Delhi High Court State vs Mohd. Afzal And Ors. [Along With ... on 29 October, 2003 Equivalent citations: 2003 VIIAD Delhi 1, 107 (2003) DLT 385, 2003 (71) DRJ 178, 2003 (3) JCC 1669 Author: P Nandrajog Bench: U Mehra, P Nandrajog JUDGMENT Pradeep Nandrajog, J. PREFACE 1. Every criminal trial is a voyage of discovery in which truth is the quest. The journey, in the present case, has been navigated by the Designated Judge of the Special Court constituted under Section 23 of the Prevention of Terrorists Activities Act, 2002 (hereinafter referred to as POTA). In the Murder Reference and the connected appeals arising out of the judgment dated 16.12.2002, we are called upon to decide the legality and validity of the trial as also the sustainability of the judgment pronounced by the Designated Judge of the Special Court, POTA. By the impugned judgment, the learned Designated Judge has held that the prosecution has successfully brought home the charge of conspiracy against accused Nos. 1 to 3, for having entered into a conspiracy with the 5 slain terrorists who had attacked Parliament House on 13.12.2001 along with Mohd. Masood Azhar, Gazi Baba @ Abu Zehadi @ Abu Seqlain and Tariq Ahmed, all Pakistani nationals (declared as proclaimed offenders), to procure arms and ammunitions and attack the Indian Parliament when in session, intending to take as hostage or kill the Prime Minister, Central Ministers, Vice-President of India and Members of Parliament and for that purpose the said accused persons procured hide-outs in Delhi, helped in procuring arms and ammunition, a motor vehicle which facilitated the entry of the terrorists into Parliament House Complex; procured Chemicals for manufacture of explosives used by the slain terrorists who attached Parliament House. The charge of conspiracy was held not proved against accused No. 4, who was however found guilty of having knowledge of the conspiracy but failed to report the same to the police and hence was found guilty of having committed the offence under Section 123 IPC. Following sentence has been imposed on the accused: (a) Life imprisonment and fine of Rs. 25,000/- and in default R.I. for a period of one year each to accused 1 to 3 under Section 121 IPC; (b) Ten year's R.I. and fine of Rs. 10,000/- and in default R.I. for 6 months to accused 1 to 3 under Section 121A IPC; (c) Life imprisonment and fine of Rs. 25,000/- and in default R.I. for one year to accused Nos. 1 to 3 under Section 122 IPC; (d) Death sentence and fine of Rs. 5 lacs to accused Nos. 1 to 3 under Section 302 read with Section 120B IPC; (e) Imprisonment for ten years and fine of Rs. 1,75,000/- and in default R.I. for one year to accused Nos. 1 to 3 under Section 307 read with Section 120B IPC (f) Death sentence and fine of Rs. 5 lacs to accused Nos. 1 to 3 under Section 3(2) of POTA; (g) Life imprisonment and fine of Rs. 25,000/-, and in default R.I. for one year to accused Nos. 1 to 3 under Section 3(3) POTA; (h) Life imprisonment and fine of Rs. 25,000/-, and in default R.I. for one year to accused Nos. 1 to 3, under Section 3(5) POTA; (i) Life imprisonment arid fine of Rs. 25,000/-, and in default R.I. for one year to accused Nos. 1 to 3, under Section 4(b) POTA; (j) Life imprisonment and fine of Rs. 25,000/-, and in default R.I. for one year to accused Nos. 1 and 2, under Section 3(4) POTA; (k) Life imprisonment and fine of Rs. 25,000/- and in default R.I. for one year to accused Nos. 1 to 3 under Section 3 of Explosive Substances Act; (1) R.I. for

20 years and fine of Rs. 25,000/- and in default R.I. for one year to accused No. 1 to 3 under Section 4 of Explosive Substances Act; (m) R.I. for 5 years and fine of Rs. 10,000/-, in default R.I. for 6 months to accused No. 4 under Section 123 I.P.C. All sentences to run concurrently. Under Section 6 POTA rupees ten lacs which are recovered stood forfeited. 2. Section 366 of the Code of Criminal Procedure, 1973 requires confirmation by the High Court of a sentence of death passed by the Court of Session, before it being executed. In the reference proceeding under Section 367, the High Court, if it thinks fit, is empowered to make further inquiry and receive additional evidence upon any point bearing upon the guilt or innocence of the convicted person. Under Section 368, the High Court may confirm the sentence, annul it or pass any other sentence, or convict the accused of any offence of which the Court of Session might have convicted him or may order a new trial on the same or an amended charge. The scope of these three Sections has been interpreted by the Hon'ble Supreme Court as casting a duty on the High Court to satisfy itself by a reappraisal and reassessment of the entire evidence, uninfluenced by the judgment of the Court of Session, about the guilt or innocence of the accused person. Reference be made to: -A) Jumman and Ors. v. State of Punjab "12. In fact the proceedings before the High Court are a reappraisal and the reassessment of the entire facts and law in order that the High Court should be satisfied on the materials about the guilt or innocence of the accused persons. Such being the case, it is the duty of the High Court to consider the proceedings in all their aspects and come to an independent conclusion on the materials apart from the view expressed by the Sessions Judge. In so doing, the High Court will be assisted by the opinion expressed by the Sessions Judge, but under the provisions of the law above-mentioned it is for the High Court to come to an independent conclusion of its own." B) . Rama Shankar Singh v. State of West Bengal. "11. The High Court had also to consider what order should be passed on the reference under SECTION 374, and to decide on an appraisal of the evidence whether the order of conviction for the offences for which the accused were convicted was justified, and whether, having regard to the circumstances, the sentence of death was the appropriate sentence." C) . Masaiti v. State of U.P. "9. In dealing with such appeals or reference proceedings where the question of confirming death sentence is involved, the High Court has also to deal with the matter carefully and to examine all relevant and material circumstances before upholding the conviction and confirming the sentence of death. All arguments urged by the appellants and all material infirmities pressed before the High Court on their behalf must be scrupulously examined and considered before a final decision is reached. The fact that 10 persons had been ordered to be hanged by the trial Judge necessarily imposed a more serious and onerous responsibility on the High Court in dealing with the present appeals." D) . Charan Singh v. State of Punjab "16. Ordinarily in a criminal appeal against conviction the appellate court can dismiss the appeal if the court is of the opinion that there is no sufficient ground for interference after examining the various grounds urged before it for challenging the correctness of the decision of the trial Court. It is not necessary for the appellate court to examine the entire record for the purpose of arriving

at an independent conclusion The position, however, is different where in addition to an appeal filed by an accused who is sentenced to death, the High Court has to dispose of the reference for confirmation of the death sentence under Section 374 of the Code of Criminal Procedure. While dealing with a reference the High Court should consider the proceedings in all their aspects and come to an independent conclusion on the material on record apart from the view expressed by the Sessions Judge." E) 1994 (Supply.) 2 SCC 372. Arjun Marik v. State of Bihar "14. It is perfectly true that in a murder trial when an accused persons stands charged with the commission of an offence punishable under Section 302, he stands the risk of being subjected to the highest penalty prescribed by the IPC; and naturally judicial approach in dealing with such cases has to be cautious, circumspect and careful. In dealing with such appeals or reference proceedings where the question of confirming a death sentence is involved the Court has to deal with the matter carefully and to examine all relevant and material circumstances before upholding the conviction and confirming sentence of death." F) . State of Tamil Nadu v. Rajendran "5. In performing its duty, the High Court is of necessity bound to consider the merits of the case itself and has to examine the entire evidence on record. The legislature having provided in the confirmation proceedings, a final safeguard of the life and liberty of the subject in cases of capital sentences, the duty of the High Court becomes more onerous to consider independently the matter carefully and examine all relevant material evidence and come to a conclusion one way or the other. It is, therefore, the duty of the High Court in a death reference to consider the evidence afresh." 3. We have thus reheard the matter afresh and have considered the issues raised in their entirety with reference to the evidence and law applicable. 4. Broadly categorised, issues which arise for consideration may be set out. They are:- 1. Whether there have been breaches of statutory safeguards during investigation? If yes, consequence thereof? - 2. What is the status of the investigation carried out till 18.12.2001 in the context of the prosecution of the accused persons for offence under POTA? 3. Is there a legal and valid sanction for the" trial of the accused persons for offences under Indian Penal Code, Explosive Substances Act and POTA? 4. Whether any charges could be framed against the accused persons for offences under Indian Penal Code? 5. Whether, the trial of the accused persons stands vitiated, in that, prejudice has been caused to the accused by imperfect framing of charges? 6. Has there been a denial of justice to accused Mohd. Afzal by denying him adequate legal aid? 7. Whether the trial stands vitiated by receipt and admission of inadmissible evidence? 8. Whether the correct principles of law pertaining to conduct, disclosure, recovery, and confessions have been applied by the Designated Judge? 9. Whether evidence relied upon by the Designated Judge stood validly proved and was admissible in a criminal trial? 10. Whether the provisions of Section 313 Cr.P.C. have been complied with, in letter of spirit? If not, effect thereof? 11. Lastly, whether the judgment of the Designated Judge is sustainable or not? PARLIAMENT "THE JURAL ENTITY" 5. Wide in it's general diffusion, the institution of Parliament proclaims "L'Etat, C'est La Nation": The State, it is The Nation 6. Every nation is the master of its own fate and arbiter of its life. This nation - this unit in India

of over 100 crore members - needs an organ and agent through which it can act. This organ and agent has to represent and reflect India's being in all its facets and scintillations of its multitudinous life. This organ and agent is Parliament. 7. Parliament derives its authority from the nation by an express derivation based on an open and free elections. The Indian Parliament, vested with such authority is the sovereign depository, for its term of 'office, of the sovereignty of the nation. It is the trustee which the nation has authorised to act on its behalf; and it exercises sovereign power under the terms of its trust (The Constitution), for the nation has given it the honour and the pledge of its confidence. 8. In the popular imagination and belief, parliament represents the nations will, it symbolises the spirit and the soul of the Indian people. It is the supreme law making body. From Kashmir to Kanyakumari and from Gujarat to Arunachal Pradesh, Parliament embodies the republican character and federal structure of the Indian Nation. In the words of late Pandit Jawaharlal Nehru :- "To sum up, all out institutions, including the parliamentary institutions, are ultimately the projections of a people's character, thinking and aims. They are strong and lasting in the measure that they are in accordance with the people's character and thinking. Otherwise, they tend to break up." (See Nehru's Message to the first issue of the Journal of Parliamentary Information, Vol.1, No. 1, April, 1955) 9. The building of the parliament, "The Parliament House" is the seat of the national sovereignty. The attack on the Parliament, therefore, is an attack on the sovereignty of the people of India. It is an attack on the integrity of the Indian State. It is an attack on the secular and pluralistic fabric and character of India. Those who made an unsuccessful attempt to attack the Parliament House on 13th December, 2001 were aware of the significance of the attack. The writing on the fake Home Ministry sticker pasted on the car in which these persons made an entry in the compound of Parliament House tells the mission in the own words of these persons. The writing on the sticker reads: "India is a very bad country and we hate India we want to destroy India." PARLIAMENT HOUSE COMPLEX 10. Ex. PW-1/19 is the site plan of the Parliament House Complex. It was prepared by S.I. Mahesh Kumar, Draftsman, Crime Branch, New Delhi (PW-30). It is an undisputed document as none of the accused persons subjected the witness to cross examination. 11. The Parliament House Building is a circular building having 12 entry points through huge wooden gates numbered 1 to 12 in the anti-clockwise direction. Wooden gate No. 11 is for the entry and exit of the Vice-President to the Parliament House and other wooden gates are used by different designated officials for entry and exit in the Parliament House Building. Enwombing the building of the Parliament House is a circular road. The circular road has open areas abutting it. Seven entrances from the roads outside lead into the Complex, down the passage, ending at the circular road enwombing the building of the Parliament House. At each entrance there is an iron gate. These gates are numbered as iron gate Nos. 1 to 7 in the anti-clockwise direction. Iron gate Nos. 1 & 2 are towards the Southern and Northern side respectively of the entry to Parliament House Complex through Sansad Marg. Iron gate Nos. 3 & 4 are at the entry points to the Complex from Lok Sabha Marg. Iron gate Nos. 5 & 7 are at the entry points to the Com-

plex from Rajya Sabha Marg and iron gate No. 6 is at the T Junction entry point to the Complex on the Rajya Sabha Marg. THE INCIDENT AT PARLIAMENT HOUSE 12. On 13.12.2001, an unsuccessful attempt was made to storm and possibly blow-up the building of Parliament House when Parliament was in session. The Vice-President was in the Parliament House and so were many Central Ministers and M.P's. PW-5, PW-21, PW-55, PW-58, PW-69 and PW-74 gave evidence as to what transpired at Parliament House in the forenoon of 13th December, 2001. 13. PW-5, ASI Jeet Ram was in the security of the Vice President of India. He deposed that he was in charge of Escort-1 vehicle. Around 11.20 AM the Vice President had to leave for his residence. Carcade of the Vice President stationed itself near Gate No. 11 i.e. the Vice President's gate. At about 11.35 AM, one white Ambassador car having a red light and a sticker of the Home Ministry drove towards the carcade of the Vice President. Since the escort vehicle, of which he was in charge, was blocking the way, the car turned left. He called for stopping the car, at which the driver reversed and while doing so, struck the car of the Vice President. He and Shekher, driver of the car of the Vice President, caught the collar of the driver of the car. The driver was maneuvering the steering at which he got suspicious and took out his revolver. Five persons got out of the car. He fired at one of the persons, Realizing that they could be terrorists. There was retaliatory firing in which he received bullet injury on his right thigh. 14. PW-55, SI Sham Singh who was on duty in the Vice President security corroborated PW-5. In addition, he deposed that four of the five persons in the car ran towards wooden gate No. 9 of the Parliament House. 15. PW-69, Inspector Santokh Singh, deposed that he was posted on duty at Parliament House on 13.12.2001. The Prime Minister was to come. At 11.40 AM he had stationed himself at iron-gate No. 5. On hearing firing sound, he alerted his force. They took position at building gate No. 5. He saw four persons wearing military uniform having pithoo bag on their back, running towards wooden No. 5 as wooden gate No. 9 had been closed by that time. There was an exchange of fire between the force led by him and the said four persons. Three of the four persons were killed in the firing in front of wooden gate No. 9 and one succeeded in running towards wooden gate No. 5. 16. PW-74, Const. Shambir Singh stated that he was on duty at wooden gate No. 5. At about 11.40 AM he heard firing sound from wooden gate No. 1. One person running towards gate No. 5 was throwing grenades. As a result of firing by him, the person was killed near gate No. 5. 17. PW-58, SI Neeraj Paliwal, who was also stationed at wooden gate No. 5, corroborated PW-69 and PW-74. In addition he deposed that the person running towards wooden gate No. 1 was killed at wooden gate No. 1. 18. PW.21 Const. Mahipal Singh of CRPF deposed that on 13.12.2001 he was on duty at Gate No. 5 when he saw a terrorist coming towards the said gate. The terrorist was firing and he threw a hand grenade which exploded near him causing injury to him and his companions. 19. The witnesses aforesaid i.e. PW.5, 21, 55, 58, 69 and 74 were not cross-examined and their testimony went unchallenged. 20. As a result of exchange of fire between the intruders and the security forces, before the intruders could be felled, eight security personnel and one CPWD gardener became

martyrs and 16 persons, 13 of whom were security personnel, received injuries. HC Om Parkash, HC Ghanshyam, ASI Nanak Chand, ASI Rampal, Ct. Vijender Singh, W/Ct. Kamlesh Kumari, Security Assistant G-II Jagdish Prasad Yadav, Watch and Ward person Matwar Singh and Des Raj, Gardener, CPWD, died at the spot. ASI Jeet Ram, Ct. Rajat Bisht, HC Kamal Singh, HC Y.P. Thapa, Ct. Rakesh Kumar, SI Purshottam Singh, Anand Jha, Assistant Cdt., CRPF, HC Samar Singh, Ct. Sukhvinder Singh, Ct.(Dir) Hans Raj, Ct. Arjun Ram Syare, Ct. Mahipal Singh, M.M.S. Nair, Shri Purshottam Pandey, Shri Sanjiv Kumar and Shri Vikram Singh were injured in the firing. 21. The fact that aforesaid 9 persons were killed as a result of exchange of fire and the aforesaid 16 persons were injured was not disputed at the commencement of trial. The MLCs of the injured persons and the postmortem reports of the aforesaid dead persons were treated as proved. Before trial commenced, it was conceded by the accused persons that they were not disputing recoveries effected at the site except the recoveries relating to the I-Cards, mobile phones, slips on which telephone numbers were noted. Order dated 5.6.2002 reads as under:- "5–6-2002 Present: Counsel for accd. persons are present. It is submitted by the counsels that part of the evidence namely, the post-mortem reports of he deceased terrorists as well as deceased persons who were killed in the attack at Parliament, MLCs of the persons injured in the attack, the recoveries of machine guns, explosive substances, etc. from the scene of occurrence in the Parliament except the recoveries of I-Cards, Mobile phones, slips on which some telephone numbers were given and other papers be considered as undisputed evidence and all the documents concerning the aforesaid evidence shall not be disputed by the accd. persons. Therefore, with the consent of the defense counsels, the documents which are MLCs of the injured persons, post mortem reports of the deceased persons and the documents regarding recovery of explosive substances, AK 47 riffles and other ammunition from the place of attack in Parliament or from the person of deceased terrorists shall be considered proved without formal proof and unopposed. The remaining witnesses shall be examined by the prosecution from 8-7-2002 onwards on day-to-day basis. The prosecution shall submit a chart of examination of witnesses giving which witness shall be examined on which date. Sd/- A.s..I. THE INVESTIGATION BEGINS 22. The attack was on the Parliament. It was not a time to stand on ceremony. It was of utmost importance to try and deduce the identity of the fire terrorists. It was not an ordinary crime and, therefore, resources had to be pooled. Different officers of the police force went about the job. Each went on to pursue their inquiry singularly; nothings could be compared afterwards. 23. PW-1 Shri G.L. Mehta, SHO, Police Station Parliament House, deposed that on 13th December, 2001 he received information on wireless that firing was going on at the Parliament House. Accompanied by SI Sanjiv Verma PW-2, SI Rajinder Singh PW-3, and SI Yograj Dogra PW-4 and other staff, he reached the Parliament House: Firing was over by the time he reached there. The injured persons being removed to the hospital. The spot of occurrence was examined by him. He noticed empty shells lying all along. The dead body of one terrorist was lying opposite wooden gate No. 1, the dead body of another terrorist was lying at porch of wooden gate

No. 5. The dead bodies of three terrorists were lying in the porch of wooden gate No. 9. Automatic rifles, arms and ammunition were lying on the ground. He deposed; that an Ambassador car No. 1527 was found by him opposite wooden gate No. 11. Electric wires were protruding out of the car which had arms and ammunition inside it. After cordoning off the entire area, he summoned the Bomb Disposal Squad of the National Security Guards. There were explosives around the dead bodies of the terrorists. He summoned a photographer and the crime team at the spot. He recorded the statement of SI Shyam Singh (PW-55) Ex. PW-1/1, (Rukka) on which he made an endorsement, Ex. PW-1/2, which was sent to P.S. Parliament Street through HC Sukhbir, PW.2 for registration of FIR. After registration of the case, HC Sukhbir came back to the spot with the FIR, Ex. PW-1/3. He prepared a rough site plan of the place, of occurrence Ex. PW-1/4. SI Yograj Dogra (PW-4) was deputed by him to conduct investigation at gate No. 1. SI Sanjiv Verma (PW-2) was deputed to conduct investigation at gate No. 9. SI Rajinder Singh (PW-3) was deputed to conduct investigation at gate No. 5. The empty shells of cartridges as also the live cartridges which were found near the Ambassador car No. DL-3C-J-1527 were collected. After separately putting them in parcels, the live and empty cartridges were sealed and seized vide seizure memo Ex. PW-1/5. While he was doing the aforesaid, one Harpal Singh (PW-20) came to the spot and produced some documents relating to the car. These documents were: (a) original delivery receipt pertaining to car in favor of one Ashiq Hussain Khan (proved as Ex. PW. 1/6); (b) photocopy of identity card of Ashiq Hussain Khan; (c) photocopy of from No. 29 and 30 in favor Ashiq Hussain Khan, and (d) a letter issued by Infrastructure Leasing and Services Ltd. 24. He seized these documents vide seizure memo Ex.PW-1/7. The Bomb Disposal Squad from the National Security Guards, which had come to the spot, defused the explosive material found in the car, as also the explosive materials on the body of the dead terrorists. The photographer thereafter took photographs and the crime team inspected the spot. Harpal Singh, the person who had come to the spot and had produced the documents relating to the car, identified one of the deceased terrorists as the person who had taken delivery of the car from him stating his name as Ashiq Hussain Khan. The ambassador car was seized. A Home Ministry sticker pasted on the wind screen of the car Ex.PW.1/8 was seizes vide seizure memo Ex.PW.1/17 after it was removed by him. From inside the car, magazine of pistol, cartridges, ammunition of AK-47 riffle, packets of dry fruit having label of"Sawan Dry Fruit" 6507 Fateh Puri Chowk Delhi 6 Phone No. 3958486, a dagger and metal pieces were recovered. Said material was seized vide seizure memo PW.1/9. Sketch of dagger Ex.PW.1/10 was prepared by him. The document relating to the car, being original registration certificate, Form No. 32, insurance cover, note, letter on letter-head of Lucky Motors showing purchase and handing over of car, cash receipt dated 11.12.2001 for Rs. 1,08,000/- in favor of Ashiq Hussain, full size road, map of Delhi and few other papers found in the car were seized vide seizure memo Ex.PW.1/11. Pieces of bullets and chips around the car were collected and seized vide seizure memo Ex.PW.1/13. Blood samples were lifted from various places vide memo Ex.PW.1/14. Except for the

original delivery receipt pertaining to the car, all articles recovered were sealed with the seal "G.L.M." 25. The photographs of the 5 slain terrorists were taken and thereafter their bodies were sent to the mortuary of the Ram Manohar Lohia Hospital and Lady Harding Medical College for postmortem. Photographs of 5 slain terrorists were Ex.PW.1/20 to PW.1/24. The case property seized was deposited in the malkhana of P.S. Parliament Street. He was associated with the investigation only to the extent deposed to by him on 13.12.2001 and thereafter investigation was taken over by the Special Cell. The witness was not cross-examined. 26. PW-14, HC Malkiat Singh deposed that he was the duty officer at PS Parliament Street on 13.12.2001. He received one rukka for registration of FIR from Insp. G.L. Mehta on the basis of which he recorded FIR No. 417/01, copy being Ex.PW.14/1 (original was produced). Witness was not cross-examined. 27. PW-2, S.I. Sanjiv Kumar deposed that he was deputed by the SHO (Sh. G.L. Mehta, PW-1) to conduct investigation at wooden gate No. 9. He deposed that after the bomb disposal squad had checked all dead bodies and had removed explosives and devices, he proceeded with the investigation. He searched the deceased terrorists one by one and seized the material recovered as well as arms and ammunitions lying around them and on their person. Three AK-47 rifles, one .385 pistol and 5 spare magazine of AK-47 rifles and three fitted magazine which were double in size were recovered. Two mobile phones were recovered. Each terrorist was having one bag containing live cartridges. The arms and ammunitions seized were recorded vide recovery memo Ex.PW.2/2. One I-Card being Ex.PW.2/3, PW.2/4 and PW.2/5 was recovered from each of the terrorist. They were pasted by him on a plain paper on which he put his signatures. From the pocket of one terrorist he recovered a paper slip Ex.PW.2/7, having seven telephone numbers, which slip was pasted by him on paper after seizure. Another slip Ex.PW2/8 having same mobile numbers was recovered by him from the pocket of another terrorist which was likewise pasted on a plain paper. The recoveries were listed in the seizure memo Ex.PW.2/2. He prepared the sketch of the three AK-47 rifles as well as the pistol being Ex.PW.2/10 to Ex.PW.2/13. He prepared the inquest proceedings in respect of the three terrorists whose bodies were found at gate No. 9 and postmortem was conducted on 17.12.2001. The Doctor who conducted the postmortem on the dead body of one terrorist, whose name was later on found to be Hamja, handed over to him two pieces of paper; one having seven phone numbers and the second having E-mail address of Preeti Zinta which was seized by him vide seizure memo Ex.PW.2/15. These two papers were Ex.PW.2/16 and PW.2/17. The inquest papers in respect of the three terrorists were Ex.PW.2/18, PW.2/19 and PW.2/20. Accused Mohd. Afzal had identified all the five deceased terrorists at the mortuary. He stated that Ex.PW.2/6 was found on the person of the terrorist identified as Raja, Ex.PW.2/8 and PW.2/9 was recovered from Rana and Ex.PW.2/16 and PW.2/17 were found on the body of the terrorist identified as Hamja. Except for the I-Cards, slips of papers containing telephone numbers and mobile phones, the articles recovered were sealed with the seal of "SKV". He identified the explosives, arms and ammunitions and the cell phones recovered and seized as Ex.P.14 to P.29. 28. This witness was only cross-examined by

accused No. 2, Shaukat. The cross-examination related to the postmortem report of the deceased terrorist Hamja. Witness was cross-examined on the issue whether he had thoroughly checked the dead bodies of the deceased terrorists. Suggestion was put to this witness that no slips or I-cards were recovered from the person of the deceased terrorists on 13.12.2001 or on 17.12.2001 when postmortem was conducted. . 29. PW.10 HC Jaiveer Singh who had assisted S.I. Sanjiv Verma deposed that he had assisted S.I. Sanjiv Verma in the investigation at wooden gate No. 9. This witness was again subjected to a limited cross-examination pertaining to recovery of I-cards and search of the person of the deceased terrorist. 30. PW.3, SI Rajender Singh, deposed that he was directed by the SHO (G.L. Mehta PW.1) to conduct investigation at wooden gate No. 5 of the Parliament House. Dead body of one terrorist was lying at gate No. 5, in the right hand of which, was one AK-56 rifle. Personal search of the dead body resulted in recovery of one I-card, Ex.PW3/3. Near the dead body, a hand grenade lever was lying. On the shoulder of the dead body was a bag. The articles recovered by him were vide seizure memo Ex.PW.3/4. Except for the I-Card, all articles seized were sealed with the seal of "RS." He prepared the sketch of AK-56 rifle and also of the hand grenade lever being Ex.PW.3/2. He sent the dead body for postmortem to Lady Harding Hospital and inquest report was Ex.PW.3/5. The name of the deceased terrorist was later on found to be Hayder on the identification of accused Mohd. Afzal. He got the postmortem of the 3 deceased security personnel, namely, Nanak, Kamlesh Yadev and Om Prakash the inquest reports being Ex.PW. 3/6, PW. 3/7 and PW. 3/8. The witness was subjected to a limited cross-examination, in that, it was put to him that accused Afzal had not identified the deceased terrorist, that he had not carried out the search of the dead body thoroughly and that no I-card was recovered. 31. PW.8 H.C. Ashwani Kumar who had assisted PW.3 in the investigation at gate No. 5, corroborated PW.3. He was cross-examined only by accused No. 3 pertaining to the contents of the I-card seized from the person of the deceased terrorist. 32. PW.4, SI Yograj Dogra deposed that he was directed by the SHO (G.L. Mehta PW. 1) to conduct investigation at gate No. 1. Dead body of one terrorist was lying outside gate No. 1. The body was found amputated and around it a lot of articles were lying scattered. Personal search of the dead body resulted in recovery of one purse containing three I-cards being Ex.PW4/2. PW4/3 and PW4/4 of Cyber Tec. which were seized by him. He found a slip Ex.PW4/5 containing details about Lok Sabha and Rajya Sabha. Two slips having 5 and 2 telephone numbers respectively being Ex.PW.4/6 and PW.4/7 were recovered from the person of the deceased terrorist. Three magic/cash cards were also found. The recovered articles were seized by him vide seizure memo Ex.PW.4/8. He recovered one Bareta pistol with empty magazine, two magazines of AK-47, one broken magazine, of 9 MM, empty cartridges of 9 MM, shells of AK-47 cartridges, 29 live cartridges, one pencil size Duracell, adapter, wires, pen battery and ear phone, which were seized by him. Sketch of pistol and magazines were prepared by him which were Ex.PW.4/9 to PW.4/12. The arms and ammunition seized was entered in seizure memo Ex.PW.4/13. One mobile phone (Sony) was also recovered from the person of the deceased ter-

rorist, which was seized vide seizure memo Ex.PW.4/14. One Satyam I-card was recovered from the deceased terrorist which was seized vide seizure memo Ex.PW.4/16. Except for the I-Cards, mobile phone, SIM cards and slips of paper recovered, all articles were sealed with the seal of "YR". He sent the dead body of the deceased terrorist for postmortem to Lady Harding Mortuary and the inquest report prepared by him was Ex.PW.4/18. The seized material was Ex.P.33 to P.45. He had got performed the postmortem of 6 deceased security men, the inquest reports being Ex.PW.4/19 to PW.4/24. The witness was subjected to a limited cross-examination pertaining to recovery and seizure of I-cards and the deposit of the siezed material in the malkhana. 33. PW.7, HC Jaiveer, who had assisted S.I. Yograj Dogra deposed in line with the evidence of PW.4. He was cross-examined. Questions were put to him in cross-examination suggesting that he was not present at the spot and that no recoveries were effected on the spot. 34. PW.9, HC Sukhbir Singh deposed that on 13.12.2001 he was with the SHO of P.S. Parliament Street when the terrorist attack took place on Parliament House. He was handed over the rukka Ex.PW.1/1, which contain the statement of S.I. Shyam Singh containing the endorsement of the SHO EX.PW.l/2 for onward transmission for registration of FIR. He took the rukka to P.S. Parliament House and got the FIR No. 417/2001 registered and came back with a copy of the FIR and the original rukka to the spot and handed over the same to the SHO. On the intervening night of 13th and 14th December, 2001 he was working in the malkhana. The case property seized by the SHO, S.I. Sanjiv Kumar Verma, S.I. Yograj Dogra and S.I. Rajender Singh was deposited in the malkhana vide entry at serial No. 1317 being Ex.PW.1/9. On 14.12.2001 Inspector Mohan Chand Sharma also deposited some property which was entered at serial No. 1319. On 15.12.2001 further case property was deposited by the SHO which was entered at serial No. 1320. Further deposit of case property was made by Inspector Mohan Chand Sharma on 15.12.2001 which was entered at serial No. 1321. S.I.Rajender Singh made further deposit of case property on 15.12.2001 which was entered at serial No. 1322. He received further case property on various dates between 16.12.2001 to 15.1.2002 for deposit in the malkhana. He handed over sealed parcels at different dates for onward transmission to CFSL laboratories at different places. This witness was not cross-examined. 35. PW.75, K. Satya Murthy, Commanding Officer of the Bomb Disposal Unit of National Security Guard deposed that on 13.12.2001 the BDS team was requisitioned for sanitising area in and around the Parliament House. He, along with Major Divesh Singh and other members of the team reached Parliament House around 12.45 p.m. and started the sanitising operations. One car bomb having lot of electric components opposite gate No. 11 of Parliament House was rendered safe. One terrorist was lying dead near gate No. 1 and some grenades were lying all over him. These grenades were taken to safe disposal area. A bag containing grenades was also found which was again removed to safe disposal area. One tiffin bomb was found which was rendered safe at the same place. Thereafter the team moved to gate No. 9. 3 bags were lying along the dead bodies of the terrorists, grenades and one tiffin bomb was found in each bag. The tiffin bombs and hand grenades were removed to the

safe disposal area. The hand grenades and rifle grenades were also removed to the safe disposal area. The team thereafter went to gate No. 5 and sanitised the area. The grenades and detonators were destroyed in the NSG range. The non-explosive components were handed over to the Delhi Police and the explosive components were sent to CFSL Chandigarh for analysis. The reports about handing over of items to the Delhi Police and sanitisation of grenades, explosives and detonator were prepared by him, Major Divesh Singh and Major Patnayak. They were Ex.PW. 75/1 to PW. 75/4. The witness was not cross-examined. 36. PW.47, Dr. Upender Kishore deposed that he had conducted the postmortem of terrorist Hamja who was identified by accused Mohd. Afzal. The postmortem report was Ex.PW.47/1, two slips of paper Ex.PW2/-16 and PW2/17 were recovered from the pocket of Hamja, which was handed over to the police on 17.12.2001. The witness was cross-examined and suggestions were put to him that he had falsely deposed that Ex.PW.2/16 and PW.2/17 were recovered from the pant pocket of Hamja. 37. PW.6 constable Rajesh Kumar deposed that he had taken 184, photographs of the place of occurrence out of which 162 good prints came out, and proved the same along with their negatives as PW. 6/2 and Ex.PW. 6/1 respectively. The witness was not cross-examined. 38. PW.30 SI Mahesh Kumar, draftsman, Crime Branch deposed that he was called to the spot by the SHO G.L. Mehta. He deposed that he took measurements of the place and prepared the site plan Ex.PW.1/19. The witness was not cross-examined. INVESTIGATION GETS THE LEAD 39. PW.66 Insp. Mohan Chand Sharma from the Operation Cell, Lodhi Road, deposed that oh 13.12.2001, at about 12 noon, news of the attack on Parliament House had reached and a team under A.C.P. Rajbir Singh, of which he was a member left for Parliament House. He was deputed to investigate about the mobile numbers found written on the slips of paper recovered from the terrorists, as also the mobile phones recovered from the terrorists and the three SIM cards recovered from the purse of terrorist Mohd. He deputed his Sub-Inspector to obtain from the Cell Phone companies, the call details of these SIM cards and telephone numbers. Call details of the mobile phone number 9811489429 written on the I. Cards recovered from the terrorists were also requisitioned by him. By evening he got the details. From the call details he noted that : a) SIM cards corresponding to telephone number 9810693456 recovered from the purse of Mohd. was used in six instruments. b) Last call made from this mobile number 9810693456 was made to mobile No. 9811489429 (the number on the I. Cards recovered from the terrorists) at 11.25 A.M. on 13.12.2001 (Time was when attack was on). c) Call details of the number 9810693456 showed it to have received calls from a satellite phone and their were several outgoing international calls to Germany. d) Six mobile instruments were used inter-changeably with the SIM cards available with him. e) Mobile number 9811489429 was used frequently and SIM card thereof was used on different instruments. International calls were made from this number. This number was frequently in touch with the two other numbers, namely, 9811573506 and 9810081228. 40. Since the terrorists had died, his investigation got narrowed down to three numbers, namely, (i) 9811489429, (ii) 9811573506 and (iii) 9810081228. Further information received from the

telephone companies revealed that the number 9811489429 and 981153506 were of Essar and were "Cash Card" numbers. The third number 9810081228 was of Air Tel and a regular card number of one S.A.R. Gilani (accused No. 3), having address 535, Mukherjee Nagar. 41. He took permission from the Joint Director, Information and Broadcasting as per the requirements of the Indian Telegraph Act for keeping under surveillance and taping mobile phone numbers 9811489429, 9811573506 & 9810081228. Since name and address of S.A.R. Gilani had come within the knowledge of the investigating agency, surveillance was mounted around his house for other clues. No movement being found, the surveillance was removed and remounted on 14.12.2001. On 14.12.2001 at about 12.30 p.m. a call was noticed on phone No. 9810081228. The call was taped. The caller and the receiver were talking to each other in Kashmiri language and since none of the persons in the special cell knew kashmiri language, one Sh. Rashid (PW-71) was summoned to translate the taped conversation. On the same day at about 8.00 p.m. a call was found coming on phone No. 9811573506 and this was also taped. The conversation, in Hindi, was between a man named Shaukat and a woman. He seized the two cassettes on which the two conversation were taped, being Exhibit PW-66/1 and PW-66/2. The Hindi translation of the taped conversation Ex.PW-66/1 was Ex.PW-66/3 and the Hindi transcript of the second conversation were PW-66/4. On inquiry from the cell phone company pertaining to the two telephone numbers, it was learnt that both the calls had emanated from Srinagar. The second call was received from the number 0194492610 at Srinagar which was given to the Srinagar Police, Central Agency for keeping watch. On 15.12.2001 at about 10.00 A.M. S.A.R. Gilani entered his house when he was apprehended on being identified by the landlord and at the time of his arrest he was having mobile No. 9810081228 with him which was seized. From the memory of the telephone, the list of dialed numbers was noted and S.A.R. Gilani was questioned about the numbers which were appearing in the chart of phone numbers. S.A.R. Gilani informed him that the mobile No. 9811489429 belongs to Afzal and 9811573506 belongs to Shaukat. The mobile phone was seized and sealed vide, seizure memo Ex.PW-66/5. Personal search of S.A.R. Gilani was taken vide search memo PW-66/6 and thereafter S.A.R. Gilani led the investigating team to the house of Shaukat being No. 1021, 1st Floor, Mukherjee Nagar. Accused No. 4 Afzan Guru opened the door. She was having a mobile phone in her hand which was seized. Its number was 9811573506. On checking the incoming and outgoing numbers from the memory of the phone, it was found that the Srinagar number from which the call was made at about 8.00 P.M. on 14.12.2001 was in the memory of the instrument. The phone along with the SIM card was seized by him vide seizure memo Ex.PW-66/7. Search was conducted in the house of Afzan Guru and the photographs Ex.PW-66/8 & 9 were recovered and seized vide seizure memo Ex,PW-66/10. Another cell phone instrument along with the SIM card were recovered from the house search which was seized vide seizure memo No. Ex.PW-66/11. In the seizure memo's the mobile phone seized from S.A.R. Gilani bearing No. 9810081228, having SIM number 8991100008006812501 & IMEI number 332021532062192 was recorded. Mobile No. 9811573506 recov-

ered from accused No. 4 Afzan Guru the IMEI number was 350177402325262 and SIM number was 10007605017 which were noted. Third mobile phone i.e. the second one recovered from the house of Afzan Guru, its IMEI number 490174612116430 and the sim number 8991100102009283792, were noted. On inquiry from the company which had issued the sim card which was recovered from the house of Afzan Guru it was learnt that it pertained to the mobile No. 9810446375. 42. Accused S.A.R. Gilani and Afsan Guru were brought to the Operation Cell, Lodhi Colony. Disclosure statement was made by S.A.R. Gilani being Ex.PW-66/13 and disclosure statement was made by accused Afzan Guru being Ex.PW-66/14. In his disclosure statement, S.A.R. Gilani disclosed that he hailed from Baramulla and that Shaukat who was also from Baramulla met him when he was studying for M.A. They became friends. He got Shaukat married to a sikh girl, Navjot. About one and a half year back Shaukat introduced him to his cousin Afzal. They used to discus freedom of Kashmir and feeling of jehad for Islam developed. Deceased terrorist Mohd. was introduced to him by Shaukat as being associated with Jaish-e-Mohd. and right hand man of Maulana Ajhar Masood and Gazi Baba. Shaukat had managed a room for Mohd. on tenancy in Christian Colony. Arms had been arranged. Five fidayeen members of Jaish-e-Mohd. being Raja, Rana, Hamja, Hayder and Mohd. had met at the house of Shaukat along with Afzal and Navjot whose name was changed to Afzan Guru. Plan to attack Parliament was discussed. Afzal had a map of Parliament. Plans to purchase car, explosives and police uniform was discussed. Thereafter, survey was conducted and plan was finalised. He agreed to provide information pertaining to Parliament House. On the day of the attack, Shaukat asked him to watch T and inform which M.P. had reached Parliament. He could point out residence of his associates, place from where Chemicals were procured as also places from where mobile phones and uniforms were procured. 43. Afzan Guru, in her disclosure stated about her marriage being performed by S.A.R. Gilani with Shaukat, Afzal being cousin of Shaukat and a surrendered militant. She said that discussions were held between S.A.R. Gilani, Shaukat and Afzal regarding Islam. She disclosed that truck No. HR-38E-6733 was financed by her parents in her name. She disclosed about Mohd. being an associate of Maulana Azhar Masood and Gazi Baba, who was brought to Delhi by Afzal. She disclosed about arranging accommodation at Christian Colony, arranging arms and explosives. She made disclosure regarding plan to attack Parliament and purchase of car, Chemicals etc. to give effect to the plan. She disclosed that Mohd. gave Rs. 10 lakhs to Shaukat and a laptop and that Shaukat and Afzal had left for Srinagar in truck No. HR-38E-6733. 44. PW66 further deposed that S.I. Hridya Bhusan was sent to Srinagar who came back in the evening at about 6.00 P.M. with accused Afzal and Shaukat. Hridya Bhushan handed over to him the accused persons, few documents, a mobile phone instrument, laptop and Rs. 10 lacs stated to have been recovered from accused Afzal and Shaukat. The laptop was retained in office for further study and rest of the articles were deposited in the malkhana. Accused Mohd.Afzal made a disclosure statement Ex.PW-64/1. The mobile phone which was seized from the accused Mohd.Afzal and Shaukat at Srinagar and handed over to him was the same in-

strument on which the last call was generated on 13.12.2001 mentioned at point Y-I in Ex.PW-36/3 i.e. the call details of mobile phone No. 9811489429. He enquired from the XANSA webcity, the owners of the company named in the I. card which the deceased terrorists were carrying. He was told that these cards were not issued by them. He obtained original of one card which the company used to issue which was Ex.PW-50/1. On 19th December the investigation was handed over to ACP Rajbir Singh as provisions of POTO were added. The witness was cross examined by the accused persons. Cross-examination by Shaukat pertained to the call details pertaining to the phone recovered from the house of Afzan Guru. It pertained to the IMEI number of the handset in relation to the instrument having a 15 digit IMEI number but the call details reflecting only 14 digits. He stated that as told to him by the company the first 14 digits pertained to the instrument and the 15th digit can be from 0 to 9 and may or may not be added. He was also cross examined about the call details of telephone No. 9810693456. He explained that numbers mentioned in seizure memo Ex.PW-66/7 were taken by him from the redial list of the telephone numbers. Cross-examination by accused Shaukat and Afzan Guru pertained to the mobile phone numbers 9811489429 and 9810693456. He explained that missed calls which would be shown on the screen of the instrument when worked upon, would not find mention in the computerised list obtained from the phone companies since these calls did not matured. He denied that Afzan Guru was arrested on 14.12.2001. Accused S.A.R. Gilani cross-examined the witness qua telephone No. 9811489429 and 9810081228. He was cross-examined pertaining to the call received on 14th December, 2001 on telephone number 9810081228 and in particular pertaining to its translation. He denied that S.A.R. Gilani was arrested outside Khalsa College on 14.12.2001 at about 1.15 P.M. Cross examination by accused Mohd. Afzal was limited to the cassette of the second conversation taped i.e. the conversation intercepted on 8 P.M., made by the caller from Srinagar to Afzal Guru. In cross-examination suggestion put was that the cassette is interpolated. 45. PW-67 S.I. Bidrish Dutt who had accompanied Inspector Mohan Chand Sharma to the house of SAR Gilani on 15th December, 2001, deposed that on 15.12.2001 at 10.00 A.M., S.A.R. Gilani was arrested by Inspector Mohan Chand Sharma. S.A.R. Gilani informed that mobile No. 9811489429 belongs to Mohd. Afzal and mobile No. 9811573506 belongs to accused Shaukat and that they were involved in Parliament attack case. He corroborated the recoveries effected and seizure made from S.A.R. Gilani. He stated that at the instance of S.A.R. Gilani they reached house No. 1021, Mukherjee Nagar, First Floor where Afzan Guru was arrested. At that time she had one mobile phone of 'Sony' make having ESSAR sim card. On redialing, list of numbers were noted. Recoveries were effected from the search of the house of Afzan Guru i.e. the photographs, the other mobile phone and the sim card. S.A.R. Gilani and Afzan Guru made disclosure statements. Witness was cross-examined by S.A.R. Gilani pertaining to arrest. A suggestion was given to this witness that S.A.R. Gilani was neither taken nor did he point out to the house of Shaukat when Afzan Guru was arrested. (It may be noted that no such suggestion was given to PW-66). Witness was cross-examined by Afzan

Guru pertaining to the recoveries made. Pertaining to the arrest, suggestion put to this witness was that Afzan Guru was arrested from her house on 15.12.2001 at about 6 to 6.30 A.M. in the morning. The witness was not cross-examined by accused Afzal and Shaukat Hussain. 46. PW-70 S.I. Harinder Singh deposed that Inspector Mohan Chand Sharma (PW-66) had given him a list of- telephone numbers to be intercepted and he put interception on all of them. On 14.12.2001, call was intercepted on telephone number 9810081228, which was in Kashmiri language and this fact was brought by him to the notice of Inspector Mohan Chand Sharma. One call was intercepted at about 20.13 hours on 14.12.2001 on telephone No. 9811573506, information was given to Inspector Mohan Chand Sharma. He handed over the cassettes after sealing to Inspector Mohan Chand Sharma as also the translation and transcription of the telephone calls. On 18.12.2001, he recorded specimen voice sample of accused Shaukat, Afzan Guru and S.A.R. Gilani and seized the same vide seizure memo Ex.PW-70/1. Witness was cross-examined as to whether he had any written orders for taping the conversation and whether he had the list of telephone numbers which he was directed to take. The witness was cross-examined regarding the procedures for taping. Witness was cross-examined about the duration of the call which he had got translated from a Kashmiri boy. Suggestion was put to the witness that he had made interpolations in the calls by erasing and tampering the same, which he denied. 47. PW-71, Rashid deposed that on 14.12.2001, at about 1.30 P.M. he was called to the Special Cell to translate in Hindi a conversation recorded in a cassette which was in Kashmiri language. He heard the cassette and dictated the Hindi translation to SI Harinder Singh (PW-70), who noted the same. Witness was cross-examined by accused No. 3 wherein he admitted that he was fifth or sixth class pass, could not write in Hindi, but could speak and read Hindi. He stated that he could translate conversation from Kashmiri language into Hindi. He stated that the Kashmiri language used in the conversation could be easily understood by an ordinary person and hence could be translated easily. He stated that there were no English words like "internet, prospectus or syllabus" in the conversation. He denied the suggestion that the conversation did not have the sentence "YEH DILLI MEH KAYA KIYA HAI". He denied that the words "YEH JAROORI HOTA HAI" in Kashmiri language were not there in the cassette. He denied that there were no equivalent words in the cassette to the translation "ABHI AAP CHUP KAR KE BETHO". He stated that he did not know what was written by S.I. Harinder Singh and he had not signed the same. He denied that he was a police informer and also denied that the tape was inaudible due to external noise. 48. Since, as per the prosecution, in the morning on 15.12.2001, Afzan Guru, was arrested at around 10.30 A.M. and she had disclosed that her husband, accused Shaukat along with his cousin accused Mohd.Afzal had fled to Srinagar in truck No. HR-38E-6733, information was flashed to Srinagar police to apprehend the truck and its occupants. 49. PW-61, Abdul Haq Bhutt, Dy.S.P., SGPO, M.R. Ganj, Sri Nagar deposed that he had received information in the morning of 15.12.2001 that two persons after committing attack on the Parliament House had started from Delhi to Srinagar and would be around Fruit Mandi, Srinagar, which is

in the jurisdiction of P.S. Parampura. He was informed that these persons had left in truck No. HR-38E-6733. He formed two to three teams to locate the truck. At about 8 A.M. he was able to locate the truck in the Fruit Mandi, but as there was a big crowd, they did not disturb the occupants but kept a watch. At about 10 A.M. the truck started from Fruit Mandi and proceeded towards Baramulla where it was stopped near Police Station Parampura. Two occupants, Mohd. Afzal and Shaukat Hussain were taken into police custody. Personal search was carried out and the two were interrogated. They disclosed that they had Rs. 10 lakhs with them, one computer and one mobile phone. These were seized vide seizure memo Ex.PW-61/4. As per the seizure memo, the mobile phone was of NOKIA make bearing IMEI No. 350102209452432. The accused persons made a joint discloser statement being Ex. PW-61/3. The officials of Delhi Police were informed about the arrest. At about 2.15 P.M. officials of Delhi Police reached Srinagar and the accused persons along with the articles recovered and the seizure memo were handed over to Delhi Police vide memo Ex.PW.-61/6. In cross-examination, the witness stated that information was received by his senior officers which was communicated to him around 5.45 A.M. on 15.12.2001. The truck was being driven by the accused Shaukat. No entry in daily diary of the police was made when he left the police station but volunteered to state that entry was made in the daily diary after completing the operation. The truck was stopped and examined at around 10.30 A.M. He did not paste any slip on the briefcase or on the computer or on the mobile phone. A suggestion was put to the witness that Shaukat and Afzan were apprehended by him from different places and the story of recovery was false, which he denied. 50. PW-62 H.C. Mohd. Akbar deposed that he was present with PW-61 when accused Mohd. Afzan and Shaukat were arrested. He deposed in line with the deposition of PW-61. In cross-examination the suggestion to this witness was that the accused Shaukat and Mohd. Afzal were brought first to the Police Station and the truck came later, which was denied by him. 51. PW-64, SI Hardey Bhushan of the Special Cell, Lodhi Colony, stated that he along with SI Sharad Kohli left for Srinagar to bring Mohd.Afzal and Shaukat to Delhi. J&K Police gave him the articles recovered at the instance of the accused as also the documents pertaining to search and seizure. He brought the accused persons, recovered articles and documents to Delhi and handed over everything to Inspector Mohan Chand Sharma who interrogated the accused. Mohd.Afzal made a disclosure statement Ex.PW-64/1 and so did Shaukat being EX.PW-64/2. 52. PW-65, SI Sharad Kohli deposed that he went with PW-64 to Srinagar and took possession of truck No. HR-38E-6733. He remained in Srinagar to get information about Tariq and Ghazi Baba till 18.12.2001. He brought the truck to Delhi on 19.12.2001 and deposited the truck at P.S. Parliament Street. 53. Since accused Mohd.Afzal, Shaukat Hussain and S.A.R. Gilani had made disclosure statement, according to the prosecution, further investigation proceeded on the information disclosed by the said two accused persons, 54. PW-76 was the officer, who conducted investigation in this respect. PW-76, Inspector H.S. Gill, of the Operation Cell, Lodhi Colony, deposed that on 16.12.2001 he took custody of accused Mohd.Afzal and Shaukat and took

them to A-97, Gandhi Vihar where they pointed out the second floor of the house as a place which was used as a hide out. Subhash Malhotra, owner of the house was associated with the investigation. The second floor was found locked and no key was available. The lock was broken and the premises were checked. Lot of Chemicals being Ammonium Nitrate, Silver Powder and sulphur were recovered. Three electronic detonator were recovered. A plastic bucket containing explosives, gloves and spoons were found. A map of Chanakya Puri made by hand, map of Delhi, one blank I-card were recovered. Police uniform, parrot cap and articles relating to police uniform were recovered. One "Sujata" make Mixer Grinder was recovered. Samples were taken out from the Chemicals and rest of the articles were sealed. The owner, Subhash Malhotra informed that a motor cycle used by the accused persons were standing down stairs. It bore registration No. HR-57-E-5768. It was also seized. Seizure memos was Ex.PW-34/J, The said two accused persons thereafter led the police party to 281 Indira Vihar where second floor of the house was taken on rent by them from Jagdish Lal who was joined in the investigation. They went to the second floor where the premises were found locked and key was not available. Lock was broken and premises checked. In an almirah, three electronic detonators, six pressure detonators, Ammonium Nitrate, Silver Powder, sulphur was found. Samples were taken out and the Chemicals as well as the samples were seized and sealed, electronic detonators and pressure detonators were also seized and sealed vide seizure memo Ex.PW-32/1. The owner told them that one motor cycle of the accused persons were parked down stairs bearing No. 3122. Motor cycle was seized vide seizure memo Ex.PW-32/2. On 17.12.2001, accused Mohd. Afzal was taken by him to the mortury of Lady Harding Medical College where the said accused identified the five terrorists, identification memo being Ex.PW-76/1. As identified by accused Mohd.Afzal he got the dead terrorists photographed and pasted their photograph on a plan paper. Ex.PW-40/2 being the photograph of Hamja, Ex.PW-41/5 being photograph of Raja, Ex.PW-45/1 being the photograph of Rana, Ex.PW-29/5 being the photograph of Mohammad and Ex.PW-45/2 being the photograph of Hayder. Accused Mohd.Afzal took them to the shop of Anil Kumar and then to R&D Store and thereafter took them to Sawan Dry Fruits shop. He then took them to a shop at Fateh Puri from where a Sujata Mixer Grinder was purchased and finally to Hamilton Road, Kashmiri Gate from where red light for the car has been purchased. At the pointing out of accused Mohd.Afzal the pointing out memo of the shop of Anil Kumar being Ex.PW-40/1 was prepared by him. Similarly, on the pointing out of accused Mohd.Afzal pointing out memo towards shop No. 657, Sawan Dry Fruits and Kirana Store, Fateh Puri Chowk, Delhi was prepared by him being Ex.PW-41/1. Pointing out memos pertaining to the shop No. 141, Tilak Bazar, Delhi being Ex.PW-42/1 was prepared by him. Pointing out memo Ex.PW-76/2 relating to the pointing out of the shop being RD Store, shop No. 6504, Fateh Puri, Delhi was prepared by him and lastly Ex.PW-76/3 being the pointing out memo prepared at the instance of accused Mohd.Afzal pointing out shop No. 1/2628, Hamilton Road, Kashmiri Gate, New Delhi was prepared by him. On 18.12.2001 accused Mohd.Afzal took them to Gupta Autodeals,

Naiwala, Karol Bagh. Ex.PW-29/1 was the pointing out memo prepared by him at the instance of accused Mohd.Afzal. Thereafter they were taken to Gaffar Market, Ex.PW-44/1 was the pointing out memo prepared by him at the instance of accused Mohd.Afzal when he pointed out the shop No. 26, Gaffar Market, Karol Bagh, New Delhi. The accused Mohd.Afzal thereafter took them to Harpal Singh's shop at Karol Bagh, at his pointing out he prepared the pointing out memo Ex.-PW-20/9. On 19.12.2001 accused took them to Model Town at the pointing out of accused Mohd.Afzal pointing out memo Ex.PW-49/1 pertaining to shop No. B-10, Model Town-II, New Delhi was prepared by him. He seized the bill book from Sushil Kumar as also the bill book from Kamal Kishore vide seizure memos Ex.PW-29/4 and Ex.PW-49/2 prepared by him. All articles seized were sealed with the seal of "HSG". On 15.1.2002 he took the remanants from the NSG which were sent to CFSL, Chandigarh for forensic analysis vide memo Ex.PW-76/4. Thereafter provisions of POTA were added and investigation was taken over by ACP Rajbir Singh. Witness identified the various articles seized by him in court. In cross-examination, witness admitted that the statement of Sushil Kumar was recorded on 18.12.2001. He also admitted that date on the seizure memo by which the bill book of Gupta Auto Deals was seized bears the date 19.12.2001. He denied the suggestion that the accused persons did not lead him to Indira Vihar, Gandhi Vihar or to different shops. He denied that they did not point out any place or that no recovery was effected. He admitted that since March, 2001 there was a Government notification requiring the shopkeepers selling Sim Card to note down the identity of the persons to whom it is sold. He stated that the articles seized were deposited in the Malkhana of P.S. Parliament Street on the day they were seized. He denied the suggestion that pointing out and recovery memo was prepared at the office of the Special Cell or that no recovery was effected from the accused persons. 55. PW-77, S.I. Lalit Mohan who assisted Inspector Mohan Chand Sharma deposed that on 14.12.2001 two cassettes pertaining to calls received on phone No. 9810081228 and 9811573506 along with transcription and translation of the conversation were handed over to Inspector Mohan Chand Sharma by S.I. Harinder Singh. Cassettes were sealed with seal of "LMN". On 18.12.2001 Sanjay Maini of Xansa Websity came and on being shown stated that I-Cards recovered from the terrorists were not issued by them. He gave a sample of the I-Card being issued by them. Inspector Mohan Chand Sharma recorded voice sample of accused S.A.R. Gilani, Shaukat and Afzan Guru which were sealed with the seal of "BD". On 31.1.2002 he collected 88 sealed parcel from Malkhana of P.S. Parliament Street and gave them to CFSL, Lodhi Road vide R/C 1/21. Seal remained intact. On being cross-examined; witness stated that he did not hear the cassettes, aftex sealing, seals were given to S.I. Harinder Singh. He denied that he or Mohan Chand Sharma made alteration to the cassettes. PROSECUTION SEEKS TO PROVE RECOVERIES PURSUANT TO THE DISCLOSURE STATEMENTS 56. PW-31, Shri Baldev Raj, who is a property dealer, deposed that Shri Jagdish Lal was the owner of house No. 281, Indra Vihar. On 9.12.2001, he had got the second floor of the house on rent to Mohd.Afzal at a rent of Rs. 4,000/- per month. When deal was finalised

Mohd.Afzal paid an advance of Rs. 1,000/- to the landlord. Witness identified accused Mohd.Afzal who was present in court. 57. PW-32, Shri Jagdish Lal, owner of house No. 281, Indra Vihar, deposed that he had let out the second floor of his house to the accused Mohd.Afzal through PW-31 on 9.12.2001 at a 'rent of Rs. 4,000/- per month and' he had received Rs. 1,000/- as advance on the same date. Mohd.Afzal then came to the house on 10.12.2001 with some luggage and made the payment of Rs. 7,000/- and took the possession of the floor. Since, a condition was put to him that Mohd.Afzal can live in the house with his family, Afzal told him that he would bring his family later on. On 11.12.2001 he saw five or six persons going upstairs with Mohd.Afzal and he followed them. He asked Mohd.Afzal that when he had been given the accommodation for residence of his family, how these persons had been brought, to which Mohd.Afzal stated that they were his friends and would leave and thereafter he would bring his family. On 12.12.2001, Mohd.Afzal left the premises with some bags after putting lock telling him that he will bring his family and children. On 16.12.2001 Mohd.Afzal and Shaukat, were brought in the evening in police custody to the house. They went to the second floor. The lock was broken and premises were searched. Three detonators with wires were recovered from the Almirah. From a plastic container, six detonators without wires were recovered. Two packets of silver powder, two packets of sulphur, one cardboard carton containing 25 packs of ammonium nitrate were recovered. These articles were seized. Seizure memo Ex.PW-32/1 was prepared in his presence which was signed by him at point 'A'. He told the police that one motorcycle belonging to the accused was standing down stairs. It was seized by the police vide seizure memo Ex.PW-32/2 signed by him at point 'A'. He stated that photographs Ex.PW-1/20 to 24 were photographs of the deceased terrorists whom he had seen in the premises. He identified in Court articles which were recovered from the second floor. On cross-examination by Mohd.Afzal, witness denied the suggestion that only accused Mohd.Afzal had accompanied the police to the house. He denied the suggestion that accused Mohd.Afzal had kept the key of the lock of the premises with his wife and the police had opened the lock after taking the key from his wife. He denied the suggestion that Mohd.Afzal had not brought 5-6 persons in the premises. He denied the suggestion that no motorcycle was parked downstairs outside his house nor the same was seized from outside his house. On being cross-examined by accused Shaukat, he deposed that he knows English and he can read English. He had read the name of the Chemical from the jar. He had heard about ammonium, but read ammonium nitrate only on that date and had seen the detonators when they were recovered. He did not know their name but was told by the police that the article recovered was a detonator. On being cross-examined by Shri Neeraj Bansal, amices Curiae, he stated that he told the police in his statement recorded under Section 161 that when Afzal left with bag, he told him that he would bring his family after Id. He re-affirmed that the police asked the key of the lock from Afzal which was not with him, but does not remember whether the police recorded this or not. He denied the suggestion that he was deposing falsely. 58. PW-33, Shri Davinder Pal Kapoor, engaged in business of property dealing deposed that in November,

2001 accused Mohd.Afzal had come to his office in the morning about 9/9.30 A.M. and wanted to take a premises on rent. Second floor of house No. A-97, Gandhi Vihar, owned by Shri Subhash Malhotra, was got rented by him at a rent of Rs. 1200/- per month. The witness was not cross-examined by the accused Mohd.Afzal. On being cross-examined by Mr. Neeraj Bansal, amices Curiae, he stated that after November, 2001, he saw the accused Mohd.Afzal in the office of the Special Cell, Lodhi Road. 59. PW-34, Subhash Chand Malhotra, deposed that in the first week of November, 2001, second floor of house No. A-97, Gandhi Vihar was let out by him to the accused Mohd.Afzal through Shri Davinder Pal Gupta, PW-33. At that time, the accused Mohd.Afzal had told his name as Maqsood and had stated that he was a student of Kirori Mal College. The agreed rent was Rs. 1, 200/- per month. Mohd.Afzal had told him that he was a Kashmiri boy. After a few days, another persons started living with him. Three or four boys used to visit him. On 13.12.2001, Mohd.Afzal, Shaukat and four more persons left the premises around 10 A.M. They were wearing T. shirts and one of them was wearing check shirt. They left in an Ambassador car and were carrying bags with them. Ambassador car was parked near a temple outside the gali in which the house was situated. Afzal came back to the premises after some time and left. On 16.12.2001, accused Mohd.Afzal and Shaukat, were brought by the police to his house. It was then that he learnt that the real name of Maqsood was Mohd.Afzal and the other person was named Shaukat. He said that Shaukat was the person who used to meet Afzal at the house. He accompanied the police to the second floor which was locked. The lock was broken. Sulphur packs were recovered, one Sujata Mixer, one T and some utensils and small gas cylinder and few papers were recovered. The papers contained map of Delhi and a map of Chanakyapuri. 20 plastic jars were recovered. Motorcycle No. 51-E 5768 was also seized by the police. Seizure memo Ex.PW-34/1 bore his signatures at point 'A' and the seizure memo pertaining to the motor cycle and papers seized were Ex.PW-34/2 and PW-34/3. Both the seizure memo Ex.PW-34/3 and PW-34/4 bore his signatures. One plastic bucket containing Chemicals was also seized. Police took out samples from the Chemical recovered and sealed the same. Ex.PW-1/20 was the photograph of the person who had lived with Mohd.Afzal. He identified the articles recovered from the premises which included three police uniforms. Accused Mohd.Afzal did not cross-examine the witness. However, Shri Neeraj Bansal, amices Curiae appointed for him cross-examined the witness. In cross-examination, he deposed that he did not verify if Mohd.Afzal was actually a student of Kirori Mal College nor got any verification done before letting out the house. He stated that after 16.12.2001 he was seeing accused Shaukat and Mohd.Afzal in Court on the date of his deposition i.e. 17.7.2002. He denied the suggestion that he was deposing falsely that the house was taken on rent by Mohd.Afzal and that he had taken any rent. He denied the suggestion that no recoveries were effected. On being cross-examined by accused Shaukat, he stated that he did not know what was inside the jars but the contents thereof were told to him by the police. He stated that he could not read English but could read Hindi. He stated that seizure memos prepared by the police were read over to him before he had signed the

same. 60. PW-37, Prem Chand deposed that he was running a hostel at B-41, Christian Colony where there are 32 rooms and he had named it Yamuna Hostel. On 6.11.2001, accused Mohd. Afzal and Shaukat had approached him for room through one Rajnish, owner of STD booth. He let out room No. 5 on the ground floor to them at a monthly rent of Rs. 1500/-. On 7th or 8th November, 2001, they came and put their lock on the room and went away. On 26.11.2001, he went to the hostel for checking the rooms and found one Kashmiri boy in room No. 5 who gave his name as Ruhail Ali Shah and told him that he was doing diploma in computer from Aptech, Kamla Nagar and also showed him the I, card. He had seen Mohd.Afzal and Shaukat coming to the room. In between he found the room closed for some time. On 6 or 8.12.2001, he saw Ruhail Ali Shah coming out of the room and he told him to give particulars for verification to which Ruhail Ali Shall stated that he would give him the particulars after coming back. On 8.12.2001, he went again and checked room No. 5 and found the same lying vacant. On 19.12.2001, he was summoned to the Special Cell where he identified the accused Shaukat and Mohd.Afzal as the persons who had come to take the room on rent from him. The I. card, which was shown to him by Ruhail Ali Shah was Ex.PW-29/4 and Ex.29/5 was the photograph of Ruhail Ali Shah (these two documents pertained to deceased terrorist Mohd.). The witnessed was not cross-examined by accused Mohd.Afzal. Shaukat cross-examined the witness. In cross-examination he stated that he maintained a register of the persons occupying the hostel, but had not given the register to the police nor had brought the same in the Court. He had no license for running a lodge or hostel. He gets police verification done of those to whom he gives, room on rent but gave no information to the police after Ruhail Ali Shah left the hostel on 8.12.2001. He did not suspect anything because several times students keep on changing the hostel. He denied the suggestion that he had not seen Shaukat and Mohd.Afzal at any time or that he saw them for the first time in the police station on 19.12.2001. On being cross-examination, by amices Curiae on behalf of Mohd.Afzal, the witness denied that Mohd.Afzal had not come to take the room on rent. 61. PW-38, Rajnish Kumar deposed that he was running STD booth at A-66, Christian Colony. On 6.11.2001, two Kashmiri boys had come to his booth inquiring about the possibility of some rooms and he took them to the house of PW-37 and left them with PW-37. He stated that the two boys, who had come to him, were standing in the Court being accused Mohd.Afzal and Shaukat. The witness was cross-examined only by accused Shaukat. In cross-examination, he stated that he had not brought the papers of STD Booth which he stated was in the name of his brother but he used to sit for running the same. He stated that he does not get any commission from PW-37 and that he had not seen the accused persons after he had taken them to PW-37 except on 19.12.2001 when he was taken to the Special Cell where he had told the names of accused Shaukat and Afzal as the boys who had come to him. He denied the suggestion that he did not sit in the STD booth and had not seen the accused Mohd.Afzal and Shaukat at his booth at any time. 62. PW-40, Anil Kumar deposed that on 6.12.2001 accused Mohd.Afzal accompanied by another person identified to be the same person whose photograph

was Ex.PW-40/2(Hamja) had visited his shop and placed an order for 50 kilograms of Ammonium Nitrate and paid an advance of Rs. 800/-. On 17.12.2001 delivery was taken after paying the balance sum of Rs. 4,000/-. Ammonium Nitrate which was supplied was packed in 500 grams jar. On 17.12.2001 Afzal had come with the police to the shop, pointing out memo was Ex.PW-40/1 which was signed by him. Some of the jars which were shown to him were identified as Ex.PW-54/1 to 24 as being supplied by him. On being cross-examined by Shri Neeraj Bansal, amices for accused Mohd.Afzal, he stated that Ammonium Nitrate could be sold by any person and no legal formalities was required for its sale. He had no documentary proof showing sale to accused Mohd.Afzal nor he had issued any receipt for the money received. The packaging of the Ammonium Nitrate was available at other shops and there is no stamp on it of his shop. 63. PW-41, Ajay Kumar deposed that he was a sales man in the Sawan Dry Fruits and Kriana shop at Fateh Puri. On 11.12.2001 accused Mohd. Afzal had come with another person being the one whose photograph was Ex.PW-41/5 (Rana) and had purchased dry fruits which were supplied in poly-bags of the shop. On 17.12.2001 accused Mohd.Afzal had come with the police to the shop. Ex.PW-41/1 to 4 were the packets of dry fruits sold from their shop. In cross-examination by amices curiae for accused Mohd.Afzal he stated that there was no proof of sale from the shop to Mohd.Afzal on 11.2.2001. He denied the suggestion that accused Mohd.Afzal had not come to the shop nor purchased dry fruits. 64. PW-42, Ramesh Adwani deposed that he conducts business in the name and style of M/s Tola Ram & Sons. On 11.12.2001 accused Mohd.Afzal had purchased 15 kilograms of silver powder which was packed in polythene packaging bearing name of his shop. On 17.12.2001 accused accompanied by the police had come to the shop. Pointing out memo Ex.PW-42/1 bore his signatures at point-A. The silver powder packed in poly-bag Ex.PW-51 was the one sold from his shop. On being cross-examined by Neeraj Bansal, amices for accused Mohd.Afzal he stated that what is referred in local parlance as silver powder is actually Aluminium powder. No license is required for its sale. No receipt was issued for its sale as it was a tax paid item. He had no proof of the visit of accused Mohd.Afzal to his shop, volunteered that quantity purchased was so large, therefore, he remembered the accused. He denied the suggestion that the accused had not visited his shop to purchase the silver powder. 65. PW-43, Sunil Kumar stated that he conducts business from 6504 Fateh Puri in the name of RD Stores from where he sells electric gadgets. On 7.12.2001 accused Mohd.Afzal had purchased one Sujata Mixer Grinder from the shop. The cash memo book concerning the sale of the mixer grinder was Ex.PW-43/2 and the carbon copy of the cash memo dated 7.12.2001 relating to the mixer grinder was Ex.PW-43/1. On 17.12.2001 the accused was brought by the police to the shop. Ex.P-72 was identified by the witness as the mixer grinder sold to the accused. In cross-examination by the amices Neeraj Bansal witness admitted that the carbon copy Ex.PW-43/1 does not bear the name and address of the buyer. He denied the suggestion that Mohd.Afzal had not purchased any Sujata Mixer Grinder from his shop. 66. PW-44 and 49 deposed about sale of mobile phone instrument. PW-44 Sandeep Chopra deposed that on 7th or 8th December ac-

cused Mohd.Afzal had purchased one mobile phone "SONY" make and cash card of Rs. 500/-from him. Since Gaffar Market is a gray market no bill was issued. Handset sold by him to Mohd.Afzal was identified as Ex.P-37 (Mobile phone recovered from deceased Mohammad). He deposed that on 18.12.2001, accused Mohd.Afzal had come to the shop with police and that pointing out memo being Ex.PW-44/1 was signed by the him at point-A. Witness was not cross-examined by Mohd.Afzal. On cross-examination by Neeraj Bansal, amices appointed on behalf of Mohd.Afzal, he deposed that he had told the police that the accused had purchased mobile phone 4 or 5 days prior to 13.12.2001. He had not maintained permanent records of the mobile set sold, only rough note was prepared which was destroyed every evening. Police had brought Mohd.Afzal to the shop on 18.12.2001 around 12.30 or 1.00 P.M. He admitted that the model of Sony cell phone was available in the market in plenty. He denied the suggestion that accused Mohd.Afzal had neither come to his shop nor purchased the cell phone Or cash card. 67. PW-49 Kamal Kishore Behl deposed that he had a shop at B-10, Model Town, New Delhi from where he sells mobile phone and sim cards. On 4th December, 2001 accused Mohd.Afzal had purchased a Motorola phone from him and a sim card was also purchased by accused. Sim cards were purchased by him from Sanjay Jain who is the distributor of sim cards. Receipt issued by Sanjay Jain pertaining to the sale of sim cards was Ex.P-83. Witness identified Ex.P-28 as the cell phone sold by him (recovered from deceased terrorist Raja). He deposed that on 19.12.2001 the police had come with accused Mohd.Afzal to his shop. Ex.PW-49/1 was the pointing out memo prepared at the shop which bore his signature at point-A. Bill book of purchase of the sim card from Sanjay Jain was seized by the police vide seizure memo Ex.PW-49/2 and the relevant receipt was Ex.P-83 which bore his signature at point-A. The witness was not cross-examined by Mohd.Afzal but was cross-examined by amices Neeraj Bansal. In cross-examination he stated that the bill bears signatures of accountant of Sanjay and not Sanjay Jain. He had no receipt evidencing sale of cell phone or sim card to Mohd.Afzal. The sim card sold to Mohd.Afzal was not used by him prior to sale nor was it given to anyone else prior to date of sale. He denied the suggestion that Mohd.Afzal has not visited the shop on 4.12.2001. On being cross-examined by accused Shaukat, witness denied that Shaukat and Mohd.Afzal had not come to the shop for purchase of cell phone. 68. Ambassador car bearing No. DL-3CJ-1527 being the vehicle used by the five slain terrorists to gain entry into Parliament House, was recovered from Parliament House. PW. 15 to PW.20, PW.23 and PW.54 are the witness examined pertaining to the Ambassador car. 69. PW.54, Mr. Anil Ahuja, U.D.C., Transport Authority, Sheikh Sarai, New Delhi produced the registration particulars of the car and deposed that as per the record, the car stands registered in the name of Infrastructure Leasing and Financial Services Ltd. who were the original registered owners. He proved Ex.PW.54/1 being the registration certificate of the car. Witness was not cross-examined. 70. PW.15, Shri Mathew George, Executive Administration of Infrastructure Leasing and Financial Services Ltd. stated that the car belonged to the company and he was authorised to sell the car on behalf of the Company. It was sold to Shri

Dheeraj Singh, an employee of the Company to whom letter Ex.PW.15/1 was issued certifying the sale of car. He had executed Form No. 29 and 30 to effect transfer of the car in the records of the Registration Authority and the original Registration Certificate was handed over to Dheeraj Singh. Ex.PW.15/2 and PW.15/3 were Form Nos. 29 and 30 executed by him but they were blank when he had signed them as they were to be filled by the buyer. On being cross-examined by the amices, Neeraj Bansal appointed for accused Mohd.Afzal, he stated that he had not brought the authorisation letter nor had he given any to the police officer. 71. PW.16 Dheeraj Singh deposed that on 7.11.2001 he purchased the car from his office and PW.15 had given to him Form No. 29 and 30 duly signed but without being filled up. The original Registration certificate and Pollution Under Control Certificate as well as the insurance papers were handed over to him. The witness was not cross-examined. 72. PW.17, Satbir Singh deposed that he purchased the car from Dheeraj Singh on 16.11.2001 for Rs. 65,555/- and took the car to his mechanic Vera @ Ranjit Singh for getting work done on the car. While doing work on the car the mechanic asked him if the car was for sale. He replied that if he got a good offer the car could be sold. He sold the car to Vera @ Ranjit Singh on 22.11.2001. He handed over all the original documents which were with him including form Nos. 29 and 30 in an unfilled condition to Vera @ Ranjit Singh. In cross-examination by Mohd. Afzal, witness stated that he had taken a receipt from Vera @ Ranjit Singh and produced photo copy of the same which was marked PW.17/A. 73. PW.18 Raghubir Singh @ Vera (wrongly referred to as Ranjit Singh by PW.17) deposed that he works as a motor mechanic from Shop No. 24, Sewa Nagar, New Delhi. PW.17 Satbir Singh had brought the car to him for repair on 20.11.2001 and he enquired from Satbir Singh if he would like to sell the car. He purchased the car in the sum of Rs. 75,000/- on 22.11.2001 and received the original documents pertaining to the car including Form Nos. 29 and 30 in a blank condition. Delivery receipt Ex.PW.18/A was given to him by Satbir Singh on 22.11.2001 itself. He sold the car to Jaggi Motors of Karol Bagh who was accompanied by the Proprietor of Lucky Motors for Rs. 81,000/-. He gave all the papers of the car to the Proprietor of Jaggi Motors along with the car when he received the consideration. The documents for effecting transfer of the car were blank when he sold the car. In cross-examination witness deposed that he did not take receipt of the amount paid by him to Satbir Singh. He deposed that Jaggi Motors etc. keep telephonic contact with him in respect of sale and purchase of cars. He denied the suggestion that he did not give blank sale documents to Jaggi Motors. 74. PW.19, Harish Chander Jaggi, Proprietor of Jaggi Motors, deposed that he purchased the car from Raghubir Singh for a the sum of Rs. 81,000/-and deposed that he received the original papers pertaining to the car as also duly executed Form No. 29 and 30 in a blank condition. He purchased the car in partnership with Harpal Singh of Lucky Motors and therefore possession of the car was given to Lucky Motors. Harpal Singh sold the car for further sum of Rs. 1,08,000/- on 11.12.2001 and the two shared the profits after deducting the amount spent on renovation of the car. On being cross-examined by Mr. Neeraj Bansal, amices appointed by Court for accused Mohd. Afzal,

witness deposed that he knows Raghubir Singh, as he works as motor mechanic. He had not brought the receipt which he had taken from Raghubir Singh. He however stated that he had taken a receipt which was given to Lucky Motors. 75. PW.20, Harpal Singh of Lucky Motors deposed that he had purchased the car in partnership with Jaggi Motors and since the mechanic was having dealing with Jaggi Motors he did not know the name of the mechanic. Car was purchased for Rs. 81,000/-. Original documents of registration along with duly signed, but in blank condition, From Nos. 29 and 30 were given to him by Jaggi Motors. These documents were Ex.PW.15/1 to Ex.PW.15/4 and Ex.PW.16/1 and 16/2. The car was sold by him on 11.12.2001 to a person who gave his name as Ashiq Hussain Khan. When he would sell any car, formality of identity of the person is completed and he had taken photo copy of a I-card of computer education from Ashiq Hussain Khan as also one coloured photograph of Ashiq Hussain Khan. At the time of purchase of the car two persons had come to him. Deal was finalized in the sum of Rs. 1,08,000/-. Form Nos. 29 and 30 were filled by Mr. Ajay Sherawat who use to sit with him for learning the work. All documents were given to the person who had come to purchase the car. Cash receipt being Ex.PW.20/1 was given. Certificate regarding sale of car issued by him was Ex.PW.20/2, Ex.PW.1/6 was the delivery receipt which was issued by Ashiq Hussain Khan accepting the delivery of the car. Ex.PW.20/3 was the photograph of Ashiq Hussain Khan. The other person accompanying Ashiq Hussain Khan was accused Mohd. Afzai and he signed on the delivery receipt as a witness. On 13.12.2001 when he was sitting in his office, news of attack on Parliament House was coming from where he gathered information that the terrorist had come in a car bearing No. DL-3CJ-1527. He collected all the papers with him pertaining to the car and immediately went to P.S. Parliament Street but learnt that the SHO was at Parliament House. He went to Parliament House where he was stopped at the gate by the guards to whom he told the purpose of his visit. SHO, Mr. G.L. Mehta thereupon met him and he told that the car was sold through him. Mr. G.L. Mehta took him to gate No. 11, where the car was standing and he identified that it was the same car. He handed over all documents to Mr. G.L. Mehta who seized the same vide seizure Memo Ex.PW.1/7 which bore his signatures. Documents which were handed over to Mr. G.L. Mehta were Ex.PW.20/4 to Ex.PW.20/8, being photo copy of the I-card purportedly issued by Cyber Tec Computer Hardware in the name of Ashiq Hussain Khan (original of which was recovered from the terrorist Mohd. and proved as Ex.PW.4/3). PW.20/5 was the photo copy of Form No. 29, Ex.PW.20/6 was the photo copy of Form No. 30, Ex.PW. 20/7 was the delivery receipt and Ex.PW.20/8 was a photo copy of the Registration Certificate of the car. He was taken to the dead bodies lying in the Parliament House and he identified that the dead body lying at Gate No. 1 was the same person who had introduced himself as Ashiq Hussain Khan. Ex.PW.4/3 was the same I-card which was shown to him by Ashiq Hussain Khan while purchasing the car photo copy of which was handed over to him. On 18.12.2001 accused Afzal was brought by police to his shop and pointing out memo Ex.PW.20/9 was signed by him at point 'A'. Witness was cross-examined by accused Mohd.Afzal. In

cross-examination, he stated that he did not ask for a license when the car was sold as any person can purchase a car. He had not taken any document from Ashiq Hussain Khan except the coloured photograph and the photo copy of his I card and that he got the delivery receipt signed from accused Mohd. Afzal as a witness. Mr. Neeraj Bansal, amices, appointed for accused Mohd. Afzal thereafter cross-examined the witness. In cross-examination he stated that he had asked the local address from Ashiq Hussain Khan who stated that he had no local address. He admitted that he did not get the verification of the address written on the I-card. He admitted that after 18.12.2001 he saw accused Mohd. Afzal in court on the date of his deposition i.e. 15.7.2002. He deposed that his signatures do not appear anywhere in Form Nos. 29 and 30, Registration Certificate, PUC or cash receipt and stated that his signatures appear only on the letter head of Lucky Motors. Thereafter, the amices wanted to cross-examine the witness that accused Mohd. Afzal had not accompanied Ashiq Hussain to the shop of Harpal Singh to which accused Mohd. Afzal interjected and stated that he admits to going to the shop of the witness and does not want any question to be put. 76. PW.23, P.R. Mehra, Principle Scientific Officer, CFSL, CBI, New Delhi, deposed that along with a letter pertaining to comparison of documents being Ex.PW.23/22, he received one delivery receipt, Ex.PW.1/6, along with the specimen signatures and writing of Mohd. Afzal marked by him as S-1 to S-21 for comparison. Specimen signatures and writing were Ex.PW.23/1 to Ex.PW.23/21. He examined all the documents carefully with the help of scientific aids and gave his report as Ex.PW.23/23. As per his report, signatures Q-1 and Q-2 on the delivery receipt were written by the same person whose specimen writing and signatures are contained in Ex.PW. 23/1 to Ex.PW.23/21 (i.e. accused Mohd, Afzal). He deposed that the detailed reasonings for conclusion are given in the report which bore his signatures at point 'A'. The witness was neither cross-examined by Mohd. Afzal nor by amices appointed on behalf of Mohd. Afzal. He was cross-examined by accused Shaukat Hussain. In cross-examination, witness deposed that it is possible to compare the disputed writing with the specimen writing even if they relate to different words but it was not possible to compare the hand-writing of words with numerals. He stated that individual writing characteristics do not undergo change and consequently writings can be identified. He stated that he did not observe any material diversions in the two hand-writing except for natural variations which he has observed in his report. 77. PW-51, Dharampal, Clerk from the District Transport Office, Faridabad produced the registration record pertaining to truck No. HR-38E-6733 and proved the Certificate of Registration Ex.PW-51/1 as being issued in the name of Navjot Sandhu, daughter of H.S. Sandhu i.e. accused No. 4. In cross-examination, he stated that this was the first registration pertaining to the truck. 78. PW-53, Shri Mahesh Chand, L.D.C. from the Transport Authority, Rajpur Road, Delhi produced the record pertaining to motorcycle No. DL-15A-3122 and deposed that as per the official record, the motorcycle was originally registered in the name of J.S.Enterprises and stood transferred in the name of accused No. 2, Shaukat Hussain Guru. Registration record being Ex.53/1 was proved by this witness. On behalf of

accused Shaukat, the witness was cross-examined. In cross-examination, the witness denied that Shaukat Hussain Guru had not applied for the registration of the motorcycle. He denied that the original documents submitted under the signatures of Shaukat Hussain Guru for transfer of registration of motorcycle in the name of Shaukat Hussain Guru were fabricated documents. Photographs of these documents, original of which were on the record, were taken on record as Ex.PW-53/D-2 to D-8. 79. PW-26, Jibba Ram deposed that he had purchased the motorcycle No. HR-51E-5768 from one Ram Niwas in October, 2000 and had taken original R.C., Sale Letter and the delivery receipt/cash receipt from him. After using the motorcycle for about a year, it was sold to one Salim for Rs. 24,000/- to whom R.C. and sale letter etc. were handed over. 80. PW-27, Salim deposed that he had purchased the motorcycle No. HR-51E-5768 from Jibba Ram and had received along with it, copy of the R.C. and sale letter. He sold the motorcycle to one Babu to whom he gave whatever papers he had received from Jibba Ram. 81. PW-28, Shri Babu Khan, deposed that he purchased the motorcycle No. HR-51E-5768 from Salim on 15.11.2001 and in turn sold the same to Sushil of Gupta Auto Deals on 4.12.2001 and handed over the R.C. and sale letter received by him. 82. PW-29, Shri Sushil Kumar, deposed that he worked in the shop of Shyam Sunder Gupta, who is owner of Gupta Auto Deals. Motorcycle No. HR-51E-5768 was purchased from Babu Khan in December, 2001 for further sale as they deal in sale and purchase. On 8.12.2001, three gentlemen accompanied by one women had come to their shop at noon time to purchase the motorcycle but deal was not struck. In the evening, two out of those four persons came back and the motorcycle in question i.e. HR-51E-5768 was sold to them for Rs. 20,000/-. Accused Mohd.Afzal and Shaukat were two out of the four who had come to the shop. He could not identify the lady present in Court as the one who had accompanied the three male persons in the forenoon but stated that in the office of Special Cell on 18.12.2001, accused Afzan Guru was shown to him by police and he had given the answer in the affirmative at that time. On 18.12.2001, accused Mohd.Afzal was brought to his shop and pointing out memo Ex.PW-29/1 was prepared which bore his signatures. After sale of the motorcycle, delivery receipt was issued which was Ex.PW-29/2. Portion 'A' to 'A' and 'B' to 'B' were filled by accused Mohd.Afzal and rest of the receipt was filled by him. The signatures of Mohd.Afzal on the delivery receipt were at point 'C'. Receipt book containing Ex.PW-29/2 and PW-29/3 were given by him to the Special Cell o 19.12.2001 which was seized by seizure memo Ex.PW-29/4. Photograph in the judicial file being Ex.PW-29/5 was that of the person who had accompanied Mohd.Afzal and Shaukat to his shop for the purchase of motorcycle. On being cross-examined by counsel for accused No. 4, he stated that he had no letter of appointment nor does he sign any attendance register. Apart from him there is one mechanic and two minor boys who are working at the shop. There were several shops around their shop doing the same business. Market remains crowded on the working days and when trial is given to a customer, one person from the shop sits with him on the pillion seat. Seldom a deal is struck with the customer in the first instance since the market is full of auto dealers and everybody tries a best bar-

gain in different shops and generally in the second go the sales are effected. To a question put as to whether he keeps a track of the customer who leaves the shop, he stated that they do not bother where the customer goes. However, for customers who purchase motorcycle from the shop, their figure remains in his mind for about a month or two because the customers contact them if he faces difficulties in registration etc. On cross-examination by accused Mohd. Afzal, he denied the suggestion that Mohd. Afzal had not come to the shop for purchase of the motorcycle and that he was identifying him falsely at the instance of police. On being cross-examined by amices Curiae, appointed on behalf of Afzal, Shri Neeraj Bansal, he admitted that delivery receipt Ex.PW-29/2 does not bear the signatures of the owner of the shop. He admitted that in case of other delivery receipts, some identification documents were attached but in the case of the present motorcycle, none were attached. He admitted that delivery receipts in the delivery book do not have serial number and that the delivery receipt Ex.PW-29/2 had been affixed in its place with the help of cello tape while in the case of other delivery receipts, no tape was used. He denied the suggestion that the delivery receipt was not issued from the shop or that it was fabricated by him at the instance of police. 83. PW-52, Charan Singh, Clerk from the registering authority at Faridabad produced the registration record pertaining to the motorcycle in question No. HR-51E-5768 and deposed that Shri Ram Niwas was the owner of the motorcycle, in whose name the same stood registered without any further transfer of the motorcycle. He deposed that certificate Ex.PW-52/A was issued by their office in response to the inquiry of Special Cell. The witness was not cross-examined. 84. PW-39, Naresh Gulati, landlord of S.A.R. Gilani, deposed that he had given second floor of his house No. 535, Dr. Mukerjee Nagar on rent to S.A.R. Gilani at a monthly rent of Rs. 3300/- in January, 2000 where the accused used to live with his family. Several persons used to visit him. He had seen the accused Mohd.Afzal and Shaukat visiting the house of S.A.R. Gilani. On being cross-examined by counsel for S.A.R. Gilani, he stated that it was correct that he entered into 11 months agreement for letting out the house. S.A.R. Gilani had come through a broker, who had told him that S.A.R. Gilani was reliable person. Tenancy was continued after November, 2000 as S.A.R. Gilani's behavior was proper. S.A.R. Gilani was having a mobile phone and not the other phone. Sometimes, telephone calls used to come at the house and some times in the neighbour's house for S.A.R. Gilani. Whenever call was received he used to come to attend the call. He was aware of the fact that S.A.R. Gilani was a Lecturer in Delhi University. Several of his friends and other Lecturers and students used to visit the house. There is common staircase which was used by S.A.R. Gilani and his family members as he lives on the first floor. He stated that he might have seen Shaukat and Mohd.Afzal visiting the house of S.A.R. Gilani 2-3 times. The witness was not cross-examined by any other accused persons. 85. PW-45, Tejpal Kharbanda stated that he lives at the ground floor of premises No. 1021, Mukerjee Nagar, owned by him where he was running a printing press. He had let out the first floor of his house to one Jyoti, being none other than accused Navjot Sandhu @ Afsan Guru, identified by him in the Court. The rent agreed

was Rs. 4200/- per month while taking the first floor, she had stated that they had their own flat at Rohini and would be shifting there in 2-3 months time. No written agreement was executed between him and Jyoti since the house was being taken on rent for a short period. She had come to take the house on rent on 6.8.2001 and shifted alone on 8.8.2001. She had told that her husband was Kashmiri and was doing business of transport and had gone to Kashmir and would be coming back soon. She lived in the house for one and half month and then her husband, accused Shaukat joined her. So long as she was living there, no visitor used to come to her. But after arrival of Shaukat, many persons started visiting the house. Accused Mohd.Afzal was one of them. Two days prior to 13.12.2001, 4-5 persons started visiting them. On 17.12.2001, he was summoned by the police to the Special Cell at Lodhi Road where he saw Jyoti, Shaukat and Mohd.Afzal and learnt that Jyoti's name was Afsan. He was shown some photographs and he identified the person who were visiting Shaukat and Jyoti whose photographs appear at Ex.PW.42/2, 45/1, 41/5, 29/5 and 45/2 (photographs of deceased terrorists). One more person was sitting there in the Special Cell, but he did not identify the said person. On a leading question being put by the Public Prosecutor, he stated that accuses S.A.R. Gilani was also sitting in the Special Cell and it was correct that he had told the police that even S.A.R. Gilani used to visit the house of Shaukat. On being cross-examined by accused Shaukat, he stated that the printing press is in the front portion of the house. He had two to three employees in the printing press. Press and his residence are inter-connected. There is a separate entrance to his residence from the front side. Two portions were let out to two sub-Inspectors. He did not get the police verification of Jyoti done as she was staying only for a short period. He volunteered that 4-5 years prior to 6.8.2001, Jyoti had been living in the same area about 4-5 houses away from his house. He had not seen her father vising her. He had not seen the friends of the sub-Inspectors visiting them. He used to sit outside the press on table-chair from where he could see the persons coming in the street. He could recognise the persons whose photographs he had identified as he had seen them several times 2-3 days prior to 13.12.2001 coming and going from the house of Shaukat and Afzan Guru. He denied that he was deposing falsely under police pressure. He admitted that he had seen news of Parliament attack on T but stated that he had not seen the face of slain terrorists on T On being cross-examined by Afsan Guru, he stated that there is a second floor in the premises, which is not owned by him, where the owner, a sikh gentleman lives. There is a common staircase which is used by the owners of first and second floor. There is a common letter box outside the house where all the letters of the occupants are put. Once or twice, telephone calls had come for Navjot or Shaukat at his house and he had called them to attend the phone. He had not seen any relative of Navjot or Shaukat visiting them. Police had come to his house after 13.12.2001 but he was not at home. His statement was recorded in the Special Cell. He denied the suggestion that the father of accused Navjot stayed with her in the premises and he had met him. He stated that he had learnt that Mohd.Afzal was cousin of Shaukat and he had seen Mohd.Afzal visiting the house. He denied that he was deposing falsely. On

being cross-examined by S.A.R. Gilani, witness denied that he was compelled by the Special Cell to state that S.A.R. Gilani was also one of the persons who used to visit Shaukat and Afzan. 86. PW-46, Usha Kharbanda, wife of PW-45, came to depose but before taking oath she stated the Court that she had received a threatening call. She was weeping and frightened and was not in a position to depose, hence her statement was not recorded. 87. PW-25, Sh. Jaswinder Singh deposed that he was running a computer center at 37, Bunglow Road, Kamla Nagar as franchise under XANSA Web-city. I-cards were issued directly by the principal company situated at Okhla. Students taking admissions would submit photographs which were sent to Okhla from where the I-cards were delivered to the students I-cards Ex.PW-4/2, 4/4, PW-3/3, PW-2/3, PW2/4 & PW-2/5 were not issued by his center nor by their principal. None of the students whose photographs appeared in their I-cards had been their students. The witness was not cross-examined. 88. PW-50, Sanjay Maini deposed that he was the Manager(Admn.) Xansa India Limited. Their franchise at Bunglow Road was functioning for the year 2001. I-cards for the students used to be issued by the head office. I-cards Ex.PW-4/2, 4/4, PW-3/3, PW-2/3, PW2/4 & PW-2/5 were never issued by the company. Specimen of a I-card which they issued was Ex.PW-50/1. He had given a specimen to the police which was seized vide the seizure memo Ex.PW-50/2. He had brought the stock register about issuance of I-cards and as per the stock register no such I-cards were issued to Kamla Nagar Franchise. Extract of the stock register was Ex.PW-50/3. The witness was not cross-examined. 89. PW-13, Sh. Dushyant Singh, Dy.Chief Security Officer, Ministry of Home Affairs deposed that he had given to the police sample of the sticker of MHA car parking to the police which was Ex.PW-13/1 under cover of letter Ex.PW-13/B. The witness was cross-examined pertaining to the procedure followed while issuing stickers. 90. PW-35, Capt. P.K. Guharay Security Manager, AirTel deposed that mobil Nos. 9810511085, 9810693456, 9810565284, 9810510816, 9810302438 & 9810446375 are telephone numbers, services whereof were provided by Air-Tel. Certificate Ex.PW-35/1 was issued by him. It gave the details of calls of these telephone numbers. Mobile No. 9810081228 belongs to S.A.R. Gilani. Call details from 1.10.2001 to 14.10.2001 of telephone No. 9810511085 were Ex.PW-35/2, that of telephone No. 9810510816 were Ex.PW-35/3, that of telephone No. 9810565284 were Ex.PW35/4, that of telephone No. 9810693456 were Ex.PW35/5, that of telephone No. 9810302438 were Ex.PW35/6, chat of telephone No. 9810446375 were Ex.PW-35/7 & that of telephone No. 9810081228 were Ex.PW-35/8. All call details are computerised sheets obtained from the computer. On cross-examination by counsel for accused Afzan Guru he stated that IMEI number mentioned in the call details pertained to number of a particular mobile set and there are no duplicate sets. Sim number denotes the number of a particular chip and it is also not duplicated. He was not sure that one sim number can have more than one phone numbers. Call I.D. refers to a particular transmission tower used by the company and the place where it is located. One transmission tower transmits within a particular area and is not unlimited. He was not aware of any coloning process by which the fraudulent calls can be made using a cell phone and that he

was not aware of the ESN MIN number. IMEI number is always 15 digits. The company keeps records of SIM numbers supplied to the distributors. He was not aware if the distributors are required to keep record of IMEI number. On being cross-examined by accused S.A.R. Gilani, he stated that he was not a technical man nor does he deal with the computers from which these bills were collected nor he was involved in the management or upkeep of the computer. The switch maintained in the computer in respect of each telephone number receives the signal of the number called and serves them through a server and it is the server which keeps records of the calls made or received. In case a call is made but the receiver does not pick up the phone, the server would not register the call. In respect of telephone No. 9810081228 he stated that no call was made from this telephone number after 13.03.23 hours on 14.12.2001. 91. PW-36, Major A.R. Satish Executive, Sterling Cellular Limited deposed that call details of telephone No. 9811573506 from 1.12.2001 to 13.12.2001 were Ex.PW-36/1 and the call details of this number from 1.12.2001 to 18.12.2001 were Ex.PW-36/2. The call details of mobile No. 9811489429 from 1.11.2001 to 13.12.2001 were Ex.PW-36/3. Call details of mobile No. 9811544860 were Ex.PW36/4 and the call details of mobile No. 9811489429 were Ex.PW-36/5. The call details were supplied by Lt.Colonel Rajiv Pandey, General Manager(Admn.) of the company under covers of letter Ex.PW-36/6 and 36/8 whose signatures he could identify. On cross-examination by accused Afzan Guru he stated that IMEI number mentioned in the report pertains to the mobile No. 9811573506. In Ex.PW-36/2 the mobile number mentioned at point-X pertained to IMEI number at point-Y. In Ex.PW-36/3 at point-X & Y, the call number and calling number are the same but I.D. and IMEI number is different. Similar was the position in respect of the entry X-1, Y-1 and X-2, Y-2. He further admitted that similar was the position with respect to entry X-3, Y-3, X-4, Y-4 & X-5, Y-5 in Ex.PW-36/2. 92. PW-78, Manjula Kapur, Manager from Seimens deposed that IMEI number is a 15 digit number, the first six digits are type approval code which represent the manufacture of the handset. The next two digits are assembly code which represent, the model. The next six digits are serial number of the handset according to GSM specification No. 3.03. First 14 digits are significant and the last digit according to GSM specification could be transmitted by the mobile number as zero. Literature pertaining to GSM specification brought by the witness relevant to the code was Ex.PW-78/1. The witness was not cross-examined. 93. PW-56, Const. Ranjit Kumar deposed that on 7.3.2002 he had collected three samples from the Malkhana, Parliament Street, vide the RC No. 7/21 and 8/21 and deposited the same at CFSL, Lodhi Road and that so long as the samples remained in his custody the seals remained intact (these samples related to the Xansa Webcity I-cards and MH stickers). The witness was not cross-examined. 94. PW-57, S.I. Pawan Kumar deposed that he had collected one sealed suitcase from the Malkhana, Parliament Street vide RC No. 3/21 and had delivered the same to GEGDBPR&D Hyderabad. So long as the suitcase remained in his custody, the seal remained intact (suitcase contained a laptop). Witness was not cross-examined. 95. PW-22, R.S. Verma, Director CFSL, Chandigarh deposed that on 31.12.2001

he received one sealed parcel containing three other sealed parcels having the seal of NSG, MHA (BDU). Ex.1-A contained Ammonium Nitrate 56.54%, Ammonium Cloride 31.19%, Aluminium 8.33%, sulphur 5.35%. Ex.1-B contained Ammonium Nitrate 45.2%, Ammonium Cloride 43.1%, Aluminium 7.34% and Sulphur 6.5%. Ex.1-C contained 79.4% PETN. He gave his reports Ex.PW-22/1 &2 which bore his signatures. Reports reveal that Ex.1-A contained samples from the explosives found in the tiffin bombs, Ex.1-B pertained to the explosives from the car bombs and Ex.1-C pertained to the explosives in the car. PETN is the acryonym for pentaerythritol tetranitrate belonging to the RDX family. The witness was not cross-examined. 96. PW-24, A. Dey, Sr.Scientific Officer, CFSL, CBI deposed that on 31.1.2002, 88 parcels were received which he had mentioned in his report Ex.PW-24/1. The results of the examination conducted by him stood detailed in report Ex.PW-24/1. All the fire arms were in working condition. The remanants of explosives, hand grenades confirmed the presence of PETN. Presence of Aluminium powder, Sulphur and Ammonium Nitrate was confirmed from the remanants. When the parcels were received, the seals were intact. Parcel No. 1 contained Sujata Mixer Grinder with three jars. White crystalised metal was found sticking inside the jars which was found as Ammonium Nitrate. Report pertaining to the Sujata mixer grinder was Ex.PW-24/2. 97. From the reports exhibited by this witness it is apparent that eight sealed parcels being parcel No. 1(1), 1(VIII) as well as three other parcels being 2, 3 & 4 were sealed with the seal of "YR". The parcel Nos. 5,16,19 to 27 were sealed with the seal of 'GLM'. Parcels No. 7 to 17 were sealed with the seal of 'SKV'. Parcel No. 18 was sealed with the seal of 'RS'. Parcel Nos. 28 to 43 was sealed with the seal of 'HSG'. Parcel Nos. 44 to 73 was sealed with the seal of 'FMTLHMCF'. Parcel No. 79 was sealed with the seal of 'LMN' and parcel No. 80 was sealed with the seal of 'BD'. 98. PW-48, Dr. Rajinder Singh, CFSL, CBI, Lodhi Road deposed that on 7.2.2002 he received three sealed parcels and on 22.2.2002 he received seven sealed parcels through Ballastic Division of CFSL, duly sealed. He examined the samples forwarded to him for auditory and voice spectrography analysis of voice samples marked C-2(a), C-2(b)(disputed voice of Shaukat) and S-1(a), S-1(b) (specimen samples of voice of Shaukat) in cassettes marked C-1 and S-1 respectively. He received voice samples C-2(c) and C-2(d) (disputed voice of Afzan) and S-3(a) and S-3(b) (samples voice of Afzan). Examination revealed that the voice samples C-2(a) to C-2(b) was similar to S-1(a) to S-1(b) and voice samples marked as C-2(c) and C-2(d) are similar to S-3(a) and S-3(b). Hence his conclusion was that the disputed voice were the probable voice of Shaukat Hussain Guru and Afzan Guru. He deposed that the auditory analysis was not possible as the voice was not audible due to high interfering background noise through recording and hence the voice spectrography analysis could not be done. He deposed that after examining the cassettes he returned the same to the forwarding authority. Report submitted was Ex.PW-48/1. He clarified that pertaining to parcel No. 79(2) line No. 4 should be read as conversation with person and not "in person". On being cross-examined by accused Shaukat witness deposed that while examining the voice by spectrography he prepared voicegraph which could be seen visual. He did not know

whether the voice samples sent to him were recorded directly or through a telephone. It was not necessary that the voice sample recorded at the instance by I.O. would have more tension in it. The person recording the voice need not have expertise to record the same. He did not remember if there were other words except the questioned conversation in the sample taped as he was concerned with the question conversation and not common sentences. He stated that when the sample voice does not have the same conversation, identification by spectrography cannot be taken out. However, identification by auditory analysis is possible. He stated that he quantified the similarity in respect of linguistic and phonetic formant frequency distribution and intonation patterns in his report. On being cross-examined by accused Afzan Guru he deposed that the spectrography analysis cannot indicate the date of conversation. In cassette Ex.C-2, analysis was confined to four sentences, two relating to the man's voice and two relating to the woman's voice. He stated that it was possible to quantify difference and similarities when comparison is done by spectrography analysis. He denied that his view about the emotional state of a person having no bearing on the accuracy of the report were incorrect and stated that he had examined approximately 5000 cassettes involving 1500 voice samples during his carrier. Pertaining to Ex.S-1 the witness deposed that the time of 2 minutes and 16 seconds was noted after he had played the cassette. 99. PW-68, S.K. Jain, Assistant Director, CFSL, Chandigarh, deposed that he received sealed parcels from CFSL, CBI. Parcel No. 1 contained audio cassette C-1, which was marked as Ex.Q-1 by him. Parcel No. 2 contained three audio cassettes S-1, S-2 and S-3 which were marked Ex.S-1, S-2 and C-3 by him. Ex.Q-1 contained recorded intercepted call on mobile phone No. 9810081228. He deposed that the recorded intercepted call pertaining to the voice of the speaker receiving call was the same as the sample voice sent to him for comparison. The witness was cross-examined by S.A.R. Gilani. Cross-examination need not to be noted as the call and the talk was accepted by S.A.R. Gilani arid the dispute related only to the transcription and translation of what was recorded in the conversation. 100. PW-59, Sh. N.K. Aggarwal Sr.Scientific Officer, CFSL, CBI deposed that he had received document which he had marked Q-1 to Q-7 (seven I-Cards recovered from the terrorists) and S-1 to S-2 (prints taken from the laptop) for spectrography comparison. He had used scientific aids like Stereo-zoom, Microscope, TVC, Video-spectral Comparator, ESDA, Transmitted light examination and gave his report Ex.PW-59/8. The document marked Q-1 was the same as Ex.PW-41/8 and Q-2 to Q-7 were the same as Ex.PW-4/2 to 4, Ex.PW-3/3, Ex.PW-2/13 to Ex.PW-2/5 and document S-1 and S-2 were the same as Ex.PW-13/1 and Ex.PW-50/1 and that documents marked as QL-1 to QL-7 were Ex.59/1 to 7. The witness was crossed examined only by the accused Shaukat and Afzan wherein he stated that the documents referred by him in his examination-in-chief were the only documents sent for examination Along with the photocopy of the report of the observation of Mr. Vimal Kant Arora. 101. PW-72, Shri Vimal Kant, an employee of Orion Convergence Ltd., a computer expert, deposed that he was called to the Special Cell on 17.12.2001 where he met Inspector Mohan Chand Sharma. He was asked to retrieve the information

stored in the laptop. He worked on the laptop to retrieve the information from 17.12.2001 to 29.12.2001 and would report whatever progress he was making to Inspector Mohan Chand Sharma as also ACP Rajbir Singh. He gave his report Ex.PW-72/1. Documents, which were found stored in the laptop and prints out of which were taken out by him and submitted Along with the report were Ex.PW-59/1 to 7, PW-72/2 and PW-72/13. In the cross-examination by accused Afsan Guru and Shaukat, witness stated that his reports contained the sum total of all his observations. He admitted that hard disc is a replaceable component and could be formated. He admitted that if a hard disc was replaced, it would not contain the data which was stores earlier unless it is re-fed. He stated that the laptop which he examined was already having a hard disc. He stated that hard disc is connected to other organs of the laptop through wires and if the hard disc has to be replaced, the laptop has to be opened and all connections have to be severed. He stated that a layman could not replace the hard disc and that he did not open the laptop to check the date of manufacturing of the hard disc. He stated that operating system, as observed in his report, was installed on 29.7.2000 and, therefore, the manufacturing date had to be prior to this date. He admitted that it was possible to take out the disc from one laptop and put it to another. But if this was done, history stored on the hard disc would reflect a change in the hardware and in the case of computer handled by him, it was not so reflected. He stated that the history is reflected in REG file which is a internal registering file of the operating system and he did not notice anything of significance in the REG file of the computer. He stated that if internet has been accessed through a computer then actual date would be reflected, additionally, if any change is made to the date setting of the computer, it would be reflected in the history i.e. in the REG file. He denied the suggestion that the date setting is a text editable file but said that a date setting could be edited. He denied the suggestion that a hard disc could be changed without it being reflected in the history maintained in the REG file. He admitted that a REG file could be edited but qualified not fully. In response to the question, "in the absence of verified time setting and reliable information about the hard disc being original, there is no certainty that the material found on a later date, was exactly the material, which may have existed on a previous date?" He replied that the question was vague and in the absence of stipulated time period could not be answered. The laptop always remained in possession of Inspector Mohan Chand Sharma when he was not working on it and after finishing his work, he left the same with Inspector Mohan Chand Sharma. He stated that he had no information about the laptop being referred to Microsoft for information. On further cross-examination by the remaining accused, he admitted that back up of complete hard disc was not taken by him. He stated that certain files were backed up/which fact was not mentioned in his report. He said that the report contained his observations and was not a report of processes which were employed. 102. PW-73, Krishan Shastri, Assistant Government Examiner of Questioned Documents, Hyderabad, deposed that letter dated 19.2.2002 from the DCP was received by him for examining the storage media of the laptop and 210 smart media storage. He deposed that EX.P-83 was the laptop sent to him

and EX-73/1 and 73/2 and 3 were smart media storage devise sent to him. After examining he gave his report Ex.PW-73/1. He qualified that he gave opinion dated 31.5.2002 with supplementary opinion dated 25.7.2002. Both constituted the report Ex.PW-73/1. In the cross-examination by accused Afsan Guru and Shaukat, witness deposed that ACGS was a software to view the images and browse them. He had mentioned in the report the various softwares installed in the storage media of the laptop. He stated that hard disc could be replaced in a laptop by highly skilled person and many systems crashed because of incompatibility of the replaced hard disc. According to his observation, DAT was last accessed on 21.1.2002 and it was created on 27.9.2001. The win. 386 swp was last accessed on 22.12.2001 and was last written on 22.1.2002. He stated that a file could not be written without being accessed by copying it on each storage media. He admitted that the date setting on the file is related to the date setting on the computer and it is possible to modify the date as date setting was a modifiable act. He said that window ME is a operating system. He stated that internet protocol addresses was found from the file system DAT, which was created on 27.9.2001 and he had mentioned this in his report. The dates of in between access and in between modification do not appear in his report. The operating system MS Windows ME was installed on 29.7.2000. Regarding the files written in 1999 found in the hard disc, he stated that they must have been written by the previous operating system on the laptop and taken from another computer and stored in this computer. 103. PW-79, M. Krishna, Government Examiner of Questioned Documents, Hyderabad, deposed that he had examined the laptop along with PW-73. Report Ex.PW-73/1 also was signed by him. Annexures Q to S were part of the report being Ex.PW-73/3 and 73/7. The laptop was last accessed on 21.1.2002 and the particular file was last created on 27.9.2001 and last accessed on 21.1.2002. (To a Court question whether he could tell if any addition or alteration were made in the file when it was accessed on 21.1.2002, he stated that he had not seen any.) It was a system dat file where details are available. In cross-examination by accused Shaukat and Afsan, witness stated that in computer forensic, one should never work on the original system. The system should be connected with another storage media for analysis. He admitted that CMOS chip reflect the date setting and that date setting could be compared with the current time setting but qualified that this was subjected to date setting not being altered. He stated that if date setting was altered, it would remain the same in the system for the earlier files and the change would be reflected in the file created after the change in the systems date. He said that dates of a particular file could not be flushed unless CMOS setting of the date and time were changed. He stated that noting of CMOS setting is essential to verify the date setting of file. He stated that all that he was required to opine upon was the date of creation of a file and of date of last access. He said that it was not possible to alter the date of any particular file unless the system date had been altered. 104. PW-60, Ashok Chand, DCP, Special Cell deposed that on 20.12.2001, ACP Rajbir Singh made a written request being Ex.PW-60/1 regarding the recording of confessional statement of Mohd.Afzal, Shaukat and S.A.R. Gilani, who were in custody. He directed their production

on 21.12.2001 at Officers' Mess, Alipur Road, where atmosphere would be free from threat vide his endorsement Ex.PW-60/2. On 21.12.2001 at 11.30 A.M. accused S.A.R. Gilani was produced by ACP Rajbir Singh. ACP Rajbir Singh was asked to leave the room. He explained to S.A.R. Gilani the consequences of confessional statements and also that he was not bound to make the same and that it could be used as evidence against him. S.A.R. Gilani did not make any confessional statement which was recorded as Ex.PW-60/4 and his endorsement was Ex.PW-60/3. Accused Shaukat was thereafter produced at 3.30 P.M., to whom also he explained that he was not bound to make the confessional statement which could be used against him. ACP Rajbir Singh was asked to leave the room. Accused showed his willingness, in writing, to make a confession which was Ex.PW-60/5. He thereafter recorded a confession in seven pages which was Ex.PW-60/6. Accused Shaukat signed the same at point 'A' on each paper. Statement was concluded at 5.15 P.M. and he signed the same at the conclusion at point 'B'. Accused was sent back. At 7.10 P.M., accused Afzal was produced by ACP Rajbir Singh. He was explained that he was not bound to give the confessional statement and if made, it could be read against him. He showed willingness to make confessional statement which was recorded in his own hand being Ex.PW-60/7. Warning drawn in the proceedings was Ex.PW-60/8. The confession recorded was Ex.PW-60/8, which is in 13 pages. Each page bore signatures of Mohd.Afzal at point 'B' and thereafter he signed the same. The confession was recorded up to 10.45 P.M. The original confessional statement of the accused was sealed with the seal of JK. ACP Rajbir Singh made an application for supply of copies of the proceedings. The confessions duly sealed in an envelope were given to him for producing before the ACMM. The envelope being Ex.PW-60/10. In cross-examination by accused Shukat, witness stated that to ensure that the accused was not under any threat or coercion, he had directed their production at the Officers' Mess, at Alipur Road. He stated that after recording the confessional statement, accused was sent back to the custody of ACP Rajbir Singh. He did not send back the accused on 21.12.2001 for rethinking and gave him only 5/10 minutes for reflection in his presence. Witness stated that as per his understanding of Section 32 POTA he had power to record confession. He had no personal knowledge of the activities of the accused apart from what they stated in the confessional statement. He admitted that he was being daily briefed by ACP Rajbir Singh. He stated that assault on Parliament was a terrorist attack. Certain question regarding the applicability of POTA sought to be put to the witness were disallowed. He said that only he and the accused were in the room when the confession was recorded. He did not ask the accused if he wanted legal assistance. He denied the suggestion that accused Shukat was never produced before him. He denied the suggestion that accused never expressed his desire to make confessional statement. He denied the suggestion that ACP Rajbir Singh dictated the confession which he recorded and got the same signed from the accused. In cross-examination by accused Mohd.Afzal, witness denied that Mohd. Afzal was not produced before him or that had not shown his willingness to make confessional statement. Witness denied that the relationship between Mohd.Afzal, Shaukat and S.A.R.

Gilani was never related by accused Mohd.Afzal and he had falsely recorded the same in the confessional statement. In cross-examination by Mr. Neeraj Bansal, amices Curiae for Shaukat, witness stated that there was no signature of accused person on the application made by ACP Rajbir Singh on 20.12.2001. He said that what the accused narrated was recorded by him and it was correct, in the proceedings it is not recorded that what was recorded was as per the s statement made by the accused but volunteered that the proceedings were carried out in the manner that what was narrated was recorded. He denied that there was no correction in the statement recorded and pointed out that there were corrections whenever required. He denied that after S.A.R. Gilani refused to make confessional statement, the other two were beaten and were forced to make confession. In cross-examination by accused S.A.R. Gilani, witness stated that he made no effort between 20.12.2001 and 21.10.2001 to ascertain if the accused persons were willing to make confession. He denied that he and ACP Rajbir Singh had tortured S.A.R. Gilani at a farm house. He denied that the wife, younger brother and minor children of S.A.R. Gilani were illegally confined at the Special Cell. He denied that S.A.R. Gilani was threatened that his wife, younger brother and children would be eliminated if Gilani did not make confession. He denied that S.A.R. Gilani was not produced before him on 21.12.2001. In cross-examination by accused Afsan Guru, he stated that it was correct that he had directed ACP Rajbir Singh to produce all the three accused at 11 A.M. on 21.12.2001 and that they were not produced together but were produced at intervals. He denied that he pressurised S.A.R. Gilani to change his mind and give confessional statement. He had not met the accused prior to 21.12.2001. He had verbally inquired from the accused persons if they were comfortable in English language. Whatever was narrated by the accused was written by him. He stated that he did not remember if on 18.12.2001 he had told the media that Afzal had already confessed to the crime. He was not aware if on 20.12.2001 accused Afzal was produced before the media. He denied that within the time available, it was not humanly possible to have recorded the confessio'nal statements. 105. PW-63 Shri V.K. Maheshwari, ACMM, Patiala House deposed that on 22.12.2001, ACP Rajbir Singh moved an application Ex.PW-63/1. Accused Mohd.Afzal, Shaukat and SAR Gilani were produced and a sealed envelope having the seal of JK containing the statement of accused persons recorded by DCP were produced. Proceedings before the DCP being Ex.PW-60/3, PW-60/6 and PW-60/9 were found in the envelope. He drew the proceedings Ex.PW-63/2 in the form of statements. Statement of Shaukat recorded by him was Ex.PW-63/1 and Shaukat's confirmation was Ex.PW-3/4. Statement of Mohd.Afzal was Ex.PW-63/5 and his confirmation was PW-63/6. Statement of accused SAR Gilani was Ex.PW-63/7 and his conformation was PW-63/8. He deposed that accused persons were identified by the I.O. He recorded the statements in his chamber where apart from himself, his orderly and the accused persons were present and the Stenographer was called for typing when required. He supplied copy of the proceedings to the I.O. and re-sealed the statements recorded by DCP in a separate parcel with his own seal of VK and gave the same to the I.O. for filing before the designated Court. 106. PW-80, ACP Rajbir Singh,

Special Cell, Lodhi Road deposed that on 13.12.2001, he reached the Parliament House on receiving information that firing was going on at 12.30 P.M. On reaching he learnt that five terrorists, who had launched the attack had been killed and some security personnel were also killed. It being a case of national importance, he gave directions to assist local police in the investigation of the case. From the spot, mobile phones, mobile phone numbers written on slips of papers were recovered and he gave directions to Inspector Mohan Chand Sharma to start investigation about the mobile phones and mobile numbers and directed Inspector H.S. Gill to help local police in recording of statements and examination of witnesses. On 15.12.2001, on the basis of interception of phones done by Inspector Mohan Chand Sharma, accused S.A.R. Gilani and Navjot Sandhu @ Afsan Guru were arrested and on the same day, Mohd. Afzal and Shaukat Hussain Guru were apprehended in Srinagar after information was sent to Srinagar through Central Vigilance Agency and they were brought to Delhi by S.I. Hardey Bhushan along with the laptop and cash recovered from them. S.I. Sharad Kohli was left behind to bring the truck recovered from the accused by road to Delhi. Inspector Mohan Chand Sharma produced the four accused persons in Court whose remand was taken. During the police custody, different hideouts were raided resulting in recovery of incriminating material. Accused persons were thoroughly interrogated on 19.12.2001 and senior officers reviewed the investigation and it was decided that provisions of POTA should be added and were accordingly added and thereafter investigation was handed over to him. Truck bearing No. HR-38D-6733 was deposited in the malkhana of Police Station Parliament Street under his endorsement Ex.PW.65/1. He thoroughly interrogated the accused Mohd.Afzal and recorded his supplementary disclosure statement being Ex.PW-64/B. Accused Mohd.Afzal, Shaukat and S.A.R. Gilani desired to make confessional statement and on 20.12.2001 he made an application Ex.PW.60/1 before the DCP, Special Cell for recording the confessional statement. Orders were passed to produce the three accused persons at COS, Mess, Alipur Road on 21.12.2001. Orders being Ex.PW-60/2. On 21.12.2001, S.A.R. Gilani was produced before the DCP at 11.30 A.M. who recorded his statement. Thereafter, accused Shaukat was produced whose statement was recorded and finally accused Mohd.Afzal was produced, whose statement was also recorded. He moved an application Ex.PW-80/1 for supplying copies of the statement which was supplied to him in a sealed envelope with direction to produce the three accused persons before the ACMM on 22.12.2001. On 21.12.2001, he had sent accused Mohd.Afzal with Inspector R.S. Bhasin to Portrait Building Section for preparing portrait of Gazi Baba and Tariq at the description to be given by the accused. Portrait prepared were Ex.PW-80/2 and 3. On 22.12.2001, application Ex.PW-63/1 was moved before the ACMM, before whom accused persons were produced and each one of them was individually called inside the chamber. He was called thrice for identification of each accused. Endorsement pertaining to identification being Ex.PW-80/4 to 6. After the proceedings were over, vide Ex.PW-63/9, he moved an application before the learned ACMM for taking copies of the proceedings and obtain copies. Except for accused Mohd.Afzal, whose police custody was extended,

other accused were sent to judicial custody on 22.12.2001 itself. On 29.12.2001, the expert called by the police completed the examination of the laptop. The expert had taken out hard copies of certain files which he seized vide memo Ex.PW.72/1, He deposed that hard copies of the stickers and I. card given by the expert from the laptop were Ex.PW.59/1 to 7 and hard copies of the photographs were Ex.PW.80/7 to 14. He obtained post-mortem reports of nine security personnel who were killed and the MLCs of 16 injured persons, which were Ex.PW.80/16 to 40. Material which was returned after destruction by NSG was seized by him vide seizure memo Ex.PW.80/15. He obtained a report Ex.PW.13/2 regarding sticker. He sent the laptop to BPH&D office, Hyderabad and obtained report. A team was sent to Pahalgam in search of Gazi Baba and other conspirators but without success and they were declared as proclaimed offenders. Reports from CFSL were collected and made a part of investigation record. He obtained sanction from the concerned authority under Section 50 of POTA and under Section 7 of Explosive Substances Act and Section 196 Cr.P.C. He recorded statements of witnesses as and when required. He obtained the post-mortem reports of the terrorists being Ex.PW.47/1 of deceased Hamja and Ex.PW.80/41 to 44 of other four terrorists. After completing the investigation, he prepared a charge-sheet and filed the same in the Court. In cross-examination, by accused S.A.R. Gilani, he said that Mr. Mohan Chand Sharma and Mr. H.S. Gill were his subordinates in Special Cell and were investigating as per his directions. He stated that initially no case under POTA had been registered. He admitted in the cross-examination that he did not write any letter to competent authority for authorising interception nor he had filed, along with the challan any letter written to Cell phone companies for taping but later on, order of Joint Director of CBI as well as order of Home Secretary were filed. He admitted that in his report under Section 173 Cr.P.C. he had not mentioned about authorisation received for interception. He admitted that no written orders were given on 19.12.2001 to add POTA. He admitted that it was correct from the documents prepared and statements recorded on 13.12.2001 that it was a terrorist attack. He admitted that on 20.12.2001 accused Mohd.Afzal was interviewed by reporters of NDTV and Aaj Tak in the Special Cell. He denied that in that interview Mohd.Afzal had stated that accused S.A.R. Gilani was not involved in the conspiracy. He admitted that the accused persons had not given any written willingness for making confessions. However, willingness was conveyed to him orally. On 21.12.2001, he did not produce all the accused persons at one time before the DCP. Accused S.A.R. Gilani was produced at 11.30 A.M. and other two accused Mohd.Afzal and Shaukat had been taken for preparation of portraits. Accused Shaukat was produced at 3.30 P.M. He denied the suggestion that after SAR Gilani refused to make confession, he pressurised the other two accused. He admitted that after 19.12.2001 he did not search the house of S.A.R. Gilani. He went through the transcripts of tape conversations between SAR Gilani and his step brother. He did not make Shah Faizal, step brother of SAR Gilani as accused as he did not find him involved. He denied the suggestion that that S.A.R. Gilani was picked up by him outside Khalsa College on 14.12.2001 at about 1.15 P.M. He denied that thereafter

S.A.R. Gilani was tortured and beaten. He denied the suggestion that the tape was tampered. He denied the suggestion put to him that S.A.R. Gilani was not produced before the ACMM. He stated that Inspector Mohan Chand Sharma had been dealing with the investigation concerning mobile phone. He did not carry out any physical examination of the mobile phone from any expert. He did not tell the accused persons that they could engage a counsel. He learnt from the record that that relatives of the accused persons were informed about their arrest. He did not get the list of distributor of SIM Card of Airtel or Essar nor he was aware of any notification of the Government requiring the retailers to keep the record of the customers. He admitted allowing media to interview accused Mohd.Afzal in his office. He denied that the laptop had been illegally accessed in December, 2001 and January, 2002. He had no document to show how instrument identification is done. He does not know what de-code table in computer terms means. He was not in a position to tell about the investigation done concerning laptop since this part was done by Inspector Mohan Chand Sharma. He denied the suggestion that accused Afsan Guru was picked up from the house on 14.12.2001, which fact was to his knowledge. He admitted that he was involved in the Red Fort shoot out case and that a complaint was made against police to NHRC but stated that the complaint was false and hence NHRC filed the complaint. On cross-examination by amices Curiae Mr. Neeraj Bansal, he stated that he recorded the disclosure statement of Mohd.Afzal on 20.12.2001 and denied the suggestion that no disclosure was made or that accused Mohd.Afzal was not produced before the ACMM. In cross-examination by accused Afsan Guru and Shaukat Hussain Guru, he stated that he was not aware of cloning of mobile phone. He had not received response from interpol of the calls details of international mobile phones. He stated that on 22.12.2001 accused were produced before the ACMM in the pre-lunch session and simultaneously handed over the confessional statements in sealed cover. He had no knowledge about preparation of copies of tapes C-1, C-2, S-1 and S-2. He denied the suggestion that accused Shaukat had never expressed willingness to make confessional statement. He denied the suggestion that the date of arrest of accused being 15.12.2001 was false. He denied that accused Shaukat Hussain was tortured in a farm house and was made to sign on blank papers. He denied that accused Afsan Guru was subjected to-verbal and physical abuses by police officials. He denied that laptop was extensively access and interpolated. He denied that Mohd. Afzal was allowed to give interview to media with the object of interfering with the trial. He denied that no recoveries were effected. Lastly, he denied that he was deposed falsely. 107. PW-11, Shri G.L. Meena, Deputy Secretary (Home), deposed that on 4.4.2002 request was received for grant of sanction under Section 50 POTA, copy of FIR, draft charge-sheet, seizure memo, site plan, disclosure statements, statements of the witnesses, CFSL report and prosecutor's opinion were accompanying the request. Through the Principal Secretary (Home) file was submitted for sanction to the Lt.Governor, which was granted by the Lt.Governor on 4.5.2002. It was communicated by him under his hand vide order dated 8.5.2002 being Ex.PW-11/1. On 4.4.2002, request was also received from the Police HQ for grant of sanction under Section 196

Cr.P.C. for offence under Section 121, 121-A, 122, 124 read with Section 120-B IPC. This request was accompanied by all the documents which were accompanying the request for sanction under Section 50 POTA. He submitted the file through the Principal Secretary (Home) to the Lt.Governor. On 4.5.2002, the Lt.Governor accorded the sanction which was communicated by him vide order dated 8.5.2002 Ex.PW-11/2. The witnesses produced the original sanction files pertaining to both the sanctions. In cross-examination, he stated that no other document except the one's he had referred to in his statement were received in his office. Since the Lt.Governor had applied his mind, he could not say as to what document he considered while granting sanction against accused S.A.R. Gilani. He had put up his note in the file which was put up to the Principal Secretary (Home) on 1.5.2002. He denied the suggestion that no material showing involvement of S.A.R Gilani was available on record or that the sanction was granted mechanically. He stated that file brought by him bore the signatures of the Lt.Governor while granting approval. He stated that notes put up by him and the Principal Secretary drew attention of the Lt.Governor to the role of individual accused. 108. PW-12, Shri T.N. Mohan, DCP, Police HQ, deposed that request was received on 3.4.2002 for sanction for prosecution of the accused persons under Section 7 of the Explosives Substance Act for offence under Section 3, 4, 5 and 6 of the said Act. The letter was accompanied with the copy of FIR. Statements recorded of the witnesses, confessional statements of the accused persons, site plan, CFSL reports and draft charge-sheet. The Commissioner of Police, after perusal of the relevant documents granted sanction which was communicated by him vide letter Ex.PW-12/1. In cross-examination, he stated that he did not make any note for drawing attention of the Commissioner of Police to the individual role of the accused persons. The Special Commissioner of Police (Intelligence) was briefing the Commissioner of Police and not him. The Commissioner of Police had not made any note but had signed on the memo drafted by the Inspector of Intelligence Branch, which branch deals with the matters regarding explosive substances and VIP security. The file was placed before the Commissioner of Police on 10.4.2002 and sanction was granted on 10.4.2002. He denied the suggestion that sanction was granted by the Commissioner of Police in a mechanical manner. 109. Except for accused S.A.R. Gilani none of the other accused led any evidence in defense. 110. DW-1 Sampat Prakash retired government official deposed that he had heard the taped conversation between S.A.R, Gilani and the caller, which was taped by the police on 14.12.2001. He had translated the said conversation, translation being Ex.DW-1/A. It contained a few English words namely "Syllabus", "Prospectus" and "O.K.". He did not find word "Yeh Chae Zurari" in the conversation. He deposed that the words "Yeh Kya kuru" is used in Kashmiri language as an exclamatory question if unexpected things happened; by way of example he stated that if there is unexpected snowfall people may say "Ye Kya Kuru" or if somebody's scooter is lost and he goes to office without scooter, he may be queried "Ye kya kuru". In this context, he deposed that if a brother queries his brother whether he had a quarrel with his wife he may use the said phrase. On cross-examination, witness stated that in the conversation he did

not find the words "Ye chae zurari" followed by a laughter. He admitted that he was a sympathiser of PUCE but was not its member. He denied that the English words "prospectus" and "syllabus" were not there in the conversation. He stated that these words were used in response to the question what do you want. 111. DW-2 Sanjay Kak a documentary film maker deposed that he had heard the taped conversation recorded by the police on 14th December, 2001 between S.A.R. Gilani and the caller. The recording was extremely bad and one could make only a few sentence at the hearing. Only on repeated hearing full conversation could be understood. The transcription and translation was Ex.DW.2/A. The taped conversation contained the words "syllabus", prospectus etc. It did not contain the words "Ye chae zurari". The witness gave same explanation as given by DW-1 to the sentence "Ye kya Kuru". A similar cross-examination as the DW-1 was subjected, too was conducted qua this witness and he gave similar replies as given by DW-1. 112. DW-3 Munshi Ram S.I. Spl.Branch, Secret Section produced document which was exhibited as DW-3/B it being copy of letter dated 21.6.2002 addressed by the Spl. Commissioner of Police to the mobile phone companies regarding procedure to be followed in case computer print outs were required by the police. 113. DW-4, Sham Tahir Khan, Principal correspondent Aajtak T Channel deposed that he had interviewed Mohd.Afzal on 20th December, 2001 for 15 minutes. The audio visual tap prepared was Ex.DW-4A. (The witness was not allowed to be examined as to the contents of the tape as the Court recorded that it's contents would be read in evidence, as it was an exhibited document). In cross-examination, witness stated that he did not feel that answers were given under pressure. However, ACP was present when the interview was being taken. The witness was cross-examined by accused Mohd.Afzal wherein he admitted that Zee T and NDTV correspondent was also present when the interview was taken. One of the interviewer had put a question to him about the role of S.A.R. Gilani, to which Mohd.Afzal stated that S.A.R. Gilani was innocent at which ACP Rajbir got up and said that he should not speak about S.A.R. Gilani. Rajibir Singh has requested not to telecast the line stated by the accused about S.A.R. Gilani and, therefore, when the interview was telecast on 20th December, 2001 line was removed but when it was re-broadcasted in the program 100 days after the attack the line was not removed. 114. DW-5, Qurat-ul-ani-Arifa wife of S.A.R. Gilani deposed that the night of 12th and 13th December, 2001 was observed as Shaib-a-Kader by the Muslim community where they pray throughout the night and read Namaz. Her husband, his brother Bismilla and her brother Khan Shahib were together present on Shahib-a-Kader night in their house at Mukherjee Nagar reading Namaz. All were tired by the morning of 13th December and slept. Everybody got up at noon time and performed the noon Namaz. At 4.00 p.m. her husband left for college whereupon she asked him whether he had informed the college authorities that he would be going to home town for Id, to which he replied that apart from Sunday and Monday (Id holiday) there were no holidays and hence it was not possible to go to the home town, besides it would be expensive. She insisted that she wanted to celebrate Id in the home town, but her husband refused, at which they had altercation. On the night at 8.00 p.m. she made a

telephonic call to her mother-in-law from a S.T.D. booth and informed her that they would not be coming to Kashmir. When her mother-in-law inquired the reason she told her to ask her son and closed the telephone. Her mother-in-law had asked for a hearing-aid to be sent from Delhi. Her husband came back from college at 9.00 p.m. On 14th December, 2001 her husband left house at 1.00 p.m. to go to the Masjid at Mall Road for performing Jumma Namaz telling her that he would be back by 4.00 p.m.. He was to send a hearing-aid for his mother through her brother who was to go to Kashmir and for this purpose two were to meet at J&K bus stand opposite Tis Hazari. Her husband did not come back by 4/4.30 p.m. Her brother-in-law also did not come back. She tried to talk to her husband on the telephone but could not contact him. She thought that the bus which had to go to J&K had got late, therefore, she opened the Roza herself. At 9.30 p.m. five or six persons in civil dress entered the house and forcibly took the entire family and were made to sit in a car where another woman who told her name as Navjot was present. They were all taken to Lodhi Colony Police Station and were confined in a room. Her son was allowed to go to the toilet and on return he told her that her brother and brother-in-law were confined in a different room in the police station. Her husband was brought to her room and was threatened that his wife and children would be harmed if he did not abide by the instructions given by the police. Her husband was in a miserable condition and was having injury marks on the body. He was proclaiming his innocence. After 2 to 4 hours her husband was taken to another room. On 15th December, 2001, in a blind folded condition, she was taken to some other place. When food was served at lunch time on the plate she saw "BSF Bhalswa Camp" written on it. 115. Her husband was again tortured by the police in her presence to admit his guilt in the offence. She was advised to convince her husband to admit his guilt. She told her husband to agree to sign whatever the police wanted. She was brought back to Lodhi Colony on the night on 15.12.2001. On 16th, her husband was brought to her room and pressurised to sign blank papers. She, her brother and brother-in-law were released in the evening of 16th and left for their house in the police car. She was threatened that if she would disclose anything she would be killed. In cross-examination, she admitted that her son was aged 5 years and her daughter about 10 years and they were living in House No. 535, Mukherjee Nagar which was a thickly populated colony. She did not make a noise when she was picked up by the police. The time was around 10 P.M. She did not ask Navjot where she was being taken by the police. Navjot was also taken to BSF Bhalswa Camp. She did not see any BSF Jawan. She did not see Mohd.Afzal and Shaukat either at Lodhi Road or at BSF Camp. She, however, had learnt that two persons had been brought to Lodhi Road on 15.12.2001. She had heard the name of Mohan Chand Sharma. She had not seen Mohan Chand Sharma or Rajbir Singh and had only heard through other persons that Rajbir Singh had given instructions. She admitted that she had not told all these facts, which she had deposed in her examination-in-chief, to any person and were only being disclosed in Court. On 16.12.2001, when she came back she informed her relatives as to what had happened. She denied the suggestion put to her that she was deposing falsely.

On being questioned by the Court, she deposed that Shabey-a-Kader Namaj commenced at 9.30 P.M. on 12.12.2001 and closed on 13.12.2001 at 7.00 A.M. During Namaj, her husband did not come out of the room where Namaj was being offered, nor he did talk to anyone. They were not communicating with each other. Cell phone was put off and kept aside and no one was talking on the phone. In the morning she got up first and then her husband got up at around 1 P.M. Since her husband was sleeping, he did not talk on the cell phone at 12.10 P.M. on 13.12.2001. She denied that her husband talked on the cell phone at 12.20 P.M. or 12.25 P.M., as according to her, he was sleeping. After 1.00 P.M., her husband might have talked on the phone as he was awake but she was in the kitchen. On 13th morning, the cell phone was kept on. On 14th they got up early in the morning to take sahari because of Roza and went back to sleep. She stated that she used to pick up the phone when her husband was sleeping. On 13.12.2001 at 9.53 P.M. he might have picked up the phone but stated that she did not remember correctly. On 14.12.2001, her husband might have left for Namaj between 12.30 P.M. And 1.00 P.M. 116. DW-6, Shah Faizal, deposed that accused S.A.R. Gilani was his brother. He had cell phone bearing No. 9810081228 on which he used to talk with him at least once a week. He wanted to appear in the medical entrance examination and for that needed syllabus and prospectus. On 13.12.2001, at about 1/1.30 P.M., he had made a call to S.A.R. Gilani and told him that he needed syllabus and prospectus. He told Gilani that since he was coming to J&K, he should bring these with him. Next day he was informed by his mother that S.A.R. Gilani was not coming home, which information she had got from Gilani's wife. He was told by his mother that his Bhabi sounded annoyed with his brother. Therefore, on 14.12.2001, at 12/12.30 noon he again spoke to his brother about sending syllabus and prospectus through Khan Sahib i.e. brother-in-law of S.A.R. Gilani as he was to come to J&K. In the context of Bhabi being annoyed, he had inquired from S.A.R. Gilani "YEH KAYA KURU" meaning thereby he was enquiring what was the quarrel between his brother and his wife. His brother querried "KAYA DILAH" meaning thereby "what! in Delhi". He responded "DILI KAYA KURU" meaning thereby "what happened in Delhi". His brother laughed. His brother repeatedly told him to hang up the phone as the phone bill would be more and told him to ring later, therefore, he did not talk in detail. On 2.1.2002, he was called at the Special Cell where he met Insp. Mohan Chand Sharma. He was queried about the talk which he had with his brother and he gave explanation as deposed by him in his examination-in-chief. He was threatened that he would be falsely implicated. Rajbir talked very roughly with him. He was called continuously on two days for interrogation. On being cross-examined, he stated that he learnt about the quarrel between his brother and his wife through his mother. He did not gave details of the syllabus and prospectus on 14.12.2001 as he had already given the same when he spoke to his brother on 13.12.2001. He said that his brother from J&K had accompanied him on 2.1.2002 to the Special Cell. He did not make complaint to any senior officer about the threats allegedly given by Mohan Chand Sharma or Rajbir Singh. He denied the suggestion that he did not talk with his brother about prospectus and syllabus on 14.12.2001. To

a court question, he admitted that telephone No. 35509 was installed in their house but stated that it did not have STD facility and, therefore, he used to make STD calls from the market. He had spoken to his brother on 13th and 14th from the same STD. He admitted that the STD code of Baramullah is 018952. 117. DW-7, Manish Pandey deposed that she had interviewed accused Mohd.Afzal and based on the same, article Ex.DW-7/A written by her, was published in the Times of India. It was a correct reporting of interview which she had conducted. On being cross-examined, witness stated that she took notes of interview. Her write-up was edited by the Editor before being published. Interview was taken in the evening of 20.12.2001. She did not make attempt to interview other accused. In response to court question, she stated that it was a formal interview in which other Journalists from printing media were present, noting down whatever was told by the accused. Interview was not taped. Noting taken at the time of interview were not preserved and there is no method to cross-check whether the story published was in accordance with the nothings taken. 118. DW-8, Dr. Arun Mehta, Computer Engineer, deposed that he had a master's degree in Computer Science and was engaged in software teaching, writing and consultancy. He deposed that information stored in a computer is on a Magnetic medium, for instance a hard disc. Magnetics may be easily polarised one way or the other. Therefore, any data in a computer can be changed by a knowledgeable person. While seizing electronic evidence one should always take a back up and keep it sealed because it is unlike a photograph of a crime scene. Date and time shown in the computer must be recorded because if there is any inaccuracy, it will be reflected. Version of the software installed should be recorded and the software used to examine the computer should also be noted. He deposed that it is easy to introduce a fresh file in a computer. There are utilities available in the internet which may change the date and time. Marks 'A' to 'G' were proof taken out by him through internet informing about the utilities. Time and date settings are easily modified. Knowledgeable person can make the modifications. In some laptops, hard" disc could be removed very easily and in some it may be difficult, but for professionals this was a routine activity. The date of last access is treated differently by different softwares and the time of last access was meaningless in the absence of knowledge as to what software is used to process the file. To court questions, witness admitted that when a file is accessed in a computer, the computer records in the history, as to when the file was accessed. He, however, clarified by saying that using special software packages, its history can be edited and the kind of special packages were in documents mark 'A' to 'G'. He deposed that software which was installed in a computer could be modified and un-installed without leaving any trace. Whenever a fresh file was introduced in a computer, computer gives the date but this could be changed. If a hard disc was replaced in a computer, the entire data would vanish. In cross-examination, witness deposed that he had never taken back-up of any computer for a criminal case and had not written any book for use of electronic evidence. Volunteered that he had written some articles concerning Tehlaka.com for submission to Vekataswamy Commission pertaining to use of electronic evidence. 119. PW-9, Dr. Peggy Mohan, de-

posed that she had done her B.A. in linguistics with reference to translation and had even obtained Master's degree and Ph.D. from Michigan University, U.S.A. She had gone through the confessional statements of Shaukat, Mohd. Afzal and S.A.R. Gilani and her opinion in respect thereof was Ex.DW-9/A. In her cross-examination, she admitted that speed of the transcriber would depend upon his knowledge of language and also varies with familiarity with the material. She stated that fresh material normally elicits request for clarification entailing pauses, thereby adds to the time taken in recording a statement. 120. DW-10, A. Farhan, deposed that he is a Telecommunication and Electronic Engineer. SIM cards, IMSI code which corresponds to telephone number are assigned by telephone companies and they are unique. No call could be made from a sealed SIM card and a SIM card being a chip, could be replicated as a chip contain a program which could be re-programmed. It was possible to replicate a sealed SIM card. This, if done, is called cloning a SIM card. IMEI number, which again is a program, could be changed. The program on the mobile phone resulting in IMEI number is a 14 digit number and 15th is called a free digit. In reference to Ex.PW-36/A, pertaining to the call at 11.19.14 hours, where two calls pertaining to the same point stood recorded, witness deposed that it was impossible that two calls were made on one phone by two IMEI numbers simultaneously. To court questions, witness stated that he could not change IMEI numbers. If software was available this could be done. Witness stated that he had changed the IMEI number of Ericsson instruments, which was used to test pre-paid billing system. He stated that with the help of a SIM programmer, cloning/duplicating the SIM card could be done. He stated that to the best of his knowledge, SIM programmers were not available in Delhi or for that matter they were not available anywhere in India. He could not tell the name of any company which gave SIM programmer to its distributors. He stated that first six digits of IMEI number represent the manufacturer or handset, next two digits represent the factory line from which the cellphone has emerged. Next six digits are serial number of handset. Last digit is the spare digit. It was not possible for two hand sets to have same 14 digit numbers. In response to a question pertaining to EX.PW-36/1, he stated that it was the output of billing system and actual calls are handled by operating system support. He could not say as to how there are two entries at the same time. He admitted that it was possible to remove one or add more calls in the business support system but stated that a corresponding change in the record of the calling party would also have to be done. PRELUDE TO THE ANALYSIS OF THE EVIDENCE 121. Before analysing the evidence and determining what stands proved, six preliminary issues need to be decided because they have a fundamental bearing on charges framed and the legality and validity of the trial itself. 122. The first preliminary issue argued by Mr. Collin Gonzalvis, learned counsel for Mohd.Afzal was that: (i) an accused has a fundamental right to counsel from point of arrest, especially in a capital case; (ii) it is the duty of the investigating agency to inform the accused person that the accused can consult a lawyer, (iii) at the time of trial, if the accused does not engage a lawyer, the State at its expense, must provide one. The lawyer so appointed must be competent and should

be given adequate time to prepare the defense. 123. The second issue urged was commonly propounded by counsel for accused Mohd.Afzal and Mr. Ram Jethmalani, learned Senior Counsel appearing for accused S.A.R. Gilani. It was contended that by allowing the media to interview Mohd.Afzal, which interview was prominently shown by the electronic media on 20.12.2001 and 21.12.2001, serious prejudice was caused to the accused persons. It was a case of media trial, was the submission made. It was argued that what was telecasted by the electronic media over the T repeatedly for the next two days was a full fledged interview of accused Mohd.Afzal. This had seriously prejudiced, or at least the possibility of causing serious prejudice in the mind of Trial Judge could not be ruled out, and as a consequence thereof accused were denied a fair trial. 124. The third issue argued by Shri Ram Jethmalani pertained to the sanction granted by the Lt. Governor for prosecution of the accused under POTA and sanction granted under Section 196 Cr.P.C. for I.P.C offences. Sanction granted by the Commissioner of Police under Section 7 of the Explosive Substances Act was also questioned. 125. The fourth issue raised by Shri Shanti Bhushan, learned Senior Counsel for accused Mohd. Afzal, was that in respect of POTA offences, all investigations prior to 19.12.2001 had to be ignored and evidence collected by the police up to 19.12.2001 was inadmissible for the POTA offences. 126. The fifth issue raised was whether an attack on the Parliament of India when it is in Session and the attack takes place when Central Ministers, Members of Parliament and the Vice President of India are present in the building housing the Parliament, and the Prime Minister was expected any moment is simply a terrorist act or it amounts to waging war against the Government of India. 127. The sixth issue raised was whether the charges 1, 9, 15 and 16 were not framed properly. Argument advanced was that in a case of conspiracy where actual acts are attributed to particular individuals which acts constitutes specific offences, a charge for conspiracy has to be framed against the conspirators and a separate charge against the individual pertaining to individual acts constituting the offence. The accused must know that his individual acts are being attributed to him so that he can defend himself properly and without being confused. Pertaining to charge No. 1, it was argued that it was vague. Charge No. 9 was challenged on the ground that as framed, the charge was that accused Mohd.Afzal and Shaukat led the police to places where explosives were recovered and hence they had committed the offence punishable under Section 5 of Explosives Substances Act. Leading to a place, it was argued was no offence. Charge No. 15 was challenged on the ground that holding of proceeds of terrorism was not an offence under Section 6 of POTA. Charge No. 16 was challenged on the ground that it was a repetition of charge No. 12. 128. In support of the first issue noted above, referring to the judgments of U.S. Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), learned counsel argued that law required a conviction to be set aside where counsel's assistance was not provided or was ineffective. Counsel had a duty to bring such skill and knowledge as to make a trial reliable adverserial testing process. Relying upon the judgment of U.S. 9th Circuit Court of Appeals Harris v. Wood and the judgment of U.S. 6th Circuit Court of appeals Groseclose v. Bells, 1997 FED App. 03551P (6th

CIR.), U.S. 9th Circuit Court of Appeals Turner v. Duncan, and the judgment of U.S. 11th Circuit Court of Appeals Dobbs v. Turpin, counsel contended that where no discernible defense strategy emerged at the trial, trial could not be relied as having produced a just result and that adequate consultation between the lawyer and the accused is an essential element of competent representation in a criminal case. In the context of the Indian decisions, counsel relied upon the judgments of Hon'ble Supreme Court , Kishore Chand v. State of Himachal Pradesh, , Khatri and Ors. v. State of Bihar and Ors., , Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar, , Ranjan Dwivedi v. Union of India, Madhav Hayawadanrao Hoskot v. State of Maharashtra to contend that right to evidence includes right to effective and meaningful evidence at the trial; it is a facet of fair procedure and an inbuilt right to liberty envisaged under Articles 14, 19 and 21 of the Constitution of India by virtue of Article of 39(a) of the Constitution of India, the Constitution provides a fundamental right of free legal aid at State expense to an indigent accused person. Counsel argued that it is the duty of the Court to see and ensure that the accused is represented with diligence and competence by the defense counsel and where the defense falls below the acceptable standards at a criminal trial, it would amount to denial of counsel's assistance. Relying upon , Sheela Barse v. State of Maharashtra, counsel argued that the accused persons had a right to be informed immediately upon arrest that he had a right to seek legal aid from the nearest legal aid committee. Counsel also relied upon some judgments of European Court of Human Rights and observations from a few judgments of various High Courts, where, in a criminal trial, the Appellate Court after noticing that the counsel had not conducted the case as per the requisite norms in a criminal trial, vital points were left uncross-examined and arguments were defective, had order re-trials. 129. Counsel for the State, Mr. Gopal Subramaniam, contended that scrutiny of the performance of a counsel who has conducted a trial should be highly deferential. He drew the attention of the Court to the observations in Strickland's case (supra) where, while dealing with the issue, the Court had noted that it was all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence and it was all too easy for a Court, examining counsel's defense after it had proved unsuccessfully to conclude that a particular act or omission of counsel was unreasonable. Counsel argued, that in the various judgments cited by the accused, it was noticed that the ineffectiveness of the defense was so serious that it resulted in a constructive denial of counsel. Counsel argued that ratio of all judgments was that the focus of the appellate court should be 'the fundamental fairness of the proceedings of the trial court whose result was under challenge before it.'. 130. None can belittle the right of every accused to be fairly and adequately represented in a criminal trial, especially where capital sentence is involved. Counsels play an important role in the resolution of issues in an adversarial system. Every accused has a right to meet the case of the prosecution on even terms. Following observations of the U.S. Supreme Court in Raymond Hamlin as approved in Madhav Hayawadanrao Hoskot (supra) epitomise the quintessence of this processual facet: " The right to be heard would be, in many cases, of little avail if it did not comprehend

the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate or those of feeble intellect. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries but it is in ours. From the very beginning our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." 131. Fair assessment of a counsel's performance has many inherent difficulties. Different counsel would defend not in the same way. No mechanical rule can be applied. To our mind, the test in Strickland's case (supra) as laid down by Justice O'Connor is the one to be applied; as extracted from the head note:- A. The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct fall within the wide range of reasonable professional assistance. B. With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional efforts, the result of the proceeding would have been different. A Reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. C. A number of practical considerations are important for the application of the standards set forth above. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." 132. The issue, therefore, has to be decided on

the facts as they emerge from the record : What are the facts emerging from the record of the present case before us? 133. On 19.1.2002, all the accused were produced before the learned Special Judge for the purpose of remand. On inquiry, accused Shaukat and S.A.R. Gilani stated that they would be engaging their own counsel. Accused Mohd.Afzal wanted a counsel to be engaged on his behalf at State expense. Mr. Attar Alam, Advocate was appointed as amices to defend accused Afzal. Mr. Attar Alam did not agree to act as amices for Mohd.Afzal and on 17.5.2002, Ms. Seema Gulati, Advocate agreed to act as amices for the accused. Charges were framed on 4.6.2002 and on 5.6.2002, all counsel, in the presence of the accused persons, made certain concessions resulting in the passing of the order dated 5.6.2002. Mohd.Afzal through out the trial never made a grievance that the statement was erroneous or was not authorised by him and made no attempt to withdraw the same, with the result that in terms of Section 58 of the Evidence Act, certain acts and documents referred to in the order dated 5.6.2002 stood proved on record without formal proof. On 1.7.2002, Ms. Seema Gulati moved an application for discharge. On 2.7.2002, she stood discharged and Mr. Neeraj Bansal was appointed as amices on behalf of accused Mohd.Afzal whom he had in fact engaged as his private counsel with Seema Gulati. We have gone through the record of the Trial Court and from the same we note that in fact, in May, 2002, Ms. Seema Gulati and Neeraj Bansal had jointly filed the vakalatnama duly signed by Mohd. Afzal to act as his counsels. On 8.7.2002, accused Mohd.Afzal gave the name of four counsels one out of whom he wanted to be engaged as amices for him. Two of the named counsel were contacted by the trial court to assist the accused but they declined. Similar was the case of other two. Hence when Ms. Seema Gulati got discharged, trial court asked Mr. Neeraj Bansal to continue to act as amices. On 12.7.2002, Trial Court recorded that these persons had expressed their inability to act as amices and hence Mr. Neeraj Bansal would continue to act as amices. The record of the Trial Court shows that the recording of evidence commenced on 8.7.2002. The record of Trial Court further reveals that for the first time, accused Mohd.Afzal himself cross-examined a witness being PW-20. Thereafter, he personally cross-examined PW-29, 66. All witness who deposed after PW-20 i.e. PW-21 to 80 were allowed to be personally cross-examined by accused Mohd.Afzal. Wherever required, the amices Mr. Neeraj Bansal conducted the cross-examination of the prosecution witnesses. The record shows that many witnesses were subjected to common cross-examination by all accused persons and on numerous occasions counsel for one accused was cross-examining on behalf of two or three accused persons. We do not find from the record that there was a denial of counsel to accused Mohd.Afzal. As noted, Mohd.Afzal did not object to Neeraj Bansal representing him as the counsel. It is no doubt true that he made an application on 8.7.2002 specifying the names of four counsels, one out of whom he wanted to act on his behalf, but when on 12.7.2002 the Court recorded that these persons had expressed their inability, hence Neeraj Bansal would continue to act as the amices for accused Mohd.Afzal, Mohd.Afzal continued with the trial without any objection or grievance. As regards the contention that counsel's assistance was denied to accused Mohd.Afzal and for that

matter to all accused persons when they were arrested, we may note the observations of Hon'ble Supreme Court in the judgment , Nandini Satpathy v. P.L. Dani: "Right at the beginning we must notice Article 22(1) of the Constitution, which reads : No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by a practitioner of his choice. The right to consult an advocate of his choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest or custody can be denied that right. The spirit and sense of Article 22(1) is that it is fundamental to the rule of law that the service of a lawyer shall be available for consultation to any accused person under circumstances of near-custodian interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice. Lawyer's presence is a constitutional claim in some circumstances in our country also, and, in the context of Article 20(3), is an assurance of awareness and observance of the right to silence. The Miranda decision has insisted that if an accused person asked for lawyer's assistance, at the stage of interrogation, it shall be granted before commencing or continuing with the questioning. We think that Article 20(3) and Article 22(1) may, in a way, be telescoped by making it prudent for the police to permit the advocate of the accused, if there be one, to be present at the time he is examined. Overreaching Article 20(3) and Section 161(2) will be obviated by this requirement. We do not lay down that the police must secure the services of a lawyer. That will lead to 'police-station-lawyer' system, an abuse which breeds other vices. But all that we mean is that if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-crimination secured in secrecy and by coercing the will, was the project." 134. We have noted the cross-examination conducted by counsel for the accused, jointly and singularly. From hindsight it is easy to pick holes in the cross-examination conducted but applying the test in Strickland's case (Supra), it cannot be said that it is a case of constructive denial of counsel to accused Mohd. Afzal. 135. Dealing with the second issue, namely, the media trial, the facts giving rise to the same as noticed above, is the interview of accused Mohd. Afzal allowed to be taken by reporters of various news channels on 20.12.2001 which was prominently telecasted on 20.12.2001 and 21.12.2001 and thereafter 100 days after the attack on the Parliament. It was contended by Mr. Collin Gonzalvis, counsel appearing for Mohd.Afzal and Mr. Ram Jethmalani, learned Senior Counsel appearing for S.A.R. Gilani that a media trial is antithesis of the rule of law and results in miscarriage of justice. Pre-trial publicity is sufficient to cause prejudice and hatred against the accused and the presumption of innocence of every accused person till found guilty by a court of law is eroded. Pre-trial publicity prejudicially pervades and saturates the community and renders virtually impossible a fair trial. It was argued that so insidious is bias that a person believing that he was actually acting impartially, in his unconscious mind, is affected by the bias and the decision is therefore, the result of a biased

mind. Law hates a biased mind. 136. Mr. Collin Golzalvis, learned counsel relied upon the judgments of European Court of Human Rights in Allenet De Ribemont v. France, 3/1994/450/529 Wayne Carl Coleman v. Ralph KEMP, 778 F.2d 1487 (54 US LW 2367), Samual H. Sheppard v. E.L. Maxwell, 384 U.S. 333 and Wilbert Rideau V. State of Louisiana, 373 U.S. 723. In all these judgments, what is to be noted is that the T had exposed to the community "repeatedly and in depth" the spectacle of the accused persons confessing in detail to the crimes, to which they were later charged. There were unfair and prejudicial news comments. There was a repeated telecast of the confessions. Further, the case relate to a trial by Jury. Apart from the said facts, though there are strong observations in the judgments against a trial by press, but that was held not to be a ground by itself to vitiate the trial. It was noted that where there was no real risk that the Jury would be influenced by publicity given by the print and electronic media, it could not be said that the trail stood vitiated. The time lag between the publicity and the conduct of the trial when the jury considered the evidence was to be kept in mind. 137. The position, in the Indian context would be different, and the judgment of Hon'ble Supreme Court R. Balakrishna Pillai v. State of Kerala, may be noted. It was held that where trials are conducted by Judges, the grievance relating to trial by press would stand on a different footing. Judges do not get influenced by propaganda or adverse publicity. The cases are decided on the basis of evidence on record. In the very present case, the Hon'ble Supreme Court in its judgment reported as 2003 (1) SCALE 113 Zee News v. Navjot Sandhu held that media interviews do not prejudice judges. 138. We may only add that Judges are trained, skilled and have sufficient experience to shut their minds receiving hearsay evidence or being influenced by the media. Besides, the media confession of Mohd.Afzal was aired on 20.12.2001 for the first time at night and repeated on 21.12.2001. The trial commenced after more than six months. It continued for approximately five months. Verdict was delivered on 16.12.2002. We, therefore, reject the second preliminary issue raised. 139. We may, however, lodge a caveat on this aspect of the matter. It has indeed become a disturbing feature as is being noticed by us repeatedly that the accused persons, after their remand by the Magistrate, are brazenly paraded before the press and interviews are being allowed. Accused persons are exposed to public glare through T and in case where Test Identification Parade or the accused person being identified by witnesses (as in the present case) arise, the case of the prosecution is vulnerable to be attacked on the ground of exposure of the accused persons to public glare, weakening the impact of the identification. Further, what is more fundamentally disturbing to our mind is the fact that police custody is given by the Court to the investigation authorities on the premise that the accused is required for the purpose of investigation. This custody is not to be mis-used by allowing the media to interview the accused persons. The practice of allowing the media to interview the accused persons when they are in police custody under the orders of the Court, has therefore, to be deprecated. 140. The third issue raised, namely, that there was no valid sanction for prosecution of the accused persons under POTA and for the penal code offences as well as under the Explosive

Substances Act, we may note the impact of the legal provisions. Section 50 of POTA reads as under : "50. No Court shall take cognizance of any evidence under this Act without the previous sanction of the Central Government, or, as the case may be, the State Government." 141. Section 196 of the Code of Criminal Procedure, 1973 reads as under : "196(1) No Court shall take cognizance of : (a)..... (b)..... (c)..... (2) No Court shall take cognizance of the offence of any criminal conspiracy punishable under Section 120B of the Indian Penal Code (45 of 1860), other than a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceeding: Provided that where the criminal conspiracy is one to which the provisions of Section 195 apply, no such consent shall be necessary." 142. PW-11 deposed about the request being received by the Lt.Governor for grant of sanction under Section 50 of POTA and grant of sanction under Section 196 of the Cr.P.C. For offences under Sections 121, 121A, 122, 124 read with Section 120B of I.P.C. 143. Shri Ram Jethmalani, learned Senior Counsel challenged the grant of sanctions by the Lt.Governor and argued that the same were null and void for the reasons - Section 3(60) of the General Clauses Act, 1897 defines "State" as follows : Section 3(60). "State Government" -a ..... b..... (c) "As respects anything done or to be done after the commencement of the Constitution (7th Amendment) Act, 1956, shall mean in a State, the Governor, and in a Union Territory, Central Government," 144. Thus, sanction under Section 50, in the Union Territory of Delhi had to be accorded by the Central Government was the submission. 145. Elaborating on this contention, it was submitted that Article 239 of the Constitution provides that a Union Territory shall be administered by the President acting through an Administrator appointed by him with such designation as may he specify. Article 239AA provides that from the date of commencement of the Constitution (69th Amendment) Act, 1991, the Union Territory of Delhi shall be called the National Capital Territory of Delhi and the Administrator thereof appointed under Article 239 shall be designated as the Lt.Governor. The said Article further provides that there shall be a Legislative Assembly having a council of Ministers. The Lt.Govenor is to act on the aid and advice of the council of Ministers in relation to matters with respect to which Legislative Assembly has power to make laws under Article 239AA(3)(a). The Council of Ministers has no power in respect of Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of the State List in so far they relate to the said Entries 1, 2 and 18. POTA was a law relating to the defense of India i.e. Entry 1" of List 1 and, therefore, in so far as Delhi was concerned, it was the power of Central Government was the argument. Section 41(1) of the Government of National Capital Territory of Delhi Act, 1991 provided that Lt.Governor shall act in his discretion in a matter which fell within the purview of the powers of the Legislative Assembly, but in respect of which powers or functions are entrusted or delegated to him by the President. Counsel contended that no empowerment under Article 239 of the Constitution of India in favor of the Lt.Governor conferring the powers

of the Central Government under POTA have been shown to exist. He further contended that Section 50 of POTA read with Section 3(60)(c) of the General Clauses Act, 1897 required sanction of the Central Government in so far as Delhi was concerned. The argument was extended in reference to Article 239 and 239AA, in that, a person appointed as Administrator under Article 239 of the Constitution had then to be appointed to the office of Lt.Governor under Article 239AA and there was no Notification to this effect. 146. Counsel relied upon the judgment of Hon'ble Supreme Court reported as , Goa Sampling Employees' Assn. v. General Superintendence Co. of India Pvt. Ltd. and Ors. 147. The contention has to be noted and rejected for the reason that Article 239 of the Constitution provides that for the purpose of administering Union Territories, the President may appoint Administrators with such designation as he may specify (Emphasis ours). Article 239(1) of the Constitution reads as under: "239 Administration of Union Territories - (1) Save as otherwise provided by Parliament by law, every Union territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify." 148. The Constitution (69th Amendment) Act, 1991 inserted Article 239AA in the Constitution of India. It reads as under: "239AA Special provisions with respect to Delhi.- (1) As from the date of commencement of the Constitution (Sixty ninth Amendment) Act 1991, the Union Territory of Delhi shall be called the National Capital Territory of Delhi (hereinafter in this part referred to as the National Capital Territory) and the administrator thereof appointed under Article 239 shall be designated as the Lieutenant Governor. (2)..... (3(a) Subject to the provisions of this Constitution, the Legislative Assembly shall have power to make laws for the whole or any part of the National Capital Territory with respect to any of the matters enumerated in the State List or in the Concurrent List in so far as any such matter is applicable to Union territories except matters with respect to Entries 1, 2 and 18 of the State List and Entries 64, 65 and 66 of that List in so far as they relate to the said Entries 1, 2 and 18. 149. Thus, in the context of the Union Territory of Delhi, the Constitution, constitutionally designated the Administrator as the Lt. Governor. Hence, distinction between the Administrator and the Lt.Governor is mis-conceived. The scheme of the Constitution, in relation to the Union Territory of Delhi would not require two Notifications, one appointing an Administrator and the other designating him. Further, Section 2(h) of POTA defines"State", in relation to a Union Territory to mean the Administrator thereof. Section 2(1)(h) of POTA reads as under : 2(1)(h)"State Government", in relation to a Union Territory, means the Administrator thereof. 150. POTA as Central Legislation itself delegates the powers of sanction to the Administrator i.e. the Lt.Governor in the Union Territory of Delhi. We may note that Article 239AA(3)(b) provides that nothing in Subclause (a) shall derogate from the power of Parliament under this Constitution to make laws with respect to any matter for a Union Territory or a part thereof, In view of the specific delegation under Section 2(h) of POTA, reliance upon Section 3(60)(c) of the General Clauses Act and the Government of National Capital Territory of Delhi ACT, 1991 is mis-placed and so is the reliance on

the judgment of the Supreme Court in Goa Sampling Employees Association case (supra). 151. We may note that the order communicating sanction under POTA being Ex.PW-11/1, records that the Lt.Governor was acting"in exercise of powers conferred by Section 50 read with Clause (h) of Sub-section (1) of Section 2 of POTA." As far as sanction for offence under the Penal Code is concerned, Notification No. 11011/2/74/UTL-(1) dated 20.3.1974, copy whereof was produced for our perusal, shows that the Lt.Governor was delegated the power under Section 196 of the Code of Criminal Procedure. Order conveying the sanction being Ex.PW-11/2 records that the Lt.Governor was acting "in exercise of the powers conferred by Sub-section (1) of Section 196 of the Code of Criminal Procedure, 1973 read with Government of India, Ministry of Home Affairs Notification No. 11011/2/74/UTL-(1) dated 20.3.1974." 152. The second ground on which the sanction was challenged was by placing reliance on the judgment of Privy Council, reported as AIR 1948 Privy Council 82, Gokulchand Dwarkadass Morarka v. The King. It was contended that law requires that it must be proved that sanction was given in respect of the facts constituting the offence charged, in that, facts should be referred to on the face of the sanction. 153. In Gokulchand Dwarkadass Morarka case (supra), it has been held as under: "A sanction which simply names the person to be prosecuted and specifies the provision of the Order which he is alleged to have contravened is not a sufficient compliance with Clause 23. In order to comply with the provisions of Clause 23, it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is plainly desirable that the fact should be referred to on the face of the sanction, but this is not essential since Clause 23 does not require the sanction to be in any particular form, nor even to be in writing. But if the facts constituting the offence charged are not shown on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority. The sanction to prosecute is an important matter; it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction. They are not concerned merely to see that the evidence disclosed a prima facie case against the person sought to be prosecuted. They can refuse sanction on any ground which commends itself to them, for example, that on political or economic grounds they regard a prosecution as inexpedient. Where facts are not referred to on the face of the sanction nor is it proved by extraneous evidence that they were placed before the sanctioning authority, the sanction is invalid and the trial court would no be a court of competent jurisdiction." 154. In , Jaswant Singh v. State of Punjab, it was held as under : "The sanction under the Prevention of Corruption Act is not intended to be nor is an automatic formality and it is essential that the provisions in regard to sanction should be observed with complete strictness. The object of the provision for sanctions is that the authority giving the sanction should be able to consider for itself the evidence before it comes to a conclusion that the prosecution in the circumstances be sanctioned or forbidden. It should be clear from the form of the sanction that the sanctioning authority considered the evidence before it and after consideration of all the circumstances of

the case sanctioned the prosecution, and therefore unless the matter can be proved by other evidence, in the sanction itself the facts should be referred to indicate that the sanctioning authority had applied its mind to the facts and circumstances of the case," 155. We have noted the deposition of PW-11. He has proved Ex.PW-11/1, being the order by which he conveyed the sanction. It reads as under : "F.No.11/23/2002/HP-11/5507 - Whereas on consideration of the allegations made in case FIR No. 417/2001 dated the 13th December, 2001, registered under Sections 3/ 4/5/20/21 of the Prevention of Terrorism Act, 2002 (15 o 2002), 121/121A/122/124/186/332/353/ 302/307/120-B of the Indian Penal Code , 1860 (45 of 1860), Sections 25/27 of the Arms Act and sections 4/5/6 of the Explosive Substances Act (6 of 1908) at Police Station Parliament Street, New Delhi, recovery memos, disclosure statement made by the accused persons the draft charge-sheet and other material/evidence placed on record, the Lt.Governor of the National Capital Territory of Delhi is satisfied that the accused persons, namely, (i) Shri Syed Abdul Rehman Gilani, son of Shri Syed Abdul Wall Gilani, resident of 535, 2nd Floor, Mukherjee Nagar, New Delhi, (ii) Mrs. Klavjot Sandhu @ Afsan Guru, wife of Shri Shaukat Hussain Guru, resident of 1021, 1st Floor, Mukherjee Nagar, New Delhi, (iii) Shri Mohd.Afzal, son of late Shri Habibullah, resident of Vill.Seer Jagir, Police Station Sopore, Distt. Baramullah (Jammu & Kashmir) and (iv) Shri Shaukat Hussain Guru, son of Abdul Sattar Guru, resident of Vill.Doabga, Sopore, Distt.Baramullah (Jammu & Kashmir), at present - 1021, 1st Floor, Mukherjee Nagar, New Delhi, have prima fade, committed offences punishable under Sections 121/121A/122/124/120-B of the Indian Penal Code, 1860 (45 of 1860), being involved in criminal conspiracy to commit the said offences with the intention of waging war against the Government of India along with other offences. And whereas it is necessary in the interest of justice that the criminal proceedings should be initiated against the said accused persons, in the Court of competent jurisdiction, for their trial in respect of the said offences alleged to have been committed by them. Now, therefore, in exercise of the powers conferred by Section 50 read with Clause (h) of Sub-section (1) of Section 2 of the Prevention of Terrorism Act, 2002 (No.15 of 2002), the Lt.Governor of the National Capital Territory of Delhi, hereby grants sanction for the initiation of criminal proceedings against the said accused persons, namely, (i) Shri Syed Abdul Rehman Gilani, son of Shri Syed Abdul Wali Gilani, resident of 535, 2nd Floor, Mukherjee Nagar, New Delhi, (ii) Mrs. Navjot Sandhu @ Afsan Guru, wife of Shri Shaukat Hussain Guru, resident of 1021, 1st Floor, Mukherjee Nagar, New Delhi, (iii) Shri Mohd.Afzal, son of late Shri Habibullah, resident of Vill.Seer Jagir, Police Station Sopore, Distt. Baramullah (Jammu & Kashmir) and (iv) Shri Shaukat Hussain Guru, son of Abdul Sattar Guru, resident of Vill.Doabga, Sopore, Distt.Baramullah (Jammu & Kashmir), at present - 1021, 1st Floor, Mukherjee Nagar, New Delhi, in the court of competent jurisdiction, for committing the said offences punishable under Sections 3/4/5/20/21 of the Prevention of Terrorism Act, 2002 (No. 15 of 2002), being involved in criminal conspiracy to commit the said offences with the intention of waging war against the Government of India, apart from other offences." 156. He also proved the

order conveyed by him pertaining to the sanction accorded under Section 196 Cr.P.C. The same reads as under : "RNo.11/24/2002/HP-11/5511 - Whereas on consideration of the allegations made in case FIR No. 417/2001 dated the 13th December, 2001, registered under Sections 121/121A/122/124/120-B of the Indian Penal Code, 1860 (45 of 1860), Sections 25/27 of the Arms Act, 1959 (54 of 1959) and Sections 3/4/5/6 of the Explosive Substances Act (6 of 1908) at Police Station Parliament Street, New Delhi, recovery memos, disclosure statement made by the accused persons, the draft charge-sheet and other material/evidence placed on record, the Lt.Governor of the National Capital Territory of Delhi is satisfied that the accused persons, namely, (i) Shri Syed Abdul Rehman Gilani, son of Shri Syed Abdul Wali Gilani, resident of 535, 2nd Floor, Mukherjee Nagar, New Delhi, (ii) Mrs. Navjot Sandhu @ Afsan Guru, wife of Shri Shaukat Hussain Guru, resident of 1021, 1st Floor, Mukherjee Nagar, New Delhi, (iii) Shri Mohd.Afzal, son of late Shri Habibullah, resident of Vill.Seer jagir, Police Station Sopore, Distt. Baramullah (Jammu & Kashmir) and (iv) Shri Shaukat Hussain Guru, son of Abdul Sattar Guru, resident of Vill.Doabga, Sopore, Distt.Baramullah (Jammu & Kashmir), at present - 1021, 1st Floor, Mukherjee Nagar, New Delhi, have prima facie, committed offences punishable under Sections 121/121A/122/124 read with 120-B of the Indian Penal Code, 1860 (45 of 1860), being involved in criminal conspiracy to commit the said offences with the intention of waging war against the Government of India Along with other offences. And whereas it is necessary in the interest of justice that the criminal proceedings should be initiated against the said accused persons, in the Court of competent jurisdiction, for their trial in respect of the said offences alleged to have been committed by them. Now, therefore, in exercise of the powers conferred by of Sub-section (1) of Section 196 of the Code of Criminal Procedure, 1973 (2 of 1974) read with the Government of India, Ministry of Home Affairs notification No. 11011/2/74/UTL-(1) dated 20th March, 1974, the Lt.Governor of the National Capital Territory of Delhi, hereby grants sanction for the initiation of criminal proceedings against the said accused persons, namely, (i) Shri Syed Abdul Rehman Gilani, son of Shri Syed Abdul Wali Gilani, resident of 535, 2nd Floor, Mukherjee Nagar, New Delhi, (ii) Mrs. Navjot Sandhu @ Afsan Guru, wife of Shri Shaukat Hussain Guru, resident of 1021, 1st Floor, Mukherjee Nagar, New Delhi, (iii) Shri Mohd.Afzal, son of late Shri Habibullah, resident of Vill.Seer Jagir, Police Station Sopore, Distt. Baramullah (Jammu & Kashmir) and (iv) Shri Shaukat Hussain Guru, son of Abdul Sattar Guru, resident of VIII. Doabga, Sopore, Distt.Baramullah (Jammu & Kashmir), at present - 1021, 1st Floor, Mukherjee Nagar, New Delhi, in the court of competent jurisdiction , for committing the said offences punishable under Sections 121/121A/122/124/120-B of the Indian Penal Code, 1860 (45 of 1860), being involved in criminal conspiracy to commit the said offences with the intention of waging war against the Government of India, apart from other offences." 157. The witness had brought the original files pertaining to both the sanctions and had clearly deposed that file when put up to the Lt.Governor contained copy of the FIR, draft charge-sheet, seizure memo, copy of the site plan, disclosure statements, statements of witnesses, FSL report and

the prosecutor's opinion. He had put up the file before the Principal Secretary, who in turn placed it before the Lt.Governor. While putting up the files, notes were prepared drawing attention of the Lt.Governor to the role of individual persons accused of the offence. 158. On the ratio of the judgments in Gokulchand Dwarkadass Morarka case (supra), it, therefore, cannot be said that there was no valid sanction. 159. Turning to the second sanction accorded by the Commissioner of Police under Section 7 of the Explosive Substances Act, PW-12 has deposed that file was put up to the Commissioner of Police which contained copy of the FIR, list of accused persons and witnesses, confessional statements, statements of witnesses, site plan, CFSL report and draft charge-sheet. He had communicated the sanction accorded by the Commissioner of Police under his signatures vide letter Ex.PW-12/1. Testimony of this witness went unchallenged in respect of the deposition by him as to what material was placed and considered by the Commissioner of Police. Thus, the sanction accorded under Section 7 of the Explosive Substances Act meets the requirement of law. 160. We may now note the fourth issue raised by the defense. Contention raised was that POTA had certain statutory safeguards and, therefore, all evidence collected prior to 19.12.2001 had to be ignored in relation to the POTA offences. Reliance was placed on Sections 36 to 48, 51 and 52 of POTA. Contention was that since POTA took away valuable right especially pertaining to bail, the legislative intent was to provide for some minimum safe guards for the benefit of the accused. It was argued that on the face of the F.I.R. POTA provisions stood attracted and that the investigation by not ad-ding POTA provision in the FIR at the initial stage circumvented the statutory safe guards. Reply of the prosecution was that the Supreme Court in various judgments had cautioned the investigation not to rush to conclusions that TADA offences were made out without their being adequate material on record. This caution was administered by the Supreme Court in the context of provisions curtailing the right of the accused to get bail as also the extended period for filing of charge sheet. POTA contains similar provisions. Therefore, not adding POTA provisions at the inception was justified. 161. A defect in an investigation does not vitiate a trial unless prejudice is shown. Has one been shown? Section 52 of POTA dealing with arrest 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 signatures 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." 162. In , D.K. Basu v. State of West Bengal the Hon'ble Supreme Court laid down guidelines to be followed by the police when an accused is arrested. Guidelines 2, 3 and 10 are substantially the same as

incorporated in Section 52 of POTA. Guidelines 2, 3 and 10 read as follows :- "2. That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest. 3. A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee. 10. The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation." 163. Whether on facts, there is a violation, is a different matter and would be dealt with when we discus the evidence. But as a mere proposition, no prejudice would be caused if POTA provisions were there or not qua the eights of the accused when arrested. 164. Sections 36 to 48 POTA deal with interception of communications and, inter alia, provide that there shall be a competent authority not below the specified rank, i.e. Joint Secretary in the Center and Secretary in a State who shall grant sanction for interception and when so granting shall satisfy himself that Sub-section (1) of Section 39 warrants an interception. The order granting sanction shall specify the details provided in Sub-section (2) of Section 39. The order shall be reviewed by a review committee. Section 43 provides for interception in case of emergency. It reads as follows : 43. Interception of communication in emergency (1) Notwithstanding anything contained in any other provision of this-Chapter, an officer not below the rank of Additional Director General of Police or a police officer of equivalent rank who reasonably determines that- (a) an emergency situation exists that involves - (i) immediate danger of death or serious physical injury to any person; (ii) conspiratorial activities threatening the security or interest of the State; (iii) conspiratorial activities, characteristic of a terrorist act, that requires a wire, electronic or oral communication to be intercepted before an order from the Competent Authority authorising such interception can, with due diligence, be obtained; and (b) there are grounds on which an order should be issued under this section to authorise such interception, may authorise, in writing, the investigating officer to intercept such wire, electronic or oral communication, if an application for an order approving the interception is made in accordance with the provisions of Sub-sections (1) and (2) of Section 38 within forty-eight hours after the interception has occurred, or begins to occur. (2) In the absence of an order approving the interception made under Sub-section (1), such interception shall immediately terminate when the communication sought is obtained or when the application for the order is rejected, whichever is earlier, and in the event of an application for permitting interception being rejected under Sub-section (1) of Section 39 or an application under Sub-section (1) of this section for approval being rejected, or in any other case where the interception is terminated without an order having been issued, the contents of any

wire, electronic or oral communication intercepted shall be treated as having been obtained in violation of this section. 165. General interception is provided for under Rule 419A of the Indian telegraph Rules, 1951. It reads as under : 419-A (1) : Directions for interception of any message or class of messages under Sub-section (2) of Section 5 of the Indian Telegraph Act, 1885, (hereafter referred to as the said Act) shall not be issued except by an order, made by the Secretary to the government of India in the ministry of Home Affairs in the case of Government of India and by the Secretary to the State Government in charge of the Home Department in the case of a State Government. In emergent cases, such order may be made by an officer not below the rank of a Joint Secretary to the Government of India, who has been duly authorised by the Union Home Secretary or the State Home Secretary, as the case may be. Such order shall contain reasons for such direction. A copy of such order shall be forwarded to the concerned Review Committee within a period of seven days: Provided that in emergent cases : (i) in remote areas, where obtaining of prior directions or interception of messages or class of messages is not feasible; or (ii) for operational reasons, where obtaining of prior directions for interception of messages or class of messages is not feasible; the officer concerned may carry out the required interception of messages or class of messages, subject to its confirmation from the concerned competent officer within a period of fifteen days. (2) While issuing directions under Sub-rule (1), the officer shall consider possibility of acquiring the necessary information by other means and the directions under Sub-rule (1) shall be issued only when it is not possible to acquire the information by any other reasonable means. (3) The interception directed shall be interception of any message or class of message as are sent to or from any person or class of persons or relating to any particular subject whether such message or class of messages are received with one or more addresses, specified in the order, being an address or addresses likely to be used for the transmission of communications from or to one particular person specified or described in the order or one particular set or premises specified or described in the order. (4) The directions shall specify the name and designation of the officer or the authority to whom the intercepted message or class of messages is to be disclosed and also specify that the use of intercepted message or class of messages shall be, subject to the provisions of Sub-section (2) of Section 5 of the said Act and the copies of the intercepted message or class of messages shall be destroyed when no longer required. (5) The direction for interception shall remain in force, unless revoked earlier, for a period not exceeding ninety days from the date of issue and may be renewed but same shall not remain in force beyond a total period of one hundred and eighty days. (6) The officer issuing the directions for interception shall also make a request in writing to the Telegraph Authority who shall extend the facilities and cooperation for interception mentioned in the directions. (7) The officer authorised to intercept any message or class of messages shall maintain proper records mentioning therein, the intercepted message or class of messages, the particulars of the persons whose messages has been intercepted, the name and other particulars of the officer or the authority to whom the intercepted message or class of messages has been disclosed, the number of copies of the in-

tercepted message or class of messages made and the modes or method by which copies are made, the date of destruction of the copies and the duration within which the directions remain in force. (8) The Central Government and the State Government as the case may be, shall constitute a Review Committee. The Review Committee to be constituted by the Central Government shall consist of the following, namely :- (a) Cabinet Secretary..... Chairman (b) Secretary to the Government of India In-charge, legal Affairs... Member (c) Secretary to the Government of India Ministry of Telecommunication... Member The Review committee to be constituted by a State Government shall consist of the following, namely - (a) Chief Secretary ... Chairman (b) Secretary, Law/Legal Remembrancer"... Member (c) Secretary to the State Govt. (other than the Home Secretary)... Member (9) Review Committee within a period of sixty days from the issue of directions shall suo motu make necessary inquiries and investigations and record its findings whether the directions issued under Sub-rule (1) are in accordance with the provisions of Sub-rule (2) of Section 5 of the Act. When the Review Committee is of the opinion that the directions are not in accordance with the provisions referred to above, it may set aside the directions and order for destruction of the copies of the intercepted message or class of messages." 166. Section 43 of POTA dealing with interception in case of emergency situation and rule 419A of the Indian Telegraph Rules, 1951 are virtually the same. Thus, as a mere proposition, no prejudice would be caused if POTA provision were added or not, qua the right of the accused pertaining to interception. 167. Regarding investigation, Section 51 of POTA reads as under : "51. Officers competent to investigate offences under this Act Notwithstanding anything contained in the Code, no police officer - (a) in the case of the Delhi Special Police Establishment, below the rank of a Deputy Superintendent of Police or a police officer of equivalent rank; (b) in the metropolitan areas of Mumbai, Kolkata, Chennai and Ahmedabad and any other metropolitan area notified as such under Sub-section (1) of Section 8 of the Code, below the rank of an Assistant Commissioner of Police; [c] in any other case not relatable to Clause (a) or Clause (b), below the rank of a Deputy Superintendent of Police or a police officer of an equivalent rank, shall investigate any offence punishable under this Act. 168. The issue is no longer res-integra. As far back as in the year 1955, it was the subject matter of consideration before the Supreme Court in the case of H.N. Rishbud and Anr. v. State of Delhi, . The Court was dealing with the prosecution of the accused persons before a special Judge for offences under the Indian Penal Code as well as Prevention of Corruption Act, 1947. Section 5(4) of the Prevention of Corruption Act, 1947 provided that a police officer below the rank of Deputy Superintendent of Police shall not investigate any offence punishable under Sub-section (2) of Section 5 without the order of the Magistrate of first class. Investigation was conducted not by Deputy Superintendent of Police but by officers of lower rank and after the permission was obtained for investigating the offences under the Prevention of Corruption Act, 1947, little or no further investigation was made. What was fate of the trial which was held on the basis of the charge-sheet filed? Taking note of the scheme of Chapter 14 of the Code of Criminal Procedure, 1898 (corresponding

to Chapter 12 of the Code of Criminal Procedure, 1973) it was held that investigation consists of ascertaining of facts and circumstances of the case, resulting finally in the formation of an opinion as to whether or not there is a case to proceed against the accused persons and subjecting them to trial. It was followed by the cognizance and thereafter trial, it was held :"(9) The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now, trial follows cognizance and cognizance is preceded by investigation. This undoubtedly is the basic scheme of the Code in respect of cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the Court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises. A defect or illegality in investigation, however, serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190 Cr.P.C. as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190 Cr.P.C. is one out of a group of section under the heading "Conditions requisite for initiation of proceedings". The language of this section is in marked contrast with that of the other sections of the group under the same heading i.e. Sections 193 and 195 to 199. These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases expecting in compliance therewith. But Section 190 does not. While no doubt, in one sense, Clauses (a), (b) and (c) of Section 190(1) are conditions requisite for taking cognizance on an invalid police report is prohibited and is, therefore, a nullity. Such an invalid report may still fall either under Clause (a) or (b) of Section 190(1). (Whether it is the one or the other we need not pause to consider) and in any case cognizance so taken is only in the nature of error in a proceeding antecedents to the trial." 169. On facts, investigation which had commenced pursuant to the registration of FIR against the accused persons under Section 120B IPC, Section 420 IPC and Section 7 of the Essential Supplies (Temporary Powers) Act, 1946 by a junior police officer lead to certain facts emerging which showed that an offence under the Prevention of Corruption Act, 1947 was made out. The provisions of Prevention of Corruption Act, 1947 were added to the FIR and thereafter permission was taken from the Magistrate. The investigation continued and an officer of the rank of Deputy Superintendent of Police took over the investigation. Virtually, no further investigation was done. The charge-sheet was filed against the accused persons for having committed the offence under the Indian Penal Code as well as under the Prevention of Corruption Act, 1947. Trial was held to be valid and evidence gathered was admitted at the trial. 170. These observation have been reiterated by Hon'ble Supreme Court in the judgment reported as 2003 AIR SCW 3258, Union of India v. Prakash P. Hinduja and Anr. For this reason we find no substance in the contentions raised by the appellants on this issue. 171.

Coming to the fifth issue raised, it raises a question as to what is war and what is a terrorist act and what are the consequences. : 172. Section 3(1) of POTA gives the contours of what constitutes a "terrorist act". It reads as follows:- "3. Punishment for terrorist acts - (1) Whoever (a) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does not act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other Chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment with any other purposes of the Government of India, any State Government used or intended to be used for the defense of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act; (b) is or continues to be a member of an association declared unlawful under the Unlawful Activities (Prevention) Act, 1967 (37 of 1967), or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property, commits a terrorist act." 173. Section 3(1) of the Terrorist & Disruptive Activities (Prevention) Act, 1987 (here-in-after referred to as TADA) defined terrorist act as: Section 2(1)(h). "Terrorist Act" has the meaning assigned to it in Sub-section (1) of Section 3, and the expression "terrorist" shall be construed accordingly. Section 3(1) of TADA reads as under: "3. Punishment for terrorist acts. (1) Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or fire-arms or other lethal weapons or poisons or noxious gases or other Chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies of services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act." 174. Comparison of POTA and TADA shows that the two statutes define terrorist act with substantial similarity, the difference being that in TADA 'acts intended to overawe the Government as by law established and acts intended to alienate any section of the people or to adversely affect the harmony amongst different sections of the people' were terrorist acts. These categories of acts are found missing in

POTA but 'acts done with intention to threaten the unity, integrity, security or sovereignty of India' are terrorist acts under both statutes. The 'acts' have to be by use of arms, ammunition, noxious substances or Chemicals, referred to in both provision. We find that the purport and intent is substantially common. 175. While considering the applicability of TADA vis-a-vis same act constituting offences under the Penal Code, the Hon'ble Supreme Court held that it is not possible to give a precise definition of terrorism or lay down what constitutes terrorism but: "It may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travels beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb harmony of the society or"terrorise" people and the society and not only those directly assaulted, with a view to disturb even tempo, peace and tranquility of the society and create a sense of fear and insecurity. A 'terrorist' activity does not merely arise by causing disturbance of law and order or of public order. The fall out of the intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law." 176. It was held that a criminal activity becomes a terrorist act where it is committed with the requisite intention as contemplated by Section 3(1) of TADA by use of such weapons as have been enumerated in Section 3(1) and which cause or are likely to result in the offences mentioned in said section. The court, in the context of the Constitution Bench judgment in Kartar Singh v. State of Punjab, which upheld the constitutional validity of TADA observed that: It is, thus, seen that most of the criminal activities constituting a terrorist act and offences under the penal law, do overlap.'177. All counsels agreed that indeed what happened on 13.12.2001 at Parliament House in the forenoon was a terrorist act as defined in POTA. Notwithstanding that none disputed that it was a terrorist act we shall none the less deal with it in relation to the evidence on record since it is a case involving capital sentence and would not return our finding on counsels concessions. 178. Section 121 IPC is a penal provision pertaining to offence of waging war against the Government of India. It reads as under:- "121. Waging, or attempting to wage war, or abetting waging of war, against the Government of India. Whoever, wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine." 179. At the outset it may be noted that Section 121 does not deal with war against 'The State'. It deals with war against the Government of India. 180. 'War' has not been defined in the Penal Code. War is a jural concept. 181. Sh. Ram Jethmalani, learned Senior Counsel urged that though even a lay person can perceive and comprehend a war in the context of its features, it cannot be defined with logical precision. Concept of war from primitive days when bows, arrows and slings were used as weapons to over throw clans and tribes to sub-

jugate them or possess their land and wealth, modern day wars have different concept. Learned counsel, however, urged that for an act or a series of acts to be labelled as war, following attributes must be present: (i) An objective to over throw the government by conquest of territory or by compelling some form of conduct or establishing an ideology or form of government. (ii) Means employed must be arms and ammunition and killing or overpowering of combatants, as distinct from killing civilians though they may be incidentally killed. (iii) Number of participants, scale of violence and nature of operation should be on a sufficiently large scale. (iv) A declaration by the competent executive authority of the State declaring a state of war. 182. Counsel contended that a fidayeen operation by five armed persons can at best qualify as an terrorist act. They cannot be exalted to the position of terrorists. Counsel contended that war is fought according to rules contained in the Hague Convention and other international covenants. Opposing participants qualify as prisoners of war, not amenable to the jurisdiction of domestic criminal courts. Only terrorists can be punished by municipal law. Learned counsel cited passage from Yoram Dinstein's book on "AGGRESSION" where Oppenheim's treatise on International Law pertaining to war was discussed by the author. Learned counsel referred to "The Law of Wars" by Ingrid Detter, where terrorism was defined basically as 'extortionate' since its perpetrators seek to obtain certain ends by force. It was opined by the learned author that 'intermittant time factor is a typical feature of terrorism'. Treacherous attack by surprise was the back-bone of terrorism's most distinctive feature. Lastly, counsel referred to decision reported as (1938) 61 LLL.Rep. 131 Kawasaki Kisen Kabushiki v. Bantham Steamship Company, decision of the U.S. Supreme Court in Alexander Kahn v. August V. Anderson, October Term 1920, and finally to the decision of the award dated 18.12.1976 pronounced by the International Chamber of Commerce, Arbitration Tribunal in Dalmia Cememt Ltd. v. National Bank of Pakistan. 183. Sh. Gopal Subramanium, learned Senor Counsel for the prosecution urged that acts falling in the definition of terrorist act as defined would, without exception, be terrorist acts, however, in a given situation the acts may go further and may as well constitute waging war against the Government of India. Counsel contended that the four attributes as being the essential features of a war applied when two states went to war and the three judgments cited by the defense dealt with "inter state war" and not "intra state war". Counsel urged that a perusal of the illustration to Section 121 gave the clue as to what the legislative meant as waging war. If joining an insurrection against the Government amounted to committing the offence of waging war against the Government of India, it showed that the legislative intent was not to restrict Section 121 to cases of armed conflict on the magnitude at which rival states engaged themselves in an armed conflict when they went to war with each other. 184. The four attributes which Sh. Ram Jethmalani, learned Senior Counsel urged us to accept as being essential for an act to constitute war, in our opinion would be appropriate in dealing with the concept of war between two rival states. 185. The phrase 'war' in ordinary parlance is to heighten the effect of an oral agreement or a written communication. As aptly described by Yoram Dinstein in his book 'Aggression' the word 'war'

is a flexible expression suitable for an allusion to any serious strife, struggle or campaign. Loosely it may be used in expression such as "war of words", "war of nerves" etc. But this is a matter of poetic license. To understand the meaning of "war" a distinction has to be drawn between what war signifies in the domestic law of a State and what it denotes in International Law. Decisions of domestic courts in Municipal laws are no precedents for they are rendered in the context of the term "war" used in a particular legal system. Similarly issues germane to international law would not apply to domestic laws. Recognising the aforestated, Oppenheim excluded civil wars from his definition. Even Yoram Dinstein, passages from whose book Sh. Ram Jethmalani quoted at the bar, while dealing with the issue lodged the caveat: " Inter-State and intra-State wars. Of the four ingredients in Oppenheim's definition of war, only the first can be accepted with no demur. 'One element seems common to all definitions of war. In all definitions it is clearly affirmed that war is a contest between states.' Some qualifying words should nevertheless be appended. International law recognizes two disparate types of war: inter-State wars (waged between two or more States) and intra-State wars (civil wars conducted between two or more parties within a single State). Traditionally, civil wars have been regulated by international law only to a limited extent. More recently, in view of the frequent incidence and ferocity of internal armed conflicts, the volume of international legal norms apposite to them has been constantly expanding. Still, many of the rules applicable to and in an intra-State strife are fundamentally different from those relating to an inter-State war. Hence, Oppenheim was entirely right in excluding civil wars from his definition. In the present study, inter-State armed conflicts will constitute the sole object of our inquiry." 186. The learned author at a later part of his treaties, while dealing with war in the technical and material sense observed: "War in the material sense unfolds regardless of any formal steps. Its occurrence is contingent only on the eruption of hostilities between the parties, even in the absence of a declaration of war. This is where Oppenheim's reference to a violent struggle is completely apposite. The decisive factor here is deeds rather than declarations. What counts is not a de jure state of war, but de facto combat. Granted, even in the course of war in the material sense, hostilities do not have to go on incessantly and they may be interspersed by periods of cease-fire (see infra, ch.2, C). But there is no war in the material sense without some acts of warfare." Further observes the author: "Yet, not every war is aimed at total victory. Oppenheim completely overlooked the feasibility of limited wars. Such wars are, in fact, of considerable frequency and import. In a limited war, the goal may be confined to the defeat of some segments of the opposing military apparatus, the conquest of certain portions of the opponent's territory, the coercion of the enemy Government to alter a given policy, etc., without striving for total victory." 187. Thus, where the goal is a complete subjugation of the enemy and a State mobilises all its resources in full measure and goes into offensive with all its military might, undeniably, it is war. But this is not the only concept of war. A dispute, like a bonder rectification mere so where it comes with an emotional load, if sought to be attained with force may well be a war. Hostilities do not cease to be wars merely because

some weapons remain on the shelf, Yorom Dinstein himself opined that there may be a broad array of causes for such say restraint: lofty moral impulses, concession to public opinion at home and abroad, desire to avoid colossal losses, fear of retaliation or purely military considerations. 188. Ingrid Detter in "The Law of wars" illuminates us a little further. The learned author opines that the hallmark of terrorism invariably implies a demand that certain acts are taken by someone else. According to the author this leads us to: 'Terrorism is thus basically extortionate as its perpetrators seek to obtain their ends by force. This force is not applied against the person who can grant the wishes of the terrorists but against some other person intending to pressurise the person in authority. Hijacking of aeroplanes, kidnapping citizens, planting bombs and killing citizens are examples of the force used by terrorists to achieve their ends. But the learned author concludes that terrorist tactics may be adopted in war "Guerilla War." 189. In our opinion, wars may occur where belligerents are not States. Individuals having different allegiance, especially political, may engage themselves against the State by use of arms. The scale of the aggression would be determinative of the fact whether the act (s) constitute war. Further, the definition of war in the municipal statute would guide. 190. Insurgency is treated to be an act of waging, war against the Government of India. We have dealt with what the Parliament of India means in the jural concept. It is the seat of the sovereignty of India. It symbolises the being of the Nation i.e. "India that is Bharat". A full blooded attack on the parliament when it is in Session would indeed be an act of war against the Government of India. The number of the combatants are only indicative of, certainly not determinative of, whether the attack would be an act of war. The five power available, to our mind, would be more decisive. To illustrate, a single person may have infiltrated into India with a nuclear bomb, a missile and a navigation system to guide a missile. He uses it to bomb the parliament when it is in Session and particularly when the President of India is to address it. The entire executive and the legislature is present. The President is there, the Vice-President is there, the Prime Minister, his entire cabinet is there. All members of Parliament are there. He intends by his attack to wipe out the entire legislative and executive body. This solitary act by one man would be more devastating then a 1000 armed men attacking the Parliament. Indeed, it would be an act of war. 191. Five or six heavily armed combatants who storm a public building, kill or take hostage civilians or for that matter highly respected citizens intend to only force the Government of India to concede to their demands. The act may not amount to waging war against the Government of India. But where the seat of the government of India itself is attacked, position would be entirely different. The two are uncomparable situations. 192. Have we reached the right conclusions, let us instruct ourselves by prying into the foliage of the past. 193. In 1781, Mansfield C.J. In R v. Gorden, (1781) 21 St. Tr.486 laid down: "There are two kinds of levying war. One against the person of the king, to imprison, to dethrone, or to kill him, or to make him change measures, or to remove counsellors. The other, which is said to be levied against the Majesty of the Kings or, in other words, against him in his legal capacity; as when a multitude rise and assemble to attain by force

and violence any object of a general public nature; that is levying war against the Majesty of the King." 194. In 1820, Lord President Hope in his charge to the jury in R v. Wilson (1820) 1st Tr.(n.s) at pp 1353, 1354 observed: "The circumstances necessary to constitute a levying of war is not that there shall be a regular trained force, nor a regular army, and, indeed, from the nature of the thing in common sense, I am sure it must strike you that, except where a foreign enemy invades the country, war can never be levied in that manner in the commencement of an insurrection. .... What is a treasonable number, as the counsel for the Crown very properly put it? What is the quantity of arms persons must have? The offence is not in their numbers, not in their force, but, in the language of the law and all the authorities, it is in the object and purpose which they have in view. ..... I lay down, as the undoubted law of the lands that the smallest body which rises in arms to effectuate a general purpose is treasonable, and constitutes a levying of war". 195. In 1839, Tindal C.J. In charging the Grand Jury in R v. Frost (1839) 4 St.Tr. (n.s) 89 laid down: "An assembly of means armed and arrayed in war like manner with any treasonable purpose, is a levying of war, although no blow be struck." 196. Nearer home, in AIR 1931 Rongoon 235, Page C.J. In the context of waging war and rioting held:- "Whether a body of persons are rioters or rebels in quo animo." 197. In AIR 1933 A11.690 S.H. Jhabwala v. Empror and AIR 1946 Nagpur 173 Maganlal Radhakrishnan v. Emperor it was held that numbers and what they were equipped with was not material. The intention of the participants if it was for purpose of depriving the government of its sovereignty, was relevant and would fall within the corners of Section 121 IPC. 198. We deal with the sixth issue raised pertaining to the alleged deficiencies in the charges. 199. Charge No. 1, 9, 12, 15 and 16 read as under: "Firstly, that on and before 13-12.01, you all along with Mohd. Masood Azhar, Ghazi Baba @ Abu Jehadi @ Abu Saqlain and Tariq Ahmed - all Pak Nationals and proclaimed offenders (P.Os) and along with Mohammad, Haider, Hamja, Raja and Rana (all Pak nationals and deceased terrorists in attack on Parliament of India) and some other unknown persons, hatched up a conspiracy to procure arms and ammunitions and to attack Indian Parliament at New Delhi, when the Parliament was in session and in the process to make hostages or kill Prime Minister and other Central ministers and members of Parliament, Vice President and other VIPs., security personnels, in and around the Parliament House and thereby to wage a war against India and to kill the persons and to commit terrorist attack and thus you all committed an offence Under Section 120B IPC." "Nineth that you accused Mohd.Afzal and Shaukat Hussain Guru led police to the recovery of explosive substance from H.No. 281, Indra Vihar, namely 3 electronic detonators, pressure denonators, 2 silver powder packets (2 kgs), 2 boxes containing sulphur (1 kg). And one box containing ammonium nitrate (12.5 kgs) and you got recovered from H.No. 97, 2nd floor, Gandhi Vihar, Delhi three electronic detonators, two silver powder packets (2 kgs). 2 packets containing sulphur for TCL (1 kg) and two boxes having 40 sealed boxes containing ammonium nitrate purified wg.20 kgs. And thereby committed an offence punishable Under Section 5 of Explosive Substance Act." "Twelveth, that you all also conspired

to commit and knowingly facilitated the commission of a terrorist act or acts preparatory to terrorist act and you also voluntarily harboured and concealed the deceased terrorists knowing that such persons were terrorists and that you were the members of a banned terrorist organisation i.e. Jaish-e-Mohammad, which is involved in terrorists act and thereby you committed an offence punishable Under Section 3(3) (4) and (5) of POTA." "Fifteenth, that you accused Mohd.Afzal and Shaukat Hussain Guru were found in possession of Rs. 10 lakhs, the amount given to you by deceased terrorists, which was the proceeds of terrorist acts and thereby you committed offence punishable Under Section 6 of POTA." "Sixteenth, that you all including the P.Os, and deceased terrorists, as mentioned above, belong or professed to belong to the terrorist organization i.e. Jaish-e-Mohammad, which is a banned terrorist organization under POTA and thereby you committed offence punishable Under Section 20 of POTA." 200. Section 218 Cr.P.C. 1973 requires framing of a charge for every distinct offence with the accused is charged of. Section 221 is an exception to Section 218. It provides that if a single act or series of acts is of such nature that it is doubtful which of several offences the facts which can be proved will constitute, the charge can be framed for all offences or alternative changes can be framed. At the trial if it is established that the accused has committed an offence, he may be convicted though he may not have been charged with the offence. Section 218 embodies the fundamental principle of criminal law that the accused person must have notice of the charge which he has to meet: However, it cannot be read pedantically to provide escape route to an accused. Justice Vivian Bose in the judgment , Willie (William) Slaney v. State of M.P. observed: "that in judging a question of prejudice, as of guilt, the courts must act with a broad vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself. 201. The said enunciation of law has stood the ground till date. Section 215 of the Code states that no error either in stating the offence or the particulars required shall be regarded as material unless the accused was misled by the error or defect resulting in a failure of justice. 202. Charge No. 1 was attacked as being vague and hence not comprehended by the accused. Vagueness alleged was that the exact dates of conspiracy have not been mentioned. This is no vagueness. Conspiracy is hatched in the darkness of secrecy and exacting details can seldom be unearthed. The charge as noted above makes known to the person charged what he is being charged with i.e. that around 13.12.01 the accused conspired with the other named persons to procure arms and ammunition to attack Indian Parliament when in session to make hostage or kill the Prime Minister, other Central Ministers, M.Ps, Vice-President thereby committing an offence under Section 120-B IPC. Charge as framed is in compliance with law. 203. No doubt charge No. 9 as framed does state that the accused Mohd. Afzal and Shaukat led the police to H.No. 281, Indra Vihar and A-97, Gandhi Vihar where explosive substances were recovered and offence committed was under Section 5 of the Explosive Substances Act,

but it is clear that the substance of the charge in possession of the explosive substances with the accused. The language could have been better. It cannot be said that the accused did not comprehend the charge or were misled, much less that a miscarriage of justice has been committed. 204. Charge No. 15 relates to Section 6 of POTA. It is a prohibitory section and forfeits proceeds of terrorism to the Government. It is not a penal section. We find that trial court has only passed an order of confiscation under the Act. We may note that it appears that trial court has treated confiscation as penal and hence has framed a charge. No adverse consequences have flown, no miscarriage of justice has resulted. 205. Charge No. 12 and 16 both pertain to being members of banned terrorist organisations and charge No. 12 in addition charges the accused of harboring terrorists, concealing terrorists, facilitating commission of a terrorist act or acts preparatory to terrorist acts. No doubt that the charge could have been better worded and 16 made a part of charge 12, but no prejudice has been caused. The accused cannot be said to be misled. No conviction has been rendered under Section 20 POTA. 206. Before analysing the evidence on record, it would be appropriate if we pen down the legal principles on which the evidence on record would have to be considered for determining the guilt of the accused persons or otherwise. 207. Section 120-A of the Penal Code defines a criminal conspiracy. Same reads as under:-"120A. Definition of criminal conspiracy. When two or more persons agree to do, or cause to be done, - (1) an illegal act, or (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof." 208. Proof of a criminal conspiracy by direct evidence is not easy to get and probably for this reason Section 10 of the Indian Evidence Act was enacted. It reads as under:- "10. Things said or done by conspirator in reference to common design. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it." 209. Thus, the substantive section of the IPC i.e. Section 120-A adumbrated thereon Section 10 of the Indian Evidence Act give us the legislative provisions applicable to conspiracy and its proof. 210. Section 10 of the Evidence Act could be divided into two parts. Part 1 refers to the existence of reasonable grounds to form a belief that two or more persons have conspired and the second part would come into operation when the condition of the first part is satisfied and makes relevant anything said, done or written by the conspirators as a relevant fact against the co-conspirators. In AIR 1965 SC 682 Sardar Sardul Singh Kavae Sher v. State of Maharashtra, the Hon'ble Supreme Court was pleased to hold that the evidentiary value of the act deed, or writing referred to in Section 10 of the Evidence Act is limited by two circumstances, namely, that the acts shall

be in reference to the common intention, and in respect of a period after such intention was entertained by anyone of them. In almost all cases of conspiracy, the following passage by Coleridge, J., in R Murphy, 173 ER 502 is quoted as laying the root of the concept of conspiracy and we may be failing in our duty if we do not note the same:- "I am bound to tell you, that although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have their common design and to pursue it by common means, and so to carry it into execution. This is not necessary because in many cases of most clearly established conspiracies there are no means of providing any such thing, and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts, the same object, often by the same means, one performing one part of an act, so as to complete it, with: a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is,"Had they this common design, and did they pursue it by these common means the design being unlawful?" 211. A conspiracy is a march under a banner. The very agreement, concert or league is the ingredient, of the offence like most crimes, conspiracy requires an act (actus reuse) and an accompanying mental state (mens rea). From the definition of conspiracy in Section 120-A, it is evident that the agreement constitutes the act and the intention to achieve unlawful object constitutes the mental state. All conspirators are liable for the crimes committed in furtherance of the conspiracy besides being liable for committing an offence of conspiracy itself. Pertaining to conspiracy, law punishes conduct that threats to produce the harm as well as the conduct that actually produces the harm. In this, lies the difference between the offence of conspiracy and general penal offences. In case of general offences, attempt to commit a crime merges when the crime is completed but in case of conspiracy, punishment is for both, the conspiracy and the completed crime. This distinctiveness of the offence of conspiracy makes all conspirators as agents of each other. Conspiracy, therefore, criminalises the agreement to commit a crime. Inherently, conspiracy is a clandestine activity. Its covenants are not formed openly. It has to be inferred from circumstantial evidence of co-operation. 212. If conspiracies are hatched in the darkness of secrecy and direct evidence is seldom forthcoming and if the offence is to be proved in relation to the acts, deeds or things done by the co-conspirators, the question would arise as to what is the nature of these acts, deeds or things. Is merely moving around together or seen in each other's company sufficient? If not, what more should be there from which it could be inferred that the conspirators were acting to achieve the desired offence in furtherance of a crime. 213. A charge of conspiracy, inherently causes prejudice to an accused because it forces him into a joint trial and the entire mass of evidence against all the accused persons is presented for consideration of the court. This prejudice may get compounded when prosecutors seek to sweep within the dragnet of conspiracy all those, who have been associated in any degree whatsoever with the main offenders. But the prosecution also has a difficulty at hand. It is difficult for it to trace the exact contribution

of each member of a conspiracy besides, direct evidence is seldom forthcoming. In the judgment , State of Maharashtra and Ors. v. Som Nath Thapa and Ors., the Hon'ble Supreme Court illuminating on this grey area, observed that for a person to conspire with another, he must have knowledge of what the co-conspirators were wanting to achieve and thereafter having the intent to further the illegal act takes recourse to a course of conduct to achieve the illegal end or facilitate its accomplishment. Except for extreme cases, intent could be inferred from knowledge for example whether a person was found in possession of an offending article, no legitimate use of which could be done by the offender. To illustrate, a person is found in possession of 100 Kg. of RDX, is proved to be visiting or visited by "A" against whom there is a charge of conspiring to blow up a public place. Here, the recovery of the offending article would be enough to infer a charge of conspiracy. However, such instances apart, it was held that law would require something more. This something more would be a step from knowledge to intent. This was to be evidenced from informed and interested cooperation, simulation and instigation. The following passage from People v. Lauria 251, California APP 2 (d) 471 was cited. "All articles of commerce may be put to illegal ends,.... but all do not have inherently the same susceptibility to harmful and illegal use....This different is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to show that by the same he intends to further promote and cooperate in it. This intent, when given effect by overt act, is the gist of conspiracy. While it is not identical with mere knowledge that another proposes unlawful action, it is not unrelated to such knowledge..... The step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifferent, lack of concern. There is informed and interested cooperation, simulation, instigation." 214. Thus, the proof of offence of conspiracy would require in most cases some kind of physical manifestation of agreement. The physical manifestations may not be proved by overt acts but may be evidenced by conscience acts or conduct of parties and reasonably clear to mark their concurrence. Where evidence is clear, offence of conspiracy may be proved by necessary implications. Innocuous, innocent or inadvertent acts and events should not enter the judicial verdict. The court must be cautious not to infer agreement from a group of irrelevant facts carefully arranged so as to give an assurance of coherence. Since more often than not conspiracy would be proved on circumstantial evidence, four fundamental requirements as laid down as far back as in 1881 in the judgment reported 60 years later at the suggestion of Rt. Hon'ble Sir Tej Bahadur Sapru 1941 Allahabad ALJR 416, Queen Empress v. Hoshhak may be re-emphasised:- 1. that the circumstances from which the conclusion is drawn be fully established; 2. that all the facts should be consistent with the hypothesis; 3. that the circumstances should be of a conclusive nature and tendency; 4. that the circumstances should, by a moral certainty, actually exclude every hypothesis but the one proposed to be proved. FACTS PROVED BY THE PROSECUTION FROM THE TESTIMONY OF PW.1 to PW.10, PW.21, PW.30, PW.47, PW.55, PW.58, PW.69, PW.74 AND PW.75. 215. Since the deposition of the witnesses above-mentioned i.e. PW. 1

to PW.10, PW.21, PW. 30, PW.47, PW.55, PW.58, PW.69, PW.74 and PW.75 relate to the occurrence on 13.12.2001; recoveries and seizures effected at site on the day of occurrence and identification of the deceased terrorists, it would be useful to analyze as to what emerges from the evidence of the witnesses aforesaid and the documents proved by them. (i) Fire power available with the terrorists: (A) From the evidence of PW.5, PW.21, PW.55, PW.58, PW.69 and PW.74, none of whom was subjected to any cross-examination, it becomes crystal clear that the 5 slain terrorists had made an entry into the Parliament House Complex in a white Ambassador car bearing No. DL-3CJ-1522, which car had a red light on its roof. These five terrorists were intercepted by the security personnel near the Vice-President's gate i.e. gate No. 11. There was firing between the security personnel and the 5 terrorists. Three terrorists were shot down by the security personnel in front of gate No. 9. One terrorist was shot down at gate No. 5 and the 5th terrorist was shot down at gate No. 1. From the evidence of these witnesses, it stands proved that the terrorists were armed with automatic assault rifles, pistols, hand grenades, rifle grenades and had ammunition with them. (B) From the testimony of PW.75, it stands proved that 11 electric detonators, 14 hand grenades and 16 rifle grenades were found at the site. Besides the aforesaid explosives, remote control devices being transceiver on the body of digital radio set antenna, remote bell, receivers, resistors, sunca battery, electric detonator, I-Land Grem and Rifle Grem were available with the deceased terrorists as unused explosives and electronic devices. Pertaining to the white Ambassador Car being used as a car bomb, it stands proved from Ex.PW.75/3, that it was a sophisticated bomb having improvised explosive devices planted to it. Seizure memo Ex.PW-80/15 shows that the stainless steel can used as body of the bomb was of 20 liter capacity and report Ex.PW-76/4 shows and it contained 30 kg explosives. (C) From the testimony of PW.1, it stands proved that 58 used cartridges of AK-47 rifle and 118 live cartridges were seized at the spot. Besides the said ammunition, as per seizure memo Ex.PW.1/13 large quantities of bullet chips and metal chips were recovered and seized from the site. It is further proved that one dagger, sketch of which was Ex.PW.1/10 was also recovered and seized at the spot. (D) From the testimony of PW.2, it stands proved that three AK-47 rifles, one .384 pistol having 8 live cartridges and about 120 other live cartridges, 5 spare magazines were the arms and ammunitions recovered from the site of gate No. 9 where three terrorists were shot down. (E) From the testimony of PW.3, it stands proved that one AK-56 rifle, one hand grenade lever was recovered from the terrorist killed at Gate No. 5. (F) From the testimony of PW.4, it stands proved that one 9 MM Beratta pistol, 20 used cartridges of AK-47 rifle, 5 used cartridges of 9 MM pistol and 29 live cartridges of 9 MM pistol were recovered from the place where the 5th terrorist was killed at Gate No. 1. 216. The fire power was awesome. Enough to engage a battalion. Had the terrorists succeeded the entire building with all inside would have perished. The foundation of the country would have shaken. The act was clearly an act of waging war against the Government of India. (ii) Registration of FIR 217. From the testimony of PW.1 SHO, P.S. Parliament Street, G.L. Mehta and PW.55 S.I. Shyam Singh, the rukka Ex.PW.1/1 stands

proved as also the endorsement on the rukka Ex.PW.1/2 by the SHO on the basis of which FIR in question was registered. Testimony of PW.9 H.C. Sukhbir Singh proves that he carried the rukka to the P.S. and handed over the same to the Duty Officer PW.14 H.C., Malkiat Singh from whose testimony it stands proved that FIR NO. 417/2001 under Section 121, 121A, 122, 124, 120B, 186, 332, 353, 302, 307 IPC read with Sections 3, 4 and 5 of the Explosive Substances Act and Sections 25 and 27 of the Arms Act was registered. 218. We have noted above the testimony of PW-1, 9, 14 & 55. None of them was subjected to any cross-examination on the facts deposed by them pertaining to the Rukka, its transmission to the police station and registration of the F.I.R. based on the Rukka. The only contention raised by Sh. Shanti Bhushan, learned Senior Counsel appearing for accused Shaukat was in the context of Ex.PW-35/1. The said document is a letter addressed by AirTel to Inspector Mohan Chand Sharma providing certain details of mobile numbers, their corresponding SIM numbers etc. The said letter is dated 17th December, 2001 and in the "captioned subject" it refers to:- "Case F.I.R. No. 417 dated 13.12.2001 Under Section 121/ 121A/122/124/302/307/186/332/353/120B IPC, 3/4/5 Explosives Substances Act, 25/27/54/59 Arms Act and 3/4/5/21/22 POTO Parliament Street, New Delhi." 219. Argument was that it is the admitted case of the prosecution that POTO was added on 19th December, 2001 as per admitted testimony of the prosecution witness (PW-80) ACP Rajbir Singh. How the AirTel people by their own refer to Section 3/4/5/21/22 POTO in their letter dated 17.12.2001? Was the question posed by Shri Shanti Bhushan learned Senior Counsel. He conceded that the aforesaid fact went unnoticed at the trial. Since none of the prosecution witness was confronted with this letter Ex.PW-35/1, at this stage we would not have the benefit of any possible explanation which could be given by the prosecution witnesses. One would be entering into an area of surmises and conjectures to get into an explanation on the letter. Shri Shanti Bhushan, learned Senior Counsel contended that it is apparent from the reading of the F.I.R. where words "Terrorists Act", " unity and integrity of India" etc. have been used which according to the learned Senior Counsel are nothing but words picked up form Section 3(2) of POTA (then POTO). This, coupled with the fact, claimed by the prosecution that Section 3/4/5/21/22 POTO were later on added to the F.I.R., according to the learned Senior Counsel was sufficient for this Court to draw an adverse inference that in the original F.I.R. POTO offences were added but to overcome the strict rigorous of law qua investigation which find mentioned in POTO and are safeguards in favor of an accused person, the prosecution changed the F.I.R. by deleting POTO offences and after virtually completing the entire investigation POTO provisions were added. 220. The argument of the learned counsel, at the first blush appears attractive and plausible but unfortunately, as noted above this aspect of the matter went unnoticed at the trial and we do not have the benefit of what the witnesses may have said. However at the bar, explanation given by the prosecution is that after the receipt of the computer print outs of the telephone calls pertaining to telephone numbers 9811489429, 9811573506 & 9810081228 referred to in the deposition of PW-66 Inspector Mohan Chand Sharma, which were received on 13th Decem-

ber, 2001 itself, the prosecution had by 15th December come into possession of six mobile instruments and had their IEMI numbers and had wanted further details of the corresponding SIM numbers pertaining to these mobile numbers and for that had addressed a letter on 17th December, 2001 to the AirTel company. No response was received and Inspector Mohan Chand Sharma had, infact on 25th December, 2001 sent a written request to have the requisite information transmitted to him. To satisfy ourselves we have perused the case diary and indeed it reflects that Mohan Chand Sharma remained in contact with AirTel authorities to get the requisite information till 25th December, 2001 and in the requisition addressed by him after 19th December, 2001 while referring to the F.I.R. the POTO provisions were mentioned (since they were added). Therefore, date of 17th being typographic error could not be ruled out. Once again, at the cost of repetition, since none of the prosecution witnesses was cross-examined on this document we draw no adverse inference there from and come to the conclusion that F.I.R. being Ex.PW-14/1 thus stood proved. 221. It is even otherwise settled law that where a witness is not cross-examined on any relevant aspect, the correctness of the statement made by a witness cannot be disputed. As far back as 1893 Lord Hershell in the judgment of the House of Lords in Browne v. Dunne, (1893) 6-67 (HL) observed : "I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses." 222. The principle of law enunciated, as extracted above, has been constantly followed by the Courts in India. Even, the law in India, as laid down by the Apex Court is that if the correctness of a statement of a witness is disputed; when in the witness box, attention of the witness must be drawn to the part of statement which is sought to be disputed, so that the witness has an opportunity to explain his statement. Section 138 of the Evidence Act confers a valuable right on the opposite party to cross-examine the witness tendered in evidence. Section 146 of the Evidence Act enlarges the scope of the provisions of Section 138 by allowing putting questions to a witness to : a. Test his veracity; b. to discover who is and what is position in life; and c. to shake his credit. 223. The judgment of the Supreme Court , State of U.P. v. Nahar Singh and , Rajinder Prasad v. Darshana Devi, may be noted. (iii) Identity of deceased terrorist : 224. From the testimony of PW.2 SI Sajiv Kumar the inquest reports being Ex.PW.2/18, 2/19 and 2/20 stood proved. From the testimony of PW.3 SI Rajender Singh, the inquest report being Ex.PW.3/5

stood proved and from the testimony of PW.4 S.I. Yograj Dogra the inquest report being Ex.PW.4/18 stood proved. PW.2 in his deposition deposed that the accused No. 1 Mohd. Afzal was taken to the mortuary where he identified all the 5 deceased terrorists. It may be relevant to note that PW.2 had seized the slips of papers being Ex.PW.2/16 and PW.2/17 recovered by the Doctors from the pocket of the terrorist identified as Hamja and therefore his presence at the mortuary cannot be doubted. Further, PW.47 has also deposed that these slips were handed over to the police on 17.12.2001 itself. PW.2, 3 and 4 had signed the postmortem reports of the respective deceased terrorists whose bodies they had respectively sent for postmortem and this also proves the presence of these three witnesses at the mortuary. Further, on each of the postmortem reports under the column "identified by" the name of the accused Mohd.Afzal finds mention, relationship mentioned is "associate", followed by the signatures of accused Mohd.Afzal. Thus, according to the prosecution, it further stands established that the 3 terrorists who were shot dead by the security personnel at gate No. 9 were Hamja, Raja and Rana. The terrorist who was shot dead at gate No. 1 was Mohd. and terrorist who was shot dead at gate No. 5 was Hayder. 225. In reply, the argument on behalf of accused Mohd.Afzal is that Section 162 of the Cr.P.C. prohibits the proof of any statement made by an accused to a police officer. Therefore, identification of accused Mohd.Afzal in the presence of the police as noted in the postmortem reports was inadmissible in evidence and the statement made on behalf of accused Mohd.Afzal by his counsel on 5th June, 2002 that the postmortem reports of the deceased terrorists be treated as proved was of no consequences. 226. We have noted the testimony of PW-2, PW-3, PW-4, PW-47 and PW-80 in the preceding part of our judgment. Presence of PWs 2, 3 & 4 when postmortem of the deceased terrorists was conducted cannot thus be doubted. Evidence of PW-47 corroborates their presence at the mortuary. Notwithstanding that as per order dated 5.6.2002 these documents were to be read as proved, but at the trial, witnesses entered into the witness box and deposed about these postmortem reports as also the fact that accused Mohd.Afzal, in their presence, had identified the deceased terrorists. None of these witnesses were subjected to any cross-examination when they deposed of these facts. Section 8 of the Evidence Act makes a conduct of a person a relevant fact for the proof of any fact in issue. What is excluded by Section 162 of the Cr.P.C. is a statement made to a police officer in the course of investigation. Evidence relating to the conduct of an accused person, which is deposed to by a police officer is admissible as conduct under Section 8 of the Evidence Act. Judgment of the Hon'ble Supreme Court , Prakash Chand v. State be noted : "There is a clear distinction between the conduct of a person against whom an offence is alleged which is admissible under Section 8 of the Evidence Act, if such conduct is influenced by any fact in issue or relevant fact and the statement made to a police officer in the course of a investigation which would be hit by Section 162 Cr.P.C. What is excluded by Section 162 of the Code is the statement made to a police officer in the course of investigation. However, the evidence relating to the conduct of an accused person when deposed to by the police officer such as leading a police officer and pointing out the place where

articles of weapons might have been used in the commission as conduct under Section 8 of the Evidence Act. This admissibility is irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act." 227. Identity of the five deceased terrorists thus stands established. Even otherwise, it makes no difference, what is relevant is the association of the accused with said five persons and not their names. (iv) Recovery of I-cards and paper slips 227A. From the testimony of PW.2 and PW.47 it stands established that the paper slip Ex.PW.2/7 and Ex.PW.2/8 were recovered from the pockets of the deceased terrorist Raja and Rana respectively. Both the paper slips contained identical telephone numbers, which are as under:- 9810510816 9810511085 9811544860 9810302438 9811059315 00971507683340 00971505516899 228. Further, as per the prosecution, it also stands established that two paper slips Ex.PW.2/16 and 2/17 were recovered from the pocket of the deceased terrorist Hamja. The paper slip Ex.PW.2/16 contains 5 telephone numbers, being the same as found on the paper slips recovered from the pocket of Raja and Rana on the spot by PW.2. From the testimony of PW.4, it stands established that two slips of papers were recovered from the deceased terrorist Mohd. Ex.PW.4/6 contained 5 telephone numbers corresponding to the first 5 telephone numbers found on the slips of paper recovered from Raja, Rana and Hamja and Ex.PW.4/7 contained two telephone numbers being identical to the telephone numbers at serial No. 6 and 7 of the slips of paper recovered from the deceased terrorist Hamja, Raja and Rana. 229. From the testimony of PW.2 it stands established that the identity card Ex.PW.2/3 was recovered from the terrorist identified as Raja. It was purportedly issued by XANSA websity. The address of the issuer of the Identity Card was 37, Bungalow Road, Karma Nagar, New Delhi and the identity card had telephone No. 9811489429 thereon. Identity card Ex.PW.2/4 was recovered from the pocket of the deceased terrorist Rana and had the same particulars thereon as the identity card found on the person of deceased Raja. Ex.PW.2/5 was the identity card found in the pocket of the deceased terrorist Hamja having the same particulars thereon as the identity card found on the person of deceased Raja. From the testimony of PW.3 it stands established that the identity card Ex.PW.3/3 was recovered from the pocket of the deceased terrorist Hayder and had the same particulars thereon as the identity card found on the person of deceased Raja. From the testimony of PW.4, it stands established that 3 identity cards Ex.PW.4/2, 4/3 and 4/4 were recovered from the deceased terrorist Mohd. Ex.PW.4/2 and PW.4/4 were in the name of Rohil Sharma and Rohil Ali Shah respectively and had the same particulars thereon as the identity card found on the person of deceased Raja. Identity card Ex.PW.4/3 was purportedly issued by Cyber Tec Compute Hardware Solution and was issued in the name Ashiq Hussain. 230. Learned counsel for the accused Mohd.Afzal and Shaukat contended that the evidence pertaining to the recovery of the identity cards and recovery of paper slips as also the evidence pertaining to recovery of mobile phones and sim cards from the spot of occurrence should be rejected inasmuch as purity of custody of the said items was doubtful as none of them were sealed at the time of their seizure nor were

they deposited in the Malkhana within a reasonable time of seizure. In reply, Sh. Gopal Subramanium, learned Senior Counsel appearing for the prosecution contended that the identity cards, paper slips and the mobile phones as also the SIM cards were not sealed as they were required for further investigation and indeed evidence showed that the investigating authorities got leads from these recoveries and, therefore, these items of recovery were rightly not sealed. Counsel contended that purity of recovery of these items was maintained inasmuch as in the recovery memos, wherever possible description of the mobile phones in reference to the IMEI number, SIM cards in reference to the number allotted by the company were noted. He argued that except for putting bald suggestions to the respective officers who made these recoveries to the effect that they were deposing falsely, none were cross-examined pertaining to the seizure memos. PWs. 2, 3 and 4 nor the officers who had been associated in the recoveries being effected were cross-examined on the seizure memos. In seizure memo Ex.PW.2/2 in respect of the recovery of the Identity card effected from the person of the deceased terrorist Hamja following finds mentioned:- "The personal search of the aforesaid deceased has been duly conducted, from whom the following articles have been found:- 1, One I/Card in the name of Anil Kumar S/o. Vinod Kumar R/o. 120A, Adarsh Nagar, Delhi which pertains to computer Education Website on which telephone No. 9811489429 and 37, Bunglow Road, Kamla Nagar, New Delhi are written." 231. Pertaining to recovery effected from the deceased terrorist Raja the following finds mentioned :- "The personal search of the aforesaid accused has duly been conducted and the following articles have been recovered from him: 1. One I-card, on which Computer Education Website and Raju Lal S/O. Ram Lal R/o. 120A, Adarsh Nagar, Delhi Telephone No. 9811489429 and 37, Bunglow Road, Kamla Nagar, New Delhi are written. 2. One slip whereon 5 mobile Nos. and 2 Nos. of UAE are written. 3. One mobile phone of 'MOtorOLA' make along with on the sim card whereof 8991, 1001, 0801, 1641, 893 Magic and Imei No. 449269/21/963901/0 are written. The aforesaid articles at Sri. No. 1 and 2 recovered from the personal search have been attached with the case file." 232. Pertaining to deceased terrorist Raja, the following finds mentioned:-"The personal search of the aforesaid third deceased has duly been conducted and as a result whereof the following articles have been recovered from him:- 1. On I-Card, on which Computer Education Website and the name of Sunil Verma S/O. Kailash Verma R/o. 120A, Adarsh Nagar, Delhi-37, Bunglow Road, Kamla Nagar, New Delhi and Telephone No. 9811489429 are written. 2. One blood stained slip, on which 5 mobile Nos. and 2 Nos. of UAE are written. 3. One letter in English written in hand without signatures. 4. One mobile phone of"Motorola' make, without Bty. On the sim card whereof 9881/1001/0801/2101/772 Magic and IMEI No. 449269,405808650 are written. 233. Pertaining to the recovery effected from the deceased terrorist Hayder, in recovery memo Ex.PW.3/4 the following finds mentioned:- "The following articles were recovered from the right upper pocket of the pants which the deceased terrorist was wearing:- (i) One identity card bearing the words 'XANSA' Computer Education Website, Name Sanjay Kaul S/O. Anil Kaul, Qualification Matric, Group Ms Office, Phone No. 9811439429,

Address 120A, Adarsh Nagar, Delhi Signature. Sd/- In English, Signature of Counsellor Sd/- In English, Date of issue 15.10.01, 37 Bunglow Road, Kamla Nagar, New Delhi-7 Telephone 76667678, WWW.XANSA.Com were written in English and the photograph of the deceased which was affixed on his identity card was stamped bearing the words 'XANSA' Computer Education, Kamla Nagar Dated 15.10.2001. The identity card was in mutilated condition." 234. In respect of the deceased terrorist Mohd. in recovery memo Ex.PW.4/8, the following finds mentioned:- " (2) One black coloured leather purse from which a sum of Rs. 12,500/- (Rupees Twelve thousand and five hundred) was recovered. Three identity cards were also found in the said leather purse out of them one identity card was bearing the following words 'XANSA Computer Education Website, Rohail Ali Shah S/o. Shri Mohd. Ali Shah, Group Ms. Office; Address, 120A, Adarsh Nagar, Delhi, Qualification Matric, Mobile phone No. 9811489429, Date of issue 15.10.2001, 37, Bunglow Road, Kamla Nagar, New Delhi, Telephone No. 7667678 and WWW. XANSA.Com. The aforesaid card was bearing a round stamp bearing the words 'XANSA' Computer Education, Website, Kamla Nagar. (3) one identity card bearing the words "XANSA" Computer Education Website, Rohil Sharing S/O. Anil Sharma R/o. 120B, Adarsh Nagar, Delhi, Group MS office, Qualification Matric, Mobile phone No. 9811489429 Date of issue 15.10.2001, 37, Bunglow Road, Kamla Nagar, New Delhi Telephone No. 7667678, WWW.XANSA.Com and was bearing a round stamp. (4) One identity card bearing the words "Cybertech Computer Hardware, Solution, Name Ashiq Hussain Khan S/o. Sh. A.B. Rashid Khan R/o. Khawaja Gilgit (Sopour), District Baramula, in English. Both the sides of the aforesaid identity card was bearing a round stamp of 'Cyber Tech Computer Hardware'. All the aforesaid three recovered identity cards bear the similar photos of only one and the same man and these photographs resemble with the face of the aforesaid deceased terrorist. (5) A paper slip was also recovered from the purse of the deceased terrorist on which detailed inside topography of 'Lok Sabha, Rajya Sabha building was found written in English. (6) One paper slip on which the following mobile phone numbers were found written: (i) 9810510816 (ii) 9810511085 (iii) 9811544860 (iv) 9810302438 (v) 9811059315 (7) One paper slip on which the mobile phone Nos. (i) 00971505516899 (ii) 00971507683340 were found written. (8) One magic card of mobile phone bearing the word 'Magic' in' English and a number 8991100108011368273 was also found written. On checking the same the number of mobile phone was learnt as 9810693456. (9) One m/speed card bearing the word 'speed' in English on the back side of it a number 10007860034 was found written. On checking the same its mobile number was learnt as 9811544860. (10) One magic card bearing the word 'Magic' in English and likewise the word 'H.O.' was also found written in blue colour and a number 8991100108011972173 was found written. On checking the same, the mobile number was learnt as 9810565284." 235. We are of the opinion that purity of the recovery of these items, in the facts and circumstances of the present case, cannot be said to be tainted. Thus, recovery of the mobile phones, sim cards and paper slips bearing telephone numbers from the person or around the deceased terrorists stands proved. We may deal

with the recovery of the two paper slips Ex.PW-2/16 and 2/17 from the pant pocket of the deceased terrorist Hamja at the time of his postmortem. It is true that PW-2 had stated that he had thoroughly searched the bodies of the deceased terrorists whose body was at wooden gate No. 9 and found a paper slip having similar telephone numbers from the pocket of one terrorist and did not effect any recovery from the terrorist Hamja, but we have no reasons to disbelieve the testimony of PW-47, the doctor who conducted the postmortem when he deposed that two paper slips, one containing five telephone numbers and the other containing the address of Preity Zinta were recovered from the pant pocket of the deceased terrorist Hamja. In any case the issue is not of much significance because recovery of paper slips from the pocket of Raja & Rana at the spot stands fully established by the testimony of PW-2 and further because of the fact that on all the three slips, same telephone numbers are to be found noted and no particular inference or connection with the crime qua the accused persons was sought to be inferred by the prosecution with reference to the slip received from the deceased terrorist Hamja. The only thing which the prosecution wanted to bring to the notice of the Court was that the telephone numbers written on the slips recovered from Raja, Rana & Hamja were the same numbers. (v) Recovery of Car sticker 236. From the testimony of PW.1, the Home Ministry sticker found pasted on the car No. DL-3CJ-1527 being Ex.PW.1/8 stood proved. (vi) Documents pertaining to car No. DL-3CJ-1527 237. From the testimony of PW.1 it stands proved that the original deliver receipt pertaining to the car in favor of Ashiq Hussain Khan being Ex.PW.1/6 was handed over to him by Harpal Singh (who was examined as PW.20). The witness also deposed about recovery of documents mark 'A' to 'E' from the car. These documents were duly proved as Ex.PW.20/4 to Ex.PW.20/8 by PW.20 Harpal Singh. (vii) Recovery of mobile phones and Sim Cards from the deceased terrorists 238. From the testimony of PW.2, the seizure memo Ex.PW.2/2 stood proved. It shows recovery of one mobile phone 'MOtorOLA' make along with a SIM card from the deceased terrorist Raja. The sim card bears No:- 8991 1001 0801 1641 893 'Magic' The IMEI No. of this mobile was:- 449269219639010. 239. It also stands established that one mobile phone 'MOtorOLA' make along with a sim card was recovered from the deceased terrorist Rana. The sim card bears the following number:- 8991100108012101772 'magic' The IMEI No. of this mobile was:- 449269405808650 240. From the testimony of PW.4 the recovery memo Ex.PW.4/14 pertaining to the deceased Mohd. stood proved. Thus, it stands proved that one mobile phone 'Sony' make along with a sim card was recovered from the deceased Mohd. The sim card pertain to the following telephone number:- 9810511085 The IMEI No. of this mobile was 350668340117472. 241. Seizures pursuant to recoveries which were effected as contained in Ex.PW.4/8 were effected at site. It stands proved that 3 sim cards being Magic cards bearing Nos. :- (a) 8991100108011368273 corresponding to mobile No. 9810693456, (b) Sim Card No. 10007860034 corresponding to mobile No. 9811544860 and (c) sim card No. 8991100108011972173 corresponding to mobile No. 9810565284 were recovered from the purse of the deceased terrorist Mohd. We have discussed in the preceding part about the purity of the

evidence pertaining to the recovery of I-cards and the paper slips from the deceased terrorists in the context of the argument of the defense that these being not sealed had resulted in a dilution of the purity of their recovery and in this context had also dealt with the arguments pertaining to the non-sealing of the mobile phones and the SIM cards. Thus, the non-sealing of the mobile phones in the circumstances was justified and does not affect the seizure. (viii) Recovery of dry fruits 242. From the testimony of PW.1, it stands established that from the spot recoveries were made of packets of dry fruits having label of Sawan Dry Fruits, 6507, Fateh Puri Chowk, Delhi-110006, Phone No. 3958486. Arrest of the accused and recoveries effected from them at the time of arrest. 243. PW.66, Insp. Mohan Chand Sharma, PW. 67 S.I. Bidrish Dutt, PW.70 S.I. Harinder Singh, PW.61 Abdul Haq Butt, Dy. S.P. S.G.P.O. M.R. Ganj Srinagar, PW. 62 H.C. Mohd. Akbar, PW.64 S.I. Hardey Bhushan PW.65 S.I. Sharad Kohli and PW.39, Naresh Gulati are the prosecution witnesses from whose evidence the prosecution seeks to prove the events leading to the arrest of the accused and recoveries effected at the time of arrest. 244. PW.66 was assigned the task of investigating further, in respect of the mobile phone numbers which came in the knowledge/possession of the police from the spot. They were 10 in all PW.66 in his evidence has given good reasons as to why he investigated only 3. They were 9811489429, 9811573506 and 9810081228. The first two were cash card numbers but the last was a regular number in name of accused S.A.R. Gilani whose address was 535, Mukherjee Nagar, New Delhi. The house was kept under surveillance. Permission was taken from the Joint Director, Information & Broadcasting on 13.12.2001 itself for interception on these three telephones. It is not in dispute that under Rule 419A of the Indian Telegraph Rules 951, in case of emergency the Joint Secretary to the Government of India who is authorised, is empowered to give a permission subject to confirmation by the competent authority, being the authorised Secretary to the Government of India. The sanction granted and confirmation obtained were not filed with the charge sheet on the ground that for security reasons the name of the two officers could not be disclosed. However, as reflected in the order dated 11.7.2002 these were produced in a sealed cover which was opened, contents read out to the accused and their counsel and then resealed. Matter rested at that without any objection from the defense. 245. At 12.21 hours on 14.12.2001 a call was intercepted and taped by PW.70 on phone number 9810081228. Talk was in Kashmiri language. The talk was translated by PW.71 Rashid. At night around 8.15 P.M. a call was intercepted on the mobile number 9811573506. The receiver was a female who was talking to one Shaukat. Information obtained from the cell phone company revealed that the call was made from a landline number 0194492610 from Srinagar. Srinagar Police was informed to keep a watch. Police did not notice any movement at the house of S.A.R. Gilani on the night of 13.12.2001 and therefore surveillance was withdrawn and reintroduced in the morning of 14.12.2001. At about 10 A.M. on 15.1-2.2001 accused S.A.R. Gilani was arrested by PW.66 on being identified by PW.39 the landlord of S.A.R. Gilani when he was about to enter his house. Mobile phone 9810081228 was recovered from his hand. He made a disclosure and led the police to the house

of accused Shaukat and Afzan Guru where accused Afzan Guru was present. She opened the door. Mobile phone 9811573506 was in her hand. IMEI number of the instrument was 351077402325262. It was seized vide seizure memo PW-66/7. Search of her house led to recovery of mobile phone having SIM card No. 8991100102009283792. The instrument had IMEI number 490174612116430. She made a disclosure that accused Mohd. Afzal and Shakat had left for Srinagar after the attack in truck No. HR-38E-6733 owned by her. They had a laptop and Rs. 10 lacs with them. This information was flashed to Srinagar. Thus, as per the prosecution witnesses, accused Afzan Guru was arrested at around 10.45 A.M. On being brought to the Special Cell Lodhi Colony, accused S.A.R. Gilani made a disclosure statement Ex.PW-66/13 and accused Afzan made disclosure statement Ex.PW-66/14. 246. As per PW-61, information was received in the morning that two persons involved in the attack on Parliament were in Srinagar around fruit mandi in the jurisdiction of P.S. Parampura. (Stated at the bar during argument that telephone No. 0194492610 from which Shaukat had spoken the previous night was in the fruit mandi). They were in truck No. HR-38E-6733. Two to three teams were formed, one of which located the truk at 8 A.M. in the mandi. Since a large crowd was in the mandi, a watch was kept. At 10 A.M. the truck moved out towards Baramulla. It was intercepted near P.S. Parampura. Accused Mohd. Afzal and Shaukat were in the truck. A laptop, Rs. 10 lacs and a mobile phone having IMEI No. 35012209452432 was recovered from them. Police at Delhi was informed. PW-64 and PW-65 left for Srinagar. They reached at about 2.15 P.M. PW-64 took custody of accused Mohd. Afzal and Shaukat. He took custody of the articles seized and brought the accused to Delhi. PW-65 stayed behind for some investigation and brought the truck to Delhi after a few days. 247. Accused S.A.R. Gilani did not dispute ownership and possession of mobile No. 9810081228 and its recovery from him. He also admitted to having received a call on the number at 12.21 hours on 14.12.2001. Recovery is thus proved. However, he denied his arrest on 15.12.2001 at 10 A.M. from his house. He stated that he was arrested on 14.12.2001 at about 1.30 noon while he was traveling in a bus when it was near Khalsa College, University of Delhi. Mr. Ram Jethmalani, learned Senior Counsel for accused S.A.R. Gilani urged before us, that : a) The call at 13.03 noon on 14.12.2001 was the last call made or received on Gilani's mobile phone and call record showed between 5 to 15 calls received or made on this number each day. Gilani was deprived use of the phone, suggesting his arrest. b) Call records showed that on 13.12.2001 at 9.37 P.M. and 11.19 P.M. He had received incoming calls on this number. As per the cross-examination by the prosecution of his wife PW-5, these calls were admitted by the prosecution to be received in the house. This falsified the prosecution case that in the night of 13.12.2001 Gilani's house was kept under surveillance and no movement being noticed, the surveillance was withdrawn and again mounted on 14.12.2001 in the morning, Call record showed that at 8.53 A.M. Gilani had received a call on this number at his house. c) Arrest memo of SAR Gilani was not produced. PW-39 Naresh Gulati, the landlord of S.A.R. Gilani did not depose that Gilani was arrested on his identification though PW-66 and PW-67 were categorical that it was on

the identification of PW-39 that they arrested SAR Gilani. The prosecution was hiding facts. No relative was informed about the arrest. d) DW-5, wife of S.A.R. Gilani, had deposed that Gilani left for offering the Jumma Namaj at the Mall Road Mosque at about 1 or 1.30 P.M. and from there was to meet her brother at J & K Bus Stop opposite Tis Hazari and was to come back at 4 P.M. When he did not return, she tried to contact him over his mobile phone which was not responding. This part of her testimony went unchallenged in the cross-examination. She had to be believed. e) The most important piece of evidence come from the testimony of PW-61 and PW-62. Information to track down truck, number HR-38E-6733 was available with the Srinagar Police in the morning of 15.12.2001 and the truck was tracked at 8 A.M. According to the prosecution, the police got the truck number when Afzan was arrested at 10.30 A.M. There was material contradiction. If the truck was tracked at 8 A.M., information would have been available with the Srinagar police in the early morning hours. This again belied the prosecution's time of arrest and was in tune with the defense that SAR Gilani was arrested on 14.12.2001 in the afternoon. f) DW-5 had stated that at 10 P.M. on the night of 14.12.2001, she and her children were illegally picked up from the house and taken to Special Cell, Lodhi Colony where she saw her husband with injuries showing torture. Her brother-in-law Bismillaha was also in illegal confinement. Her husband and Bismillaha were being forced to sign on blank papers. This testimony also went unchallenged. 248. Shri Gopal Subramaniam, learned Senior Counsel for the prosecution refuted as under:- a) Accused Afzan Guru had stated in her statement under Section 313 Cr.P.C. that accused S.A.R. Gilani knew her house and he had shown the house to the police. This shows that S.A.R. Gilani was arrested prior to her arrest and he had taken the police to her house. b) To PW-66 suggestion was put by Afzan Guru that she was arrested on 14.12.2001 but to PW-67 the suggestion put was that she was arrested at about 6 A.M. on 15.12.2001. c) In her statement recorded under Section 313 Cr.P.C. she stated that she was arrested on 14.12.2001 between 6 PM and 7 PM. A palpably false statement as she had a talk with accused Shaukat on 14.12.2001 at 8.15 P.M. Which fact she admitted in her statement under Section 313 Cr.P.C. Question and answer being as under : "Q. It is in the evidence against you that your cell No. 9811573506 was put on surveillance and on the evening of 14.12.2001 you had talked to your husband Shaukat Hussain on his cell No. and tape in this regard is Ex.PW-66/4. What have you to say? Ans. It is correct. I enquired as to what has been brought in truck. I talked to him in Police Station." d) DW-5 being wife of accused S.A.R. Gilani was an interested person and her testimony stood falsified by her denial that accused SAR. Gilani who was in the house in the night of 12th and 13th December had not used the phone, as call records showed that indeed calls had been received on this number. She had denied the calls received at the night of 13th December which again was false. Facts deposed by her about her illegal confinement, torture of SAR Gilani etc. were not put by her to PW-66 or PW-80 and were being stated for the first time in court. e) From the evidence it emerged that SAR Gilani was arrested first and thereafter Afzan Guru at the instance of SAR Gilani and it was he who led

the police to the house of Afzan Guru. On overall conspectus of the evidence it stood established that arrest took place on 15.12.2001. f) PW-61 and PW-62 were over zealous in their testimony and it was natural human conduct to take credit. From the testimony of PW-66 it stood established that police at Srinagar was flashed a message on 14.12.2001 to look out for two persons, one name Shaukat near fruit mandi as the police had got said information from the call intercepted at 8.15 P.M. on the phone of Afzan Guru. Police was already on the look out. Information about the truck was flashed on 15.12.2001 after Afzan Guru gave disclosure. Possibility of PW-61 mixing up the two could not be ruled out. g) PW-61 on being cross-examined, apart from being put a suggestion that he was deposing falsely (which he denied), was put a suggestion that he arrested Shaukat and Mohd. Afzal from different places, thereby admitting that PW-61 arrested them. PW-62, who was with PW-61 when Shaukat and Mohd. Afzal were arrested, was given the suggestion that Shaukat and Mohd. Afzal were first brought to the police station and truck was brought later, thus arrest was admitted. 249. Counsel contended that aforesaid features clearly brought out that SAR Gilani was arrested first and the evidence was not destructive of the statement of PW-66 and PW-67 that SAR Gilani was arrested on 15.12.2001 from outside his house just as he was about to enter at 10 A.M. He led the police to house of Afzan Guru where she was arrested at about 10.45 A.M. and thereafter Shaukat and Mohd. Afzal were arrested at Srinagar at around 11.30A.M. 250. We need not discuss and analyze the rival contentions on the time of arrest as per the rival contentions noted above. To our mind, a very disturbing feature pertaining to the arrest of the accused persons has been noted by us. The Hon'ble Supreme Court in the judgment of D.K. Basu v. State of West Bengal, 1997 SC 610 has laid down guidelines to be followed by the police at the time of arrest of an accused, one of them being to notify the near relative of the accused of the arrest. The over zealous prosecution in its written submissions filed stated thus : "defense did not even led evidence of Bismillah (brother of Gilani) or Khan Saheb (Brother-in-law of Gilani) which evidence would have been material in light of DW-5's testimony. Their evidence would have been important especially in light of the fact that Bismillaha is the relative who has attested the arrest memo of Gilani, Afzal and Shaukat." 251. We have perused the case diaries. Indeed, the arrest memo of SAR Gilani, Mohd. Afzal and Shaukat bear the signatures of Bismillah as having attested the same. Mohd. Afzal's and Shaukat's arrest memos have been prepared at Delhi. The presence of Bismillah's signatures as having attested the arrest memos of the three accused probablises the testimony of DW-5 that Bismillaha was in illegal confinement and was forced to sign papers. In any case, the prosecution stands discredited qua the time of arrest of accused S.A.R. Gilani and accused Afzan Guru. But where does that lead us? 252. In Re: Nagarmal Janakiran Agarwal AIR 1941 Nagpur 338, Pollock, J. held that "even if the arrest was illegal, the question whether the arrest was valid or not would not affect the question whether the accused was guilty or not." 253. In , Prabhu v. Emperor, the Privy Council held that validity of trial and conviction was not affected by irregularity in arrest. The Supreme Court followed this in , H.N. Rishbud v. State of

Delhi, and held that illegality in investigation cannot result in setting aside the trial unless it can be shown that it has brought about a miscarriage of justice. In , Pooron v. Director of Inspection, the Supreme Court held that relevant evidence cannot be excluded merely on the ground that it was obtained illegally - "where the test of admissibility of evidence lies in relevancy unless there is an express or implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search or seizure is not liable to be shut out." 254. The doctrine "falsus in uno, falsus in omnibus" has not been accepted in Indian jurisprudence. In the judgment , Krishna Mochi v. State of Bihar, the Supreme Court held :- "Even if a major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where the chaff can be separated from the grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove the guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno, falsus in omnibus has no application in India and the witnesses cannot be branded as liars. The maxim falsus in uno, falsus in omnibus (false in one thing, false in everything) has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to is, that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in given set of circumstances, but it is not what may be called "a mandatory rule of evidence". (See Nisar Ali v. State of U.P.) 255. That a person was arrested, at a particular place, at a particular time, he was searched, resulting in a recovery are all distinct facts. Unreliability of the prosecution witnesses on one fact does not mean one has to discard the other facts deposed, if they are sufficiently proved and stand the test of credibility. Grain has to be separated from the chaff. We are concerned here with the recoveries. S.A.R. Gilani's case is no problem. He admits that the mobile phone number 9810081228 was recovered from him. He admits the call details thereof. The other three accused deny the recoveries effected from them. We proceed to consider the evidence of the prosecution with caution as time of arrest of accused persons has been seriously dented. 256. Afzan Guru admits her arrest. PW-66 and 67 state that they arrested her. In cross-examination, this assertion goes unchallenged. Therefore, proved. PW-66 and 67 state that when they were led to the house of Afzan Guru by S.A.R. Gilani she opened the door and she had mobile number 9811573506 in her hand, the instrument had IMEI No. 351077402325262. It was seized vide seizure memo PW-66/7. Search of her house led to recovery of SIM card No. 8991100102009283792, and the instrument had IMEI No. 490174612116430, seized vide seizure memo Ex.PW-66/11. PW-66 was cross-examined by all the accused. Except for a bald suggestion that no recovery was affected by him or under his supervision, no worthwhile cross-examination has been done qua the recovery. PW-67, S.I. Bidrish Dutt, who was a witness to the search and seizure and deposed to the re-

coveries was not subjected to any cross-examination at all on the recoveries. His testimony on this aspect went unchallenged. Neither has PW-66 nor has PW-67 been subjected to any cross-examination in respect of recovery memo PW-66/7 and PW-66/11. No suggestion has been put to them that these are fabricated documents. Recovery memo PW-66/7 notes as under :- "In the presence of the witnesses mentioned hereinafter, a mobile phone make SONY the mobile No., IMEI No. and SIM No. whereof are 9811573506, 350177-402325262 and 10007605017 respectively, has been recovered from Navjot Sandhu alias Afshan Guru, W/o Shaukat Hussain Guru, R/o Village Doabga, Sopore, Baramullah, J & K presently residing at 1021, 1st Floor, Mukherjee Nagar, Delhi. The screen of recovered Sony set is bearing the word"ESSAR". On checking the Redial List of aforesaid recovered instrument, the following calls have been noticed on the screen; 1) 0163422711 2015 Hrs. 14.12.2001 2) 0194492610 2011 Hrs. 14.12.2001 3) 0163422701 1745 Hrs. 14.12.2001 4) 0117861297 1136 Hrs. 14.12.2001 5) 123 1846 Hrs. 13.12.2001 6) 0117453416 1417 Hrs. 13.12.2001 7) 0117450433 1329 Hrs. 13.12.2001 8) 09810081228 1225 Hrs. 13.12.2001 9) 9810081228 1215 Hrs. 13.12.2001 10) 91911489429 1136 Hrs. 13.12.2001

257. Indeed, the dialed list reflected on the screen as noted in the recovery memo shows that the calls at serial No. 2, 5 to 10 were reflected in the computer print out of this number. Calls at serial No. 1, 3 and 4 were not reflected as they had not materialised:-

Recovery Memo Ex.PW-66/11 notes as under : "In the presence of the witnesses mentioned hereinafter, the house search of House No. 1021, 1st Floor, Mukherjee Nagar, Delhi belonging to Navjot Sandhu alias Afshan Guru, W/o Shaukat Hussain Guru, R/o House No. 1021, 1st Floor, Mukherjee Nagar, permanent resident of Village Doabga, Sopore, Baramullah, J & K has been carried out. During that, a mobile phone make"ERICSSON" and a magic Sim kept beside the T.V. have been recovered. The recovered mobile phone was not working. The IMEI No. whereof is 490174612116430 and Magic SIM No. 8991100102009283792. The aforesaid recovered SIM has been kept in an envelope and sealed with the seal of MCS. The recovered mobile phone has been converted into a while cloth parcel and also sealed with the seal of 'MCS'. Both the sealed parcels have been taken into police possession as a piece of evidence by means of memo." 258. Indeed, the SIM number noted, pertained to mobile phone No. 9810446375, computer print out of the call details whereof showed that the IMEI number noted of the handset was used on this SIM card. 259. The facts aforesaid lend assurance to the testimony of PW-66 and PW-67. We accept their testimony qua the recoveries as truthful. The recoveries from the person and house of accused Afzan Guru thus stand proved. Counsel for the accused submitted that no independent witnesses were associated and, therefore, recoveries must fail. We do not agree. If the police witnesses are credible and their testimony not shaken, mere non-association of independent witness by itself is no ground to reject the recovery by disbelieving the police.

In the judgment reported as 2000 (VII) A.D. (SC) 613, Government of NCT of Delhi v. Sunil, it was held : 'We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during British period and policemen also know about it. Its hang over persisted during post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence, when a police officer gives evidence in Court that a certain article was recovered by him on the strength of the statement by the accused it is open to the Court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the Court has any good reason to suspect the truthfulness of such records of the police, the court could certainly take into account the fact that no other independent person was present at the time of recovery. But is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettision such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions." 260. This takes us to the recovery effected from accused Shaukat and Mohd. Afzal on their arrest at Srinagar. PW-61 and PW-62 deposed about arrest of accused Shaukat and Mohd. Afzal at Srinagar. In cross-examination, the accused did not dispute the factum of arrest by these two officers at Srinagar. Their testimony does not stand discredited. The arrest of accused Shaukat and Mohd. Afzal as deposed to by PW-61 and PW-62 stands proved. PW-61 and PW-62 deposed that the accused were in Truck No. HR-38E-6733 when they were intercepted. Recovery memo Ex.PW.61/4 was prepared by them. In reads as follows : Seizure Memo In connection with Prevention of Terrorist Activities In the above noted case, police of Parampura led by me, today intercepted a truck No. HR-38E-6733 at about 11.45 and recovered : (1) cash in Indian currency amounting to Rs. 10 lacs in 23 wads out of which of wads of notes in the denomination of Rs. 500/- and 2 wads in the denomination of Rs. 100/- which are sealed and remaining wads are unsealed. (2) one Audio/Video computer laptop. (3) One adopter. (4) One Audio/Video camera. (5) Three leads. (6) None Cds. (7) Three large size Cds. (8) One Modulim (9) One FDD (10) One Digital Audio/Video recorder of Sharp make. (11) one memory stick. (12) Two booklet Instruction manual. (13) One mobile phone (Make Nokia) bearing IMEI No. 3501022-94522432. The aforesaid articles have been taken by me into possession as a piece of evidence in the presence of the witnesses. The memo has been prepared on P.S. Parampura dated 15.12.2001." 261. In cross-examination except for the suggestion that no recoveries were made from the truck, there is no worthwhile cross. The credibility of the witnesses is not shaken. Their deposition stands.

The recovery of one mobile phone having IMEI No. 350102209442432, the laptop and Rs. 10 lacs thus stands proved. Counsel for the defense argued that from evidence of PW-61 and PW-62, it has emerged that these recoveries were effected on the joint disclosure of accused Mohd. Afzal and accused Shaukat and hence were not admissible in evidence against any of them. Decisions of the Hon'ble Supreme Court , Lachman Singh v. State and , Mohd. Abdul Hafiz v. State of A.P. were relied upon. We shall deal with the evidencary value of this recovery when we deal with its effect and evidencary value a little later. For the present, we clarify, our finding is that it is proved that accused Mohd. Afzal and Shaukat were arrested by PW-61 and PW-62 at Srinagar. When they were apprehended, they were in truck No. HR-38E-6733, and from that truck the laptop, mobile phone instrument and Rs. 10 lacs were recovered. 262. The next evidence, in the sequence of facts, martialled by the prosecution against the accused is the records of the two mobile service provider companies: (1) Airtel, and (2) Essar. PW-35 and PW-36 deposed to prove the computer print outs of the computer generated records of mobile phone numbers 9810511085, 9810510816, 9810565284, 9810693456, 9810446375, 9810081228, 9811573506, 9811489429. 263. The computer print outs detail the following information:- 1. Mobile telephone number to which the details pertain. 2. Time of call. 3. Nature of call i.e. incoming or outgoing. 4. Call duration. 5. Tower from which call is received or transmitted. 6. Handset number of the mobile instrument used. 264. Has the prosecution proved these call details, if yes, only then can they be read in evidence. 265. All counsel, for the prosecution as well as the defense, did not dispute that the calls routed at the respective centres of AirTel and Essar are computer operated and the data/information is recorded by the concerned computer. Dispute was whether the computer print outs, for the various telephones, stood proved as per Section 65B or not. 266. Shri Shanti Bhushan, learned Senior Counsel for accused Shaukat Hussain contended that the contents of electronic record could be proved only in the manner prescribed by Sub-section (4) of Section 65B i.e. by issuance of a certificate signed by a person occupying a responsible position in relation to the operation of the computer or by a person responsible for the management of the calls recorded by the computer. Contention was that Ex.PW-35/2 to 35/8 and Ex.PW-36/1 to 36/5, being the call details of various telephones were not proved and hence could not be relied upon. 267. Reply of the prosecution was that as per Sub-section (1) of Section 65B computer generated print outs were admissible in evidence provided they satisfied the conditions mentioned in Sub-section (2) and Sub-section (4) merely provided on alternative mode of proof by way of certification. 268. Section 3 of the Evidence Act, 1872 defines evidence as under: "Evidence" - Evidence means and includes:- 1)————- 2) all documents including electronic records produced for the inspection of the court; 269. By way of amendment to the Evidence Act, 1872, incorporated by Act. No. 21 of 2000 following was inserted: "The expression"Certifying Authority","digital signature","Digital Signature Certificate","electronic form","electronic records","information","secure electronic records","secure digital signature" and "subscriber" shall have the meanings

respectively assigned to them in the Information Technology Act, 2000." 270. Section 2(c) of the Information Technology Act, 2000 reads: “electronic record” means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro record." 271. Section 65A and 65B of the Evidence Act, 1872, inserted by Act No. 21 of 2000 read as under:- 65A. Special provisions as to evidence relating to electronic record. The contents of electronic records may be proved in accordance with the provisions of Section 65B. 65B. Admissibility of electronic records. (1) notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible. (2) the conditions referred to in Sub-section (1) in respect of a computer output shall be following, namely :- (a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer; (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of said activities; [c] throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and (d) the information contained in the electronic reproduces or is derived from such information fed into the computer in the ordinary course of the said activities. (3) Where over any period, the function of storing or processing information for the purposes of any activities regular carried out on over that period as mentioned in Clause (a) of Sub-section (2) was regularly performed by computers, whether - (a) by a combination of computers operating over that period; or (b) by different computers operating in succession over that period; or (c) by different combinations of computers operating in succession over that period; or (d) in any other manner involving the successive operation over that period, in whatever order, or one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly. (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, - (a) identifying the electronic record containing the statement and describing the manner which it was produced; (b) giving such particulars of any device involved in the production

of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer; (c) dealing with any of the matters to which the conditions mentioned in Sub-section (2) relate, and purporting to be signed by a person occupying a reasonable official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it. (5) For the purposes of this section, - (a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form or whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment; (b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer shall be taken to be supplied to it in the course of those activities; (c) to a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment. 272. Thus, computer generated electronic records is evidence, admissible at a trial if proved in the manner specified by Section 65B of the Evidence Act. 273. Sub-section (1) of Section 65B makes admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfilllment of the conditions specified in Sub-section (2) of Section 65B. Following are the conditions specified by Sub-section (2) : a) The computer from which the record is generated was regularly used to store or process information in respect of activity regularly carried on by a person having lawful control over the period, and relates to the period over which the computer was regularly used; b) Information was fed in the computer in the ordinary course of the activities of the person having lawful control over the computer; c) The computer was operating properly, and if not, was not such as to affect the electronic record or its accuracy; d) Information reproduced is such as is fed into computer in the ordinary course of activity. 274. Under Sub-section (3) of Section 65B, Sub-section (1) and (2) would apply where single or combination of computers, is used for storage or processing in the regular course of activities and the computers used shall be construed as a single computer. Under Sub-section 4 of Section 65B, if evidence is desired to be led under Section 65B, it would be admissible if a certificate is tendered, signed by a person either occupying a responsible official position in relation to the computer or being in the management of the relevant activities; provided the following is certified: (a) electronic record containing the statement is identified with description of how it was produced; (b) that electronic record was a computer print out generated by a device particulars whereof are given; (c) deals with matters to which conditions in Sub-section (2) relate. 275. Under Sub-section (5), information shall be taken to be supplied to a computer by means of an appropriate equipment, in the course of normal

activities intending to store or process it in the course of activities and a computer output is produced by it whether directly or by means of appropriate equipment. 276. The normal rule of leading documentary evidence is the production and proof of the original document itself. Secondary evidence of the contents of a document can also be led under Section 65 of the Evidence Act. Under Sub-clause "d" of Section 65, secondary evidence of the contents of a document can be led when the original is of such a nature as not to be easily movable. Computerised operating systems and support systems in industry cannot be moved to the court. The information is stored in these computers on magnetic tapes (hard disc). Electronic record produced there from has to be taken in the form of a print out. Sub-section (1) of Section 65B makes admissible without further proof, in evidence, print out of a electronic record contained on a magnetic media subject to the satisfaction of the conditions mentioned in the section. The conditions are mentioned in Sub-section (2). Thus compliance with Sub-section (1) and (2) of Section 65B is enough to make admissible and prove electronic records. This conclusion flows out, even from the language of Sub-section (4). Sub-section (4) allows the proof of the conditions set out in Sub-section (2) by means of a certificate issued by the person described in Sub-section 4 and certifying contents in the manner set out in the sub-section. The sub-section makes admissible an electronic record when certified that the contents of a computer print out are generated by a computer satisfying the conditions of Sub-section 1, the certificate being signed by the person described therein. Thus, Sub-section (4) provides for an alternative method to prove electronic record and not the only method to prove electronic record. 277. Whether Section 65B casts a positive mandate on the person relying upon electronic record, to adduce affirmative evidence that at all material time the computer was working properly when information was being fed in it, and whether on facts, the computer generated call details have to be ignored due to alleged malfunctioning? 278. The last few years of the 20th Century saw rapid strides in the field of information and technology. The expanding horizon of science and technology threw new challenges for the ones who had to deal with proof of facts in disputes where advanced techniques in technology was used and brought in aid. Storage, processing and transmission of date on magnetic and silicon medium became cost effective and easy to handle. Conventional means of records and data processing became out dated. Law had to respond and gallop with the technical advancement. He who sleeps when the sun rises, misses the beauty of the dawn. Law did not sleep when the dawn of Information and Technology broke on the horizon. World over, statutes were enacted. Rules relating to admissibility of electronic evidence and it's proof were incorporated. 279. Did the law relating to admissibility and proof of electronic record have a positive mandate to be satisfied by the one who relies upon electronic record? The positive mandate being to establish positively that there was no malfunctioning of the equipment processing the operations at the relevant time, to which the record relates. 280. In England this positive mandate was statutorily enacted and the prosecution had to show by positive and affirmative evidence that it was safe to rely upon the

document produced by a computer from out of its memory. The Police & Criminal Evidence Act, 1984 was enacted. But, while interpreting Section 69 of the said Act, the courts took a practical approach and gave an interpretation where computer generated record could be proved by a statement, made by an employee unfamiliar with the precise details of the operation of the computer, that the print out was retrieved from the computer memory and the computer was not malfunctioning. Section 69 reads as under : "(1) In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown - (a) that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer. (b) that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of it contents; and [c] that any relevant conditions specified in rules of Court under Sub-section (2) below are satisfied. (2) Provision may be made by the rules of Court requiring that in any proceedings where it is desired to give a statement in evidence by virtue of this section such information concerning the statement as may be required by the rules shall be provided in such form and at such time as may be so required." 281. In R.V. Shepherd, 1993 A.C. 380. Lord Griffiths, dealing with the defense argument held:- "The principal argument for the defendant starts with the proposition that the store detective was not a person occupying a responsible position in relation to the operation of the computer within the meaning of paragraph 8(d) of Schedule 3 to the Act and, therefore, was not qualified to sign a certificate for the purpose of providing proof of the matters contained in Section 69(a). This I accept. Although the store detective understood the operation of the computer and cold speak of its reliability she had no responsibility for its operation. I cannot however, accept the next step in the defendant's argument which is that oral evidence is only acceptable if given by a person who is qualified to sign the certificate. The defendant does not go so far as to submit that evidence must be given by a computer expert but insists that it must be someone who has responsibility for the operation of the computer; either the operator or someone with managerial responsibility for the operation of the computer. Documents produced by computers are an increasingly common feature of all business and more and more people are becoming familiar with their uses and operation. Computers vary immensely in their complexity and in the operations they perform. The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly." 282. Statement by the witness that when the computer was working they had no trouble with operation of central computer was held sufficient in discharge of the affirmative burden.

283. In R v. Ana Marcolino,(CA "Crim.Div"), following the dictum of Lord Griffiths in R.V. Shepherd the evidence of the witness proving electronic record was analysed step wise which analyses is illuminative as to how the issue was dealt with. Lord Justice Henry posed the question: Does the evidence given by Mr. Slade satisfy the test in Shepherd, 1993 AC 380? The answer came as follows: 1). he had been employed by Vodaphone for over four years as the risk supervisor and his duties included identifying fraudulently used accounts and liaising with the police. This account had been used fraudulently. 2) He had retrieved from the computer the records relating to this mobile telephone and produced from those records the itemized account for the relevant period. To do so, he had accessed the billing records for that period. 3) he was not familiar with the precise details of the operations of the computer because he had not designed it. However, he had general knowledge of the system. He had no reason to believe that the computer records were inaccurate because of improper use. 4) Vodaphone is continuously audited by the DTI. No complaint has been made as to the accuracy of their records. Vodaphone has their own quality assurance department which constantly monitored the system. 5) he asserted that the computer was working properly at the relevant time. In support of that assertion he relied upon the following facts : a) There was no record of any malfunction. Had their been, it would have been drawn to his attention by the billing department. In any event, the computer had ancillary equipment which would have taken over, had there been any failure or malfunction of the primary systems. b) If there had been any malfunction, the billing records would be classed as 'in suspension'; those records were not. c) The billing record itself is made without human intervention, although it is triggered by the use of a mobile phone. The system runs a series of internal checks as to accuracy and function before the call is made and the subsequent detail recorded. If there is any malfunction the records are put into suspension. The records of these calls had not been suspended. d) The records in relation to malfunction were kept by persons who could not reasonably be expected to have any personal recollection of them. These persons had a duty to report any malfunction. None had been reported. Miss Calder submitted that the evidence of external audit is irrelevant. In our judgment, the jury was entitled to take into account that these records were produced by a large company providing a substantial public service the subject of licensing and external audit by the DTI. Such evidence goes directly as to whether there has been improper use. It is the view of this Court that the totality of the evidence as set out above satisfies the test propounded by Lord Griffiths. Mr. Slade was sufficiently familiar with the workings of the computer. The records are designed to reveal malfunction. None was revealed. 284. The conviction was found to be safe and the appeal was dismissed. 285. In DPP v. Me. Kewon, (1997) 1 Criminal Appeal 155, Lord Hoffman, applying Section 69 of the Police and Criminal Evidence Act, 1984 in relation to the inaccuracy in the time display in the computer print out, held:- "I shall for the moment assume that the inaccuracy in the time display meant that"the computer not operating properly". The question is therefore whether that was"such as to affect the production of the

document or the accuracy of its contents“. If the words are read literally, it did. The document said that the first test had occurred at 23.00 GMT when it was in fact 00.13 BST. As to one hour, the discrepancy is merely as to the way in which the time was expressed. 23.00 GMT is the same time as 00.00 BST. But the remaining 13 minutes cannot, I think, be dismissed as de minimis. The inaccuracy of the time reading therefore affected the accuracy of a part of the contents of the document. In my view, however, the paragraph was not intended to be read in such a literal fashion.”The production of the document or the accuracy of its contents" are very wide words. What if there was a software fault which caused the document to be printed in lower case when it was meant to be in upper case? The fault has certainly affected the production of the document. But a rule which excluded an otherwise accurate document on this ground would be quite irrational. To discover the legislative intent, it is necessary to consider the purpose of the rule. The first thing to notice is that Section 69 is concerned solely with the proper operation and functioning of a computer. A computer is a device for storing, processing and retrieving information. It receives information from, for example, signals down a telephone line, strokes on a keyboard or (in this case) a device for Chemical analysis of gas, and it stores and processes that information. If the information received by the computer was inaccurate (for example, if the operator keyed in the wrong name) then the information retrieved from the computer in the form of a statement will likewise be inaccurate. Computer experts have colourful phrases in which to express this axiom. But Section 69 is not in the least concerned with the accuracy of the information supplied to the computer. If the gas analyser of the Intoximeter is not functioning properly and gives an inaccurate signal which the computer faithfully reproduces, Section 69 does not affect the admissibility of the statement. The same is true if the operator keys in the wrong name. Neither of these errors is concerned with the proper operation or functioning of the computer. The purpose of Section 69, therefore, is a relatively modest one. It does not require the prosecution to show that the statement is likely to be true. Whether it is likely to be true or not is a question of weight for the justices or jury. All that Section 69 requires as a condition of the admissibility of a computer-generated statement is positive evidence that the computer has properly processed, stored and reproduced whatever information it received. It is concerned with the way in which the computer has dealt with the information to generate the statement which is being tendered as evidence of a fact which it states. The language of Section 69(1) recognises that a computer may be malfunctioning in a way which is not relevant to the purpose of the exclusionary rule. It cannot therefore be argued that any malfunction is sufficient to cast doubt upon the capacity of the computer to process information correctly. The legislature clearly refused to accept so extreme a proposition. What, then, was contemplated as the distinction between a relevant and an irrelevant malfunction? It seems to me that there is only one possible answer to that question. A malfunction is relevant if it affects the way in which the computer processes, stores or retrieves the information used to generate the statement tendered in evidence. Other

malfunctions do not matter. It follows that the words “not such as to affect the production of the document or the accuracy of its contents” must be read subject to the overall qualification that the paragraph is referring to those aspects of the document or its contents which are material to the accuracy of the statement tendered in evidence." 286. The Law Commission in England reviewed the law relating to computer generated evidence. It summed up the major problem posed for the rules of evidence by computer output in the words of Steyn, J.:- “Often the only record of the transaction, which nobody can be expected to remember, will be in the memory of a computer. ... if computer output cannot relatively readily be used as evidence in criminal case, much crime (and notably offences involving dishonesty) would in practice be immune from prosecution. On the other hand, computers are not infallible. They do occasionally malfunction. Software systems often have”bugs“. — Realistically, therefore, computers must be regarded as imperfect devices.” 287. It noted that given the extensive use of computers, computer evidence could not be unnecessarily imp leaded, while giving due weight to the fallibility of computers. The Law Commission noted that Section 69 had enacted a law which was unsatisfactory for 5 reasons:- “First, Section 69 fails to address the major causes of inaccuracy in computer evidence. As Professor Tapper has pointed out,”most computer error is either immediately detectable or results from error in the data entered into the machine“. Secondly, advances in computer technology make it increasingly difficult to comply with Section 69: it is becoming”increasingly impractical to examine (and therefore certify) all the intricacies of computer operation“. These problems existed even before networking became common. A third problem lies in the difficulties confronting the recipient of a computer-produced document who wishes to tender it in evidence: the recipient may be in no position to satisfy the court about the operation of the computer. It may well be that the recipient’s opponent is better placed to do this. Fourthly, it is illogical that Section 69 applies where the document is tendered in evidence, but not where it is used by an expert in arriving at his or her conclusions, nor where a witness uses it to refresh his or her memory. If it is safe to admit evidence which relies on and incorporates the output from the computer, it is hard to see why that output should not itself be admissible; and conversely, if it is not safe to admit the output, it can hardly be safe for a witness to rely on it.” 288. The Commission recommended deletion of Section 69, the opinion was: “Where a party sought to rely on the presumption, it would not need to lead evidence that the computer was working properly on the occasion in question unless there was evidence that it may not have been - in which case the party would have to prove that it was (beyond reasonable doubt in the case of the prosecution, and on the balance of probabilities in the case of the defense), The principal has been applied o such devices as speedometers and traffic lights, and in the consultation paper we saw no reason why it should not apply to computers. 289. We may note that Section 69 of the Police and Criminal Evidence Act, 1984 has since been repealed and the common law presumption :-”in the absence of evidence to the contrary the courts will presume that mechanical instruments were in order

at the material time“, operates with full force. 290. Experience has shown to us that development in computer networking, access, control, monitoring and systems security are increasingly making it difficult for computer errors to go undetected. Most computer errors are immediately detected or resultant error in the date is immediately recorded. In a court of law it would be impractical to examine the intricacies of computer functioning and operations. To put it in the words of the Law Commission report in England:-”Determined defense lawyers can and do cross-examine the prosecution's computer expert at great length. The complexity of modern systems makes it relatively easy to establish a reasonable doubt in a juror's mind as to whether the computer was operating properly. Bearing in mind the very technical nature of computers, the chances of this happening with greater frequency in future are fairly high. We are concerned about smoke-screens being raised by cross-examination which focuses in general terms on the fallibility of computers rather than the reliability of the particular evidence. The absence of a presumption that the computer is working means that it is relatively easy to raise a smoke-screen." 291. The law as it stands enacted in India does not have a provision analogous to Section 69 of the Police and Criminal Evidence Act, 1984 in England. The conditions which require to be satisfied are the ones set out in Sub-section (2) of Section 65B. The conditions, as noted above are:- a) The computer from which the record is generated was regularly used to store or process information in respect of activity regularly carried on by a person having lawful control over the period, and relates to the period over which the computer was regularly used; b) Information was fed in the computer in the ordinary course of the activities of the person having lawful control over the computer; c) The computer was operating properly, and if not, was not such as to affect the electronic record or its accuracy; d) Information reproduced is such s is fed into the computer in the ordinary course of activity." 292. In effect, substantially, Section 65B of the Indian Evidence Act and Section 69 of the Act in England have same effect. 293. Thus, in the context of Section 65B(2)(c) the condition that throughout the material part of the period to which the computer operations related, the computer was operating properly has to be complied with. However, this compliance would be on the principle laid down in Shepherd (supra) and as applied in Ana Marcolino (supra) and Me. Kewon (supra). Thus in our opinion, is the only practical way to deal with computer generated evidence unless the response is by way of a challenge to the accuracy of computer evidence on the ground of misuse of system or operating failure or interpolation. Such challenge has to be established by the challenger. Generic and theoretical doubts by way of smoke screen have to be ignored. 294. The testimony of PW.35 and PW.36 establishes that the call details Ex.PW.35/2 to Ex.PW.35/8 and Ex.PW.36/1 to Ex.PW. 36/5 were computer generated and pertained to the respective periods indicated in the print outs. Testimony establishes that they related to the services provided by the respective companies in respect of the different mobile phone numbers. It is true that neither witness made a positive statement that during the relevant period, the computers worked properly but reading the statement as a whole, the same is implicit. No

suggestion was given to the witness that their computers were malfunctioning. We are satisfied that on the evidence on record, the prosecution has duly proved the electronic record Ex.PW.35/2 to Ex.PW.35/8 and Ex.PW.36/1 to 36/5. 295. The technical flaw whereby on four occasions double entries have been recorded are explainable, in that, they are double entries pertaining to the called and caller numbers. Even otherwise as held in Ana Marcolino (Supra) the malfunction is not sufficient to cast a doubt upon the capacity of the computer to process information correctly. It does not establish in any way that the capacity of. the computer to process, store and retrieve information used to generate the statement, tendered in evidence, was effected. CONCLUSIONS WHICH EMERGED FROM THE MOBILE PHONES, SIM CARDS RECOVERED DURING INVESTIGATION AND THE RECORDS OF THE CALL DETAILS OF THE VARIOUS TELEPHONE NUMBERS. 296. For facility, we have extracted in tabular form the person, cell phone number and IMEI number of the mobile instrument recovered. Same is as under:- PERSON DOCUMENT! CELLPHONE NUMBER RAJA:
One Handset with one SIM Card inside it was recovered EX.PW2/2 98105-10816 44926921963901/0 RANA: One Handset with one SIM Card inside it was recovered EX.PW2/2 98103-02438 44926940580865/0 MOHAMMAD: One Handset with one SIM card inside it EX.PW4/14 98105-11085 35066834011747/2 MOHAMMAD: One SIM card in purse EX.PW4/8 98106-93456 MOHAMMAD: One SIM card in purse EX.PW4/8 98105-65284 MOHAMMAD: One SIM card in purse EX.PW4/8 98115-44860 GILANI: One handset with one SIM Card inside it was recovered EX.PW66/5 98100-8212 28 332021532062192 AFSAN: One handset with one SIM Card inside it EX.PW66/7 98115-73506 350177402325262 AFSAN:
One handset with one SIM Card inside it EX.PW66/11 98104-46375 490174612116430 SRINAGAR (AFZAL AND SHAUKAT): One handset without SIM Card EX.PW61/4 3501022094 52432
297. From the call details of the various telephone numbers, the following position emerges:- a) Instrument IMEI No. 449269219639010, recovered from the deceased terrorist Raja at the spot, was used with the SIM Card corresponding to mobile No. 9811489429. On 24.11.2001, it was used with the SIM Card corresponding to mobile No. 9810565284 (SIM recovered from the purse of deceased terrorist Mohd.). From 26.11.2001 to 29.11.2001 it was again used with the SIM card pertaining to mobile No. 9811489429. From 1.12.2001 to 6.12.2001 it was used with the SIM card corresponding to mobile No. 981069356 (being the second SIM card recovered from the deceased terrorist Mohd.). From 5.12.2001 to 6.12.2001, it was used with the SIM card corresponding to mobile No; 9810565284 being the third SIM card recovered from the purse of the deceased terrorist Mohd. From 7.12.2001 to 12.12.2001, it was again used with the SIM card corresponding to mobile No. 9811489429. On 12.12.2001, it was used with the SIM card pertaining to mobile No. 9810510816 recovered from the deceased terrorist Raja. Thereafter, on 12.12.2001 it was again used on the first SIM card recovered from the pocket of deceased terrorist Mohd. corresponding to mobile No. 9810565284 and finally on 13.12.2005, it

was recovered with the SIM card corresponding to mobile No. 9810510816. It, thus, stands established that the persons having the SIM card corresponding to mobile No. 9811489429 was inter-changing the mobile instrument with deceased terrorist Raja and Mohd. It is pertinent to note here that the SIM card pertaining to this mobile No. 9811489429 was never recovered. b) Call details of the mobile No. 9811489429 shows that on 13.12.2001, the SIM card corresponding to this mobile No. was used in the instrument having IMEI No. 350102209452430. This instrument is the same which was recovered from the truck when accused Mohd. Afzal and Shaukat were intercepted in the truck. c) From the call details of mobile No. 9811489429, it stands established that on 13.12.2001 at 11:19:14 when the Parliament was under attack, a call was made to the No. 9811573506 i.e. number pertaining to the SIM card recovered from the handset in the hand of accused Afzan when she was arrested. It also shows that at 11:22:15 hours on 13.12.2001, when Parliament was under attack, a call was received on this number from the mobile phone No. 9810693456 i.e. from the SIM card recovered from the deceased terrorist, Mohd. at the spot. Further at 11:32:40 hours, a call was made from this number to the mobile No. 9811573506 i.e. the number recovered from the hand of Afzan Guru. d) Call details of the SIM card pertaining to mobile No. 9810446375 recovered from the house of Afzan showed that this SIM card was used on the instrument 350177402325262 i.e. the instrument recovered from the hand of Afzan when she was arrested, which instrument, in turn was used for operation of the SIM card pertaining to mobile No. 9811573506. e) Mobile No. 9810446375 was activated for the first time on 2.11.2001 and first call made was to accused S.A.R. Gilani on his mobile No. 9810081228. Thus, two mobile numbers, therefore, remained constantly in touch. f) Mobile No. 9810446375 remained constantly in touch with mobile No. 9811489429. g) On 6.12.2001 the mobile No. 9810446375 was twice in touch with a satellite phone 8821651150059. Again on 7.12.2001 two contacts were made over these two phones. h) The user of the number 9810446375 was stopped with effect from 7.12.2001. i) The SIM card pertaining to the mobile number 9810446375 was used in the instrument bearing No. 350177402325260 from 27.11.2001 till its disuse. Their instrument was recovered from the hands of accused Afzan when she was arrested. j) SIM card pertaining to mobile No. 9811489429 was activated on 6.11.2001 and was used on the handset having IMEI number 449269219639010 recovered from deceased terrorist Raja. Its user was discontinued on 29.11.2001 and remained dormant till 7.12.2001 when again it was put to use. On 13.12.2001, the SIM card pertaining to this number was used in the handset No. 350102209452430 i.e. the instrument recovered from the truck at Srinagar when Mohd. Afzal and Shaukat were intercepted. k) On 7.12.2001 the mobile No. 9811489429 remained in touch with the satellite phone 8821651150059 and on 8.12.2001 it remained in touch with the said number twice. l) On 13.12.2001, three calls were made from Mobile No. 9810693456 recovered from deceased terrorist Mohd. to mobile phone No. 9811489429 at 10:43:34 hours, 11:08:16 hours and 11:25:32 hours. The last being when the attack was on. At 11:10:14 hours and 11:32:40 hours on 13.12.2001 two calls were made from mobile No.

9811489429 to 9811573506. At 12:12:49 hours a call was made from mobile No. 9811573506 to 9810081228 and on 12:22:50 hours, a return call was made. 298. It, thus, stands proved that the various handsets recovered were used inter-changeably with the various SIM cards recovered. Further, stands established that the SIM card of the mobile number 9810446375 was used from 27.11.2001 till date of disuse in the handset having number 350177402325260. It further stands established that mobile number 9811489429 was used from 6.11.2001 till 13.12.2001 on the handset recovered from deceased terrorist Raja and on 13.12.2001 it was used on the instrument recovered from the truck in Srinagar. 299. (We shall be dealing with the further evidentary value of the SIM cards and the mobile sets as also the inter-changeable use made and the call records while dealing with the disclosure statements and confessions made as the case of the prosecution is that the mobile No. 9811489429 SIM card whereof was never recovered was in fact the number of accused Mohd. Afzal as per his confession and the number 9810446375 was of Shaukat as per his confession). EVIDENCE RELATING TO FURTHER FACTS SOUGHT TO BE ESTABLISHED BY THE PROSECUTION. 300. Reverting back to the testimony of PW-66 and PW-67, accused Shaukat and Mohd. Afzal were handed over to PW-66 by SI Hirday Bhushan at about 6 P.M. along with the laptop, Rs. 10 lacs and the mobile phone recovered from the truck at Srinagar. From the testimony of PW-66 and PW-64, it emerges that disclosure statement of accused Mohd. Afzal Ex.PW-64/1 was recorded followed by the recording of a disclosure statement being Ex.PW-64/2 made by accused Shaukat. In the said disclosure statements, accused Mohd. Afzal disclosed that he was a surrendered militant, was a cousin of accused Shaukat. He was in contact with Tariq, who was an active militant of Jaish-e-Mohd. and on his instigation, he met deceased terrorist Mohd., a Pakistani citizen, who along with his associates were assigned the task of carrying out "Fidayeen attack" in Delhi. He instructed Shaukat to work for the community. He was introduced to Ghazi Baba, the supreme commander of Jaish-e-Mohd. Shaukat arranged for an accommodation at boys' hostel at Christian Colony where he brought Mohd. He and Shaukat received money. The slain terrorists were Pakistani citizens and were brought to Delhi by him. He had arranged for accommodation at A-97, Gandhi Vihar. Arms and ammunitions were brought to Delhi by the terrorists. Meeting was organized at the house of Shaukat to chalk out the plan for carrying attack. Shaukat's wife Afzan and accused S.A.R. Gilani were present in the meetings. He arranged for additional accommodation at 281, Indra Vihar. He along with terrorist Mohd. purchased SIM cards. He purchased Ammonium Nitrates, Aluminium and Sulphur to make explosives. A second hand motorcycle bearing No. HR 51 E 5768 was purchased. Map of Delhi to study the topography of the area of Parliament Street was purchased. He helped terrorist Mohd. in purchasing a White Ambassador Car from Lucky Motors. Terrorist Mohd. got prepared fake identity cards for the slain terrorists. He purchased a red VIP light to be fitted on the roof of the car. Terrorist Mohd. had instructed him to switch on T.V. at about 11.30 A.M. to inform him the names of the VIPs present in the Parliament. At 11.25 A.M.

on 13.12.2001, he received a call from terrorist Mohd. on his mobile Number 9811489429 from Mohd.'s mobile No. 9810693456 inquiring about the position of VIPs. He could not give the information as he was away from television. He phoned Shaukat to get the information about position of VIPs. After the attack, he and Shaukat left in truck No. HR 38 E 7633 for Srinagar. 301. In his disclosure statement, Shaukat gave information that he and Mohd. Afzal were from Baramula. He had come into contact with accused S.A.R. Gilani, who was also a resident of Baramula. While he was a student, they used to discuss "Jehad" for liberation of Kashmir. Accused S.A.R. Gilani got his marriage solemnised with Navjot Sandhu, a sikh girl, who later changed her name to Afzan Guru. Mobile phone No. 9810446375 was his. He and Mohd. Afzal had arranged for accommodation at Christian Colony for the terrorists. Mohd. Afzal took accommodation at A-97, Gandhi Vihar. The slain terrorists used to held meetings at his house and in which meetings his wife and accused S.A.R. Gilani were present. He changed his mobile number from 9810446375 to 9811573506. He had lent his motorcycle DL-1S 3122 to the terrorists. He made disclosure about the plans hatched to attack Parliament House. 302. Based on the inputs available from the disclosure statements, Shaukat and Mohd. Afzal led the police to the different places and identified the places from where Chemicals for making explosives were purchased, the place from where the mixer grinder for mixing the explosives were made, the place from where the car, motorcycle, red light and SIM cards were purchased. 303. We have noted above the testimony of the various witnesses in this respect, but before we analyze the same, we may deal with the legal submission made by the counsel for the accused persons, on the basis of which they contended that no credence could be placed on the evidence of the said witnesses. The argument was based with reference to the fact that no test identification parade for identification of accused Mohd. Afzal, Shaukat or Gilani was got conducted qua the witnesses who identified them. It was argued that it was highly improbable and unnatural for alleged landlords and shopkeepers who had seen the accused persons as per their own testimony only once or twice to have recognised them. Even in respect of the identification of the deceased terrorists with reference to their photographs as the persons who accompanied accused Mohd. Afzal at the time when he purchased various articles or were seen in the premises at Christian Colony, Gandhi Vihar and Indra Vihar, it was submitted that an identification by mixing up photographs ought to have been conducted. 304. The facts which establish the identify of an accused person are relevant facts as per Section 9 of the Evidence Act. Substantive evidence of a witness is the statement made by him in the Court. No doubt, there are judgments holding that evidence of identification of an accused person at the trial for the first time is inherently of a weak character and to carry the strength of conviction, the evidence should show as to how and under what circumstances the witness was identifying a particular accused. However, the judgments have to be read and understood in the peculiar facts of those cases. We may note a few. In the judgment , Budhsen and Anr. v. State of U.P., it was held :- "The purpose of a prior test identification, therefore, seems to be to test and

strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceeding. There may, however, be exceptions to this general rule, when for example, the Court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration." (Emphasis ours). 305. In the judgment , State of Maharashtra v. Sukhdeo Singh, it was observed : "Test identification parade, if held promptly and after taking the necessary precautions to ensure its' credibility, would lend the required assurance which the Court ordinarily seeks to act on it. In the absence of such test identification parade, it would be extremely risky to place implicit reliance on identification made for the first time in Court after a long lapse of time and that too of persons who had changed their appearance. We, therefore, think that the learned Trial Judge was perfectly justified in looking for corroboration." 306. The aforesaid observations show that law on Test Identification Parade is not a cast iron straight jacket legal proposition admitting of no exceptions. Requirement of Test Identification Parade emanates from the rule of prudence to generally look for corroboration as to the identity of the accused who is a stranger to the witness. As held in the judgment reported as 2003 (5) Scale 152, Malkhan Singh and Ors. v. State of M.P., this rule of prudence is subject to exceptions, when for example, the Court is impressed by a particular witness on whose testimony, it can safely rely. After all, the identification parade belongs to the stage of investigation and there are no provisions in the Code of Criminal Procedure which make it mandatory for the Investigating Agency to conduct a test identification parade, nor is there any provision which confers right upon the accused to claim one. We may note that a test identification parade does not constitute a substantive evidence and they are governed by Section 162 Cr.P.C. 307. In Malkhan Singh's case (supra), the Hon'ble Supreme Court cited with approval its earlier observations in an unreported judgment of Hon'ble Supreme Court in Criminal Appeal No. 92/56, Prakash Chand Sogani v. The State of Rajasthan and it was held : "It seems to us that it has been clearly laid down by this Court, in Parkash Chand Sogani v. The State of Rajasthan (supra), that the absence of test identification in all cases is not fatal and if the accused person is well-known by sight it would be waste of time to put him up for identification. Of course if prosecution fails to hold an identification on the plea that witnesses already knew the accused well and it transpires in the course of the trial that the witnesses did not know the accused previously, prosecution would run the risk of losing its case." 308. It, therefore, flows that test identification parade is a rule of prudence and prior identification of the accused by the witnesses re-assures the Court that his evidence of identification carries conviction. It would be required where accused is not known to the witness. Distinction has been drawn in law where a witness identifies an accused whom he had sufficient time to see in contradistinction to a fleeting glimpse of the accused. Further, if the evidence of the witness otherwise inspires confidence, absence of a prior test identification parade would be no ground to reject or disbelieve the testimony

of the witness, more particularly in the case where the witness is a member of the public and no motive is attributed to him for falsely implicating the accused person. 309. We proceed with the further analysis of the evidence. PW-76 and PW-77 deposed that pursuant to the disclosure statements made by accused Mohd. Afzal and Shaukat, Inspector Mohan Chand Sharma gave custody of the two accused to them from where he took them to the following places:- 1) A-97, Gandhi Vihar. 2) 281, Indira Vihar. 3) B-47, Christian Colony. 310. Thereafter accused Mohd. Afzal was taken to the various shops from where 2 mobile phones and a SIM card was purchased, Chemicals for making explosives were purchased, the Sujata mixer grinder was purchased, the Ambassador car was purchased, the motorcycle No. HR-51E-5768 was purchased and the dry fruits were purchased. owners of the three residential premises and the persons who were responsible for the letting off of the premises were examined as the witnesses. owners of the shops or the person effecting sales were examined. Witnesses pertaining to the sale of the motorcycle and its ownership, sale of the Ambassador car and its ownership were also examined. PW-76 and PW-77 proved the pointing out memos prepared at the instance of the accused persons and the recoveries effected. In our discussion pertaining to identity of deceased terrorists, we have held that evidence given by a police officer such as leading to and pointing out places is admissible as conduct under Section 8 of the Evidence Act. 311. The testimony of PW-31 and PW-32 establishes that accused Mohd. Afzal had rented the second floor of house No. 281, Indira Vihar from PW-32 who was the owner thereof on 9th December, 2001. Testimony of PW-32 establishes that he had seen 5 or 6 persons coming to the rented accommodation on 11th December, 2001 and on 12.12.2001 Mohd. Afzal left the premises with some bags after putting lock and never returned. Testimony of this witness established that on 16.12.2001, in the presence of Mohd. Afzal and Shaukat, who were brought to the place, keys of the premises were broken. When Mohd. Afzal left the premises, he had locked the same and Mohd. Afzal did not produce the key. On search of the premises at 281, Indira Vihar detonators, silver powder, sulphur, ammonium nitrate in huge quantity was recovered. He witnessed the search and seizure recorded in seizure memo Ex.PW-32/1. His testimony further establishes that the police seized motorcycle No. HR-1SK-3122 vide seizure memo Ex.PW-32/2 in his presence. The witness stated that Ex.PW-1/20 to 24 being the photographs of the deceased terrorist were persons whom he had seen with Mohd. Afzal in the premises on 11.12.2001. 312. The important facts which get established from the testimony of this witness may be summerised as (i) that accused Mohd. Afzal was with the witness on 9.12.2001 when the tenancy agreement was arrived at, he had again met Mohd. Afzal on 10.12.2001 when further payment was made to him and saw him again on 11.12.2003 and hence could have easily recognized accused Mohd. Afzal; (ii) that accused Mohd. Afzal had physical and legal custody of the premises and he locked the same on 11.12.2001 and that thereafter none came to the premises till 16.12.2001 when the lock was broken on Mohd. Afzal's not producing the key; (iii) that the Chemicals and detonators recorded in seizure memo PW-32/1 were recovered from the

premises; and (iv) that five or six persons had been visiting the premises. 313. We may note at this stage that PW-22 Shri R.S. Verma from the CFSL, Chandigarh had proved the reports Ex.PW-22/1 and 22/2 pertaining to the explosives contained in the tiffin bomb and the car bomb recovered from the spot on 13.12.2001. From the report, it is evident that ammonium nitrate, aluminium (popularly known as silver powder) and sulphur was found in the said explosives. Testimony of PW-24 Sh. A. Dey from the CFSL proves the report Ex.PW-24/1 which establishes that the sealed parcels with the seal of HSG i.e. the Chemicals seized from the premises were aluminium nitrate, sulphur and aluminium powder. It, therefore, stands established that the unused explosives being the tiffin bomb and the car bomb recovered from the spot contained the same Chemicals which were recovered from this premises. 314. From the testimony of PW-53, it stands proved that the motorcycle DL-1SK 3122 stood registered in the name of accused Shaukat Hussain Guru. Therefore, from the testimony of PW-32 it gets proved that either it was Shaukat, who had left it there and therefore visited the premises or he had lent the motorcycle to accused Afzal or any of the slain terrorists. 315. Testimony of PW-33 and PW-34 establishes that the second floor of the premises A-97, Gandhi Vihar owned by PW-34 was taken on rent by accused Mohd. Afzal in the first week of November, 2001. Testimony of PW-34 establishes that after a few days another person, being terrorist Mohd. started living with accused Mohd. Afzal and that 3 or 4 boys used to Visit Mohd. Afzal quite often. Shaukat used to visit him in the house. It stands established from his testimony that on 13.12.2001 accused Mohd. Afzal, Shaukat and 4 more persons had left the premises around 10 A.M. They left in an Ambassador Car, Mohd. Afzal came back to the premises and left. It stands established that it was Mohd. Afzal who was in legal and physical possession of the second floor of the premises in question. On 16.12.2001, the lock was broken and the articles mentioned in seizure memo Ex.PW-34/1, 34/3 and 34/4 to which he was a witness were recovered. It thus stands established that from the premises Sulphur packets, Sujata mixer grinder, a plastic bucket containing a mixture of Chemicals were seized, samples whereof were taken and seized. It stands established that electronic detonators, pressure detonators, silver powder, ammonium nitrate, police uniforms, battery cells, starters, old earphones were recovered. PW-34 lives in the same house. He had categorically deposed that terrorist Mohd. was the other person whom he had seen staying in the second floor and he had seen Shaukat visiting the house. This part of his testimony went unchallenged. Qua this witness it cannot be said that his identification of terrorist Mohd. by the photograph PW.1/20 inspires no confidence. 316. Testimony of PW-22 and PW-24 establishes that the composition of Chemicals found sticking to the jar of the mixer grinder and the Chemicals in the bucket were of the same composition as was the composition of the Chemicals in the explosives seized from the deceased terrorists at Parliament House. It, thus, stands established that premises A-97, Gandhi Vihar were let out to accused Mohd. Afzal. He was in legal and physical possession thereof. It stands established that the Chemicals which were recovered from the premises

were used to make the explosives seized at Parliament House. It also stands established that the Sujata mixer grinder was used for mixing of the Chemicals for ultimate manufacture of the tiffin bomb and the car bomb. It also stands established that on 13.12.2001 accused Mohd. Afzal along with Shaukat and 4 more persons had left the premises in Ambassador Car parked outside the premises; The testimony of PW-34 also establishes that he was a witness to the recovery of motorcycle No. 51-E 5768 from the spot. It also establishes that terrorist Mohd. had lived in the house. It also establishes that Shaukat used to visit the house. 317. From the testimony of PW-26 to PW-29 as well as from the testimony of PW-52, it stands established that Sh. Ram Niwas was the registered owner of the motorcycle, who had sold it to PW-26, who in turn sold it to PW-27, who in turn sold it to PW-28 and finally PW-28 sold it to PW-29. It, thus, stands established that on 4th December, 2001, custody of this motorcycle was with Gupta Auto Deals. From the testimony of PW-29, it emerges that on 8.12.2001, ? gentlemen and a lady had come to purchase a motorcycle at noon time but deal could not be struck and in the evening two of those persons came back and the motorcycle was sold to them. From the testimony of this witness, it stands established that one of the two persons, who came to purchase the motorcycle was accused Mohd. Afzal. Witness stated that Ex.PW-29/5 (photograph of Mohd.) was the person who had accompanied Mohd. Afzal when the motorcycle was purchased. The witness had clearly stated that he remembers the persons who purchases motorcycle from his shop for a month or two as many a times they come back with registration related problems. We are, therefore, satisfied that this witness would have remembered the face of accused Mohd. Afzal and deceased terrorist Mohd. as the persons who came to his shop and purchased a motor cycle from him. No infirmity to the identification of accused Mohd. Afzal by this witness can be inferred nor can it be said that identification by this witness of deceased terrorist Mohd. does not inspires confidence. It is a fact that when a person would purchase a motorcycle, he would be with the seller for at least 15 to 20 minutes examining the vehicle being purchased, discussing its condition, settling the price and thereafter completion of the documents. The seller would not have a fleeting glance at the buyer. He would be seeing the buyer over a sufficient period of time so as to have a lasting impression on his memory about the physical attributes and the facial contours of the person. It thus, stands proved that accused Mohd. Afzal was the one who was present at the time when the motorcycle was purchased and possession thereof was taken. We have no reason to doubt the testimony of this witness that deceased terrorist Mohd. had accompanied Mohd. Afzal when the motorcycle was purchased. 318. From the testimony of PW-37 and PW-38, it stands established that accused Mohd. Afzal and Shaukat had approached PW-37 through PW-38 and had taken on rent a room at the premises B-41, Christian Colony on 6.11.2001. It stands established that neither of them used the room and on 26.ll.200r, he found a Kashmiri boy in the room who gave his name as Ruhel Ali Shah, that boy had shown Jo him his identity card which was the same identity card which was recovered from the deceased terrorist Mohd. This witness had deposed that

he had met Ruhel Ali Shah (Mohd.) in the room on 6th or 8th December, 2001. From the deposition of PW-37, it is apparent that on 26.11.2001, he had a conversation with Ruhel Ali Shah (Mohd.) pertaining to the personal information of Ruhel Ali Shah. This witness had obviously spent at least 10 to 15 minutes with Ruhel Ali Shah and had a conversation with him and, therefore, the identification by this witness that Ruhel Ali Shah (Mohd.) had stayed in the room which he had let out to accused Mohd. Afzal and Shaukat inspires confidence. It, therefore, stands established that accused Mohd. Afzal and Shaukat had taken on rent the premises at B-41, Christian Colony and that deceased terrorist Mohd. had stayed there uptil 8th December, 2001. 319. From the testimony of PW-15 to PW-20 and PW-54, it stands established that the Ambassador Car used by the slain terrorists to make an entry into Parliament House on 13.12.2001 bearing No. DL-3CJ-1527 was registered in the name of Infrastructure Leasing and Financial Services Limited, who sold it to PW-16, sold thereafter to PW-17, to PW-18, to PW-19 and finally to PW-20 in that order. It stands established that on 11.12.2001, the deceased terrorist Mohd. accompanied by accused Mohd. Afzal had purchased the said car. Though, the signatures of accused Mohd. Afzal on the delivery receipt Ex.PW-1/6 have been proved by PW-23, P.R. Mehra, Principle Scientific Officer, CFSL, New Delhi who gave his report on the basis of comparison with the admitted specimen signatures of accused Mohd. Afzal, we ignore the same and do not deal with the submissions made by Shri Colin Gonsalvis, learned counsel for accused Mohd. Afzal that since it was a POTA offence, the police could not have taken the specimen signatures of accused Mohd. Afzal without permission of the court in terms of Section 27 of POTA because of the reason that what the prosecution was wanting to establish by the said document was the fact that accused Mohd. Afzal had accompanied deceased terrorist Mohd. when the car was purchased. While cross-examining PW-20 accused Mohd. Afzal prevented his counsel from cross-examining the witness in respect of his presence when the car was sold because he admitted the said fact. In his statement under Section 313 Cr.P.C., accused Mohd. Afzal admits that he had accompanied Mohd. when the car was purchased. From the testimony of PW-20, it therefore, stands established that accused Mohd. Afzal was present with the slain terrorist Mohd. who purchased the car on 11.12.2001. 320. PW-40 deposed that on 6th December, 2001 accused Mohd. Afzal accompanied by the person whose photograph was Ex.PW-40/2 (Hamja) had visited his shop and ordered for 50 Kgs. of ammonium nitrates. Delivery was taken on 7th December, 2001. He further deposed that in his presence, accused Mohd. Afzal was brought by the police to his shop and proved the pointing out memo Ex.PW-40/1. We are satisfied that since this witness had dealt with accused Mohd. Afzal twice as a customer on 6.12.2001 and thereafter on 7.12.2001, he had sufficient interaction to recognize accused Mohd. Afzal and remember him on 17.12.2001 when the police took accused Mohd. Afzal to his shop. Indeed ammonium nitrate was recovered from 281, Indra Vihar and A-97, Gandhi Vihar. The testimony of this witness clearly establishes that Mohd. Afzal had purchased ammonium nitrate from his shop which was used in the manufacture

of the explosives. 321. Prosecution has proved that from Parliament house, on 13.12.2001, they had recovered packets of dry fruits near the deceased terrorists and the car which had the label of Sawan Dry Fruits, Fateh Puri. PW-41 deposed that on 11.12.2001, he had sold dry fruits to accused Mohd. Afzal who was accompanied by the deceased terrorist Rana, identified by him in reference to Ex.PW-41/5 being the photograph of Rana. He deposed that on 17.12.2001, the accused was brought to the shop and pointed out the shop to the police in his presence as noted in the pointing out memo. There is nothing brought on record to discredit this witness. However, we ignore the testimony of this witness as admittedly, on 13.12.2001 itself i.e. the day of the incident, police was aware of the dry fruits being sold from said shop knowledge emanating from the recovery of the dry fruit packets. 322. PW-42 deposed that on 11.12.2001, he had sold 15 Kgs. of Silver Powder to accused Mohd. Afzal and that on 17.12.2001, the police had brought him to his shop. The witness proved the pointing out memo Ex.PW-42/1. He identified the silver powder poly bags as sold from his shop. (Silver powder is the common name of aluminium powder). From the testimony of this witness, it stands established that 15 Kgs. of silver powder was purchased by accused Mohd. Afzal which was packed into polythene bags bearing name of his shop. This process of packaging would have taken some time. This witness did not have a fleeting glimpse of accused Mohd. Afzal. It can safely be assumed that from the time when accused Mohd. Afzal entered his shop, settled the purchase, the commodity was packed in polythene bags and final delivery taken, 15 to 20 minutes time would have elapsed. Sufficient time was spent by accused Mohd. Afzal with this witness on 11.12.2001, enough to leave lasting impression in the memory of this witness to have recognized accused Mohd. Afzal on 17.12.2001. His testimony inspires confidence. Indeed aluminium powder was recovered from the premises 281, Indira Vihar. It was used in the making of the explosives recovered from Parliament House Complex. 323. PW-43 deposed that he had effected the sale of a Sujata Mixer Grinder to accused Mohd. Afzal on 7.12.2001. He deposed that on 17.12.2001, the accused was brought to his shop and in his presence pointed out the shop. He confirmed that he had sold the mixer grinder to accused Mohd. Afzal. This witness proved the cash memo book and it showed that a Sujata Mixer Grinder was sold by him on 7.12.2001. He identified that the mixer grinder recovered from A-97, Gandhi Vihar was sold by him. Nothing has been brought out to dis-credit this witness qua his identification of accused Mohd. Afzal and the only argument pressed in aid was the non-conduct of test identification parade. We may deal with his testimony in a different way. It has beer, proved by the prosecution that a Sujata Mixer Grinder was recovered from the premises A-97, Gandhi Vihar. This witness identified that Ex.PW-72 i.e. the recovered mixer grinder was the one sold by him. This part of his testimony went unchallenged. He produced his bill book which had recorded sale of a mixer grinder on 7.12.2001. It, thus, stands established that the mixer grinder in question was sold by him and it reached the premises taken on rent by accused Mohd. Afzal. Testimony of this witness finds independent corroboration. 324. PW-44 and PW-49 deposed

about sale of a mobile phone and SIM Card to accused Mohd. Afzal. The handset identified by PW-44 was the one recovered from deceased terrorist Mohd. and the handset identified by PW-49 was the one recovered from the deceased terrorist Raja, In his testimony, PW-44 identified Ex.P.37 recovered from deceased terrorist Mohd. as the one he sold to accused Mohd. Afzal on 7.12.2001 or 8.12.2001 as also one cash card. He stated that since Gaffar Market was a grey market, he had no record which establishes the sale. PW-4 had proved that handset having IMEI No. 350668340117472 was recovered from Mohd. The call records of mobile phone No. 9810693456 Ex.PW-35/5 shows that from 8.12.2001 till 13.12.2001 this instrument was used by deceased Mohd. There being no independent corroboration of the evidence of PW-44, though he did not stand discredited, we are inclined to ignore this testimony. 325. In his testimony, PW-49 stated that he had sold a Nokia make mobile phone and a Sim card to accused Mohd. Afzal who was accompanied by Shaukat on 4.12.2001. He said that he purchases SIM cards from Sanjay Jain and said that bill book containing receipt Ex.P-83 having date 21.9.2001, which belonged to Sanjay Jain was signed by him when he purchased the SIM cards. This contained five SIM cards having mobile numbers : 981487884, 9811489429, 9811487855, 9811487858 and 9811288427. The defense was quick to pounce upon this. The reason, mobile No. 9811489429 call details whereof were Ex.PW-36/3 (and was alleged by the prosecution as the number of accused Afzal) showed use with effect from 6.11.2001. This, according to the defense, showed that either the call details were false or that PW-49 had been using this number. The conclusion to which the defense has jumped is, in our opinion, based on an assumption that when PW-49 said that he sold a SIM card to Mohd. Afzal on 4.12.2001, this was the SIM card. In his testimony, PW-49 did not say that he sold this SIM to Mohd. Afzal on 4.12.2001 he only said that he sold one SIM card (without identifying it) to Mohd. Afzal on 4.12.2001. It could be any card. The witness may have sold the particular card to Mohd. Afzal or any other person on 6.12.2001. The witness does not stand discredited. However, since no independent corroboration of the testimony of this witness is available. We do not take into account his testimony. We may lodge a caveat here. While discussing the call details, We had noted that the mobile No. 9811489429 was used in the instrument No. 449269219639010 recovered from deceased terrorist Raja and was then used in the handset having number 350102209452430 i.e. instrument recovered from truck at Srinagar. SIM card was never found. As would be noted later, Mohd. Afzal in his confession admitted ownership and possession of this number. We may thus not be understood as having recorded a finding that this number has no evidencary value. 326. PWs 15 to 20, 26 to 29, 31 to 34, 37, 38, 40, 41, 42, 44/49, 52 and 53, whose evidence we have discussed are independent witnesses and do not spring from sources which are tainted. Facts deposed by them not only lend corroboration but even assurances to the Court about the truth of what they deposed. Except for the identification of the deceased terrorists by PW-20, PW-29, PW-37, and PW-40 from whose testimony it is evident that they spent at least 15-20 minutes with accused Mohd. Afzal and the terrorist Mohd.

(in case of PW-20, 29 and 37) and terrorist Hamja (in case of PW-40) and, therefore, these four witnesses cannot be said to have had a mere glance at terrorist Mohd. and hence identification by them inspires confidence, we ignore the identification of the terrorists by other witnesses. We do so, not that said witnesses stand discredited or that their evidence does not inspire confidence, but by way of extra care and caution, to rule out over zealous evidence. From the facts proved by the witnesses, who deposed about letting out of three premises, recoveries effected there from, sale of car, motorcycle, Chemicals and Sujata Mixer grinder, in so far accused Mohd. Afzal is concerned, the following stands proved : a) Afzal had taken on rent premised No. A-97, Gandhi Vihar in the first week of November, 2001 and had taken on rent premises 281, Indra Vihar on rent on 9.12.2001. On 6.11.2001 Afzal and Shaukat had taken on rent a room at B-41, Christian Colony. b) Deceased terrorist Mohd. resided at the room at B-41, Christian Colony. He also resided at 281, Indira Vihar. c) Afzal was seen in the company of five or six persons at the premises at Gandhi Vihar and Indra Vihar. d) Chemical and equipments for manufacturing explosives were found at A-97, Gandhi Vihar and 281, Indra Vihar. These Chemicals were the same as were found in the tiffin bomb and car bomb which terrorists carried to Parliament house. e) Detonators were found at the aforesaid two premises. f) Afzal was last seen locking the premises No. 281, Indra Vihar on 12.12.2001. It remained locked till the lock was broken on 16.12.2001 when police searched the premises. g) Afzal left the premises A-97, Gandhi Vihar on 13.12.2001 with Shaukat and four more persons in an Ambassador car. The premises was locked till lock was broken by the police on 16.12.2001 and on search Chemicals for manufacture of explosives were found. h) Afzal was involved in the purchase of the Ambassador car used by the terrorists to enter Parliament House. The car was purchased by deceased terrorist Mohd. i) Afzal was involved in the purchase of the motorcycle No. HR-51E-5768 and he was in the company of deceased terrorist Mohd. j) Chemicals used to manufacture explosives were purchased by Afzal and he was accompanied by persons. 327. Let us download the facts emerging from the cell phone records. Mobile number 9811489429 was first activated on 6.11.2001. The SIM card of this number was used in the handset recovered from deceased terrorist Mohd. and Raja. On 13.12.2001 it was used on the handset recovered from the truck when accused Afzal and Shaukat were intercepted in the truck at Srinagar. Afzal for the first time took on rent premises at 281, Indra Vihar in the first week of November, 2001 coinciding with the activation of mobile No. 9811489429. This number was regularly in touch with the number of Shaukat Gilani and the terrorists. All these proved facts lead to only one hypothesis that this was the number of accused Afzal. We have already noted that the SIM card of this number was used on the mobile sets recovered from deceased terrorists Mohd. and Raja. This establishes frequent contact between accused Afzal and the terrorists. It also establishes that accused was in touch with the same satellite number as was in touch by the deceased terrorists. The learned Special Judge has relied upon eye witness evidence to hold that Afzal was interacting with the terrorist. We have preferred to use the unimpeachable evidence pertaining to the use of

mobile numbers, their Sim cards and handsets. Our conclusion is the same. 328. As far as accused Shaukat is concerned, at least five facts are established. They are:- a) He was seen visiting the premises at Gandhi Vihar and Indira Vihar in the company of 3 or 4 other persons. b) Motorcycle of Shaukat was recovered from the premises A-97, Gandhi Vihar. c) Shaukat was seen along with Mohd. Afzal and 4 more persons leaving the premises A-97, Gandhi Vihar in a white Ambassador Car at 10 A.M. on 13.12.2001. d) Shaukat was present with Afzal when the room at the premises B-41, Christian Colony was taken on rent and this room was never occupied by Afzal or Shaukat and in fact was accompanied by the deceased terrorist Mohd. 329. Let us download the facts pertaining to the mobile phones. Mobile No. 9810446375 of Shaukat remained in contact with the mobile phone No. 9810693456 belonging to deceased terrorist Mohd. It also remained in contact with the satellite phone 8821651150059, which phone, in turn remained in contact with the mobile phone of terrorist Mohd. and accused Mohd. Afzal. There is thus corroborative evidence independently available to show that Shaukat remained in touch with terrorist Mohd. and received calls from the same satellite number from which terrorist Mohd. and accused Mohd. Afzal received calls. 330. The testimony of PW-39, Naresh Gulati reveals that accused S.A.R. Gilani was a tenant under him on the second floor of house No. 535, Mukherjee Nagar since January, 2000, where he was living with his family. Several persons used to visit him and accused Afzan and Shaukat also used to visit him. These facts as deposed were admitted by accused S.A.R. Gilani. 331. From the testimony of PW-51, it stands established that truck bearing No. HR-38E-6733 belonged to Navjot Sandhu @ accused Afzan Guru w/o Shaukat. 332. Testimony of PW-45 establishes that accused Afzan, introducing herself as Navjot had taken on rent a two room set on the first floor of house No. 1021, Mukherjee Nagar owned by PW-45. He was residing at the ground floor of the premises where he had his printing press. After about a month and a half of the letting, her husband, accused Shaukat joined her and the two lived thereafter as husband and wife. Visitors used to come to the house, accused Afzal being one of them. These facts were not disputed. The witness deposed that two to three days prior to 13.12.2001, four or five persons started visiting them. On 17.12.2001 at the Special Cell he had identified that the persons whose photographs were Ex.PW-40/2, PW-45/1, PW-41/5, PW-29/5 and PW-45/2 (being photographs of the deceased terrorists) were the ones who used to visit Shaukat and Afzan. He deposed that in the Special Cell, there was one more person sitting there whom he did not identify. He was allowed to be put a leading question and in response thereto he stated that having seen accused SAR Gilani pointed out to him, it was correct that he had told the police that he had also seen Gilani visiting the house of Shaukat. 333. In cross-examination, the witness admitted that he had not got done police verification when accused Afzan had come to take the house on rent because she had been living in the same area four to five houses away from his house. 334. From the evidence of this witness, prosecution alleges that it stands proved that Afzan had a sinister motive in not telling her true name to PW-45 when she took the premises on

rent, and that accused S.A.R. Gilani had been visiting the house of Shaukat, and that terrorists were also visiting the house. 335. In our opinion, nothing incriminating against either accused Afzan or S.A.R. Gilani has been brought out from the testimony of this witness. 336. It is the admitted case of the prosecution that the name of Afzan prior to her marriage was Navjot. In short she could well be called Jyoti. Further, the admission of this witness that he had not got police verification done of Jyoti as she had been living in the same area four to five years prior to 6.8.2001, four or five houses away shows that he knew accused Afzan prior to her marriage and would have also known her name. If accused Afzan had any sinister motive, it goes against human conduct that she would go back and reside in an area where she was known and would be recognized by persons. Further, it is not the case of the prosecution that any conspiracy was hatched in August, 2001, therefore, the question of attributing any sinister motive to accused Afzan does not arise. Assuming that the deceased terrorists had been coming to the house, that by itself is neither here nor there as her husband Shaukat was living in the house. They may well be just meeting him. What was talked inside is not known. The circumstance may be relevant but nothing adverse there from can be inferred against Afzan without anything more being established. As regards accused S.A.R. Gilani, we may note that this witness at the first instance never deposed that he had seen SAR Gilani visiting the house. His examination-in-chief shows that he was literally led into stating that he had seen accused SAR Gilani visiting the house. It is pertinent to note that even while so stating, witness did not depose that he had seen accused SAR Gilani visiting the house in the presence or the company of the deceased terrorists. 337. Testimony of PW-25, PW-50, PW-59, PW-72, PW-73 and PW-79 pertained to the information in the laptop recovered from the truck at Srinagar and the information stored in the memory thereof. From the testimony of PW-1 to PW-4, it stands established that seven I-Cards were recovered from the person of the deceased terrorists, one each from the terrorists Raja, Rana, Hamja and Hayder purporting to be issued by a computer centre at Bunglow Road and purporting to be of Xensa Web City., Two similar cards were recovered from accused Mohd, and one more I-Card purportedly issued by Cyber Tech Computer Hardware was recovered from the terrorist Mohd. In all there were these two formats of the identity cards, one of Xensa Web City and other of Cyber Tech Computer Hardware. Testimony of PW-25 and PW-50 establishes that the cards pertaining to Xensa Web City were fake. Testimony of PW-59, Sh. N.K. Aggarwal, Sr. Scientific Officer, CFSL; PW-72, Sh. Vimal Kant, a computer engineer; PW-73, Sh. Krishan Shastri from bureau of police research at Hyderabad; and PW-79, Sh. M. Krishna, Government examiner of questioned documents establishes that stored in the memory of the laptop was a file which contained the format of the identity card pertaining to Xensa Web City recovered from the deceased terrorists and that the said identity cards were prepared by taking print outs from the laptop in question. Also stored was a file from which the fake Home Ministry Sticker pasted on the wind screen of the Ambassador car was recovered. The testimony of these witnesses, inter alia, establish the fact that

history of the use of a computer is reflected in the "REG" file which is an internally registering file of the operating system. The "DAT" file could be edited and the date and time setting of a computer could be edited, but if that was done, it would be reflected in the history recorded in the "REG" file. Though date setting could be edited, the "DAT" setting is not a text editable file. The computer records the dates when the files are created and when the computer was last accessed. The date and time setting is reflected in the CMOS Chip. Further, it stands established that if the date setting was altered it would remain the same in the system for the earlier files and the change would be reflected in the files created after the change in the system's date. It was not possible to alter the date of any particular file unless the system's date had been altered. None of these witnesses deposed that they had noted any such alterations being effected. In the cross-examination, apart from asking theoretical questions, nothing material was brought out on record to challenge the veracity of the reports proved by these witnesses, which reports brought out the position afore stated. It is no doubt true, that the evidence of the technical experts was to the effect that where a laptop is being examined, as a rule of precaution a back up should be taken for if any tampering was alleged against the person examining the computer, the purity of the contents of the memory of the computer could be maintained in the back up file. 338. In the context aforesaid, let us analyze what emerges from the evidence on record pertaining to the laptop. PW-61 corroborated by PW-62 deposed about the recovery of the laptop from the truck at Srinagar. It was identified as Ex.P-83 by PW-61. PW-64 and PW-65, SI Hriday Bhushan and SI Sharad Kohli, who had gone from Delhi to Srinagar to bring accused Afzal and Shaukat deposed that on 15th December, 2001 itself, the laptop was handed over to them and on 15th December, 2001 itself by late evening, was handed over to PW-66, Inspector Mohan Chand Sharma, who called PW-72, Vimal Kant to retrieve information from the computer and furnish the same to him. PW-72 worked on the laptop to retrieve information from 17th December, 2001 to 29th December, 2001. No suggestion in cross-examination has been made to PW-66 or PW-72 that they tampered with the laptop when it remained in their custody. The laptop was sealed and deposited in the Malkhana on 16.1.2002 as per the testimony of PW-80 to which there was no challenge. It is no doubt true that in the report of PW-79, it is recorded that the computer was last accessed on 21.1.2002 but that does not mean that there was interpolation made in the computer, much less interpolation pertaining to the file having the format of the identity card and the writing of the fake Home Ministry Sticker recovered from the car used by the deceased terrorists. It is important to note that PW-72 worked on the computer to retrieve information up to 29.12.2001 and had given the computer print out to the police as retrieved from the computer pertaining to the format of the identity card and the fake Home Ministry Sticker. Thus, the file containing these two documents, being created by way of interpolation on 21.1.2002 is ruled out. Secondly, PW-79 had categorically stated in response to a court question that no alterations had been made as none were recorded in the history of the computer when it was accessed on 21.1.2002. Further,

the report Ex.PW-73/1 shows that the WIN386.SWP5 was accessed last on 22.12.2001 and was last written on 21.1.2002. Now, a file cannot be written upon without being accessed is the question which needs to be answered. The answer would be found in the testimony of PW-79 where in response to a court question, the witness deposed that in the system DAT file system accessing details are available and he had not seen any alterations made. This testimony of PW-79 could be dovetailed to the testimony of PW-73 wherein he deposed that the USER.DAT was last accessed on 21.1.2002 but WIN386.SWP was last accessed on 22.12,2001 but was last written on 21.1.2002. It is evident that WIN386.SWP is a self writing file and, thus, the opening of the laptop on 21.1.2002 would have been automatically written on the file. The computer would record the same without any conscious human intervention. This, however, can only take place when a user consciously opens those files and access them. It is, thus, apparent that on 21.1.2002, the laptop was opened but it is equally true that there was no change in any other file, PW-73 has authored a book "Computer Crime and Forensics" which lists WIN386.SWP as a swap file. Our finding, therefore, is that no doubt it stands established that the computer was accessed on 21.1.2002 but the access does not reveal that any of the file was altered or modified. The defense has not brought out anything credible to establish that on 21.1.2002, the computer was tampered with or that any file was created or altered. We, therefore, hold that the I-Cards pertaining to Xansa Web City, recovered from the deceased terrorists were computer print outs obtained from the laptop in question. We also hold that the fake Home Ministry Sticker recovered from the windscreen of the Ambassador Car used by the terrorists to make an entry into Parliament House was generated from the laptop in question. 339. That takes us to the penultimate analysis of the evidence. The taped conversation between accused Shaukat and Afzan Guru on the night of 14.12.2001 and the taped conversation between accused S.A.R. Gilani and his brother in the afternoon of 14.12.2001. PW-68, who did the auditory analysis of the taped conversation and the sample taped voice of accused S.A.R. Gilani proved his report Ex.PW-68/A wherein he had opined that the taped conversation contained the voice of accused S.A.R. Gilani. In view of the fact that accused S.A.R. Gilani admitted to the conversation with his brother, we discuss no further except to note that as per the witness, he had not analysed the entire conversation but had analysed a few words from the taped and the sample conversation. He also admitted that the question cassette had a lot of background noise and he could enhance the cassette speech to make it audible by using computer software. The taped conversation between accused Shaukat and accused Afzan was not sent to this witness. PW-48 deposed that he could not carry out the auditory and voice spectrographic analysis of the taped conversation between accused S.A.R. Gilani and his brother because the voice was inaudible due to high inferring background noise and hence could not be compared. He, however, could analyze the taped conversation between accused Shaukat and accused Afzan and deposed that the taped conversation was the probable voice of the same person whose sample voice was sent to him for analysis. On being cross-examined, the witness stated that as mentioned

in his report, the tape containing the recorded conversation between accused Shaukat and Afzan was of two minutes and sixteen seconds as was noted by him in the report. 340. In her statement recorded under Section 313 Cr.P.C. accused Afzan admitted having talked to her husband on the mobile phone 9811573506 but said that this conversation she had when she was in the police cell. The call in any case stands admitted by her and it also stands admitted that she had a talk with Shaukat. There is, however, one factor which leads us to the conclusion that this call has to be ignored. The call records of the mobile phone No. 9811573506 on which number this call was received shows that on 14.12.2001 on 20:09:07 hours a call from the calling No. 0194492619 was made which lasted for a duration of 49 seconds. The taped conversation which was sent to the experts, as noted above was of 2 minutes and 16 seconds as per the deposition of PW-48. This discrepancy was not explained by the prosecution even during oral arguments at the bar. The only explanation given was that this aspect was not confronted to PW-48. It was not necessary to confront PW-48 with the entry in the mobile phone record pertaining to the number because it was not the previous statement or the document emanating from PW-48. PW-48 was put a specific cross-examination as to from where he had recorded the time of two minutes and sixteen seconds as the duration of the call in the disputed cassettes sent to him and he categorically replied that the time was noted by him after he played the cassette and so recorded. It was for the prosecution to have re-examined the witness and obtained verification or led independent evidence to reconcile the truth. 341. In any case, assuming it to be correct, the taped conversation is as under:- 14.12.2001 Time: 2013 Hrs. 9811573506 Caller: Hello I am! Was there any telephonic call? Receiver: Shaukat where are you? Caller: I am in Srinagar. Receiver: Reached there. Caller: Yes Receiver: Some person had come just now. Caller: From where? Receiver: I don't know. Don't say anything. Caller: O.K. Receiver: I don't know they are with the lady of ground floor. Some vehicle is still parked outside. Caller: O.K. Receiver: I don't know. I did not speak anything. Caller: O.K. Alright. Receiver: Tell more, don't speak anything now and tell me. I am much afraid. Caller: No, No nothing dear, O.K. Receiver: Are you fine? Caller: Yes, Yes. Receiver: Reached safely? Caller: Yes Yes. Receiver: And Chotu? Caller: Yes Yes Receiver: Do you know? Caller: Yes Yes alright you may make a call. Receiver: When? Caller: In the night Right now, I am calling from Outside, Receiver: Alright I will call up tomorrow (while weeping) Caller: O.K. Conversation between accused Shaukat Hussain Guru (Caller) and Navjot Sidhu alias Afshan Guru (Receiver) 342. Prosecution relied on two parts of the conversation (underling by us) namely when Afzan tell Shaukat not to speak over the phone and the part of the conversation where in response to the query"whether anyone had come¿', she had responded that a car was standing downstairs to infer that it showed that Afzan knew that she and her husband were under some kind of a surveillance by the police being involved in the attack on Parliament House, which is an incriminating circumstance. If it is the correct transcript of the talk, there can be no doubt that Shaukat and Afzan were talking between the lines. Afzan was scared. Certainly, an inference

may be drawn she was concerned about the safety of Shaukat. But does it probabilise her involvement in the conspiracy or attributes knowledge of the conspiracy to her. In the context of law of conspiracy and proof required, we shall deal with it a little later. 343. As regards the conversation between Gilani and his brother the call is admitted, the talk is admitted and the duration of time is admitted. Dispute pertained to two issues, what was the exact conversation and secondly if the prosecution version is to be accepted, what is the purport of the conversation. 344. There were minor variations in the transcription of the talk as per the prosecution and as per the defense. The translated prosecution version of the taped conversation is :- 14.12.2001 Time: 1222 Hrs. 9810081228 Receiver: Hello Caller: Hello SALAM WALEKUM are you alright? Receiver: Yes, fine 'Janab'. Caller: Are you in the house itself. Receiver: No No. I am not at home. I am speaking from the vehicle. They have not out yet, I am going towards the house itself. They would be moving out. Caller: O.K. Receiver: Yes Janab what do you wish to say. Caller: I could not get you,. . . . . ? Receiver: I think you do one thing. Just put the phone down. Now, they can not send, they just have to move out. Caller: To whom? Receiver: To Khan Sahib, they have to move just now. Caller: O.K. Receiver: I will send after two/three days. I shall call up in the night as it will cost more right now. Caller: O.K. Or on 'EID'. Receiver: Yes, I shall call up today or tomorrow. You may prepare the list. Caller: O.K. Receiver: You should give this here. Caller: O.K. Janab, are you alright? Receiver: Yes, I am absolutely fine. Caller: What have you done in Delhi? Receiver: It is necessary to do 'while laughing'. Caller: Just maintain calm now. Receiver: O.K. (while laughing). Where is Bashan? Caller: His duty is off today. Receiver: Is he in Baramula? Caller: Yes. Receiver: O.K. - O.K. Caller: Can I put the phone down? Receiver: Yes Yes, put the phone down. Conversation between accused S.A.R. Gilani (Receiver) . . . . . step brother Sh. Shah Faizal (Caller). 345. defense version of translated taped conversation is :- Kashmiri Conversation English Translation Hindustani Language Receiver Hello Hello Hello Caller Hello, Assalammalaikum Jenab Assalammalaikum Sir Hello, Assalammalaikum Jenab Receiver Valaikum Salaam Valaikum Salaam Valaikum Salaam Caller Vaaray? Are you well? Kya aap theek hain? Receiver Theek paaeth, khosh, khosh! Very well, quite happy! Theek tarah se hoon? Caller

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Caller Jaan paaeth Quite fine Bahut ache Receiver Na apuz kyazi vanay No, why should tell lies Nahin, mein jooth kuon bolun Caller Che kati chukh? Gare pathae? Where are you? Calling from home? Receiver Na, Na. Ba chhus na gare paethac. No, No. I am not speaking from home. Nahin, Nahin, Mein ghar se nahin bole raha hoon. Caller Kya? What? Kva? Receiver

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Receiver Ba Chhus gaadi manz. I am in the bus. Mein gaadi mein hoon. Caller Bassi manz? In the bus? Kya bus mein? Receiver Tim chhe neran waale. Ba chhus garah pakaan. Tse van che kyah gachhi? They are about to leave. I am heading towards home. What do you want? Who nikalne waale hein. Mein ghar ja raha hoon. Tumhein kya chahiye? Caller Syllabus te prospectus

Syllabus & prospectus. Syllabus aur prospectus. Receiver Myani khayala che trav vunkes phone. Vunkes nare na : kaaem. Timan chhu yyuni narun. Khan i Saa' bas I deem it advisable for you to drop the phone at this moment. Your job can't be done this time. They have to leave just now. Khan Sahib Tumhara isi waqt mere khyal mein, phone rakhna theek rahega. Tumhara kaam is waqt nahin ho sakta. Unko abhi jaana hai. Khan Sahib. Caller Kaman? Whom? Kinko? _____ _____ _____ _____ _____ _____ Receiver Khan Saa'baas hassa. Ba karay cheer phone. Az ya pagah. Ya doyi teryi dohai. Ya Eed peth. Yunkes Khasan ponsa ziyada. It is Khan sahib. I will ring you up late at night. Today or tomorrow or on the Eed. Festival. It will cost higher at this time. Khan sahib hain. Mein der se phone karunga. Aaj ya kal. Ya do ya teen din ke baad. Ya Eed.. Per. Is samay paisa zyada lagega. Caller Accha, Accha, Janeb, Janeb. Yes, Yes, Sir, Sir. Haan, Haan, Janab, Janab. Caller Bae Soruv Theekh? Rest all well? Bilkul theek? Receiver Janeb Sir Janab Caller Ye kyah korva? What has happened? Yen kya hua? Receiver Kya? Dilli-Ha? What, in Delhi? Kya Dilli mein? Caller Dilli, kya korva? What has happened in Delhi? Dilli mein kya hua? Receiver Ha! Ha! Ha! (Asaan) Ha! Ha! Ha! (laughing) Ha! Ha! Ha! (hansna) Caller Vuni bihizyava sokha saan. Relax now. Ab sakun se rahna. Receiver Ha! Ha! Ha! (Asaan) Accha che katev chukch? Srinagar ha. Ha! Ha! Ha (laughting) O.K Where are you? In Srinagar? Ha! Ha! Ha! (hansna) Accha tum kahan ho. Tum Srinagar mein ho?

Caller

Receiver Che chukha Srinagar? Are you in Srinagar? Tum Srinagar mein ho?

Caller Na, mein kor tate chutee. No, I am no longer there. Ab men wahan nehin hoon.

Receiver Che chukh vanay varmullay? Are you now at Baramulla? Kya turn abhi Baramulla mein ho?

Caller Aa. Yes. Haan.

Receiver Accha O.K. Accha.

Caller Tate kar mein Chutee. I have left the place. Mein ne yahan chod diya hai.

Receiver Accha. O.K. Accha.

Caller Accha. Khuda Hafiz O.K. God bless you. Accha. Khuda Hafiz

Receiver Khuda Hafiz God bless you. Khuda Hafiz.

Caller Accha tharva? O.K. Should keep the phone? Kya mein phone rakhun?

Receiver Accha tharva. O.K. Keep the phone. Haan phone rakh do.

346. During the hearing of the appeal, we had called for the tape from Malkhana and in the presence of the parties played the same. Indeed

the voice was so inaudible that we could not make head or tail of the conversation. We tried our best to pick up the phonetical sounds where there was a dispute as to what words were used, but were unable to do so. Testimony of PW-48 reveals that he could not analyze the talk as it was highly inaudible. PW-48 is a phonetic expert. If he could not comprehend the conversation in a clearly audible tone, the probability of ordinary layman picking up the phonetic sounds differently cannot be ruled out. The prosecution witness, PW-71, Rashid, who prepared a transcript of the tape is fifth class pass and it was not his profession to prepare transcript of taped conversation. The possibility of his being in error cannot be ruled out. Benefit of doubt must go to the defense.

347. Alternatively, even assuming that the transcription of the talk as relied upon by the prosecution is correct, it leads one nowhere. Prosecution relies on one part of the talk as such being incriminating against accused S.A.R. Gilani. It is:- Caller : What have you done in Delhi (Delhi kaya karu). Receiver It is necessary to do. (Eh Che Zururi).

348. To the query of his brother "Yeh Kya Karoo" to which the response was "Eh Chhe Zururi", the prosecution alleges that the conversation showed that Gilani was involved in the conspiracy in the attack on Parliament House. Prosecution alleges that when his brother asked him what had be done in Delhi, he replied this was necessary. This inference as drawn by the prosecution, to our mind, does not hold good. Firstly, it was so, the natural corollary would be that the persons querying would have to be imputed with the knowledge that he was aware that accused S.A.R. Gilani was involved in the attack on Parliament House and this would make the said person as an accused. Admittedly, brother of accused S.A.R. Gilani was not charged as being part of the conspiracy. Secondly, the defense has given a plausible acceptable version of the talk. As noticed in the deposition of Shah Faizal, brother of accused S.A.R. Gilani, who deposed as DW-6, had spoken to his brother on 13.12.2001 at 1.00/1.30 P.M. which fact is proved from the call records of the phone number of accused S.A.R. Gilani which shows that on 13.12.2001, he had received a call at 13:21:01 from the number 0194458131 which was a call from Srinagar. DW-6 had stated that he had wanted his brother to bring syllabus and prospectus as he wanted to appear in the medical entrance examination and this testimony of DW-6 went unchallenged by the prosecution. This witness has deposed that his mother had told him that his brother's wife had told her that they were not coming for Id to Srinagar and his Bhabhi sounded annoyed and it was in this context that he asked the question "Yeh Kya Karoo" to which Gilani counter querried "Kya Dilah" to which he responded "Delhi Kya. Karoo", and his brother laughed. This part of the talk is undoubtedly in colloquial style. The conclusion drawn by the prosecution can hardly be contended, much less accepted. The witness explained, which was corroborated by DW-1 and DW-2, that in Kashmir such type of exclamatory querying was usual when unexpected things happen and in the context of the testimony of DW-6 that what he meant

by the question was the fight between Gilani and his wife, we find that assuming the talk to be the one as per the transcription of the prosecution, nothing incriminating emerges and no fact apart from the fact of the talk stands established.

349. We now come to the last and to an important and critical milestone in the sequence of events and evidence relied upon by the prosecution. The same relates to the confessions recorded before the police by accused Shaukat and Mohd. Afzal.

350. As per the testimony of PW-80, ACP Rajbir on 19.12.2001, POTO provisions were added to the FIR and the investigation was handed over to him. He interrogated accused Mohd. Afzal, and recorded his supplementary disclosure Ex.PW-64/3. Accused Mohd. Afzal, Shaukat and Gilani expressed the desire to make their confessional statement. As per the provisions of POTO, confessional statements could be recorded before a police officer not below the rank of a Superintendent of Police, he moved an application on 20.12.2001 before DCP Ashok Chand, who directed the presence of the accused persons before him the next day i.e. 21st December, 2001. He produced the three accused persons before DCP Ashok Chand as directed by him at the Alipur Road Mess, where first accused S.A.R. Gilani was called in at about 11.30 A.M., and thereafter he produced accused Shaukat at about 3.30 P.M. and finally accused Mohd. Afzal at about 7.10 P.M. PW-60 Ashok Chand corroborated the aforesaid facts and stated that accused S.A.R. Gilani refused to make a confessional statement which fact was duly recorded by him in Ex.PW-60/3 and PW-60/4. Accused Shaukat expressed his willingness to make a confessional statement and gave in writing that he was not under any duress which statement was proved as Ex.PW-60/5. Confessional statement was thereafter recorded as dictated by accused Shaukat in the hand writing of PW-60 and accused Shaukat signed each page. PW-60 appended his signatures at the conclusion of the statement. Accused Mohd. Afzal was produced last at about 7.10 P.M. He stated that he was not under any pressure. Mohd. Afzal's willingness to have the confessional statement recorded was noted vide Ex.PW-60/7 and the confessional statement as dictated by Mohd. Afzal was recorded by him in his own hand being Ex.PW-60/9. Mohd. Afzal signed each page and PW-60 signed at the end. The witness further stated that he had warned the accused persons of the consequences of the statements and that there was nobody else present when he recorded the confessional statements. After the statements were recorded, ACP Rajbir moved an application for supplying him carbon copies of the proceedings which he gave. The original statements were sealed in an envelope Ex.PW-60/10. In cross-examination, the witness deposed that he gave about 5 to 10 minutes to the accused persons, to reflect in his presence and re-think of their willingness to make the confessional statement. While cross-examining the accused Shaukat made contradictory suggestions. In that, at one place the witness was cross-examined that the accused was never produced for recording of a

statement and at another place the cross-examination was that the accused was produced but AGP Rajbir drafted the confession which he got signed from the accused Shaukat. Cross-examination by Mohd. Afzal reveals that he did not dispute the recording of the statement but said it was not voluntary. Correctness of a part of the confessional statement where relationship between Mohd. Afzal, Shaukat and Gilani was recorded was sought to be challenged as being wrongly recorded.

351. PW-63, Sh. V.K. Maheshwari, ACMM, Delhi deposed that on 22.12.2001, the accused persons were produced in his court along with the sealed envelope Ex.PW-60/10 by ACP Rajbir Singh for recording of their statements in terms of Sub-section 5 of Section 32 of POTA. He proved the fact that the accused persons, were brought inside his chamber one by one where only he and his stenographer was present. He recorded the statements of the accused persons who were identified by the IO. He proved the proceedings which he held on 22.12.2001.

352. PW-63 was cross-examined and the tenor of the cross-examination was that the accused were never produced in his chamber. They were in the police van when the IO got recorded their statements. The witness denied that the accused persons were brought to his court only once together just to show their faces to him. The witness in his cross-examination stated that he did not find that the accused persons were under any threat or duress.

353. Prosecution alleges that the testimony of PW-60, PW-63, PW-80 clearly establishes that accused Shaukat and Mohd. Afzal had voluntarily made confessional statements. Truthfulness of the confessional statements, according to the defense, was evidenced by the fact that no confessional statements of accused SAR Gilani was recorded for he refused to make one. If the prosecution had to fabricate the confession they could have well fabricated or obtained under duress one from accused SAR Gilani against whom even otherwise the prosecution alleges there was much less direct evidence as compared to the evidence available against accused Shaukat and Mohd. Afzal.

354. The argument of the defense in rebuttal was that the testimony of PW-60 showed that he did not give much time to the accused to rethink after he had warned them of the consequences of their confession. Law required a cooling period to be given to the accused and this having not been done, it indicates that the police was in a hurry to record the confessions which suggested police pressure. Secondly, it was contended that Section 32 of POTA did not oust the normal provisions of law pertaining to the recording of confessions and therefore if indeed the accused persons voluntarily made confessions the accused should have been taken directly to the Magistrate for recording of the confession. Thirdly, counsel contended that even when produced before the Metropolitan Magistrate, the accused had no assurance that they would not be handed back to police custody, and therefore, the threat of police atrocities could be looming large over their heads. Lastly, it was argued with reference to the testimony of DW-4 and

DW-7 that admittedly on 20th December, 2001 accused Mohd. Afzal was allowed to be interviewed in police presence by the press and the media wherein accused Mohd. Afzal told the media persons and press persons that accused SAR Gilani was not involved. This interview was admitted by PW-80. This, according to the defense, was a telling evidence. In the evening of 20th December, 2001 accused Mohd. Afzal while making a confession to the media exonerated accused SAR Gilani of any involvement. Something must have happened in the night which had to be nothing but police torture that on 21.12.2001 accused Mohd. Afzal implicated SAR Gilani.

355. From the evidence on record, the fact which gets established is that accused Shaukat and Mohd. Afzal did make confessional statements which were recorded by PW-60. Whether they were voluntarily or not would be dealt with by us when we analyze the confessional statements in light of the evidence on record and for the present, leave the issue holding that the defense version where accused Shaukat and Mohd. Afzal did not make any confessional statement is rejected and the version of the prosecution that the two made a confessional statement is accepted.

356. In his confessional statement, Ex.PW-60/9, Mohd. Afzal stated that he was born in the year 1969 and completed his schooling in the year 1998 from Government School, Sopore. On being motivated by Yasin Malik of JKLF, he joined it for purposes of Jehad and liberation of Kashmir. He went to Pakistan occupied Kashmir where he underwent military training which included handling of arms and ammunitions. He returned to India on instructions to destroy communication networks etc. but since the security forces were tipped off, he came to Delhi along with Shaukat in the year 1988. He did odd jobs and completed his graduation from Delhi University in the year 1993-94. While studying he met Abdul Rehman Gilani, who was pursuing his post graduation course. In the summer of 1993-94 on the advice of his family, he surrendered before the BSF and returned to Delhi where he worked till 1996. He went back to Sopore where he worked as Commission Agent for medical and surgical goods in the year 1996. He came across Tariq, who claimed to be a doctor. They used to discuss current state of affairs in Kashmir. Tariq disclosed to him that he was an active militant of Jaish-e-Mohd. and motivated him to join the Jehad for liberation of Kashmir. Tariq introduced him to Ghazi Baba, who was equipped with wireless set and satellite phone. Even Ghazi Baba motivated him and gave him literature containing speeches of Maulana Masood Azhar. He agreed to work for them and was assigned the task of providing a safe hide out for the Fidayeens in Delhi. He was introduced to Mohd. and Hayder, Pak Nationals and members of Jaish-e-Mohd. In October, he rang up Shaukat and asked him to arrange accommodation for himself and Mohd. In the first week of November, he and Mohd. came to Delhi along with laptop and an amount of Rs. 50,000/-. They went to Shaukat's house, who took them to a pre-arranged accommodation in room No. 5, Christian Colony, Boys' Hostel. He told Shaukat that Mohd. had come to

Delhi for Fidayeen attack. He arranged another hide out at A-97, Gandhi Vihar. He went to Sri Nagar to deliver money received through Hawala to Tariq and came back to Delhi with Raja and Hayder, both Pak Nationals and militants of Jaish-e-Mohd. They were made to stay at the hide out A-97, Gandhi Vihar. He and Mohd. purchased the Chemicals being ammonium nitrate, ammonium powder and sulphur which they mixed in the ratio of 7:2:1 for making explosives. In the first week of December, he again went to deliver money to Tariq and brought Rana and Hamja, both Pak Nationals and Jaish-e-Mohd/s militants to Delhi. Four AK-47 rifles, twelve loaded magazines, one grenade launcher, three pistols with spare magazines, fifteen hand grenades, fifteen grenade shells, two packets of electronic detonators and transformers and tans receivers with radio set were brought by them to Delhi. He arranged another accommodation at 281, Indira Vihar. Mohd. used to receive directions from Ghazi Baba from satellite phone. He motivated SAR Gilani and Shaukat for Jehad in Kashmir. Shaukat provided his motorcycle for conducting recee. Meetings were held in which Shaukat, Gilani and Afzal were present. Various targets were discussed. Another motorcycle was purchased for conducting recee, and finally decision was taken to strike at the Parliament House in a meeting which was held in the house of Shaukat when all were present. The details of the plan were finalised to attack the Parliament House in the said meeting. As per plan on 11.12.2001, the Ambassador Car was purchased by him and Mohd. Mohd. had prepared the M.H.A. Stickers and I-Cards from the laptop. They prepared the instant explosive devices with the help of the Chemicals and mixer grinders. One instant explosive device was fitted in the car. On the night of 12.12.2001, he, Shaukat and Gilani were given Rs. 10,00,000/-, by Mohd. for being shared between him, Shaukat and Gilani. He was told to take the laptop and return it to Ghazi Baba. They remained in touch on the mobile phone; his i.e. Afzal's being 9811489429, Mohd.'s phone No. being 9810693456. Over the phone on 13.12.2001, at about 10.40 P.M. he was told by Mohd. to watch television and note down the position of various VIPs in Parliament House. Since he was in the market, he contacted Shaukat on Shaukat's mobile phone 9811573506 and asked him to watch television. Immediately thereafter he received a call from Mohd. that the attack was on and he in turn rang up Shaukat and conveyed the said information. He and Shaukat left for Sri Nagar in Shaukat's truck HR 38E 6733. They were arrested by the police on 15th December, 2001 along with the lap top and Rs. 10,00,000/-. He was brought back to Delhi where he got recovered explosives and he was repentant for his actions.

357. Shaukat in his confessional statements Ex.PW-60/6 stated that he was born in 1967, completed his schooling from Sopore in 1988 and came to Delhi for higher studies. He came into contact with SAR Gilani who was from Baramulla and was studying in post-graduation in the University of Delhi. In 1997, he started fruit business but suffered losses. He got married to Navjot Sandhu in March, 2000. Navjot was a Sikh girl and at

the time of marriage, converted into Islam and changed her name to Afzan Guru. With finances provided by his in-laws, truck No. HR 38E 6733 in the name of Afzan was purchased in June/July, 2000. Mohd. Afzan, a surrendered JKLF militant was his cousin and did his graduation along with him. Afzal also got acquainted with S.A.R. Gilani. Afzal used to motivate him and Gilani to join Jehad in Kashmir. He was influenced by Osama Bin Laden. At the asking of Mohd. Afzal, he got rented room No. 5 in a Boys' Hostel in Christian Colony for Afzal and a militant to stay there. In the first week of November, 2001, Afzal and Mohd. came to Delhi. Mohd. told him that he had come to Delhi for carrying out a "Fidayeen attack". Abdul Rehman Gilani agreed to offer his help in carrying out of Fidayeen attack. Afzal went to Sri Nagar to deliver money and brought four more Pak Nationals, Raja, Rana, Hayder and Hamja to Delhi. Afzal arranged accommodation at A-97, Gandhi Vihar. He i.e. Shaukat was having mobile No. 9810446375 which he had used extensively and as a precaution he changed his mobile No. to 9811573506. He had lent his motorcycle for conducting recee of targets. Meetings were held in his house for discussing plans and his wife was in the knowledge of the plans. Afzal and Mohd. purchased a white Ambassador Car. On 12.12.2001, he, Afzal and Gilani met Mohd. at the Gandhi Vihar hide out. Mohd. gave them a computer and Rs. 10,00,000/- with the directions to Afzal to give the laptop to Ghazi Baba. Money was to be distributed amongst Afzal, Gilani and himself. On 13.12.2001 Afzal called him from mobile phone No. 9811489429 asking him to watch television and report the latest positions of the VVIPs in Parliament. He received another call from Afzal that the mission was on. He and Afzal left in the truck for Sri Nagar where they were apprehended on 15.12.2001. The laptop and Rs. 10,00,000//- were recovered by the police.

358. As per Section 24 of the Evidence Act, confession obtained by inducement, threat or promise proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable, for supposing that by making it, he would gain any advantage or avoid any evil of a temporal nature is irrelevant in a criminal proceeding and such a confession has to be thrown out and not taken into evidence at all. As per the mandate of Section 25, confession made to a police officer cannot be proved. Under Section 26, confessions made by a person to a Magistrate while in the custody of a police are admissible in evidence. Section 27 which has been held to be in the nature of an exception to Sections 25 and 26 of the Evidence Act made admissible in evidence fact distinctly discovered pursuant to a confession made to a police officer (we shall be dealing with Section 27 separately a little later). Section 30 makes a confession admissible against a co-accused.

359. Admissions and confessions are exceptions to the hearsay rules and are placed in the category of relevant evidence in Section 17 to 30 of the Evidence Act presumably on the premise that being declarations against the interest of the maker, they are probably true.

360. Section 32 of POTA makes admissible confessions made to a police officer not lower in rank than a Superintendent of Police. It provides for the manner in which the confession has to be recorded. Section 32 reads as under:- "32. Certain confessions made to police officers to be taken into consideration.

(1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical or electronic device like cassettes, tapes or sound tracks from out of which sound or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or rules made there under.
(2) A police officer shall, before recording any confession made by a person under Sub-section (1), explain to such person in writing that he is not bound to make a confession and that if he does so, it may be used against him: Provided that where such person prefers to remain silent, the police officer shall not compel or induce him to make any confession.
(3) The confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes it.
(4) The person from whom a confession has been recorded under Sub-section (1), shall be produced before the Court of a Chief Metropolitan Magistrate or the Court of a Chief Judicial Magistrate along with the original statement of confession, written or recorded on mechanical or electronic device within forty-eight hours.
(5) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate, shall, record the statement, if any, made by the person so produced and get his signature or thumb impression and if there is any complaint of torture, such person shall be directed to be produced for medical examination before a Medical Officer not lower in rank than an Assistant Civil Surgeon and thereafter, he shall be sent to judicial custody."

361. What is the evidentiary value of a confession and whether the confession recorded before a police officer under Section 32 of POTA is or is not admissible against the co-accused would require consideration only if we come to the conclusion and hold that the confessions made by accused Mohd. Afzal and accused Shaukat inspire confidence and are not a result of threat coercion, inducement, in short, are not extracted by the police under pains of torture on being put to any kind of danger or harm.
362. From the testimony of PW-60 and PW-63, it stands established that the confession was made before the Deputy Commissioner of Police i.e. a person not lower in rank than a Superintendent of Police. It was recorded in writing, and therefore, Sub-section (1) of Section 32 stands complied

with. It is further evident that accused Mohd. Afzal and Shaukat were explained by PW-60 that they were not bound to make the confession and if made, it could be used against them. In spite of warning, the .two agreed to make the confessional statements, and therefore, Sub-section 2 of Section 32 also stands complied with. Testimony of PW-60 establishes that he directed production of the accused persons for making the confessional statements at the Alipur Road Mess (it is at a distance of about 15 kilometers from the Special Cell at Lodhi Colony) and there is nothing on record that the atmosphere was not free from threat or inducement. It is not the case of accused Mohd. Afzal and Shaukat that they did not know English language. As per their confessions, they are graduates. They have signed in English, therefore, Sub-section 3 of Section 32 also stands complied with. Both the accused persons were produced before PW-63, the Chief Metropolitan Magistrate on the next day of the confession along with the original statement of confessions and PW-63 recorded their statements and got their signatures to the effect that they had made the confessional statements. Neither of the two accused made any complaint to PW-63 when they were produced before him on 22.12.2001 that they were tortured.

363. It is true that the proceedings conducted before PW-60 show that immediately after warning the accused persons and on getting a response from accused Shaukat and Mohd. Afzal that they were voluntarily making the confessional statements, he proceed to record the confessions but this in our opinion would be no ground to hold that the confessions were not voluntary. In the judgment Ranjit Singh v. State of Punjab, the Hon'ble Supreme Court held that it is only when the officer recording the confession forms a belief that the accused should be granted some time to think over the matter, it becomes obligatory for the officer to grant reasonable time. It was held:- "In given case depending on facts the recording officer without granting any time may straight away proceed to record the confessional statement, but if he thinks it appropriate to grant time, it cannot be a mechanical exercise for completing a formality."

364. Accused Mohd. Afzal at no point of time retracted from his confessional statement. As far as accused Shaukat is concerned, he moved an application on 19.1.2002 stating that he had "certain doubts" regarding the verbal confession made before the police and he apprehended that the police might have"twisted the same in a different way and formation". He alleged in the application that he was made to sign blank papers.

365. In our opinion the belated retraction of the confession is sufficient to ignore the retraction. However, we may note that while cross-examining PW-60, nothing was put and no suggestion was made by Shaukat drawing the attention of the witness to any part of the confessional statement to establish that what was recorded was twisted or was different than what was dictated by Shaukat. The contents of the application are at complete variance with the line of cross-examination of PW-60 wherein the suggestion put was that ACP Rajbir had drafted the confession in his

hand and the accused was made to sign the same. On 3rd June, 2002, accused Shaukat made another application where he denied making any confession at all. Again, what was stated in the application was at variance with the line of cross-examination of PW-60.

366. Learned counsel for the defense urged us to reject the confessional statements as not being voluntary on the alternative submissions that the two confessional statements were at variance with each other and were at variance with the evidence proved on record.

367. It is settled law that where the prosecution has otherwise successfully established facts which are stated in a confessional statement, it would be a good ground to presume that the confessional statement was voluntary. The test is not to minutely disect a confessional statement and compare it with the proved facts on record. The test is that if broadly the facts otherwise proved coincide with the facts stated in the confession, it would be sufficient re-assurance that the confession is voluntary. See , Davender Pal Singh v. State of NCT, , Lal Singh v. State of Gujarat. However, there are bound to be variations here and there in confessional statements made by two co-accused and it would be unsafe to compare the two confessions incident wise or fact wise as stated. In the judgment Ravinder Singh v. The State of Maharashtra, it was held that while determining whether the confessions were voluntary or not, the court is not required to examine one confessional statement with reference to the confessional statement of the co-accused. The confession of a maker is a substantive evidence against him and needs not to be corroborated and the requirement, if any, is of general corroboration. Minor contradictions between two confessions were held to be of no consequence.

368. If we look to the two confessional statements, they are substantially the same. Both referred to Afzal's past as a surrendered militant. Relationship between Afzal and Shaukat as being cousins. Their past history of schooling in Sopore and graduation in Delhi. Their coming into contact with accused SAR Gilani who was a professor. Afzal's motivation for Jehad and struggle for liberation of Jammu and Kashmir and his in turn motivating Shaukat. Afzal's coming into company with Tariq and Ghazi Baba. Afzal's motivation to help in carrying out a fidayeen attack in Delhi. Afzal's seeking help from Shaukat in providing hide outs and Shaukat helping in procuring hide outs. Afzal's bringing the five terrorists to Delhi and procuring Chemicals and bringing arms with the terrorists are all common features of both the confessional statements. The discussion of the plans to carry out a fidayeen attack in Delhi, Shaukat providing his motorcycle for recee, phone numbers used by Shaukat and Afzal and procuring the Ambassador Car are further common features of the two confessional statements. Minor contradictions here and there as to whether Shaukat procured the hide out at Christian Colony Or both of them procured the hide out are minor variations. The broad contours of the conspiracy are the broad contours of the confessional statements.

369. We, therefore, hold that the confessional statements have not only been

validly proved but also the confessions have been validly recorded. The confessions are voluntary and suffered from no infirmity and are therefore admissible in evidence against accused Shaukat and Afzal, the makers of the confessional statements.

370. Are these two confessional statements admissible in evidence against co-accused SAR Gilani and Afzan Guru? It is true that under Section 30 of the Evidence Act, the confessional statement is admissible in evidence against a co-accused but the said confessional statement would be the one which is recorded as per Section 26 before a Magistrate.

371. The embargo under Section 25 of the Evidence Act that a confessional statement made to a police officer cannot be proved against the maker is removed in the instant case by Section 32 of POTA. We have extracted above Section 32 of POTA and from Sub-section (1) thereof, it is apparent that notwithstanding anything in the Code or in the Indian Evidence Act, confessions to a police officer not lower in rank than a Superintendent of Police would be admissible at the trial of such person for an offence under the Act. The language of Sub-section (1) of Section 32 clearly makes the confession admissible at the trial of the maker. The legislature has clearly used the word "such person".

372. When Section 32 of POTA was enacted, the legislature was aware of the provisions of the Code of Criminal Procedure and the Evidence Act. Legislature was aware that confessions made to a police officer are inadmissible in evidence. The Legislature was further aware that under Section 30 of the Evidence Act, confessions, made before a Magistrate would be admissible against a co-accused. While making a departure, while enacting POTA, the Legislature, if it wanted to make the confession of a co-accused admissible against the other co-accused, to our mind would have made a specific, reference to this effect. In the absence of any specific provision to this effect, we are afraid that we cannot accept the argument of the prosecution that confession recorded under Section 32 of POTA would be admissible in evidence against a co-accused. Not only does language of Sub-section (1) of Section 32 of POTA where it provides: "shall be admissible in the trial of such person" rule out any such interpretation but also due to an external aid which we may seek from the Terrorists and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as TADA).

373. While enacting TADA, the legislature enacted a provision similar to Sub-section 1 of Section 32 of POTA. Section 15(1) of TADA as originally framed read as under:- "15. Certain confessions made to Police Officers to be taken into consideration. Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer' in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds of images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or

rules made there under:"

374. Section 21 of TADA as originally enacted contained the following:-"Section 21. Presumption as to offences under Section 3 In a prosecution for an offence under Sub-section (1) of Sec. 3 if it is proved:- (a)..... (b)..... (c) that a confession has been made by a co-accused that the accused had committed the offence, or (d)..... the Designated court shall presume unless the contrary is proved that the accused had committed such offence.

375. The Legislature had, therefore consciously made the confession of a co-accused admissible in evidence against a accused when TADA was enacted. Since there was criticism of TADA, one of which being the presumption against the accused on a mere confession of a co-accused who obviously could not be cross-examined at the trial, the Legislature amended TADA by Act No. 3 of 1993 and deleted Sub-clause (c) of Section 21(1) of TADA. However, intending only to remove the legislation pertaining to the statutory presumption which was created against an accused, based on the confessional statement of a co-accused, the Legislature by the same Act made a corresponding amendment in Section 15 of TAPA. The amended Section reads as under:- "15. Certain confessions made to Police Officers to be taken into consideration. Notwithstanding anything in the Code or in the Indian Evidence Act 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds of images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made there under: Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused."

376. The absence of a provision corresponding to Sub-clause (c) of Sub-section 1 of Section 21 and the clear amendment incorporated in Sub-section 1 of Section 15 of TADA when Sub-clause (c) of Sub-section 1 of Section 21 of TADA was amended when compared with the language of Sub-section (1) of Section 32 makes the legislative intent quite clear. The confession of a co-accused recorded before a police officer under POTA would not be admissible in evidence against the accused.

377. Since, in the analysis of the evidence, qua SAR Gilani and Afzan a controversy was raised during arguments to the true scope and effect of Section 27 of the Indian Evidence Act. We may deal with it. The controversy may be stated thus:- "Whether a recovery of a material object as a consequence of information received by the police on a disclosure or a confessional statement emanating from the accused is the sine qua non for the applicability of Section 27 or not?"

378. Counsel for the prosecution contended that the basic idea embodied in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. It was contended that any information provided by the

accused, which was not in the knowledge of the police, if receives confirmation by subsequent investigations would be admissible under Section 27 of the Evidence Act. In support of the proposition, Sh. Gopal Subramanium, learned counsel for the prosecution relied upon the observations of the Hon'ble Supreme Court in its judgment , State of Maharashtra v. Damu.

379. We proceed with the reproduction of Section 27 of the Evidence Act. It reads as under:- "27. How much of information received from accused may be proved. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

380. Though the decision of the Privy Council reported as AIR 1947 PC 67 Pulukuri Kottaya and Ors. v. Emperor is considered to be the locus-classics on the scope and interpretation of Section 27 of the Evidence Act but we would prefer to peep a little more into history for that would enable us to better appreciate Pulukuri Kottaya (Supra).

381. A full bench consisting of seven Judges of the Lahore High Court in the judgment reported as AIR 1929 Lahore 344, Sukhan v. Emperor, on a reference made by two Judges held that the expression "fact" as defined by Section 3 of the Evidence Act included not only the physical fact which can be perceived by the senses, but also the psychological fact or mental condition of which any person is conscious. It was held that the phrase "facts discovered" used in Section 27 in the former sense i.e. it referred to a material and not a mental fact. It was held as under:- "The expression"fact" as defined by Section 3 of the Statute includes, not only the physical fact which can be perceived by the senses, but also the psychological fact or mental condition of which any person is conscious. It is in the former sense that the word is used in Section 27. The phrase "fact discovered" Used by the legislature refers to a material, and not to a mental fact. The fact discovered may be the stolen property, the instrument of the crime, the corpse of the person murdered or any other material thing; or it may be a material thing in relation to the place or the locality where it is found."

382. This view was followed by the Bombay high Court. However, the Madras High Court in its judgment reported as AIR 1937 Madras 618 had taken a somewhat contrary view, in that the Madras view was that any information which serves to connect the object discovered with the offence charged was admissible under Section 27.

383. Analysing the two views and interpreting Section 27, the Privy Council in Pulukuri Kottaya (Supra) affirmed the view taken by the full bench of the Lahore High Court and held that Section 27 was an exception to the prohibition imposed by Sections 25 and 26 and enabled certain statements made by a person in police custody to be proved. The condition necessary for Section 27 to come into operation was the discovery of a fact

in consequence of information received from an accused person while in custody of the police.

384. On this being established only so much of the information as related distinctly to the fact thereby discovered could be proved. However, the immediate following observations in para 10 are illustrative and need to be noted. Same are:- "Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused."

385. The argument of the prosecution, that on the recovery of the object, all information relevant to the object was admissible was rejected. The court observed that Section 27 could not be construed so sweepingly as would nullify the substance of Sections 25 and 26. It was held:- "In their Lordhsips' view it is fallacious to treat"fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact."

386. It is thus to be noted that the place from where the object was produced and the knowledge of the accused persons that the object was at a particular place i.e. the twin going hand in hand was "the fact discovered" within the meaning of Section 27 of the Evidence Act.

387. The scope of the Section came again to be considered by the Hon'ble Supreme Court in the judgment Jaffar Hussain Dastagir v. State of Maharashtra. The court was considering the following statements:- "I will point out one Gaddi @ Ram Singh of Delhi at Bombay Central Railway Station at Ill-Class waiting hall to whom I had given a bag containing Diamonds of different sizes more than 200 in number."

388. Pursuant to the said statements, the accused, maker of the statement led the police to the waiting hall and from amongst a crowd of people pointed out accused Gaddi from whom a packet containing 271 diamonds was found. However, there was evidence on record that the police had already received information that accused Gaddi had the diamonds with him. Issue that came up for consideration in the context of applicability of Section 27 was that the information which led to the discovery of some fact was given by the maker of the statement and the police was not aware of the said fact earlier. The High Court had taken the view that the mental fact of the maker of the statement that the diamonds were with the accused Gaddi, who was at the Central Railway Station would be admissible in evidence though recovery of the diamonds at the instance of the maker of the statement was inadmissible as the police already had prior information of the said fact. The judgment of the High Court was overruled and it was held that there was no discovery of any fact within the meaning of Section 27 of the Evidence Act. On the analysis of the facts, the court held:- "In our view Gaud must have learnt that Parekh and/or accused No. 3 had the custody of the diamonds. Therefore the statement of the appellant that accused No. 3 had the custody of the diamonds

would not be discovered in consequence of the information received from the appellant. The discovery, if any, merely related to the whereabouts of accused No. 3. There was no discovery of any fact deposed to by the appellant within the meaning of Section 27. If the police had not gone to the office of the Bombay Samachar and had not learned of the complicity of the third accused with the crime, the statement of the appellant would amount to information received from him relating to the discovery of the diamonds in the custody of accused No. 3."

389. Another illuminative judgment of the Hon'ble Supreme Court. In its decision reported as , H.P. Administration v. Om Prakash, it was held:- "In the Full Bench Judgment of Seven Judges in Sukhan v. The Crown, 2nd 10 Lah 283 : (AIR 1929 Lah 344) (FB) which was approved by the Privy Council in Pulukuri Kotaya's case, 74 Ind App 65 : (AIR 1947 PC 67) Shadi Lal, C.J., as he then was speaking for the majority pointed out that the expression 'fact' as defined by Section 3 of the Evidence Act includes not only the physical fact which can be perceived by the senses but also the psychological factor mental condition of which any person is conscious and that it is in the former sense that the word used by the Legislature refers to a material and not to a mental fact. It is clear therefore that what should be discovered is the material fact and the information that is admissible is that which has caused that discovery so as to connect the information and the fact with each other as the 'cause and effect.' That information which does not distinctly connect with the fact discovered or that portion of the information which merely explains the material thing discovered is not admissible under Section 27 and cannot be proved. As explained by this Court as well as by the Privy Council normally Section 27 is brought into operation where a person in police custody produces from some place of concealment some object said to be connected with the crime of which the informant is the accused. The concealment of the fact which is not known to the police is what is discovered by the information and lends assurance what the information was true. No witness with whom some material fact, such as the weapon of murder, stolen property or other incriminating article is not hidden, sold or kept and which is unknown to the police can be said to be discovered as a consequence of the information furnished by the accused. These examples however are only by way of illustration and are not exhaustive. What makes the information leading to the discovery of the witness admissible is the discovery from him of the thing sold to him or hidden or kept with him which the police did not know until the information was furnished to them by the accused. A witness cannot be said to be discovered if nothing is to be found or recovered from him as a consequence of the information furnished by the accused and the information which disclosed the identity of the witness will not be admissible. But even apart from the admissibility of the information under Section 27, the evidence of the Investigating Officer and the panchas that the accused had taken them to P.W.11 and pointed him out and as corroborated by P.W.11 himself would be admissible under Section

8 of the Evidence Act as conduct of the accused."

390. Yet another judgment Mohd. Inayatullah v. State of Maharashtra, may be referred to. The court noted that although the interpretation and scope of Section 27 had been a subject matter of several authoritative pronouncements. Its application to concrete cases is not always free from difficulty (Refer Para 10). Analysing Section 27, in para 11, the court held:- 'It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody, The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably" "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the proveable information. The phrase "distinctly" relates "to the fact thereby discovered"(sic) (and ?) is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery."
391. Having noted the above, though there are plethora of judgments on Section 27, we may refer to the judgment in State of Maharashtra v. Damu '(Supra) relied upon by the defense.
392. Counsel relied upon the following observations in para 35 of the judgment:- "The basic idea embodied in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is based on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. Hence, the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum."
393. Counsel contended that it was clear from the judgment of the Privy Council in Pulukuri Kottaya (Supra) that the fact discovered was not the object found but was the place from which the object was produced and the knowledge of the accused to this fact. This, he contended was explained and amplified in Damu's judgment. This, according to the learned counsel, would make admissible under Section 27 of the Evidence Act all information received by the police from the accused persons which was not within the knowledge of the police if the said information was subsequently proved.
394. We are afraid, the submission is without any merit and the judgment of the Hon'ble Supreme Court in Damu's (Supra) case, cannot be read in the manner sought to be projected by the prosecution. The observations in para 35 on which the counsel relied has to be understood in the context in

which it was applied on the facts of the case. The following paras 36 and 37 immediately succeeding paras 35 of the judgment are relevant and will be noted :- "36, No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which"distinctly" relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with under standability. In this case, the fact discovered by PW44 is that A-3 Mukinda Thorat had carried the dead body of Dipak to the spot on the motorcycle.

395. How did the particular information lead to the discovery of the fact? No doubt, recovery of dead body of Dipak from the same canal was antecedent to the information which PW 44 obtained. If nothing more was recovered pursuant to and subsequent to obtaining the information from the accused, there would not have been any discovery of any fact at all. But when the broken glass piece was recovered from that spot and that piece was found to be part of the tail lamp of the motorcycle of A-2 Guruji, it can safely be held that the investigating officer discovered the fact that A-2 Guruji had carried the dead body on that particular motorcycle up to the spot."
396. We, therefore, hold, that in order that Section 27 may be brought in aid, the prosecution must establish:-
397. That consequent to the information given by the accused, it led to the discovery of some fact stated by him.
398. The fact discovered must be one which was not within the knowledge of the police and the knowledge of the fact was for the first time derived from the information given by the accused.
399. Information given by the accused must lead to the discovery of a fact which is the direct outcome of such information.
400. The discovery of the fact must be in relation to a material object and of course would then embrace within its fold the mental condition i.e. the knowledge of the accused of the place from where the object was produced and the knowledge that it was there.
401. Only such portion of the information as is distinctly connected with the said discovery is admissible.
402. The discovery of the fact must relate to the commission of some offence.
403. Fact discovered, therefore, has to be a combination of both the elements i.e. a physical object and the mental condition.
404. We have rechartered the journey undertaken by the Special Judge POTA. What have we discovered? What have we failed to discover which the learned Special Judge POTA discovered when he undertook his voyage.
405. ACCUSED NO. 1 MOHD. AFZAL.
406. Motivated by Tariq, under instructions of Gazi Baba accused Mohd. Afzal, on 6.1-1.2001 acquired the mobile No. 9811489429 which was activated and was used on the handset having IMEI No. 449269219639010 which was recovered from the deceased terrorist, Rana. The user of this number was discontinued on 29.11.2001. It was again put to use on 7.12.2001. On

13.12.2001, the SIM card pertaining to this number was used in the handset No. 350102209452430 i.e. the instrument recovered from the truck at Srinagar when Afzal and Shaukat were intercepted. In his confessional statement, accused Afzal admitted that he was using the mobile No. 9811489429. This establishes that accused Mohd. Afzal had passed on the instrument used by him earlier to the terrorists and was ultimately recovered from the deceased terrorist, Rana.

407. Mohd. Afzal had taken on rent the second floor of house No. A-97, Gandhi Vihar in the first week of November, 2001 which coincided with the activation of first mobile phone number used by accused Mohd. Afzal. After a few days deceased terrorist Mohd. resided there with Afzal. Explosives and Chemicals used for making the car bomb and Tiffin bomb were recovered from this premises. Motor Cycle 51-E-5768 was recovered here. Shaukat was visiting him here. 3 or 4 persons were visiting the place. On 13.12.2001, Afzal along with Shaukat and 4 more persons left this place on 13.12.2001 at around 10 A.M. In an ambassador car. Sujata Mixer grinder was recovered here. It was used to mix Chemicals for manufacture of the bombs.
408. Afzal had falsely told his name as Maqsood to the landlord to hide his identity.
409. Mobile phone No. 9811489429 remained in touch with the mobile phone recovered from the deceased terrorist, Mohd. It had also remained in touch with the mobile phone No. 9810446375 used by Shaukat, which mobile phone number was first activated on 2nd November, 2001. Both these mobile phones were in touch with the satellite phone 8821651150059, which satellite number was in communication with the mobile No. 9810693456, recovered from the deceased terrorist Mohd.
410. The instrument IMEI No. 449269219639010 which was used initially on the SIM card having mobile No. 9811489429 belonging to Afzal was used in the SIM card pertaining to mobile No. 9810565284, recovered from the deceased terrorist Mohd. The instrument was finally recovered from the person of deceased/terrorist Raja which showed that accused Afzal was interchanging the instrument sometimes with the terrorist Raja and sometimes with the terrorist Mohd. When the attack was on, Afzal had received a call at 11:19:14 from the mobile No. 9811573506 from Mohd. On 7.12.2001, mobile No. 9811489429 had received a call from the satellite No. 8821651150059, from which satellite number, calls were received on the mobile number recovered from the deceased terrorist Mohd. as well as calls were received on the mobile number of Shaukat. Afzal remained in touch with the terrorists during the time when Parliament was under attack.
411. Afzal had taken on rent a second premises, House No. 281, Indira Vihar on rent on 9th December, 2001 where he was seen with five or six persons. He was last seen leaving the premises on 12.12,2001 after locking the same. Chemicals, which were used for making explosives, were recovered from this premises. Ammunition was also recovered from this premises.

412. Terrorist Mohd. had purchased the Ambassador Car bearing No. DL-3C J 1527 Mohd. Afzal had accompanied terrorist Mohd. when the car was purchased. This car was used by the terrorist to make entry into Parliament House.
413. Afzal along with Shaukat had taken on rent a room in the boys' hostel at B-41, Christian Colony on 7th or 8th November, 2001 where the deceased terrorist Mohd. had resided.
414. Mohd. Afzal had purchased sulphur, aluminium powder and Ammonium Nitrate, which was used for making explosives used by the terrorists. The Chemical compositions of the explosives in the car bomb were the same Chemicals which were purchased by him and were recovered from the two premises, A-97, Gandhi Vihar and 281, Indira Vihar.
415. Afzal was involved in the purchase of the motorcycle, which was recovered from the premises A-97, Gandhi Vihar.
416. Afzal was in Delhi, evidenced by the calls made by and on his mobile phone No. 9811489429 till noon when Parliament was attacked and he there-after absconded along with Shaukat and was arrested from Srinagar in the morning of 15th December, 2001.
417. The laptop which was recovered in the truck HR 38 E 6733, which was registered in the name of accused Afzan when Shaukat and Afzal were arrested, was the laptop used for preparing the fake Cyber Tec. identity cards and the fake Home Ministry stickers.
418. Afzal made a confession admitting his accomplicity in the crime which stood corroborated by the independent evidence evidencing the truthfulness of the confessional statement.
419. From the facts and circumstances, it therefore, stands established that accused Mohd. Afzal was a part to the conspiracy to attack Parliament when it was in Session. He procured hide outs for the terrorists, was instrumental in the smuggling of arms and ammunitions used by the terrorists. Had actively purchased the Chemicals used for making the explosives. Had been involved in the purchase of a motorcycle used for recee by the terrorists and had been involved in the purchase of the white Ambassador Car used by the terrorists.
420. ACCUSED No. 2. SHAUKAT HUSSAIN GURU.
421. He along with Afzal took on rent room No. 5, Boys' Hostel, B-41, Christian Colony on 7.11.2001 in which room the deceased terrorist Mohd. had stayed.
422. Cell phone No. 9810446375 which was recovered from the house of Shaukat was for the first time made operational on 2nd November, 2001. This coincides with the period when Afzal acquired a mobile phone and the first hide out was procured. This number was in contact with the satellite phone No. 8821651150059 and was also in communication with the mobile No. 9810693456 recovered from the deceased terrorist Mohd., on which number Mohd. had received calls from the same satellite phone No. 8821651150059, and even Afzal had received phone calls from this number. This establishes that Shaukat was in touch with Afzal and Mohd. during

the period November-December, 2001 and all the three were in contact with the same satellite phone No. 8821651150059.

423. Shaukat's motorcycle was recovered from the hide out and was used for recee by the terrorists.

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

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

426. Shaukat had been visiting Afzal at A-97, Gandhi Vihar and 281, Indira Vihar. He had also accompanied him when the room at the Boys' Hostel at Christian Colony was taken on rent. It may be true that Shaukat was Afzal's cousin. Had it been a case where Afzal had taken only one room on rent, it could have been argued that Shaukat visiting his cousin, was not an incriminating circumstance but, where three premises are taken on rent, this innocence cannot be inferred. It cannot be inferred that Shaukat was merely moving around with his cousin. Keeping in view the totality of the evidence, Shaukat was equally liable for what was happening at the hide outs.

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

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

429. The confessional statement of Shaukat implicating him in the attack on Parliament House gave his role. The confession stands corroborated by the independent evidence on record proving that Shaukat remained in touch with the terrorists and remained in touch through the satellite phone with an external agency.

430. Shaukat's role in the conspiracy was clearly that of an active participant. Evidence on record does not show that he has been brought within the sweep of the dragnet of conspiracy by merely being seen associated with Afzal. There is more than mere knowledge, acquiescence, carelessness, indifference or lack of concern. There is clear and cogent evidence of informed and interested co-operation, simulation and instigation against accused Shaukat. Evidence qua Shaukat clearly establishes the steps from knowledge to intent and finally agreement. ACCUSED No. 3. S.A.R. GILANI

431. He was on close and intimate terms with accused Afzal and Shaukat and remained in contact with both of them over the telephone in the months of November and uptil 13th December, 2001. When Shaukat acquired the mobile phone 9810446375 on 2.11,2001, the first call was on the mobile number of S.A.R. Gilani. Again, when Shaukat changed his number to 9811573506 on 7.12.2001, the first call was to S.A.R. Gilani on his mobile

phone. Further, Afzal had stopped using his mobile phone 9811489429 w.e.f. 29.11.2001 till 7.12.2001. On reactivation on 7.12.2001 the first call was at S.A.R. Gilani's phone. On 13.12.2001 at 12:15:09 hours, immediately after the attack Gilani had received a call from Shaukat and at 12:25:11 hours, he had made a call to Shaukat at Shaukat's mobile phone 9811573506.

432. There is, however, no evidence on record to establish that he remained in touch over the telephone with the terrorists. Prosecution alleged that the fact that Gilani was in touch with accused Afzal and Shaukat was a prima-facie evidence of his being a co-conspirator. Prosecution highlighted the fact that the mobile phone of Shaukat, when made operational for the first time, the first call was made to Gilani. After Shaukat's number went into disuse on 29.11.2001 and was again put to use after the break on 7.12.2001, the first call was made to Gilani. Further, immediately after the attack on Parliament, Gilani had received a call and had returned one to Shaukat.

433. We have pondered over this evidence, it is a relevant circumstance but by itself without anything more on record is not sufficient to draw an inference against S.A.R. Gilani that he was involved in the conspiracy. After all S.A.R. Gilani was known to Shaukat and Afzal. When one acquires a mobile phone, it is but natural that one would test it for use. What other number would one connect other than that of a known person. By itself, with nothing more, we are afraid that conviction cannot be sustained on this evidence.

434. Admittedly, as noted above, there is no evidence of Gilani being in telephonic touch with any of the terrorists. There is no evidence that Gilani was instrumental in procuring the hide outs or the Chemicals used for manufacture of explosives. There is no evidence of Gilani's involvement in procuring arms and ammunitions. Prosecution sought to rely upon the testimony of PW-45, landlord of Shaukat that he had seen Gilani visiting the house of Shaukat and this was an additional evidence to show his involvement in the conspiracy, particularly when Shaukat's landlord had stated that 4 or 5 persons started visiting Shaukat's house 2 or 3 days prior to 13.12.2001, and these persons were the deceased terrorists.

435. While discussing the evidence of PW-45, Shaukat's landlord, we had noticed that in his deposition, at the first instance, he had never mentioned that Gilani was seen by him visiting the house of Shaukat. On a leading question being put by the public prosecutor, he stated that to the police he had told that Gilani was seen by him visiting the house of Shaukat. It is of importance to note that even while so stating, PW-45 did not state that he had seen Gilani visiting the house of Shaukat in the company of the five terrorists. We had noted nothing incriminating in the evidence of PW-45 against Gilani.

436. Prosecution had relied upon the conversation between Gilani and his brother in the afternoon of 14th December, 2001 and had contended that the talk was incriminating, in that, it showed Gilani's participation in the

attack on Parliament House. We had, while discussing the taped conversation, even assuming the prosecution version to be correct, come to a conclusion that there was nothing which could incriminate Gilani as far as the conversation is concerned.

437. Finally, prosecution had relied upon the disclosure statement made by Gilani and had contended that the information provided in the disclosure statement was ultimately proved to be correct.

438. We have dealt with the law pertaining to Section 27 of the Evidence Act and since no recoveries were effected pursuant to the disclosure statement, we hold that nothing incriminating against accused S.A.R. Gilani has been brought out by the prosecution on the basis of the disclosure statement.

439. We have already held that under POTA a confession of an accused is not admissible in evidence against the co-accused.

440. We are, therefore, left with only one piece of evidence against accused S.A.R, Gilani being the record of telephone calls between him and accused Mohd. Afzal & Shaukat. This circumstance, in our opinion, do not even remotely, far less definitely and unerringly point towards the guilt of accused S.A.R. Gilani. We, therefore, conclude that the prosecution has failed to bring on record evidence which cumulatively forms a chain, So complete that there is no escape from the conclusion that in all human probabilities accused S.A.R. Gilani was involved in the conspiracy.

441. We may also note, that though it is not necessary for the prosecution to prove as to what specific role was played by a particular conspirator to achieve the illegal agreement of the conspirators but, it has to be established by cogent evidence that the accused was a part of the conspiracy and this would require proof of some participative acts, which may not be overt but could be gathered from circumstantial evidence and in appropriate cases a high degree of consciousness may be sufficient. Evidence on record does not bring out a high level of consciousness qua S.A.R. Gilani in the conspiracy. ACCUSED No. 4 AFZAN GURU @ NAVJOT SANDHU.

442. As far as accused Afzan Guru is concerned, except for her being the wife of accused Shaukat what has been brought on record against her by the prosecution is firstly the confessional statement of Shaukat and Afzal, which we have already held is inadmissible against her.

443. Secondly, from the information retrieved from the laptop, prosecution contended that the terrorists had contemplated preparing an identity card for a woman and this lends credence to the fact that Afzan was involved in the conspiracy. However, to our mind, this fact could equally be indicative that the conspirators did not associate any woman in the conspiracy.

444. Thirdly, we have the evidence that five or six persons who were identified by the landlord as the terrorists were seen visiting the house (though we have expressed our reservation on the identification of the deceased terrorists by the landlord). But this would not establish that Afzan was a party to a conspiracy.

445. The next evidence relied upon by the prosecution was the statement of PW-29, Sushil Kumar from whom the motor cycle HR-51E-5768 was pur-

chased. No doubt he said that when he sold the motor cycle, 3 men and a woman had come to his shop, but did not identify the woman as being Afzan. Indeed, the learned trial Judge has absolved accused Afzan from the charge of having entered into a conspiracy.

446. We have discussed above the law relating to discovery based on a confession or a disclosure under Section 27 of the Evidence Act. No discoveries were effected at the instance of Afzan pursuant to the alleged disclosure. From the evidence against accused Afzan Guru, we are of the opinion that even the offence that she had knowledge of the conspiracy and failed to report the same to the police is not established. She was admittedly a housewife and Shaukat was her husband. Merely because some meetings took place, assuming it to be correct, in the house would not be sufficient by itself to impute knowledge to her.

447. The only other piece of evidence against her is the telephonic call she had with Shaukat in the night of 18.12.2001 which was taped. The evidence is border line. Firstly, the call records show that it was of 49 seconds duration but the expert PW-48 Dr. Rajinder Singh who conducted the auditory and voice spectograph analysis of the taped conversation was categorical that the tape sent to him was of 2 minutes and 19 seconds duration. Secondly, assuming the conversation to be correct, it is certainly indicative of some thing suspicious. The cause could be, as stated by the prosecution that she was aware of her husband's activities and was therefore concerned. But it could well be that she was aware of the fact that Afzal was a surrendered militant and post attack on Parliament, her husband and Afzal leaving for Srinagar had roused her suspicion. S.A.R. Gilani's address was known to the police on 13.12.2001. Police was on the look out for Gilani. Afzan resided in Mukherji Nagar, so did S.A.R. Gilani. She may have seen police conducting surveillance in the area. Many probable causes may have induced the fear. Had there being any more evidence, position would have been different. Again, we may note that no role whatsoever has been assigned to accused Afzan as a participative member in the conspiracy. She provided no logistics; she procured no hide outs; she procured no arms and ammunitions; she was not even a motivator.

448. The two pieces evidences against Afzan, in our opinion do not create circumstances from which an inference of guilt can be firmly and cogently established. They do not unerringly point towards the guilt of Afzan. Law requires proof of facts establishing circumstances which taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the accused was involved. Evidence should not only be consistent with the guilt of the accused but should in addition be inconsistent with his innocence.

449. We accordingly hold that the prosecution has brought home its case of conspiracy against accused Mohd. Afzal and accused Shaukat but has failed to prove the case against accused SAR Gilani and Navjot.

450. We accordingly acquit accused S.A.R. Gilani and Afzan Guru @ Navjot Sandhu from all the charges.

451. Though during arguments, counsel for the accused had drawn our attention to the examination of the accused under Section 313 Cr.P.C. and had stated that all circumstances were not put to the accused and in certain cases: the circumstances put were mumbled jumbled. In that three to six distinct facts and circumstances were rolled into one.
452. We are not going into this issue because the facts which we have taken into account and the circumstances on which we have relied have been adequately and fairly put to the accused persons in their examination under Section 313 Cr.P.C.
453. Where do Mohd. Afzal and Shaukat get anchored.
454. In view of our discussion as to what would be, in law an offence of waging war against the Government of India, though there were five terrorists who attacked Parliament on 13.12.2001 but from the fire power available with them and they being armed to the teeth and had they succeeded, the entire Parliament which was in Session would have been wiped out, we hold that the actions of the terrorists would be acts of waging war against the Government of India. Accused Afzal and Shaukat were active participants in providing the logistic support. If not acts of waging war what they did would certainly be of acts of abetting the waging of war. We hold that accused Afzal and Shaukat guilty of committing the offence under Section 121 IPC.
455. Section 121-A makes the conspiracy to commit an offence punishable by Section 121, a substantive offence. We hold accused Afzal and Shaukat guilty of having committed the offence under Section 121-A IPC.
456. Section 122 IPC makes it an offence to collect arms or ammunition to wage war against the Government of India. We accordingly hold accused Afzal and Shaukat guilty of having committed the offence under Section 122 of the IPC.
457. Admittedly 9 security personnels were killed by the terrorists when they broke into Parliament House, They succeeded in so doing as a result of a conspiracy to which accused Afzal and Shaukat were a party. It was not even the argument of the defense that it was not the intention of the terrorists not to kill anyone who came in their way in Parliament House. We accordingly hold guilty accused Afzal and Shaukat for having committed an offence under Section 302 r/w Section 120-B IPC.
458. On parity of reasons, admittedly 16 security personnels nearly escaped death as a result of being fired upon by the terrorists. It was not even argued that it was not the intention of the conspirators to attempt to kill anyone who came in their way. We hold accused Afzal and Shaukat guilty of having committed an offence under Section 307 r/w Section 120-B IPC.
459. That takes vis to the POTA offences. Section 3 of POTA reads as under:- "3. Punishment for terrorist acts. -

(1) Whoever,-

(a) with intent to threaten the unity, integrity, security or sovereignty of India

or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other Chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defense of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act;

(b) is or continues to be a member of an association declared unlawful under the Unlawful Activities (Prevention) Act, 1967 (37 of 1967), or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property, commits a terrorist act. Explanation.- For the purposes of this subsection, "a terrorist act" shall include the act of raising funds intended for the purpose of terrorism.

(2) Whoever commits a terrorist act, shall, -

(a) If such act has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to fine;

(b) in any other case, be punishable with imprisonment for a term which shall not be less than 5 years but which may extend to imprisonment for life and shall also be liable to fine.

(3) Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(4) Whoever voluntarily harbours or conceals, or attempts to harbour or conceal, any person knowing that such person is a terrorist shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life and shall also be liable to fine: Provided that this sub-section shall not apply to any case in which the harbour or concealment is by the husband or wife of the offender.

(5) Any person who is a member of a terrorist gang or a terrorist organisation, which is involved in terrorist acts, shall be punishable with imprisonment for a term which may extend to imprisonment for life, or with fine which may extend to rupees ten lakh, or with both. Explanation. - For the purposes of sub-section, "terrorist organisation" means an organisation which is concerned with or involved in terrorism.

(6) Whoever knowingly holds any property derived or obtained from commission of any terrorist act or has been acquired through the terrorist funds shall be punishable with imprisonment for a term which may extend to imprisonment for life, or with fine which may extend to rupees ten lakh, or with both.

(7) Whoever threatens any person who is a witness or any other person in whom such witness may be interested, with violence, or wrongfully restrains or confines witness, or any other person in whom witness may be interested, or does any other unlawful act with the said intent, shall be punishable with imprisonment which may extend to three years and fine."

432. Counsel for the defense argued that the terrorists act could only be committed if an act or a thing was done by using bombs, dynamites or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other Chemicals or by any other substances of a hazardous nature or by any other means whatsoever in such a manner' as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defense of India or in connection with any other purposes of the Government. It was contended that under Sub-clause (b) of Sub-section (1) of Section 3, membership by an association declared unlawful under the Unlawful Activities (Prevention) Act, 1967 or promotion of the objects of such association would constitute a terrorist's act. There was no evidence that accused Afzal and Shaukat were member of an association declared unlawful under the Unlawful Activities (Prevention) Act or that they aided or promoted the objects of such associations. It was contended that accused Afzal and Shaukat could, therefore, neither be charged under Sub-section (2) of Section 3 of POTA, much less convicted there under.

433. Learned counsel for the prosecution, per contra, contended that the definition of a terrorist's act had to be construed in the light of the words, "does any act or thing" occurring in Clause (a) of Sub-section (1) of Section 3 coupled with the explanation to Sub-section (1) of Section 3. Relying on the explanation, the prosecution contended that if the raising of funds intended for the purposes of terrorism would make it a terrorist's act in the light of the explanation, the words, "or thing" in Clause (a) of Sub-section (1) of Section 3 makes the legislative intent clear, in that the doing of anything pertaining to explosive substances which were used to threaten the

unity, integrity, security or sovereignty of India or to strike terror in the people would fall within the definition of a terrorist's act.

434. We agree with the submission of the prosecution for if the definition of a terrorist's act is to be restricted to mean that a physical act using explosives is the sine qua non to bring it within the ambit of a terrorist's act the words "or thing" would be rendered etiose.

435. The dictionary meaning of the word "thing" is as under:- "an object that one need not, cannot, or does not wish to give a specific name to; an inanimate material object, especially as distinct from a living sentient being; an action, activity, concept or thought".

436. Action, activity, concept or thought being "thing", the actions of accused Mohd. Afzal and Shaukat in procuring explosives and Chemicals for manufacture of explosives and participating in the preparation of explosives would be action amounting to doing of a thing using explosives intending to threaten the unity, integrity, security or sovereignty of India. We accordingly hold accused Afzal and Shaukat guilty of having committed the offence punishable under Section 3(2) POTA.

437. The charge of conspiracy against accused Afzal and Shaukat to attack the Parliament of India stands established and we, therefore, hold them guilty of having committed the offence under Section 3(3) of POTA.

438. Admittedly, the five persons, who attacked Parliament, committed terrorists acts and indeed were terrorists. Accused Afzal and Shaukat have been proved by the prosecution of harbouring the terrorists in the hide outs procured by them. We accordingly hold accused Afzal and Shaukat guilty of having committed the offence under Section 3(4) of POTA.

439. Section 4 of POTA reads as under:- "4. Possession of certain unauthorized arms, etc. Where any person is in unauthorized possession of any -

(a) arms or ammunition specified in columns (2) and (3) of Category I or Category II (a) of Schedule 1 to the Arms Rules, 1962, in a notified area,

(b) bombs, dynamite or hazardous explosive substances or other lethal weapons capable of mass destruction or biological or Chemical substances of warfare in any area, whether notified or not, he shall be guilty of terrorist act notwithstanding anything contained in any other law for the time being in force, and be punishable with imprisonment for a term which may extend to imprisonment for life, or with fine which may extend to rupees ten lakh, or with both. Explanation. - In this section "notified area" means such area as the State Government may, by notification in the Official Gazette, specify."

440. Evidence on record establishes that accused Afzal and Shaukat were in unauthorised possession of arms and explosives recovered from the hide outs. Indeed they were lethal. We therefore, hold them guilty of having committed the offence under Section 4(b) of POTA.

441. Sections 3 and 4 of The Explosive Substances Act, 1908 reads as under :-

"3. Punishment for causing explosion likely to endanger life or property. Any person who unlawfully and maliciously causes by -

(a) any explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property has been actually caused or not, be punished with imprisonment for life, or with rigorous imprisonment of either description which shall not be less than ten years, and shall also be liable to fine;
(b) any special category explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property has been actually caused or not, be punished with death, or rigorous imprisonment for life, and shall also be liable to fine." "4. Punishment for attempt to cause explosion, or for making or keeping explosive with intent to endanger life or property. Any person who unlawfully and maliciously -
(c) does any act with intent to cause by an explosive substance or special category explosive substance, or conspires to cause by an explosive substance or special category explosive substance, an explosion of a nature likely to endanger life or to cause serious injury to property; or
(d) makes or has in his possession or under his control any explosive substance or special category explosive substance with intent by means thereof to endanger life, or cause serious injury to property, or to enable any other person by means thereof to endanger life or cause serious injury to property in India, shall, whether any explosion does or does not take place and whether any injury to person or property has been actually caused or not, be punished, -
(e) in the case of any explosive substance, with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;

(ii) in case of any special category explosive substance, with rigorous imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

442. Section 2 of the Act defines explosive substance as under:- "2. Definitions. In this Act, -

(a) expression "explosive substance" shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine or implement;"

443. Possession of explosive substances and Chemicals for manufacturing explosive substances from accused Afzal and Shaukat from the hide outs

procured by them stands established. We accordingly convict accused Afzal and Shaukat for having committed the offence under Section 3 as well as the offence under Section 4 of The Explosive Substances Act.

444. As per the confession of Afzal and Shaukat, the sum of Rs. 10,00,000/- recovered from them were given to them by the terrorist Mohd. We accordingly forfeit the said amount to the Government of India.

445. We accordingly answer the murder reference in terms of our findings above. We affirm the conviction of accused Mohd. Afzal and accused Shaukat Hussain Guru in respect of the charges they stand convicted by the learned Special Judge, POTA. We acquit accused S.A.R. Gilani and accused Afzan Guru @ Navjot Sandhu from the charges.

446. As regards the sentence imposed by the learned Special Judge, POTA for the various offences of which accused Mohd. Afzal and accused Shaukat Hussain Guru stand convicted, we find that the learned Special Judge, POTA has given legally sound, adequate and justified reasons while imposing the sentence for various offences except for the offence u/s 121 of the Indian Penal Code. The learned Special Judge has imposed the sentence of life imprisonment.

447. The State commends us to enhance the sentence to one of death.

448. The attack was on Parliament, when in session. The sovereignty of the country was attacked. To borrow the words of the Apex Court in the judgment reported as 2002 (Vol. IV) A.D. (SC) 445 (Para 87), Krishna Mochi v. State of Bihar, the gravity of the offence is of a magnitude that the collective conscious of the community is so shocked that it will expect the holders of the judicial power centre, to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty. Indeed, after the unfortunate incident, this country had to station its troops at the border and large scale mobilisation of the armed forces took place. The clouds of war with our neighbour loomed large for a long period of time. The nation suffered not only an economic strain but even the trauma of an imminent war. We agree with the submissions made by the prosecution that for the offence of waging war, accused Mohd. Afzal and accused Shaukat Hussain Guru deserve the higher penalty. We accordingly modify the sentence imposed on the said two accused persons under Section 121 IPC by awarding death sentence to these two accused. The rest of the sentences imposed by the learned Special Judge stand affirmed,

449. In view of the decision in the murder reference, we allow Crl.A. No. 19/2003 filed by S.A.R. Gilani as also Crl.A.No. 12/2003 filed by Navjot Sandhu @ Afzan Guru. Since we have allowed the appeal filed by S.A.R. Gilani, we need not decide the miscellaneous application filed during arguments praying that S.A.R. Gilani be Examined again. Crl.A.No. 43/2003 filed by Mohd, Afzal and Crl.A. No. 36/2003 filed by Shaukat Hussain Guru stand dismissed.

450. We dismiss Crl. A. No. 80/2003 filed by the State praying that the acquittal of accused Navjot Sandhu under Section 120/ 121/121-

A/122/302/307/120-B IPC, Section 3/4 of Explosive Substances Act and Section 3(1)(a), 3(2), 3(3), 3(4), 3(5) and 4(b) POTA be set aside.

451. Crl. A. No. 59/2003 stands dismissed against respondent No. 2; respondent No. 3 (S.A.R. Gilani). The same is allowed to the extent that the sentence imposed upon accused Mohd. Afzal and accused Shaukat Hussain Guru for the offence under Section 121 IPC is enhanced by awarding death sentence instead of life imprisonment.

452. We may also deal with the application filed by accused Mohd. Afzal being Crl. M. No. 470/2003. In view of our findings in the murder reference, grounds A to F stand dealt with, and therefore, nothing survives as regards the said grounds sought to be urged in support of the appeal. As regards grounds G and H, we are of the opinion that accused Mohd. Afzal in the garb of raising additional grounds cannot urge facts not stated by him in his statement recorded under Section 313 Cr.P.C. The grounds G and H in the application in fact are additions to the statement made by him under Section 313 Cr.P.C. which cannot be allowed. The application in so far it seeks to urge grounds G and H is dismissed. Rest of the grounds have been considered by us while answering the murder reference.

453. Before ending, we would place on record our appreciation for the learned Senior Counsel who argued the matter, including the team of assisting counsels. We were rendered valuable assistance at the hearing of the murder reference and connected appeals.