

(2010) 02 CAL CK 0044

In the Calcutta High Court

Case No : Death Reference 2 of 2005 in Sessions Case No. 79 of 2002 and C.R.A. 377 and 425 of 2005

State of West Bengal

APPELLANT

Vs

Md. Jamiluddin Nasir and Others
 Adil Hossain @
Manu and Another Vs State of West Bengal and Others

 Sakir Akhtar @ Rohit Vs The State of West Bengal

RESPONDENT

Date of Decision : 05-02-2010

Acts Referred:

Arms Act, 1959 — Section 2, 25, 27, 27(2), 27(3)
Criminal Procedure Code, 1973 (CrPC) — Section 164
Evidence Act, 1872 — Section 10, 14, 157, 9
Penal Code, 1860 (IPC) — Section 120B, 120B(1), 121, 121A, 302

Citation : (2010) 02 CAL CK 0044

Hon'ble Judges : Kalidas Mukherjee, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Asimesh Goswami, Swapan Mallick and Usaf Ali Dewan, in C.R.A. Nos. 425 of 2005; 377 of 2005; 427 of 2005 and 428 of 2005, Jayanta Narayan Chatterjee, Paromita Mukhopadhyay, Uttam Basak, Aindreela Chakraborty, Suman De, Sourav Chatterjee, Bikash Chakraborty, Prithviraj Sinha Roy, Tanushree Nag and Palash Majhi, No. 2 in C.R.A. 427 of 2005, Joymalya Bagchi, Jayanta Narayan Chatterjee, Sourav Chatterjee and Gourav Banerjee, Nos. 1 and 2 in C.R.A. 425 of 2005, Ashoke Kumar Mukherjee and Subir Gangully, in C.R.A. 377 of 2005, Syed Shahid Imam and Modassar Alam, No. 1 in C.R.A. 427 of 2005 and Nudrat Urshi, Ishtiaque Alam, Ayub, Zareen N. Khan, Md. Salahuddin, Lokesh Sharma, Shahjahan Hossain and Hashim Hossain, Nos. 1 and 2 in C.R.A. 428 of 2005, for the Appellant;

Judgement

Ashim Kumar Banerjee.J;

A. FACTS

A.1. INCIDENT ON JANUARY 22, 2002

A. 1.1. SCENE - 1

At about 6:36 a.m., Calcutta Police Control Room at Lai Bazar received an information of firing in front of American Centre. Control Room immediately asked the Shekespeare Sarani Police Station to proceed to the spot. On investigation it revealed that a group of police personnel was guarding American Centre. The said group was about to complete their night duty and the new group was to take over. During the period when handing over of charge was going on at 6:15 a.m., two persons riding on a Motor Cycle one having a pistol in his hand, driving the Motor Cycle and the pillion rider having Machine Gun being AK-47 model indiscriminately fired at the police party and then fled towards south direction. The entire incident took about five minutes causing casualty to many police personnel and injuring others. One private security guard of American Centre along with one civilian also sustained injury. Eighteen police personnel with gun shot injuries were removed to S.S.K.M. Hospital, Calcutta. Five of them succumbed to their injury while the others except one were treated and discharged subsequently. Two civilians Moti Jadav, a pedestrian and a private security guard one Aubray Gallyat employed by American Centre also sustained gun shot injury. The investigating team recovered cartridges from the place of occurrence. Bullets were also removed from the dead bodies as well as from the bodies of injured persons. Those were subsequently examined by the forensic expert.

A. 1.2. SCENE - 2

At about 6:00 a.m. two friends namely Gilbert Gomes and Sahid Ikbali alias Pappu (P.W. 62) went to purchase milk in Beniapukur. Sahid saw a Maruti Car and a Motor Bike at the crossing of Beniapukur Lane. He was talking to Gilbert Gomes just in front of the shop of one Ashok Nandy. He saw blue coloured Maruti 800 Car standing there. A lorry was going from Beniapukur side and could not pass because of the blockade of road by the Maruti Car. Two persons were sitting in the front seat. He asked those persons to make way for the lorry to avoid jam. The Maruti vehicle number was BRK 4907. After about ten minutes, a black coloured Motorbike came to the side of the Maruti vehicle. Two persons got down from the bike with a cricket bat cover having something inside it. One of them boarded the Maruti Car by saying "Insa Alia Kum Ho Gaya". Both the car and the bike left the place. The Motorcycle was having registration number being W.B. 01 P-2144. At about 9:00 a.m. he heard the news of American Centre shoot out. He apprehended that the morning incident witnessed by him might have some correlation and hence, informed Shale Babu, a police inspector known to him working at Lai Bazar.

On August 29, 2002 the learned Sessions Judge framed the charges against all the accused including the appellants above named under Sections 121, 121A, 122, 120B, 302, 333, 467, 468 and 471 of the Indian Penal Code as also under Sections 25(1A), 27(2) and 27(3) of the Arms Act read with Section 120B of the Indian Penal Code.

A.2. PRELUDE

A. 2.1. INTRODUCTION

The appellants, herein, are Aftab Ansari (hereinafter referred to as Aftab), Jamiluddin Nasir (hereinafter referred to as Nasir), Musarrat Hussain (hereinafter referred to as Bobby), Sakir Akhtar (hereinafter referred to as Rohit), Hasrat Alam (hereinafter referred to as Hasrat), Rehan Alam (hereinafter referred to as Monti) and Adil Hassan (hereinafter referred to as Adil).

A.2.2. E-MAIL

On January 19, 2002 Jamiluddin Nasir sent an E-mail to a person having I.D. Aaa Mere 7 @ Yahoo.Co.In. informing that he was taking up a new work and asked the addressee to pray for him so that he could achieve success. On January 20, 2002 Nasir again sent another E-mail to the same person by saying that next day would be his opening day and asked the person to pray to God for his success. On the next day January 21, 2002 the person having I.D. Aaa Mere 7 replied to Nasir that he should continue to check mail.

A.3. TEASTALL INCIDENT ON JANUARY 21, 2002

Sanjoy Paul (P.W. 37) was a Florist and a resident of 3-Russel Street. He was taking tea from a Punjabee Teastall and P.W. 38 was also taking tea at the crossing of a Middleton Street and Russel Street. On January 20, 2002 at about 6:30 a.m. the blue coloured Maruti 800 Car while coming with high speed suddenly applied brake, as a result another person got his tea spilled over his hand. An altercation took place on that score. He (P.W. 37) also identified the Maruti Car having registration BRK 4907. He was a regular visitor of the said tea stall. On January 22, 2002 he saw a Motorbike which crossed him with full speed proceeding towards Cammac Street. He identified the bike as well as the Maruti Car. He also deposed that when the altercation took place on the spilling over of tea, the black colour motorbike which he saw on 22nd January also joined the motorist supporting them. He also identified the chocolate coloured jacket and green coloured jacket worn by the motor cyclist and the pillion rider. This incident was corroborated by Jayanta Kumar Bose (P.W.-38). He was a morning walker and a regular visitor of the said tea stall. His tea got spilled over his hand on January 20, 2002. He also gave the description of the Motor Car as well as Motorbike and the persons involved in the spilling over incident. He identified Nasir as the driver of the Maruti vehicle.

A.4. JANUARY 21ST MORNING

On January 21, 2002 early morning Dilip Kumar Singh (P.W. 47) saw Nasir taking out Maruti 800 Car from the garage at 1 Tilzala Lane. While he was driving, Abdulla was sitting by his side. Two other unknown persons were following them in the black colour Motorbike.

A.5. PREPARATION / CONSPIRACY

A.5.1. E-mail

E-mails were exchanged on November 27 & 28, December 5 & 17, 2001 and January 8 & 9, 2002. On a combined reading of the E-mails it appears that they were planning to arrange a flat as well as Maruti Car. The E-mails also referred to Jaipur episode.

A.5.2. ACQUISITION OF FLAT

Dilip Singh (P.W. 47), a promoter in Tilzala area, handed over flat at 1 Tilzala Lane to Niaz Hossain, Nasir introduced Niaz to Dilip. Niaz converted one room in the flat as garage. Dilip identified the Motorcar as well as the Motorbike kept inside the said flat in question.

A.5.3. PASSPORT

As per the confessional statement made by Nasir he initially helped Asif to have a passport from a person known to him at Patna. He then came to know that Asif got a passport done for Aftab in the name of Farhan Mullick.

A.5-4- REASON / ZEHAD

Asif was killed in an encounter with the police at Gujarat. According to his associates it was a fake encounter and they wanted to take revenge. According to Nasir as per his confessional statement, in December 2001 he went to his flat at Khan Road, Khir Gao, Hazaribag where he met Zahid, Sadakat, Salim and Imam Hossain. Zahid and Sadakat told that police had killed Asif and they would take revenge and they would not spare the Calcutta Police either as Asif was in police remand at Calcutta. They decided to blow off Government Buildings and carry out killing of cops. They would teach the police a lesson. Zahid and Sadakat possessed two AK-47 rifles along with huge collection of cartridges. The said statement was corroborated by a letter written by Aftab to the widow of Asif being exhibit No. 45/1 where he expressed condolence for the sad demise of Asif. He informed the widow that the police had killed Asif in custody and Amir (the next brother of Asif now absconding) was making preparations to take revenge. He advised her to watch and see and cautioned him that she should not discuss anything with the bearer of the letter.

A.6. PRINTING - NEXUS WITH MAIN CAUSE ?

A. 6.1. This episode apparently does not have any nexus with the prime incident at American Centre. This episode relates to printing of fake tax token and car registration certificate involving three accused being Rohit, Bobby and Hasrat. If we take the confessional statement of Rohit and Bobby we would find that Rohit (Sakir Akhtar) was an unemployed youth. Around January - February 2000 he was looking for a job. Bablu introduced him to Asif as Rajesh. Asif introduced him as owner of a leather company and offered him a marketing job at a salary of Rs. 2000.00 per month. Rohit agreed and joined Asif. Few days later Asif introduced him with his brother Amir as Rajesh and another person by the name of Abdulla. Rohit's brother Rajesh was working at Archies Printing Works at Razabazar along with a boy named Bobby (Musarat Hussain). Rajesh introduced Bobby to him and

they became friendly and they started chatting at Ramlila Park from time to time. One day Asif stopped Rohit at Ramlila Park. Rohit introduced Bobby to Asif. Asif asked what Bobby was doing. Bobby told him that he was working at Archy's Printing and gave his card. After some days Asif introduced Rohit to Aftab as Guptaji, a big businessman. They all got together at Ramlila Park. Guptaji told them that if they want to make money they should abduct a big business man. All of them agreed to such proposal. Aftab told they would have to impersonate CBI personnel and use forged tax token and registration certificate.

A.6.2. At this juncture Asif and Aftab rang up Bobby and asked him to come to Ramlila Maidan. Accordingly, Bobby came. He was assigned the job of printing of blank tax token and registration certificate. He initially did not agree. He was given Rs. 10,000.00 in advance. He then agreed to do the same on the assurance that another six thousand rupees would be paid later on. Bobby got the printing job done by Hasrat. He was however not paid the balance six thousand. Rohit informed Asif and Aftab. Asif and Aftab assured payment of six thousand more which was however not paid. This was also corroborated by Bobby in the confessional statement. The above facts got also corroborated through seizure of the blank tax token and registration certificate both from Tilzala flat as well as from Hasrat's possession. Seizure witnesses proved such seizure. This episode happened in 2000. During the printing operation Asif was alive and he was involved in getting those fake Government documents printed through Hasrat. How they would use those documents, however, did not come in evidence. Neither Nasir in his confessional statement nor any of the witnesses referred to this printer group and co-relate them with the shoot out incident or the conspiracy involved therein.

A.6.3- Involvement of Hasrat would show that he did not even meet the core group being Aftab, Asif or Nasir at any point of time. He was known to Bobby and on his request being lured, printed those fake documents. Hasrat did not give any confessional statement.

A.7. HAZARIBAG

On January 22, 2002 when the shoot out took place the investigating team could not find out any clue as to how this could happen and who were involved in such incident. After about five, six days Kolkata Police got an information from Hazaribag that there had been an encounter between the police and the terrorists where two terrorists were killed. One of them made a dying declaration admitting his involvement in American Centre Shootout Incident. Such information was received by Shri Sujit Mitra (P.W. 122) on January 28, 2002 from the Deputy Commissioner of Detective Department. The police party went to Hazaribag and investigation revealed as follows :

a) Zaida Khatun (P.W. 73) was a teacher at a primary school at Hazaribag.

She sold four khatahs of land at 1/25 Moulona Abul Kalam Azad Colony to Nasir and identified him.

b) Abdul Hamid Khan (P.W. 106) was the son of Abdul Mazid Khan, owner of two houses at Hazaribag, out of which one house was rented to Nasir in part.

c) Kausalya Nand Chowdhury (P.W. 113) was the Officer in-charge, Sadar Police Station at Hazaribag. On January 27, 2002 he received an information from S.P., Hazaribag that one police team was coming to Hazaribag from Delhi being led by Mr. Rabi Sankar, S.E.P., Delhi Police. They came on a tip off that two terrorists had taken shelter at Hazaribag. On investigation it revealed that the terrorists were staying at the residence of Abdul Mazid Khan at Khirgaon as also at the residence of one Monti at Hasmian Colony. Monti was connected with the terrorists. Two raid parties proceeded, one for Khirgaon and another for Hasmia Colony. On January 27/28 at about 2:40 a.m. they cordoned the house of Mazid Khan. At 6:45 a.m. S.P. Hazaribag requested the inmates of the house to come out and asked them to surrender before the police. After about half an hour two persons escaped from the side gate and began to fire indiscriminately upon the police party. There had been an encounter and ultimately both the miscreants died. One of them (Salim) died on the spot and the other one (Zahid) subsequently died at the hospital. While the injured man was being carried to the hospital he disclosed that he was a member of Lasker-E-Taiba and a resident of Pakistan. He participated in the shootout incident at American Centre along with one Sadakat. One AK-47 rifle was seized from the said injured person who subsequently died at the hospital.

d) On the next day, the Kolkata Police Team arrived at Hazaribag. They took the AK-47 rifle to Kolkata after complying with necessary formalities.

e) Abdul Mazid deposed that he was staying at Raurkella whereas his two sisters were residing at Hazaribag in the other building. They informed him about the shootout incident over telephone. He let out one flat in the other building to Nasir. Nasir began to reside in the said flat after execution of the agreement in December 2001. The other flat was occupied by one B.D.O. He identified the chocolate coloured jacket seized by the police in his presence from the flat. In November 2001 he saw Nasir residing in the flat. He saw one Maruti Zen Car parked there. In first week of December 2001 he saw Hasan Imam (Monti) one of the relatives of Nasir in the said flat who had complained about the water scarcity. He visited the flat to check whether the tube-well was working or not. He could not find Nasir. However, Hasan told him that Nasir went out of Hazaribag and he introduced Zahid and Salim who were staying at that time. They were introduced as staff of Nasir. Maruti Car and the Motorbike were parked. He identified the photographs of Zahid who was killed in the encounter, f) Monti was his distant maternal uncle. Nasir used to visit Hazaribag and put up at his in-law's place at Hasmia Colony. Monti told him once that his brother in-law, Adil was to join them soon. According to his E-mail I.D. was Aao Mere 7 @ Yahoo.Co.In.

B. INVESTIGATION AND SUBMISSION OF CHARGESHEET

B.1. Mr. Anil Kar, P.W. 123 was entrusted with the job of investigation. He interrogated the injured police personnel at the hospital as well as at the Shakespeare Sarani Police Station. The other police officers also assisted him in the matter of investigation including Sujit Mitra, (P.W. 122) who went to Hazaribag. On January 29, 2002 Nasir was arrested. Search was conducted in the house of Jahida Khatoon wherefrom the Hazaribag Tenancy Agreement was recovered. Monti and Adil were arrested from Hazaribag on January 27, 2002. Tilzala Flat was also searched wherefrom both the Maruti Car and Motorcycle were seized including the sketch map of American Centre.

B.2. Fake tax token and registration certificates were also seized from Tilzala as well as Hasrat's house. Investigation revealed that the Maruti Car was stolen from Delhi and the complaint for theft of car was lodged with Manas Saravar Police Station by its owner. P.W. 99 proved that the Car involved in the incident was the same Car which was stolen from Delhi. Mukesh Thakkar (P.W. 28) purchased the Motorbike. He sold it to Debasis Ghosh being P.W. 29 who sold it to Ranadeep Das (P.W. 30) who sold it to Hargovind Prasad Shaw (P.W. 33) who sold it to Rezwan Ahmed (P.W. 33). Rezwan was a mechanic. He sold it to Sohail Akhtar. They all identified the Motorcycle. Sk. Salam (P.W. 55) repaired the Motorbike at the instance of Nasir in January 2002.

B.3. Aftab was arrested on March 22, 2002. Bobby and Hasrat were arrested on March 6, 2002. Rohit was arrested on April 6, 2002. Adil and Monti were arrested on February 6, 2002.

B.4. Investigation further revealed, Nasir and Amir became friends while studying in same Madrasa and Asif was the brother of Amir. Asif came in contact with Aftab at Tihar Jail when they were in jail custody. Such fact was corroborated by Nadir Ahmed Khan (P.W. 46). Nadir was a friend of Asif. Asif went to Kashmir and became zehadi and came back to Kolkata. After arrest three of the accused being Nasir, Bobby and Rohit made confessional statement before the Magistrate u/s 164 Criminal Procedure Code. They however retracted such confession at a much belated stage and that too after the trial had started. We would deal with the confessional statement in detail little later.

B.5. During investigation several incriminating documents were seized which included one diary and a letter. The letter was addressed to the widow of Asif by Aftab as referred to hereinbefore whereas the diary contained several payments made various persons. The diary also noted particulars of the Maruti vehicle being BRK 4907. According to the investigating team the diary / note book belonged to Aftab.

C. GIST OF EVIDENCE

Let us analyze the evidence topic wise.

C.1. RAMLILA & TANDOOR MOHAL (JANUARY TO NOVEMBER 2000)

Bobby, Rohit, Raju used to chat at Ramlila Park. They came in contact with Asif

and then Aftab. Aftab told all of them (Boby was not present) that they should abduct big business man to make money and for that purpose they would have to impersonate CBI Personnel and forge Government documents including tax token, motor vehicle registration certificates etc. Rohit was entrusted to get those printed, Asif paid him Rs. 10,000.00. Bobby was called over phone. Bobby was entrusted to do the job of printing. He initially did not agree. He later on agreed to do it in lieu of money. He was paid Rs. 10,000.00 by Asif. Bobby later on contacted Raju alias Hasrat and persuaded him to print those in exchange of money. Raju printed those and handed over back to Bobby. Raju never came in contact with any other person except Bobby (at least such evidence did not come out). Hasrat started pressurizing Bobby for the final payment who, in turn, asked Rohit, Aftab and Asif and called Rohit at Tandoor Mohal and told him that the payment would be made later on. However, such payment was never made.

C.2. CONSPIRACY

Asif was killed in police encounter. According to the core group, such encounter was fake. They decided to take revenge. They took Tilzala flat and converted one room for garage to park Maruti car and Motorbike. They took flat at Hazaribag on rent for post hide out. They got fake passports done from Patna from a person known to Nasir. Zahid and Sadakat possessed two AK-47 rifles shown to others including Nasir. They held a meeting at Hazaribag and decided to attack police party. All of them assembled at Tilzala flat before the final attack. Aftab was the master-mind giving necessary instructions initially to Nasir and then to Zahid and Sadakat through E-mails and/or phone.

C.3. TEA STALL INCIDENT (JANUARY 20, 2002)

Nasir took out the Maruti Car from Tilzala garage. Dilip saw him taking out the Car and the Motor Bike. They got involved in the tea stall incident referred to above as watched by Sanjoy Paul and corroborated by Jayanta Kumar Bose. Both of them identified the Car and the bike as well as the persons involved in the incident.

C.4. E-MAIL

Two E-mails dated January 29, 2002 would corroborate the involvement of Nasir and Aftab. E-mails were exchanged possibly just before Nasir was arrested. The E-mails would show that Nasir informed Aftab that Zahid was killed by the police. The person involved in passport episode was also arrested at Patna and he was leaving Kolkata for a safe place.

C.5. AMERICAN CENTRE (JANUARY 22, 2002)

In the morning at about 6:15 a.m. Barun Pal was supervising the change over. The motor cyclist started firing indiscriminately and Barun tried to retaliate by taking out his revolver. However, he could not do it as he was made a target. He could save himself by ducking. Anil Kar was asked to investigate. He interrogated the injured police personnel and other witnesses. Altogether eighteen police

personnel were injured with gunshot injury. Five of them succumbed to their injury and the others except one were treated and discharged subsequently. Two civilians including one security guard also sustained injury. The Motor cyclist came from north to south direction. The person driving the Motor cycle was firing from his pistol whereas the pillion rider was firing from AK-47. The entire incident took place for about five to ten minutes.

C.6. HAZARIBAG

On January 27, 2002 Delhi Police Team came to Hazaribag and conducted a joint raid with Hazaribag police at Khirgaon flat. Salim died instantly. Zahid was injured and died subsequently. Zahid made a dying declaration to the police admitting his involvement in American Centre shoot out incident. Hajaribag police informed Kolkata counterpart who rushed to Hazaribag and after completion of formalities one AK-47 rifle seized from Zahid was brought to Kolkata which was subsequently returned to Hazaribag police as the forensic expert opined that the bullets involved in American Centre incident did not match the said rifle.

C.7. INVOLVEMENT

C.7.1. On a sum total and analysis of the facts and evidence that came out during investigation and/or examination of the materials seized by the investigating team exhibited at the trial we have narrowed down the involvement of the accused being the appellants in the above appeals and facing death sentence as per the order of the learned Sessions Judge. Aftab and Asif were the master-mind. They included Zamiluddin Nasir in their core group. Nasir was an active associate working at the dictate of Aftab and/or Asif. Asif died in later part of 2001 which gave rise to the conspiracy hatched by the core group as a result of which the shoot-out took place at American Centre. If we consider the confessional statement of Nasir we would find his deep involvement in waging war as against the country being an active associate of Aftab and Asif. Pertinent to note, the confession was made by Nasir immediately after his arrest whereas he retracted the same after more than one year and that too, after the trial had already started. We have considered the evidence of the learned Magistrate. We have also considered the confessional statement. We do not find any reason to discard the same merely because he retracted the same subsequently.

C.7.2. The matter can be viewed from another angle. The factum of involvement as would come out from such confessional statement got corroboration from the other witnesses. The involvement of the Car and the Motorbike got proved as being identified by various witnesses including Sanjoy Pal and Jayanta Kumar Bose. Dilip Kumar Singh, the mechanic who repaired the Motorcycle also proved the involvement of Nasir. The letter of Aftab to the widow of Asif was also proved through the handwriting expert. The E-mails made everything clear and transparent. It is true that Aftab was not present at the time of shoot-out incident. It is also true that Nasir was not present at the place of occurrence. But

their involvements were apparent from the evidence that came out and discussed hereinbefore. They were equally responsible, so as Zahid and Sadakat being the shooters involved in the shoot-out incident.

C.7.3. We place strong reliance on two exhibits being the notebook of Aftab and the letter written by Aftab to the widow of Asif. Handwriting of Aftab was certified by the hand writing expert who deposed in the trial. The contents of the letter would show that Aftab knew about the decision to take revenge for the killing of Asif.

C.8. PRINTER GROUP

Rohit, Bobby and Raju (Hasrat) formed the printer group. They were involved in the matter of printing fake certificates. Rohit and Bobby made confessional statement. Their confessions got corroboration from the witnesses discussed above. Involvement of Raju was also proved by recovery of blank tax token from his residence. Their involvement in such printing episode was amply proved. However, we do not get any evidence which would link such printing episode either with the conspiracy of waging war against the country or implementation of such decision through shoot-out incident. It is true that two of them were involved in chatting at Ramlila Park. Rohit knew about the purpose of printing as disclosed to him by Aftab that those would be recovered for abduction purpose for making money. Bobby also in his confessional statement stated that Rohit told him that those would be used for criminal activities within India as told to him by Asif and Aftab. Hence, we are of the view that this trio although did the printing job being lured by money, did not have any involvement in the subsequent conspiracy and/or the shoot-out incident resulting therefrom.

C.9. MONTI & ADIL

C.9.1. These two persons were residents of Hazaribag. They were distantly related with Nasir. Monti was the distant maternal uncle of Nasir whereas Adil was the brother in-law of Monti. Nasir used to go to Hazaribag and stay at Adil's place. According to Nasir, Monti told him that Adil would join them soon. Such statement, if we give full credence, would prove Monti's involvement. However it does not involve Adil as it did not have any corroboration. From Abdul Mazid we come to know that Monti was present at the flat of Nasir and he introduced Zahid and Sadakat as staff of Nasir. Kausalya Nand Chowdhury, Hazaribag Police Inspector deposed that Monti gave shelter to the terrorists at Hasmia Colony. Kausalya also deposed that one raid party also proceeded towards Hasmia Colony on January 27, 2002. We however do not find the result of such raid either from Kausalya Nand Chowdhury or any other witness. What happened at Hasmia Colony, is not known to us. If we take the case of Adil we do not find any evidence indicating his involvement in the crime save and except Nasir's statement that too as per Monti's information to the effect that Adil would join them soon. We hardly find any evidence involving Adil in the incident.

C.9.2. So far Monti is concerned, statement of Kausalya Nand Chowdhury or

Abdul Mazid would not be sufficient to implicate him. He was present in Nasir's flat. He might not be knowing the actual identity of Sadakat or Zahid and, as such, he introduced them as staff of Nasir. From Nasir's statement we find that Monty's E-mail I.D. was Aaa Mere 7, Yahoo.co.in. From E-mails we find that Nasir asked Monty to pray to God for his success. If we give full credence to the E-mail we would have to hold that the addressee might be knowing of the conspiracy. However such evidence without any corroboration and/or support from any other material would not be sufficient to implicate him.

C.9.3. From the confessional statement of Nasir we find that Monti drove the Motorcycle from Hazaribag to Kolkata and delivered it at Kolkata and left for Hazaribag. We also came to know that he was involved in Jaipur incident in money extortion case. Jaipur episode was disbelieved by the learned sessions Judge who acquitted the Jaipur accused of the charges. If we give full credence to Nasir's statement on the Motorcycle delivery it would only prove that he drove the Motorcycle and delivered it at Kolkata. This might be at the request of Nasir without knowing the purpose for which it would be used. Merely because he drove the Motorcycle to Kolkata and delivered it there it would be totally unsafe to come to a conclusion that he was involved in the incident.

D. CONFESSION & RETRACTION

D.1. Rohit, Bobby and Nasir made confessional statement. All the three statements were made more or less immediately after their arrest. Bobby made the confession on March 22, 2002. Rohit made it on April 19, 2002 and Nasir made it on February 22, 2002. By the statement of Nasir the entire mystery was unearthed. According to him, he and Asif were childhood friends. They were studying in same Madrasa where his father was an English teacher. He got admission in Bangabasi College whereas Asif studied in Moulana Azad College. Asif became an active member of Students' Wing of Islamic Organization. Asif pressurized him to join. They had several friends including Nadim and Abdulla (now absconding). In 1991 Asif went to Kashmir and became a Zehadi. He also wanted Nasir to join him. After finishing studies Nasir worked in various companies. In 1994 Delhi police arrested Asif under T.A.D.A. Act wherefrom he managed to escape. In 1999 Asif met him and requested him for a passport. Nasir took him to Patna and requested one of his known person to help Nasir in getting a passport. During Muharram in 2000 Nasir again went to Patna when his friend told him that Asif got a passport done in the name of Farhan Mullick (alias Aftab). Asif engaged Nasir as his employee in building construction at a salary of Rs. 2000.00 per month. Nasir was in dire need of job as he was unemployed by that time. He was married. Asif introduced him with his friend Niaz who wanted a flat. Nasir arranged ground floor flat at 1 Tilzala Lane for Niaz through Dilip Singh, a promoter. The flat was renovated to accommodate the Maruti-800 Car to be parked there. Niaz entrusted Nasir to look after the flat. Niaz, his brother Fiaz, Asif used to come to the said flat. In or about April/May 2001 Asif disclosed that they would kidnap big businessman to make money and Aftab would lead

them. Nasir was entrusted to look after the gang. Nasir did not have any other option but to accept the proposal as he was unemployed. As per Asif's instruction he went to Agra in May 2001 and brought a lakh of rupees from Arshad Khan. In August 2001 he opened two E-mail I.D.s. He met Aftab at Benaras. Asif introduced him with Aftab. At their instance he got a flat at Hazaribag on rent from Abdul Hamid. His distant maternal uncle Monti was living at Nalanda. Nasir used to stay at his brother-in-law Adil's place at Hazartibag. Monti told him that Adil would join them soon. In October 2001, he purchased two khatas of land at Hazaribag. He went to Jaipur and got rupees two lakhs from Dilip Bhai. He purchased a jeep for Rs. 80,000.00. Aftab told him at Kolkata that Asif was killed by Gujarat police in an encounter. They assembled at Hazaribag flat in December 2000 and decided to take revenge. Zahid and Sadakat showed them two AK-47 rifles. Zahid and Sadakat came to Kolkata by Jhodpur Express by January 14 & 16, 2002 respectively. Nasir received them and lodged them at 1 Tilzala Lane. Monti came in a Motorcycle from Hazaribag and left the Motorcycle there and left for Hazaribag. On that day Abdulla came and joined them. Zahid was communicating with Aftab. They initially decided to launch attack on Bhawani Bhavan. As there would be a chance of innocent people being died they changed their strategy and attacked American Centre. On January 19 Nasir got the Motorcycle repaired. On January 20 they went to American Centre in the morning on a spot inspection and they got entangled in tea spilling episode. Initially they decided to attack on January 21. However they postponed the attack for a day and ultimately attacked American Centre on January 22. Zahid and Sadakat did the operation. Zahid was driving the Motorcycle whereas Sadakat being a pillion rider fired from AK-47. Nasir drove the car. Abdulla was sitting next to him. After the incident they all came back to the flat. Sadakat and Abdulla left Kolkata through Sealdah Station. On the same day Zahid left Kolkata on the next day having packed AK-47 rifle and pistol in his bag. Nasir accompanied him up to the Howrah Station. He left Kolkata via Chambal Express for Gaya. Nasir started living at his in-law's place wherefrom he was arrested on January 29, 2002. His personal revolver was seized from a hideout at Kolabagan by the police on being shown by him.

D.2. Nasir retracted the confession at a much later stage and more than one year after making of the statement. By that time, the trial had started. On perusal of the evidence of the learned Magistrate and from the questionnaire we are satisfied that the learned Magistrate observed all formalities before recording such statement. Moreover each and every important statement of Nasir got corroborated by independent witnesses. The mechanic who repaired the Motorcycle deposed to the said extent. The persons involved in the tea stall incident identified him and narrated the incident in detail which tallied with the statement made by Nasir. Acquisition of Tilzala flat was proved by Dilip being P.W. 47. Acquisition of land got proved by Jahida Khatoon (P.W. 73). Taking Hazaribag flat on rent was proved by Abdul Hamid (P.W. 106). By this process each and every important statement of Nasir got proved. The prime incident was

also proved by the injured police officials including Barun Kumar Das being the F.I.R. informant. Hence, such confessional statement was safely relied upon by the learned sessions Judge.

D.3. ROHIT & BOBY

Both of them almost corroborated each other on the issue of printing which we have discussed in detail hereinbefore. Even if we give full credence to those statements we would find that their involvement was up to the stage of printing of fake certificates and/or tax token. We do not find any material from the said two statements which could implicate them with the prime incident or the conspiracy resulting in such shoot-out incident.

E. CONVICTION

E.1. On the above materials on record, the learned sessions Judge convicted all the seven appellants and sentenced them by giving capital punishment. According to the learned Judge, prosecution could prove the flat transaction at 1 Tilzala Lane at the instance of Nasir. The prosecution also proved that the back portion of the said flat was converted into a garage to accommodate the Maruti-800 Car and the Motorcycle involved in the incident. The particulars of the Car tallied with the recordings of Aftab in his note book. The letter written by Aftab to Asif s widow was also proved. A mechanic proved repair of the Motorcycle at the instance of Nasir. Tea stall incident was proved by Sanjoy and Jayanta. Conspiracy was proved through Binod and Dilip. Hazaribag connection was proved through reservation chart. The learned Judge also relied on three confessional statements referred to above and the seizure list and ultimately held all of them guilty u/s 121, 121A 122 and 120B of the Indian Penal Code as well as appropriate provisions under the Arms Act.

E.2. The learned Sessions Judge held all the seven appellants guilty of the offence and sentenced them to death. While doing so the learned Sessions Judge held that the prosecution had proved by producing photographs as also testimonies that a room at the back portion of the Tiljola flat was converted into garage to keep the blue coloured Maruti car and the motorcycle. He also observed that engine number of concerned car tallied with the noting of Aftab in his notebook tendered as exhibit. He also observed that the letter of Aftab addressed to the widow of Asif conclusively proved the conspiracy. The learned Judge also relied upon the confessional statements made by three of the above appellants and the seizure made from time to time by the investigating agency including the green coloured jacket and the chocolate coloured jacket as also incriminating materials including fake tax token and motor vehicles registration certificate. On the basis of those materials, the learned Sessions Judge held all the above appellants guilty of the offence and sentenced them accordingly.

F. APPEAL

Since the learned sessions Judge held all the seven persons guilty of the offences

and sentenced them with capital punishment those cases came up before us for confirmation of the death sentence. At the same time all the seven persons filed separate appeals as against the conviction and sentence. We heard all the appeals along with the death reference analogously on the above mentioned dates.

G. ARGUMENT

G.1. Sahid Imam

G.1.1. Mr. Imam appeared for Bobby, Aftab and Jamiluddin Nasir. He submitted principally on the confessional statement and tried to impress upon us that it was nothing but a fake recording made by the prosecution by utilizing blank signatures obtained from the accused from time to time. He also contended that the learned Magistrate while taking down the statement did not observe the safeguards required therefore which would make such statements fatal and could not be relied upon. In any event those were retracted by the statement makers at the appropriate time. He submitted that Nasir did not know Hindi, even then his statement was recorded in Hindi and not in Urdu language which Nasir was fluent with. Mr. Imam further contended that the incident could well be proved by the close circuit cameras installed by American Centre, unfortunately those were not brought by the prosecution in evidence. The AK-47 rifle seized from Hazaribag and brought down to Calcutta did not match the bullets and/or the cartridges found and/or seized in the incident and tendered during the trial and in any event the said rifle was not exhibited by the prosecution. Mr. Imam also made detailed argument the way Nasir was produced before the Magistrate to support his case that the procedural safeguard was not observed before recording such statement.

G.1.2. Arguing on behalf of Bobby, Mr. Imam contended that the Ramlila incident took place in 2000 in which Asif was involved whereas according to the prosecution the shoot-out incident took place as a result of the conspiracy hatched by the accused to take revenge against the police authority for killing of Asif. Hence, Ramlila incident could not have any nexus with the prime episode and Bobby could not be entangled with the same.

G.1.3. On the issue of Arms Act Mr. Imam contended that the sanction was granted on August 14, 2002 long after the chargesheet had been filed. Hence, the proceeding was bad for want of appropriate sanction required u/s 39 of the Arms Act as on the date of submission of the chargesheet.

G.1.4. As and by way of an alternative submission, Mr. Imam contended that assuming Aftab was guilty of the charges brought against him he could not be imposed the capital punishment in view of an assurance given by the Central Government at the highest level to the appropriate Governmental Authority at Dubai. According to Mr. Imam, Aftab was brought down to India from Dubai by virtue of an Extradition Treaty, India had with Dubai, under which no person could be punished as and by way of capital punishment. We called the Additional

Solicitor General and requested him to take appropriate instruction in the matter. The learned Additional Solicitor General produced a Xerox copy of the written communication dated January 20, 2010 received by him from Ministry of Home Affairs wherefrom it appears that Aftab was never extradited. He was deported from United Arab Emirates to India on February 20, 2002. Hence the submission made by Mr. Imam on that score is of no consequence.

G.1.5. On merits Mr. Imam contended that two civilians being Motilal Yadav and Aubray Gallyot sustained bullet injury although their injury reports were not tendered in evidence. In fact Yadav was not called to give evidence. According to Mr. Imam, the dying declaration of Zahid was not properly recorded and, as such, could not be relied upon by the prosecution. He also made elaborate arguments on the description of the incident as to who was driving the Motorcycle and who was firing from AK-47 as there had been contradiction between Kausalya Nand Chowdhury on one hand as per Zahid's statement and the police official on the other including Sahid Ikbal, Beniapur Milk Booth Witness. Mr. Imam also commented on the procedural irregularity in the matter of holding of the test identification parade. According to him, the sanction granted by the Home Secretary as well as the chargesheet would depict total non-application of the mind. According to him, shoot-out incident took place involving killing of police personnel. There was no evidence to show that the principal attack was on American Centre to implicate Section 121, 122 and 121A of the Indian Penal Code. According to him, the E-mails could not conclusively prove involvement of Nasir and Aftab. He prayed for their acquittal.

G.2. Mr. Subir Ganguly & Mr. Ashok Mukherjee

Both of them argued on behalf of the Rohit. According to them, the confessional statement was not voluntary and the statement was retracted at an early stage. There had been procedural irregularities in recording such statement. Hence, such retracted confession could not be made the basis of conviction without any corroboration from independent witnesses. They also contended that exhibit 45 being the diary of Aftab did record payment of diverse sums to Rohit. However Rohit named in the said diary and the accused Rohit were not the same person, at least it was not proved through independent evidence. No independent witness identified Rohit. No opportunity was afforded to him to explain the evidence appearing against him relating to transaction referred to in the diary. According to them, Rohit had no role to play in the commission of alleged offence and his conviction was based upon surmise, conjecture and presumption and as such should be set aside.

G.3. Mr. Jayanta Narayan Chatterjee

G.3.1. Mr. Chatterjee argued on behalf of Raju alias Hasrat. He also assisted Mr. Joymalya Bagchi who argued on behalf of Monti and Adil.

G.3.2. On behalf of Hasrat Mr. Chatterjee contended that there was no evidence that Hasrat took part in the conspiracy. Even if it was proved that he printed

those fake certificates, those would at least implicate him under appropriate provisions of the Indian Penal Code for forging Government documents u/s 467, 468 and 471 of the Indian Penal Code and in no stretch of imagination could support his conviction u/s 121, 121A or Section 27 of the Arms Act or Section 302 read with Section 120B of the Indian Penal Code. He contended that Hasrat did not have any role to play in the commission of alleged offence before the American Centre and, as such, he could not be charged with the offence of waging war against the Government or possessing prohibited arms attracting the provisions of Section 27 of the Arms Act.

G.4. Mr. Joymalya Bagchi

Mr. Bagchi argued on behalf of Monti and Adil. According to Mr. Bagchi they neither took part in any conspiracy nor anything came out in evidence save and except that they were distantly related to Nasir. Hence, their conviction was totally unjust. No material could be produced by the prosecution to implicate them under the appropriate provisions as per the chargesheet submitted by the prosecution as against them.

G.5. Public Prosecutor

G.5.1. Mr. Asimesh Goswami, learned Public Prosecutor defended the State in the appeals as well as supported the death sentence in the death reference case. According to Mr. Goswami, although the confessional statements were retracted by the makers at a much belated stage those statements could be relied upon and were rightly relied upon by the learned sessions Judge being corroborated by independent witnesses. He referred to the statements as well as the corroboration made by different witnesses referred to above. According to Mr. Goswami, Asif and Nasir were friends from childhood. One persuaded other to join the terrorist group. They started operation by extortion through abduction and ultimately procured prohibited arms. Aftab was master-mind behind them. Their each and every involvement was supported by independent witnesses as also materials on record tendered at the time of trial. According to Mr. Goswami the learned sessions Judge was right in holding all of them guilty of the offence. Referring to the deposition of the Magistrates, recording statement u/s 164, Mr. Goswami contended that the learned Magistrate complied with the formalities subjectively and the procedural irregularities, if any, were nominal in nature and could not be fatal which would lead to elimination of those statements. Mr. Goswami referred to the evidence that came out relating to acquisition of Tilzala flat as well as the Hazaribag flat. According to him, no illegality was committed by the Court of sessions taking cognizance under the Arms Act considering the sanction granted u/s 39 thereof. In this regard he referred to two Apex Court decisions in the case of Government of NCT of Delhi v. Jaspal Singh 2004 Scc [Cri] 933 and in the case of Sardul Singh Caveeshar Vs. The State of Bombay, Page-747.

G.5.2. Mr. Goswami prayed for confirmation of the death sentence imposed by

the learned sessions Judge on Aftab and Nasir.

G.5.3. Mr. Goswami however in his usual fairness did not put other five accused on the same pedestal. He conceded that the evidence as against Monti and Adil was scanty and it would be unsafe to rely on those evidence to come to a definite conclusion about their involvement in the crime. He left the matter to the Court for a decision on that count.

G.5.4. On the printer group, Mr. Goswami in his usual fairness did not put them on the same pedestal with Aftab and Nasir. Amongst the three, according to him, Rohit could be placed in Serial No. i by placing Bobby at serial No. 2 and Hasrat at serial No. 3. Their cases were also left to the discretion of this Court.

H. CASES RELIED

Almost all the counsel appearing for the prosecution as well as defence relied on the Apex Court decision in the case of State v. Navjot Sandhu reported in 2005 SCC (Cri) 1715 wherein the Apex Court dealt with the Parliament Terrorist Attack Incident. We would deal with the said case separately little later as it would be of immense help to us to decide the present case as there are many resemblance both on facts as well as in law. The said case was relied upon by the parties on different issues. Let us now deal with the cases cited by the parties topic wise:

H.1. Circumstantial Evidence

i) Sardar Khan v. State of Karnataka 2004 SCC [Cri] 564. The Apex Court in paragraph 20 of this decision once again explained what would constitute circumstantial evidence. According to the decision, the circumstance from which an inference of guilt is to be drawn must be cogently and firmly established; should have a tendency to unerringly point to the guilt and taking cumulatively would form a chain wherefrom there was no escape in all human probabilities that the crime was committed by the accused and nobody else.

ii) State of Uttar Pradesh v. Madan Mohan and Ors. 1989 SCC [Cri] 585. In this decision the Apex Court considering the facts involved therein observed that failure of prosecution and/or the eyewitness to explain the injury on the accused would raise doubt.

iii) Rameshbhai Chandubhai Rathod v. State of Gujarat 2009 4 SBR 458. Paragraph 15 of this decision once again reiterated the formula to be followed to find out circumstantial evidence.

iv) Batcu Venkateshwarlu and Ors. v. Public Prosecutor 2009 2 SBR 438. In paragraph 38 and 39 of this decision the Apex Court distinguished the phrases "proof and "doubt".

v) Haru Ghosh v. State of West Bengal 2009 4 Crimes 1 [Supreme Court]

vi) State of Haryana v. Ram Singh 2002, SCC [Cri] 350

vii) Bachittar Singh and Anr. v. State of Punjab 2003 SCC [Cri] 233

viii) Bodhraj and Ors. v. State of Jammu and Kashmir 2003, Supreme Court Cases [Criminal], Page-201. The Apex Court in this case held that conviction could be based solely on circumstantial evidence, however such evidence must be tested by the touchstone of law relating to circumstantial evidence laid down by the Apex Court in the case of Hanumant Vs. The State of Madhya Pradesh, Page-343.

ix) Subhash Ramkumar Bind @ Vakil and Another Vs. State of Maharashtra, Page-443

x) Palanisamy and Raju v. State of Tamil Nadu 1986 SCC [Cri] 97.

H.2. CONFESSION

a) Govinda Pradhan and Another Vs. The State, Page-269. Paragraph 8 of this decision spoke about the procedural to be followed while recording confessional statement. The Apex Court observed that it was the duty of the Magistrate to satisfy himself that the accused was free from any possible police influence.

b) Chandran v. State of Tamil Nadu 1978 SCC [Cri] 528. Here, the Magistrate in his certificate recorded that he hoped that the confession was voluntary. The word "hope" was considered by the Apex Court not a "satisfaction" required u/s 164 of the Criminal Procedure Code.

c) State of Rajasthan Vs. Darbara Singh, Page-2906. According to this decision, the Magistrate must satisfy himself that the confession was voluntary. It is not necessary that he should record that he was satisfied as to the voluntary nature of the statement. Paragraph 30, 31 and 32 of this decision dealt with the issue of retraction. The Apex Court herein observed that the accused did not retract the confession at the earliest opportunity. Hence, it could be acted upon.

d) Esher Singh v. State of Andhra Pradesh 2004 Cri LJ 5021

e) Jit Singh v. State of Punjab 1976 SCC (Cri) 341

f) Bhagwan Singh and Ors. v. State of Madhya Pradesh 2003, SCC [Cri] 712. In this decision the Apex Court once again discussed about the safeguards the Magistrate should take while recording confession. The Apex Court also observed that it must be taken in question answer form.

g) Shri Lalhunpuia v. State of Mizoram 2004 4 Crimes 545. In paragraph 8 and 9 of this decision the Apex Court discarded a confessional statement after observing that it was not recorded in the manner it ought to be. The learned Magistrate in this case did not record his observation that the statement was voluntary according to his belief.

h) Paramananda Pegu v. State of Assam 2004 SCC [Cri] 2081. This case dealt with the issue of retracted confession. The Apex Court observed that the Court should be assured of its voluntary nature and truthfulness. The Court should also have regard to the corroboration from other evidence. On facts, the Apex Court

discarded the retracted confession after observing that it did not have any corroboration from other evidence and was contradictory to the medical evidence available on record.

i) State of Maharashtra Vs. Damu Shinde and Others, . In this case the Apex Court discarded the argument of the defence that since the investigating officer did not explain as to how he could come to know that the accused was willing to make confession. The Apex Court was of the view that the confession was recorded after almost a full month after the accused was removed from police custody to judicial custody the same could be safely relied upon.

H.3. CONSPIRACY

a) Saju Vs. State of Kerala, Page-102. The Apex Court considering the evidence came to a conclusion that there was no evidence as to the circumstance of motive. Hence, the accused was entitled to the benefit of doubt.

b) Nazir Khan and Anr. v. State of Delhi 2003 SCC [Cri] 2033. According to the Apex Court, essential ingredient of criminal conspiracy is the agreement to commit an evidence. Such an agreement can be proved by direct evidence or by circumstantial evidence. Once the agreement was proved proof of overt act was not essential.

c) State of Maharashtra v. Sadruddin Jan Mohommad Bardia and Ors. 1992 SCC [Cri] 974.

d) K.T.M.S. Mohd. and Anr. v. Union of India 1992 SCC [Cri] 572.

e) Government of N.C.T. of Delhi v. Jaspal Singh 2004 SCC [Cri] 933. The Apex Court observed, conspiracy is proved by showing that two or more persons have agreed to do or cause to do an illegal act or an act which is not illegal by illegal means and that some overt act was done by one of the accused in pursuance of the same. It further observed, where their common object or design is itself to do an unlawful act, the specification of such act itself which formed their common design would suffice.

f) Alope Nath Dutta and Ors. v. State of West Bengal 2008 2 SCC (Criminal) 264

H. 4. Evidence Act

a) Parmod Kumar Vs. State, Page-68. Section 9 of the Evidence Act, 1872 was discussed in this decision. The Division Bench of Delhi High Court held that conviction could not be based on identification as there was possibility of the accused being seen by the witnesses during recovery of weapon.

b) Dudh Nath Pandey v. State of Uttar Pradesh 1981 SCC [Cri] 379. Section 11, 27 and 45 were discussed herein. The Apex Court held that mere recovery of the arm did not ipso facto proved the offence. The evidence of the Ballistic Report was also important.

c) Kora Ghasi v. State of Orissa 1983 SCC [Cri] 387. Section 27 of the Evidence

Act was considered. The Apex Court observed, recovery of crime articles from an open space should not be given much weight.

d) *Vijender v. State of Delhi* 1997 SCC [Cri] 857. The Apex Court observed that hearsay evidence was not admissible, however could be relied upon as corroborative evidence u/s 157 of the Evidence Act.

e) *Sardul Singh Caveeshar Vs. The State of Bombay*, , Page-747. Section 10 and 14 of the Evidence Act were discussed. The Apex Court herein observed, on a charge of conspiracy evidence not admissible u/s 10 as proof of the two issues to which it relates viz., of the existence of conspiracy and of the fact, of any particular person being a party to that conspiracy, is not admissible at all. What is sought to be admitted in such a case is, something said, or done, or written by any one of the co-conspirators behind the backs of the others as being in law attributable to the others.

f) *Kanan and Ors. v. State of Kerala* 1979 SCC [Cri] 621. Identification of the accused in Court without T.I. parade was unsafe to rely upon.

g) *Mohd. Abdul Hafeez v. State of Andhra Pradesh* 1983 SCC [Cri] 139.

h) *State of Himachal Pradesh Vs. Lekh Raj and Another*, Page-43

i) *Sanjeev Kumar Vs. State of Himachal Pradesh*, Page-116

H. 5. Arms Act

a) *Laxchami Prasad Agarival v. The State of Bihar* 1993 2 PLJR 460. The learned single Judge of the Patna High Court observed that Section 39 has no application in case of a prosecution u/s 27.

b) *Vinod Kumar Shukla v. State of Madhya Pradesh* 2000 1 Crimes 33. This was a case u/s 25(1)(a) where the learned single Judge of the Madhya Pradesh High Court observed that sanction u/s 39 was a condition precedent on the basis of materials collected during investigation.

c) *Puran Singh v. State of Uttaranchal* 2008 1 Cal [Criminal] LR [Sc] 834.

d) *Mahendra Pratap Singh v. Uttar Pradesh* 2009 3 Scc 1352.

e) *Bapu v. State of Madhya Pradesh* 2004, Volume-II, Crimes, Page-609. It is also a case u/s 25(1)(a) where the learned single Judge of Madhya Pradesh High Court acquitted the accused as the sanction was not obtained by observing the formalities reported u/s 39. The learned Judge relied on the fact that the pistol was not produced before the authority at the time of sanction.

H. 6. *Death Sentence Jagdish v. State of Madhya Pradesh* 2009 6 Supreme 692. In this case the Supreme Court rejected the plea that there had been delay in execution of the death sentence and as such it should be converted into life imprisonment.

H. 7. Miscellaneous

- a) State of West Bengal and another Vs. Mohammed Khalid and others, Page-785. In this decision the Apex Court refused to interfere with the sanction to prosecution in writ jurisdiction after being satisfied on merits about the involvement of the accused in terrorist activities.
- b) S. Nalini and Ors. v. State 1999 SCC [Cri] 691. This decision dealt with various aspects of TADA Act while dealing with Rajib Gandhi Assassination Case.
- c) Chonampara Chellappan v. State of Kerala 1979 SCC [Cri] 1029.
- d) Mohanlal Gangaram Gehani v. State of Maharashtra 1982 SCC (Cri) 334
- e) Bhuboni Sahu v. The King 1949 LR 76 IA 147.
- f) Kaptan Singh and others Vs. State of M.P. and another, , Page-185.
- g) Yash Pal Mittal Vs. State of Punjab,
- h) Hardeo Singh Vs. State of Bihar and Another,
- i) Sudhir Shantilal Mehta v. CBI 2009 3 SCC [Cri] 646.

H. 8. We have discussed the cases cited before us which we felt relevant herein. The other cases cited are merely referred to.

I. LAW ON THE SUBJECT

I.1. WAGING OF WAR

I.1.1. Section 121, 121A and 122 and 123 of the Indian Penal Code deal with the crime of Waging of War.

I.1.2. u/s 121 whoever wages war against the Central Government or attempts or abets to do such would be punishable either with death sentence or imprisonment for life along with fine. This particular Section deals with the offence against the Central Government only.

I.1.3. Section 121A inter alia provides that when someone conspires to wage war against the Central Government or the State Government by conspiring to overawe by means of criminal force he shall be liable for punishment either imprisonment for life or punishment up to ten years as also fine. If we make a distinction between these two provisions we would find that if someone wages war or attempts or abets to do it as against the Central Government he would be given a punishment of death or imprisonment of life whereas a conspiracy to wage war against the Central Government or the State Government would attract a lesser punishment of imprisonment of life or imprisonment up to ten years. So there is a distinction between actual committing of crime or conspiring for the same with criminal force.

1.1.4. Section 122 deals with collection of arms for waging war against the

Central Government having the equal punishment as one gets u/s 121A.

1.2. CONSPIRACY

Section 120B of the Indian Penal Code deals with inter alia criminal conspiracy. If someone conspires with another to commit an offence punishable for a term of two years or upwards including the capital punishment he would get the identical punishment as if he had abetted such offence.

I. 3. CONFESSION

Section 164 of the Criminal Procedure Code suggests a complete procedure to be followed by any Magistrate for the purpose of recording a confessional statement of an accused which can be used in trial against the said accused. The Magistrate however before recording such confession must explain to the person making it that he was not bound to make such confession and in case he makes it the same might be used against him in evidence. The Magistrate must be satisfied that to his belief such confession was voluntary.

I. 4. ARMS ACT, 1959

1.4.1. Section 2 has defined inter alia "prohibited arms" which means a firearm so designed that if pressure is applied to the trigger it would start continuous firing so long the cartridge loaded in the firearm does not become empty.

Section 3 inter alia provides that unlicensed acquisition or possession of any firearm would amount to offence punishable under the said provision.

1.4.2. Section 5 deals with unlicensed manufacture or sale or transfer of any firearm which would amount to an offence punishable under the said provision.

1.4.3. So, in case of any ordinary firearm possession/acquisition would attract Section 3 whereas manufacture and/or sale would attract Section 5.

1.4.4. Section 7 however deals with "prohibited arms" and would attract punishment in case of acquisition or possession or manufacture or sale or transfer or in any way dealing with any manner without sanction of the Central Government. Hence, Section 7 is a composite provision in case of a prohibited firearm, whoever deals with it in any manner whatsoever without permission from the Central Government, would be vulnerable under this provision.

1.4.5. Section 25 deals with punishment for certain offences under the said Act of 1959. Sub-section i(a) deals with punishment for contravention of Section 5 whereas Sub-sections i-A as well as i-AA deal with contravention of Section 7. The said two provisions (Sub-section i-A and i-AA) inter alia provide for punishment from 5 to 10 years in case of acquisition or possession or 7 years to imprisonment for life in case of manufacture, sale, transfer etc.

1.4.6. Section 27(2) inter alia provides that contravention of Section 7 shall be punishable with imprisonment for a term not less than 7 years but may extend to imprisonment for life in case of user.

1.4.7. Section 27(3) however provides that in case of such usurer causes death to any person the penalty would be death sentence.

1.4.8. Section 39 obligates the prosecution to take appropriate sanction from the District Magistrate before trying any offence u/s 3.

1.4.9. On a composite reading of the aforesaid provisions, in our considered view, if any offence is committed by any person for acquisition or possession of any ordinary firearm discretion is left to the District Magistrate whether he would be proceeded with or not, despite committing such crime. This safeguard is however not available to any other offences under the said Act including dealing with prohibited arms.

J. LAW AS DECIDED BY THE APEX COURT ON AN IDENTICAL ISSUE

J.1. Our task has become easier in dealing with the present case as we get immense guidance from the Apex Court decision in the case of Navjot Sandhu (Supra). In the said decision the Apex Court dealt with each and every relevant provision of the statute as well as the factual matrix involved in the said case before application of the appropriate law on the subject. We, thus intend to discuss the relevant excerpts.

J.2. In Parliament Shoot-out case all the five shooters were killed and hence they were not available for trial. In our case, out of two shooters one was killed subsequently and the other was absconding till the learned sessions Judge held the trial. During pendency of the appeal the other shooter was arrested and is now facing trial. The persons behind the screen were proceeded with in both these cases. Hence, we get ample support from the said decision.

J.3. Four persons were involved in the said case who were proceeded with on the allegation of not only conspiring for the crime but also giving active support to the militants involved in such shoot-out incident. In this backdrop the observations of the Apex Court are as hereunder :i) Waging of war against the Government of India - what is necessary is that object and purpose is to strike at the sovereign authority of Government to achieve a public and general purpose, intended to be achieved by use of force and arms and by defiance of Government troops or armed personnel deployed to maintain public tranquility. There is no hard and fast rule in order to constitute offence of waging war. ii) As criminal acts took place pursuant to the conspiracy to attack Parliament House, the appellant Afzal was a party to the conspiracy, though not having been part of the attack himself, shall be deemed to have abated the offence.

iii) The criminal responsibility for a conspiracy requires more than a mere positive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime.

iv) There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators.

v) The offence continues to be committed so long the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance.

vi) the twin tests to be applied to evaluate a confession are -

a) Whether the confession was perfectly voluntary, and

b) If so, whether it is true and trustworthy.

vii) Court may take into account the retracted confession, but it must look for the reasons for the making of the confession as well as for its retraction, and must weigh the two to determine whether the retraction affects the voluntary nature of the confession or not.

viii) There is no hard and fast rule regarding grant of time for reflection before recording a confession.

ix) The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme.

x) When men enter into an agreement for an unlawful end, they become ad hoc agents for one another and have made a partnership in crime.

xi) In order to constitute a single conspiracy there must be a common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose.

xii) In reaching the stage of meeting of minds, two or more persons share information about doing an illegal act or a legal act by illegal means.

xiii) It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient.

K. OUR VIEW ON THE LAW ON THE SUBJECT

K. I. WAGING OF WAR

The common purpose to cause a concerted attack on the Governmental machinery including police force amounts to "waging of war". From the nature of the attack it is clear that the strategy was not only to attack the police force but also the police force guarding the American Centre to attract global attention. This strategy can safely be called as "waging of war" against the Central Government attracting the mischief of Section 121 and 121A of the Indian Penal Code.

K.2. ARMS ACT

"Prohibited arm" is distinctive from ordinary firearm. Possession and/or acquisition of ordinary firearms without a licence contravenes Section 3 and is liable to be proceeded with a prior sanction from the appropriate authority u/s 39. In case of prohibited arms, mere dealing with it in any manner whatsoever is totally prohibited unless specifically permitted by the Central Government, u/s 7. User of the said prohibited arms causing death to any one automatically attracts contravention of Section 27(3) liable for capital punishment. Such proceeding does not require any prior sanction at all. Hence considering the factual matrix involved herein the sanction was superfluous.

K.3. CONSPIRACY

Conspiracy has two parts. We are concerned with Sub-section (1) of Section 120B of the Indian Penal Code which deals with a pre-concerted effort by two or more persons by meeting of minds and entering into an agreement to commit a crime. Here, before the American Centre Incident there was enough evidence which would help us to come to a definite conclusion that such incident was a result of a pre-concerted effort after an agreement being arrived at by the conspirators to commit such crime. Hence, Section 120B(1) squarely applies in the instant case.

K.4. FORGERY

The Government is only authorised and entitled to issue tax token and/or vehicle registration certificate through the prescribed authority under the Motor Vehicles Act. Printing of those certificates and/or tokens thus falls within the exclusive domain of the Government. Whoever prints it without the authority of the Government and that too for an oblique purpose to counterfeit the same, attracts penalty and/or punishment u/s 467, 468 and 471 of the Indian Penal Code. In the instant case, tax token registration certificate etc. were recovered from Tiljala flat as well as Hasrat's residence. Those were proved to be fake. Printing of those articles by the concerned accused got corroboration from the confession statements made by two of the accused. Hence, those three provisions are squarely attracted in the instant case.

L. APPLICATION OF LAW CONSIDERING

INVOLVEMENT OF THE ACCUSED JOINTLY AND SEVERALLY

Altogether seven accused are involved in the above appeals and/or death reference. They are compartmentalized in three categories -

1. Master-mind / Core Group
2. Printer Group
3. Hajaribag Residents

L.1. Core Group

L.1.1. From the evidence we are not hesitant to place Aftab and Nasir in this group. It is true that Aftab was not present in Kolkata at the time of shoot-out incident, at least we do not get any supportive evidence for the same. If we consider his pre-concerted effort, from the very beginning we would find that he initially tried to mobilize youths for criminal activities by luring them with money and/or job either by himself or through Asif or subsequently through Nasir. He got the tax token and/or registration certificates printed through Bobby, Rohit and Hasrat and they did it in lieu of money without knowing as to how those would be used. He also lured some of them that if they wanted to make money they would have to abduct rich people for a ransom. Printing and abduction might not have any direct link with the shoot out incident, at least we do not get any positive linkage and as such we have to keep Rohit, Bobby and Hasrat out of this group by giving benefit of doubt, at least in case of Rohit. Mr. Imam made frantic attempt to distinguish the evidence. According to him, there was no direct evidence implicating Aftab. He made comment on the E-mails by saying that the authenticity of those were doubtful as anybody could send E-mail to any address if the address was known to the addressor. Similarly, the reply to the E-mail did not specifically prove that those were sent by Aftab. We are unable to accept. These E-mails were retrieved in presence of Nasir as well as cyber cafe owner and its employee. Those could not be retrieved unless the password was made known to the retriever. Those passwords were supplied by Nasir as per the evidence of the concerned police inspector being corroborated by the cyber cafe owner and/or its employee. From the confessional statement of Nasir as well as Rohit the presence of Aftab was proved. Such statement got corroboration from Hamid, Ali Reza Khan and other independent witnesses.

L.1.2. From the evidence of Ali Reza Khan (P.W.39) we come to know that Asif went to Kashmir and became jehadi after being trained to the said extent. From such evidence it is also clear that conspirators had taken recourse to the act of terrorism.

L.1.3- Contents of the e-mails as discussed herein before would complete the chain of conspiracy.

L.1.4. Nasir initially was engaged by Asif as his salaried employee. It was not for any illegal purpose. He might have been trapped. However, his subsequent involvement clearly suggests that he knew what he was doing. In shoot-out incident he arranged accommodation for the shooters. He actively participated at the time of incident as and by way of back-up force. He arranged for their escape and hide-out.

L.1.5. With regard to Nasir Mr. Imam contended that Nasir was a paid employee of Asif and he was doing what he was asked to do, without knowing the main purpose. We are unable to accept, at least evidence does not permit us to do so. Nasir made the confessional statement before the Magistrate. The Magistrate proved such statement. The retraction was made after more than one year and that too after the trial had commenced. Even the retraction was lawfully made

such retracted confession was entitled to be relied upon as it found corroboration from independent witnesses as discussed hereinbefore. Nasir was certainly a direct activist in such shoot-out incident and could safely be charged with the offence of "waging of war" along with Aftab. We confirm their conviction as held by the learned sessions Judge.

L.1.6. We have already affirmed the conviction of Aftab and Nasir on "waging of war". Such waging of war was a conspiracy against the State. They actively guided the shooters in the shoot-out incident. Nasir acted as a back-up force while driving the Motor car. Hence, their involvement could safely attract contravention of Section 27(3). It might be so, that there was no direct evidence that either of them touched the AK-47 rifle used in the shootout incident, but from the circumstantial evidence it was proved that the entire strategy was to attack the American Centre and the cops present there with the help of AK-47. In case of Nasir, he drove the Maruti Car to help one of the shooters escaped from the scene along with AK-47 rifle. Such involvement can safely relate to contravention of Section 27(3), Arms Act/120B I.P.C. Hence, their conviction and sentence for contravention u/s 27(3) Arms Act / 120B of the Indian Penal Code is also affirmed along with Section 302 read with Section 120B. Similarly, their conviction and sentence u/s 467, 468 and 471/ 120B of the Indian Penal Code is also affirmed as at their instance those fake documents were printed.

L.2. PRINTER GROUP

As observed by us hereinbefore, printing of tax token and registration certificate for the purpose of using them to counterfeit original certificate attracts penalty and/or punishment under Sections 467, 468 and 471. From the analysis of the evidence as discussed hereinbefore, Bobby, Rohit and Hasrat were equally responsible along with Aftab, Asif and Nasir. Their convictions and sentences under the provisions of Sections 467, 468 and 471 read with 120B is confirmed. We hold that Bobby, Rohit and Hasrat are not guilty of the other charges brought against them and accordingly their conviction and sentences are set aside.

L.3. HAZARIBAG GROUP

Monti and Adil were not parties to the printing job, at least there is neither direct nor indirect evidence to the said effect.

Monti and Adil were distantly related to Nasir. They were admittedly residents of Hazaribag. Let us bring the evidence that came out in trial in a narrow campus involving both of them.

L.3-1.Adil

Nasir in his confessional statement stated, Monti told him that Adil would join them soon. This statement was made de hors the context Nasir was discussing. Why Monti said so and what for Adil would join, is not clear. Such statement was made by Nasir while referring to his visit at Hazaribag when he says that he occasionally stayed in the house of Adil who was the brother in-law of Monti

being his distant maternal uncle. It might be so, that Monti and Adil became the nucleus for establishing a centre at Hazaribag. Unfortunately we do not get any such evidence. Thus we get, Adil used to give shelter to Nasir whenever he was at Hazaribag. Adil told Monti that he would join them soon. Monti however did not make any such statement in the trial. It was hearsay evidence that came out by way of confession u/s 164 from Nasir without having any corroborative evidence. We are unable to find out any reason to come to a conclusion that Adil was involved in any of the crimes, either in the shoot-out incident or in the conspiracy or in the printing episode or giving shelter to the shooters after the shoot-out incident for which we could safely affirm his conviction. His conviction and sentences under all the charges framed are set aside.

L.3.2. MONTI

Monti was present at the flat at Hazaribag when Zahid and Salim were there. This was watched by Abdul Mazid when he went to enquire whether the tubewell was properly working or not. Monti introduced Zahid and Salim as staff of Nasir. From the confessional statement of Nasir we also find that Monti drove the Motorcycle from Hazaribag to Kolkata and left Kolkata after delivery. This evidence was not safe to affirm the conviction. Against this evidence we do not find any corroboration from any one out of 123 prosecution witnesses that Monti was involved in the crime. Kausalya Nand Chowdhury, Hazaribag Inspector made a passing reference that he was giving shelter to the terrorists. Such statement also did not get any corroboration. Doubt also arises in our mind when we find that out of the two raiding parties one meant for Hasmia Colony did not report back what had happened, at least such report did not come in evidence. Kausalya Nand Chowdhury could not throw any light on that. Pertinent to mention, Hasmia Colony residence belonged to Monti.

L.3.3. If we consider Navjot Sandhu (Supra) we find in paragraph 320 the Apex Court narrowed down the involvement of Shoukat. The important circumstances against Shoukat are as follows:

1. Taking a room on rent along with Afzal at Christian Colony Hostel into which Afzal inducted the terrorist Mohammad about a month prior to the incident. Soukat used to go there.
2. The Motorcycle of Shoukat being found at Indira Vihar, one of the hideouts of the terrorists which was hired by Afzal in the first week of December 2001.
3. His visits to Gandhi Vihar House which was also taken on rent by Afzal in December 2001 to accommodate the terrorists and meeting Afzal there quite often, as spoken to by PW-34.
4. Accompanying Afzal and Mohammad for the purchase of Motorcycle by Afzal.
5. His frequent calls to Afzal especially on the date of attack.
6. His leaving Delhi to Srinagar on the date of attack itself in his truck with Afzal

who carried a mobile phone, laptop used by the terrorists and cash of Rs. ten lakhs.

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

L.3.4. On the above facts Soukat was acquitted of the charges u/s 121 and 121A and was imposed a lighter punishment of ten years imprisonment for concealment of the strategy of waging of war taken by the other prime accused. In our case, Adil and Monti were seen together with Zahid and Salim at the Hazaribag Flat of Nasir. They possibly helped Nasir in getting that flat (there is no definite evidence on that score). Monti drove the Motor Cycle from Hazaribag to Calcutta and left Calcutta after delivery, according to the confessional statement of Nasir. We do not find any corroboration from any other evidence on that score. Even if we give full credence to such statement of Nasir and compare with the evidence in case of Shoukat we are unable to approve the conviction either u/s 121 or u/s 121A in case of Adil and Monti. We are unable to affirm the conviction of Monti on any of the charges and his conviction and sentence are set aside.

M. PUNISHMENT

M.1. We have confirmed the conviction of Aftab and Nasir on the charges of waging of war, printing of fake documents and dealing with prohibited arms resulting in casualty. We do not find any reason to alter the punishment in their cases. In any event, the conviction u/s 27(3) automatically attracts capital punishment. Hence, there is hardly any scope for the Court to give any lighter punishment. We are constrained to hold that the punishment imposed on Aftab and Nasir does not deserve any alteration and/or modification and thus is confirmed.

M.2. In case of printer group, we have already given benefit of doubt to Rohit for his involvement in the conspiracy of "waging war". We however hold him guilty of the charges of printing of fake documents along with Bobby and Hasrat. The punishment imposed by the learned sessions Judge u/s 467, 468 and 471 read with Section 120B to the extent of printing of fake documents is thus affirmed.

M.3. We have already set aside the conviction of Monti and Adil and as such they are acquitted of all the charges. They be set at liberty at once if not wanted in any other case.

N. RESULT

The death reference is accordingly answered. The appeals filed by Aftab and Nasir are dismissed. Appeals filed by Rohit, Bobby and Hasrat are allowed in part and are disposed of accordingly. The appeals filed by Monti and Adil are allowed.

O. DIRECTION

O.1. A copy of this judgment and order be sent to the correctional home to be given to each of the accused. The Jail Superintendent is also directed to act

accordingly.

O.2. We have confirmed the conviction and sentence as against Aftab and Nasir. We have also approved capital punishment imposed upon them. Let such punishment be not executed for a period of three months from date to enable them to approach the Apex Court.

O.3. Let the Lower Court Records along with a copy of this judgment be sent down at once.

O.4. Urgent xerox certified copy will be given to the parties, if applied for.

I agree.