosecution that on being informed by accused Bilal Ahmed Mir and Ansar Ahmed Dar during their interrogation the police officials recovered two bags lying under the beds in that room No. 3 and in one of those bags cash amount of Rs. 14 lakhs and explosive material weighing 3.900 kgs. were found. In the other bag cash amount of 10.90 lakhs was found. From the explosive material recovered from the possession of accused Mohd. Afzal Kumhar and Adil Nazir Keen two separate samples of 10 gms. each of that explosive material were taken and sealed and marked as S-1 & 2 and four detonators with wires were also sealed in two separate parcels marked as D-1 & 2 for being sent to Central Forensic Scientific Laboratory(CFSL). Seizure Memo Ex.PW-8/A in respect of the recoveries from these two accused was prepared at the spot. The remaining quantity of the explosive material was also sealed in separate parcels. From the explosive material recovered at the instance of Bilal Ahmed Mir and Ansar Ahmed Dar also separate packet of 10 gms. was prepared and sealed as sample and marked as S-3 for being sent to CFSL for confirmation that the same was explosive material. Rest of the material was also separately sealed. The recovered currency notes, totaling Rs. 34.90 lakhs were also taken into police possession. From that room one mobile phone was also seized. In view of the said recoveries of huge quantity of explosive material and cash from the possession of these four accused persons a case under Sections 121/121-A/122/123 IPC and under Sections 4/5 of the Explosive Substances Act, 1908 was registered at Kotla Mubarakpur police station vide FIR No. 18/02. On

15/01/02 the offences punishable under Sections 3/4/5/21/22 of the Prevention of Terrorism (Second) Ordinance, 2001(POTO) were also invoked and the investigation thereafter was taken over by an Assistant Commissioner of Police, PW-18 Rajbir Singh.

5. Pursuant to the information given by accused Mohd. Afzal Kumhar the police arrested one Dilip Tribhuvandas Barot @ Dilip Bhai, who was allegedly a hawala operator, and then pursuant to his disclosure two more hawala operators, Rajesh Khoda Bhai Prajapati @ Raju Bhai and Mehboob Karim Merchant were also arrested. As per the prosecution case all these three persons used to provide money to the terrorists for terrorist activities through, as is commonly known in the criminal world, hawala channels. According to the further prosecution case, all these seven accused persons were involved in a criminal conspiracy to commit various offences including the offence of waging war against the Government of India.

6. During the course of investigation accused Mohd. Afzal Kumhar and Abdul Nazir Keen had shown their willingness to the investigating officer ACP Rajbir Singh to make confessional statements and accordingly their confessions were recorded by PW-1 Shri Balaji Srivastava, Deputy Commissioner of Police, Spl. Branch & Spl. Cell, u/s 32 of the POTO on 24-01-2002. Accused Bilal Ahmed and Ansar Ahmed Dar had also at one time shown their willingness to make confessional statements but when produced before the DCP they changed their minds and did not make any confessional statements. In the confessional statements made by the other two accused they admitted, inter-alia, that they had come to Delhi from Kashmir on 30/12/01 to create panic in Delhi on the occasion of Republic Day celebrations by exploding bombs on the route of Republic Day Parade for which purpose they had collected RDX etc. On 25/01/02 both these accused were produced before PW-5 Shri V.K. Maheshwari, Addl. Chief Metropolitan Magistrate, New Delhi as required u/s 32(4) & (5) of POTO and before him they admitted having made the statements before the DCP voluntarily and without any coercion from any quarter. The ACMM then recorded the statements of accused Mohd. Afzal Kumhar and Adil Nazir Keen to that effect(Ex. PW-5/B and Ex.PW-5/C respectively).

7. It is also the prosecution case that the samples of the explosive material recovered on 14/01/02 from accused Mohd. Afzal Kumhar and Adil Nazir Keen was sent to CFSL on 25/01/02 and when examined at CFSL, New Delhi it was confirmed the presence in the brown coloured putty like material of "RDX", "PETN" and "AMMONIUM NITRATE" and the four detonators which were recovered from the possession of accused persons were also examined by the scientists at the CFSL and the result of the examination was that the same were =live" ones and the same with the said explosive material could form the components of =Improvised Explosive Device"(IED) and so were =explosive substance" as defined in the Explosive Substances Act, 1908. The other sample of explosive material recovered from room No. 3 of Karan Hostel at the instance

of accused Bilal Ahmed Mir and Ansar Ahmed Dar was also examined at CFSL and the opinion of the expert was that the Physico-Chemical examination confirmed the presence of Potassium Chlorate which could also form a component of Improvised Explosive Device. During the investigation it was found that the Motorola mobile phone, Ex.P-22, which was also recovered from room No. 3 of Karan Hostel on 14/01/02 had been purchased by accused Adil Nazir Keen on 06/01/02. Its number was 98113-36055.

8. On the completion of investigation, requisite sanctions under the Code of Criminal Procedure, Explosive Substances Act, 1908 and POTO were obtained by the investigating agency and then charge-sheet was submitted in the Designated Court on 28/03/02 against seven accused persons. One accused was discharged at the charge stage while the remaining six accused were charged on 20/04/02 for the commission of various offences as noticed already. The accused had pleaded not guilty and claimed to be tried. The prosecution then examined nineteen witnesses to establish its case and during their evidence several documents were also exhibited. The main defence plea of accused Mohd. Afzal Kumhar, Adil Nazir Keen, Ansar Ahmed Dar and Bilal Ahmed Mir, who are now the appellants before us, was that they had, in fact, been lifted by the police from Karan Hostel on 2nd January, 2002 and were thereafter kept in illegal confinement till 15th January, 2002 and then booked for the present case and the so- called recoveries were planted ones. Accused Bilal Ahmed Mir had claimed that he was living in Karan Hostel from December, 1998 till June, 2001 and then he vacated the hostel premises as the same was demolished for reconstruction and after its reconstruction he again started living there from December, 2001. He further stated that his co-accused Ansar Ahmad Dar had been visiting him on earlier occasions also while his other two co- accused persons had come to him for the first time on 31st December, 2001. It was also his stand that his family itself was victim of terrorists in Kashmir inasmuch as his brother and his other relative were killed by the terrorists and then he himself had shifted to Delhi from Kashmir. Accused Mohd. Kumhar had claimed in his statement u/s 313 Cr.P.C. that he was working as a Jr. Engineer in the Rural Development Department, J&K since May, 1999 and had further that he had come to Delhi on 31st December, 2001 for some business purposes relating to co- accused Adil and Ansar and had stayed with co-accused Bilal who was known to them as all of them belonged to village Anantnag. He further claimed that on 02-01-2002 he along with his other three co-accused persons was arrested by some policemen in plain clothes at about 10-10.30 p.m. and were kept in the special cell. This accused also claimed that his grandfather was also killed by the militants in Kashmir since was having affiliation with National Conference. Accused Ansar Ahmad Dar claimed in his statement u/s 313 Cr.P.C. that his family had links with politicians and his Phoofoa was Deputy Home Minister in Deve Gowda Government and for that reason the terrorists had killed his(Ansar"s) father his another phoofoa was abducted by terrorists and had demanded ransom of Rs. five lacs. He also claimed that he himself used to visit Delhi in connection with his business of

spices and further that his co-accused Adil and were also doing business in partnership and this time both of them had also accompanied him to Delhi. He further claimed that he was kept in Special Cell from 02-01-2002 to 15-01-2002. Accused Adil Nazir Keen also claimed in his statement u/s 313 Cr.P.C. that he was a frequent visitor to Delhi in connection with his business and he stated that he had come to Delhi on 31-12-2001 and had stayed with co-accused Bilal in his hostel room along with co-accused and Ansar who had also come to Delhi along with him. He also claimed that he along with his co-accused persons were apprehended on 02-01-2002 from the room of Bilal in Karan Hostel at about 10.30 p.m. and since then they remained in police custody. He also claimed that his family was also victim of the terrorists in Kashmir to which place they belonged. The pleas taken by accused Dilip Tribhuvandas and Rajesh Bhai Prajapati are, however, now not of any relevance in view of the orders passed by the Designated Judge in their favour because of their exoneration by the POTA Review Committee. The accused persons had also examined fourteen witnesses in defence, some of whom had been examined on behalf of accused Rajesh Bhai Prajapati and Dilip Tribhuvandas while the remaining were examined on behalf of the accused Mohd. Kumhar, Adil Nazir Keen, Bilal Ahmed Mir and Ansar Ahmed Dar in support of their common defence that they had been taken into custody by the police on 02-01-2002 and not on 14-01-2002 as was being claimed by the police.

9. The learned trial Judge after analyzing the evidence produced from both the sides came to the conclusion that the prosecution had failed to establish that the accused persons were members of any banned terrorist organization and further that the confessions of accused Mohd. Afzal and Adil Nazir recorded by PW-1 DCP Balaji Srivastava u/s 32 of POTO could not be said to have been made by these accused voluntarily. But at the same time accepting the prosecution evidence regarding recovery of RDX and huge amount of cash from the accused-appellants on 14/01/02 the learned trial Court also observed in the impugned judgment that "...At the same merely for the reason that their confessional statements are vitiated on account of non compliance of the provisions of Section 32 POTA it cannot be said that it affects in any manner the recovery of incriminating material effected from the possession of the accused persons from Karan Hostel..." And further held that..."the acts of all the accused while possessing huge quantity of hazardous explosive material i.e. RDX, electric detonators as well as unaccounted cash amount of Rs. 34.90 lakhs do amount to terrorist acts." The trial Judge also held that from these recoveries...it is proved that all the accused had entered into a criminal conspiracy to wage war against the Government of India or to overawe the Govt. of India by use of the hazardous explosive substance.... And then after rejecting the defence plea that the accused-appellants had been picked up by the police from Karan Hostel on 02/01/02 the trial Court convicted each one of the four accused-appellants for different offences and acquitted of them some offences vide judgment dated 30th October, 2007 and awarded different sentences to each one of them vide

order dated 22nd November,2007.

10. The offences for the commission of which the accused- appellants were acquitted and the offences of which they were convicted and the sentences awarded to them are as under:

(1) All the accused-appellants were held guilty under Sections 121-A/122 IPC and sentenced to undergo rigorous imprisonment for a period of 10 years on each count and also to pay fine of Rs. 25,000/- each, in default to undergo SI for three months;

(2) All the accused-appellants were acquitted of the charge under Sections 3(1) (b), 3(5) and 20 of POTA and instead were convicted u/s 3(3) of POTA for having conspired to commit a terrorist act with the help of hazardous explosive material and were sentenced to undergo RI for seven years and to pay a fine of Rs. 25,000/- each, in default to undergo SI for three months;

(3) All the accused-appellants were further convicted u/s 4(b) of POTA and sentenced to RI for seven years;

(4) All the accused-appellants were held guilty u/s 22(2) POTA and sentenced to RI for five years;

(5) All the accused-appellants were convicted u/s 4(b)(ii) of the Explosive Substances Act and sentenced to RI for seven years and fine of Rs. 25,000/- each, in default were ordered to undergo SI for three months;

(6) All the accused-appellants were also held guilty u/s 5(b) of the Explosive Substances Act and sentenced to undergo RI for seven years and fine of Rs. 25,000/- each, in default to undergo SI for three months

11. Feeling aggrieved, accused Mohd. Afzal Kumhar and Adil Nazir Keen filed a joint appeal (being CrI. A.No.811 of 2007) while other two convicted accused Bilal Ahmad Dar and Ansar Ahmad Dar had filed their separate appeals, being CrI.A. No. 89 of 2008 and CrI. A. No. 90 of 2008 respectively. However, all the three appeals were taken up together for hearing and so are now being disposed of by this common judgment.

12. The State, however, chose not to challenge the acquittal of the accused for the offences under Sections 3(b) & (5) and Section 20 POTA.

13. On behalf of accused-appellants Mohd. Afzal Kumhar and Adil Nazir Keen submissions were made by their counsel Ms. Kamini Jaiswal while for accused-appellants Bilal Ahmad Mir and Ansar Ahmad Dar their counsel S/Shri Maninder Singh and Ajay Kumar advanced arguments. The respondent State was represented in all the three appeals by Additional Public Prosecutor Shri M.N. Dudeja.

14. From the foregoing narration of the prosecution case as well as the defence pleas it is clear that at least on one aspect of the case there is no dispute

between the prosecution and the defence and that aspect is regarding the place of arrest of the accused- appellants. It is the prosecution case that the accused-appellants were staying in room No. 3 of Karan Hostel in Kotla Mubarakpur, New Delhi and they were arrested from there. Accused-appellants had also admitted that they were staying in room No. 3 of Karan Hostel and that they all were arrested from there only. However, there is a serious dispute between the two sides regarding the actual date of arrest of the accused-appellants. As per the prosecution case they were arrested on 14/01/02 while the accused persons claim that all the four were picked up by the police on 02/01/02 to be falsely implicated in a case of terrorism. It was submitted by the learned Counsel for all the appellants that since there have been many incidents of terrorism in our country over the last many years the Indian intelligence agencies have been claiming that the acts of terrorism were being resorted to by militants belonging to terrorist organizations to liberate India occupied part of Kashmir and that in that mission Kashmiri youth were also taking active part. So, learned Counsel submitted, every year around Republic Day and Independence Day the police arrests some Kashmiri boys to create fear amongst them. It was also contended that this time since there was a terrorist attack on the Parliament House in December, 2001 the Intelligence Agencies must have apprehended some untoward incidents in the Capital around the Republic Day also and as a precautionary measure it must have been decided to apprehend some Kashmiri boys and since the Intelligence Agencies keep a track and have all the information about the places where Kashmiri boys coming to Delhi for studies or business etc. stay, Karan Hostel, where the appellants, who are all Kashmiri boys, were staying was targeted for picking up Kashmiri boys to be detained and in that process the appellants came to be picked up on 02/01/02. And this suggestion was put also to the investigating officer PW-18 ACP Rajbir Singh in his cross-examination(which was denied) as also to PW-12 SI Sanjay Dutt Govind to whom it was also put that in 2000 and 2001 also around the same time he had conducted raid at Karan Hostel. However, counsel further submitted, since the near and dear ones of these accused in Kashmir came to know about that illegal action of the Delhi Police they protested and their protests reached the authorities in Delhi and then in order to avoid the situation becoming awkward for them because of their having illegally confined innocent persons the police showed on papers the arrest of the appellants on 14/01/02 for their having been found in possession of RDX etc. which in fact were never recovered from the accused. Learned Counsel also submitted that to substantiate the plea that the accused had been picked up from the Hostel on 02/01/02 they had examined evidence of totally independent witnesses but the same had been brushed aside by the trial Court on unsustainable grounds.

15. Now, as far as the defence plea is concerned the same cannot be taken up for consideration at the outset since it has to be examined after the prosecution evidence has been analysed by us. A plea in defence, even if it is found to be not proved, does not entitle the prosecution to secure an order of conviction on the

accused for that reason alone. It has to establish its case independently. If after trial the prosecution is found to have discharged the initial burden of establishing its allegations against the accused the occasion then arises for examining the defence plea to find out if the same has been proved on the scale of probabilities and then it is considered in whose favour the scale has tilted. So, we shall first examine and re-appraise the prosecution evidence independently to find out if the same establishes the allegations against the convicted accused persons or not and then would come to the defence plea.

16. The prosecution case was that the accused-appellants were members of a militant organization known as Lashkar-e-Toiba and their aim was to spread terror in India to overawe and wage war against the Government of India to ensure liberation of India occupied Kashmir. The prosecution had sought to establish its case relying upon the confessional statements of accused-appellants Mohd. Afzal Kumhar and Adil Nazir Keen recorded by PW-1 Balaji Srivastava, DCP, which according to the learned APP Mr. Dudeja could be used against the other two accused also who had faced trial for the same offences alongwith Mohd. Afzal and Adil Nazir. To further strengthen its case the prosecution had also relied upon the recoveries of huge quantity of RDX and Indian currency from accused Mohd. Afzal Kumhar and Adil Nazir Keen which they were carrying with them in separate bags at the time of their apprehension and also upon recoveries of about twenty five lacs of rupees and explosive material from room No. 3 of Karan Hostel on the pointing out of other two accused persons on 14/01/02. We shall first take the prosecution case regarding the confessions of accused-appellants Mohd. Afzal Kumhar and Adil Nazir Keen since in the criminal cases against terrorists, which according to the prosecution as well as the Designated Court the accused- appellants are, confessions of accused persons regarding their involvement in terrorist acts is the most formidable piece of evidence which the prosecution can place in the forefront during their trial since the basic ingredient of a confession is admission of guilt by the accused and there can be no better proof of the commission of a crime than the admission of guilt by the accused themselves. In *Sahib Singh Vs. State of Haryana*, the Supreme Court had also observed that:

...Conviction on "confession" is based on the maxim *habemus optimum-testem, confidante reum*" which means that confession of an accused is the best evidence against him. The rationale behind this rule is that an ordinary, normal and sane person would not make a statement which would incriminate him unless urged by the prompting of truth and conscience.

17. In "*Devender Pal Singh Vs. State National Capital Territory of Delhi and Another*", the Hon'ble Supreme Court had made a reference with approval to the following views of Justice M. Monir, author of "*Principle and Digest of Law of Evidence*":

...the confession, if once proved to have been made and made voluntarily, is one of the most effectual proofs in the law.

18. As noticed already, the Designated Court in the present case has rejected the confessional statements holding that the same were "manipulated" and "fabricated" by the police. This finding of the Designated Judge has emboldened the appellants in these appeals and relying upon that finding in their favour their counsel have forcefully contended before us that the entire case should have been rejected by the trial Court after coming to such a conclusion because if the police could manipulate and fabricate confessions of the accused it could have very conveniently made a false case of so-called recoveries of RDX etc. also and if that was a possibility, the benefit of doubt had to be extended to the accused. The learned prosecutor Mr. Dudeja had submitted that since these are appeals against a judgment of conviction, this Court is not bound to accept the findings of the trial Court in respect of the confessional statements of the accused and the prosecution evidence in that respect is to be analysed and re-appreciated by this Court independently and if that is done then we will be convinced that the Designated Court had discarded the two confessional statements on totally unsustainable grounds.

19. We are in full agreement with the submission of the learned prosecutor that even though the trial Court has rejected the confessional statements of two accused persons we can still reverse its findings if we find the same to be not based on sound reasons.

20. Although no confession made by an accused before a policeman is admissible in evidence under the general law of evidence but in the present case the confessional statements of two accused which were made before PW-1 DCP Balaji Srivastava can be considered as substantive evidence provided the same are found to have been made voluntarily by the accused. That is so since the same were recorded by a senior ranking police officer in exercise of the power vested in him in that regard u/s 32 of POTO. Section 32 reads as under:

Certain confessions made to police officers to be taken into consideration- (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before 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 like cassettes, tapes or sound tracks from out of which sound or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or rules made thereunder.

2. A police officer shall, before recording any confession made by a person under Sub-section (1), explain to such person in writing that he is not bound to make a confession and that if he does so, it may be used against him:

Provided that where such person prefers to remain silent, the police officer shall not compel or induce him to make any confession.

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

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

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

21. Section 32 of POTO was incorporated in POTA also when it was enacted in 2002. Before proceeding further we may briefly notice as to under what circumstances POTO and POTA came to be promulgated and why the Legislature made a departure from the Evidence Act and the Code of Criminal Procedure while enacting a provision like Section 32 of POTO and POTA. In view of the ever increasing terrorist activities in our country the Parliament has been coming out with special penal statutes to curb the menace of terrorism. In the year 1985 the Terrorist and Disruptive Activities (Prevention) Act (TADA) was enacted by the Parliament. Its constitutional validity was challenged on the grounds that it contained draconian provisions including the one relating to the admissibility in evidence of confessional statements of accused recorded by policemen. The Constitution Bench of the Supreme Court, however, in "Kartar Singh v. State of Punjab" : 1994 (3) SCC 569, upheld the validity of this Act including Section 15 whereunder also it was provided that confessional statement of an accused charged for some offence under TADA made before a police officer not below the rank of Superintendent of Police would be admissible in evidence. Section 15 of TADA, as it stood before its amendment in 1993, read like this:

15. Certain confessions made to police officers to be taken into consideration:

(1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872) but subject to the provisions of this section, a confession made by a person before 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 device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or rules made thereunder.

(2) The police officer shall, before recording any confession under Sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily.

22. In 1993, this Section of TADA was amended and confessional statement of an

accused was made admissible even against co-accused who was charged and being tried alongwith the maker of the confession and the same was also held to be not unconstitutional by the Constitution Bench.

23. In Kartar Singh's case the Hon''ble Supreme Court while dealing with the challenge to the Constitutional validity of various provisions of TADA had gone into the reasons behind promulgation of TADA. This is what the Hon''ble Supreme Court had noticed in paras No. 21, 30 and 33:

21. From the recent past, in many parts of the world, terrorism and disruption are spearheading for one reason or another and resultantly great leaders have been assassinated by suicide bombers and many dastardly murders have been committed. Deplorably, determined youths lured by hardcore criminals and underground extremists and attacked by the ideology of terrorism are indulging in committing serious crimes against the humanity. In spite of the drastic actions taken and intense vigilance activated, the terrorists and militants do not desist from triggering lawlessness if it suits their purpose....

30. It was only in the above prevailing circumstances, the Legislature has been compelled to bring forth these Acts (TADA) to prevent and deal with the peril of the erupting terrorism....

33. The Parliament, evidently, taking note of the gravity of terrorism committed by terrorists either with an intention to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people and the consequent widespread apparent danger to the nation, has felt the need of not only continuing but also further strengthening the provisions of TADA Act (Act 31 of 1985) in order to cope with the menace of terrorism, enacted Act 28 of 1987 bringing drastic changes with regard to the admissibility of confessions made to police officials prescribing special procedures and providing condign punishments etc., leave apart the question with regard to the validity of these provisions to be tested on the touchstone of the Constitution.

24. Regarding the confessional statements recorded u/s 15 of TADA the Supreme Court after the judgment in Kartar Singh" case (supra) has ruled in its various decisions that the confessional statements of accused, if shown to have been made voluntarily and truthfully and recorded by the competent police officer after complying with the procedural safeguards provided u/s 15 and the Rules framed under TADA, constitute substantive piece of evidence which can be made the sole basis of conviction and that too without any corroboration. In fact in most of the cases under convictions under TADA were upheld thereafter by the Apex Court relying upon confessional statements alone. In this regard we may make a useful reference to the decision of Hon''ble Supreme Court wherein the evidentiary value of a confession recorded u/s 15 of TADA was sought to be eroded on behalf of the convict and after considering earlier judgments on the

point Hon"ble Supreme Court held that confession u/s 15 of TADA was a substantive piece of evidence which could be made the sole basis of conviction without any corroboration. That judgment was rendered in Jameel Ahmed and Another Vs. State of Rajasthan, and the relevant paras of that judgment are being re-produced hereunder:

23. Since the prosecution case in these appeals is primarily founded on various confessions of the accused involving themselves as well as other co- accused, we will first consider the argument of the appellants that, assuming that the confessional statements have been proved to have been made in accordance with law and voluntary and truthful, even then can such confessions be relied upon solely to base a conviction on the maker of the confession, and if so, can it also be used against a co-accused and if so whether such confession requires corroboration or not, and if so required whether such corroboration need be general or should be of all material facts in the confession. The argument of learned Counsel in this regard is that the prosecution should prove the involvement of the accused by other evidence first and the confession of an accused can only be used as a corroborative piece of evidence and not as a substantive piece of evidence, that too against the maker only. This argument is basically founded on an assumption that Sections 25 to 30 of the Evidence Act also apply to the confessions recorded u/s 15 of the TADA Act. In support of this argument, the learned Counsel relies on the line of judgments of this Court which considered the scope of Sections 25 to 30 of the Evidence Act and the probative value of such a confession; one of such judgments is Mohd. Khalid v. State of West Bengal. The passage relied upon by the appellants in support of this contention of theirs in the said judgment runs thus:

It is only when the other evidence tendered against the co-accused points to his guilt then the confession duly proved could be used against such co-accused if it appears to affect him as lending support or assurance to such other evidence.

(emphasis supplied).

24. We do not think this principle laid down by this Court in Mohd. Khalid (supra) u/s 30 of the Evidence Act could be applied to confessions recorded u/s 15 of the TADA Act. Herein it is relevant to note that Section 15 of the TADA Act by the use of non-obstante clause has made confession recorded u/s 15 admissible notwithstanding anything contained in the Indian Evidence Act or the Code of Criminal Procedure. It also specifically provides that the confession so recorded shall be admissible in the trial of a co-accused for offence committed and tried in the same case together with the accused who makes the confession. Apart from the plain language of Section 15 which excludes the application of Section 30 of the Evidence Act, this Court has in many judgments in specific terms held that Section 30 of the Evidence Act has no role to play when the court considers the confession of an accused made u/s 15 of the TADA Act either in regard to himself or in regard to his co-accused.

25.

26. Therefore the argument of learned Counsel that a confessional statement of an accused made u/s 15 of the TADA Act can be used only to corroborate other substantive evidence produced by the prosecution cannot be accepted.

27. The next question for our consideration in this regard would be whether confession recorded u/s 15 of the TADA Act can be solely relied upon for basing a conviction on the maker of that confession....The Section further provides that such statement made to the Police Officer shall be admissible in evidence. Once the statement is admissible in evidence then like any other evidence, it is for the court to consider whether such statement can be relied on solely or with necessary corroboration. Therefore, the argument that as a matter of rule such statement u/s 15 of the TADA Act should not be relied upon without corroboration cannot be accepted. We have already noticed that this provision of law is a departure from the provision of Sections 25 to 30 of the Evidence Act....

28. Therefore, the argument of learned Counsel that merely because the statement has been recorded by a Police Officer the same should be treated as a weak type of evidence and should not be accepted without corroboration, cannot be countenanced.

25. The above quoted views of the Supreme Court were referred to with approval in a recent decision also of the Apex Court which is reported as "Mohamed Amin @ Amin Choteli and Anr. v. C.B.I." 2008 (14) Scale 240. This is what was observed in para No. 27 of this judgment:

27. The ratio of the above noted judgments is that if a person accused of an offence under the Act makes a confession before a police officer not below the rank of Superintendent of Police and the same is recorded by the concerned officer in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, then such confession is admissible in the trial of the maker as also the co-accused, abettor or conspirator not only for an offence under the Act but also for offence(s) under other enactments, provided that the co-accused, abettor or conspirator is charged and tried in the same case along with the accused and the Court is satisfied that requirements of the Act and Rules have been complied with. Whether such confession requires corroboration depends on the facts of the given case. If the Court is convinced that the probative value of the confession is such that it does not require corroboration then the same can be used for convicting the maker and/or co-accused under the Act and/or other enactments without independent corroboration. If a person accused of committing an offence under the Act challenges his confession on the ground that it was not made voluntarily, then the initial burden is on the prosecution to prove that all requirements u/s 15(1) of the Act and Rule 15 of the Rules have been complied with. Once this is done, the burden shifts on the accused person and it is for him to prove that the confession was not made voluntarily or that the same is not

truthful and if he adduces evidence during the trial to substantiate his allegation that the confession was not voluntary then the Court has to carefully scrutinize the entire evidence and surrounding circumstances and determine whether or not the confession was voluntary. The confession made u/s 15(1) of the Act cannot be discarded only on the ground of violation of the guidelines laid down in Kartar Singh's case because the same have not been incorporated in the Act and/or the Rules.

26. A perusal of various pronouncements of the Hon'ble Supreme Court rendered in cases of TADA after Kartar Singh's judgment shows that the confessional statements of the accused involved in those cases have been challenged on some kind of irregularities in the recording of those statements as well as the procedure adopted for that purpose. However, the Hon'ble Supreme Court in "Jayawant Dattatray Suryarao v. State of Maharashtra" AIR 2001 SCW 4717 while dealing with the challenge to the confessional statement on the ground of some irregularities observed as under:

Confessional statement before the police officer u/s 15 of the TADA is substantive evidence and it can be relied upon in the trial of such person or co-accused, abettor or conspirator for an offence punishable under the Act or the rules. The police officer before recording the confession has to observe the requirement of Sub-section (2) of Section 15. Irregularities here and there would not make such confessional statement inadmissible in evidence. If the Legislature in its wisdom has provided after considering the situation prevailing in the society that such confessional statement can be used as evidence, it would not be just, reasonable and prudent to water down the scheme of the Act on the assumption that the said statement was recorded under duress or was not recorded truly by the concerned officer in whom faith is reposed....

(emphasis supplied)

27. In Devinder Pal Singh's case (supra), the Hon'ble Supreme Court while dealing with the challenge to the confessional statement of the accused had also observed that merely because of non-observance of any procedural requirement under the Rules framed under TADA does not cause any prejudice to the accused and unless prejudice is shown to have been caused the confessional statement cannot be discarded because of non-observance of a procedural requirement. It was also observed that "Procedure is hand maid and not the Mistress of Law, intending to sub serve and facilitate the cause of justice and not to govern or obstruct it".

28. TADA lapsed in 1995 but since terrorism in the country continued unabated, The Prevention of Terrorism Ordinance, 2001 (POTO) was promulgated followed by promulgation of the Prevention of Terrorism (Second) Ordinance, 2001 in the wake of attack on the Parliament House on 13th December, 2001. In 2002 the Prevention of Terrorism Act, 2002 (POTA) was enacted replacing the said Second Ordinance of 2001. POTO had also a provision similar to Section 15 of TADA

regarding the confessions of accused made before senior ranking police officers. That is Section 32. The confession made by an accused u/s 32 POTA (which corresponds to Section 32 of POTA) has also thus to be considered as a substantive piece of evidence in view of the various decisions of the Supreme Court on Section 15 of TADA and also in view of the non-obstante provision in this Section also similar to the one which was there in Section 15 of TADA excluding the applicability of the provisions of the Evidence Act to such confessions.

29. In fact, Section 32 of POTA also came to be considered by the Hon'ble Supreme Court in a case now popularly known as Parliament Attack case, reported as AIR 2005 3820, "State v. Navjot Sandhu", and the views of the Apex Court in respect of this provision are to be found at page No. 3849 of AIR and are re-produced below:

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 (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, 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.. Thereafter, referring to the Constitution Bench judgment in Kartar Singh's case(supra) in which certain guidelines were laid down for being taken care of by the Parliament, the Hon''ble Supreme Court made the following observations (at page 3855) of AIR:

The Constitution Bench judgment 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....

And then at page 3857 the Court concluded the discussion relating to Section 32 of POTA by observing as under:

As the law now stands, the confession recorded by the police officer u/s 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.

30. So, what follows from the above-noted decisions of the Supreme Court is that the confession of an accused being tried for offences under TADA/POTA made before police are admissible in evidence provided, of course, the same were not made under any kind of compulsion or as a result of torture from any quarter. However, there can be a situation where confession of an accused would be admissible in evidence even if the confession was made under compulsion or as a result of torture. That exception would come into play if the accused is =tortured" and =compelled" by his own conscience to make a =confession of guilt" which, if not made, would kill him from within. Reference in this regard can be made usefully to the following observations also of the Supreme Court in Gurdeep Singh @ Deep Vs. The State (Delhi Admn.),

22. So the crux of making statement voluntarily is, what is intentional, intended, enameled by other influences, acting on one's own will, through his own conscience. Such confessional statements are made mostly out of a thirst to speak the truth which at a given time predominates in the heart of the confessor which impels him to speak out the truth. Internal compulsion of the conscience to speak out the truth normally emerges when one is in despondency or in perilous situation when he wants to shed his cloak of guilt and nothing but disclosing the truth would dawn on him. It sometimes becomes so powerful that he is ready to face all consequences for clearing his heart.

31. We may also notice the following observations of the Hon''ble Supreme Court

in a later judgment in Ravinder Singh @ Bittu Vs. The State of Maharashtra,

There can be no doubt that a free and voluntary confession deserves the highest credit. It is presumed to flow from the highest sense of guilt....

32. Let us now see what accused Mohd. Afzal Kumhar and Adil Nazir had claimed in their statements recorded by PW-1 Balaji Srivastava. Ex. PW-1/A is Mohd. Kumhar's statement and his preliminary questioning and its contents are re-produced below:

Confessional statement u/s 32 of the Prevention of Terrorism (Second) Ordinance, 2001.

Date: Thursday, January 24, 2002.

Place: Office of the Asstt. Commissioner of Police,

Southern Range, (Operation Cell),

Lodhi Colony, New Delhi.

Time: 1700 hrs.

Accused Mohd. Kumhar s/o Gulam Mohd. Afzal Kumhar r/o Telwani, Anantnag, PS Anantnag, J&K has been arrested in case FIR No. 18/2002 PS KM Pur. He has been produced before me by the IO Sh. Rajbir Singh ACP for recording his confessional statement u/s 32 of Prevention of Terrorism (Second) Ordinance, 2001, in the office of Asstt. Commissioner of Police, Southern Range, (Operation Cell), Lodhi Colony, New Delhi.

Now I have asked ACP Sh. Rajbir Singh to leave the room where the proceedings are being conducted. He has since left the room. Apart from myself and my Personal Assistant ASI Rajiv Sharma who shall record the statement directly on the computer, only the accused Mohd. Kumhar is present. The door of the chamber is also closed.

I have explained to the accused Mohd. Afzal Kumhar that he is not bound to make a confession and that if he does so, any confession he may make, may be used as evidence against him and I believe that this confession is being made voluntarily. It is being taken in my presence and hearing. I have specifically asked him the language in which he wants to make the same. He has replied that he can read, write, speak and understand English. I am not under any compulsion, threat or inducement to make any confessional statement. I have been informed and have understood that my statement can be used as evidence against me. I am making my statement voluntarily.

Sd/-, 24/01/02

Name of Accused : Mohd. Kumhar

Date:

Having satisfied myself that the accused is not under any compulsion, threat or inducement to make a confessional statement, I proceed to accordingly record his statement in English which is as under:

I was born in the year 1970 in Village Telwani, PS Anantnag, J&K. I studied 10+2 from M.L. Higher Secondary School and completed Diploma in Civil Engineering in 1993. My father is a contractor in R&B division of Anantnag. In 1994, I came to Delhi and did a Diploma in AUTOCAD from India Education Centre, Connaught Place. In 1999, I joined Rural Development Department, Block Shangus, Anantnag, as a Junior Engineer and since then I have been working there. I was familiar with Adil since childhood, who lived in my neighbourhood in Village Telwani. Adil had a Kirana shop in Telwani, Dist. Anantnag and shifted to Chini Chowk, Anantnag in the year 2000. He is also making a shopping complex in Anantnag. Ansar, who owns a masala factory, named Nafis Masala Mill, in Dayalgam, is a friend of Adil and I.

In 1999, Abu Amaar, a Pakistan national and an LeT militant (District Commander in Anantnag) along with his associates started coming to Telwani and they used to stay forcibly in our houses. The visits of these militants became frequent in year 2000. During these visits I got acquainted with Abu Amaar. Adil also came in contact with Abu Amaar during this period. He motivated us to work for the tanzim and also lured that working for tanzeem would be monetarily beneficial for us. I along with Adil and Ansar joined LeT. We used to provide shelter and amenities to the LeT militants. During this period, Abu Amaar also provided us basic training in making IEDs.

About two months back Abu Amaar contacted me and directed to bring hawala money from Delhi for the Tanzim and also told me to take Adil for this task. In then contacted Adil and told him that Abu Amaar had called him for some task. Adil and I met Abu Amaar in a house in village Shangus, Anantnag. During this meeting Abu Amaar asked me and Adil to bring some money for the Tanzim from Delhi. On 29.12.2001, Abu Amaar again contacted me and told that very soon we would have to go to Delhi to collect money for Abu Amaar. He told that we would be collecting Rs. 35 lacs from Delhi and out of which we can use Rs. 8-10 lacs for ourselves. Abu Amaar directed us to go to Delhi the next day and gave us Rs. 10 thousand for meeting expenses. He also gave us two currency notes of Rs. 10/- as token for taking the delivery of hawala money. He also informed that we would be receiving some explosives, which were to be planted along the route of Republic Day Parade.

Accordingly, I along with Adil and Ansar arrived in Delhi on 31.12.2001. Amaar gave us the number of one Bilal Ahmed Meer a native of Vill. Dayal Gam, Anantnag, who was also a friend of Ansaar and was staying in Room No. 3, Karan Hostel, 1804/2, Parsadi Gali, Kotla Mubarakpur, New Delhi. (Phone # 4655730). Abu Amaar told us that Bilal was also an L-e-T sympathizer and we would be staying at his place and receive all the necessary directions for the operation, there. accordingly, I along with Adil and Ansar came to Delhi and started staying

at Bilal's room. I was given code name Nazir for the operation.

On 02.02.02, at about 2.30 PM Adil received a call for the delivery of hawala money from the Pakistan contact of Abu Amaar and he fixed the time and place for the delivery of hawala money. Accordingly, I along with Adil went to Bangali Sweet corner, South Extension-I at 6.45 PM where two persons contacted us, and finally delivered the hawala money of Rs. 6.75 lacs to us in the hostel after taking one of the token currency notes. This person code name Nissar also gave us one bag containing white coloured explosive material, which has been recovered from Bilal's room.

After that Nissar called us on Bilal's number and directed to wait for further instructions for receiving the remaining money. On 05.01.2001, the caller from Pakistan directed to receive Rs. 15 lakhs from hawala operator namely Dalip Bhai of M. Ramesh Kumar & Co., 4482, Ist Floor, Dau Bazar, Cloth Market, Chandni Chowk, New Delhi and gave his telephone numbers 3988310 and 3157693. Accordingly, I contacted Dalip Bhai on the said telephone number and on the same day Adil and I received Rs. 15 lakhs from his above shop after giving him the token currency note of Rs. 10/-. During this period I received instructions from Abu Amaar and his associates from Kashmir & Pakistan and I also gave them the confirmation of receipts of the hawala transactions and delivery of explosive material. Abu Amaar also directed us to buy a mobile phone & a cash card to receive further instructions. Accordingly, on 07.01.02, Adil purchased a mobile phone and cash card No. 98113-36055 and we subsequently, informed them our mobile number.

On 11.01.2002, I along with Adil again received Rs. 3.25 lakhs through hawala from Dilip Bhai of M. Ramesh & Company. On 13.01.2002, I received instructions of Abu Amaar at Bilal's phone and we were directed to collect another hawala payment of Rs. 10 lakhs from Dilip Bhai from Fateh Puri, Chandni Chowk. This hawala transaction was to take place on 14th January, 2002. I gave new token number of Rs. 10 note. The caller also informed us that we would be receiving some more explosives from Nisar, who would contact us soon. New day on 14.01.2002, Nisar called us and directed us to meet near gate No. 2 of Jama Masjid at about 6 PM, and collect the explosives from him. Accordingly, I along with Adil went to M. Ramesh Kumar & Company and after giving him a pre determined token currency of Rs. 10/- both of us collected hawala payment of Rs. 10 lakhs from him. Thereafter, Adil and I went to Jama Masjid, where we met Nisar, who gave us two packets containing explosives and also gave us electronic detonators and directed us to wait for further instructions of Abu Amaar. After receiving the consignment of explosives and the hawala payment when we reached near Karan Hostel in Kotla Mubarakpur, we were apprehended by the police and thereafter, our two other associates Ansar and Bilal were also arrested and hawala payments and explosives were also recovered.

We had been directed by Abu Amaar before leaving Kashmir to receive the areas where armoured vehicles are parked and also to look out for the possible places

on the route of Republic Day Parade where maximum damage due to explosives can be done. We were also directed by Abu Amaar to prepare a few IEDs and plant them on the route of Republic Day Parade during rehearsals so that circumstances would be created compelling cancellation of the Republic Day Parade. On our pointing out Dilip Bhai has already been arrested. I can also reveal the hideouts of Abu Amaar & his associates in Kashmir and get him arrested.

33. The preliminary questioning and statement made by accused Abdul Nazir Keen are recorded in Ex.PW-1/B and the same are re-produced below verbatim:

Confessional statement u/s 32 of the Prevention of Terrorism (Second) Ordinance, 2001.

Date: Thursday, January 24, 2002.

Place: Office of the Asstt. Commissioner of Police, Southern Range, (Operation Cell),

Lodhi Colony, New Delhi.

Time: 1900 hrs.

Accused Adil Nazir Keen s/o Nazir Ahmed Keen r/o Chini Chowk, PS Sadar Distt., Anantnag, Kashmir and village Telwani, PS Anantnag, J&K has been arrested in case FIR No. 18/2002 PS KM Pur. He has been produced before me by the IO Sh. Rajbir Singh ACP for recording his confessional statement u/s 32 of Prevention of Terrorism (Second) Ordinance, 2001, in the office of Asstt. Commissioner of Police, Southern Range, (Operation Cell), Lodhi Colony, New Delhi.

Now I have asked ACP Sh. Rajbir Singh to leave the room where the proceedings are being conducted. He has since left the room. Apart from myself and my Personal Assistant ASI Rajiv Sharma who shall record the statement directly on the computer, only the accused Adil Nazir Keen is present. The door of the chamber is also closed.

I have explained to the accused Adil Nazir Keen that he is not bound to make a confession and that if he does so, any confession he may make, may be used as evidence against him and I believe that this confession is being made voluntarily. It is being taken in my presence and hearing. I have specifically asked him the language in which he wants to make the same. He has replied that he can read, write, speak and understand English.

I am not under any compulsion, threat or inducement to make any confessional statement. I have been informed and have understood that my statement can be used as evidence against him. I am making my statement voluntarily.

Sd/-, 24-01-02

Name of Accused: Adil Nazir Keen Having satisfied myself that the accused is not under any compulsion, threat or inducement to make a confessional statement, I

proceed to accordingly record his statement in English which is as under:

I was born in 1976 in Chini Chowk, PS Sadar, Distt. Anantnag, Kashmir. My father was a headmaster in Government school and my mother is a supervisor in Anganwadi. I studied up to 10+2 and started my business of Kirana items, hosiery items, clothes items and etc. I know Kumhar who is a Junioir Engineer in Shangus, Rural Development Department. I also know Ansar who owns spice factory since childhood.

In 1999 while my family was in Tailwani, Ammar a LeT militant (District Commander) along with his associates started coming to Tailwanil the militant and his associates used to forcibly stay in the houses of the natives including mine. The visits of these militants became frequent in year - 2000. During these visits I got acquainted with Abu Amaar. In 2001 my family shifted to Chini Chowk, Anantnag. who is a close friend of mine also came in contact with Abu Amaar during this period. Abu Amar motivated me Mohd. and Ansar to work for the Tanzim and also said that working for militant organization for the cause of Jihad, would also be monetarily beneficial for us. Accordingly I along with and Ansar joined Lashkar-e-Tayyaba. Abu Amaar provided us basic training in making IEDs. Besides this, we continued to provide shelter and other amenities to the LeT militants.

About two months ago came to me and told that Abu Amaar had called me for some task. I accompanied to meet Abu Amaar in a house in village Shangus, Anantnag. During this meeting Abu Amaar asked and I to bring some money for the Tanzim from Delhi. On 29.12.2001 again came to me and told that very soon e would be going to Delhi to collect money for Abu Amaar. He told that we would be collecting R. 35 lacs from Delhi and out of which we could use Rs. 8/10 lacs for ourselves. I agreed as and I were already planning to start a joint business of packing tobacco for further sale in J&K and we decided that we could use our share of Rs. 8/10 lakhs in our business. Abu Amaar directed us to go to Delhi the next day and accordingly we left for Delhi on 30.12.2001. Abu Amaar also gave Rs. 10 thousand for meeting the expenses. He also gave two currency notes of Rs. 10/- as token for taking the delivery of hawala money. Abu Amaar also directed us that apart from the hawala money we were to receive a consignment of explosive which was to be planted at strategic places along the route of Republic Day Parade.

Accordingly, I along with and Ansar arrived in Delhi on 31.12.2001. Abu Amaar had given us the number of one Bilal Ahmed Meer a native of Vill. Dayal Gam, Anantnag, who was staying in Room No. 3, Karan Hostel, 1804/2, Parsadi Gali, Kotla Mubarak Pur, New Delhi and having a PP telephone No. 4655730. Bilal is a friend of Ansar since childhood. Abu Amaar told us that Bilal was also an LeT sympathizer and we would be staying at his place and receives all the necessary directions for the operation there. accordingly, I along with and Ansar came to Delhi and started staying at Bilal's room in Kotla Mubarakpur. We were given code name Nazir for the operation. On 02.01.02, in the afternoon I received a

call for the delivery of hawala money from the Pakistan contact of Abu Amaar and he fixed the time and place for the delivery of hawala money. Accordingly, I along with went to Bangali Sweet Corner, South Extension-I at the given time in the evening where two persons contacted us, and finally delivered the hawala money of Rs. 6.75 lacs to us in the hostel after taking one of the token currency notes. This person code name Nisar also gave us one bag containing about 4 Kg. of white coloured explosive material and told us to wait for further directions. This explosive has already been recovered from Bilal's room.

After that Nissar called on Bilal's number and directed to wait for further instructions for receiving the remaining money. On 05.01.2001, the caller from Pakistan directed to receive Rs. 15 lakhs from hawala operator namely Dlip Bhai of M Ramesh & Co., 4482, 1st Floor, Dau Bazar, Cloth Market, Chandni Chowk, Delhi and gave his telephone numbers 3988310 and 3157693. Accordingly, contacted Dalip Bhai on the said telephone number and on the same day I and received Rs. 15 lakhs from his above shop after giving him the token currency note of Rs. 10/-.

Abu Amaar directed us to buy a mobile phone & a cash card to receive further instructions. Accordingly, on 07.01.02, I purchased a mobile phone and cash card No. 9811336055 and we subsequently, informed them our mobile number. During this period received instructions from Abu Amaar and his associates from Kashmir & Pakistan and we also gave them the confirmation of receipts of the hawala transactions and delivery of explosive material. On 11.01.2002, I along with again received Rs. 3.25 lakhs through hawala from Dilip Bhai of M Ramesh & Company. On 13.01.2002, received instructions of Abu Amaar at Bilal's phone and we were directed to collect another hawala payment of Rs. 10 lakhs from Dilip Bhai from Fateh Puri, Chandni Chowk. This hawala transaction was to take place on 14th January, 2002. The caller also informed us that we would be receiving some more explosives from Nisar, who would contact us soon.

Next day on 14.01.2002, Nisar called us and directed us to meet near gate No. 2 of Jama Masjid at about 6 PM, and collect the explosives from him. Accordingly, I along with went to M. Ramesh Kumar & Company and after giving him a pre determined token currency of Rs. 10/- both of us collected hawala payment of Rs. 10 lakhs from him. Thereafter, and I went to Jama Masjid, where we met Nisar, who gave us two packets containing explosives and also gave us electronic detonators and directed us to wait for further instructions of Abu Amaar. After receiving the consignment of explosives and the hawala payment when we reached near Karan Hostel in Kotla Mubarakpur, we were apprehended by the police and thereafter, our two other associates Ansar and Bilal were also arrested and hawa payments and explosives were also recovered.

Abu Amaar had directed us before leaving Kashmir to receive the areas where army vehicles are parked and also to lookout for possible places on the route of Republic Day Parade where maximum damage due to explosives can be done. He had also directed to prepare a few IEDs and plant them on the route of Republic

Day Parade during rehearsals so that circumstances would be created compelling cancellation of the Republic Day Parade. I can also reveal the hideouts of Abu Amaar & his associates in Kashmir and get him arrested.

34. Now, We shall examine whether these statements were made by accused Mohd. Kumhar and Adil Nazir Keen and were recorded truthfully after ensuring observance of all the requisite procedural safeguards and if they made the same, whether they had done that voluntarily. That can be found out only after examining the evidence of the concerned witnesses and so we now proceed to undertake that exercise. To prove these two confessional statements the prosecution had examined PW-1 DCP Balaji Srivastava who had recorded the same. In his chief- examination he deposed that on 24-01-2002 he was working as DCP, Special Branch, Delhi Police and on that day ACP Rajbir Singh(PW-18), the investigating officer of this case, had produced before him accused Mohd. and Adil for recording of their confessional statements for which they had expressed their willingness. He also deposed that ACP Rajbir Singh had on 22-01- 2002 informed him on 22-01-2002 that these two accused persons had expressed their willingness for making confessional statements before the DCP and then he had fixed the date of 24- 01-2002 for recording of the statements. Both the accused were brought before him at the office of ACP, Southern Range, Operation Cell at 5 p.m., as had been directed by him. PW-1 further deposed that before recording of the confessional statements of the two accused persons he had asked them individually and separately whether they had expressed willingness to make confessional statements and both of them had answered in positive. He had also asked them whether there was any threat or pressure upon them to which they had replied that they were not under any sort of threat, inducement or pressure. He further deposed that he had asked the accused persons about the language in which they would like to make their statements and both of them had told him that they could read, write and speak English. PW-1 further deposed that after warning the accused that they were not bound to make any confession and in case they decide to do that their confessions could be read against them in evidence but despite that warning both the accused showed their willingness to make confessional statements and after satisfying himself that the willingness of the accused to make confessional statements was voluntary he had recorded their statements on computer. He further deposed that both the accused had read their confessional statements on the computer and then their print-outs were taken out and the accused had read the same also and thereafter had signed on all the pages and he himself had also signed the confessional statements on the last page. PW-1 further stated that when the statement of accused Mohd. was recorded besides himself his PA and the accused there was nobody else present in the room and when recording of statement of this accused was over only then the other accused Adil was called inside the room and was sent out. This witness proved the preliminary questioning and confessional statement of accused Mohd. as Ex. PW-1/A and the preliminary questioning and confessional statement of accused Adil as Ex. PW- 1/

B. In the cross-examination of PW-1 it was suggested to him that the accused had not made any confessional statements before him and that the confessional statements were already available on the computer created by the investigating officer and only a print-out of the same was produced before him and he had made the accused persons to sign the same. The witness refuted that suggestion.

35. It is also the prosecution case that after the recording of the aforesaid confessional statements of accused Mohd. Kumhar and Adil Nazir Keen by DCP Balaji Srivastava on 24-01-2002 both these accused were produced before Addl. Chief Metropolitan Magistrate Shri V.K. Maheshwari (PW-5) on 25-01-2002 as was required to be done u/s 32(4) & (5) of POTO. Shri V.K. Maheshwari has also been examined by the prosecution and he has deposed that when accused Mohd. Kumhar and Adil Nazir Keen were produced before him along with their confessional statements recorded by DCP Balaji Srivastava he had enquired from both the accused persons in respect of their confessional statements and whatever they had stated before him was recorded by him in the proceeding sheet prepared separately in respect of both the accused persons. PW-5 proved his proceedings in respect of the accused as Ex.PW- 5/A and statement of Mohd. Afzal Kumhar as Ex.PW-5/B and that of accused Adil Nazir Keen as Ex.PW-5/C. The proceedings recorded by the ACMM that day, Ex.PW-5/A, are being re-produced below:

25.1.2002

Present : ACP Rajbir Singh.

He has produced before me accused Mohd. Afzal Kumhar S/o Gulam Mohd. Afzal Kumhar and Adil Nazir Keen S/o Nazir Ahmed Keen, and identified them. IO stated before me that these accused persons produced before DCP Sh. Balaji Srivastava on 24.1.2002. They have tendered their statements voluntarily before DCP Sh. Balaji Srivastava. He has also produced before me their statements in a sealed envelope, seal with the seal of DCP, SB, Delhi. IO made a request that as per provision of Section 32(4) & (5) of POTO, confirmation of the statements made by these accused may be sought from the accused. Seal of envelope unsealed. I found another sealed envelope inside this envelope which has also been stappled. This envelope has also been opened. I found two statements in this envelope, one is of accused Mohd Kumhar and another is of Adil Nazir Keen recorded by DCP Sh. Balaji Srivastava. Both these statements have been typed, bearing the signatures of DCP and of accused persons. After going through both the statements I put my initial on each sheet of the statement. Statement of Mohd. Kumhar is of three sheets while the statement of accused Adil Nazir Keen has also been written on three sheets. I also put date below my initial.

I came inside my chamber, accused No. 1 Mohd. has also been called inside my chamber, other accused and police officer sent outside the Court room along with IO. I called my Peon inside of my chamber for security purpose. Custody of accused has been handed over to the Peon. Inside my chamber I, myself, my

peon and my steno present. Window/doors of the chamber closed in such a manner that nobody from outside can see the accused or accused can see anybody outside the chamber. Accused has been explained by me that he is not bound to make any confessional statement to any authority. He has further been informed that in case he will make any confessional statement, same can be used in evidence against him. In enquired from accused whether the has made his statement before DCP Sh. Balaji Srivastava. Accused stated before me that he has made his statement before the concerned officer voluntarily, according to his own wishes, without any fear or torture/pressure. I also enquired from accused whether he is having any injury on his body. Accused has stated that he has no injury on his body. I further told him that he is in the Court he is at liberty to make any complaint about any authority/officer or anybody if he has any. Accused has stated that he has no complaint against anyone. Hence he has nothing to complain. I recorded his statement separately without oath to this effect. Accused signed the statement after reading and understanding the same. Thereafter below the signatures of accused IO who has been called inside, also put his signatures in token of identification of accused.

At this stage, this accused is sent outside my chamber.

At this stage, accused No. 2 Adil Nazir Keen has been called inside my chamber. Inside my chamber, I, my steno, and my Peon are present. Chamber is closed. All the windows/doors has been closed in such a manner that nobody from outside can see the accused or accused can see anybody outside the chamber.

Accused Adil Nazir Keen has been explained by me that he is not bound to make any confessional statement to any authority. He has further been informed that in case he will make any confessional statements, same can be used in evidence against him. In enquired from accused whether he has made his statement before DCP Sh. Balaji Srivastava. Accused stated before me that he had made a statement before DCP Sh. Balaji Srivastava voluntarily, according to his own will and without any pressure or coercion. Nobody has induced him to make the statement. I also enquired from accused whether he is having any injury on his body. Accused has state that he has no injury on his body. I further explained him that he is in the Court before a Magistrate(ACMM). He is at liberty to make any complaint against anybody if he has any. However, accused stated that he has no complaint against anybody. I recorded his statement to this effect without oath. Accused signed the statement made by him before me after reading any understanding the same. At this stage, IO has been called inside to put his signatures in token of identification of accused.

36. The statement Ex.PW-5/B of accused Mohd. Afzal Kumhar is also re-produced below:

I am Diploma holder in Civil Engineering and also Diploma Holder in AUTOCAD and I am working as Jr. Engineer in Rural Development Department Anantnag, J&K. I know English and can speak and write the same. On 24.1.2002 I was

produced before DCP. I made my statement before him. I made my statement according to my own will without any pressure. Nobody was induced or threatened me to make my statement. None has tortured me. I have been treated nicely since the date of my arrest on 14.1.2002 till today. I have no complaint to make about anybody. My statement was recorded on my dictation. I signed the statement after reading and understanding. I have seen my statement today. It bears my signatures. I identify the same.

Sd/-

ACMM/New Delhi

25.1.2002

I am signing after reading and understanding my statement in the Court today.

Sd/-

(Mohd. Afzal Kumhar)

37. The statement Ex. PW-5/C of accused Adil Nazir Keen is re-produced below:

I am doing business of Kiryana item and Hosiery items after doing my 10+2 examination from Hanifia Institute, Ananatnag. My age is about 26 years. I am well-versed in English. I put my signatures in English. I can also write English and understand English. On 24.1.2002 I was made to appear before DCP by the Police Officer. DCP recorded my statement which I have tendered myself. I made my statement according to my own wishes. Nobody has tortured me to make my statement. No one has guided me as to what statement is to be made. I made statement without any enticement or any promise. I have nothing to complain about anybody. DCP has recorded my statement as I disclosed to him. I have seen my statement made before DCP now before this Court. I have gone through the statements it is the same statement which has been made. I also identify my signatures on the statement.

Sd/-

ACMM/N. Delhi

25.1.2002

I have gone through the above statement which I have made today it is correctly recorded as given by me. I also confirm my statement made by me before DCP.

Sd/-

(Adil Nazir Keen)

38. It is not in dispute that after the ACMM had recorded these confirmatory statements of the two accused they were remanded to judicial custody same day.

39. In the cross-examination of PW-5 Shri V.K. Maheshwari a suggestion was put to him on behalf of accused Mohd. Afzal Kumhar and Adil Nazir Keen that these accused were not produced before him and that he had recorded the proceedings at the instance of the investigating officer in a routine manner and also that the accused had not signed in his presence, which he denied. Another contradictory suggestion put to the witness was that on 25/01/02 the entire Patiala House Court Complex including his Court was sealed by security personnel. PW-5 denied that suggestion also.

40. In our view, nothing could be elicited in the cross-examination of PW-1 DCP Balaji Srivastava and PW-5 Shri V.K. Maheshwari, ACMM, New Delhi which could create any doubt regarding creditworthiness of their evidence as also in respect of their satisfaction regarding the voluntary character of the confessions made by accused Mohd. Afzal Kumhar and Adil Nazir Keen. No good reason could be put forth before us by the learned Counsel for these two accused persons for disbelieving the evidence of these witnesses. The DCP had satisfied himself, after questioning the two accused and also warning them that they were not bound to make any statement and in case they would do that their statements could be used against them, that both the accused were willing to make confessional statements voluntarily and we do not find any fault with his satisfaction or commission of violation of Section 32 of POTO. On an independent analysis of the evidence of PWs 1 & 5 we find that their evidence establishes beyond any doubt that the confessional statements Ex. PW-1/A and Ex. PW-1/B of accused Mohd. Afzal Kumhar and Adil Nazir Keen respectively were recorded correctly and the same had been made by these two accused voluntarily. We are not inclined to accept the plea of these two accused that a police officer of the rank of Deputy Commissioner of Police and also the Addl. Chief Metropolitan Magistrate would have recorded their statements falsely and without the accused persons having actually made the same before them. Their statements were quite elaborate and contained so much personal details which the DCP could not be expected to know and none of the two accused has claimed that their personal background mentioned in the statements was not correct. It is significant to note that these two accused persons have not disputed the fact that the confessional statements proved by PW-1 and the confirmatory statements proved by PW-5 were having their signatures. Both these accused admittedly are well educated and know English language fully well. They had made endorsements in English in their own handwriting before PW-5 affirming that whatever PW-5 had recorded in their confirmatory statements was correct. These two accused have admitted this fact at the time of recording of statements u/s 313 Cr.P.C. Although it was also stated that they had written whatever was dictated by ACP Rajbir Singh but that statement cannot be accepted as no such suggestion was given to PW-18 ACP Rajbir Singh or the ACMM in their cross-examination.

41. Accused Mohd. Afzal Kumar had in his statement u/s 313 Cr.P.C. stated in reply to Question No. 23 pertaining to his confessional statement Ex. PW-1/A that they (he was obviously referring to co-accused Adil Nazir also) were produced

before some police officer who did not tell his rank and did not ask them anything except name and address. It was not claimed that the statement Ex.PW-1/A was not signed by him or that he had not read its contents. And when asked about the statement of his recorded by the ACMM his reply was that he and others were not produced before ACMM and they were made to sign some pre-written papers.. Accused Adil Nazir Keen also had denied having made any statement before the DCP and regarding the statement before the ACMM he claimed that he was made to sit outside the court room and made to sign on paper. However, when PW-5 was cross-examined no such suggestion was put to him and on the contrary a totally unbelievable suggestion was put to him that on 25/01/02 the entire Patiala House Court including his Court had been sealed by the security personnel. To PW-18 ACP Rajbir Singh it was also suggested, which was also denied by the witness, that these accused were not produced in the chamber of ACMM and instead the Naib Court had brought the proceedings and got signed from the accused =in the court". Although in the cross-examination of PW-18 ACP Rajbir Singh it was further put to him that he had got the signatures of the accused persons on confessional statements =under duress and force" but when statements of the two accused were recorded u/s 313 Cr.P.C. this plea was abandoned and what plea they took has already been noticed. At that time nothing was said by them that PW-18 had coerced them in order to get their signatures on the confessional statements. The accused, in any case, have not spelt out as to how and in what manner and by whom they were made to sign pre-written papers. Here, we may refer to a decision of the Supreme Court in S. N. Dube Vs. N. B. Bhoir and Others, wherein also the accused against whom their confessional statement u/s 15 of TADA were being used against them had claimed that their confessions were obtained by the police officer after exerting coercion and physical and mental torture. The Supreme Court refused to accept the said plea of the accused since they had not attributed any specific act of coercion etc. to the concerned police officer in his cross-examination. In Devender Pal Singh Vs. State National Capital Territory of Delhi and Another, also similar view was taken and the relevant lines from para No. 10 of that decision are extracted below:

10. A mere statement that requisite procedures and safeguards were not observed or that statement was recorded under duress or coercion, is really of no consequence. Such a stand can be taken in every case by the accused after having given the confessional statement. It could not be shown as to why the officials would falsely implicate the accused. There is a statutory presumption u/s 114 of the Evidence Act that judicial and official acts have been regularly performed. The accepted meaning of Section 114(e) is that when an official act is proved to have been done, it will be presumed to have been regularly done. The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not judicial approach to distrust and suspect him without good grounds therefor. Such an attitude can do neither credit to the magistracy nor good to the public. It can only run down the prestige of police

administration....

(emphasis laid)

The Supreme Court in the same judgment had in para No. 6 made a reference to its earlier decision in *Jayawant Dattatray Suryarao Vs. State of Maharashtra*, , wherein it had also accepted the position that there could be some cases where the power is misused by the police but then had also observed that such a contention can be raised in almost all the cases and it is for the Court to decide to what extent the said statement is to be used.

42. At least, the accused admit that they had signed on papers on which something was written. They have not claimed that they had not gone through those papers or were prevented from doing that. Nor any such grievance was raised by the accused before the Designated Court whenever they were produced there by the investigating officer seeking their police/judicial remand or even when they had appeared in Court after taking of cognizance by the Designated Judge and also when they were supplied the documents submitted with the charge-sheet including the statements recorded by PWs 1 and 5. In *Mohd. Amin's case*(supra) also the accused persons had not disputed their signatures on their confessional statements and taking that fact into consideration as also the fact that the allegations made by them regarding coercion, torture etc. after more than one year of recording of confessions it was held that the plea of torture etc. was afterthought and products of ingenuity of their advocates and that statements made by them u/s 313 Cr.P.C. were also the result of afterthoughts. In the present case, it is also significant to note that none of the accused had taken a plea during investigation stage that after their arrest they were tortured or in any other way compelled to sign the documents purporting to be their confessional statements. And if at all there had been any coercion from the police they could have easily informed the ACMM that they had not made the confessional statements which had been placed before him by the police for getting the same confirmed from them. They did not do that. It is also worth noticing that the prosecution case was that only two of the accused had volunteered to make confessional statements and the other accused had not shown any such willingness. Now, if the confessional statements of the accused were to be fabricated the police could have prepared similar statements of other five accused also. That was not done. The contradictory stands taken by the accused also lend assurance to the prosecution case that the two accused had made confessional statements before PW-1 and that too voluntarily. In *Jameel Ahmed's case*(supra) the Supreme Court had also observed that an accused taking contradictory stands in respect of his confessional statement by first claiming that his signatures were taken on blank papers and then later on at the stage of recording of his statement u/s 313 Cr.P.C. that his signatures were taken on pre-written papers would show that the statement was in fact made by the accused. Similar view was taken by the Hon'ble Supreme Court in *Mohd. Amin's case*(supra) also. In fact, in that case the Hon'ble Supreme Court had found

contradictory statements in respect of the confessional statement made by the accused at the stage of recording of his statement u/s 313 Cr.P.C. and in his SLP and taking note of the contradictory stands the Hon'ble Supreme Court rejected the argument that the confessional statement was not a voluntary one. So, we are not inclined to accept these pleas of the accused persons, which are clearly an afterthought, in preference to the sworn testimony of the DCP and ACMM who had no axe to grind against the accused persons or any reason whatsoever to fabricate their confessional statements. The confessional statements were recorded by the DCP after due compliance of all the procedural safeguards enumerated in Section 32 of POTO and in a free atmosphere and as has been noticed already after recording of those statements the two accused had been remanded to judicial custody on 24th January itself.

43. The Designated Judge has although discarded the confessional statements but in fact, a perusal of para No. 59 of the impugned judgment shows that the learned Designated Judge was really not confident about her conclusion regarding the confessional statements inasmuch as in this para the learned Judge herself relied upon some part of the confessional statements regarding the prosecution case that the accused-appellants were indulging in terrorist activities of collecting explosives for causing explosions in Delhi on the route of Republic Day parade as well as receiving hawala money on the instructions of one Abu Amaar. The Judge also observed that the confessional statements were uncorroborated and that "there is nothing on record to suggest that any enquiry was conducted by the IO of the case...to verify the confession made by both the accused....Now, whether a confessional statement requires some corroboration or not is one thing and whether statement was made at all by an accused and that too voluntarily is another thing. If the statement is found to be not made voluntarily then no amount of corroboration can make it a voluntary one. In view of the contradictory observations of the learned Designated Judge we shall now have to consider the reasons given in support of the final conclusion regarding the two confessional statements. The grounds of challenge to those confessional statements put forth on behalf of these two accused persons before the Designated Court and which were accepted also were re-iterated before us also by the learned Counsel for these two accused-appellants. One of the reasons for rejecting the confessional statements given by the Designated Judge was that before recording of the statements PW-1 DCP Balaji Srivastava had not given any cooling-off time to the two accused to re-consider their decision to make confessional statements and then to decide whether they still wanted to go ahead with the making of confessional statements and that it would have been appropriate if the DCP had given a day or two days time to the accused to reconsider their decision but that was not done which showed that the ACP as well as the DCP were in a hurry to record the confessional statements. This observation of the learned Designated Court, in fact, shows that it was at least not doubting the recording of the statements of the accused by PW-1 as had been deposed by him and the stand of the accused that they had not made any

confessional statements was also not acceptable to the Court. Now, whether there were any circumstances suggesting that the statements were not made by the accused voluntarily need s to be considered. Ms. Kamini Jaiswal, learned Counsel for appellants Mohd. Kumhar and Adil Nazir Keen, in order to lend strength to this reasoning of the Designated Judge cited one judgment of the Hon"ble Supreme Court in State of Rajasthan Vs. Ajit Singh and Others, wherein it was observed by the Supreme Court that time of 15 to 30 minutes given to the accused by the police officer for reflection before recording the actual confessions was not sufficient cooling-off time. In the present case, learned Counsel argued, even that much time was not given to the accused to re-consider their decision of making confessional statements. However, in our view this conclusion of the Designated Court cannot be sustained since it overlooked the fact that it was not even the case of accused Mohd. Kumhar and Adil Nazir Keen that they were produced before the DCP and he had immediately asked them to state whatever they wanted to confess. Their plea was of total denial regarding making of confessional statements. In any case, for this reason the confessional statements could not be discarded in view of the judgment of the Hon"ble Supreme Court reported as Ranjit Singh @ Jita and Others Vs. State of Punjab, , "Ranjit Singh v. State of Punjab" wherein it had been held that "In a given case, depending on facts, the recording officer without granting any time may straight away proceed to record the confessional statement ... This judgment has been referred to even in the decision of the Hon"ble Supreme Court in Ajit Singh's case(supra) cited by Ms. Jaiswal. On this aspect learned prosecutor had also cited one judgment of this Court reported as 2006 (1) JCC 382, "Harbans Singh v. State" wherein a similar objection had been taken on behalf of the accused that his confessional statement should be considered to be involuntary because sufficient cooling-off time was not given to him by the DCP before recording the confessional statement. That argument was not accepted by the Division Bench on the ground that since the accused had not retracted from his confessional statement the same could not be disbelieved or discarded from consideration because of the failure of the DCP to defer recording of the confessional statement to give an opportunity to the accused to reconsider his decision. This view was upheld in appeal by the Hon"ble Supreme Court in its judgment reported as JT 2007 (3) SC 490, "Harbans Singh v. State". So, in view of the judgment of this Court also the finding of the learned Designated Judge discarding the confessional statements for the said reason have to be reversed since accused persons have not even claimed that they had at any stage retracted from the confessions which the prosecution was relying upon and which we have already found to have been made by them.

44. Learned Designated Judge also held that the confessional statements of both the accused were manipulated and fabricated documents and that was evident from the fact that both the statements were to a large extent re-production of each other and learned Counsel for the accused had pointed out that even certain clerical mistakes in one statement had been copied as it is in the other

statement. Even for this kind of reason the Apex Court had in "Mohamed Amin v. CBI" 2008 (14) Scale 240, refused to reject the confessional statements as being involuntary. In fact, the Supreme Court in Ravinder Singh @ Bittu Vs. The State of Maharashtra, has held that while determining whether the confessions were voluntary or not, the court is not required to examine one confessional statement with reference to the confessional statement of the co-accused. As noticed already, the legal position in respect of the confessional statements recorded under POTO/POTA is that confessional statement of one accused cannot be used against co-accused even if both are being tried together for the same offences and the confessional statement can be used only against the maker and the same cannot be used even to corroborate any other evidence against the co-accused who might not have made any confessional statement nor can the confessional statements of different accused persons in the same trial can be used to corroborate each other's confessional statement. Thus, in case one confessional statement is compared with another one that would show that the two confessional statements are being considered either for the purpose of corroborating each other or contradicting each other, which is not permissible. So, in the present case the Designated Judge could not have discarded the confessional statements of accused Mohd. Afzal Kumhar and Adil Nazir Keen after comparing the two statements and noticing certain similarities in some paras of the two confessional statements. Another objection taken is that when their so-called confessional statements were recorded the two accused were in police custody and PW-1 was supervising the investigation also and for this reason also the same should be considered to be involuntary. However, similar objection when raised before the Apex Court in Mohamed Amin's case (supra) also but the same was not considered to be a good reason to discard the confessional statement and for this conclusion the fact that the recording officer had complied with all the procedural safeguards before recording the statements was considered to be a factor for rejecting this objection. Same is the position here. PW-1 had observed all the procedural safeguards before recording the statements of the two accused.

45. Other reasons given by the Designated Court for not believing the confessional statements was that the same had been recorded on a computer but had not been saved in the hard disc and also because there was a non-compliance of the provisions of Section 65(b) of the Indian Evidence Act; the personal assistant of DCP Srivastava who had admittedly recorded the statements on the computer had not been examined by the prosecution; the prosecution had not proved whether the request allegedly made by the ACP to DCP Srivastava on 22-01-2002 conveying to him the willingness shown by the accused persons to make confessional statements and requesting the DCP to record the same was oral or written and DCP Srivastava had recorded the statements not in his own office but in the office of the investigating officer and no justification had been tendered as to why DCP had gone to the office of ACP for recording the confessional statements.

46. In our view, in the facts and circumstances of this case, the confessional statements of accused Mohd. Afzal Kumhar and Adil Nazir Keen could not be rejected for any of the afore-said reasons also given by the learned Designated Judge. Just because there is no evidence whether ACP Rajbir Singh had informed the DCP orally or in writing on 22/01/02 about the willingness shown by the two accused persons to make confessional statements it cannot be inferred that the statements recorded by the DCP were not made voluntarily by the accused. DCP(PW-1) had deposed that the ACP had informed him on 22/01/02 about the willingness of the two accused to make confessional statements and ACP(PW-18) had also deposed to that effect. In their cross-examination it was not challenged that there was no such intimation given by the ACP to the DCP and we have no reason to disbelieve them. In fact, it was not even suggested to PW-18 ACP Rajbir Singh in cross-examination that accused Mohd. Afzal and Adil Nazir had never expressed to him their desire to make confessional statements. Similarly, because of the non-examination of the personal assistant of PW-1, who admittedly had recorded the statements on the computer, no adverse inference against the prosecution could be drawn, as has been done by the Designated Judge observing that he was the best witness to prove as to whether the statements had been made by the accused voluntarily. How could the personal assistant of the DCP say whether the statements being made by the accused and which he was typing on the computer were being made voluntarily by the accused or not. The prosecution having shown from the evidence of the DCP and the ACMM that they had done everything what they were expected to do before recording the statements of the accused the burden shifted to the accused to show that there was a possibility of their having been forced to make the confessional statements. We have already held that nothing has been brought on record from which any such inference could be drawn against the prosecution. Similarly the recording of the statements by the DCP in the office of ACP cannot be said to be a ground to reject the same. It could have been elicited from the DCP in his cross-examination as to why he had not chosen his own office for that purpose and then he would have given his reason for that. That was not done. The accused persons have not been able to show as to how their statements stood vitiated for this reason.

47. The computer had been used only as a sophisticated typing machine for recording the statements. The typewriter is a thing of the past. After typing on the computer, print-outs of the statements were taken and the accused had signed the same only after going through the contents and not on blank papers. They have not claimed that they had not read the contents of the print-outs. The police was not supposed to save those statements in the computer and because of that it could also not be said that there was non-compliance of Section 65 of the Evidence Act. In any case, that cannot be said to be a circumstance having anything to do with the voluntariness of the statements in question. It is not the case of the accused that they had stated something else before the DCP and what the print-outs showed had not been stated by them. So, whether their

statements were saved or not in the computer becomes irrelevant. Similar objection was taken before the Supreme Court in "Devender Pal Singh Vs. State National Capital Territory of Delhi and Another, wherein also confessional statement was recorded on a computer and that statement was neither saved nor was transferred to a floppy. Rejecting that objection It was observed that "Merely because the confessional statement was recorded in a computer, it cannot be ground for holding that the confessional statement was not voluntary". Another objection taken in the case on behalf of the accused was that language of the statements of both the accused was almost identical and that was also a circumstance which showed that statements were not made voluntarily but for that reason also confessional statements were not discarded in the said case.

48. We are, therefore, of the view that the learned Designated Judge was not right in discarding the confessional statements of accused Mohd. Afzal Kumhar and Adil Nazir Keen recorded by PW- 1 DCP Balaji Srivastava. We have already reproduced the confessional statements of these two accused which have to be treated as substantive evidence. Now the question is whether the admissions made by these two accused in their confessional statements make out the offences of which they have been convicted by the Designated Court. On this aspect the main emphasis of the learned Counsel Ms. Kamini Jaiswal was that as far as the offences punishable under Sections 121-A and 122 IPC are concerned the same are certainly not made out and these two accused have been convicted wrongly for these offences since mere recovery of explosive material and cash would not constitute the offence of conspiracy to wage war against the Government of India. In support of the submission that offence of conspiracy to wage war against the Government of India is in any event not made out against the accused Ms. Kamini Jaiswal placed strong reliance upon one judgment of Apex Court in Nazir Khan and Others Vs. State of Delhi, , one of Bombay High Court in "Javed v. State of Maharashtra" 2007 Cri. L.J. 2006, one decision of Patna High Court in Mir Hasan Khan and Others Vs. The State, and one judgment of Rangoon High Court in "Aung Hla v. Emperor" AIR 1931 Rang 235. The reason for laying extra emphasis on the challenge to the convictions for these offences under IPC appears to be that the two accused have been awarded the sentence of imprisonment of ten years (only) under Sections 121-A and 122 IPC while in respect of other offences they have been awarded sentence of imprisonment of even lesser periods and in case we set aside their conviction under Sections 121A and 122 IPC they could straightaway walk out of the jail as they have already remained in jail for that period.

49. As noticed already, accused Mohd. Afzal Kumhar and Adil Nazir Keen have been convicted under Sections 121-A and 122 IPC as also under Sections 3(3), 4(b) and 22(2) of POTA and also under Sections 4(b)(ii) and 5(b) of the Explosive Substances Act, 1908. In their confessional statements these two accused had clearly admitted that they had collected RDX and other explosive material etc. from different persons for preparing "Improvised Explosive Devices"(IEDs). The prosecution had examined the ballistic experts(PWs3 & 4)

from Central Forensic Science Laboratory(CFSL) who had testified and proved their reports Ex.PW-3/A and Ex.PW- 4/A to the effect that the putty like material examined by him (which according to the prosecution was recovered from the person of these two accused) confirmed the presence of RDX/PETN/AMMONIUM NITRATE and that the detonators, which were also examined, and "RDX", "PETN" and Ammonium Nitrate" can form the components of "IMPROVISED EXPLOSIVE DEVICE"(IED) and therefore were "Explosive Substance" as defined in the Explosive Substances Act, 1908. It was also opined that the other powdery material(which was recovered from room No. 3 of Karan Hostel) confirmed the presence of "Potassium Chlorate. which can form a component of .Improvised Explosive Mixture". The two accused had admitted that they had collected RDX etc. for causing explosions on the route of Republic Day Parade which would compel the Government to cancel the Republic Day Parade. However, before they could accomplish their nefarious design they came to be apprehended on 14/01/02 and the explosive material also came to be seized before it could be utilized for the intended act of terrorism. In the confessional statements these accused had also admitted that they were arrested on 14/01/02 alongwith RDX etc. Thus, these two accused had by collecting highly explosive material for being used for the aforesaid purpose intended to be achieved by the and which certainly was a "terrorist act" as defined in Section 3(1) of POTA, had conspired to commit a "terrorist act" and, so, had committed the offence punishable u/s 3(3) of POTA. And being in unauthorised possession of RDX, which undisputedly is capable of mass destruction, is also a "terrorist act" punishable separately u/s 4(b) of POTA and since these two accused had been found in unauthorized possession of RDX they also committed the offence punishable u/s 4(b) of POTA and were rightly convicted for that offence also. The confessional statements of accused Mohd. Afzal Kumhar and Adil Nazir Keen also make out a clear case of the offence punishable u/s 22(2) of POTA since they had categorically admitted that huge amount of money in cash recovered from them as also from room No. 3 of Karan Hostel on 14/01/02 had been received by them from hawala operators for being used for committing acts of terrorism. The two accused have been rightly convicted under Sections 4(b)(ii) and 5(b) of the Explosive Substances Act, 1908 also as they had admitted in their confessional statements the possession of "special category of explosive substance" as defined in the said Act and also that the possession thereof was to cause serious injury to property and endanger lives of the people watching the Republic Day Parade.

50. We now come to the conviction of accused Mohd. Afzal Kumhar and Adil Nazir Keen under Sections 121-A and 122 IPC. Section 121-A IPC reads as under:

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

constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.. And Section 121 IPC reads like this:

121. Waging, or attempting to wage war, or abetting waging of war, against the Government of India----- Whoever, wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine.. Section 122 IPC reads as under:

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

51. Now, what amounts to "waging war" is not defined in the Indian Penal Code nor in TADA, POTA or any other statute. However, when the Parliament House Complex was attacked by some terrorists in December, 2001 some persons came to be tried for different offences including that of waging war against the Government of India. When the appeals against convictions of the accused of that case came up before the Supreme Court the question as to what is "waging war" also came to be considered and Supreme Court then gave its views on this aspect after taking into consideration some earlier judgments dealing with the offence of "waging war". That case is State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, and it will be useful to make a reference to the relevant observations in this judgment. This is what was observed by the Supreme Court:

In the case of Maganlal Radhakrishnan AIR 1946 Nag 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 Rang 235 were also referred to and the following principles were culled out:

- (i) No specific number of persons is necessary to constitute an offence u/s 121, Penal Code.
- (ii) The number concerned and the manner in which they are 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 force and 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.

....

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....

The conspiracy to commit offences punishable u/s 121 attracts punishment u/s 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 121A 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....

...

...

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.

...

...

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.

...

...

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?

...

...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 ...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. ...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 imperiling 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 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 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....The undoubted objective and determination of the deceased terrorists was to impinge on the sovereign authority of the nation and its Government.... 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 u/s 121A IPC....

(emphasis laid)

52. In our view, applying the aforesaid principles enunciated by the Apex Court the offence of conspiracy to wage war against the Government of India by accused Mohd. Afzal Kumhar and Adil Nazir keen is clearly made out on the basis of facts admitted by these two accused in their confessional statements. They had categorically admitted that they had come to Delhi from Kashmir to strike terror in the city on the occasion of Republic Day celebrations and in order to accomplish that mission they had collected huge quantity of RDX and other explosive material as well as lakhs of rupees and had kept the same in room No. 3 of Karan Hostel which was in addition to the RDX and cash recovered from both of them on 14.1.2002 when they had reached Karan Hostel after collecting explosive material and cash from different persons whose reference had been given to them (accused) by their (accused's) leader sitting in Kashmir. They had also clearly admitted that the explosive material which they had collected was to be used for causing explosions on the route of Republic Day parade. So, quo animo of these accused in camping at Karan Hostel was to prepare themselves for the salvo on the Republic Day. Now, "Republic Day" has a great significance and importance in the history of independent India. After gaining independence from the British Raj on 15th August, 1947 the Constitution of independent India came into force on 26th of January, 1950 and India declared itself as a "Republic" on that date and since then the entire country celebrates Republic Day on 26th day of January every year. In the capital city of Delhi Republic Day celebrations are held at the Rajpath. Republic Day Parade is witnessed by the President of India, Vice President, Prime Minister and invariably on that day Head of some foreign country also witnesses the Republic Day Parade at Rajpath. Besides these dignitaries, the Chief Justice of India and other Judges of the Supreme Court, Judges of the High Court, Cabinet Ministers, senior bureaucrats also are present at the Rajpath on 26th January to witness the Parade. Lakhs of members of the general public also witness the parade. Before 26th January full dress rehearsal is also carried out of the actual celebrations a couple of days

before when also many dignitaries remain present to witness the parade and other events. Now, imagine, what the accused persons had planned to do on 26th January, 2002. They had conspired to explode bombs etc. in the presence of all these dignitaries. One shudders at the very thought of the scene of mass destruction which would have taken place had the accused- terrorists succeeded in their plans. Accused Mohd. Afzal and Adil Nazir had admitted that they had the instructions from high-ups of their organization(Let) to cause explosions on the route of the Republic Day Parade. As observed at the outset, It does appear to us that the task which the terrorists could not accomplish while attacking the Parliament House Complex on 13th December,2001 was again attempted to be accomplished by the present duo even though they belong to a separate militant outfit LeT(which fact the two accused had admitted in their confessional statements) while the terrorists who had planned to capture or blow off the Parliament building belonged to a terrorist organization called JKLF. This is not a case where the material against the accused for their convictions u/s 121A is only recoveries of RDX from them, as was the submission of Ms. Jaiswal. So, the judgments cited by Ms. Jaiswal in support of her submission that offences under Sections 121A and 122 IPC are not made out are of no help to these two confessing accused persons. The purpose of their collecting RDX etc. was to overawe the Central Government by use of criminal force etc. and so a terrorist act which, as per the above extracted views of the Supreme Court in the Parliament Attack case also would fall within the purview of "waging war against the Government of India" conspiracy to commit act would come under the dragnet of Section 121A IPC. For the same reasons the offence u/s 122 IPC is also made out against accused Mohd. Afzal Kumhar and Adil Nazir Keen.

53. So, as far as accused-appellants Mohd. Afzal Kumhar and Adil Nazir Keen are concerned their confessional statements by themselves are sufficient to sustain their convictions. However, the submission of the learned Additional Public Prosecutor that since all the four convicted accused had been charged and tried together for different offences the confessional statements made by accused Mohd. Kumhar and Adil Nazir Keen could be treated as substantive evidence even against their co-accused Bilal Ahmed Mir and Ansar Ahmed Dar cannot be accepted in view of the decision of the Supreme Court in the Parliament attack case (supra) wherein also a similar submission was made on behalf of the State but the same was rejected. This is what the Supreme Court observed in para No. 10 of the judgment while rejecting the plea of the prosecution that confessional statement of one accused could be used against co-accused also:

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 Subramaniam that Section 32(1) can be so construed as to include the admissibility of confessions of co-accused as well.... 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....

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)....

(emphasis supplied)

54. It was also the submission of the learned Additional Public Prosecutor Mr. Dudeja that even if the confessions of accused Mohd. Afzal Kumhar and Adil Nazir Keen are not to be read as substantive evidence against accused Ansar Ahmed Dar and Bilal Ahmed Mir there is other sufficient incriminating material also against them brought on record from which the prosecution case against them also stands fully established and relying upon that material only the Designated Court has convicted not only these two accused but even the conviction of Mohd. Afzal and Adil Nazir Keen was also based on that material alone. Mr. Dudeja submitted that that material against all the four appellants is the recovery of huge quantity of explosive material and Indian currency of almost 35 lacs of rupees from their possession on 14-01-2002. Mr. Dudeja submitted that the prosecution had adduced sufficient reliable evidence to prove those recoveries and accepting the same the learned Designated Judge had rightly concluded that from those recoveries the only inference which could be drawn was that all the four accused-appellants had committed various offences including that of conspiring to wage war against the Government of India. Regarding the said recoveries relied upon by the prosecution and accepted by the learned Designated Judge the submission made on behalf of the appellants was that those recoveries had not been established beyond reasonable doubt and that doubt regarding genuineness of those recoveries was further strengthened from the evidence adduced by the accused persons in support of their defence that they were already in illegal custody of the police from 02/01/02 onwards and so there was no question of their being apprehended on 14/01/02. As far as accused-appellant Bilal Ahmed and Adil Nazir are concerned an additional submission was made that even if it were to be accepted that there was some recovery of explosive material and cash from room No. 3 of Karan Hostel these two accused at least cannot be held guilty for any offence because of those recoveries since the prosecution's own case was that those recoveries were pursuant to a joint disclosure made by them.

55. We shall now examine the evidence of recovery witnesses. We start with the evidence of PW-19 Inspector Mohan Chand Sharma who was the leader of the raid team which had gone to Karan Hostel in the afternoon of 14-01-2002 on

getting an input from Central Intelligence Agency that some Kashmiri boys had collected explosive material in Karan Hostel to be used for spreading terror and panic in the public during the Republic Day celebrations. The relevant part of the examination-in-chief of PW- 19 is reproduced hereunder:

...On 14-1-2002 I received a specific information through informer in my office at Lodhi Colony that some militants of Lakshar-e-Toiba were staying at Karan Hostel Kotla Mubarakpur and they were having explosive substances and hawala money. I made D.D. entry containing this information. However in order to keep secrecy I did not mention the correct address and name and mentioned only south Delhi. The D.D. entry made by me in this regard is at Sr. No. 12 of the D.D. register brought by me. Copy of the D.D. is Ex.PW- 19/A (Original seen and returned). On this information S.I. Sanjay Dutt, SI Gobind Shrama, S.I. Hardaya Bhushan, S.I. Sushil, ASI Anil Tyagi myself and other staff in all 16-17 officials reached Gaini Market Kotla Mubarakpur at about 1.30 p.m. Informer took me to Karan Hostel and showed me the place. It was told to us by the informer that there were four militants staying at room No. 3 of Karan Hostel K.M.pur. I got confirmed this news and learnt that while two were still inside the room and two had gone out. We decided to wait for the other two persons and to keep watch around the hostel. I called owner of Karan Hostel Mr. Ram Kumar, and enquired from him. He told that one Bilal used to live in the room No. 3 and for few days three more boys were staying with him. I deployed staff at different place around Karan Hostel to keep watch. Ram Kumar was with me. At about 8 p.m. two kashmiri boy holding bags in their right hand came in front of Karan Hostel. Ram Kumar identified them as the same boys who were living in the room of Bilal. We apprehended them and immediately room No. 3 was also raided. The other two occupants of the room No. 3 were apprehended. The two persons apprehended outside were Mohd. Afzal and Adil present in the court. We took them along with their bags inside room No. 3 of Karan Hostel. The bag in the hand of was checked and it was found to be contained Rs. 5 lakhs in cash, and 2.280 kg. of RDX and 2 detonators. Similarly the bag of Adil was also checked and it was found to contain Rs. 5 lakhs in cash, 2 kg RDX and detonators. Bilal and Ansar who were apprehended from inside the room were interrogated and they told about two bags lying under the bed of the room. Those bags were also taken out and checked. In one bag Rs. 14 lakhs cash, 3.900 kgs. of white explosive substance were found and in the other bag Rs. 10.90 lakhs cash was found. All these articles were seized vide seizure memo Ext. PW-8/A and PW- 8/B by S.I. Gobind Sharma. ...

56. PW-8 SI Govind Sharma was also a member of the raid team. Relevant part of his evidence is extracted below:

...On 14.1.02, Insp. Mohan Chand Sharma recd. a specific information in the office of Spl. Cell that a boy who was named Bilal concerned with the earlier information was staying in Karan Hostel in K.P. Pur and with him, three other Kashmiris were staying and they were having hawala money and explosive

material.... We reached at Giani Mkt. K.M. Pur at about 1.30 p.m. Through our source, we learnt that at that time, in the hostel, one boy Bilal with him one more boy were there in the hostel room, while other boys had gone somewhere.... We continued our watch around hostel and at about 8 p.m. two boys came towards Karan Hostel, and both of them were apprehended at the pointing-out of Ram Kumar. In their hands, they were holding bags (in right hand), they were apprehended with help of police staff. Simultaneously, we raided room No. 3 with the help of police staff and they were also apprehended from room No. 3 of hostel. Two boys who were caught outside hostel, were Mohd. Kumhar and Adil Nazeer Keen, both are present in court (correctly identified). The two boys who were apprehended in the room of hostel are accused Bilal and Ansar present in court (correctly identified). Two boys, who were apprehended outside the hostel, were also brought to room No. 3 and contents of bags which were in their hand, were searched. The bag which was in hand of Mohd. Afzal Kumhar was of red and white colour and on it "speed pre-paid mobile" was written. It was checked and in it, Rs. 5 lakhs in cash, consisting of 35 packs of Rs. 100/- currency notes and 30 packs of Rs. 50/- currency notes. In the bag, there was one polythene bag on which "Mission Kashmir" was written and some photos. In that poly. Bag, there was a transparent bag, which contained RDX, it was weighed and found to be 2.280 kgs. In the side pockets of bag of Mohd. Afzal Kumhar two detonators were found. Bag in the hand of accused Adil was of Maroon colour on which "Jam Park" and other things were written, it was also opened and checked and in it Rs. 5 lakhs currency notes, 50 pacs. Of hundred currency notes were found. In that also, there was one black poly. Bag and in that poly. Bag, two kgs. of RDX was found and in the side pocket of that bag of Adil Nazir, two detonators were found. 40 gms. of contents were taken separately as sample from both polythene bags i.e. of Mohd. Afzal Kumhar and Adil Nazir Keen and were sealed in plastic packs, the detonators recovered from two accused persons, were wrapped and sealed in plastic jars

Accused Bilal and Ansar who were apprehended from inside the hostel room were interrogated and during interrogation they told that under bed lying in the room, they had kept bags containing explosives and money. At the pointing-out of these two accused persons, one green colour bag was recovered from under the bed towards bathroom. It was checked and a white polythene was found containing 3.9 kgs. of white explosive material and Rs. 14/lakhs cash was also found (fourteen lakh)....

57. PW-12 SI Sanjay Dutt was another member of the raid team. This is what also deposed regarding the raid proceedings:

...We reached in K.M.Pur near Giani Market about 1.30 p.m. and collected there.... At about 8 p.m. two boys were seen approaching Karan Hostel who were holding bags in their hands, on seeing them Ram Kumar told us that these were the same boys, who were staying with Bilal. Those two boys were apprehended at the entry gate of Karan Hostel and their names were found out to be Afzal and

Adil. Both are present in court(correctly identified). Simultaneously, we raided room No. 3 of Karan Hostel and apprehended two boys, who were inside the room, they were Bilal and Ansar, both accused present in court(correctly identified).Thereafter the bags hold by Afzal and Adil were checked. Afzal was having red colour bag on which "speed pre-paid mobile" was written and was found to contain Rs. 5 lakhs in cash and one polythene bag on which "mission kashmir" was written and on checking the poly bag, it was found to contain one more transparent poly bag in which black and brown kneaded material was found which was RDX. It was weighed and found to be 2.280 Kg. From the side pocket of bag one transparent polythene bag was found in which there were two electronic detonators, they were bound together with a tap. Then we checked bag of Adil. It was maroon colour bag on which "Gems Park" was written and in that bag also Rs. 5 lakhs cash and a black colour poly bag was found in which two kgs. RDX was found in the side pocket of that bag also, a transparent bag containing 2 detonators was found. Out of the RDX recovered from 2 bags a sample of 10 gms.... Bilal and Ansar, who were apprehended in room No. 3 had pointed out towards a bag lying under the bed which was towards the bathroom side of the room and another bag lying under the other bed opposite that bed, which was of blue colour. Both these bags were checked in green colour bag, an amount of Rs. 14 lakhs in cash and in a poly. white coloured explosive material was found which on weighing was found to be 3.9 kgs in the second blue colour bag, Rs. 10.9 lakhs cash was recovered....

58. The relevant part of the chief-examination of PW-16 ASI Anil G. Tyagi is re-produced below:

On 14-1-2002, I was working with Spl. Cell Lodhi Colony. On that day, I had joined raiding party. It was headed by Insp. Mohan Singh at his instructions. I along with other team members reached Kotla Mubarakpur at about 1.15-1.30 p.m. Since the information was that one kashmiri boy was staying in hostel i.e. room No. 3 of Karan Hostel K.M. Pur in Prasadi Gali and three more kashmiri boys used to come to him the raiding party was divided in small groups and was to keep watch around the hostel. Ram Kumar the owner of the hostel was called by Insp. Mohan Chand Sharma around 2.00 p.m. He was enquired and he informed that one kashmiri boy called Bilal lives in room No. 3 of his hostel and three more kashmiri boys were those days staying with him. He also told that at that moment there were only two boys in the room and two were outside the room. We kept watch continuously around the hostel and at about 8 I , Mohan Chand Sharma, SI Sanjay Dutt, SI Gobind Sharma were standing near the gate of hostel with Ram Kumar owner of the hostel. When two boys coming with bags hanging on their shoulders coming and Ram Kumar pointed out towards those boys saying that two were same who were staying in the hostel in the room of Bilal. We apprehended both of them at the hostel gate as pointed out by Ram Kumar. Rest of the team went inside the hostel and apprehended the two boys who were inside the room No. 3 of hostel. The two boys apprehended outside were also taken to that room No. 3. The two boys who were apprehended

outside disclosed their names as Mohd. Afzal Kumhar and Adil Nazir Keen. The bag carried by Mohd. Afzal Kumhar was checked and it contained cash amount of Rs. 5 lakh and a polythene containing something and on polythene "Mission Kashmir" was written. The polythene was checked and in it another transparent polythene was found containing black and white colour kneaded explosive material. From the side pocket of the bag in a polythene wrapped in a tape two detonators were found. The explosive on weight was found 2.80 kg. From the bag of the Adil Nazir Keen Rs. 5lakh and similar explosive material in the polythene and two electronic detonators on the side pocket were recovered. The explosive material on weight was found 2 kg. The sample of 10 gram each was taken from the explosive material recovered from two bags. SI Govind Sharma prepared the recovery memo concerning the recoveries from these two bags. The recovery memo is Ex. PW-8/A with my signature at point F on each page. Bilal and Ansar accused persons were inside the room and they got discovered two bags from under the bed of the room. From those two bags a sum of Rs. 24,9000/- cash and explosive material was recovered. In one bag only cash was there while in other bag cash and 3.90 kg. of explosive material was recovered. 10 grams sample was taken from the explosive and separately sealed....

59. From the evidence of the three police officials which we have extracted above it is clear that all of them have fully corroborated each other's version in respect of the raid proceedings all of them have deposed consistently in respect of the recoveries of RDX and cash from the possession of accused Mohd. Afzal Kumhar and Adil Nazir Keen kept in separate bags which they were carrying on their shoulders at the time of their apprehension. It has also been consistently deposed by all the three raid members that from inside room No. 3 of Karan Hostel there was recovery of more explosive material and cash kept in two bags lying under the bed in that room. As far as accused Mohd. Afzal and Adil Nazir are concerned, they have in their confessional statements recorded by PW-1 had admitted that that explosive material and cash also was obtained by them together and also that the same were also recovered from room No. 3 of Karan Hostel. These police witnesses had also deposed about the preparation of packets of samples of the explosive material recovered, sealing of those packets as also about the sealing of detonators, preparation of seizure memos at the spot. They were subjected to extensive cross-examination by different counsel representing the accused persons in the trial but nothing could be elicited which could discredit their testimony. It was also the stand of accused Mohd. Afzal Kumhar and Adil Nazir Keen during the cross-examination of the investigating officer(PW-18) that he had on 9th or 10th January, 2002 arrested some hawala operators and hawala money to the tune of Rs. 80-90 lacs recovered from them and that money had been planted upon the accused in the present case. This plea of planting, which the learned trial Court has rejected and in our view very rightly, in fact, negatives the possibility of innocence of these two accused persons. This shows that they were aware of the activities of the police which persons involved in criminal activities can only possibly know. It has now been

well settled by a catena of judicial pronouncements of the Apex Court that evidence of police officials associated in the investigation of some crime can also be safely relied upon for basing conviction unless, of course, there are glaring flaws appearing in their evidence which throw sufficient amount of doubt regarding their trustworthiness.

60. On behalf of the appellants their counsel had pointed out certain features in their evidence which according to them cast a serious doubt regarding the truthfulness of their version of the raid proceedings. However, we do not think that those features pointed out by the learned Counsel in the prosecution evidence create any doubt about the correctness of the prosecution case. It had been submitted by the learned Counsel that the prosecution case was that in the rukka itself prepared by SI Govind Shama (PW-8) it had been mentioned about the exact weight of the explosive material recovered from the possession of the accused as well as the exact weight of the explosive material separated as sample which could not have been done unless the raid officials were carrying with them the weighing material which admittedly they were not carrying and after the raid somebody had allegedly gone to fetch the same but by that time rukka had already been dispatched. Learned Counsel submitted that all this was established during the cross-examination of the three raid team members and that shows that, in fact, even the rukka and recovery/seizure memos had been prepared at the police station and not at the place of raid and that makes the entire raid proceedings highly doubtful. It was also pointed out that the apprehension of the accused-appellants on 14/01/02 becomes doubtful also for the reason that in their arrest memos the date of their arrest is shown as 15/01/02 and not 14/01/02. Another deficiency pointed out with great emphasis was that there was a discrepancy in the property number of Karan Hostel shown in the raid documents inasmuch as in the site plan Ex. PW-8/DA, prepared by PW-17, the place of recovery had been shown to be 1804/1 while PW-17 SI Sharad Kohli himself had deposed in evidence that the recovery was made at room No. 3 Karan Hostel, premises No. 1804/2 which fact also, according to the learned Counsel, casts a serious doubt regarding the place of raid allegedly conducted by the police. Same submissions were advanced before the trial Court also and we are in general agreement with the reasoning given by the learned Designated Judge for rejecting these submissions and accepting the prosecution case in respect of the recoveries of RDX etc. As far as accused Mohd. Afzal Kumhar and Adil Nazir Keen are concerned their confessions, referred to already, do not leave any scope for suspecting the prosecution case and their confessions add extra strength to the prosecution case against them in respect of all the allegations levelled against them. As far as the availability of the weighing equipment etc. with the raid team members is concerned it could have been elicited from them during their cross-examination as to when and how the explosive material could be weighed and when PW-8 SI Govind Sharma was questioned on this aspect in cross-examination he had said that when proceedings were going on at the spot one team member had gone to collect the

weights and balance. He did not say that that man had gone after the ruqqa had been dispatched through SI Anil Tyagi. So, it cannot be accepted that ruqqa etc. were prepared at the police station. Nothing, however, could be elicited from any of the police witnesses examined by the prosecution to establish the recoveries which could render their testimony doubtful. It is the prosecution case that all the four accused-appellants were arrested from a place called Karan Hostel in Kotla Mubarak Pur and it is also the case of the accused-appellant that they were, in fact, arrested from Karan Hostel only and it is also their admitted case that all of them were staying in room No. 3 of that hostel. So, nothing turns around the submission of the learned Counsel for the appellants regarding the so-called uncertainty, which in fact is not there at all, regarding the property from where recoveries were made. By the time proceedings at the spot continued date changed to 15th January when formal arrest of the accused was made, as deposed to by PW-17 SI Sharad Kohli. So, mention of date of arrest of the accused as 15th January in the arrest memos does not show that no raid was conducted on 14th January. These are too flippant grounds of challenge to jettison the formidable prosecution evidence regarding the recoveries of RDX and cash from the person of accused Mohd. Afzal Kumhar and Adil Nazir Keen and other explosive material and cash of about rupees twenty lacs kept in two bags recovered from room No. 3 of Karan Hostel.

61. Learned Counsel for the appellants had also argued that the evidence of the police witnesses who have been examined to prove the recoveries of RDX etc. should not be relied upon since the only independent witness examined, namely, PW-15 Ram Kumar, owner of the Karan Hostel, had not supported the prosecution case regarding those recoveries. However, we are not inclined to reject the evidence of the three police officials who were the members of the raid team because of the reason that PW-15 had not deposed about the recoveries for which purpose he was examined and had to be cross-examined by the public prosecutor. He however, had admitted that one day in the month of January, 2002 the police had arrested accused Bilal who was his tenant in Karan Hostel, and his three associates from room No. 3 of Karan Hostel. When cross-examined by the public prosecutor he stated that he was not sure whether that was on 14th January, 2002. He denied that RDX was recovered in his presence from the accused but stated that police had told him that RDX and 34/35 lakhs of rupees had been recovered from accused persons. He admitted his signatures on seizure memos in respect of the recoveries of RDX etc. but claimed that he had signed those documents without reading the contents. It does appear that since this witness admitted his signatures on documents which showed that he was a witness to the recoveries he was not telling the truth in Court when he claimed that no recoveries were made in his presence. And his predicament can be appreciated. He was being pitted against persons who had been proclaimed by the police as terrorists. However, when cross-examined on behalf accused persons nothing favourable for the accused also could be elicited from him by the defence counsel. In this regard we can also rely upon the following observations

of the Supreme Court in *Anter Singh Vs. State of Rajasthan*,

10. We shall first deal with the plea as to whether evidence relating to recovery is acceptable when non-official witnesses did not support the recovery and made departure from the statements made during investigation. In AIR 1978 1511 (SC) it was observed that where the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses did not support the prosecution version. Similar view was taken in *Mohd. Aslam v. State of Maharashtra*. It was held even if panch witnesses turn hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated....

62. So, we come to the conclusion that the prosecution case regarding the recoveries of RDX etc. also stands duly established beyond any shadow of doubt. Those recoveries lend full corroboration to the confessional statements of accused Mohd. Afzal Kumhar and Adil Nazir Keen. There is another piece of corroborative evidence relief upon by the prosecution for landing assurance to the confessional statements of accused Mohd. Afzal Kumhar and Adil Nazir Keen. As has been noticed already, both these accused had claimed in their respective confessional statements recorded by PW-1 that they had purchased one mobile phone on 07-01-2002 and cash card No. 98113-36055. The evidence of the police officials who had raided room No. 3 of Karan Hostel have all deposed about the recovery of one mobile phone having the said number from that room. As per the prosecution case, it was found during investigation that the said mobile phone had been purchased in the name of accused Adil Nazir Keen. Evidence of the police witnesses even on this aspect also does not suffer from any infirmity. When it was put to accused Mohd. Afzal Kumhar and Adil Nazir Keen while recording their statements u/s 313 Cr.P.C. that mobile phone having number 9811336055 had been purchased by them on the instructions of Abu Amar (reference to whom was also made in the confessional statements of these two accused persons and in respect of whom it was suggested to PW-18 ACP Rajbir Singh in cross-examination that this person Abu Amar had died in an encounter on 9th January in J&K and which suggestion also shows that there was some person by the name of Abu Amar who was known to these two accused persons and at his instance they had joined LeT for committing terrorist acts and that fact also confirms the fact that the confessional statements had actually been made by these two accused only) their answer was "I do not know". Accused Adil Nazir Keen, when put a question that he and his co-accused Afzal Kumhar had purchased one mobile phone having number 9811336055 replied that he was apprehended on 02-01-2002 and so question of purchasing mobile phone on 07-01-2002 did not arise. When it was not even put to this accused that mobile phone had been purchased by them on 07-01-2002 there was no occasion for him to have on his own stated that there was no question of his purchasing any mobile phone on 07-01-2002. That shows that, in fact, he had actually purchased the mobile phone on 07-01-2002 as had been admitted by

him even in his confessional statement recorded by PW-1. The purpose for which these accused had collected lacs of rupees, as inferred by the learned Designated Judge, was that the same were to be used for terrorist activities and that very purpose is categorically admitted in the confessional statements of Mohd. Afzal Kumhar and Adil Nazir Keen.

63. Now, we come to the case against accused-appellants Bilal Ahmed Mir and Ansar Ahmed Dar in respect of whom we have already concluded that confessional statements of their two co-accused cannot be used against them. Learned Additional Public Prosecutor had submitted that the recovery of the explosive material and cash kept in two bags lying under the beds in the hostel room of accused Bilal Ahmed Mir was effected on the pointing out of accused Bilal Ahmed Mir and Ansar Ahmed Dar when the raid team had entered that room in Karan Hostel and had interrogated them and so their being co-conspirators with Mohd. Afzal Kumhar and Adil Nazir Keen for the commission of various offences is clearly made out.

64. Regarding the recoveries of two bags containing explosive material and cash at the pointing out of accused Bilal Ahmed and Ansar Ahmed Dar it would be noticed from the evidence of PW-8 SI Govind Sharma, which we have already reproduced in extenso, that he had claimed that when the raid team members had entered room No. 3 accused Bilal Ahmed and Ansar Ahmed were found inside and they were interrogated and during interrogation "they told that under bed lying in the room, they had kept bags containing explosives and money".... Similarly PW-12 SI Sharat Kohli deposed that "Bila" and Ansar, who were apprehended in room No. 3 had pointed out towards a bag lying under the bed towards the bathroom side of the room and another bag lying under the other bed....". PW-16 ASI Anil Tyagi had deposed that "Bila" and Ansar accd. Persons were inside the room and they got discovered two bags from under the bed of the room. From those two bags a sum of Rs. 24,90,000/- cash and explosive material was recovered.". PW-19 Inspector Mohan Chand Sharma, the leader of the raid team. Deposed that "Bilal and Ansar who were apprehended from inside the room were interrogated and they told about two bags lying under the bed of the room".... We have already found the evidence of these police witnesses to be acceptable in toto. Their evidence establishes beyond any shadow of doubt that on their pointing out two bags containing explosive material and huge amount of cash kept under the beds in the room of Bilal Ahmed Mir were recovered by the police. In the Parliament Attack case(AIR 2005 SC 3820) the Supreme Court while dealing with evidence recovery under made pursuant to a joint disclosure statement of more than one accused had observed as under:

14. Joint disclosures Before parting with the discussion on the subject of confessions u/s 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. 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 Subramaniam 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 u/s 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 of 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 to 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.... So, in view of this decision of the Supreme Court the argument of the learned Counsel for the appellants that recoveries pursuant to joint disclosures of accused Bilal Ahmed Mir and Ansar Ahmed Dar do not incriminate any one of them cannot be accepted.

65. After having gone through the entire evidence relating to the confessional statements of accused Mohd. Afzal Kumhar and Adil Nazir Keen, recoveries of explosive material which they were carrying on their shoulders as also lacs of rupees, recoveries of incriminating material from inside the room of Bilal Ahmed Mir in which admittedly all the four appellants were staying together the final picture which emerges is that on 14/01/02 accused Mohd. Afzal Kumhar and Adil Nazir were apprehended while going to room No. 3 in Karan Hostel. At that time they were carrying with them RDX, cash money etc. and in the room of Bilal more explosive and cash was recovered. At that time Bilal Ahmed Mir and Ansar Ahmed Dar were present in that room. According to Bilal Ahmed only co-accused

Ansar Ahmed Dar had visited him earlier and other two co-accused had come to him for the first time on 31/12/01. There is no explanation coming from him as to how his co-accused stayed with him if he did not know them and similarly there is also no special reason given by his three co-accused persons as to why they stayed in a small hostel room even though they were on a business trip. Bilal Ahmed Mir and Ansar Ahmed have not offered any explanation for the presence of the explosive substances and lacs of rupees in the room where they were staying. Their stand is of total denial which cannot be accepted in view of the fact that we have found the evidence of police witnesses very much reliable and so it can be safely concluded that both these two accused were also fully aware of the fact that explosive substance and lacs of rupees were kept under the beds in room No. 3 of Karan Hostel and so they were also in conscious possession thereof. The judgment cited by Mr. Maninder Singh (2002 SCC (Crl.) 1769) on the point as to what amounts to "possession" of some contraband item is not applicable here as the facts here are quite different from the facts of that case. So, in our firm view, all these circumstances, which stand established from prosecution evidence, are sufficient to conclude that all the four appellants were party to the conspiracy to wage war against the Government of India and in order to achieve that goal all of them had assembled in room No. 3 of Karan Hostel for making bombs there before the Republic Day.

66. A faint submission towards the end was made that though the two sanction orders for the prosecution of the accused were got exhibited through PW-2 Shri G.L.Meena, Deputy Secretary (Home), Government of NCT of Delhi as Ex. PW-2/A and Ex. PW-2/B but it has not been established that the Lieutenant Governor had actually given the sanctions as is recorded in the said two sanction orders. In our view, this objection is totally devoid of any merit. The two formal sanction orders Ex. PW-2/A and Ex. PW-2/B are signed by PW-2 Shri G.L. Meena "By order and in the name of the Lt. Governor of the National Capital Territory of Delhi". In the cross-examination of PW-2 it was not even put to him that the Lieutenant Governor had not accorded sanctions for the prosecution of the accused persons. In fact, it was put to the witness that he had, in fact, obtained signatures of the Lieutenant Governor and the Lieutenant Governor himself had not applied his mind at the time of according sanctions. This suggestion clearly shows that the accused were not disputing the fact that the Lieutenant Governor had accorded the sanctions. As far as the suggestion to this witness that the Lieutenant Governor had not accorded sanction after applying his mind is concerned we do not find any substance in that objection also. A perusal of the two sanction orders shows that the Lieutenant Governor had accorded sanctions after considering all the relevant material. In this regard we may refer to a decision of the Hon'ble Supreme Court in "Mohd. Iqbal M. Sheikh and Ors. v. The State of Maharashtra" 1998 (2) JCC 180 wherein it was held that when the relevant sanction order is produced on record and the same indicates the materials considered by the sanctioning authority and that the sanction was accorded by the sanctioning authority after applying mind to the relevant

materials the same would be sufficient to hold that there was a valid sanction. We, thus, reject this ground of challenge also put forth on behalf of the convicted accused for seeking their acquittal on the ground of invalidity of sanction. Learned APP had argued that Section 465 of the Code of Criminal Procedure provides that no finding, sentence or order by a Court of competent jurisdiction shall be reversed by a Court of Appeal or revision on account of any error or irregularity in any sanction for the prosecution unless in the opinion of the Court a failure of justice has occasioned thereby and so on account of any irregularity in the two sanction orders in question, even if the same had existed, this Court would not have reversed the judgment of conviction on that ground. We, however, need not go into this aspect in view of our conclusion that the Lieutenant Governor, who undisputedly was the sanctioning authority, had accorded the sanctions under POTA as well as u/s 196 Cr.P.C. after due application of mind to all the relevant materials.

67. No other point was urged on behalf of the appellants, as far as the prosecution case is concerned.

67. In view of our conclusion that the prosecution has been able to discharge its burden of proving the allegations against all the four accused-appellants the stage has now come to examine their defence plea to the effect that the prosecution case regarding recoveries of RDX etc. on 14/01/02 should not be accepted since they had been illegally picked up from Karan Hostel on 02-01-2002 and were kept in illegal confinement thereafter till 15-01-2002 when after foisting this false case upon them they were produced before the Designated Court. The case of the accused-appellants is that when their family members came to know that they had been picked up by the police they had approached the Chairman of the J&K Legislative Council in Sri Nagar on 11-01-2002 and had brought to his notice this fact and then the Chairman Shri Abdul Rashid Dar, who has been examined as DW-14, had on 14-01- 2002 around 10.30 a.m. sent a fax message to the Chief Minister of J&K, who on that day was stated to be in Delhi, bringing to his notice the fact about the four accused persons having been picked up by the police on 02-01-2002. The submission of the counsel for the appellants was that since the information about the police picking up the appellants had reached Delhi through the then Chief Minister of J&K in the morning of 14th January the policemen sensing that the persons whom they had illegally picked up on 2nd January were having access upto the senior politicians they(policemen) might land themselves in trouble for their illegal action must have decided to show the arrest of the accused-appellants on papers only during the so-called raid on the night of 14th January, 2002. It was also the submission that the fact that the accused were picked up on 02/01/02 by the police from Karan Hostel was almost impossible to be established by any direct evidence by the accused persons nor were they expected in law to establish that plea beyond reasonable doubt and were only supposed to probablise that plea and that the accused persons had been able to do from the evidence of eight defence witnesses (DWs-3 to 6, DW-9, DW-12,

DWs-13 and 14). Strong reliance was placed on one fax message(Ex.DW-13/B) allegedly sent by DW-14 Shri Abdul Rashid Dar to the then Chief Minister of J&K on 10.30 a.m. In support of this point raised Mr. Maninder Singh, learned Counsel cited one judgment of the Apex Court in "Mohd. Zahid v. The Govt. of NCT of Delhi" 1998(2) JCC 124. Learned Counsel had also submitted that DW-14 Shri Abdul Rashid Dar had categorically deposed that he was approached by the family members of the four accused persons on 11-01-2002 to inform him about the said illegal act of the Delhi Police in picking up the accused persons from Karan Hostel and further that he had thereafter on 14-01- 2002 in the morning around 9.30 a.m., when he had reached his office, his secretary had faxed the letter Ex.DW-13/B, signed by him(DW-14) to the State Chief Minister in Delhi and around 11 a.m. the Chief Minister himself had confirmed the receipt of that faxed letter. Learned Counsel submitted that if the family members of the accused persons had approached DW-14 on 11-01-2002 with the complaint against the Delhi Police it cannot be accepted that they had known at that time that the accused persons would be apprehended by the Delhi Police in some false case and so they should prepare a defence plea in advance to be used in future in the event of their actual arrest.

68. After examining the defence evidence we have come to the conclusion that the accused have neither been able to establish nor even probabalise that they were picked up from Karan hostel on 02/01/02. DW-3 Bakhtawar Zaman is the brother of accused Ansar Ahmed Kumhar. What was sought to be shown through this witness that one Mohd. Ashraf Sheikh had made a telephone call to his (DW3"s) phoofi that accused Ansar, Bilal and two more boys had been picked up by the police on 02/01/02 and then Ashraf"s phoofi informed the family of accused Bilal and Bilal"s family informed his(DW-3"s) family about that. Then on 5th evening he made telephone call at Karan hostel but from there he could not get any proper response. This shows that Mohd. Ashraf, whosoever he was, had some positive information about the picking up of the accused on 02/01/02 before 5th January and that Mohd. Ashraf was also living in Delhi. This witness also stated that on 11/01/02 it had been confirmed that accused had been arrested by the police on 02/01/02. However, the defence has not produced that Mohd. Ashraf Sheikh. He was their best witness and so evidence of DW-3 is of no value.

69. DW-4 Gulam Hassan Bhutt, Chief Accountant in a Co- operative Society in Anantnag, deposed that he knew accused Bilal and Ansar as Bilal was his next door neighbour and he(DW-4) used to maintain accounts of the mill of Ansar on part time basis. He further deposed that Bilal"s elder brother had come to him on 04- 01-2002 and informed to him that Bilal had been arrested by the police on 02-01-2002 and thereafter on 11-01-2002 he along with relatives of these two accused had met the Chairman of the Legislative Council Shri A.R. Dar and also Mohd. Maqbool Dar, Ex. Home Minister. Even Bilal"s brother who informed this witness about the arrest of the accused on 02-01-2002 has not been examined. He could have given the exact information as to how he had come to know that

Bilal had been arrested on 02-01-2002. Therefore, evidence of this witness is also of no value. DW-5 Gul Mohd. Mani and DW-6 Gul Mohd. Sheikh, both residents of Anantnag, had simply deposed that they had learnt about the arrest of accused Bilal and Ansar on 02-01-2002. They, however, did not come out with the source of that information and so their evidence is also meaningless. In case these people had actually come to know about the arrest of the accused on 02/01/02 they would have taken some steps immediately. No action was taken by anyone to find out about the accused. That fact also improbabilises the defence plea.

70. Now we come to the defence plea revolving around Ex.DW- 13/A, which is the copy of the letter which DW-14 Shri Dar had allegedly faxed to the then Chief Minister, J&K on 14/01/02 who on that date was in Delhi. This document was first exhibited in the evidence of DW-13 who was employed in the Jammu & Kashmir Legislative Council Secretariat. He deposed that this letter of Mr. Dar was faxed to the then Chief Minister Shri Farooq Abdullah on 14/01/02 at 10.30 a.m. and was received at New Delhi at 10.38 a.m. The letter Ex. DW-13/A is being reproduced below:

For the very kind attention of Hon"ble Chief Minister, Jammu and Kashmir State.

Four boys from Anantnag district, whose particulars are given hereunder, had gone to Delhi around 30th of December. Since 2nd or 3rd of January their whereabouts are not known. They are reported to have been picked up by the Delhi Police from Karan Hostel, Kotla Mubarakpura, Parasadi gali, South Extension, New Delhi. The J&K State, CID cell, Delhi was requested to trace out these four boys but till now nothing has been heard from them. You will kindly appreciate the agony to their parents and other family members who are in all circumstances entitled to know the fate of their children.

1. Mohd. Afzal Kumar S/o Sh. Mohd. Kumar, R/o Tailwani Anantnag (Junior Engineer).
2. Bilal Ahmad Mir, R/o Dialgam, Anantnag, (M.B.A. student staying in Karan Hostel where from they have been picked up).
3. Abdul Nazir Keen R/o Bulwani, Anantnag.
4. Annyatullah Dar R/o Dialgam, Anantnag.

No. :- PO/HCM/759/IC-02 Sd/-

Dated:- 14-01-02 Chairman

J&K Legislative Council.

Hon"ble Chief Minister,

J&K State.

This document of the defence shows that the family members of the accused

persons had informed DW-14 that all the four accused-appellants had come to Delhi from Kashmir on 30th December, 2001. However, it is not even the case of the accused persons that all four of them had come to Delhi on 30th December, 2001. Accused Bilal Ahmed Mir has claimed that he was living in Karan Hostel since 1998 and not that he had come to Delhi from Kashmir on 30th December, 2001 along with his three co-accused persons. It is, thus, clear that if at all the family members of the accused persons had met DW-14 on 11-01-2002, although even this fact cannot be accepted since none of the family members of the accused persons has come forward to say so in evidence, they had not given to him correct information and for this reason the document Ex. DW-13/A cannot be of any help for establishing the defence plea to the effect that the accused-appellants had been picked up by the police from Karan Hostel on 02-01-2002.

72. Now we come to the evidence of DW-14 Shri Abdul Rashid Dar. He had deposed that on 11/01/02 parents of the accused persons had met him and had informed him that the four accused persons had gone to Delhi on 30/12/01 and on 02/01/02 they had been picked up by Delhi Police. Then on 14/01/02 they had called him at his house in Jammu in the morning and then he contacted the State Chief Minister who that day was in Delhi and as desired by the Chief Minister he had faxed to him the letter Ex.DW-13/B, in which these facts were written. And then around 11 a.m. he had spoken to Chief Minister again when he was informed that he would be coming back in the evening that day. In the evening the Chief Minister returned from Delhi and informed him that he had found out that a case had been registered against the accused persons and they would be produced in Court next day. In cross-examination by APP this witness stated that the Chief Minister had given him the impression that the accused had been arrested on 14/01/02. From the evidence of DW-14 and the contents of Ex.DW-13/A it is clear that whatever was written in Ex.DW-13/A was told to DW-14 by the family members of the four accused-appellants. Since none of the relatives of the accused persons had seen them being picked up by the police on 02/01/02 the evidence of DW-14 does not at all help the accused. The Chief Minister also must have informed DW-14 regarding the arrest of the accused on 14th January only after verifying the factual position. We are also of the view that the evidence of DW-14 does not inspire confidence inasmuch as he has claimed that the parents of the accused had met him on 11-01-2002 but, as observed already, none of them has even bothered to enter the witness box to say that they had actually met DW-14 on 11-01- 2002 or on 14-01-2002 as had been deposed by DW-14. We are also of the view that the defence has also not been able to establish that the letter Ex. DW-13/A was, in fact, received by the Chief Minister in Delhi on 14-01-2002 at 10.38 a.m. Neither the then Chief Minister of J&K nor even his private secretary has been examined to prove that the said letter was, in fact, received in Delhi on 14-01-2002 at the Kashmir House. Nor the letter allegedly faxed and received in the Kashmir House, New Delhi has been got proved by the defence. There is no explanation for the non-examination of the relevant witnesses posted at the Kashmir House on

14-01-2002 who could only confirm whether any such letter was received at all from DW-14 or not.

73. The judgment of Apex Court in Mohd. Zahid's case (supra), relied upon by the counsel for the appellants, is clearly distinguishable on facts and does not help the appellants here. In that case the accused convicted under TADA took a plea that he was actually arrested by the police on 6th March, 1990 but was shown to have been arrested on 8th March, 1990 at 5.30 p.m. To probabilise this plea reliance was placed on the fact that on 8th March the father of the accused had moved an application before the concerned Magistrate bring to his notice that fact and for a direction to the police for the production of his son. Same day a telegram to that effect also was sent to higher authorities by the father of the accused. During the trial the father of the accused was not examined. The trial Court convicted the accused. The Supreme Court summoned the Daily Diary Book of the concerned police station for 8th March, 1990 which showed that there was an interpolation made in the entry regarding the time of departure of the police which had gone to apprehend the accused. Before interpolation the departure time was shown as 6 p.m. and then was changed to 5 p.m. So, the Supreme Court felt that if the police had left the police station at 6 p.m. the accused could not have been arrested at 5.30 p.m. as was being projected by it and so the defence plea was found to be probable. That is not the position here at all.

74. DW-9 Moti Lal also falsifies the defence plea instead of helping them. He deposed that on 1/1/02 and 2/1/02 he had taken accused Ansar Ahmed, Adil and Afzal to Mr. Nigam (DW-10) of Nigam Packers as Ansar wanted some packing material and thereafter the accused did not meet him (DW-9). He had also stated that 7-8 days after 02/01/02 when he was going home he saw these accused and one other person being shown on TV News and next day he had also read about their arrest in the newspaper. So, according to this defence witness he had seen the accused on TV and read about them 7-8 days after 02/01/02 when he had met them last. That was thus around 9th or 10th January. This is not even the case of the accused that they had been shown on TV or their arrest was reported in newspapers also around 9th or 10th January. In any case, the newspaper cutting to that effect has not been produced and no evidence of any TV Channel has been adduced. It can thus be said that this defence witness has given a version which was not true.

75. We have already accepted the prosecution case regarding the recovery of mobile phone with the number 9811336055 from room No. 3 of Karan Hostel on 14-01-2002 purchase of which on 07-01-2002 was admitted also by accused Mohd. Afzal Kumhar and Adil Nazir Keen in their confessional statements. If they were in police custody from 2nd January onwards they could not have purchased the mobile phone during that period. Thus the admission by the accused persons of purchase of the mobile phone on 07/01/02 and then its recovery from the room of accused Bilal Ahmed on 14/01/02 also falsifies the plea of the accused

persons that they were arrested on 02-01-2002.

76. We are, therefore, of the view that the defence plea that the accused had been apprehended on 02/01/02 is neither established nor even probalised.

77. In view of our foregoing conclusions, these appeals are dismissed and consequently the convictions of all the four accused- appellants for various offences as recorded by the Designated Judge vide judgment dated 30-10-2007 as also the sentences awarded to them vide order dated 22/11/07 are affirmed.