

international sense does not fit into the ambit and reach of section 121. In the Parliament attack case,¹⁵ the Supreme Court held as follows:

while these are the acceptable criteria of waging war, we must dissociate ourselves from the old English and Indian authorities to the extent that they lay down a too general test of attainment of an object of general public nature or a political object. The Supreme Court expressed reservations in adopting this test in its literal sense and construing it in a manner out of tune with the present day. The court must be cautious in adopting an approach which has the effect of bringing within the fold of S.121 all acts of lawless and violent acts resulting in destruction of public properties, etc., and all acts of violent resistance to the armed personnel to achieve certain political objectives. The moment it is found that the object sought to be attained is of a general public nature or has a political hue, the offensive violent acts targeted against the armed forces and public officials should not be branded as acts of waging war. The expression "waging war" should not be stretched too far to hold that all the acts of disrupting public order and peace irrespective of their magnitude and repercussions could be reckoned as acts of waging war against the Government. A balanced and realistic approach is called for in construing the expression "waging war" irrespective of how it was viewed in the long past. An organised movement attended with violence and attacks against the public officials and armed forces while agitating for the repeal of an unpopular law or for preventing burdensome taxes were viewed as acts of treason in the form of levying war. We doubt whether such construction is in tune with the modern day perspectives and standards.

[s 121.3] Terrorist Acts.—

Though every terrorist act does not amount to waging war, certain terrorist acts can also constitute the offence of waging war and there is no dichotomy between the two. Terrorist acts can manifest themselves into acts of war. According to the learned Senior Counsel for the State, terrorist acts prompted by an intention to strike at the sovereign authority of the State/Government, tantamount to waging war irrespective of the number involved or the force employed. However, the degree of animus or intent and the magnitude of the acts done or attempted to be done would assume some relevance in order to consider whether the terrorist acts give rise to a state of war. Yet, the demarcating line is by no means clear, much less transparent. It is often a difference in degree. The distinction gets thinner if a comparison is made of terrorist acts with the acts aimed at overawing the Government by means of criminal force. Conspiracy to commit the latter offence is covered by section 121A.¹⁶ The incorporation of Chapter IV of the [Unlawful Activities \(Prevention\) Act, 1967](#), shall not be viewed as deemed repeal of [section 121 of the IPC, 1860](#). As explained in *Navjot Sandhu (supra)*, a "terrorist act" and an act of "waging war against the Government of India" may have some overlapping features, but a terrorist act may not always be an act of waging war against the Government of India, and vice-versa. The provisions of Chapter IV of the [Unlawful Activities \(Prevention\) Act](#) and those of Chapter VI of the [Indian Penal Code \(IPC\)](#), 1860 including section 121, basically cover different areas.¹⁷

[s 121.4] Foreign nationals not excluded.—

The word "whoever" is a word of broad import. Advisedly such language was used departing from the observations made in the context of the Treason Statute. Supreme Court finds no good reason why foreign nationals stealthily entering into Indian territory with a view to subverting the functioning of the Government and destabilising the society should not be held guilty of waging war within the meaning of section 121. The section on its plain term need not be confined only to those who owe allegiance to the established Government.¹⁸

The explanation to the section makes it clear that the offence is complete even without any act or illegal omission occurring in pursuance of the conspiracy.¹⁹ It is not

necessary that any act or illegal omission should have taken place in pursuance of a conspiracy. An action of waging war, attempt to wage war or abetment to wage war are also covered by section 121-A.^{20.}

2. Government of India.—The expression "Government of India" is surely not used in the narrow and restricted sense in section 121. In our considered view, the expression "Government of India" is used in section 121 to imply the Indian State, the juristic embodiment of the sovereignty of the country that derives its legitimacy from the collective will and consent of its people. The use of the phrase "Government of India" to signify the notion of sovereignty is consistent with the principles of Public International Law, wherein sovereignty of a territorial unit is deemed to vest in the people of the territory and exercised by a representative government.^{21.}

3. 'Abets the waging of such war'.—Such abetment is made a special offence. It is not essential that as a result of the abetment the war should in fact be waged. The main purpose of the instigation should be 'the waging of war'. It should not be merely a remote and incidental purpose but the thing principally aimed at by the instigation. There must be active suggestion or stimulation to the use of violence.^{22.} As criminal acts took place pursuant to the conspiracy, the appellant, as a party to the conspiracy, shall be deemed to have abetted the offence. In fact, he took an active part in a series of steps taken to pursue the objective of conspiracy. The offence of abetting the waging of war, having regard to the extraordinary facts and circumstances of this case, justifies the imposition of capital punishment and, therefore, the judgment of the High Court in regard to the conviction and sentence of Afzal under [section 121 IPC, 1860](#) shall stand.^{23.}

[s 121.5] Principles relating to Section 121.—

- (i) No specific number of persons is necessary to constitute an offence under [S.121, Penal Code](#).
- (ii) The number concerned and the manner in which they are equipped or armed is not material.
- (iii) The true criterion is *quo animo* did the gathering assemble?
- (iv) The object of the gathering must be to attain by force and violence an object of a general public nature, thereby striking directly against the King's authority.
- (v) There is no distinction between principal and accessory and all who take part in the unlawful act incur the same guilt.^{24.}

[s 121.6] CASES.—Mumbai Terror Attack Case.—

The primary and the first offence that the appellant and his co-conspirators committed was the offence of waging war against the Government of India. What matters is that the attack was aimed at India and Indians. It was by foreign nationals. People were killed for no other reason than they were Indians; in case of foreigners, they were killed because their killing on Indian soil would embarrass India. The conspiracy, in furtherance of which the attack was made, was, *inter alia*, to hit at India; to hit at its financial centre; to try to give rise to communal tensions and create internal strife and insurgency; to demand that India should withdraw from Kashmir; and to dictate its relations with other countries. Nothing could have been more "in like manner and by

like means as a foreign enemy would do". The appellant was rightly held guilty of waging war against the Government of India and rightly convicted under [sections 121, 121A and 122 of the IPC, 1860](#).²⁵

[s 121.7] Red Fort Attack Case.—

The evidence as to the transmission of thoughts sharing the unlawful design would be sufficient for establishing the conspiracy. Again there must have been some act in pursuance of the agreement. The offence under section 121 of conspiring to wage a war is proved to the hilt against the appellant, for which he has been rightly held guilty for the offence punishable under [sections 121 and 121-A, IPC, 1860](#).²⁶

[s 121.8] Parliament Attack Case.—

The single most important factor which impels to think that this is a case of waging or attempting to wage war against the Government of India is the target of attack chosen by the slain terrorists and conspirators and the immediate objective sought to be achieved thereby. The battlefield selected was the Parliament House complex. The target chosen was Parliament – a symbol of the sovereignty of the Indian republic. Huge and powerful explosives, sophisticated arms and ammunition carried by the slain terrorists who were to indulge in *fidayeen* operations with a definite purpose in view, is a clear indicator of the grave danger in store for the inmates of the House. The planned operations if executed, would have spelt disaster for the whole nation. The undoubted objective and determination of the deceased terrorists was to impinge on the sovereign authority of the nation and its Government. Even if the conspired purpose and objective falls short of installing some other authority or entity in the place of an established Government, it does not detract from the offence of waging war.²⁷

[s 121.9] Charge under Section 121, conviction under Section 123.—

In the case the Court has specifically dealt with the question whether the offence under [section 123, IPC, 1860](#) of which the accused was not charged, is a minor offence falling under the charges framed, and held that the fact that there was no charge against the accused under this particular section, does not, in any way, result in prejudice to him because the charge of waging war and other allied offences are the subject matter of charges. It was held that the accused is not in any way handicapped by the absence of charge under [section 123, IPC, 1860](#). The case which he had to meet under section 123 is no different from the case relating to the major charges which he was confronted with. In the face of the stand he had taken and his conduct even after the attack, he could not have pleaded reasonable excuse for not passing on the information. It was held that viewed from any angle, the evidence on record justifies his conviction under [section 123, IPC, 1860](#).²⁸

[s 121.10] Previous Sanction.—

No Court shall take cognizance of any offence punishable under Chapter VI of [IPC, 1860](#) except with the previous sanction of Central Government or of the State Government.²⁹ Where sanction was obtained only after cognizance, yet no prejudice

was caused because the matter was not proceeded any further and charge was also not yet framed. The Court remitted the matter for disposal after the date of sanction.³⁰

1. Subs. by the A.O. 1950, for "Queen".
2. Subs. by Act 26 of 1955, section 117 and Sch., for "transportation for life" (w.e.f. 1 January 1956).
3. Subs. by Act 16 of 1921, section 2, for "and shall forfeit all his property".
4. Subs. by Act 36 of 1957, section 3 and Sch. II, for "Illustrations" (w.e.f. 17 September 1957).
5. The brackets and letter "(a)" omitted by Act 36 of 1957, section 3 and Sch. II (w.e.f. 17 September 1957).
6. Subs. by the A.O. 1950, for "Queen".
7. Illustration (b) omitted by the A.O. 1950.
8. *Mohammed Ajmal Mohammad Amir Kasab v State of Maharashtra*, (2012) 9 SCC 1 [LNIND 2012 SC 1215] : 2012 AIR (SCW) 4942 : AIR 2012 SC 3565 [LNIND 2012 SC 1215] : 2012 Cr LJ 4770 : JT 2012 (8) SC 4 [LNIND 2012 SC 1215] : 2012 (7) Scale 553 .
9. *State (NCT of Delhi) v Navjot Sandhu @ Afsan Guru*, AIR 2005 SC 3820 [LNIND 2005 SC 580] : (2005) 11 SCC 600 [LNIND 2005 SC 580] : (2005) 2 SCC (Cr) 1715.
10. *Maganlal v State*, (1946) Nag 126.
11. *Md Jamiluddin Nasir v State of WB*, 2014 Cr LJ 3589 : AIR 2014 SC 2587 [LNIND 2014 SC 138] .
12. *Nazir Khan v State of Delhi*, (2003) 8 SCC 461 [LNIND 2003 SC 696] : 2003 AIR SCW 5068 : AIR 2003 SC 4427 [LNIND 2003 SC 696] : 2003 Cr LJ 5021 .
13. *State (NCT of Delhi) v Navjot Sandhu @ Afsan Guru*, AIR 2005 SC 3820 [LNIND 2005 SC 580] : (2005) 11 SCC 600 [LNIND 2005 SC 580] : (2005) 2 SCC (Cr) 1715.
14. *Mohammed Ajmal Mohammad Amir Kasab v State of Maharashtra*, (2012) 9 SCC 1 [LNIND 2012 SC 1215] : 2012 AIR (SCW) 4942 : AIR 2012 SC 3565 [LNIND 2012 SC 1215] : 2012 Cr LJ 4770 : JT 2012 (8) SC 4 [LNIND 2012 SC 1215] : 2012 (7) Scale 553 .
15. *State (NCT of Delhi) v Navjot Sandhu @ Afsan Guru*, AIR 2005 SC 3820 [LNIND 2005 SC 580] : (2005) 11 SCC 600 [LNIND 2005 SC 580] : (2005) 2 SCC (Cr) 1715.
16. *State (NCT of Delhi) v Navjot Sandhu @ Afsan Guru*, AIR 2005 SC 3820 [LNIND 2005 SC 580] : (2005) 11 SCC 600 [LNIND 2005 SC 580] : (2005) 2 SCC (Cr) 1715.
17. *Mohammed Ajmal Mohammad Amir Kasab v State of Maharashtra*, (2012) 9 SCC 1 [LNIND 2012 SC 1215] : 2012 AIR (SCW) 4942 : AIR 2012 SC 3565 [LNIND 2012 SC 1215] : 2012 Cr LJ 4770 : JT 2012 (8) SC 4 [LNIND 2012 SC 1215] : 2012 (7) Scale 553 .
18. *State (NCT of Delhi) v Navjot Sandhu @ Afsan Guru*, AIR 2005 SC 3820 [LNIND 2005 SC 580] : (2005) 11 SCC 600 [LNIND 2005 SC 580] : (2005) 2 SCC (Cr) 1715.
19. *Mohammed Ajmal Mohammad Amir Kasab v State of Maharashtra*, (2012) 9 SCC 1 [LNIND 2012 SC 1215] : 2012 AIR (SCW) 4942 : AIR 2012 SC 3565 [LNIND 2012 SC 1215] : 2012 Cr LJ 4770 : JT 2012 (8) SC 4 [LNIND 2012 SC 1215] : 2012 (7) Scale 553 .
20. *Adnan Bilal Mulla v State of Bombay*, 2006 Cr LJ (NOC) 406 Bom : (2006) 5 AIR Bom R 11 DB.

21. *Mohammed Ajmal Mohammad Amir Kasab v State of Maharashtra*, (2012) 9 SCC 1 [LNIND 2012 SC 1215] : 2012 AIR (SCW) 4942 : AIR 2012 SC 3565 [LNIND 2012 SC 1215] : 2012 Cr LJ 4770 : JT 2012 (8) SC 4 [LNIND 2012 SC 1215] : 2012 (7) Scale 553 .
22. *Hasrat Mohani*, (1922) 24 Bom LR 885 [LNIND 1922 BOM 136] .
23. *State (NCT of Delhi) v Navjot Sandhu @ Afsan Guru*, AIR 2005 SC 3820 [LNIND 2005 SC 580] : (2005) 11 SCC 600 [LNIND 2005 SC 580] : (2005) 2 SCC (Cr) 1715.
24. *State (NCT of Delhi) v Navjot Sandhu @ Afsan Guru*, AIR 2005 SC 3820 [LNIND 2005 SC 580] : (2005) 11 SCC 600 [LNIND 2005 SC 580] : (2005) 2 SCC (Cr) 1715 **relied** on *Maganlal Radhakrishnan*, AIR 1946 Ngp 173 .
25. *Mohammed Ajmal Mohammad Amir Kasab v State of Maharashtra*, (2012) 9 SCC 1 [LNIND 2012 SC 1215] : 2012 AIR (SCW) 4942 : AIR 2012 SC 3565 [LNIND 2012 SC 1215] : 2012 Cr LJ 4770 : JT 2012 (8) SC 4 [LNIND 2012 SC 1215] : 2012 (7) Scale 553 .
26. *Mohd. Arif v State of NCT of Delhi*, JT 2011 (9) SC 563 [LNIND 2011 SC 753] : 2011 (8) Scale 328 [LNIND 2011 SC 753] : (2011) 10 SCR 56 [LNIND 2011 SC 753] : (2011) 13 SCC 621 [LNIND 2011 SC 753] **relied** on *Kehar Singh v State (Delhi Admn.)*, AIR 1988 SC 1883 [LNIND 1988 SC 887] . See also *State of Gujarat v Jaman Haji Mamad Jat*, 2007 Cr LJ 1584 (Guj).
27. *State (NCT of Delhi) v Navjot Sandhu @ Afsan Guru*, AIR 2005 SC 3820 [LNIND 2005 SC 580] : (2005) 11 SCC 600 [LNIND 2005 SC 580] : (2005) 2 SCC (Cr) 1715.
28. *Shaukat Hussain Guru v State (NCT) Delhi*, AIR 2008 SC 2419 : (2008) 6 SCC 776 : 2008 Cr LJ 3016 : 2008 (8) SCR 391 : (2008) 3 SCC (Cr) 137.
29. Section 196(1)(a) of [Code of Criminal Procedure, 1973](#).
30. *Jamil Akhtar v State of WB*, 2001 Cr LJ 4529 (Cal).

THE INDIAN PENAL CODE

CHAPTER VI OF OFFENCES AGAINST THE STATE

The offences against the State fall into the following groups:—

- I. Waging, or attempting or conspiring to wage, or collecting men and ammunition to wage war against the Government of India (sections 121, 121A, 122, 123).
- II. Assaulting President, or Governor of a State with intent to compel or restrain the exercise of any lawful power (section 124).
- III. Sedition (section 124A).
- IV. War against a power at peace with the Government of India (section 125) or committing depredations on the territories of such power (sections 125–126).
- V. Permitting or aiding or negligently suffering the escape of, or rescuing or harbouring, a State prisoner (sections 128, 129, 130).

31. [[s 121A] Conspiracy to commit offences punishable by section 121.

Whoever within or without ^{32.}[India] conspires to commit any of the offences punishable by section 121, ^{33.}[***]or conspires to overawe,¹ by means of criminal force or the show of criminal force, ^{34.}[the Central Government or any ^{35.}[State] Government ^{36.}[***]], shall be punished with ^{37.}[imprisonment for life], or with imprisonment of either description which may extend to ten years, ^{38.}[and shall also be liable to fine].

Explanation.—To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.]

COMMENT—

Conspiracy to wage war.—This section provides for the offence of conspiring to wage war against the Government of India. It was thought right to make the offence of conspiring by criminal force, or by show of criminal force, more severely penal than the offence of actually taking part in an unlawful assembly, having for its object the overawing of the Government. The reason was this that persons who by conspiring to bring about such a result, set the whole matter in motion, seemed more criminal and far more deserving of punishment than those who were their mere tools, and only took part in such an assembly.

The Explanation to section 121A clarifies that it is not necessary that any act or illegal omission should take place pursuant to the conspiracy, in order to constitute the said offence. Thus, the [criminal act](#) done by the deceased terrorists in order to capture the Parliament House is an act that amounts to waging or attempting to wage war. The conspiracy to commit either the offence of waging war or attempting to wage war or abetting the waging of war is punishable under [section 121A IPC, 1860](#) with the maximum sentence of imprisonment for life. In the circumstances of the case, the imposition of maximum sentence is called for and the High Court is justified in holding

the appellant Afzal guilty under [section 121A IPC, 1860](#) and sentencing him to life imprisonment.^{39.}

The words 'conspires to overawe by means of criminal force or the show of criminal force, the Central Government, or any State Government' in this section clearly embrace not merely a conspiracy to raise a general insurrection, but also a conspiracy to overawe the Central Government or any State Government by the organisation of a serious riot or a large and tumultuous unlawful assembly.^{40.}

[s 121A.1] Ingredients.—

The section deals with two kinds of conspiracies:—

1. Conspiring within or without India to commit any of the offences punishable by section 121.
2. Conspiring to overawe by means of criminal force or the show of criminal force, the Government.

1. 'Overawe'.—The word 'overawe' clearly imports more than the creation of apprehension or alarm or even perhaps fear. It appears to connote the creation of a situation in which the members of the Central or State Government feel themselves compelled to choose between yielding to force or exposing themselves or members of the public to a very serious danger. It is not necessary that the danger should be a danger of assassination or of bodily injury to themselves. The danger might well be a danger to public property or to the safety of members of the general public.²⁵ The word 'overawe' clearly imports more than the creation of apprehension or alarm or fear. A slogan that Government can be changed by an armed revolution does not mean that there is a conspiracy to change the Government by criminal force. At best it means that the petitioners want to educate the people that by force only the Government could be changed.^{41.}

Explanation.—The Explanation to this section says that to constitute a conspiracy under this section, it is not necessary that any act or illegal omission should take place in pursuance thereof.

^{31.} Ins. by Act 27 of 1870, section 4.

^{32.} The words "British India" have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Sch. (w.e.f. 1 April 1951), to read as above.

^{33.} The words "or to deprive the Queen of the sovereignty of the Provinces or of any part thereof" omitted by the A.O. 1950.

^{34.} Subs. by the A.O. 1937, for "the Government of India or any Local Government".

^{35.} Subs. by the A.O. 1950, for "Provincial".

^{36.} The words "or the Government of Burma" omitted by the A.O. 1948.

^{37.} Subs. by Act 26 of 1955, section 117 and Sch., for "transportation for life or any shorter term" (w.e.f. 1 January 1956).

^{38.} Ins. by Act 16 of 1921, section 3.

39. *State (NCT of Delhi) v Navjot Sandhu @ Afsan Guru*, [AIR 2005 SC 3820](#) [[LNIND 2005 SC 580](#)] : [\(2005\) 11 SCC 600](#) [[LNIND 2005 SC 580](#)] : (2005) 2 SCC (Cr) 1715.
40. *Ramanand v State*, (1950) 30 Pat 152.
41. *Aravindan*, [1983 Cr LJ 1259](#) (Ker).

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