

(2013) 03 DEL CK 0025

In the Delhi High Court

Case No : Criminal Appeal No. 1143 of 2011

Zafar Umar Khan @ Jafar Umar

APPELLANT

Vs

State (Govt. of NCT of Delhi)

RESPONDENT

Date of Decision : 13-03-2013

Acts Referred:

Arms Act, 1959 — Section 25
Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 106, 27
Foreign Exchange Regulation Act, 1973 — Section 9(1)(b)
Prevention of Terrorism Act, 2002 — Section 18, 22, 22(2), 32, 32(1)

Citation : (2013) 1 JCC 765 : (2013) 3 RCR(Criminal) 41

Hon'ble Judges : Siddharth Mridul, J; Sanjiv Khanna, J

Bench : Division Bench

Advocate : Zafar Sadique and Mr. Izhar Ahmad, for the Appellant; Sidharth Luthra, ASG with Mr. Pawan Sharma, Standing Counsel, Mr. Tarunveer Singh, Yashpreet Singh and Mr. Shiv Pande, Advocates along with ASI Heera Lal, for the Respondent

Judgement

Sanjiv Khanna, J.—The appellant Zafar Umar Khan @ Jafar Umar by the impugned judgment dated 4th January, 2011 has been convicted for offences u/s 22(2) of the Prevention of Terrorism Act, 2002 (hereinafter referred to as, POTA) and Section 25 of the Arms Act (hereinafter referred to as, the Act). By order of sentence dated 10th January, 2011 u/s 22(2) POTA the appellant has been sentenced to undergo Rigorous Imprisonment for a period of 14 years and fine of Rs. 10,000/- and u/s 25 Arms Act he is to undergo Rigorous Imprisonment for a period of seven years with fine of Rs. 10,000/-. In case of default in payment of fine, the appellant has to undergo Rigorous Imprisonment for one year on each account. Briefly, the prosecution case is that pursuant to secret information, which was reduced into writing vide DD No. 18 dated 13th May, 2003, Special Cell, Northern Range (SB), Ashok Vihar, a police team led by Inspector Kulbhushan Sharma (PW-32) consisting of SI Umesh Sharma (PW-9), ASI Ishwar Singh (PW-12), SI Surender Prakash (PW-13) and Head Constable Hira Lal

(PW-6) was formed which reached Veer Bhumi, Ring Road at about 2.30 P.M. The informer was with the police team. Once the appellant had received Rs. four lacs from Rakesh Kumar, at about 2.45 P.M. he was apprehended. From the appellant a nine mm pistol, with nine live cartridges, was recovered for which he could not produce a licence or permit. Two diaries were recovered which purportedly had coded information. The police deciphered the codes and discovered that the diaries contain details of earlier hawala transactions, in which appellant was involved. It is alleged that the said funds were being transmitted by a terrorist organization for purposes of terrorism in India which is an offence punishable u/s 18, POTA.

2. In order to appreciate the case and the contentions of the prosecution and appellant, we feel it will be appropriate and convenient to divide this judgment into three parts; action and arrest of the accused on 13th May, 2003 and the recoveries made; whether the appellant had received hawala money earlier and whether money received earlier and Rs. 4 lacs allegedly seized on 13th May, 2003 were for the purpose of spreading terrorism in India; quantum of sentence.

Action and arrest of the accused on 13th May, 2003 and the recoveries made

3. To prove and establish the action which led to the alleged seizure and arrest of the appellant, as noticed above, the prosecution relies upon statements of Head Constable Hira Lal (PW-6), SI Umesh Sharma (PW-9), ASI Ishwar Singh (PW-12), and Inspector Kulbhushan Sharma (PW-32). Another member of the raiding party, SI Surinder Prakash was examined as PW-13 but his cross-examination remained incomplete and, therefore, his statement cannot be referred to. The statements of PW-6, 9, 12 and 32 are almost in seriatim. They corroborate with each other and are supported by the contemporaneous documentary record in the form of DD entries etc. which we shall refer to. We are first referring to the statement of Inspector Kulbhushan Sharma (PW-32) since he was the investigating officer. He has deposed that at about 1.25 P.M. on 13th May, 2003 a secret informer intimated that one person would come to Veer Bhumi to collect hawala money which was to be used for the purpose of terrorism in Kashmir. DD entry No. 18 (Exhibit PW-32/A) was recorded at 1.25 P.M. at Special Cell, Northern Range. ACP P.S. Kushwaha was informed who directed PW-32 to form a raiding party. The raiding party consisting of PW-6, 9, 12 and 13 was formed which made a departure to the place of action, as was recorded in DD No. 19 (Exhibit PW-32/B). Public witnesses were requested but they did not agree to join. In the meanwhile, the informer signaled that the person who was to receive the hawala money was approaching Veer Bhumi from Darya Ganj. The raiding party members took their positions. After about ten minutes, second person arrived on scooter and halted it there. The person present earlier moved towards him and started a conversation. He gave a currency note to the person mounted on the scooter, who examined it and then kept it in his pocket. Thereafter, the person on the scooter opened the scooter's dickey, took out a polythene bag and handed it over to the first person. At this moment, the police party was signaled

and both of them were apprehended at the crime spot. The first person was identified as the appellant and the second person, on the scooter, was identified as Rakesh Kumar. The recovered polythene bag was found to contain eight bundles of Rs. 500/- currency note. From possession of the appellant, one 9 mm pistol, loaded with nine cartridges, was recovered from left dub of his pant. After the sketch of the pistol and cartridges (Exhibit PW-6/A) was prepared they were put in a cloth, sealed and seized vide seizure memo (Exhibit PW-6/B). A Siemens mobile phone (model A-40) was also seized from the appellant vide seizure memo (Exhibit PW-6/C). Two small diaries in green and grey colour, consisting of 50 and 52 pages respectively, were seized vide seizure memo (Exhibit PW-6/D). The currency notes were counted and they totaled Rs. 4 lacs. The currency notes were also sealed vide seizure memo (Exhibit PW-6/11). On search of Rakesh Kumar, two Siemens and Nokia mobile phones were recovered and seized vide memo (Exhibit PW-6/E). The hundred rupee note, which was given to Rakesh Kumar by the appellant, and one paper which mentioned the number of the currency note i.e. DEV 480375, was seized vide seizure memo (Exhibit PW-/F). From the scooter's dicky Rs. 16,110/- along with one purse containing visiting cards etc. were seized vide Exhibit PW-6/G. The investigating officer prepared the rukka and through Head Constable Hira Lal (PW-6) the case was registered at Special Cell, Lodhi Colony. The rukka (Exhibit PW-9/A) was sent at about 7.30 P.M. and DD Nos. 7A and 8A dated 13th May, 2003 were recorded at Special Cell, Lodhi Colony. Pursuant thereto FIR No. 35/2003 under Sections 25, 54 and 59 of the Act was recorded. The mobile phone recovered from the appellant was produced before the court and marked Exhibit P-5 and the pocket diaries as Exhibit P-6 and P-7. The two mobile phones recovered from Rakesh Kumar were marked Exhibit P-8 and P-9, the pistol and the cartridges recovered from the appellant were marked Exhibit P-3 and P-4/1 to 9 respectively. The currency notes recovered from the appellant's pockets were recognized as Exhibit P-1 to P-8. The currency notes of Rs. 16,110/- recovered from the dicky of the scooter of Rakesh Kumar were collectively given Exhibit P-10. The currency note of Rs. 100/-, which was used for the purpose of identification and recovered from Rakesh Kumar, after it was given to him by the appellant, was marked Exhibit PW-9/11 and the paper on which the number was written and recovered from Rakesh Kumar was given Exhibit P-12.

4. A reading of the statements of the aforesaid witnesses proves the prosecution version to the extent that a raiding party was organized and the said team, at about 2.45 P.M., had detained and then arrested the appellant from Veer Bhumi, Ring Road and from his possession one pistol with nine cartridges, Rs. 4 lacs in cash, two diaries and one mobile phone were recovered. There is hardly any discrepancy in the statements of the said four witnesses to perforate the prosecution version. The arrest memo of the appellant and Rakesh Kumar (Exhibit 31/B) supports the prosecution version. It came to knowledge, the appellant was using the sim card with No. 9810926936 in the mobile phone seized and Rakesh Kumar was using sim cards with Nos. 9811534372 and

9891194642 in the two mobile phones seized from him. Call record details of these telephone numbers, which also relate to telephone No. 9810926936, i.e., the telephone of the appellant, were proved before the trial court and marked Exhibit Nos. PW-15/1 to 14. The prosecution has proved the application form on the basis of which the said number was allotted to the appellant through the produced enrolment form No. 15A. This form was signed by the appellant and mentioned that he is a resident of Mander, district Poonch, J & K. Photocopy of the appellant's identify card was produced and proved before the court (marked PW-15/B). The call records Exhibit PW-15/J (1 to 4) show that the last call, received on telephone No. 9810926936 on 13th May, 2003 at 1.00 P.M., was made from telephone No. 9811354372, i.e., Rakesh Kumar's telephone. Two other calls were made from the same number on 13th May, 2003 at 12.55 and 12.59 P.M. The aforesaid call records tally with the call records (Exhibit PW-24/B) of telephone No. 9811534372, belonging to a different service operator. As per the service provider, the said telephone number belongs to Ramesh Chand, 809/10, Multani Dhanda, Paharganj, Delhi. The call records of telephone No. 9811534372 for the period ending 1st October, 2003 show that the last call on 13th May, 2003 was at 1.19 P.M. Therefore it transpires that the calls were made to telephone No. 9810926936, as is duly mentioned and recorded in these call records, on 13th March, 2003 at 12.44, 12.58 and 12.59 P.M. which had lasted for 1.17 minutes, 04 seconds and 038 seconds, respectively. The call records of telephone No. 9810926936, end at 1300 hours i.e., 1.00 P.M. on 13th May, 2003. This evidence reflects that, on 13th May, 2003, the raid was conducted by the police team, which ended at around 1.00 P.M. as is stated by the witnesses PW-6, 9, 12 and 32. The seizures were made during the raid as is proved and established. The appellant at that time was present in Delhi is established from the hotel ledger file (Exhibit PW-11/A) which records that the appellant had booked himself at Garib Nawaz Guest House on 9th May, 2003 at 8.00 A.M. The departure date recorded therein is 15th May, 2003 and it is mentioned that the bag was handed over to the police on the said date (See Exhibit PW-11/B). The said exhibit has been referred to subsequently on other relevant aspects.

5. We do not agree with the appellant's contention that the statements of PW-6, 9, 12 and 32 should be disbelieved because no public witnesses participated in the raid and there is discrepancy in the statements as who and how public witnesses were requested to join but had refused. It is generally seen that it is difficult and virtually impossible to get and make public witnesses to participate and be part of a police raiding team in such cases. This practical reality cannot be ignored and forgotten. A realistic and pragmatic approach has to be taken. This has been reiterated by the Supreme Court in *Dharampal Singh Vs. State of Punjab*, :

28. The case of the prosecution cannot be rejected only on the ground that independent witnesses have not been examined, in case on appraisal of the evidence on record the court finds the case of the prosecution to be trustworthy. It has come in the evidence of the prosecution witnesses that an attempt was

made to join person from public at the time of search but none was available. In the face of it mere absence of independent witness at the time of search and seizure will not render the case of the prosecution unreliable.

As has been observed in *Ajmer Singh Vs. State of Haryana*,

20. We cannot forget that it may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence.

In the present case, we have contemporaneous official records in form of DD entries, substantial recovery of money, pistol as well as mobile phone records which corroborate the testimony of the police officers. We note that statements made by the police officers in the court cannot be rejected merely on the ground that the statements are made by persons belonging to the police force. This cannot be a reason for us to discard and not accept these statements. In *Aher Raja Khima Vs. The State of Saurashtra*, it has been held that:

39. ...The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not a judicial approach to distrust and suspect him without good grounds therefor. Such an attitude could do neither credit to the magistracy nor good to the public. It can only run down the prestige of the police administration.

Whether the appellant had received hawala money earlier and whether Rs. 4 lacs allegedly seized on 13th May, 2003 and money received earlier were for the purpose of terrorism in India

6. In view of the above discussion, recovery of the pistol and the cartridges (Exhibit P-3 and P-4/1 to 9) and, therefore, commission of the offence under the Arms Act is concerned, the same has to be established beyond doubt. The next issue is whether the offence u/s 22(2) POTA has been established and proved. Section 22(2) of POTA reads as under:-

22. Fund raising for a terrorist organization to be an offence.-

2. A person commits an offence if he-

a. receives money or other property, and

b. intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism.

7. For Section 22(2) to apply, two conditions have to be simultaneously satisfied. The first condition is that the accused should have received money or property

and the second condition is that he intends it to be used or he had reasonable cause to suspect that it may be used for the purposes of terrorism.

8. Once we accept the seizure of money, i.e., Rs. 4 lacs, at the time of raid from the appellant, the first condition is satisfied. The real dispute relates to satisfaction of the second condition, i.e., whether the money received was intended to be used or accused had reasonable cause to suspect that it might be used for the purposes of terrorism. The expression "reasonable cause to suspect" has been given a broader scope in sub-section (2) to Section 22. However, reasonable "cause to suspect" cannot mean that the accused had merely a vague conjecture or a surmise. There should be convincing evidence that the accused readily believed or had reasons to believe or should have good ground to suspect that the money would be used for the purposes of terrorism. Sub-section (5) to Section 22 states that a person guilty of offence u/s 22(2) can be sentenced to a term of imprisonment not exceeding 14 years with or without fine. The punishment prescribed under this section is stringent.

9. We accept the appellant's contention that the two diaries (Exhibit Nos. P-6 and P-7) and the alleged codes used in the said diaries are questionable evidence. There are several reasons for us to disregard the codes in these two diaries as incriminating evidence. The code language is rather simple and could have been easily recorded, at any time, in the diary. The diaries indicate that they contain other entries of outlay expenditure and incomings. There was no need for the appellant to specially record four coded entries (Q-1, Q-2 in Exhibit P-6 and Q-3 and A-4 in Exhibit P-7). P.S. Kushwaha (PW-41), Additional DCP Crime Branch, in his cross-examination, has averred that he had taken over the investigation on 6th June, 2003 and the diaries were handed over to him in an unsealed condition. It is only thereafter that the diaries were sent to the handwriting expert's opinion on 23rd July, 2003. One can see that there was substantial delay in sending the diaries after they were seized on 13th May, 2003. Further, the specimen handwriting of the appellant was taken on 19th May, 2003, nearly two months before the diary was sent to the handwriting expert. This delay is again not explained. The specimen handwritings were not taken as per the mandate in the Full Bench decision of this Court in *Sapan Haldar & Anr. v. State* CrI. A. 804/2001 decided on 25th May, 2012. Lastly, there is no mention of the diary codes in the confessional statement (Exhibit PW-10/H) recorded under POTA. Thus the possibility that the coded entries may have been entered in the diary after it was seized is not implausible. For these reasons, we cannot accept the said coded entry in the diaries Exhibits P-6 and P-7 as culpable evidence.

10. Further, we do not think that the alleged contents of the two disclosure statements (Exhibit PW-6/J and Exhibit PW-30/A) contain any statement which can be covered u/s 27 of the Evidence Act. The disclosure statement (Exhibit PW-6/J and 30/A) were recorded by the police officers and not recorded under POTA. Pursuant to the said disclosure statements no recovery was made.

11. This bring us to the purported confession made by the appellant and

recorded u/s 32 of POTA by the Ujjwal Mishra (PW-10), Deputy Commissioner of Police, Special Cell, Delhi. The confession marked (Exhibit PW-10/H) was recorded on 21st May, 2003 and signed by the appellant at point "A". The appellant was produced before PW-10 pursuant to application moved by Umesh Sharma (Exhibit PW-10/D) stating that confessional statement of the appellant was to be recorded. The said application is undated but a noting (Exhibit PW-10/E) was made by Ujjwal Mishra that the appellant may appear on 20th May, 2003 at 1700 hours in his office. It was further delineated that if any statement was recorded, copy of the same would be given to the Investigating Officer. On 20th May, 2003 noticing (Exhibit PW-10/F) was recorded by Ujjwal Mishra stating, inter alia, that Umesh Sharma (PW-9) had requested the undersigned to record the statement of the appellant u/s 32 of POTA. The appellant was informed that he was not bound to make any statement u/s 32 of POTA and was also told that the statement could be read against him. Thereafter, the appellant had written in his own handwriting (vide Exhibit PW-10/G) that he wanted to make a statement and would like to give his statement in writing, in Urdu language. The appellant's signatures appear at point "B" and are dated 20th May, 2003. Vide Exhibit PW-10/F, PW-10 recorded that if the appellant wanted to make a statement, it would be recorded on 21st May, 2003 at 1700 hours. Thereafter, statement (Exhibit PW-10/H) was recorded and the said statement reads as under:-

I am Zafar Umar Khan s/o Mohd. Sadque Khan R/o Kellar Mohra, Tehsil-Medhar, Distt.-Poonch (J. & K.). I was born in 1958 at Kellar Mohra. I run contract business at Poonch (J & K). Approximately one year ago, terrorists gunned down my eldest son who was about 22 years old. After that terrorists gunned my maternal uncle Md. Reyaz Khan s/o Ala Ditta Khan r/o Naka Munjari, Tehsil-Medhar, Distt.-Poonch. The terrorists belonged to Hizbul Mojahideen who later on turned to be Hizbe Islamia and Peer Panjal Regiment. First of all my son whom the terrorists had kidnapped from road and had gunned down was known as Umran Zafar. I am the deputy Sarpanch of my panchayat Jirawali Gali, Kellar Mehra Panchayat and am a responsible person. The terrorists kept an eye on me and my family and they took forcibly and threateningly from me different types of work which also includes bringing the hawala money collected from Delhi. I had brought money thrice from Delhi and had handed over to Peer Panjal Regiment Commander Umar. Now the fourth time, I got caught while collecting money in Delhi due to which I could not carry the 4,00,000/- rupees. I do not know what might have fallen to my family because of this. I had collected the hawala money here due to the fear and coercion of terrorist Umar. Rakesh had given me these rupees in Delhi itself. Apart from Umar I have also given twice to Harkatul Ansar Commander Rasheed. I handed over the hawala money brought from Delhi. This time Rakesh called me from Delhi on my number 9810926936 and told me that money had come. And he had given me. If the government takes the responsibility of protecting me and my family, I will work for my country India instead of working for the terrorists.

12. Learned counsel for the appellant has submitted that PW-10 had oscillated and his testimony is contradictory because, at one point, he had stated that on 21st May, 2003 ACP Umesh Sharma had given him a statement of the appellant in Urdu (Exhibit PW-10/A) and then had allegedly corrected himself and stated that the said statement (Exhibit PW-10/A) written in Urdu was given by the appellant to him and since he did not know Urdu, he had asked the appellant to read out so that it can be typed in Hindi simultaneously. So, the same was typed in Hindi and given Exhibit No. PW-10/B. We do not think there is any contradiction in the statement of PW-10. PW-10's statement was recorded on 28th April, 2007 nearly four years after he had recorded the statement Exhibit PW-10/B. He had immediately corrected himself and stated that Urdu statement (Exhibit PW-10/A), written by the appellant, was given to him by the appellant himself.

13. The procedure followed by PW-10 for recording the statement u/s 32 POTA shows that the said witness had followed the stipulations in sub-sections (2) and (3) of the said Section. Sub-section (2) mandates that the police officer, before recording the confession, shall explain to the person in writing that he was not bound to make a confession and that if he makes a confession, it might be used against him. The second requirement, i.e., sub-section (3) requires that the confession should be recorded in an atmosphere free from threats and inducement. PW-10 has stated that on 20th May, 2003 when the appellant was produced before him he explained him that the statement might be used against him and thereafter he was asked to be produced on the next day so that the appellant could think over and decide whether he should make the statement. The statement was recorded on the next day, i.e., on 21st May, 2003. The statement (Exhibit PW-10/B) mentions that when it was recorded, no other police officer was present except the Steno and PW-10.

14. Sub-sections (4) and (5) to Section 32 of POTA have been complied with. After the statement was recorded, the appellant was produced before Ms. Sangita Dhingra Sehgal (PW-28). She has stated that on 23rd May, 2003 she was working as CMM, Delhi and one ACP Umesh Kumar had produced the appellant along with the sealed envelope containing the confessional statement of the appellant. The appellant was questioned by her and she was satisfied. The sealed envelope was opened and the contents thereof was read over to the appellant. He did not complain of any torture on that day or earlier. He had stated that he had written the statement in Urdu voluntarily and admitted signature which was in his handwriting. Each and every content of the statement was read over to him and he was again apprised that he was free to say anything before her. The appellant had stated that he had made the confession voluntarily. The proceedings before her (Exhibit PW-28/A) states that the appellant was produced by Umesh Kumar, Assistant Commissioner of Police, Special Branch in terms of Section 32 of POTA. After identification of the appellant, Umesh Kumar was directed to leave the chamber for conducting further proceedings. Thereafter, the Presiding Officer (PW-28) questioned the appellant and satisfied herself about his

condition she recorded that he was in a fit condition. The sealed envelope was opened, read over to the appellant, who did not complain of any torture or pressure on the said date or earlier and averred that he had voluntarily given the hand written statement in Urdu, which was translated and typed on computer in Hindi. The statement was read over and it was explained that he was free to withdraw whatever he had said earlier. We notice that on the said date the appellant was sent to judicial custody and was not remanded to the police custody, thereafter, vide order dated 23rd May, 2003 made on the application moved by the Umesh Kumar, ACP, Special Cell. The said order is available at page No. 1167 of the trial court record.

15. Learned counsel for the appellant has rightly contended that there have been some lapses and Section 52 of POTA has not been fully complied with. Section 52 of POTA reads as under:-

52. Arrest.-

1. Where a police officer arrests a person, he shall prepare a custody memo of the person arrested.
2. The person arrested shall be informed of his right to consult a legal practitioner as soon as he is brought to the police station.
3. Whenever any person is arrested, information of his arrest shall be immediately communicated by the police officer to a family member or in his absence to a relative of such person by telegram, telephone or by any other means and this fact shall be recorded by the police officer under the signature of the person arrested.
4. The person arrested shall be permitted to meet the legal practitioner representing him during the course of interrogation of the accused person: Provided that nothing in this sub-section shall entitle the legal practitioner to remain present throughout the period of interrogation.

16. Right of arrested person to consult a legal practitioner is an important right, which should not be given only a lip service. It is discernible that the appellant herein was not provided services of legal practitioner till at least 23rd May, 2003. Sub-section (2) to Section 52 postulates that the person should be informed of his right to consult legal practitioner as soon as he is brought to the police station. In the present case, initially the appellant was arrested on 13th March, 2005 and the POTA provisions were invoked subsequently on 19-May-2003. This, however, did not mean that the appellant should not have been informed of his rights u/s 52(2) of POTA. Equally important is the right under sub-section (4) to Section 52, which permits the person arrested to meet the legal practitioner during the course of interrogation. On the said question, it would be apposite to reproduce the following observations in the case of State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, :

163. Now the question remains as to what is the effect of non-compliance of the

obligations cast on the police officer by sub-sections (2) to (4) of Section 52. This question becomes relevant as we find the non-observance of the requirements of subsection (2) read with sub-section (4) as well as subsection (3) or one of them in the instant cases. Does it have a bearing on the voluntariness and admissibility of the confession recorded u/s 32(1)? Should these safeguards envisaged in Section 52(1) be telescoped into Section 32? These are the questions which arise.

164. In our considered view, the violation of procedural safeguards u/s 52 does not stand on the same footing as the violation of the requirements of sub-sections (2) to (5) of Section 32. As already observed, sub-sections (2) to (5) of Section 32 have an integral and inseparable connection with the confession recorded u/s 32(1). They are designed to be checks against involuntary confessions and to provide an immediate remedy to the person making the confession to air his grievance before a judicial authority. These safeguards are, so to say, woven into the fabric of Section 32 itself and their observance is so vital that the breach thereof will normally result in eschewing the confession from consideration, subject to what we have said about the judicial custody. The prescriptions u/s 52, especially those affording an opportunity to have the presence of the legal practitioner, are no doubt supplemental safeguards as they will promote the guarantee against self-incrimination even at the stage of interrogation; but these requirements laid down in Section 52 cannot be projected into Section 32 so as to read all of them as constituting a code of safeguards of the same magnitude. To hold that the violation of each one of the safeguards envisaged by Section 52 would lead to automatic invalidation of the confession would not be in consonance with the inherent nature and scheme of the respective provisions. However, we would like to make it clear that the denial of the safeguards under sub-sections (2) to (4) of Section 52 will be one of the relevant factors that would weigh with the court to act upon or discard the confession. To this extent they play a role vis-?-vis the confessions recorded u/s 32, but they are not as clinching as the provisions contained in sub-sections (2) to (5) of Section 32.

17. The statutory safeguard in sub-sections (2) and (4) of Section 52 should not be violated and ignored by the investigating agencies. Strict compliance of the two sub-sections which give statutory protections to the arrested person should be adhered to and followed. Perhaps in the present case there was some lapse on the part of the judicial officers, who were dealing with the applications for police remand, in not ascertaining whether or not the appellant was informed of his statutory rights.

18. In view of violation of sub-sections (2) and (4) of Section 52, we initially had some doubts on whether or not we should take into consideration the confession (Exhibit PW-10/B). However, on much rumination, we are inclined to take the confession into consideration as corroborative evidence and not the primary evidence in view of other material facts, as proved, including the explanation

which has been given by the appellant in the court in his statement u/s 313 Cr. P.C. A major reason why we do not think that the confession should be completely disregarded is the admitted factual position that the confession was never retracted. The appellant was represented by a legal practitioner in the trial but did not retract the confession or even state, in any of his application, that it was illegally extracted because of torture, physical abuse etc. though such plea was taken after the evidence of the prosecution witnesses, in the statement u/s 313 Cr. P.C.

19. As noticed above, the appellant and Rakesh Kumar were arrested on 13th May, 2003. Rakesh Kumar had handed over Rs. 4 lacs to the appellant. The conversations between the appellant and Rakesh Kumar on 13th May, 2003, about an hour before they met at Veer Bhumi, have been proved from the call records Exhibit PW-15/1 to 15/4. The aforesaid call records on carefully examination show that the appellant had been in touch with Rakesh Kumar on telephone No. 9811534372 on 3rd February, 2003, 4th February, 2003, 5th March, 2003, 9th April, 2003 and as already noticed above on 13th May, 2003. The telephone No. 9810926936 was used by the appellant only when he was in Delhi after it was procured on 16th November, 2002. The call records, which was obtained by the prosecution (Exhibit PW-15/1 to 4) from the service provider Airtel vide letter dated 28th July, 2003, (Exhibit PW-15/1 to 4) shows that the appellant was present in Delhi on the following dates 16th November, 2002; 23rd December, 2002 to 25th December, 2002; 31st January, 2003 to 4th February, 2003; 3rd March, 2003 to 5th March, 2003; 8th April, 2003 to 9th April, 2003 and 9th May, 2003 to 13th May, 2003. As stated above, the first call exchanged between the appellant and Rakesh Kumar was made on 3rd February, 2003. Most of the other calls during this period when the appellant was in Delhi are to either satellite phones or to Pakistan. The appellant, in his statement u/s 313 Cr. P.C., has stated that he was a contractor with the Forest Corporation. It was for the appellant to explain for what plausible reason Rakesh Kumar had given him Rs. 4 lacs after he had handed over to him a currency note of Rs. 100/-. It was for the appellant to explain and state why on earlier occasions he and Rakesh Kumar had got in touch, as proved and established from the call details of telephone Nos. 9810926936 and 9811534372. In his statement u/s 313 Cr. P.C., the appellant has been on denial mode and simply stated that the facts put to him were incorrect. There was no explanation offered to the Court. In case the appellant had given a plausible explanation or even stated that the money paid to him by Rakesh Kumar was for the purpose of business or for other such purposes, the position would have been different. It is apparent that Rakesh Kumar, who had paid the money, was indulging in hawala business and the appellant had been in touch with him for the said purpose, i.e., for hawala transactions. There is no reason offered for the appellant, a contractor with the Forest Corporation, would get in touch with Rakesh Kumar for getting hawala money. Read in this manner we opine that the evidence on record, including the confession, establish and prove that the money might be used or the appellant

had reasonable cause to suspect that the money might be used for purpose of terrorism. In this regard, it would be appropriate to reproduce the following observations of Markandey Katju, J. in Harbans Singh Vs. State (Govt. of N.C.T. of Delhi), :

13. The High Court has recorded a finding that the prosecution has sufficiently proved that the confession of the accused was genuine and it was made and confirmed by the Chief Metropolitan Magistrate as per the provisions of Section 32 of POTA. As seen from the record, the recovery of the money immediately after the transaction in question has been sufficiently proved. Admittedly, the two appellants, namely, Harbans Singh and Mohd. Ayub Mir, were strangers to each other till the time the money was being handed over. Harbans Singh identified Mohd. Ayub Mir with the colour of his dress of which he had made a note in a slip of paper. The number of the 10 rupee note was another such factor in identifying each other. Neither of the two claimed to have had any kind of transaction with each other at any earlier point of time. They were neither partners in business nor had any occasion to deal with each other. In this situation, the purpose of handing over the cash is especially within the knowledge of the two accused-appellants, Harbans Singh and Mohd. Ayub Mir. Section 106 of the Evidence Act casts upon them a responsibility of advancing an explanation for the same. The applicability of Section 106 of the Evidence Act in the criminal law has been recognized by the Supreme Court in several judgments. Two recent judgments on the point are State of W.B. v. Mir Mohammad Omar and Sucha Singh v. State of Punjab.

20. As noticed above, the presence of appellant in Delhi on different times, as mentioned in the call records 9810926936, is proved from the call records. This is further proved from the hotel register (Exhibit PW-11B to 11F).

21. There is no explanation whatsoever where, for whom and for what purpose the appellant was collecting the said money. What was the reason for the appellant to repeatedly come to Delhi and get in touch with Rakesh Kumar, who was in hawala business. The appellant has not explained the telephone calls, which were repeatedly made to Pakistan or calls on the satellite phone from the telephone No. in question, i.e., 9810926936, which, we notice, was only used when the appellant was in Delhi. In these circumstances, we feel that the confessional statement to the effect that the money in question was to be used for terrorist activities in Kashmir should be treated as proved beyond doubt. We would, in view of our finding, accept the contention of the prosecution that earlier also the appellant had come to Delhi to collect money and pass it on for terrorist activities in Kashmir.

22. Rakesh Kumar (PW-34) became an approver and was not put on trial. However, in the court, he turned hostile and claimed that he had received a telephone call from the appellant who had asked him to show samples of socks, an offer which he purportedly declined. Thereafter, he received a request call from the appellant to meet in Jama Masjid area and they finally agreed to meet

near Janak Cinema. He met the appellant at Janak Cinema at about 1.00 to 1.30 P.M. to negotiate and settle the price of goods, i.e., the socks to be supplied. The appellant wanted to take him to the hotel where he was staying. At that time, he and the appellant was apprehended before they could reach the hotel. On 14th May, 2003 he was handed over to the Enforcement Directorate. He denied he was detained under COFEPOSA in the year 1996 and had remained in jail for nine months. He denied that he was operating as a hawala agent on dictates of one Habibullah residing in Dubai or that Habibullah used to talk to him on telephone No. 9811534372. He has accepted, however, that this was his number. He has agreed that the Enforcement Directorate had recorded his statement on 14th May, 2003 but has alleged that the said statement was recorded under force and coercion etc. He went on to accept that his statement, running into several pages (Exhibit PW-25/C to H and J) was signed by him at point DX-1 to DX-5, was recorded before Judicial Magistrate on 8th September, 2003. At that time of recording, he and the Magistrate alone were present. The statement made by PW-34 has to be taken with a pinch of salt. He was an approver who did not support the prosecution case and turned hostile. We note that the Review Committee had negated invocation of POTA provisions against him. Rakesh Kumar was proceeded against under Foreign Exchange Management Act, 2000 and the order against him, dated 20th March, 2009, was passed by Assistant Directorate of Enforcement (Exhibit PW-41/F) imposing penalty of Rs. 15 lacs, which has been placed on record. Another order (Exhibit PW-41/J) dated 30th September, 2005 imposes penalty of Rs. 1.40 crores for contravention of Section 9(1)(b) and (d) of Foreign Exchange Regulation Act, 1973. Rakesh Kumar had also been detained under COFEPOSA vide Exhibit PW-21/A dated 27th February, 1996. These orders prove his involvement in hawala transaction which he had vehemently denied, and hence to believe that he is a true witness or take rest of his uncorroborated statements as veritable would not be correct in our view.

Quantum of sentence

23. The appellant has been awarded maximum sentence for the offence u/s 22(2), i.e., 14 years of imprisonment. He has also been awarded seven years of imprisonment for the offence u/s 25 of the Act. In addition, he has been awarded sentence or fine of Rs. 10,000/- separately for the two offences in default of which he has to undergo Rigorous Imprisonment for one year each.

24. We feel that the maximum sentence of fourteen years for offence u/s 22(2) POTA is considerably severe and harsh on the appellant. As per prosecution version, the appellant lost his son to bullets of terrorists and his uncle also died under suspicious circumstances. The appellant, it is stated, was aggrieved as suitable ex gratia payments were not made on his son's death. The tragedy of losing a young son would have adversely impacted appellant's personal life. At the same time, the evil consequences and pernicious effect of being involved in funding or passing on money for the purpose of terrorism cannot be understated. Terrorism affects the very fabric of the society and results in needless violence

and loss of lives. In the present case, it is noticeable that the appellant got involved with the terrorists in the month of November, 2002 till he was caught and arrested on 13th May, 2003. There is nothing on record to suggest that he himself had carried out any terrorist attack, had used fire arms to kill any third person or was a part of any team which was engaged in organizing terrorist crimes. His guilt is reflected in the confession statement from which he has not retracted. The appellant, therefore, can be given the benefit that he has repented and would not indulge in any such activities in future. Balancing various factors, we have modified the sentence to the extent indicated below. The appellant has been in detention since 13th May, 2003 and has suffered incarceration for nearly 10 years in addition to remissions which he may have earned. We are, therefore, inclined to modify the order of sentence and direct that the appellant would be released on the sentence undergone for the offence u/s 22(2) of POTA, i.e., sentence of nearly 9 years and 10 months. We uphold the conviction and sentence under the Arms Act. The appellant will pay fine of Rs. 10,000/- each for the offence u/s 22(2) of POTA and Arms Act and in default of payment of fine, he shall undergo Simple Imprisonment of three months each. The appeal is disposed of.