Nazir Khan And Ors vs State Of Delhi on 22 August, 2003

Equivalent citations: AIR 2003 SUPREME COURT 4427, 2003 (8) SCC 461, 2003 AIR SCW 5068, 2003 (7) ACE 537, 2003 (6) SCALE 652, 2003 ALL MR(CRI) 2651, 2003 SCC(CRI) 2033, 2003 (5) SLT 14, (2003) 12 ALLINDCAS 401 (SC), (2003) 4 KHCACJ 585 (SC), 2003 (12) ALLINDCAS 401, (2003) 3 BANKCAS 345, (2003) 1 ALD(CRL) 580, (2004) 2 BANKJ 131, (2004) 1 GCD 52 (SC), 2004 CHANDLR(CIV&CRI) 95, (2004) SC CR R 965, (2003) 7 INDLD 728, (2003) 106 DLT 70, (2004) 1 EASTCRIC 138, (2003) 26 OCR 839, (2004) 1 RAJ CRI C 41, (2003) 3 CURCRIR 173, (2003) 6 SUPREME 234, (2004) 1 ALLCRIR 34, (2003) 6 SCALE 652, (2003) 10 INDLD 768, (2003) 47 ALLCRIC 712, (2003) 4 ALLCRILR 824, (2003) 4 CRIMES 29, 2003 (2) ALD(CRL) 651, (2003) 2 ANDHLT(CRI) 566

Author: Arijit Pasayat

Bench: Doraiswamy Raju, Arijit Pasayat

CASE NO.:
Appeal (crl.) 734 of 2003

PETITIONER:
Nazir Khan and Ors.

RESPONDENT:
Vs.

State of Delhi

DATE OF JUDGMENT: 22/08/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:

J U D G M E N T With Death Reference No.(Crl.) No.1 of 2003 AND CRIMINAL APPEAL NO.....(D.14990/2002) ARIJIT PASAYAT,J Terrorists have no religion, no concept of communal or social harmony and value for human life. Secularism, which is one of the greats attributes of the Indian Constitution, is viewed differently by some people. Communal harmony is not what they want. No religion propagates terrorism or hatred. Love for all is the basic foundation on which

almost all religions are founded. Unfortunately, some fanatics who have distorted views of religion spread messages of terror and hatred. They do not understand or realise the amount of damage they do to the society and as a result of these fanatic acts of misguided people innocent lives are lost, distrust in the minds of communities replaces love and affection for others. Neighbours belonging to different communities who have lived like brothers for ages start viewing each other with suspicion and hatred. Their compassion is first replaced by a sense of diabolic designs. The object of these misguided people- the terrorists - seems to be to spread a message of terror and strike fear in the hearts of the citizens. The present case amply reflects the designs of some people to perpetrate such acts. The temple of democracy in the country - the Parliament - did not also escape the wrath of such people. Whoever did it, wanted to disturb the equilibrium in the minds of the citizens. The millions of peace loving citizens in the country are threatened to be put on a ransom by a group of people. The background scenario with which the case at hand is concerned reveals the macabre designs of a group of such people. The Kingpin of the whole case is a person called Ahmed Umar Sayeed Sheikh (described shortly as 'Umar Sheikh') a British national and trained militant who allegedly received training in Afghanistan and other places. Prosecution version as unfolded during trial which led to conviction of the present appellants for offences punishable under Sections 364A, 121A, 122, 124A read with Section 120B of the Indian Penal Code, 1860 (for short the 'IPC') and Sections 3 and 4 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the 'TADA Act'), and Section 14 of the Foreigners Act, 1946 (in short 'Foreigners Act') is as under:

> There were originally 9 accused persons who were tried in the Sessions Case No.43/2001 by the learned Designated Court, TADA, New Delhi. Along with the accused appellants three other persons faced trial. Two of them namely, Haji Shamin and Mohd. Yamin have been acquitted. Interestingly, before completion of trial, Umar Sheikh was allowed to leave the country along with other militants in exchange of passengers who had been made hostages in Indian Air Lines hijacked flight AI-814. . In other words, the mastermind of the whole conspiracy with which the present case is involved escaped nets of law. The legitimacy of such action is not the subject matter of consideration in these cases, though it has raised many eyebrows. Interestingly this plea was raised by the appellants who submitted that they have become victims of unintended circumstance, while the mastermind and kingpin has gone out mocking of the security network in the country, and they are facing the blunt. This case does not seek to find out an answer to such questions and therefore we are not dealing with them. Nazir Khan (A-1), Abdul Rahim (A-3) and Naser Mohmood Sodozey (A-
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> 8) who were Pakistani nationals have been convicted and sentenced to suffer death sentence for offence punishable under Section 364A IPC read with Section 120B IPC. For the said offences, Narul Amin (A-2), Mohd. Sayeed (A-4) and Mohmood (A-7) have been awarded life sentence.

All the accused appellants were subjected to a fine of Rs.50,000/- each under Section 364A IPC and in default to undergo RI for three years each. All the accused persons were sentenced under Section 120B read with Sections 364, and 364A IPC to life imprisonment and each one of them was

sentenced for the offence under Sections 121A, 122 and 124A IPC and also to pay a fine of Rs.10,000/- each. A-1, A-3 and A-8 were sentenced to death under Section 3(2)(1) of the TADA Act and a fine of Rs.50,0000/- each. For the said offence, others were convicted and sentenced to life imprisonment and a fine of Rs.50,000/- each. A-2 and A-7 were sentenced to 10 years imprisonment for harbouring and concealing the terrorists under Section 3(4) of the TADA Act. All the six accused persons were found guilty for the offence punishable under Sections 3(1) and 3(5) of the TADA Act. Nazir Khan (A-1) and Naser Mohmood Sodozey (A-8) were also convicted under Section 14 of the Foreigners Act for having entered India without valid permission and valid documents. They were each to undergo 5 years rigorous imprisonment and a fine of Rs.25,000/-each. Since the death sentence awarded to the three accused appellants is subject to confirmation by this Court, Death Reference No.1 of 2003 has been made to this Court. To continue the narration of facts as presented by the prosecution, Umar Sheikh visited several places in Pakistan and met Abdul Rauf and other militants associated with Harkat-ul-Mujahiddin (in short 'HUM'). He came in contact with other militant organizations like Jamet-e-Islamic and Al-e-Hadees. He was given a mission to perpetrate terrorist activities in India. He obtained visa for India and was given instructions to reach India and contact other militants. He was advised to organize kidnapping of foreign nationals visiting India and to pressurize Indian Government to release some dreaded militants confined in jails of India. He met some people in Islamabad to get instructions. He came to Delhi in 1994. He was apprised of the militant network already working and was asked to contact Mohmood (A-7) a Mauzzin of Jama Masjid, Delhi who was to introduce another militant named Farooque. He went to Jama Masjid to meet Farooque. He met one Yusuf @ Sultan @ Mehboob at Jama Masjid and was told that one Shahji was the main architect of the entire operation.

Umar Sheikh was put up in a hotel named Ishak Guest House in Jama Masjid Area on 27th July, 1994. Thereafter, he was contacted by other militants and he moved about in Delhi, Ghaziabad, Saharanpur etc. A number of hide outs were prepared in these areas by either purchasing properties or by taking rooms on rent. Some of these hide outs were in Nizamuddin, Sarai Kale Khan, Jama Masjid area, Suaiwalan area, Turkman Gate area of Delhi. Some other hideouts were at Ghaziabad and Saharanpur. Shahji arranged arms, ammunition and money. Since Umar Sheikh was London born and had studied there, his accent and command of English were used to develop contacts with and seek friendship with different foreigners, who were to be subsequently kidnapped. He did so on three occasions i.e. 29.9.1994, 16.10.1994 and 20.10.1994. A Maruti Van bearing registration No. DID 9016 was purchased from Karol Bagh by Abdul Rahim (A-3). British and American nationals were taken to the hideouts and were kept as hostages. However, on one occasion one foreign national managed to escape. After these nationals were kidnapped they were told that they have been taken as hostages and that they would face death if they try to escape. The hideouts were at Saharanpur, Ghaziabad where these persons were kept confined. It was a stroke of good luck that while on a routine check around in Ghaziabad, police officials became suspicious and struck gold while trying to find out as to why a person was suspiciously running away when asked to stop. After kidnapping the four nationals their photographs were taken by the militants and along with the photographs demand letters were sent to British Embassy and American Embassy, and to various news agencies (in India and abroad), newspapers and the demand was that the Government of India should release 10 hard core terrorists from jails. Copies of the demands were faxed to President, Prime Minister and other dignitaries. Three days' time was given for meeting the demands and the

threat was given that in case the demands were not met, the kidnapped foreigners would be killed. As indicated above, it was just a fortunate and providential co-incidence that led the revelation of the conspiracy hatched. On 31.10.1994 a police party headed by Station Officer, Satya Dev Yadav of Police Station, Mussourie near Ghaziabad, had gone to Nai Basti, Mussourie in connection with the investigation of a theft case. Since they found a person running suspiciously they entered the house from which the person had jumped out and ran away. They found the door bolted from inside and when nobody responded, they broke open the door and entered the house. An American national was found chained inside the room with a spike. He was unchained and released and on enquiry he disclosed how he had been abducted from Delhi. From there he was brought to the police station. His statement was recorded and FIR under different provisions of IPC and TADA Act was recorded. On the basis of his information, police officials were posted near the house from where he had been rescued expecting that some members of the militants organizations may visit the place being unaware of the police action. Constables Sompal and Jagpal Singh saw three persons approaching the house of Sufi Anwar where the captive was held. When they came near the house, constables challenged them and the three persons attacked the constables by raising slogans and they wanted to kill the constables. One of the constables was assaulted by two of them, while another constable was over-powered by the third terrorist. One of the terrorists fired at the constable concerned. Two of the terrorists fled away after firing and the third one was arrested after he suffered a bullet injury. He was the main architect of the entire operation i.e. Umar Sheikh. Another case was registered and the police became suspicious that what they have found out is the tip of the iceberg and laid trap. Ultimately, the Maruti van DID 9016 was found in the possession of Abdul Rahim (A-3) and Mohd. Sayeed (A-4). The police had become aware of vehicle's number during interrogation of Umar Sheikh. The van was surrounded while it was being driven by Mohd. Sayeed (A-4). He tried to run away while police officials tried to apprehend him. However, the van was stopped and accused persons were apprehended. On interrogation, all the accused persons claimed to be the members of Harkut-ul-Ansar (in short 'HUA') a terrorist organisation. During interrogation police learnt about kidnapping and abduction of three British nationals who were kept as hostages in a house at Saharanpur. Immediately, action was taken and the house where the three British nationals were confined was surrounded. By throwing bombs and taking advantage of the darkness some of the terrorists managed to escape, but one of the terrorists was killed in an encounter. Unfortunately, two police officials sacrificed their lives while trying to combat with the terrorists. The three British nationals were abducted from Connaught Place in Delhi and were found to be chained when they were rescued. They were brought to Delhi. Arms and ammunitions of huge quantity were seized from the house where they were confined. The Police swung into action. On interrogation, the details of hide outs were found out and on raiding them huge quantity of arms and ammunitions including AK-47 rifle were seized. The names of the two persons involved in the operation i.e. Mohmood @Ayub (A-7) and Nasar Mohmood (A-8) surfaced during investigation. Rest were declared proclaimed offenders as they could not be arrested in spite of best efforts. However, three of the proclaimed offenders were later arrested. A-2 was arrested by Assam Police while A-7 was arrested by Jammu and Kashmir Police and A-8 was arrested by Srinagar Police. During investigation, it came to light that not only the effort was of kidnapping the foreigners who had already kept as hostages, but intention was to kidnap many more so that greater pressure can be used for getting release of 10 hard core terrorists who were the members of HUA.

Since accused Umar Sheikh was released from Tihar Jail along with other militants no charge was framed against him but charges were framed against rest of the accused persons under various provisions. During investigation, the statements of the accused persons were recorded in terms of Section 15 of the TADA Act. Though statements of foreign nationals had been recorded under Section 164 of the Code of Criminal Procedure, 1973 (for short the 'Code') it was not possible to secure their presence as they had left India and gone back to their respective countries. They did not choose to come to India. However, placing reliance on the prosecution version substantiated to a great extent by the confessional statements recorded under Section 15 of the TADA Act, and amongst other corroboration provided by recoveries of arms and ammunitions, the accused appellants were found guilty and sentenced as afore-mentioned.

In support of the appeal filed by the accused appellants, Mr. M.N. Krishnamani, learned senior counsel submitted that use of the statements recorded under Section 15 of the TADA Act was impermissible as the statements cannot be called voluntary statements, free from any coercion or threat or undue influence. It was further submitted that even if the confessional statements are taken into account, they do not in any manner establish offences for which the accused appellants have been convicted. Accepting the prosecution version, based on the confessional statements, A-1 can at the most be said to have been involved in kidnapping but he never threatened to kill the captive. Similarly, so far as A-2 is concerned, he was involved in the kidnapping as he was not aware of it when it was done. So he was not involved in the conspiracy. Though A-3 can be said to be a part of the conspiracy and kidnapping, there was no material to fasten A-4 who is only a driver of the vehicle with any offence. At the most, he can be guilty of not disclosing the factum of kidnapping under Section 368 IPC and, therefore, there was no scope for applying Section 120B along with other provisions to convict the said accused appellant. A-7 was not aware of the conspiracy and was not involved in any kidnapping. A-8 at the most can be guilty of conspiracy and nothing else. In any event, the confessional statements would not entail conviction under Section 364A read with Section 120B IPC. The confessional statements in their entirety may come to the extent of sharing that A-1 and A-3 were involved in conspiracy and kidnapping while others were not so involved. In any event, Umar Sheikh was the person who is stated to be head of the whole mission, and the present appellants cannot be held to be guilty. The ingredients of Section 3(2)(i), it was submitted are non-existent and therefore the conviction under these provisions is unfounded. All the accused are small pawn in a big plot and do not deserve the harsh sentence imposed. More so when some of the accused have been given life sentence for similar offences, no differential treatment to award death sentence in case of three can be countenanced. The alleged kidnapped persons have not appeared as witnesses and statements made by them during investigation cannot be utilized. Rebutting the submissions, Mr. K.K. Sood, learned Additional Solicitor General submitted that the evidence, materials and circumstances are sufficient to establish involvement of each of the accused. There has been no retraction from the confessional statements, the procedural requirements have been meticulously followed, the statements were voluntary and at no point of time any objection was made relating to recording of the confessional statements. The recoveries of arms and ammunitions provide ample substantiation to the confessions made. Even though in law there is no requirement for any corroboration, there is ample corroboration in the case at hand. There is no question of segregating the acts so far as offence of criminal conspiracy is concerned. Even if a person withdraws after participating in a conspiracy for some time, that does not dilute the factum of

conspiracy. With reference to the definition of criminal conspiracy in Section 120A in particular in Explanation appended to the main provision, it is submitted that whether the illegal act is the ultimate object of such agreement or is merely incidental to that object is immaterial. The offence is made under the illustration appended to Section 10 of the Indian Evidence Act, 1872 (in short the 'Evidence Act') and even if all the conspirators are ignorant of all the decisions and are strangers, that is really of no consequence. The object and purpose of the conspiracy was clear and the manner of organizing the activities to achieve the ultimate objective has been amply established. Merely because the persons who were kidnapped have not appeared at trial to give evidence on account of unavoidable circumstances that does not weaken the quality/quantity of evidence placed on record. The position where they were placed certainly would have left a bad taste in the mouth, and no adverse inference can be drawn because of their non-appearance due to their leaving for their homes.

The rival stands need careful consideration.

In Hitendra Vishnu Thakur and Ors. vs. State of Maharashtra and Ors. (1994 (4) SCC 602), this Court observed that:

> "the legal position remains unaltered that the crucial postulate for judging whether the offence is a terrorist act falling under TADA or not is whether it was done with the intent to overawe the Government as by law established or to strike terror in the people etc. 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 is to be one that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law. It is in essence a deliberate and systematic use of coercive intimidation".

As was noted in the said case, it is a common feature that hardened criminals today take advantage of the situation and by wearing the cloak of terrorism, aim to achieve acceptability and respectability in the society; because in different parts of the country affected by militancy, a terrorist is projected as a hero by a group and often even by many misguided youth. As noted at the outset, it is not possible to precisely define "terrorism". Finding a definition of "terrorism" has haunted countries for decades. A first attempt to arrive at an internationally acceptable definition was made under the League of Nations, but the convention drafted in 1937 never came into existence. The UN Member States still have no agreed-upon definition. Terminology consensus would, however, be necessary for a single comprehensive convention on terrorism, which some countries favour in place of the present 12 piecemeal conventions and protocols. The lack of agreement on a definition of terrorism has been a major obstacle to meaningful international countermeasures. Cynics have often commented that one State's "terrorist" is another State's "freedom fighter". If terrorism is defined strictly in terms of attacks on non-military targets, a number of attacks on military installations and soldiers' residences could not be included in the statistics. In order to cut through the Gordian definitional knot, terrorism expert A. Schmid suggested in 1992 in a report for the then UN Crime Branch that it might be a good idea to take the existing consensus on what constitutes a "war crime" as a point of departure. If the core of war crimes - deliberate attacks on civilians, hostage taking and

the killing of prisoners - is extended to peacetime, we could simply define acts of terrorism as "peacetime equivalents of war crimes".

League of Nations Convention (1937) :

> "All criminal acts directed against a State along with intended or calculated to create a statute of terror in the minds of particular persons or a group of persons or the general public".

(GA Res. 51/210 Measures to eliminate international terrorism)

1. Strongly condemns all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed;

2. Reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them".

3. Short legal definition proposed by A.P. Schmid to United Nations Crime Branch (1992) :

> Act of Terrorism = Peacetime Equivalent of War Crime

4. Academic Consensus Definition:

> "Terrorism is an anxiety-inspiring of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby - in contrast to assassination - the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence-based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audience (s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought" (Schmid, 1988).
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> Definitions:
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> Terrorism by nature is difficult to define. Acts of terrorism conjure emotional responses in the victims (those hurt by the violence and those affected by the fear) as well as in the practitioners. Even the U.S. government cannot agree on one single definition of uniform and universal application. The old adage, "One man's terrorist is another man's freedom fighter" is still alive and well. Listed below are several

definitions of terrorism used by the Federal Bureau of Investigation.

Terrorism is the use or threatened use of force designed to bring about political change. - Brian Jenkins Terrorism constitutes the illegitimate use of force to achieve a political objective when innocent people are targeted. - Walter Laqueur. Terrorism is the premeditated, deliberate, systematic murder, mayhem, and threatening of the innocent to create fear and intimidation in order to gain a political or tactical advantage, usually to influence an audience. - James M. Poland Terrorism is the unlawful use or threat of violence against persons or property to further political or social objectives. It is usually intended to intimidate or coerce a government, individuals or groups, or to modify their behavior or politics. - Vice-President's Task Force, 1986 Terrorism is the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.

- FBI Definition No doubt in the case of conspiracy there cannot be any direct evidence. The ingredients of offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. In Halsbury's Laws of England (vide 4th Ed. Vol.11, page 44, page

58), the English Law as to conspiracy has been stated thus:

"Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indictable offence at common law, the punishment for which is imprisonment or fine or both in the discretion of the Court.

The essence of the offence of conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however, it may be. The actus rues in a conspiracy is the agreement to execute the illegal conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other."

There is no difference between the mode of proof of the offence of conspiracy and that of any other offence, it can be established by direct or circumstantial evidence. (See: Bhagwan Swarup Lal Bishan Lal etc.etc vs. State of Maharashtra [AIR 1965 SC 682 at p.686]) Privacy and secrecy are more characteristics of a conspiracy, than of a loud discussion in an elevated place open to public view. Direct evidence in proof of a conspiracy is seldom available, offence of conspiracy can be proved by either direct or circumstantial evidence. It is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object, which the objectors set before themselves as the object of conspiracy, and about the manner in which the object of conspiracy is to be carried out, all this is necessarily a matter of inference. The provisions of Section 120-A and 120-B, IPC have brought the law of conspiracy in India in line with the English Law by making the overt act unessential when the conspiracy is to commit any punishable offence. The English Law on this matter is well settled. Russell on crime (12 Ed.Vol.I, p.202) may be usefully noted-

> "The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties, agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se, enough."

Glanville Williams in the "Criminal Law" (Second Ed. P. 382) states-

> "The question arose in an lowa case, but it was discussed in terms of conspiracy rather than of accessoryship. D, who had a grievance against P, told E that if he would whip P someone would pay his fine. E replied that he did not want anyone to pay his fine, that he had a grievance of his own against P and that he would whip him at the first opportunity. E whipped P. D was acquitted of conspiracy because there was no agreement for 'concert of action', no agreement to 'co-operate'.
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> Coleridge, J. while summing up the case to Jury in Regina v. Murphy [(1837) 173 ER 502 at p. 508] states:
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> "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 this 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 the most clearly established conspiracies there are no means of proving 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."

As noted above, the essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event no overt act is necessary to be proved by the prosecution because in such a situation, criminal conspiracy is established by proving such an agreement. Where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120B read with the proviso to sub-section (2) of Section 120A, then in that event mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction under Section 120B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions, in such a situation, do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfillment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established, the act would fall within the trapping of the provisions contained in section 120B [See: S.C. Bahri v. State of Bihar (AIR 1994 SC 2420)] The conspiracies are not hatched in open, by their nature, they are secretly planned, they can be proved even by circumstantial evidence, the lack of direct evidence relating to conspiracy has no consequence. [See: E.K. Chandrasenan v. State of Kerala (AIR 1995 SC 1066)].

In Kehar Singh and Ors. v. The State (Delhi Administration) [AIR 1988 SC 1883 at p. 1954], this Court observed:

> "Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the court must enquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy required some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of the two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. Conspiracy can be proved by circumstances and other materials. (See: State of Bihar v. Paramhans [1986 Pat LJR 688]). To establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or service in question could not be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do so, so long as it is known that the collaborator would put the goods or service to an unlawful use. (See: State of Maharashtra v. Som Nath Thapa [JT 1996 (4) SC 615]) We may usefully refer to Ajay

Agarwal vs. Union of India and Ors. (JT 1993 (3) SC 203). It was held:

x x x x x x "8.....It is not necessary that each conspirator must know all the details of the scheme nor be a participant at every stage. It is necessary that they should agree for design or object of the conspiracy. Conspiracy is conceived as having three elements: (1) agreement; (2) between two or more persons by whom the agreement is effected; and (3) a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aim is to be accomplished. It is immaterial whether this is found in the ultimate objects. The common law definition of 'criminal conspiracy' was stated first by Lord Denman in Jones' case that an indictment for conspiracy must "charge a conspiracy to do an unlawful act by unlawful means" and was elaborated by Willies, J. on behalf of the judges while referring the question to the House of Lords in Mulcahy v. Reg and House of Lords in unanimous decision reiterated in Quinn v. Leathem:

'A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rest in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful; punishable of for a criminal object, or for the use of criminal means.' This Court in B.G. Barsay v. State of Bombay held:

"The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Under Section 43 of the Indian Penal Code, an act would be illegal if it is an offence or if it is prohibited by law."

In Yash Pal Mittal v. State of Punjab [(1977) 4 SCC 540] the rule was laid as follows: (SCC p. 543 para 9) "The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested.

There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or overshooting by some of the conspirators.

In Mohammad Usman Mohammad Hussain Maniyar and Ors. v. State of Maharashtra (1981) 2 SCC 443, it was held that for an offence under Section 120B IPC, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or cause to be done the illegal act, the agreement may be proved by necessary implication."

The main plea of the accused-appellant is that there was no corroboration to the alleged confessional statement. Various circumstances, according to him, clearly show that it was not voluntary. Strong reliance is placed on State v. Nalini (1999 (5) SCC 253) to contend that corroboration is necessary. It is to be noted that the legislature has set different standards of admissibility of a confessional statement made by an accused under TADA Act from those made in other criminal proceedings. A confessional statement recorded by a police officer not below the rank of Superintendent of Police under Section 15 of TADA Act is admissible, while it is not so admissible unless made to the Magistrate under Section 25 of the Evidence Act. It appears, consideration of a confessional statement of an accused to a police officer except to the extent permitted under Section 27 of the Evidence Act is not permissible. These aspects are noted by this Court in Sahib Singh v. State of Haryana (1997 (7) SCC 231) and Gurdeep Singh v. State (Delhi Admn.) (2000 (1) SCC 498). There is one common feature, both in Section 15 of TADA Act and Section 24 of the Evidence Act that the confession has to be voluntary. Section 24 of the Evidence Act interdicts a confession, if it appears to the Court to be the result of any inducement, threat or promise in certain conditions. The principle therein is that confession must be voluntary. Section 15 of TADA Act also requires the confession to be voluntary. Voluntary means that one who makes it out of his own free will inspired by the sound of his own conscience to speak nothing but the truth. As per Stroud's Judicial Dictionary, 5th Edn., at p.2633 threat means:

> "It is the essence of a threat that it be made for the purpose of intimidating, or overcoming, the will of the person to whom it is addressed (per Lush, J, Wood v. Bowron (1866) 2 QB 21) cited intimidate."

Words and Phrases, permanent edition, Vol.44, p. 622 defines 'voluntary' as:

> 'Voluntary' means a statement made of the free will and accord of accused, without coercion, whether from fear of any threat of harm, promise, or inducement or any hope of reward - State v. Mullin (85NW 2nd 598, 600, 249 lown
>
> 10)".

In Words and Phrases by John B. Saunders 3rd edition, vol.4, p.401, 'voluntary' is defined as:

> ".....the classic statement of the principle is that of Lord Sumner in Ibrahim v. Regem (1914 AC 599) (at p.609) where he said, "it has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to be a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercise or held out by a person in authority. The principle is as old as

> Lord Hale". However, in five of the eleven textbooks cited to us ....support is to be found for a narrow and rather technical meaning of the word "voluntary". According to this view, "voluntary" means merely that the statement has not been made in consequence of
>
> (i) some promise of advantage or some threat
>
> (ii) of a temporal character (iii) held out or made by a person in authority, and (iv) relating to the charge in the sense that it implies that the accused's position in the contemplated proceedings will or may be better or worse according to whether or not the statement is made. R. v. Power [(1966) 3 All ER 433) (at pp.454, 455)] per Cantley, V."

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

As was observed in Nalini's case (supra) TADA Act was enacted to meet any extraordinary situation existing in the country. Its departure from the law relating to confession as contained in the Evidence Act is deliberate. Section 24 of the Evidence Act deals with confession caused by inducements, threat or promise, which is irrelevant in criminal proceedings. The expression 'confession' has not been defined in the Evidence Act. Broadly speaking, it is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed that crime. Law relating to confessions is to be found generally in Sections 24 to 30 of the Evidence Act and Sections 162 and 164 of the Code of Criminal Procedure, 1898 (for short 'the old Code') corresponding to identical provisions of the Code. Confession is a species of admission. A confession or admission is evidence against its maker, if its admissibility is not excluded by some provision of law. Law is clear that a confession cannot be used against an accused person unless the Court is satisfied that it was voluntary. At that stage, the question whether it is true or false does not arise. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the voluntariness of the confession, the court may refuse to act upon the confession, even if it is admissible in evidence. The question whether a confession is voluntary or not is always a question of fact. A free and voluntary confession is deserving of highest credit, because it is presumed to flow from the highest sense of guilt. In Principle and Digest of Law of Evidence, Vol.I, New Edn. By Chief Justice M. Monir, after noticing conflicting views and discussing various authorities, the learned author summarized the position as follows:

> "The rule may therefore, be stated to be that whereas the evidence in proof of a confession having been made is always to be suspected, the confession, if once proved to have been made and made voluntarily, is one of the most effectual proofs in the

law."

As was noted in Gurdeep Singh's case (supra) whenever an accused challenges that his confessional statement is not voluntary, the initial burden is on the prosecution for it has to prove that all requirements under Section 15 of TADA Act and Rule 15 of the TADA Rules have been complied with. Once this is done the prosecution discharges its burden and then it is for the accused to show and satisfy the Court that the confessional statement was not made voluntarily. The confessional statement of the accused can be relied upon for the purpose of conviction, and no further corroboration is necessary if it relates to the accused himself. It has to be noted that in Nalini's case (supra) by majority it was held that as a matter of prudence the Court may look for some corroboration if confession is to be used against a co-accused though that will be again within the sphere of appraisal of evidence. The following observations in Jayawant Dattatray Suryarao v. State of Maharashtra (2001 (10) SCC 109) are relevant:

> "60 (2): Confessional statement before the police officer under Section 15 of the TADA Act is substantive evidence and it can be relied upon in the trial of such person or co-accused, abettor or conspirator for an offence punishable under the Act or the Rules. The police officer before recording the confession has to observe the requirement of sub-section (2) of Section 15. Irregularities here and there would not make such confessional statement inadmissible in evidence. If the legislature in its wisdom has provided after considering the situation prevailing in the society that such confessional statement can be used as evidence, it would not be just, reasonable and prudent to water down the scheme of the Act on the assumption that the said statement was recorded under duress or was not recorded truly by the officer concerned in whom faith it is reposed. It is true that there may be some cases where the power is misused by the authority concerned. But such contention can be raised in almost all cases and it would be for the Court to decide to what extent the said statement is to be used. Ideal goal may be: confessional statement is made by the accused as repentance for his crime but for achieving such ideal goal, there must be altogether different atmosphere in the society. Hence, unless a foolproof method is evolved by the society or such atmosphere is created, there is no alternative, but to implement the law as it is."

Aforesaid aspects have been highlighted in Devender Pal Singh v. State of NCT of Delhi and Anr. (2002 (5) SCC 234) and Mohd. Khalid v. State of West Bengal (2002 (7) SCC 334).

Applying the principles which can be culled out from the principles set out above to the factual scenario, the inevitable conclusion is that the trial Court was justified in its conclusions by holding the accused appellants guilty. When an accused is a participant in a big game planned, he cannot took the advantage of being ignorant about the finer details applied to give effect to the conspiracy hatched, for example, A-7 is stated to be ignorant of the conspiracy and the kidnapping. But the factual scenario described by the co- accused in the statements recorded under Section 15 of the TADA Act shows his deep involvement in the meticulous planning done by Umar Sheikh. He organized all the activities for making arrangements for the accused and other terrorists.

Confessional statement of A-2 shows how he got acquainted with bigger players like Shahji and Mohmood @Ayub (A-7) and others who used to visit Farooque. His presence when Umar Sheikh showed photographs of Americans kidnapped has also been established by confessional statement. The officials who were of the requisite rank recorded the confessional statements after meticulously following the procedural requirements of the Tada Act and Terrorist and Disruptive Activities (Prevention) Rules, 1987 (in short the 'TADA Rules'). Though a faint attempt was made to say that the statement was not voluntary, the fact that there was no retraction at any point of time and particularly, when they were brought before the concerned Magistrate for confirmation of the fact that the statement had been recorded by the police officials, the stand appears to be afterthought. The object and the purpose for which the conspiracy was hatched is clear from the fact that messages were sent to Embassies, government officials, high dignitaries and the medias indicating the nature of the ransom, and the consequences if demanded ransom was not fulfilled. The circumstances clearly show the role played by each of the accused in the conspiracy. It was submitted that the activities cannot be treated as an offence against the State. Chapter VI of IPC relates to offence of the State. The Trial Court has convicted the accused under Sections 121A, 122 and 124 IPC. For convicting the accused persons under the aforesaid provisions, the trial Court has relied on the fact that the accused persons were trying to overawe the Government of India by criminal force and to bring out hatred and contempt in the people of India and to arouse dissatisfaction in a section of people in India against the Government of India established by laws and collected materials and arms for the aforesaid offences.

The line dividing preaching disaffection towards the Government and legitimate political activity in a democratic set up cannot be neatly drawn. Where legitimate political criticism of the Government in power ends and disaffection begins, cannot be ascertained with precision. The demarcating line is thin and wavy. The Indian Law Commissioners in their Second Report dated 24.6.1847 had observed We conceive the term "wages war against the Government" naturally to import a person arraying himself in defiance of the Government in like manner and by like means as a foreign enemy would do, and it seems to us, we presume it did to the authors of the Code that any definition of the term so unambiguous would be superfluous". Mere collection of men, arms and ammunitions does not amount to waging war.

There is a difference, says Foster: (3 Crown cases, pp.208, 209 and 210) "between those insurrections which have carried the appearance of an army formed under leaders, and provided with military weapons, and with drums, colours, etc., and those other disorderly tumultuous assemblies which have been drawn together and conducted to purposes manifestly unlawful, but without any of the ordinary shew and apparatus of war before mentioned.

> "I do not think any great stress can be laid on that distinction. It is true, that in case of levying war the indictments generally charge, that the defendants were armed and arrayed in a warlike manner; and, where the case would admit of it, the other circumstances of swords, guns, drums, colours etc., have been added. But I think the merits of the case have never turned singly on any of these circumstances".

> "In the cases of Damaree and Purchase,...there was nothing giving in evidence of the usual pageantry of war, no military weapons, no banners or drums, nor any regular consultation previous to the rising; and yet the want of these circumstances weighed nothing with the Court, though the prisoners' counsel insisted much on that matter. The number of the insurgents supplied the want of military weapons; and they were provided with axes, crows, and other tools of the like nature, proper for the mischief they intended to effect.... "The true criterion, therefore, in all these cases is, Quo animo did the parties assemble? For if the assembly be upon account of some private quarrel, or to take revenge on particular persons, the statute of treasons hath already determined that point in favour of the subject....
>
> "Upon the same principle and within the reason and equity of the statute, risings to maintain a private claim of right, or to destroy particular inclosures, or to remove nuisance, which affected or were thought to affect in point of interest the parties assembled for these purposes, or to break prisons in order to release particular persons without any other circumstances of aggravation, have not been holden to amount to levying war within the statute."

It is the fundamental right of every citizen to have his own political theories and ideas and to propagate them and work for their establishment so long as he does not seek to do so by force and violence or contravene any provision of law. Thus where the pledge of a Society amounted only to an undertaking to propagate the political faith that capitalism and private ownership are dangerous to the advancement of society and work to bring about the end of capitalism and private ownership and the establishment of a socialist State for which others are already working under the lead of the working classes, it was held that it was open to the members of the Society to achieve these objects by all peaceful means, ceaselessly fighting public opinion that might be against them and opposing those who desired the continuance of the existing order of society and the present Government; that it would also be legitimate to presume that they desired a change in the existing Government so that they could carry out their programme and policy; that the mere use of the words 'fight' and 'war' in their pledge did not necessarily mean that the Society planned to achieve its object by force and violence.

1. About the expression 'Whoever' - the Law Commissioners say: (2nd Report: Section 13) "The laws of a particular nation or country cannot be applied to any persons but such as owe allegiance to the Government of the country, which allegiance is either perpetual, as in the case of a subject by birth or naturalization, &c., or temporary, as in the case of a foreigner residing in the country. They are applicable of course to all such as thus owe allegiance to the Government, whether as subjects or foreigners, excepting as excepted by reservations or limitations which are parts of the laws in question.

2. Regarding 'Wage war' according to the Law Commissioners - These words "seems naturally to import a levying of war by one who throwing off the duty of allegiance arrays himself in open defiance of his Sovereign in like manner and by the like means as a foreign enemy would do, having gained footing within the realm. There must be an insurrection, there must be force accompanying

that insurrection, and it must be for an object of a general nature.

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

The word "wages" has the same meaning as "levying" used in the English statute. In Lord George Gorden's case (1784) 21 St Tr 485, 644, Lord Mansfield said: "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 remove counsellors : - the other, which is said to be levied against the majesty of the king, or, in other words, against him in his regal 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; and most reasonably so held, because it tends to dissolve all the bonds of society, to destroy property, and to overturn government; and by force or arms, to restrain the king from reigning according to law." An assembly armed and arrayed in a warlike manner for any treasonable purpose is bellum levatum, though not bellum percussum. Lifting and marching are sufficient overt acts without coming to a battle or action.

> "No amount of violence, however great, and with whatever circumstances of a warlike kind it may be attended, will make an attack by one subject on another high treason. On the other hand, any amount of violence, however insignificant, directed against the King will be high treason, and as soon as violence has any political objects, it is impossible to say that it is not directed against the king, in the sense of being armed opposition to the lawful exercise of his power. Where the object of a mob is not mere resistance to a District Magistrate but the total subversion of the British power and the establishment of the Khilafat Government, a person forming part of it and taking part in its actions is guilty of waging war. When a multitude rises and assembles to attain by force and violence any object of a general public nature, it amounts to levying war against the Government. It is not the number of the force, but the purpose and intention, that constitute the offence and distinguish it from riot or any other rising for a private purpose. The law knows no distinction between principal and accessory, and all who take part in the treasonable act incur the same guilt. In rebellion cases it frequently happens that few are let into the real design, yet all that join in it are guilty of the rebellion. A deliberate and organized attack upon the Government forces would amount to a waging war if the object of the insurgents was by armed force and violence to overcome the servants of the Government and thereby to prevent the general collection of the capitation-tax". (See Aung Hia's Case (1931) 9 Rangoon page 404) "There is a diversity between levying of war and committing of a

great riot, a rout, or an unlawful assembly. For example, as if three, or four, or more, do rise to burn, or put down an inclosure in Dale, which the lord of the manor of Dale hath made there in the particular place; this or the like is a riot, a rout or an unlawful assembly, and no treason. But if they had risen of purpose to alter religion established within the realm, or laws, or to go from town to town generally, and to cast down inclosures, this is a levying of war (though there be great number of the conspirators) within the purview of this statute, because the pretence is public and general, and not private and particular". (See Cokes' Inst. Ch.1, 9) Section 124A deals with 'Sedition'. Sedition is a crime against society nearly allied to that of treason, and it frequently precedes treason by a short interval. Sedition in itself is a comprehensive term, and it embraces all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquility of the State, and lead ignorant persons to endeavour to subvert the Government and laws of the country. The objects of sedition generally are to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. "Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or constitutions of the realm, and generally all endeavours to promote public disorder. In the aforesaid analysis, the offences punishable under Sections 121A, 122, 124A are clearly established and sufficiently and properly stand substantiated, on the overwhelming materials available on record. In order to bring the offences within the parameters of Section 3(2)(i) of TADA Act, the death sentence is permissible to be imposed when the act has resulted in the death of any person. Under Clause (ii) of sub-section (2) of Section 3, in any other case, the maximum sentence is imprisonment for life. In the case at hand except the killing of two police officials, no other death has resulted. The ransom letters and the threats had not resulted in any death. Further, the direct involvement of the present accused appellants in the killing of the two police officials has not been established by cogent evidence. There is no evidence that any of the accused was directly or indirectly involved in the killings. The deaths occurred when police surrounded the hideout and some terrorists wanted to escape. It is not the case of the prosecution that the accused-appellants were inside or that they escaped during the shoot out or that any of them fired any shot or that there was any conspiracy in those regards. The action of those terrorists who successfully escaped by firing at the police appears to be independent of the present conspiracy and not shown to be related in any manner. There is nothing on record to involve or connect them with the design, conspiracy or action for which the appellants are being now dealt with. Neither their names nor their identity or even their role in the conspiracy with which we are concerned has ever been placed on record to connect them or their actions with the present group of conspirators and their design. The punishment for terrorists act is provided in sub-section (2) of Section 3. For the purpose of bringing in application of Section 3(2)(i) of the TADA Act, the terrorist act should have resulted in the death of any

person. In other cases clause (ii) operates. Sub-section (1) provides as to commission of which acts can be considered to be a terrorist act. Above being the position, we feel the imposition of death sentence is not at any rate a compulsion in this case and cannot be imposed and only life sentence can be imposed.

No infirmity could be pointed out regarding conviction and/or sentence for offences relatable to Section 3(4) of TADA Act or Section 14 of Foreigners Act. Accordingly, they are maintained. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence that reflect more sublet considerations of culpability that are raised by the special facts of each case. Punishment ought always to fit with the crime. In the case at hand, the entire planning for commission of offence punishable under Section 364A was masterminded and executed by Umar Sheikh who has managed presently to go out of net of law. In his case, death sentence may have been appropriate. But in case of the co- conspirators (the present six accused appellants) similar approach is not warranted on the peculiar facts found/established. No distinctive feature has been indicated to impose two different sentences i.e. death sentence for three and life sentence for three others. There is no appeal by the prosecution to enhance the sentence in those cases where life sentence has been imposed. It would be therefore appropriate to impose life sentence on all the six accused appellants. In the ultimate, convictions of A-1, A-3 and A-8 under Section 3(1)(i) of TADA Act is altered to Section 3(1)(ii) of TADA Act. Their convictions under Sections 121A, 122 and 124 IPC and sentences imposed are maintained. The conviction under Section 364-A read with Section 120B IPC is maintained, as it is the conviction under Section 3(4) of the TADA Act and Section 14 of the Foreigners Act for the concerned accused appellant along with sentence imposed. However, considering the gravity of the offence and the dastardly nature of the acts and consequences which have flown out and would have flown in respect of the life sentence, incarceration for the period of 20 years would be appropriate. The accused appellants would not be entitled to any remission from the aforesaid period of 20 years. As observed by this Court in Ashok Kumar v. Union of India (AIR 1991 SC 1792 and Satpal v. State of Haryana and Anr. (1992 (4) SCC 172), "imprisonment for life" means imprisonment for the full span of life. The death reference and appeals are accordingly disposed of.