

(2007) 08 GUJ CK 0044

In the Gujarat High Court

Case No : Criminal Confirmation Case No. 7 of 2005 and Criminal Appeal No. 2317 of 2005

State of Gujarat

APPELLANT

Vs

Shahnawaz Abdulgafur Bhatti

RESPONDENT

Date of Decision : 29-08-2007

Acts Referred:

Arms Act, 1959 — Section 25(1), 25(1AA), 25(1B), 39
Constitution of India, 1950 — Article 100, 101, 102, 103, 104
Criminal Procedure Code, 1973 (CrPC) — Section 366(1)
Evidence Act, 1872 — Section 25, 27
Explosive Substances Act, 1908 — Section 4, 5, 6, 7
Foreigners Act, 1946 — Section 13(2), 14
Foreigners Order, 1948 — Rule 3(5), 5(2)
Passports (Entry into India) Rules, 1950 — Rule 3, 5, 6
Penal Code, 1860 (IPC) — Section 120B, 121, 121A, 122, 123
Wireless Telegraphy Act, 1933 — Section 3, 6(1)

Citation : (2008) 1 GLR 346

Hon'ble Judges : H.N. Devani, J;A.M. Kapadia, J

Bench : Division Bench

Advocate : A.J. Dasia, APP and Kirtidev Dave, in Criminal Confirmation Case No. 7 of 2005, for the Appellant; Kirtidev Dave and A.J. Dasia, Assistant Public Prosecutor in Criminal Appeal No. 2317 of 2005, for the Respondent

Judgement

A.M. Kapadia, J.—Criminal Confirmation Case No. 7 of 2005 arises pursuant to submission of the proceedings of Sessions Case Nos. 11 of 2002 and 18 of 2003 made u/s 366(1) of the Code of Criminal Procedure ("the Code" for short) by the learned Additional Sessions Judge, Fast Track Court No. 2, District Kachchh at Bhuj, who, by his judgment and order dated 14-10-2005, has sentenced respondent-Shahnawaz Abdulgafur Bhatti, the accused of Sessions Case No. 18 of 2003, ("the accused" for short) to death for commission of offence punishable u/s 121 read with Section 120B of the Indian Penal Code ("I.P.C for short) whereas Criminal Appeal No. 2317 of 2005 filed u/s 374(2) of the Code by the accused Shahnawaz Abdulgafur Bhatti from the jail is also directed against the

judgment and order dated 14-10-2005 rendered by the learned Additional Sessions Judge, Fast Track Court No. 2, District Kachchh at Bhuj, in Sessions Case No. 18 of 2003 by which the appellant/ accused is convicted for commission of the offence punishable u/s 121 read with Sections 120B I.P.C., 121A, 122 and 123 I.P.C., 124A I.P.C; Sections 25(1)(d), 25(1)(a), 25(1AA) of the Arms Act; Sections 13(2) and 14 of the Foreigners Act; Sections 4(b), 5 and 6 of the Explosive Substances Act, 1908,

Rules 3 and 6 of the Indian Passport Rules, 1959 (Entry into India), Paragraph 3 of the Criminal Law Amendment 1961, Paragraph 3 of the Indian Foreigners (Report to Police) Orders, 1971 and Sections 3 and 6(1) of the Indian Wireless and Telegraphs Act, 1933.

1.1. For the aforesaid offences, the accused is visited with the following punishments:

Sr.No.	Sections	Sentence imposed
1.	Section 121 read with Death sentence	
2.	Section 120B I.P.C.	R.I. for 3 months
3.	Section 121A I.P.C.	R.I. for 10 years and fine of Rs. 250/- i.d.,
4.	Sections 122 and 123 I.P.C.	R.I. for 3 months
5.	Section 124A I.P.C.	R.I. for 3 years and fine of Rs. 250/- i.d.,
6.	Sections 25(1)(d), 25(1)(a), 25(1AA) of the Arms Act	R.I. for 7 years and fine of Rs. 250/- i.d.,
7.	Sections 13(2) and 14 of the Foreigners Act	R.I. for 3 months
8.	Sections 4(b), 5 and 6 of the Explosive Substances Act, 1908	R.I. for 7 years and fine of Rs. 100/- i.d.,
9.	Rules 3 and 6 of the Indian Passport Rules, 1959 (Entry into India)	R.I. for 1 month
10.	Paragraph 3 of the Criminal Law Amendment, 1961, Paragraph 3 of the Indian Foreigners (Report to Police) Orders, 1971 and Sections 3 and 6(1) of the Indian Wireless Telegraphs Act, 1933	R.I. for 10 years and fine of Rs. 250/- i.d.,

2. As Criminal Confirmation Case and Criminal Appeal arise out of the common judgment and order dated 14-10-2005 rendered in Sessions Case Nos. 11 of 2002 and 18 of 2003 by the learned Additional Sessions Judge, Fast Track Court No. 2, District Kachchh at Bhuj ("the trial Court" for short), this Court proposes to hear the reference for confirmation of sentence of death and the appeal preferred by the accused together and to deal with the merits of the case against the accused in the light of all the material questions of law as well as facts, and to adjudicate upon the guilt of the accused and appropriateness of sentence of death by this common judgment.

3. The facts emerging from the record of the case, more particularly, as disclosed in F.I.R. and unfolded during trial are as under:

3.1. As per the allegations made in the complaint lodged by Gulabsinh Amarsinh

Parmar, on 27-7-2001, at 7-00 hours, A.S.I. Rajpal Hardwarilal, B. No. 1292, Head Constable, Mulbharthi Prembharthi, Armed Police Constables, Lakhmanram Thakraram, Prithvisinh Mulvaji, Bhagwanbhai Ranchhodbhai and other police personnel of Hajipir Outpost were patrolling in the Hajipir Dargah area. Meanwhile, at 9-30 a.m., one Ramzan Pirmamad of Hajipir came and informed the staff of Hajipir Outpost that a suspicious individual was there in the Baval bushes near Mubarak Pir's Dargah. Thereupon, they went to the Baval bushes shown by him and found the suspicious looking individual and upon inquiring about his name and whereabouts, he informed that his name was Mazzamil Hussain Abdul Gafur, resident of Mugang Chowky, Lahore, Pakistan. Upon conducting physical search of the individual, Indian currency in the sum of Rs. 20,000/- consisting of 34 notes of Rs. 500/- denomination and 30 notes of Rs. 100/- denomination, one wet chit bearing numbers in English and one live cartridge were found in his possession.

3.2. It is further case of prosecution that, S.I. Naranayansingh No. 70110012 and S.I. Surendrasingh No. 69500224 of G-Branch of the B.S.F. also arrived and joined in helping the police. As the said individual was found to be in possession of a cartridge, hence upon it becoming certain that he must be having some weapon, the said Pakistani citizen expressed his willingness to show the weapon, whereupon immediately two panchas (1) Ishaq Ismail Mujhavar and (2) Noormamad Saleman Mujhavar, both residents of Hajipir, Taluka Bhuj, were called and in their presence the Pakistani intruder took out one AK 56 Rifle and its magazine which contained 28 live cartridges from the Baval bushes on the western side of the Muzhuddin Hussain Mubarak Pir's Dargah. Possession of the AK 56 Rifle Body No. H. 7177 valued at Rs. 1,50,000/- and the cartridges valued at Rs. 560/- was taken by drawing a detailed panchnama.

3.3. As per further case of the prosecution, as ultra-modern weapons were recovered from the Pakistani citizen and it was probable that he was accompanied by other intruders, it did not appear to be safe to keep the Pakistani citizen at the Police Station; hence he was taken to the B.S.F. camp at Hajipir. Upon the Nara Police Station being informed in this regard through V.H.F. message sent from Hajipir Outpost, the in-charge P.S.I. and other staff reached Hajipir. As the Pakistani intruders had intruded through the desert, with a view to find out as to from where they had entered the border of India, local guides having expertise in the traditional way of tracking footprints and Police Force Photoprint Tracker on Special Duty Prabhatsinh Bharmalji Jadeja and police staff as well as B.S.F. personnel started tracking footprints on the path through which the intruders had come, whereupon at a distance of about 4 to 5 kilometres from Hajipir Outpost one bed-sheet and four live cartridges were found and clues indicating entry of three other intruders into the border of India from Pakistan were found.

3.4. It is further case of the prosecution that as it was found that four individuals had intruded, an entry was made in the Nara Police Station, Station Diary being

Entry No. 12 of 2001 at 11-15 hours on 27-5-2001. As per the averments made in the complaint, upon preliminary interrogation of the apprehended intruder, it was learnt that he was a trained terrorist belonging to the Pakistani Lashkar-e-Toiba hence, on the basis of Order No. L.I.B/B.D.R./ Restrict Movement/247/2001 dated 28-5-2001 passed by the Superintendent of Police, Kachchh-Bhuj, in exercise of powers conferred under the Foreigners Order, 1948 read with Government of Gujarat Notification No. B.S.F. 1160 (11) dated 2-12-1960, he was placed under restrictions at the Joint Interrogation Centre at Bhuj, where he was jointly interrogated by the police as well as other agencies operating at Kachchh.

3.5. It is further case of the prosecution that during the course of interrogation of the Pakistani intruder it was revealed that his real name is Shahnawaz Abdulgafur Bhatti, aged 19 years, resident of Nalowala, District Hafizabad Punjab, Pakistan.

3.6. It is further case of the prosecution that on 27-5-2001, police footprint trackers and other staff members, while tracking such footprints in the desert, which were coming from the direction of Pakistan, passed near Survandh and footprints of two out of the three intruders were tracked from Survandh through the Baval bushes to the farm of Kashmirasingh Kalusingh Sikh at the Mm/border of Nara Village. The footprints were found from the Kashmirasingh's vadi till his house. Upon searching in house, Kashmirasingh informed that two persons had come to his house and he had arranged for food and drinks and with the Rs. 500/- currency note given by them he had purchased cold drinks, salted peanuts, sugar, etc., from the shop of Muluksingh Gurdayalsingh of the village and in return they had given him Rs. 500/- as remuneration. It was learnt that these persons had come with intruders from Pakistan and were going to meet Maheru Bhil who was residing on the outskirts of Jaru village. Saying that from there both had some work at the place of Ghulam Hussain Mutva at Sarada village, they had left his place. The tracking was halted at night.

3.7. As per further case of prosecution, on 28-5-2001, while tracking footprints they crossed the Hajipir cross-road and reached the border of Muru village where they found footprints at a little distance from the house of Maheru Bhil. Upon making search for Maheru Bhil, he was not found. Proceeding further with tracking footprints they passed through Dhedh Talav and found footprints till the border of village Sarada. They halted tracking at night.

3.8. It is further case of the prosecution that on 29-5-2001, upon proceeding further, footprints were found near the water tank of Sarada village where upon searching for Ghulam Hussain, he was not found to be present, however, they secured information from the village that on 28-5-2001 two individuals had come to visit Ghulam Hussain and had met Sodha Haji Sahu, Maluk Alajudiya and Jhanjhan Haji Hayat, etc., there. It was learnt that from there Mamad Ali of Bhitara village had taken the said persons in his milk tempo. Upon getting investigation done by the footprint trackers around Sarada village and going

further no footprints were found, hence, it appeared that the Pakistani intruders had left Sarada village in a vehicle. Ghulam Hussain, Sodha Haji Sahu, Maluk Alajudiya and Memon Haji Hayat of Sarada village were not found to be present. Mamad Ali of Bhitara village was also not found to be present.

3.9. It is further case of the prosecution that on 30-5-2001, the B.S.F., during the course of searching for the intruders in the desert, found a box of used AK 56 cartridges and two pairs of old boots which were produced along with a report.

3.10. As per further case of the prosecution, Shahnawaz Abdulgafur Bhatti, resident of Nalowala, Punjab, Pakistan and member of a terrorist organization named Lashkar-e-Toiba, and along with him his three accomplices-Pakistani intruders under the guidance of Lashkar-e-Toiba and with the intention of actually waging war in India and with a view to spread lawlessness and to create hatred against the lawfully established Government in the minds of the people and to spread discord, have hatched a conspiracy with the help of certain anti-India anti-national elements and having obtained help from anti-India elements, Shahnawaz and three unknown Pakistani intruders who had absconded.

3.11. A complaint in respect of the aforesaid incident was lodged at Nara Police Station by Gulabsinh Amarsinh Parmar, P.S.I., Joint Interrogation Centre, Kachchh at Bhuj, which came to be registered vide CR No. 2 of 2001 at Nara Police Station for commission of the offences punishable under Sections 120B, 121, 121A, 123, 124A of I.P.C., Section 13(2) of the Foreigners Act, 1964 and Rules 3 and 6 of the Indian Passport Rules, 1950 (Entry into India) as well as Paragraph 3 of Criminal Law Amendment, 1961 and Paragraph 3 of the Indian Foreigners (Report to Police) Orders, 1971 and Sections 25(1)(d), 25(1)(a), 25(1AA), 25(1B)(f) of the Indian Arms Act.

3.12. Pursuant to the registration of the complaint, investigation was entrusted to Dilipkumar Rameshchandra Agravat, P.I. L.C.B. Police Station, District Kachchh at Bhuj by the District Superintendent of Police, Kachchh.

3.13. On taking over the investigation, D.R. Agravat, investigating officer, recorded statements of the witnesses and as there were incriminating evidences against Kashmirasingh Kalusingh, he was arrested on 19-7-2001 and his statement was recorded. He had also obtained police custody remand for ten days and made necessary investigation. Thereafter as there were sufficient incriminating evidences against the other six accused persons i.e., (i) Mamad Alikhan Jat, (ii) Gulamhusen Madhu Jat, (iii) Sodha Haji Sahu Jat, (iv) Jhanjhan Haji Hayat Jat and (v) Maluk Ala Judia Jat and (vi) Meharu Pappu Bhil, they were arrested on 29-7-2001 and their statements were recorded and they were produced before the Court within the stipulated time.

3.14. Thereafter the AK 56 rifle and other articles recovered from the accused Shahnawaz were forwarded to F.S.L. for necessary analysis. During the course of investigation, the accused Shahnawaz, a Pakistani citizen, who had brought along with him explosive and other destructive equipments was interrogated and

during the course of the interrogation, Shahnawaz expressed willingness to show the said articles. The investigating officer, D. R. Agravat, therefore, requisitioned the services of two Panchas and after informing them regarding all the facts and ascertaining their willingness to act as Panchas, the preliminary panchnama was drawn at L.C.B. Office at Bhuj. Thereafter at the instance of the accused Shahnawaz, various articles were recovered and panchnama was drawn accordingly on 17-12-2001. The articles which were recovered by him were as under:

- (i) AK 56 Rifle - 1 - valued at Rs. 1,50,000/-
- (ii) Empty Cartridges - 2
- (iii) Cartridges - 240 pieces valued at Rs. 24,000/-
- (iv) Yellowish explosive substance with normal greasiness 1,27,000 grams
- (v) Brownish black explosive substance 5,700 grams
- (vi) Yellow coloured oil cake like explosive substance with excessive oil-9,700 grams
- (vii) Hand grenades - 10 pieces
- (viii) Remote controls - 4 pieces
- (ix) Delay switches - 17
- (x) Wireless hand-set 2
- (xi) Battery manufactured by Energier company - 10 pieces
- (xii) Detonators (Electronic) 10 pieces
- (xiii) Detonators (Ordinary) 10 pieces, etc.

3.15. The said articles were sealed in presence of the panchas and thereafter the accused and the muddamal were brought to Bhuj. As all the muddamal were dangerous and explosive, experts from F.S.L. were called and the seal of the muddamal was opened in the presence of panchas by drawing panchnama. Samples of the muddamal substances were taken out and were sealed and panch slips were attached to the same in the presence of panchas. Thereafter upon weighing the R.D.X., it was found to weigh 12 Kgs. and 700 grams. All the muddamal articles were forwarded to F.S.L., Ahmedabad and detonators were sent to Vadodara Explosive Experts for analysis thereof.

3.16. At the end of the investigation sufficient incriminating evidences were found against all the seven accused persons who were arrested earlier. He obtained necessary sanction from the State Government as well as District Magistrate and on obtaining necessary sanction, he filed charge-sheet against seven accused in the Court of learned J.M.F.C., Nakhatrana where the case is registered as Criminal Case No. 77 of 2002.

3.17. After filing of charge-sheet against seven accused, he was transferred, and therefore, investigation was handed over to Police Inspector, G. H. Vasavada. Since, AK 56 rifle and live cartridges were recovered from the accused Shahnawaz, he was arrested on 21-11-2002. Thereafter, after making further investigation, G.H. Vasavada obtained necessary sanction to file supplementary charge-sheet against Shahnawaz and has filed supplementary charge-sheet against him before the learned J.M.F.C, Nakhatrana where it was registered as Criminal Case No. 384 of 2003.

3.18. As the offences punishable under Sections 121, etc., of I.P.C. are exclusively triable by a Court of Session, the learned J.M.F.C, Nakhatrana committed the case to the Court of Session, Kachchh at Bhuj, where it was numbered as Sessions Case Nos. 11 of 2002 and 18 of 2003.

3.19. Since both the Sessions Cases arose from the same CR No. 2 of 2001 the learned Additional Sessions Judge, Fast Track Court No. 2, Kachchh at Bhuj to whom both the cases were made over for trial, consolidated both the cases and framed charge against the accused of both the Sessions Cases for commission of the offences punishable under Sections 120B, 121, 121 A, 123, 124A of I.P.C., Section 13(2) of the Foreigners Act, 1964 and Rules 3 and 6 of the Indian Passport Rules, 1950 (Entry into India) as well as Paragraph 3 of Criminal Law Amendment, 1961 and Paragraph 3 of the Indian Foreigners (Report to Police) Orders, 1971 and Sections 25(1)(d), 25(1)(a), 25(1AA), 25(1B)(f) of the Indian Arms Act.

3.20. The charges were read over and explained to the accused. As the accused persons pleaded not guilty to the charge and claimed to be tried, they were put to trial by the trial Court in Sessions Case Nos. 11 of 2002 and 18 of 2003.

3.21. In order to bring home the charge levelled against the accused, the prosecution has examined as many as 18 witnesses and has relied upon their oral testimony, the details of which have been given in Paragraph 6 of the impugned judgment and order, as under:

_____ Sr. Status Exh. Page No. No. No. _____

1. Vikramsinh Malsinh Rahevar	
Witness 12 43	2. Ishaq Ismail Panch witness 15 45
3. Gulamrasul Mithakhan	
Witness 19 48	4. Mamad Kumbhir Jat Witness 20 49
5. Ramzan Tarmahmad	
Witness 21 50	6. Balvirsinh Kashmirsinh Panch witness 22 54
7. Rajpal	
Hardvarilal Yadav Witness 24 55	8. Popat Moti Panch witness 27 59
9. Sardarbhai	
Lavjibhai Karan Witness P.S.I. 33 63	10. Gulabsinh Amarsinh Complainant P.S.I. 40 67
11. Jayendrasinh Rajendrasinh	
Witness P.S.I. 43 70	12. Mahipatsinh Murubha Panch witness 44 72
13. Noormamad	
Suleman Panch witness 65 76	14. Chandrasinh Laxmansinh Panch witness 67 78
15. Dilipkumar Rameshchandra	
Investigating Officer 73 80	16. Navnitbhai Valjibhai Witness 87 86
17. Gopal	
Champaneri	

3.22. To prove the culpability of the accused, the prosecution has also produced as many as 32 documents and relied upon the contents of the same, details of which are enumerated in Paragraph 7 of the impugned judgment and order, as under:

Sr.	Particulars	Exh.	Page No.	No.	No.
1.	Order passed by the District Magistrate granting sanction u/s 39 of the Arms Act	13	306		
2.	Order passed by the District Magistrate granting sanction for prosecution u/s 7 of the Explosive Substances Act.	14	308		
3.	Receipt of muddamal article	No. 6	16	311	
4.	Receipt of muddamala article	No. 7	17	312	
5.	Panchnama in respect of recovery of muddamal	18	313		
6.	Panchnama in respect of recovery of muddamal	23	315		
7.	Article - Notes of Rs. 500/- denomination	Mark 11/4			
8.	Panchnama in respect of recovery of muddamal	28	316		
9.	Slips of muddamal article Nos. 17, 29, 309 18, 19 and 30. to 32	322			
10.	Extract of Police Station Diary	34	323		
11.	Extract of Police Station Diary	36	325		
12.	Extract of Police Station Diary	37	326		
13.	Xerox copy of the letters received from B.S.F. & &	38	328		
14.	Original complaint	Mark 11/1	41	331	
15.	Slips of muddamal article Nos. 40, 45 347 22 to 30, 32 to 37 to to 60	362			
16.	Panchnama of muddamal observation	61	363		
17.	Panchnama of place of incident	66	36		
18.	Panchnama in respect of recovery of muddamal (Mark 11/3 and 11/7)	69 & 372			
19.	Note sent to F.S.L.	Mark 11/15	74	373	
20.	Receipt issued by F.S.L.	Mark 11/16	75	378	
21.	Analysis report sent by F.S.L. in respect of muddamal	Mark 11/17	22		
22.	Note sent by F.S.L.	Mark 11/18	77	382	
23.	Receipt issued by F.S.L.	Mark 11/19	78	389	
24.	Receipt issued by F.S.L.	Mark 11/20	79		
25.	Analysis report sent by F.S.L. in respect of muddamal	Mark 11/21	26		
26.	Note sent by F.S.L.	Mark 11/12	81	395	
27.	Certificate issued by Explosive Department	82	399		
28.	Receipt issued by F.S.L.	Mark 11/24	83	401	
29.	Analysis report sent by F.S.L. in respect of muddamal	Mark 11/25	30		
30.	Analysis report sent by F.S.L. in respect of muddamal	Mark 11/26	31		
31.	Sanction dated 3-11-2001	Mark 11/28	88	414	
32.	Sanction dated 11-3-2003	Mark 11/30	89	416	

3.23. After recording of the evidence of the prosecution witnesses was over, the trial Court explained to the accused the circumstances appearing against them 156 FEBRUARY 2008 in the evidence of the prosecution witnesses and recorded their further statements as required u/s 313 of the Code. In their further statements the accused denied the case of the prosecution by saying that they

are poor people and they have been falsely implicated in the case. However, they did not lead any evidence nor did they examine any witness in support of their defence.

The present accused of Sessions Case No. 18 of 2003, who has been sentenced to death, has further stated that he is a poor man and he has been falsely implicated in the case. He has further stated that the prosecution has filed false case against him and he did not know anything about the muddamal which were recovered by the investigating agency. He has further stated that he is a citizen of Pakistan and for worshipping at Hajipir he came to India through the desert route as he is poor and unable to afford the expenses to come to Hajipir via Punjab which would take much time and when he was coming to Hajipir for worshipping, near the border of India and Pakistan, officers of B.S.F. caught him and entrusted to the police and thereafter the police has falsely implicated him with the muddamal which the police has recovered from some isolated place. He has further stated that he is innocent. He, therefore, urged to release him.

3.24. On appreciation, evaluation, analysis and scrutiny of the evidence adduced by the prosecution, the trial Court held that prior to framing of the charge against accused No. 7, Maheru Pappu Bhil has died whereas during the pendency of the trial, accused No. 2 Mamad Alikhan, has also died, and therefore, the case against both of them has been abated. So far as remaining five accused persons of Sessions Case No. 11 of 2002 are concerned, the trial Court has held that the prosecution has failed to prove the charge levelled against them, and therefore, they are acquitted whereas so far as the accused of Sessions Case No. 18 of 2003 is concerned, i.e., Shahnawaz, a Pakistani citizen, the prosecution has successfully established the charges levelled against him and it has been held that he has entered into the territory of India without passport or permit with AK 56 rifle, live cartridges as well as R.D.X., detonators and other equipments and materials mentioned in panchnama, and therefore, he attempted to wage war against the Indian Government and to create anarchism in India by exploding R.D.X. by creating terrorism and he intended to wage war against the Government of India and hence all the charges levelled against him have been duly proved and accordingly convicted him for the offences with which he was charged.

3.25. The trial Court thereafter heard the accused Shahnawaz on the question of sentence. According to the trial Court, the accused Shahnawaz was found with AK 56 rifle, live cartridges and large quantity of R.D.X. and since his attempt was to explode R.D.X. in the Indian Territory and to create anarchism and to wage war against the Government of India by bringing the said articles to Indian territory along with his three other companions who are absconding and thereby to terrorize the people and to create anarchism, and therefore, he attempted to wage war against Government of India. Therefore, according to the trial Court, it is a "rarest of rare case" for imposing the death sentence and accordingly the trial Court imposed extreme penalty of death for commission of offence under

Sections 121 and 120B of I.P.C. and also imposed R.I. for life u/s 121A of I.P.C. and other various sentences for various offences to which reference is made in earlier paragraphs of this judgment which has given rise to instant two proceedings before this Court.

4. Mr. Kirtidev Dave, learned Advocate of the accused, in support of the defence has raised several contentions pointing out that the conviction and sentence recorded against the accused is not justified, which can be summarised as under:

4.1. Mr. Kirtidev Dave, learned Advocate of the accused, has firstly assailed the grant of sanction to prosecute the accused by the sanctioning authority. According to him the investigating officer has obtained sanction under the Arms Act from the Additional District Magistrate on 2-11-2001. The sanction to prosecute 7 other accused, who are Indian, has been accorded by P.W. 17 on 3-11-2001. This sanction was prayed for the 7 Indians only. The sanction by the State Exh. 89 is accorded on 11-3-2003. As per the prosecution case, the alleged recovery of arms and ammunitions from the accused was effected on 27-5-2001. The F.I.R. against all the accused, including the accused Shahnawaz was filed on 14-7-2001. The F.I.R. included charges of Section 121 and other offences under Chapter VI of the I.P.C. Therefore, the investigating officer was well aware on the day he sought sanction u/s 196 of the Code that the allegations against the accused are more serious. However, the investigating officer chose not to seek sanction against the accused because it was decided to implicate him in more serious and grave charge.

4.2. In sum and substance, his submission centered around that the authority has accorded sanction without application of mind and it also led to the conclusion that the investigating agency has acted in improper and unjust manner. According to him, the Pakistani citizen may not claim fundamental rights under the Constitution of India. However, the equality and fairness in trial are fundamental of internationally accepted principles of human rights. Therefore, the trial based on such illegal sanction cannot be sustained. It is also contended by him that the prosecution has examined only the clerk and not the sanctioning authority, therefore, also sanction is not in accordance with law. Therefore, according to him, based on the illegal sanction, resultant conviction is bad in law and cannot be sustained. In support of the aforesaid contention he relied upon the following decisions:

(i) State of Gujarat v. Dalpatsing Mafasing and Ors. 1993 (2) GLR 1775.

(ii) P.C. Joshi and Another Vs. The State of Uttar Pradesh,

(iii) The State of Rajasthan Vs. Tarachand Jain,

4.3. According to Mr. Dave, as per the prosecution case, the B.S.F. personnel were there at the time of discovery. However, no person from B.S.F. has been examined. The report of the B.S.F. was produced by the prosecution but was not tendered in evidence by the prosecution. This action is bad in law. The report of

the B.S.F. and the seizure memo of the B.S.F. for the same articles and at the same time was produced during the cross-examination of P.W. 9 P.S.I. Sardarbai Lavjibhai Karan. The report is at Exh. 38 while the seizure memo is at Exh. 39. Both these documents are tried to be kept away from the scrutiny of the trial Court by the prosecution. These documents are prepared by a public servant in discharge of his official duty. It is the bounden duty of the prosecution to unfold the truth by producing all the relevant documents.

4.4. He has also asserted that as per the story of the B.S.F., the accused was apprehended by them at 9-30 a.m. on 27-5-2001. The panchnama (Exh. 28) discloses that the accused was apprehended by P.W. 5 Rajpal Yadav at 10-00 a.m. on the same day. Now the person apprehended by B.S.F., who had seized the articles at 9-30, cannot lead the P.W. 5-Rajpal Yadav to discovery and also the recovery as mentioned in panchnama (Exh. 28). This creates serious doubt about the prosecution version right from the inception. The prosecution alleges that the story of seizure is cooked up by B.S.F. for getting benefit and publicity. The prosecution admits intervention by B.S.F. P.W. 9 "Sardarbai Lavjibhai Karan has also admitted that the police station had been handed over the custody of the accused and the articles by the B.S.F. P.W. 5-Sardarbai Lavjibhai Karan has also admitted that no accused and articles would be handed over to any agency without proper paperwork. Therefore, according to him, not recording any statement of anybody from B.S.F. and also keeping away Exhs. 38 and Exh. 39 from scrutiny of the Court casts serious doubts about the genuineness of the investigation. It is alleged that the police created recovery at their end to get reward and publicity. The Police alleges the same against the B.S.F. This is the Police case, therefore, the evidence has to be produced by the Police. B.S.F. is a paramilitary force under the Act of 1968. Therefore, B.S.F. has not to come before the Court and hence the basic doubts created by the action of the police creates serious doubts, about the genuineness of the recovery and discovery by it on 27-5-2001.

4.5. It is emphasised by him that as per the case of the prosecution, the accused was detained on 27-5-2001 whereas the F.I.R. has been lodged on 14-7-2001. The filing of F.I.R. and interrogation of the accused was delayed for over six weeks and there is no just and proper ground for the delay. The manner in which the F.I.R. was prepared at Bhuj office, creates serious doubt about it. The police had received the first information on 27-5-2001 and the Exh. 38, report of the B.S.F. is crystal clear. The other accused were also known to the police within a short span. Therefore, this belated F.I.R. is not genuine one. It is a creation after due deliberation by number of agencies and superior officers. Therefore, no reliance can be placed on such F.I.R.

4.6. It is pointed out by him that admittedly, the accused was in custody from 27-5-2001. Therefore, the F.I.R. based on his confessional statement is clearly hit by Section 25 of the Evidence Act. Therefore also the F.I.R., Exh. 41, which is not first in point of time, is not admissible.

4.7. It is emphatically submitted by him that the prosecution has relied upon the so-called second discovery-cum-recovery of the muddamal on 17-12-2001. The prosecution wants to prove this discovery panchnama (Exh. 28) through the deposition of P.W. 15-Dilip Rameshchandra Agravat - Investigating Officer. As per this panchnama and evidence, the place from where the recovery is made can be reached only after a walk of 12 km. The mark of identification was a stick on a heap. Between May and December there was monsoon. Therefore, the so-called identification could not have remained as such. This creates serious doubts about the alleged discovery.

4.8. He has also drawn our attention that P.W. 15, Dilip Rameshchandra Agravat, has stated that the interrogation was going on till 16-12-2001. The alleged discovery was effected on 17-12-2001. Therefore, the facts were disclosed to the police well before the panchnama had begun. Therefore, the first part of the panchnama about disclosure is not genuine. Under the circumstances, the second portion of the panchnama is also not genuine. Therefore the said panchnama cannot be considered as panchnama u/s 27 of the Evidence Act. Besides this, the date of second discovery is after about seven months when the accused was in joint interrogation centre. No doubt, under Rules 3(5) and 5(2) of the Foreigners Order, 1948, the custody of a foreigner can be with the civil authority. However, as per Rule 5(2b) the permission to leave India can be refused if presence is required to answer a criminal charge. In this case, the civil authority waited for pretty long time and kept him under detention from 27-5-2001 to 21-11-2002. Therefore, the so-called discovery on 17-12-2001 is not free from reasonable doubts and no reliance can be placed on such discovery in such a serious crime. The seriousness of crime would require more vigilant investigation and proper and perfect evidence. This is lacking in this case, and therefore, the benefit of doubt must go to the defence.

4.9. It is also emphasized by him that the trial Court has narrated in details the arguments of defence. However, the trial Court has not assigned any reason for the conclusion arrived at by it.

4.10. According to him, this is a case of confirmation, and therefore, even if no appeal is filed, the entire evidence is required to be reconsidered and re-appreciated.

4.11. It is also emphasized by him that there is no evidence worth consideration against the accused which can connect him with such serious charges of waging war against the Government of India. Discovery of the weapons itself is not established. It is true that the accused is a Pakistani citizen and without passport he came to Indian through unauthorized way, therefore, he can be convicted for the said offence but not for the offences of waging war against the Government of India as well as under the Explosive Substances Act and also under the Arms Act.

4.12. On the aforesaid premises, according to him, the impugned judgment and

order convicting the accused for the offences of waging war as well as under the Explosive Substances Act and the Arms Act, deserves to be quashed and set aside by allowing this Appeal and also by dismissing the Criminal Confirmation Case. He, therefore, prayed that the Criminal Confirmation Case may be dismissed and Criminal Appeal No. 2317 of 2005 may be allowed and the accused may be acquitted of the offences with which he was charged.

4.13. In the alternative, he submitted that the trial Court is not justified in imposing death sentence on the accused. The trial Court has not assigned any reason for imposing death sentence. According to him, this case is not one of the "rarest of rare cases" as per the catena of decisions rendered by the Supreme Court in this regard. Therefore, also the Criminal Confirmation Case No. 7 of 2005 is required to be dismissed.

5. Mr. A. J. Desai, learned A.P.P. for the State of Gujarat, has vehemently opposed the contentions advanced by Mr. Kirtidev Dave, learned Advocate of the accused.

5.1. It is contended by him that the sanctioning officer has after application of mind given the consent to prosecute the accused and to prove the said sanction, prosecution has also examined the witnesses who have signed the letter of sanction.

5.2. According to him, there is voluminous evidence against the accused for commission of the offences with which he was charged. He was found in suspicious circumstances at a distance of 50-60 feet from Hajipir Dargah and this information was conveyed to Mulbharti, Head Constable at Hajipir Out Post. He was identified as a Pakistani citizen from whom Rs. 20,000/- was also recovered and live cartridges and AK 56 Rifle were also recovered by the police officer after making discovery panchnama in presence of panchas. It is further emphasized by Mr. A.J. Desai, learned A.P.P., that thereafter the accused was sent to Joint Interrogation Centre, Kachchh at Bhuj, under the provisions of Foreigners Order, 1971, as he was a Pakistani citizen and came to India without passport by unauthorisedly crossing the boundaries of Kachchh. It is also emphasized by him that during interrogation he has shown his willingness to find out the explosive articles, AK 56 Rifle and R.D.X. which were brought by him from Pakistan with the help of other three Pakistanis who absconded and another accused i.e., accused No. 7, Maheru Pappu Bhil, who died during pendency of the trial, therefore, as per his information two panchas were called and preliminary panchnama was drawn and in the presence of the panchas explosive muddamal R.D.X., etc., were recovered. He has also pointed out that all the panchas have supported with regard to discovery made from the accused of the explosive substance, and therefore, his intention and attempt was to terrorize the people of India and then wage war against the Government of India by blasting the explosive substances which were brought by him at the instance of Azam Chima and other three Pakistanis and deceased Maheru Pappu Bhil. It is also asserted by him that there is nothing to disbelieve the evidence of police officers who

have found him in suspicious condition and they have recovered muddamal by drawing two discovery panchnamas at the instance of the accused. He has also drawn our attention to the evidence of Investigating Officer which is of sterling quality and there is no reason to discard the said piece of evidence. According to him, the charges levelled against the accused, have been duly proved, and therefore, the impugned judgment and order convicting the accused for commission of the offences punishable under the I.P.C. as well as other provisions, does not call for interference of this Court in exercise of powers u/s 374(2) of the Code.

5.3. In respect of the imposition of death sentence upon the accused, Mr. A.J. Desai, learned A.P.P., has submitted that the accused is a Pakistani citizen and he has crossed the border of Indian territory. He has brought explosive substance at the instance of Azam Chima and other three Pakistanis, with a view to blast the explosive substance within the territory of India and thereby to terrorise the people of India and to wage war against the Government of India. If the accused would have succeeded in his attempt, then it is not very difficult to perceive the result. No sympathy can be shown to him and this can be a "rarest of the rare" case. In the alternative Mr. A. J. Desai, learned A.P.P., has submitted that if this Court comes to the conclusion that this is not a "rarest of the rare" case, and therefore, death sentence imposed on the accused deserves to be commuted to life imprisonment, then the directions given by the Supreme Court in Subash Chander Vs. Krishan Lal and Others etc. etc., , may be followed and a direction may be issued that the accused shall not be entitled to any commutation or premature release under the Code, Prisoners Act, Jail Manual or any other statute and the rules made for the purpose of grant of commutation and remissions, and shall spend his entire life in the prison, in view of the act committed by the accused, who is a Pakistani citizen, by bringing explosive substance to the Indian territory with a view to blast it and with a view to wage war against the Government of India.

5.4. On the aforesaid premises, it is submitted that no case is made out by the accused for commutation of death sentence to life imprisonment, and therefore, the appeal should be dismissed and the Criminal Confirmation Case should be allowed.

6. This Court has considered the submissions advanced by Mr. Kirtidev Dave, learned Advocate of the accused and Mr. A. J. Desai, learned A.P.P. for the State of Gujarat at length and in great detail. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned Advocates for the parties with reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with confirmation cases, this Court has examined the entire evidence on record for itself independently of the trial Court and examined arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether it was the

accused and none else who has committed the offences as alleged against him. We have also carefully considered the judgments cited at the bar by the learned Advocates for the parties.

7. Before re-appreciating evidence of witnesses examined in this case, it would be advantageous to refer to criteria for appreciation of oral evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters, not touching the core of the case, hyper-technical approach by taking sentence torn out of the context here or there, from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter, would not ordinarily permit rejection of the evidence as a whole. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of the evidence given by the witness, the Appellate Court which had not this benefit, will have to attach due weight to the appreciation of evidence by the trial Court, and unless the reasons are weighty and formidable, it would not be proper to reject the evidence on the ground of variations or infirmities in the matter of trivial details. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the police are meant to be brief statements and could not take place of evidence in the Court. Small/trivial omissions would not justify a finding by a Court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming, from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it. In the deposition of witnesses, there are always normal discrepancies, however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and the like. It is not uncommon that improvements in earlier version are made at the trial in order to give a boost to the prosecution case, albeit foolishly. Therefore, it is the duty of the Court to separate falsehood from truth. In sifting the evidence the Court has to attempt to separate the chaff from the grains in every case. The Court cannot abandon the attempt on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, the evidence of the witnesses examined in this case will have to be

appreciated.

8. In the light of above-quoted principles, the Court will have to consider the question whether guilt of the accused is established by the prosecution. In order to decide this question, it would be necessary for the Court to discuss in extenso the evidence adduced by the witnesses.

9. Mr. Kirtidev Dave, learned Advocate for the accused, has assailed the impugned judgment on the ground that the sanction to prosecute the accused is not accorded strictly in accordance with law and it has been granted without application of mind.

9.1. In this connection, we may first advert to the oral testimony of P.W. 1, Vikramsinh Malsinh Rahevar, Exh. 12. He has, inter alia, testified that he is serving as a Clerk in the office of the District Magistrate, Kachchh District at Bhuj. He has produced papers from the office of the Additional District Magistrate in respect of granting of sanction on 2-11-2001 to prosecute the accused persons u/s 39 of the Arms Act. He has identified the signature of H.M. Gadhvi, Additional District Magistrate. The said document is produced at Exh. 13. He has further testified that the District Magistrate has granted sanction on 15-1-2001 to prosecute the accused persons u/s 7 of the Explosive Substances Act. He has also identified the signature of M.N. Chhibar, District Magistrate and the said letter is produced at Exh. 14.

In cross-examination he has admitted that he has no personal knowledge in this regard.

9.2. A conjoint reading of the oral testimony of P.W. 1, Vikramsinh Malsinh Rahevar, Exh. 12 and documents at Exhs. 13 and 14, it is seen that as per Exh. 13, sanction to prosecute eight accused persons, including the present accused Shahnawaz, for commission of the offences under the Arms Act was granted by the Additional District Magistrate in exercise of powers conferred u/s 39 of the Arms Act. Exh. 14 shows that against eight accused persons, including the present accused Shahnawaz, sanction was granted to prosecute them under the provisions of Explosive Substances Act by the District Magistrate in exercise of powers conferred u/s 7 of the Explosive Substances Act.

9.3. In view of the aforesaid evidence, according to us, it is not correct to contend that the sanctioning officer has not applied mind properly prior to the granting of sanction to prosecute the accused under the provisions of the Arms Act and Explosive Substances Act.

9.4. Since, both these documents Exh. 13 and Exh. 14 are bearing the signature of the sanctioning authority i.e., Additional District Magistrate and District Magistrate respectively as identified and testified by P.W. 1-Vikramsinh Malsinh Rahevar Exh. 12, who is serving as a Clerk in the office of the District Magistrate, it is not necessary for the prosecution to examine the authors of the said documents themselves.

9.5. The prosecution has also obtained the sanction to prosecute the accused for commission of the offences under Sections 120B, 121, 121A, 123 and 124A I.P.C. In this regard, the prosecution has examined P.W. 16 Navnitbhai Valjibhai Champaneri, Exh. 87, P.W. 17 Gopal Kumarswami Naikar, Exh. 92, P.W. 18 Vijaykumar Bhaskarraai, Exh. 93.

9.6. P.W. 16, Navnitbhai Valjibhai Champaneri, Exh. 87, has in his oral testimony testified that he is serving as Deputy Section Officer in the Home Ministry, Government of Gujarat, and he has produced the sanction obtained against accused Nos. 1 to 7 of Sessions Case No. 11 of 2002, which is at Exh. 88 whereas the sanction to prosecute the accused of Sessions Case No. 18 of 2003, Shahnawaz is produced at Exh. 89.

9.7. P.W. 17, Gopal Kumarswami Naikar, Exh. 92, has inter alia, testified in his evidence that after examining the papers placed before him, he has granted sanction in exercise of the powers conferred u/s 196 of the Code to prosecute seven accused persons for commission of the offences punishable under Sections 120B, 121, 121A, 123 and 124A I.P.C.

9.8. P.W. 18, Vijaykumar Bhaskarraai, Exh. 93, has also stated that after examining the papers placed before him, he has granted sanction to prosecute the accused Shahnawaz in exercise of powers conferred u/s 196 of the Code for commission of the offences punishable under Sections 120B, 121, 121 A, 123 and 124A I.P.C.

9.9. A close analysis of the oral testimony of these witnesses as well as the orders granting sanction produced at Exhs. 88 and 89, it cannot be said that the sanctioning authority has not applied mind prior to granting approval to prosecute the accused. These witnesses have studied the entire case file and the accusation alleged against the accused, and thereafter, granted the sanction to prosecute the accused. Therefore, the letters of sanction to prosecute the accused for commission of the offences punishable under Sections 120B, 121, 121 A, 123 and 124A I.P.C. produced at Exhs. 88 and 89 has been accorded in accordance with law and it is not correct to say that the sanctioning authority has not applied mind prior to granting sanction.

9.10. In view of the aforesaid evidence, according to us, prior to filing of the charge-sheet, the prosecution has obtained necessary sanction to prosecute all the accused persons, including the present accused Shahnawaz, for commission of the offences under the Arms Act and Explosive Substances Act and under Sections 120B, 121, 121 A, 123 and 124A I.P.C. and the trial Court has rightly negated the contention that the sanction is not accorded in accordance with law or on non-application of mind. Therefore, the contention advanced by Mr. Kirtidev Dave having been found to be meritless, has to be rejected and accordingly we reject the said contention and hold that the prosecution has successfully established that the prosecution has obtained necessary sanction prior to the filing of the charge-sheet against the accused persons for prosecuting them

under the provisions of the Arms Act, Explosive Substances Act and under Sections 120B, 121, 121A, 123 and 124A I.P.C. and the trial Court has rightly held that the sanction is accorded in accordance with law.

9.11. The judgments relied upon by Mr. Kirtidev Dave, learned Advocate of the accused, in support of his above contention are not applicable to the facts of the present case as those judgments rested on the facts of those cases which have no bearing to the facts of the present case, and hence, detailed reference to the judgments relied upon by Mr. Dave are avoided with a view not to burden the judgment.

10. The next question which is to be answered by this Court is whether the prosecution has proved the charges levelled against the accused for commission of the offences levelled against him.

11. In this connection, we have to first of all, find out how this incident has been reported to the police authority. In this regard, we have to scrutinise the evidence of P.W. 5, Ramzan Tarmahmad, Exh. 21. He has testified that at the relevant time he was residing at Hajipir and was conducting prayer services at the Hajipir Dargah. At the relevant time, when he was near Mubarakpir Dargah of Hajipir, he had gone near the bushes at a distance of about 50-60 feet thereof to relieve himself, when he found a person drinking water from a muddy puddle. On seeing him, the said person asked him to come near him. The said person thereafter inquired from him as to whether he was a Hindu or a Muslim, to which he had replied that he was a Muslim. The said person was wearing a salwar and there was money in its front pocket. The said person asked him to keep the money and get him a shirt and give him food and water. The said person was wearing only a salwar and the rest of his body was bare. This witness told the said person to keep the money with him. This witness was suspicious about the said person. The lower leg of the said person was bleeding. This witness brought him near the water stand and gave him a bucket of water and told him to drink water and take a bath and in the meanwhile he would get him some clothes and food. This witness had also asked his nephew (who has since then expired) to keep an eye on the said person. He thereafter went to the police station where Jamadar Rajpal, Mulbharthi, Lakhmanram constable, Pathubha, etc., were present. He informed them about the said person and told them that he suspected the said person. He, thereafter took the policemen to the place where he had seated the said person, whereupon the police apprehended the said person and took him away. Later on he learnt that the said person was a Pakistani whose name was something like Muzbilhussain. He had Rs. 500/- and one live cartridge. Thereafter the police had interrogated him and then they went near the bushes with the accused. In the bushes a rifle was lying beneath a jute sack. Thereafter, the said person was taken to the B.S.F. Camp.

11.1. This witness was cross-examined by the learned Advocate of the accused, at length and in great detail. Suggestions were made to this witness about non-recording of his statement. However, he has repelled such suggestions and he

has in unequivocal terms stated that he has informed the police about the said incident. He has also stated that police has recorded his statement subsequently.

11.2. Nothing substantial has been brought out during the cross-examination of this witness which would shake or discredit the evidence of this witness.

12. The prosecution has thereafter examined and relied upon the oral testimony of P.W. 2, Ishaq Ismail, a panch witness, Exh. 15. He has inter alia testified that two years and three months ago, he had been asked by the Hajipir Police Jamadar to come near Mubarakpir Dargah as they had apprehended an accused person named Majboolhussain Abdul Gafur. He had seen the accused person. Rs. 20,000/- had been recovered from him which consisted of currency notes of the denomination of Rs. 100 and Rs. 500. One rifle was also recovered. Upon interrogation it was revealed that he was a Pakistani. Thereafter a panchnama had been drawn. Subsequently, the accused was taken to the B.S.F. camp. He has further deposed that the rifle referred to earlier, had been taken out by Muzbilhussain from the bushes. The possession of the rifle was taken over by the police by drawing panchnama. There were 28 cartridges also. He has identified the rifle and cartridges and acknowledged his signatures on the panchnama Exh. 18 as well as panch slips.

12.1. This witness was also cross-examined by the learned Advocate of the accused at length and in great detail but nothing substantial which would be any help to the accused could be brought out from his cross-examination and this witness withstood the test of cross-examination successfully.

12.2. A question was asked by the Court to this witness to which he replied that the rifle and money which were recovered from the accused were shown by the accused himself. He has also stated that during the panchnama B.S.F. personnel were also present. The said panchnama is produced at Exh. 18 and he has identified his signature in the said panchnama.

12.3. On close scrutiny of the oral testimony of P.W. 2 Ishaq Ismail, Exh. 15 and the panchnama at Exh. 18, it has to be held that Exh. 18 is a discovery panchnama. The panch has deposed as per the contents of the panchnama. Therefore, there is no reason to disbelieve the testimony of P.W. 2, Ishaq Ismail, Exh. 15 and the panchnama at Exh. 18, by which the rifle and Rs. 20,000/- were recovered from the accused Shahnawaz.

13. The prosecution has thereafter examined and relied upon the evidence of P.W. 7, Rajpal Hardvarilal Yadav, Exh. 24. He has, inter alia, testified that at the relevant time he was discharging duties at Hajipir Outpost. On 27-5-2001 at 7-00 a.m., he and his staff consisting of Head Constable Mulbharthi, Police constables Lakhmanram, Bhagwanji and Prithvirajji, etc., were patrolling in the Hajipir area. Mean while, they had received information that a suspicious looking individual was seen in the bushes located near the Mubarakpir Dargah, opposite Hajipir Dargah. Upon receiving such information, he had immediately proceeded to the said place along with his staff and there, in the baval bushes, they found a

suspicious looking individual. On asking his name, address, etc., he started prevaricating. Thereafter he had divulged information to the effect that his name was Muzzamil Hussain Gurjar, aged 21 years, resident of Moga Chowky, Lahore, Pakistan. Upon conducting physical search of the said individual, a plastic bag was found from the salwar that he was wearing. Upon opening the said plastic bag, Rs. 20,000/- in Indian currency notes, one live cartridge and a wet chit were found.

13.1. This witness has further deposed that on the basis of the aforesaid articles, he felt suspicious and carried out further interrogation of the said person, whereupon the said person showed the bushes near the pit, wherein he had kept the AK 56 rifle wrapped in a jute sack. Upon opening the sack, a magazine bearing No. P-5177 and an AK 56 weapon were found. On opening the magazine, 28 live cartridges were found. On further interrogation, it was revealed that the said person was connected with Pakistan's Lashkar-e-Toiba group, therefore, he immediately asked for help from the B.S.F. The said individual also disclosed that he had come along with 3 to 4 other persons. Therefore, this witness immediately sent message through V.H.F. set to the Nara Police Station as well as to his higher officers. Thereafter he had drawn a panchnama of all the articles recovered in the presence of panchas from 10-00 to 11-00 hours. The panchas of the said panchnama were Ishaq Osman and Noormamad Sale, both residents of Hajipir.

13.2. Thereafter he had taken Muzzamil Hussain as well as the articles recovered by way of the aforesaid panchnama to the B.S.F. Camp for the purpose of safety. Subsequently, on arrival of his higher officers as well as the officers of B.S.F., the B.S.F. officers had handed over the articles recovered vide the aforesaid panchnama to his higher officers. Thereafter, the muddamal receipt in connection with the articles detailed in the panchnama was written at the Nara Police Station in his presence. The higher officers had taken Muzzamil Hussain and the articles recovered from him to the Joint Interrogation Centre, Bhuj for interrogation and as instructions had been issued to the staff present there to disperse into two groups and to proceed for patrolling in search of the absconding persons, he had also participated in the search for the 3 to 4 absconding persons in the Nara Vadi area.

13.3. This witness has also identified the accused as Muzzamil Hussain as well as the currency notes, AK 56 rifle and 28 cartridges recovered from him.

13.4. This witness was also cross-examined by the learned Advocate for the accused at length and in great detail. He has denied the suggestion made to him during the course of cross-examination that the accused was arrested by the B.S.F. personnel. He has also successfully withstood the test of cross-examination and nothing has been brought out during his cross-examination to make his evidence unreliable.

14. The prosecution has thereafter examined and relied upon the oral testimony

of P.W. 8, Popat Moti, a panch witness, Exh. 27. He is a panch witness to the panchnama drawn on 17-12-2001. He has deposed that on 17-12-2001, at 9-30 at night, he had been called at the L.C.B. office at Bhuj for acting as a panch. A person named Shahnawaz Abdul Gafur Bhatti was present there. He informed that he was ready and willing to show the place where the rifle and other things were kept. Shahnawaz was a resident of Pakistan.

14.1. This witness has further deposed that he had put his signature on the panchnama. He accordingly identified his signature on the preliminary panchnama. He has further deposed that between 9-30 to 9-45 hours they had started out in a Government vehicle. The accused Shahnawaz was with them and he was to show the way on which they were to go and accordingly they had departed from Bhuj. From Bhuj they proceeded in the Government vehicle and passed through Nakhatrana, Desalpar, Hajipir and entered the desert. They proceeded further into the desert as far as the vehicle could go. Thereafter, as it was not possible for the vehicle to go any further, they stopped the vehicle and set out on foot on the way shown by Shahnawaz. After walking ahead on foot for about 12 kilometres, they saw a mound of sand, whereupon Shahnawaz removed sand from the top of the mound and took out four sacks from beneath the sand. One rifle was recovered from a sack. From the second sack explosives like bombs were found which were shown to the panchas and were sealed. Khakhi tape was applied and something was written on it.

14.2. One packet of cigarettes, one strip of tablets meant for headaches, and some pieces of wood were also seen there. No other articles were found to be seen. All the sacks were again sealed and they had immediately set out on the return journey. At that time it was about 6-30 in the evening. While sealing the sacks, a panchnama was drawn and he has signed the said panchnama which is at Exh. 28. This witness has also identified his signature on the slips attached to the muddamal articles Exhs. 29, 30, 31 and 32.

14.3. This witness was also cross-examined at length but nothing substantial which would impeach his testimony has been brought out.

14.4. A conjoint reading of the evidence of P.W. 8, Popat Moti, Exh. 27 and the panchnama Exh. 28, it is clear that the panch witness has deposed as per the contents of the panchnama. In the first part of the panchnama, the accused has shown his willingness to show the place where the rifle, R.D.X., etc., were hidden by him. The accused showed the place where they saw a mound of sand, and Shahnawaz removed sand from the top of the mound and took out four sacks from beneath the sand. One rifle was recovered from a sack. From the second sack explosives like bombs were found in the presence of this witness and those muddamal articles were sealed in his presence. Therefore, there is no reason to disbelieve the say of this panch witness with regard to the discovery of the weapons and explosive substances made at the instance of the accused.

15. The prosecution has thereafter examined and relied upon the oral testimony

of P.W. 9, Sardarbhai Lavjibhai Karan, at Exh. 33. He was in-charge P.I. at Nara Police Station at the relevant time. On 27-5-2001 at 11-20 hours, Head Constable Mulbharthi of Hajipir Outpost informed that all the police personnel at Nara Police Station should immediately come to Hajipir, hence, he immediately proceeded to Hajipir with nine policemen. Upon reaching there, he learnt that a terrorist has been apprehended with an AK 56, currency notes and a live cartridge and has been taken to the B.S.F. Camp by the B.S.F. personnel and he is being interrogated there. Upon coming to know of the aforesaid, he went to the B.S.F. Camp. At that time an individual who had been apprehended was there. Upon asking his name and whereabouts, he informed that his name was Muzzamil Hussain Abdulgafur Gurjar, resident of Lahore, Pakistan. As three other intruders had entered along with him, search was made in the area surrounding Hajipir. A.S.I. Rajpal Hardvarilal of Hajipir Outpost had drawn a panchnama of the muddamal articles viz., currency notes of Rs. 20,000/- a chit with numbers written in English, one live cartridge and another panchnama in connection with the recovery of an AK 56 body No. H. 77 P and 28 live AK 56 cartridges and taken possession of the same. This witness along with police personnel had carried out search for three intruders, but could not find them. However, as regards the apprehended Muzzamil, the higher officers also arrived at Hajipir and interrogated him, and thereafter, they had taken him to Joint Interrogation Centre, Bhuj. An entry in this regard was made by this witness in the Nara Police Station, Station Diary being Entry No. 12/01 on 27-5-2001 at 15-00 hours after which he took charge of the investigation. Thereafter he recorded statements of several witnesses. Kashmirasingh Kalusingh Sikh, resident of Nara had given shelter to the intruders in return for money, out of which he had spent a five hundred rupee-note at the shop of Mallucksingh Gurdayalsingh. The said note was recovered from Mallucksingh Gurdayalsingh by drawing a panchnama and his statement was also recorded. P.S.I.J.R. Vaghela had made search in the desert region in connection with the present case and a report of the muddamal articles so recovered was submitted to the P.S.O. which was also kept in the investigation file. The other three intruders could not be traced despite search being made and on 6-6-2001 the said officer was relieved from Nara Police Station and the investigation was entrusted to P.S.I.G.A. Parmar.

15.1. This witness was also cross-examined by the learned Advocate of the accused at length and in great detail. A suggestion was made to him that the accused was arrested by B.S.F. personnel. He had repelled the said suggestion. He has also stated in his cross-examination that he has continued the investigation till the accused was taken to the Joint Interrogation Centre.

15.2. We could not notice anything from his cross-examination which would make his evidence untenable or unbelievable. On the contrary, his evidence inspires confidence and appears to be trustworthy.

16. The prosecution has thereafter examined and relied upon the oral testimony of P.W. 10, Gulabsinh Amarsinh Parmar, Exh. 40. He has, inter alia, testified that

on 6-6-2001 he was handed over investigation in connection with Nara Police Station, Station Diary Entry No. 12/01. Meanwhile, the combing was being carried out in search of the other accused and he had joined in the said combing. On 30-5-2001, B.S.F. Subedar Naransinh had handed over 4 live cartridges, bed-sheet, two pants, purse and belt along with a report in connection with which an entry was made in the Station Diary. He had forwarded all the aforesaid articles as well as all the papers in connection with the report which he had received, to S.L. Karan. The investigation and combing in connection with this case was going on and those accused who were apprehended were sent to Joint Interrogation Centre, Bhuj where they were being interrogated, thereafter on 14-7-2001, he had lodged F.I.R. Exh. 41, on behalf of the State Government.

16.1. This witness was also cross-examined at length but nothing substantial could be brought out by the learned Advocate of the accused which would be capable of creating any doubt in the trustworthiness of the evidence of this witness. It is required to be mentioned that his evidence inspires confidence and it is reliable and reliance can be placed upon it with regard to filing of complaint as well as the role played by him in the investigation.

17. The prosecution has thereafter examined and relied upon the oral testimony of P.W. 11, Jayendrasinh Rajendrasinh Vaghela, Exh. 43. He has deposed that in the year 2001 when he was discharging duties at the Dayapar Police Station, it was learnt that a terrorist had been apprehended from Hajipir, whereupon they had immediately proceeded from Dayapar Police Station and gone to the B.S.F. Camp, at Hajipir. Upon being sent to carry out combing in the desert in search of the accomplices of the apprehended person, they had found two pairs of black shoes of size 8 and 9 as well as one empty cartridge shell, one black coloured salwar and one old torn cloth from the Hajipir desert, which they had brought from the desert and submitted at the Nara Police Station along with a report. The P.S.O. had taken possession of the same by drawing a panchnama.

17.1. This witness was cross-examined by the learned Advocate of the accused but nothing substantial which would be of any help to the accused could be brought out during the cross-examination.

18. The prosecution has thereafter examined and relied upon the oral testimony of P.W. 12, Mahipatsinh Murubha Rathod, a panch witness, Exh. 44. In presence of this witness the sacks containing muddamal articles, such as, R.D.X., hand grenades, etc., were opened and after taking small quantity as samples, they were again sealed. He has, inter alia deposed that on 20-12-2001 at about 1 O'clock in the afternoon, he had been called at the L.C.B. Office at Bhuj by the police as a panch as the police wanted to collect samples of the R.D.X. seized by them. An officer from the Forensic Science Laboratory and the other panch, Jigar Pandya were also present in the office at that time. They were shown four black coloured sacks, which were in a sealed condition. The said sacks were opened and shown to them. The first sack contained some sticky yellow coloured substance, which according to the officer present there was R.D.X. The second

sack contained 10 hand grenades. The third sack contained wires, detonators and a remote control, whereas the fourth sack contained cartridges. Inside the sack, which contained the yellowish substance, there were other bags, from each of which small quantities of the substance was collected as samples. The witness has identified his signature on each of the panch slips attached to the sacks as well as the samples.

18.1. This witness was also cross-examined by the learned Advocate of the accused but he stuck to the version made by him in the examination-in-chief and nothing could be brought out which would be of any help to the defence.

19. The prosecution has thereafter examined and relied upon the oral testimony of P.W. 15, Dilipkumar Rameshchandra Agravat, Exh. 73. He has, inter alia, deposed that he was discharging duties as P.S.I. at the L.C.B. Police Station in the year 2000. Pursuant to the order dated 18-7-2001 of the District Superintendent of Police, further investigation in connection with Nara Police Station I CR No. 2/01 was entrusted to the L.C.B. whereupon he had taken charge of the investigation. He studied the case papers and became conversant with the investigation carried out by the previous officer. He, thereafter, recorded statements of the concerned witnesses against the accused. As there was sufficient evidence against the accused Kashmirasingh, the said accused was arrested at 19-00 hours on 19-7-2001. He recorded the statement of the accused. He obtained remand of the accused for ten days and made necessary investigation. Thereafter as there was sufficient evidence against the other accused (i) Mamadali Khan Jat, (ii) Ghulamhussain Madhu, (iii) Sodha Sahu Jat, (iv) Janjan Ghaji Hayat, (v) Mallu Kala Jadia and (vi) Meru Pappu Bhil, they were arrested on 29-7-2001, their statements were recorded and they were produced before the Court within the stipulated time-limit.

19.1. Thereafter, the AK 56 rifle and cartridges etc., recovered from the accused Shahnawaz were forwarded to the F.S.L. officer for analysis. Thereafter, on the basis of information it was learnt that when the accused Shahnawaz had come from Pakistan he had brought along with him explosives and related equipment. Thereafter, as the accused Shahnawaz expressed willingness to recover the said articles, two panchas were called and after apprising them of the facts and ascertaining their willingness to act as panchas the preliminary panchnama was drawn at the L.C.B. Office at Bhuj between 21-30 to 21-45 hours on 17-12-2001. Thereafter at the instance of the accused, various articles were recovered and panchnama was drawn accordingly. The articles were sealed in the presence of panchas. The accused and muddamal were brought to Bhuj. As all the muddamal was dangerous and explosive, experts from F.S.L. were called and the seal of the muddamal was opened in the presence of panchas by drawing panchnama. Samples of the muddamal substances were taken out and were sealed and panch slips were attached to the same in the presence of panchas. Thereafter, upon weighing the R.D.X., it was found to weigh 12 Kgs and 700 grams. All the muddamal articles were forwarded to F.S.L., Ahmedabad and detonators were

sent to Vadodara Explosive Experts for analysis thereof.

19.2. As sanction for filing charge-sheet against the seven accused arrested earlier was received from the State Government as well as the District Magistrate, charge-sheet was filed.

19.3. The report received from F.S.L., Ahmedabad was kept along with the charge-sheet and was produced at Exhs. 74 to 85.

19.4. Thereafter as he had been transferred, permission to file charge-sheet against the accused Shahnawaz was obtained by Police Inspector, G. H. Vasavada, who had filed the charge-sheet against the said accused.

19.5. This witness was cross-examined by the learned Advocate of the accused and made the suggestion that the muddamal articles i.e., AK 56 rifle and R.D.X. were recovered beneath the heap of sand earlier and the accused is connected with the said muddamal but he has repelled the said suggestion and has stated that the muddamal were discovered at the instance of the accused. He has successfully withstood the test of cross-examination and nothing has been pointed out from the cross-examination which would impeach the credibility of his evidence.

This is the sum and substance of the evidence of the prosecution witnesses.

20. On re-appraisal of the evidence of the prosecution witnesses, as discussed hereinabove, the following points can be culled out which would lead to the unerring conclusion about the complicity of the accused for commission of the serious crime:

(i) The accused Shahnawaz, a citizen of Pakistan, was found at Hajipir Dargah without passport and through unauthorised route.

(ii) He was found by P.W. 5, Ramzan Tarmahmad, near Mubarakpir Dargah of Hajipir. The accused asked help from P.W. 5, Ramzan Tarmahmad. The accused was found under suspicious circumstances.

(iii) P.W. 5, Ramzan Tarmahmad, immediately reported to the Police Station about the said accused.

(iv) P.W. 7, Rajpal Hardvarilal Yadav, along with his Police personnel immediately went there on receiving the information and they saw the suspicious individual near Mubarakpir Dargah, Hajipir.

(v) P.W. 7, Rajpal Hardvarilal Yadav, immediately drew the discovery panchnama by calling P.W. 2, Ishaq Ismail, to act as panch, as the accused had shown his willingness to show the muddamal, and in the presence of P.W. 2, Ishaq Ismail, Rs. 20,000 and AK 56 rifle were recovered from the accused.

(vi) P.W. 2, Ishaq Ismail, endorsed the said panchnama about discovery of Rs. 20,000 and AK 56 rifle from the place shown by the accused.

- (vii) Thereafter, the accused was sent to Joint Interrogation Centre.
- (viii) A complaint was lodged against the accused Shahnawaz as well as other accused persons on 14-7-2001 by P.W. 10, G.A. Parmar.
- (ix) During the detention in the Joint Interrogation Centre, the accused showed his willingness to show the place where the rifle and other articles were hidden.
- (x) The rifle and other articles were recovered in presence of the panchas by drawing panchnama.
- (xi) During the course of investigation, the real name of the accused was revealed that in fact the accused is Shahnawaz Abdulgafur Bhatti, a Pakistani intruder, and a resident of Nalowala, Punjab, Pakistan.
- (xii) Under the guidance of Lashkar-e-Toiba at the instance of Azam Chima, the accused and his three accomplices had entered into the Indian territory with explosive substances in huge quantity through unauthorized route by crossing border of Kachchh and had hidden those dangerous and hazardous articles in the desert area of Indian territory, which were subsequently discovered at the instance of the accused by drawing panchnama.
- (xiii) The three accomplices who accompanied the accused at the time of crossing the border of Indian territory unauthorizedly have successfully fled through the same route.
- (xiv) The attempt on the part of the accused and his three accomplices was to bring the explosive substances and dangerous arms and ammunitions to the Indian territory to terrorise the citizens of India and to hatch conspiracy to wage war against the Government of India.
- (xv) The complicity of the accused for commission of the offence of bringing within the territory of India dangerous and hazardous equipments like AK 56 rifle and explosive like R.D.X. has been duly established.
- (xvi) The explanation offered by the accused for crossing Indian territory through unauthorized route i.e., through Hajipir at Kachchh for worshipping at Hajipir Dargah is not swallowable. The say of the accused is that he is a poor man and could not afford to come via the legal route. But the fact of recovery of Rs. 20,000/- from him falsifies the said version of the accused.

21. In view of the aforesaid finding, now the next question which falls for determination of this Court is as to what offence or offences has/have been committed by the accused Shahnawaz.

22. The accused is mainly charged with the offence of waging or attempting to wage war or abetting waging of war against the Government of India and criminal conspiracy under Sections 121 and 120B I.P.C. He is also charged with the offences punishable under the Arms Act, Foreigners Act, Explosive Substances Act, 1908, Indian Passport Rules, 1959 (Entry into India), Paragraph

3 of the Criminal Law Amendment, 1961, Paragraph 3 of the Indian Foreigners (Report to Police) Orders, 1971 and the Indian Wireless and Telegraphs Act, 1933.

23. To answer the aforesaid question, it would be advantageous to refer to Section 121 of I.P.C., which reads as under:

121. 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.

To prove the offence of "waging war", the prosecution must establish the following:

- (i) that the accused waged war, or attempted to do so, or abetted the same;
- (ii) that such war was against the Government of India.

It is not incumbent on the accused to show what the object and meaning of the acts done were, but it is the duty of the prosecutors to make out their case against the accused.

24. In the case of Nazir Khan and Ors. v. State of Delhi JT 2003 (Supp. 1) SC 200, the Supreme Court has explained the meaning of the expression "waging war" as under:

The expression "waging war" means and can only mean waging war in the manner usual in war. In other words, in order to support a conviction on such a charge it is not enough to show that the persons charged have contrived to obtain possession of an armoury and have, when called upon to surrender it, used the rifles and ammunition so obtained against the Government troops. It must also be shown that the seizure of the armoury was part and parcel of a planned operation and that their intention in resisting the troops of the Government was to overwhelm and defeat these troops and then to go on and crush any further opposition with which they might meet until either the leaders of the movement succeeded in obtaining the possession of the machinery of Government or until those in possession of it yielded to the demands of their leaders.

In Paragraph 34 of the said decision, it is further observed by the Apex Court as under:

The Indian Law Commissioners in their Second Report dated 24-6-1847 had observed "We conceive the term "wages war against the Government" naturally to import a person arraying himself in defiance of the Government in like manner and by like means as a foreign enemy would do, and it seems to us, we presume it did to the authors of the Code that any definition of the term so unambiguous would be superfluous". Mere collection of men, arms and ammunitions does not amount to waging war.

Applying the principles laid down by the Supreme Court in the above referred to

judgment as well as the provisions contained in Section 121 of the I.P.C., we are afraid to and it would be difficult to perceive that the acts committed by the accused would fall within the mischief of Section 121 of the I.P.C. According to us, the prosecution has failed to prove the charge levelled against the accused for commission of the offence u/s 121 of I.P.C.

25. A minute scrutiny of the evidence which has been reproduced in the foregoing paragraphs, it is not correct to contend that the accused has waged war, attempted to wage war or abetted to wage war against the Government of India. Therefore, according to us, the conviction recorded against the accused for commission of the offences punishable u/s 121 read with Section 120B I.P.C. cannot be sustained and hence it requires to be quashed and set aside and resultantly the sentence to death imposed on the accused for commission of the said offences also deserves to be quashed and set aside.

26. Now the next question to be determined by this Court is as to whether the conviction of the accused u/s 124A I.P.C. is justified or not? To answer the said question, it would be appropriate to refer to Section 124A I.P.C. which reads as under:

124A. Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1 : The expression "disaffection" includes disloyalty and all feelings of enmity.

Explanation 2 : Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this Section.

Explanation 3 : Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this Section.

26.1. To prove the charge of commission of offence punishable u/s 124A I.P.C., the prosecution must prove:

- (i) that the accused spoke or wrote the words, or made the signs or representations, or did some other acts, in question;
- (ii) that the accused thereby brought or attempted to bring into hatred or contempt; or excited or attempted to excite disaffection;
- (iii) that such disaffection was towards the Government established by law in India.

26.2. A perusal of the evidence adduced by the prosecution, according to us, does not establish that the accused spoke or wrote the words or made the signs or representations, or did some other acts, or the accused thereby brought or attempted to bring into hatred or contempt; or excited or attempted to excite disaffection; or that such disaffection was towards the Government established by law in India. Therefore conviction and sentence u/s 124A I.P.C. has to be quashed and set aside.

27. It is true that the prosecution has successfully established that the accused being a Pakistani, came to India without passport through unauthorized route with three other accomplices and has brought with him dangerous, lethal and hazardous arms and ammunitions and explosive substances, and hidden them in the heap of sand 12 Kms. away from Hajipir within the territory of India. It is unlikely that a law-abiding citizen would conceal such quantities of explosives in the desert. Stockpiling such a large quantity of explosives in the desert could not have been meant for a bona fide purpose. The explosives are capable of creating havoc if they are used in preparing bombs, as they are capable of mass destruction. In our view considering the fact that the accused is a foreign national who has been found to have unauthorisedly entered the Indian territory without a valid passport, and a huge cache of arms and ammunition have been recovered at his instance, it would be prudent and reasonable to draw inference of criminal conspiracy. Therefore, the said acts of the accused, according to us, amount to conspiracy to commit offence punishable u/s 121A as well as collecting arms, etc., with intention of waging war against the Government of India punishable u/s 122 I.P.C. and also concealing the same with intent to facilitate design to wage war punishable u/s 123 I.P.C. Therefore, in our view, the accused has committed offences punishable under Sections 121A, 122 and 123 I.P.C.

28. So far as the offences committed by the accused under other Acts, such as, Arms Act, Foreigners Act, Explosive Substances Act, Indian Passport Rules, 1959 (Entry into India), Paragraph 3 of the Criminal Law Amendment, 1961, Paragraph 3 of the Indian Foreigners (Report to Police) Orders, 1971 and Sections 3 and 6(1) of the Indian Wireless and Telegraphs Act, 1933, they are duly proved.

29. The net result of the aforesaid discussion is that the conviction and sentence recorded against the accused for commission of the offences punishable under Sections 121 read with Sections 120B and 124A I.P.C. cannot be sustained, and therefore, it has to be quashed and set aside whereas the conviction recorded and sentence imposed by the trial Court against the accused for commission of the offences punishable under Sections 121A, 122 and 123 I.P.C., Sections 25(1) (d), 25(1)(a), 25(1AA) of the Arms Act, Sections 13(2) and 14 of the Foreigners Act, Sections 4(b), 5 and 6 of the Explosive Substances Act, 1908, Rules 3 and 6 of the Indian Passport Rules, 1959 (Entry Into India), Paragraph 3 of the Criminal Law Amendment, 1961, Paragraph 3 of the Indian Foreigners (Report to Police) Orders, 1971 and Sections 3 and 6(1) of the Indian Wireless and

Telegraphs Act, 1933 are to be confirmed and maintained.

30. For the foregoing reasons, Criminal Appeal No. 2317 of 2005 filed by the accused succeeds in part and accordingly it is partly allowed. Consequently, conviction recorded against the accused for commission of the offences punishable u/s 121 read with Section 120B I.P.C. and sentence to death is quashed and set aside so also the conviction recorded against the accused for commission of offence punishable u/s 124A I.P.C. is quashed and set aside and the sentence of R.I. for 3 years and fine of Rs. 250/- i.d., R.I. for 3 months is quashed and set aside and the accused is acquitted of the said offences. Obviously, therefore, Criminal Confirmation Case No. 7 of 2005 has to be dismissed, and accordingly, it is dismissed.

(i) The conviction u/s 121A I.P.C. and sentence to suffer R.I. for life and fine of Rs. 250/- i.d., R.I. for 3 months, (ii) conviction under Sections 122 and 123 I.P.C. and sentence to suffer R.I. for 10 years and fine of Rs. 250/- i.d., R.I. for 3 months, (iii) conviction under Sections 25(1)(d), 25(1)(a), 25(1AA) of the Arms Act and sentence to suffer R.I. for 7 years and fine of Rs. 250/- i.d., R.I. for 3 months, (iv) conviction under Sections 13(2) and 14 of the Foreigners Act and sentence of R.I. for 7 years and fine of Rs. 100/- i.d., R.I. for 1 month, (v) conviction under Sections 4(b), 5 and 6 of the Explosive Substances Act, 1980 and sentence to suffer R.I. for 10 years and fine of Rs. 250/- i.d., R.I. for 3 months, (vi) conviction under Rules 3 and 6 of the Indian Passport Rules, 1959 (Entry into India) and sentence to suffer R.I. for 1 year and fine of Rs. 100/- i.d., R.I. for 1 month and (vii) conviction under Paragraph 3 of the Criminal Law Amendment, 1961, Paragraph 3 of the Indian Foreigners (Report to Police) Orders, 1971 and Sections 3 and 6(1) of the Indian Wireless and Telegraphs Act, 1933, are hereby confirmed and maintained.

All the substantive sentences are ordered to run concurrently.

The ultimate result is that Criminal Confirmation Case No. 7 of 2005 is dismissed and Criminal Appeal No. 2317 of 2005 is partly allowed, as discussed in the foregoing paragraphs of this judgment.