S.K. Shukla & Ors vs State Of U.P. & Ors on 10 November, 2005

Author: A.K. Mathur

Bench: B.N. Agrawal, A.K. Mathur

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           CASE NO.:
Writ Petition (crl.)  132-134 of 2003

PETITIONER:
S.K. Shukla & Ors

RESPONDENT:
State of U.P. & Ors.

DATE OF JUDGMENT: 10/11/2005

BENCH:
B.N. Agrawal & A.K. Mathur

JUDGMENT:
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J U D G M E N T (with SLP(Crl) No. 1521/2004, T.P.(Crl) Nos. 82-84/2004 & Crl.A. 1511/2005 @ SLP (Crl) No. 5609/2004) A.K. MATHUR, J.

All these cases are inter-related and common arguments were raised, therefore, they are disposed of by this common order.

Writ Petition Nos 132-134/2003 under Article 32 of the Constitution of India is directed against the withdrawal of the POTA order by the State Government dated 29th August 2003 against accused Udai Pratap Singh, Raghuraj Pratap Singh @ Raja Bhaiya & Akshay Pratap Singh @ Gapalji. The Union of India was also permitted to be impleaded as a party-respondent.

In SLP (Crl) 5609 of 2004, the petitioner has challenged the order passed by the POTA Review Committee dated 30.4.2004 under Section 60 of the Prevention of Terrorism Act, 2002 (15 of 2002) (hereinafter referred to as 'the POTA'). Leave granted.

In SLP (Crl) 1521 of 2004, the High Court order dated 24.2.2004 was challenged whereby accused Akshay Pratap Singh @ Gopalji was granted bail in case No.10 of 2003, under Section 3/4 of POTA, Police Station Kunda, District Pratapgarh, U.P. on his furnishing a personal bond for Rs.1,00,000/- with two sureties each in the like amount to the satisfaction of the Special Judge, designated court, Kanpur.

T.P (Crl) Nos. 82-84/2004 have been filed by the petitioners apprehending that there is likelihood of miscarriage of justice in the State of U.P. seeking transfer of cases pending against the accused persons from the Special Judge, Kanpur Nagar U.P. to the Designated Court in Delhi In order to

appreciate the controversy involved in the matter, it will be proper to take the first case i.e. SLP(Crl) 5609 of 2004 whereby the Review Committee reviewed the cases of all the three respondents i.e. Raghuraj Pratap Singh alias Raja Bhaiya, Udai Pratap Singh and Akshay Pratap Singh alias Gopalji under Section 3/4 of the POTA Act and directed the State Government to release all these accused persons and the proceedings against them shall deem to have been withdrawn from the date of this direction and they may be released from the custody forthwith under Section 3/ 4 of the POTA Act by order dated 30.4.2004. Aggrieved this order, the present petition was filed by the appellant.

The prosecution case as disclosed in recovery memo dated 25.1.2003 of 13.45 hrs lodged at P.S. Kunda by Paramhans Mishra, Inspector In-charge, P.S. Kotwali Kunda that he along with informant and other police officials raided the house of Udai Pratap Singh for execution of warrant of arrest in crime No. 55/1993 under Section 2/3 of the Gangster Act pending before Special Judge, Allahabad. They entered through main gate and went inside the Raj Mahal premises where they found Shri Kesri Nandan, advocate, who told them that he is an advocate for civil cases of Uday Pratap Singh. They found Uday Pratap Singh present in Raj Mahal where he was standing with one piece of AK 56 rife with black colour belt hanging on his right shoulder. In the rifle, there was triangular sign on the butt with 56 written in between it, then something was written in Chinese language and the number was printed 1600232 and the weapon was in perfect condition and on his shoulder there was a bag with three pieces of magazines of AK 56 rifle. After unloading the AK 56 rifle they found 36 bullets. When he was asked to produce the licence, he could not show anything nor was he ready to tell them how he had acquired all these items. It is further alleged that when they entered into his bed room they found (i) 25 bullets of .75, .65 bores (ii) 16 bullets of 400 NITRO

(iii) 1 bullet of .577 bore (iv) 3 other old rusted bullets which were not able to read (v) 12 bullets of .405 (vi) 35 bullets of 77 mm and

(vii) 35 bullets which are old, rusted and not readable. After that they found a square wooden box yellow colored polythene bag which contained in it about 200 gms of explosive chips and in gray colour polythene bag there was some suspicious black power. In a white cotton bag there was blue colour polythene which contained near about 400 gms suspicious brown colour powder. In the same bed room in another corner 55 bullets .605 bore and 22 bullets of .22, two pieces of Motorola wireless set. They further raided the mango gardens of Uday Pratap Singh from two clues given by Bhole Tewari. On the western direction of the Raj Mahal Bhadri, at 200 mtrs from the western wall at the mango gardens of Uday Pratap Singh, the police discovered freshly dug mud. After digging 3 ft deep with length of 5 ft and width of 4 ft they discovered three polythene green bags and they also found (i) one DBBL gun (ii) another DBBL gun .12 bore

(iii) another DBBL gun No.4136 C/1 (iv) another DBBL gun number destroyed (v) one rifle (vi) one SSBBL gun No.3077-1994

(vii) one SBBL gun number 12194-B.2 (viii) five pieces of SSBBL guns (ix) two pieces of Mauzre guns (x) two pieces of Muzzle loading guns (xi) thirteen pieces of swords (xii) two pieces of Hachet (xiii) two pieces of iron spears (xiv) one cane with concealed sword (xv) one iron axe with cap and (xvi) one big knife with handle.

On 26th January, 2003 they recovered one 30 spring field self loading rifle, one 30 carbine, 11 cartridges of 30 spring field rifle and 30 cartridges of 30 carbine. These huge catchy of arms were recovered on the raid by the police on 25/26th January 2003 and, therefore, an order under POTA was passed against all the three accused namely, Raghuraj Pratap Singh alias Raja Bhaiya, Udai Pratap Singh and Akshay Pratap Singh alias Gopalji by the State Government. All this recovery of arms, ammunition and other weapons were detailed in the order. It was also disclosed that a conspiracy was hatched by Uday Pratap Singh to cause a massacre and/or to create terror after killing some VIPs. In this order it was mentioned that statement of one Shri Rajendra Yadav was recorded on 30.2.2003 wherein he stated that Raghuraj Pratap Singh alias Raja Bhaiyya and Akshay Pratap Singh alias Gopalji have brought AK-47 (56) rifle and given it to Udai Pratap Singh. It was also alleged that after this statement he was murdered on 3.3.2003 and the father of the deceased filed an FIR No.16 of 2003 under Section 302/34/506/120B IPC in P.S. Kunda, Distt. Pratapgarh for causing the murder under a conspiracy hatched by Raghuraj Pratap Singh, Akshay Pratap Singh and Udai Pratap Singh. It was alleged that these persons kept the huge arms and ammunition including AK-56/AK-47 in their house and whoever speaks against them meet the same fate. It was also alleged that they propose to take some action against Chief Minister Mayawati. It was also mentioned in the order that the said AK-56 rifle was brought by Raghuraj Pratap Singh in presence of Akshay Pratap Singh and was given to Shri Udai Pratap Singh. On the basis of this, State Government granted permission to launch prosecution under Section 50 of the POTA Act to prosecute the accused persons namely, Raghuraj Pratap Singh alias Raja Bhaiya, Udai Pratap Singh and Akshay Pratap Singh alias Gopalji under Sections 3(2), 3(3), 3(7) and 4 of POTA Act by order dated 5.5.2003. The petitioner has given details of the large number of criminal cases pending against these persons. Shri Raghuraj Pratap Singh is said to be involved in 37 cases for various offence under Sections 302, 307,147, 148, 120-B, 320 IPC. The petitioner has also given a chart of the cases pending against Uday Pratap Singh for various offences under Sections 302, 307, 397 etc. totalling around 50 cases. The petitioner has also given a chart mentioning the cases against Akshay Pratap Singh for the offence under Sections 302, 307 & the Gangster Act and many other cases under Indian Penal Code totalling around 32 cases. After this order was passed by the State Government against the accused persons political events took a turn. A new regime came in power. This regime after resuming the power revoked the order by an order dated 29.8.2003. This order was challenged by the petitioner in the Writ Petition (Crl) 132-134 of 2003 under Article 32 of the Constitution before this Court.

Meanwhile the accused also filed a review petition under Section 60 of POTA before the Reviewing Committee appointed under the POTA Act. They also filed petition before the Central Government. The Reviewing Committee headed by Justice Naseem Uddin and Rajendra Kumar Dubey, ex Commissioner in U.P. reviewed the matter and held that since there is no case against the applicants under the POTA and no prima facie case is found under Sections 3 and 4 of the POTA Act, therefore, there is no basis for proceeding against accused under POTA and the State of U.P. was directed to release all the three applicants. This is the subject matter of the Special Leave Petition (Crl) 5069 of 2004. All the arguments were directed on whether the order passed by the Review Committee is sustainable in law or not. In fact, before this order of the Review Committee the State Government has already passed the order for withdrawing the cases against all the accused under the POTA Act by order dated 29.8.2003 but since the order was passed by the Review Committee therefore we

shall now deal with this petition first that whether this order of the Review Committee can be sustained or not.

Before we address ourselves and examine the validity of this order passed by the Review Committee under Section 60 of the POTA Act, it will be relevant to review the necessary provisions of the POTA Act. The said Act i.e Prevention of Terrorism Act, 2002 was promulgated by the Parliament with a view to prevent terrorists activities and the matters connected therewith. The terrorist act has been defined in Section 2(1)(g) which reads as under:

> "2(1)(g) : "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 reads as under:

> "3.(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 defence 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 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 sub-section, "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 five 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 organization, which is involved in terrorists 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 this sub-section, "terrorist organization" means an organization 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 the witness, or any other person in whom the 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."

Section 4 reads as under:

"Where any person is in unauthorized possession of any:-

(a) arms or ammunition specified in columns (2) and (3) of Category I or Category III(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."

Section 60 lays down that the Central Government and the State Government constituting a Review Committing for purposes of reviewing the cases. Section 60 reads as under:

"60(1) The Central Government and each State Government shall, whenever necessary, constitute one or more Review Committees for the purposes of this Act.

(2) Every such Committee shall consist of a Chairperson and such other members not exceeding three and possessing such qualifications as may be prescribed.

(3) A Chairperson of the Committee shall be a person who is, or has been, a Judge of a High Court, who shall be appointed by the Central Government, or as the case may be, the State Government, so however, that the concurrence of the Chief Justice of the High Court shall be obtained in the case of a sitting Judge:

Provided that in the case of a Union territory, the appointment of a person who is a Judge of the High Court of a State shall be made as a Chairperson with the concurrence of the Chief Justice of the concerned High Court.

4 to 7 Inst. by act 4/2004 w.e.f. 27.10.2003 (4) Without prejudice to the other provisions of this Act, any Review Committee constituted under sub-section (1) shall, on an application by any aggrieved person, review whether there is a prima facie case for proceeding against the accused under this Act and issue directions accordingly.

(5) Any direction issued under sub-section (4):

(i) by the Review Committee constituted by the Central Government, shall be binding on the Central Government, the State Government and the police officer investigating the offence; and

(ii) by the Review Committee constituted by the State Government, shall be binding on the State Government and the police officer investigating the offence.

(6) Where the reviews under sub-section (4) relating to the same offence under this Act, have been made by a Review Committee constituted by the Central Government and a Review committee constituted by the State Government, under sub-section (1), any direction issued by the Review Committee constituted by the Central Government shall prevail.

(7) Where any Review Committee constituted under sub-

section (1) is of opinion that there is no prima face case for proceeding against the accused and issues directions under sub-section (4), then, the proceedings pending against the accused shall be deemed to have been withdrawn from the date of such direction."

A perusal of these relevant Sections shows that Section 3 deals with terrorist activities and we are specially concerned with sub-section (3) which, inter alia, states that 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. Therefore the ambit of Terrorist Act is very wide and in this any person who commits or advocate, abets, advises or incites or knowingly facilitates the commission or involved in preparation to a terrorist act can be roped in under the wide definition of the Terrorist Act. In fact, the sub-section (1) of Section 3 clearly says that whoever with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or a section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or 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 manner as to cause death 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 defence 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 persons 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. That shows that if any person with the help of any bombs, dynamite or explosive substance or by fire arm or lethal weapons terrorize people or any section of people then such action will amount to a terrorist activity and the preparation thereof will also be punishable. Therefore, the question before us is whether the possession of the weapons by the accused persons in their houses were lethal weapons and the possession of the explosive substances were preparation of the terrorist act or not. Secondly, whether unauthorized possession under Section 4(a) of the Arms Act and ammunition specified in column 2 and 3 and category (1) or category 3(a) of Schedule 1 to the Arms Act, 1959 in notified area would attract the wrath of this provision. Likewise, whether possession of hazardous explosive or lethal weapons capable of mass destruction by these accused persons can be prosecuted or not under Section 4(b) of the Act.

Learned counsel for the appellant has seriously challenged the order passed by Review Committee. Learned counsel for the petitioner submitted that in fact the Review Committee did not appreciate

the scope of Section 4 of the Act properly. He submitted that though the cases of these accused persons are covered under Section 4(a) because of unauthorized possession of arms and ammunition, but in case it is not covered under Section 4(a), then alternatively it is squarely covered under Section 4(b) because there is no need to notify the area under Section 4(b) as required under Section 4(a) of the Act.

Shri Shanti Bhushan, learned senior counsel appearing for the State supported the order of the Review Committee. Shri Rao, learned senior counsel appearing for the accused respondents also strenuously urged that the order passed by the Review Committee is correct and the Review Committee has not committed any irregularity or illegality.

Section 4 has already reproduced above has two parts, one with the possession of the arms and ammunition specified in column 2 and 3 of the category 1 or category 3(a) of Schedule 1 of the Arms Rules, 1962, the unauthorized possession of them in notified area is punishable. Now the category 1 of Schedule under the Arms Rules, 1962 read with category 3(a) of the Schedule 1 reads as under:

> SCHEDULE I (See rule 3) Category Arms Ammunition I
>
> (a) Prohibited arms as defined in Section 2 (1) (i) and such other arms as the Central Government, may, by notification in the Official Gazette, specify to be prohibited arms.

Prohibited ammunition as defined in Section 2 (1) (h) and such other articles as the Central Government may, by notification in the Official Gazette, specify to be prohibited ammunition.

(b) Semi-automatic fire-arms, other than those included in categories 1 (c) and III (a), smooth bore guns having barrel of less than 29" in length.

Ammunition for arms of category I

(b).

(c) Blot action or semi-automatic rifles of ".303" or 7.62 mm. bore or any other bore which can chamber and fire service ammunition of .303" or 7.62 mm. calibre; muskets of .410" bore of any other bore which can fire .410"

> musket ammunition ; pistols, revolvers or carbines of any bore which can chamber .380" or .455" rimmed cartridges or service 9 mm. or ".445"

rimless cartridges.

Ammunition for fire-arms of cate-

gory I (c).

(d) Accessories for any fire-arms designed or adapted to diminish the noise or flash caused by the firing thereof.

Nil.

II Machinery for manufacture or proof-

testing of a fire-arm.

Machinery for manufacturing ammunition.

III Fire-arms other than those in categories I, II and IV, namely :

Ammunition for fire-arms other than those in categories I, II and IV, namely :

(a) Revolvers and pistols.

Ammunition for fire-arms of cate-

gory III (a).

(b) Breech- loading rifles other than .22 bore rifles mentioned in category III (c) below.

Ammunition for fire-arms of cate-

gory III (b).

(c) 22 bore (low velocity) rifles using rimfire cartridges, breech-loading smooth-bore guns and air-rifles.

Ammunition for fire-arms of cate-

gory III (c).

(d) Air-guns and muzzle-loading guns.

Ammunition for fire-arms of cate-

gory III(d).

IV Curios and historical weapons, other than those excluded under Section 45

(c).

Curios and historical ammunition.

V Arms other than fire-arms : Sharp-

edged and deadly weapons, namely-

swords(including sword-stick), daggers, bayonets, spears (including lances and javelins; battle-axes, knives (including kirrpans and khukries) and other such weapons with blades longer than 9" or wider than 2" other than those designed for domestic, agricultural, scientific or industrial purpose, steel batton; "Zipo" and other such weapons called "life pre-

serves"; machinery for making arms, other than category II; and any other arms which the Central Government may notify under Section 4.

Nil.

VI VI (a) Articles containing explosives or fulminating material; fuses and friction tubes other than blank fire cartridges.

VI (b) Ingredients as defined in Section 2 (b) (VII).

Note. Parts and accessories of any arms or ammunition and charges for fire-arms and accessories for charges belong to the same category as the arms or ammunition.

The second category i.e. Section 4(b) which says that the unauthorized possession of bombs, dynamites, hazardous explosive substances or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances of a hazardous nature capable of mass destruction whether notified or not notified. Therefore, the possession of bombs, dynamite or hazardous explosive substance or lethal weapons in an unauthorized manner is punishable in itself and need not be in notified area. Therefore, Section 4(a) and (b), the possession of the arms mentioned in clause (a), unauthorized possession thereof in notified area is prohibited whereas in Section 4(b) any bomb, dynamite, hazardous explosive or lethal weapon capable of a mass destruction is punishable irrespective of the fact that the area is notified or not notified. The qualification of the notified area is not required in Section 4(b).

So far as Section 4(a) is concerned, the Review Committee had discussed the matter in greater details and it was found that the notification under Section 4(a) was not issued prior to the recovery of the arms and ammunition at the house of Udai Pratap Singh on 23.1.2003. It was submitted that the raid in the house of Raghuraj Pratap Singh alias Raja Bhaiya, Udai Pratap Singh and Akshay Pratap Singh alias Gopalji were politically motivated as these persons did not support the Government of Mayawati, the raid was conducted and POTA cases were launched against them. When the new Government came headed by Chief Minister Mulayam Singh Yadav then this order was revoked under POTA as Raghuraj Pratap Singh supported this Government. We are not concerned with the political overtone of the matter. We are examining the matter purely from the

legal point of view. The question before us is that on the relevant date whether the whole area of Uttar Pradesh was notified area or not under Section 4(a) of the Act. Much argument was addressed in this case and the original records of the Secretariat and of the Government Press was placed before us for our perusal. It may also be relevant to mention here that a committee was appointed on the complaint made by some of the legislators that the raid at the house of Udai Pratap Singh was made prior to issue of the notification of the notified area. The committee after considering full enquiry found that notification of notified area was promulgated on 29.1.2003 and it was communicated to the district on 31.3.2003 and it reached them thereafter. Since this finding was seriously debated before us also, therefore we perused the report of the committee as well, we called the original record to satisfy ourselves when exactly was notification issued. After going through the note sheet of the Secretarial file as well as the record of the Government printing press, Lucknow, we are satisfied that in fact the notification declaring whole of State of Uttar Pradesh as a notified area was not published on 23.1.2003. But the decision on the note-sheet was taken on 22.1.2003 and a communication was sent to the Government Press for publication of it on 23.1.2003 but in fact it was published as per the record of the Government Press on 29.1.2003 though it was dated notification dated 23.1.2003. Therefore after close scrutiny of the records of the Government Secretariat's files as well as original registers of the Government Press, we are of the opinion that the view taken by the Review Committee to this extent is correct that the whole area was notified on 29.1.2003 only and not on 23.1.2003 - the date of the notification. The requisition reached the Government Press for publication 5.30 on 27.1.2003 and it was published and ready for dispatch on 29.1.2003 and accordingly it was dispatched to the Home Department on 29.1.2003. Therefore, from these facts it is clear that the finding accorded by the Review Committee that the notification notifying the State of U.P. as a notified area under Section 4(a) was published in the Extra Ordinary Gazette of U.P. on 29.1.2003 and it was dispatched thereafter to all the districts magistrates. Therefore, it became effective from the date of its publication. Normally under the State General Clause Act, an Act comes into force on the date when the assent of the Governor or the President as the case may be, is first published in the official gazette of the State. Therefore, publication in the gazette is essential as it affects the rights of the public. Since this prohibitory notification notifying that the possession of certain kinds of arms in the notified area is prohibited, therefore, it would come into effect from the date when it was published in the official gazette.

Therefore, so far as this part of the finding given by the Review Committee that notification under Section 4(a) had not come into existence at the time when the raid at the premises of Udai Pratap Singh was conducted, this finding of the POTA Review Committee is correct. As a result of this finding so far as charge under Section 4(a) cannot be sustained.

Now, coming to alternative submission of the learned counsel that Section 4(b) where unauthorized possession of the bombs, dynamites or hazardous explosive substance or lethal weapons capable of mass destruction is concerned, in that case the area need not be notified. The unauthorized possession thereof itself has been found to be punishable under this Section. Learned counsel submitted that this aspect seems to have been completely missed by the Review Committee. The Review Committee only concentrated with regard to the question of Section 4(a), but did not examine the matter with reference to sub-section (b) of Section 4 of the Act. The two expressions which appear in Section 4(b) are relevant for our purposes i.e. the possession of "hazardous

explosive substance" or "lethal weapons capable of mass destruction" .

Learned counsel for the petitioner has submitted that the hazardous explosive substances were recovered from the house of Udai Pratap Singh cannot be dismissed as an explosive of low intensity and in that connection learned counsel has invited our attention to the expression hazardous and also invited our attention to the findings given by the forensic experts. The explosive substances recovered were sent for Forensic Science Laboratory, U.P. Agra and Forensic Science Laboratory in their report has observed as under:

> "On the analysis explosive substances Nitrate, Sulpher, Potassium and Charcoal were found in the Exhibit. Organic chemical and DLC method has been used."

Our attention was also invited to the observation of the bomb disposal/disbursement certificate it was mentioned that 'low intensify'. Therefore the question is whether this explosive can be said to be as hazardous substance or not. Firstly, it is unlikely that a law abiding citizen will keep such quantity of the explosive at his house. It is not an explosive for purpose of firecrackers. In the light of the facts mentioned above, keeping of such explosive at their house does not show that it was meant for a bonafide purpose. The question is whether this substance is hazardous in nature or not. The very fact of keeping such huge quantity of explosive in house is on the face of it is a hazardous and it is not kept normally by a person unless who deals in explosive with authorized licence for that purpose. The possession of such explosive without any authorized licence is a serious matter. Though, it is dealt separately because the accused has already been charged under the Explosive Act. But in this present context can such unauthorized possession by a person can be said to be a bonafide, is it not a hazardous or injurious to the public at large? The hazardous has been defined in Collins Cobuild English Language Dictionary as "something that is hazardous is dangerous, especially to people's health or safety. The hazardous has also been defined in the New Oxford Dictionary of English as "Risky; dangerous". Aiyar's Advanced Law Lexicon at page 826 defines 'Hazardous substance' as :

> "A solid waste, or combination of solid wastes which because of its quantity, concentration or physical, chemical or infectious characteristics may cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed."

The explosive substance has also been defined in Section 2 of the Explosive Substance Act, 1908 which reads as under:

> "2. In this Act the 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 substances; also any part of any such apparatus, machine or implement."

Therefore considering the hazardous substance under Section 4(b) mean that possession of it by any person be it notified area or otherwise is also punishable under the Act.

Learned Counsel Shri Shanti Bhushan and Shri Rao tried to play it down that as per the finding of the bomb demolishing squad it is of low intensity and cannot fall in category of hazardous substance. We regret, we cannot accept their submission. This explosive is capable of creating a havoc if it is used for preparing a bomb, it is capable of mass destruction. Any person in this background possessing this hazardous explosive substance cannot be credited to have it for bonafide purpose. Therefore, the fact that hazardous substance was found at the house of Udai Pratap Singh clearly shows that the case is covered by Section 4(b) and it cannot be played down simply because it has been reported by the bomb demolishing squad that it is of low intensity. This explosive substance is certainly hazardous and is capable of being used for preparation of bomb or other explosive material for scaring the people or for causing mass destruction be it in terms of the human beings or any building or otherwise. This aspect of the matter seems to have not been adverted by the Review Committee.

Similarly, learned counsel for the appellant has also placed much emphasis on the expression "other lethal weapons". AK-56 is a weapon of such a mass destruction that if it is fired then it can at a time kill number of persons because of his lethal potentiality. The expression "lethal" has also been defined in Aiyar's Advanced Law Lexicon which reads as under:

> "Lethal weapon. A deadly weapon. The term "lethal weapons"

means deadly weapons. "Guns, Swords, pistols, knives, and the like are lethal weapons as matter of law, when used within striking distance of the party assaulted. Others are lethal or not according to their capability of producing death or great bodily harm in t he manner in which they are used."

A lethal weapon is a weapon capable of causing an injury, and if it is barreled and if a shot, bullet, or other missile can be discharged from it, it is a firearm. A signal pistol firing a cartridge with explosive ballistic and containing a phosphorous and magnesium flare is a lethal weapon To give 'legal' is natural meaning, such a weapon should be proved to be one capable of causing injuries of a more than trivial nature and of a kind which it might reasonably be expected could lead to death."

Stroud's Judicial Dictionary of Words & Phrases defines 'lethal weapon' as under:

> "A lethal weapon is a weapon capable of causing an injury, and if it is barreled and if a shot, bullet, or other missile can be discharged from it, it is a firearm. A signal pistol firing a cartridge with explosive ballistite and containing a phosphorous and magnesium flare is a lethal weapon".

AK-56 is a very dangerous weapon and it is used in the warfare as well as in terrorist activities very frequently. The possession of which in an unauthorized manner is itself is an offence under Section 4(b) of the Act. Learned counsel has also brought to our notice the potentiality of creating mass destruction by a weapon like AK-56 and invited our attention to the literature of the AK-47 and

AK-56, AK-56 is, in fact, the improved version of AK-47. AK-47 literature which has been brought to our notice reads as under:

> "AK-47.net: AK-47:- The AK-47 was designed by Mikhail Timofeyevich Kalashnikov as a replacement for the SKS and as a rifle that could be used by Soviet tank crews. In 1946, while working at the Kovrov weapons plant, Kalashnikov began work on the AK-47. The AK-47 was accepted as the standard rifle for the Soviet Army in 1949 and retained that status until it was succeeded by the AKM. To this day between 30 and 50 million copies and variations of the AK-47 have been produced world wide, making it the most widely used rifle in the world.
>
> The AK-47 is chambered in 7.62X39 and features hardwood furniture with a fixed stock. The AK-47 has a 16 inch barrel with a muzzle nut to protect the threads. The AK-47 features a stamped receiver with a non ribbed cover plate and magazine. The rifle can be fired in two different firing modes; semi and full auto. The AK-47 has a 800 meter leaf sight that is only adjustable for range. All windage adjustments must be made by using the front sight. The AK-47 weighs 4,300 g and has a rat e of fire of 600rpm. The rifle will accept most synthetic and metal magazines, generally 30 rounds in capacity. The rifles effective killing range is 1,500 meters, and is generally not used for more than 300 meters. The original AK-47 was not outfitted for the use of a bayonet, however the design was changed and a bayonet was added. The AK-47 also features a hollow compartment in the buttstock which was used to keep the cleaning kit."

(Source of information is www.ak-47.net/ak47/akru/ak47.html) AK-56 has the same features except some minor improvement on it, reads as under:

> "Caliber: 7.62X39 Action: Gas operated, rotating bolt Overall length: 874 mm Weight: 3.80 kg.
>
> Magazine capacity: 30 rounds The type 56 assault rifle was adopted by PLA in 1956, along with Type 56 carbine (which was a licence built Soviet SSKS copy). The type 56 assault rifle was, in turn, also a licensed copy of the Soviet AK-47 assault rifle, with minor modifications.

Type 56 is a gas operated, selective fire weapon. The receiver is machined from steel, the two lugged bolt locks into receiver walls. Type 56 ha AK-47 style controls with reciprocating charging handle and massive safety-fire selector lever at the right side of the receiver. The furniture was made from wood, and compact version with underfolding metallic buttstock was also available. The only visible difference from Soviet AK-47 is a permanently attached spike beyonet, which folds under the barrel when not in use."

The design features has been quoted from the Janes Information Group reads as under:

> "Type 56 basic version with a fixed wooden stock, Type 56-1 with a vertically folding metal stock, and Type 56-II with a horizontally folding metal stock. Except for the differences in the stock and the lack of a tool kit with the basic variant, the two versions with folding stock are identical to the basic variant.
>
> The Type 56 is such a reliable weapon that it can function normally after total immersion in mud and water. The fully chromed barrel ensures effective operation even at very low temperatures. Unlike the Aks, the Type 56 is fixed with a foldable bayonet, but the two later version versions have no bayonet.
>
> All Type 56 assault rifles fire in either semiautomatic or automatic mode and have an effective range of about 300 m. At full cyclic rate, they can fire about 600 rounds per minute semiautomatic. Both the Type 56-I and Type 56-II can mount a grenade launcher."

The above potentiality of AK-56 is capable of causing mass destruction. It fires about 600 rounds per minutes, it means 600 bullets if hit all the 600 targets, it can lead to a mass destruction. Therefore, the possession of such unauthorized weapon is dangerous and is capable of mass destruction. It is a lethal weapon capable of mass destruction and unauthorized possession thereof is itself punishable. This aspect was also not been adverted by the Review Committee. The Review Committee only directed that an unauthorized possession of the weapons which have been specified in column 2 and 3 of category 1 or category 3(a) of Schedule 1 to the Arms Rules possession of it in the notified area is punishable. But if at the same time one of the weapons falls in the category of Section 4(b), then it does not mean that since it falls in category 4(a), it stands excluded from category of Section 4(b). If the weapon falls in the category of Section 4(b) also under the head 'lethal weapon', then irrespective of the fact that it falls in the category

(a) will not be excluded from category of Section 4(b). We cannot read both the provisions of clause (a) and (b) to be of exclusive of each other. Both the provisions have to be read harmoniously. If the weapon which is specified in clause (a) is equally covered under clause (b) under the heading of 'lethal weapon', then it would not mean that it shall stand excluded from Section 4(b). We have to keep in view the purpose for which this Act was enacted i.e. prevention of the terrorists activities and we cannot interpret provisions of Section 4(a) and

(b) to be exclusive of each other [Ref : 2005 (6) SCALE 177]. If the weapons enumerated in clause (a) are also covered in clause

(b), then it does not go out of the net of clause (b). This aspect was not addressed by the Review Committee at all. The Review Committee put a complete gloss over possession of the explosive substance, that it is not a hazardous or capable of mass destruction because of its low intensity.

Secondly, the Review Committee has also has entered into the merit of the matter that accused persons Raghuraj Pratap Singh alias Raja Bhaiya, Udai Pratap Singh and Akshay Pratap Singh alias Gopalji cannot be connected with the recovery of these catchy of arms. The role of the Review

Committee is very limited and the Review Committee has to see a prima facie case and cannot enter into the merit that whether ultimately the conviction will be entailed or not or the evidence is so weak to connect the other accused persons. The role given to the Review Committee under sub-section (4) of Section 60 is very limited and it has only to see whether there is a prima facie case for proceeding against the accused under the Act or not. The Review Committee has traveled beyond its scope, the sufficiency of evidence cannot be gone into by the Review Committee. It is also not the job of the Review Committee whether confession is admissible or not. Role assigned to Review Committee is very limited and if the prima facie case connects the accused on the basis of the material with the prosecution then it is not for the Review Committee to dilate on that as if they are trying the cases under the Act. As we have already mentioned above that we need not enter into the political controversy that whether first order passed was politically motivated or the second order passed was also equally politically motivated by other party in power, we do not want to go into these questions. The use of the Act for personal benefit of the political parties has to be condemned in no uncertain terms. This Act cannot be used for the political ends; it is meant for the benefit of the nation so that the terrorists activities do not disturb the sovereignty or integrity of the nation. So far as this case is concerned, we are of the opinion that there is prima facie case for prosecuting the accused persons. These accused persons were charged under Section 3(3) read with Section 4

(a)(b) of the Act. But so far as Section 4(a) is concerned, for reasons mentioned above, it cannot proceed now. But it can proceed so far as under Section 3(3) & Section 4(b) of the Act is concerned along with Arms Act & Explosives Act. Therefore, we allow this appeal in part. We set aside the order of the Review Committee and hold that the respondents can be prosecuted under Section 3(3) and Section 4(b) of the Act and other provisions of the Explosive and Arms Act. The accused, Mr. Udai Pratap Singh and Raghuraj Pratap Singh alias Raja Bhaiya may surrender before the Judge, Designated Court, under POTA Act/Sessions Judge, Kanpur Nagar within a week and apply for bail. In case they fail to appear before the Judge, the Judge, Designated Court under POTA Act, Kanpur Nagar get them arrested. So far as Akshay Pratap Singh is concerned, as he is already on bail, he need not to surrender. However, any observation made in this order will not prejudice their trial.

SLP(Crl) 1521 of 2004 This petition is directed against the order passed by the High Court granting the bail. By this petition, the petitioner has challenged the order passed by the High Court of Judicature, Allahabad releasing Akshay Pratap Singh @ Gopalji on bail. Since the bail has already been granted and he was in detention for a long time, we do not propose to interfere with the bail order, but observation made by the learned Judges in the order cannot be sustained as it is contrary to our finding. Therefore, SLP(Crl) 1521 of 2004 is dismissed.

Writ Petition (Crl) 132-134 of 2003 This petition is filed against the order passed by the State Government dated 29.8.2003 whereby public prosecutor was directed to withdraw the POTA cases against the accused persons. An application was moved by public prosecutor for withdrawal of theses cases before Special Judge, though no order was passed permitting withdrawal of these cases. However, in view of our finding in SLP (Crl) 5609 of 2004, we cannot affirm the order of the State Government for withdrawal of these cases and consequential application made by the public prosecutor for withdrawal of these cases. The order passed by the Government dated 29.8.2003 as well as application moved by the special public prosecutor before the Special Judge, Kanpur Nagar

cannot be sustained and accordingly the order passed by the State Government and the application moved by the special public prosecutor before the Special Judge at Kanpur, both are rejected. In this connection our attention was invited to 1983(1) SCC 438, 1980(3) SCC 435, 1996(2) SCC 610, 2002(3) SCC 510. In these cases it has been laid down that the public prosecutor has to shoulder a greater responsibility for withdrawal of the cases under Section 321 Cr.P.C. In Sheonandan Paswan vs. State of Bihar and others 1983 (1) SCC 438, it was held, that the settled law laid down by the Supreme Court has been that the withdrawal from the prosecution is an executive function of the Public Prosecutor and the ultimate decision to withdraw from the prosecution is his. Before an application is made under Section 321, the Public Prosecutor has to apply his mind to the facts of the case independently without being subject to any outside influence. The Government may suggest to the Public Prosecutor that a particular case may not be proceeded with, but nobody can compel him to do so. However, Section 321 of the Code does not lay any bar on the Public Prosecutor to receive any instruction from the Government before he files an application under that section. If the Public Prosecutor received such instructions, he cannot be said to act extraneous influence. On the contrary, the Public Prosecutor cannot file an application for withdrawal of a case on his own without instruction from the Government, since a Public Prosecutor cannot conduct a case absolutely on his own, or contrary to the instruction of his client, namely, the Government. Unlike the Judge, the Public Prosecutor is not an absolutely independent officer. He is appointed by the government for conducting in court any prosecution or other proceedings on behalf of the Government concerned. So there is the relationship of counsel and client between the Public Prosecutor and the Government. If the Government gives instructions to a Public Prosecutor to withdraw from the prosecution of a case, the latter after applying his mind to the facts of the case may either agree with instructions and file a petition stating grounds of withdrawal or disagree therewith having found a good case for prosecution and refuse to file the withdrawal petition. In the latter event the Public Prosecutor will have to return the brief and perhaps to resign, for, it is the Government, not the Public Prosecutor, who is in the know of larger interest of the State". The Public Prosecutor cannot act like a post box or act on the dictate of the State Governments. He has to act objectively as he is also an officer of the Court. At the same time court is also not bound by that. The courts are also free to assess whether the prima face case is made or not. The court, if satisfied, can also reject the prayer. However in the present case we have examined the matter and found that there is a prima facie case to proceed against the accused persons under Section 4(b) of the Act and other provisions of the Explosive or Arms Act, therefore, the sanction granted by the Government and application moved by public prosecutor for withdrawal of the cases cannot be sustained. Hence writ petition Nos.132-134 of 2004 is accordingly allowed and the order of the State Government dated 29.8.2003 withdrawing the cases against the accused persons is quashed, likewise direction to the public prosecutor for withdrawing the cases from the Court.

Transfer Petition No.82-84 of 2004 This petition relates to transfer of the cases from State of U.P. to any other court under Section 406 Cr.P.C. 1993 in criminal case No.3/2003 in crime case No.10/03 under Sections 3 & 4 of POTA Act titled as State vs Udai Pratap Singh, Raghu Raj Pratap Singh @ Raja Bhaiya and Akshya Pratap Singh @ Gopalji pending before the Designated Court under POTA at Kanpur to the Designated Court under POTA at Delhi or before any other Special Judge at Delhi.

Likewise, crime case Nos. 113/2002 and 209/2002 under Sections 2/3 of U.P. Gangster and Anti-social Activities (Prevention) Act, 1986 titled as State vs Udai Pratap Singh, Raghu Raj Pratap Singh @ Raja Bhaiya and Akshya Pratap Singh @ Gopalji pending in the court of Special Judge (Gangster Act), Allahabad, U.P. to the court of Special Judge at Delhi or to any other court at Delhi.

The petitioner has stated that there will be no chance of fair trial in the State of U.P. as most of the witnesses are afraid to speak against the respondents and even one Shri Rajender Yadav was killed as he deposed against these persons. It was also mentioned that the State Government is not serious. The State Government has already withdrawn the POTA cases against the accused persons and directed the public prosecutor to withdraw these cases. In this background, there is no likelihood of fair trial in the State of U.P. The respondents failed to file counter affidavit, but an affidavit has been filed by one Dinesh Priyadarshi on behalf of respondents No. 2 to 4. But no affidavit was filed by the respondents though they were made a party to the petition. We failed to understand why the affidavit has not been filed by respondents themselves. It is alleged that accused Raghuraj Pratap Singh alias Raja is an independent MLA who is supporting the present government and is a Minister in the government. After going through the transfer petition and counter affidavit on behalf of the respondents, we are of the opinion that there is likelihood of miscarriage of justice in the background mentioned above. It is alleged that murder of Shri Rajender Yadav has taken place and his younger brother is connected with this case. Therefore in the interest of justice both these cases be transferred to any other court where, in a proper atmosphere, the matter can be dealt with fairly. In the interest of justice, we direct that criminal case No.3/2003 in crime case No.10/03 under Sections 3 & 4 of POTA Act titled as State vs Udai Pratap Singh, Raghu Raj Pratap Singh @ Raja Bhaiya and Akshya Pratap Singh @ Gopalji, and case No. 113/2002 & 209/2002 under Section 2/3 of U.P. Ganster & Anti Social Activities(Prevention) Act, 1986 titled as State of U.P. vs. Udai Pratap Singh, Raghu Raj Pratap Singh @ Raja Bhaiya & Akshya Pratap Singh pending in the Court of Special Judge(Gangster Act), Allahabad, U.P. be transferred to a Special Judge in M.P. Let the Hon. Chief Justice nominate any Special Judge to try these cases. The transfer petitions are accordingly allowed.