Supreme Court of India
State Of W.B vs Mohammed Khalid on 24 November, 1994
Equivalent citations: 1995 AIR 785, 1995 SCC (1) 684
Author: S Mohan
Bench: Mohan, S. (J)

PETITIONER:
STATE OF W.B

Vs.

RESPONDENT:
MOHAMMED KHALID

DATE OF JUDGMENT24/11/1994

BENCH:
MOHAN, S. (J)
BENCH:
MOHAN, S. (J)
MUKHERJEE M.K. (J)

CITATION:
1995 AIR 785 1995 SCC (1) 684
JT 1994 (7) 660 1994 SCALE (4)1048

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by MOHAN, J.- Criminal Appeal No. 327 of 1994 is directed against the judgment and order dated 13-4-1994 of the High Court of Calcutta in CO No. 9121 (W) of 1993.

2.Criminal Appeal No. 328 of 1994 is directed against the judgment and order dated 13-4-1994 of the High Court of Calcutta in CO No. 8377(W) of 1993. Criminal Appeal No. 329 of 1994 is directed against the judgment and order dated 13- 4-1994 of the High Court of Calcutta in CO No. 8378(W) of 1993.

3.All these cases arise out of writ petitions filed in the High Court of Calcutta challenging the validity of sanction and taking cognizance of the cases against each of the respondents by the Designated Court under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as 'TADA). A further challenge in the writ petition was also made to the 'vires' of TADA. The orders of

sanction and taking cognizance were quashed. The challenge to the Act was not gone into since the same was pending at the relevant time before this Court.

4.To highlight the issue involved, it is enough if we advert to the facts in Criminal Appeal No. 328 of 1994 since CO No. 8377(W) of 1993, against which this appeal has been preferred, is the main case. The same decision was applied to Criminal Appeals Nos. 327 and 329 of 1994. The short facts are as under.

5.On the evening of 16-3-1993, an explosion occurred at or near Premises No. 267, B.B. Ganguly Street, Calcutta. 69 persons died, 5 of them died as a result of direct blast and 46 others were injured. The said premises and some other buildings adjoining it collapsed and/or were badly damaged.

6.A complaint was lodged on 17-3-1993 regarding this incident by Mr B.K. Chattopadhaya, Sub-Inspector attached to Bowbazar Police Station. This complaint was treated as first information report. On that basis, Case No. 84 dated 17-3-1993 was registered in the police station under Sections 120-B/436/326/307/302 Indian Penal Code and Sections 3 and 5 of the Explosive Substances Act. Having regard to the gravity of the offence, the Commissioner of Police, Calcutta passed an order that the case shall be investigated by a team of high-ranking police officials. In the course of investigation witnesses were examined, various seizures were made and confessions made by two of the accused, namely, Pannalal Jaysoara and Mohammed Gulzar were recorded by a learned Metropolitan Magistrate on 7-4-1993 and 19-5-1993 respectively. During investigations it appeared that materials had transpired for prosecuting the accused under Sections 3 and 4 of TADA. On 3-5-1993, information to this effect was given to the learned Chief Metropolitan Magistrate, Calcutta. The learned Magistrate made a record of this fact and observed that the investigating officer might proceed to investigate offences under TADA.

7.Upon completion of investigation, the police obtained sanction to prosecute under Sections 3 and 5 of the Explosive Substances Act from the State Government. Sanction under Section 20-A(2) of TADA from the Police Commissioner was also obtained. The charge-sheet was submitted on 14-6-1993, well within 90 days as is spoken to under Section 167(2)(a)(i) of the Code of Criminal Procedure (hereinafter referred to as the 'Code').

8.The sanction to prosecute under Sections 3 and 5 of the Explosive Substances Act and the sanction under Section 20- A(2) were obtained on 11-6-1993. While granting sanction under Section 20-A(2) of TADA it was mentioned that the records were placed before the sanctioning authority for examination and perusal. It appeared that for the last 5/6 years accused Pannalal Jaysoara had been manufacturing bombs in the "Khaskhas" room on the first floor of 267, B.B. Ganguly Street, Calcutta as and when required by accused Mohammed Rashid Khan, first respondent in Criminal Appeal No. 328 of 1994. Accused Jaysoara was introduced to other accused, namely, Mohammed Abdul Aziz, first respondent in Criminal Appeal No. 329 of 1994 and Lala alias Parwez Khan. Death of 69 persons, serious injuries to 46 persons and complete destruction of a two-storeyed building and partial collapse of other two and damage to five more buildings were caused by the accused by an explosion caused by bombs and huge quantities of extremely dangerous nitro-glycerine-based

explosives which experts have opined to be dangerous to life and property. The sanctioning authority mentioned inter alia that the intention of the accused was to strike terror in the people and/or to strike terror in a particular section of the people and/or to adversely affect the harmony amongst the Hindus and the Muslims. It was also mentioned the accused had conspired and prepared to commit disruptive activities. In the charge-sheet all the necessary ingredients under Sections 3(1) and 4 of TADA had been mentioned.

9.The first respondent, Mohammed Rashid Khan moved a writ petition under Article 226 of the Constitution of India making inter alia the following prayers:

> That the cognizance taken by learned Chief Metropolitan Magistrate, Calcutta, Respondent 7, in TADA Case No. 1 of 1993 arising out of Section 'H' (Bowbazar Police Station) Case No. 84 dated 17-3-1993 and all subsequent proceedings thereto are illegal, void and inoperative in law;
>
> A writ in the nature of certiorari and/or an order of direction in the like nature commanding the respondents to transmit the records relating to TADA case pending before the said respondent to this Court;
>
> A writ in the nature of prohibition and/or an order of direction in the like nature prohibiting the respondents and/or their agents and/or their subordinates from proceeding any further with the TADA case; A writ in the nature of mandamus to respondents to forbear from applying the provisions of TADA against him and from taking any action or step thereunder and to release the petitioner from custody forthwith.

10.A declaration was also prayed for that TADA is violative of the Constitution and is liable to be struck down. But the High Court by its impugned judgment held that TADA has been wrongly applied in the case and the orders of sanction and further taking cognizance by the Designated Court on 14- 6-1993 was not proper, legal and valid and the same was quashed and set aside.

11.Aggrieved by the impugned judgment, the State of West Bengal has preferred these criminal appeals.

12.Mr K.T.S. Tulsi, learned Additional Solicitor General in attacking the judgment argues as under.

13.The High Court gravely erred in quashing the order, taking cognizance, by entering the area which is beyond the scope of jurisdiction under Article 226 of the Constitution of India. The jurisdiction is confined to cases where the allegations before the Designated Court ex facie cannot constitute an offence under TADA. The High Court cannot examine the merits of the allegations. In fact, what has been done by the High Court is a laboured exercise of scrutinising the material placed before the Designated Court. In doing so, it entered into a debatable area and began the process of appreciation of evidence admissibility of confession or prejudgment on trial or determine the guilt or innocence of the accused. It has made an analysis of the materials to determine the truth or

otherwise of the allegations. It has conducted a virtual pre-trial at a premature stage. On that basis, it had come to a conclusion that there is no evidence in support of these allegations. The law is, the High Court must assume each of the allegations made in the charge-sheet to be factually correct and examine the ingredients of the offence without adding or subtracting anything therefrom.

14.In support of this submission, learned counsel relies on State of Maharashtra v. Abdul Hamid Haji Mohammed1 wherein this Court has held, the High Court under Article 226 has no jurisdiction to enter into a debatable area whether the direct accusation made in conjunction with the attendant circumstances, if proved to be true, is likely to result in conviction for an offence under TADA. The moment there is a debatable area, in the case, it is not amenable to the writ jurisdiction.

15.In State of Haryana v. Bhajan Lal2 it has been categorically laid down that the allegations made in the FIR or the complaint taken on their face value and accepted in its entirety constitute an offence. The High Court 1 (1994) 2 SCC 664: 1994 SCC (Cri) 595 2 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426 is not justified in quashing the criminal proceedings. In State of Bihar v. P.P. Sharma3 this Court had ruled that writ petition should not be entertained against charge-sheet while exercising jurisdiction. If the matter is considered on merits in the guise of prima facie evidence, it would amount to a pre-trial. To the same effect are the following rulings:

1. State of Maharashtra v. Abdul Hamid1 (SCC pp. 669-70, para 7).

2.State of Haryana v. Bhajan Lal2.

3.State of Bihar v. PP Sharma3 (SCC p. 269, para 68).

4.Maninder Kaur v. Rajinder Singh4.

5. Radhey Shyam Khemka v. State of Bihar5.

6. State of Bihar v. Murad Ali Khan6 (SCC p. 662).

16. The next submission is, under Article 226 the High Court is not entitled to go into the validity or otherwise of the order granting sanction for prosecution. The order of sanction is required to be proved by evidence in the course of trial. All objections with regard to validity or otherwise could be raised there since witnesses are summoned to prove the order and they being subject to cross-examination. In this case, the order of sanction, on the face of it, shows that the sanctioning authority had gone through all the reports, the recorded statements of witnesses, confessions and seizure list and the opinion of experts. The High Court has to accept these averments on their face value. The correctness or otherwise of the statement is only subject to proof during a trial. Therefore, the High Court is wrong in holding, there was non-application of mind. In the case of PP Sharma3 it has been held, if all the facts of the case are not mentioned in the sanction order the same does not become invalid as the prosecution can prove these facts in the course of trial.

17. The finding of the High Court that the affidavit of Mr Sujit Kumar Sanyal is not proper because he was neither an investigating officer nor an informant is contrary to record. It was brought to the notice of the High Court through the affidavit of the Commissioner of Police that the Special Investigation Team had been set up on 18-3-1993 which was headed by Mr Sujit Kumar Sanyal. Unfortunately, the affidavit of Commissioner of Police was not taken into account. Therefore, the contrary findings are wrong. The High Court wrongly excluded from consideration the effect of confession of the two accused for the reasons that the confession could not have been considered by the Designated Court as the same remained in sealed cover. In this regard, it is submitted that charge-sheet specifically refers to the confession recorded by the Magistrate under Section 164 of the Code.

3 1992 Supp (1) SCC 222 : 1992 SCC (Cri) 192 1 (1994) 2 SCC 664: 1994 SCC (Cri) 595 2 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426 4 1992 Supp (2) SCC 25 : 1992 SCC (Cri) 522 5 (1993) 3 SCC 54: 1993 SCC (Cri) 591 6 (1988) 4 SCC 655 : 1989 SCC (Cri) 27

18.The High Court has held in the impugned judgment that from the act of preparation and storage of bombs intention to commit offences under TADA cannot be inferred as the motive was to defend the Muslims. This finding is shocking and is contrary to the well-established principles of self-defence. Then again, the preparation and keeping of bombs are illegal. It tantamounts to terrorising the people. Therefore, this would be a terrorist act under Section 3(1). If the Act itself is illegal it cannot be justified on the plea of self-defence. The question is whether a right of private defence exists under Indian Penal Code or any other law. Further, Section 3(3) is also attracted.

19.This Court in Yogendra Morarji v. State of Gujarat7 (SCC p. 234, para 30) has dealt with the right of self-defence. The right of self-defence commences not before a reasonable apprehension arises in the mind of the accused.

20.The finding of the High Court that there are no materials in support of allegation of conspiracy under Section. 3(3) proceeds on misappreciation of the material and is contrary to the averments contained in the chargesheet. It is not necessary to bring home the charge of conspiracy to establish the time and the place of conspiracy or even the actual words of communication. It is not necessary to prove who entered into conspiracy and the nature of conspiracy. The existence of conspiracy can be inferred from the conduct of the various accused prior to and subsequent to the conspiracy. Existence of explosive materials is enough to prove the conspiracy when there was preparation for a large number of bombs. In support of this submission, reliance is placed on Ajay Aggarwal v. Union of India8, dealing with the law relating to conspiracy. On the basis of this citation it is submitted, even if the explosion has not taken place, the very possession of bomb would amount to conspiracy.

21.Then again, the High Court has clearly gone wrong in holding that there must be a breakdown of law-enforcing machinery. That would be a condition precedent for prosecuting the accused for offences under TADA. This finding is contrary to the decision of this Court in Kartar Singh v. State of Punjab9. In that ruling the legislative intention to bring TADA has been clearly spelt out. In para 145 at p. 653, of the ruling what has been observed is that the ordinary procedural law was found to be inadequate by the Legislature and, therefore, the object of Legislature in bringing in TADA may

not be defeated or nullified. The interpretation of the High Court, if adopted, would clearly make the TADA unworkable. Sections 3 and 4 of TADA are intended for the whole of India. It has nothing to do with the breakdown of law-enforcing machinery.

22.The High Court had gone on a totally incorrect premise when it quashed the order taking cognizance on the ground that it is not a reasoned 7 (1980) 2 SCC 218 : 1980 SCC (Cri) 394 8(1993) 3 SCC 609, 617 : 1993 SCC (Cri) 961 9(1994) 3 SCC 569: 1994 SCC (Cri) 899: JT (1994) 2 SC 423 order. It is submitted that no reasons need be stated. Therefore, this approach of the High Court is clearly contrary to the following rulings of this Court:

(1) Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia10 (SCC p. 721, para 14). (2) R.S. Nayak v. A.R. Antulay11 (SCC pp. 755-56, para 43).

(3) State of Bihar v. Ramesh Singh12 (SCC p. 39, para 4).

(4) Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya13 (SCC p. 85, para

7).

23. Equally, the High Court erred in holding that the Court taking cognizance can only look at the police report and nothing else. This is clearly contrary to the ruling of this Court in Satya Narain Musadi v. State Of Bihar14 (SCC pp. 157-58, paras 9 and 10). The report under Section 173(2) is accompanied by all the documents and statements. All of them can be looked into. In support of the above submissions, it is urged that the judgment of the High Court is perverse and is liable to be set aside.

24.Mr U.R. Lalit, learned Senior Counsel appearing for the appellants submits that a charge-sheet in criminal law is a mere narration. It is a manifestation of evidence collected. No charge-sheet is ever construed in a restricted way, as has been done by the High Court. In this case the High Court has grievously erred.

25. When a police report is filed cognizance is almost automatic. In fact, in A.C. Aggarwal, Sub-Divisional Magistrate v. Ram Kali15 this Court held that when Section 190(1)(b) of the Code uses the words "may take cognizance" it means, must take cognizance and that it has no discretion in the matter. In law, no reasons need be given for taking cognizance under Section 193.

26. Mr Ram Jethmalani, learned Senior Counsel, appearing on behalf of the respondents submits that a report of the police constitutes the facts found as a result of investigation. Under Section 173 of the Code the Court is called upon to take action. The report in the accompanying documents -though complementary must be held distinctive. In law, the report should contain the minimum. Should the report fail to bring out the ingredients of an offence the same cannot be supplemented by other materials. Thus, the submission is, the report is relevant for the issue of process.

27. The impugned order is in two parts-

1. taking cognizance; and

2. issuing a process.

10 (1989) 1 SCC 715, para 14 1989 SCC (Cri) 285 11 (1986) 2 SCC 716, para 43 1986 SCC (Cri) 256 12(1977) 4 SCC 39, para 4 1977 SCC (Cri) 533 13(1990) 4 SCC 76, para 7 1991 SCC (Cri) 47 14(1980) 3 SCC 152, paras 9 & 10 : 1980 SCC (Cri) 660 15AIR 1968 SC 1, 5 : (1968) 1 SCR 205 : 1968 Cri LJ 82

28.The theory of curable irregularity cannot be applied except in revisional or appellate stage. Section 170(5) makes a clear distinction between the report and documents along with the report. Section 190(1)(b) states : "Such facts constitute an offence." Section 190 of the Code is controlled by Section 20-A(1) and (2) of TADA. Under such circumstances, the Court will have to examine whether the bar has been removed. In support of this submission, reliance is placed on Gokulchand Dwarkadas Morarka v. King16. Though that case arose under Defence of India Rules, the ratio squarely applies.

29.A cognizance which is barred cannot be overcome by a sanction. The court must look at the validity of sanction. In this case, the sanction was never produced before the Court. On the contrary, the Court took cognizance automatically. The specific case of these respondents before the High Court was, there was no such sanction. The burden that the sanction was granted in relation to the facts constituting the offence has,-not been discharged. While taking cognizance perusal of sanction is not mentioned. This order is conclusive.

30.The Commissioner of Police in his affidavit does not say that he handedit over to the Designated Court and that the Court returned to the Police as there was no infrastructure for safe custody. On the basis of the affidavit it is submitted that no sanction was made. In criminal justice the quantum of evidence at the time of issuing the process must be the same as at the time of taking cognizance. Relying on Vadilal Panchal v. Dattatraya Dulaji Ghadigaonkar17 it is urged that under Section 202 of the Code a plea of self-defence could be raised and the decision invited at the time of issuing process.

31.As regards the exercise of inherent jurisdiction in quashing under section 482 of the Code it could be exercised in three cases:

(i) When there is a legal bar to prosecution.

(ii) The FIR and the complaint do not make out the offence.

(iii) When there is no legal evidence.

The High Court can interfere during investigation

(i) not under the inherent powers but under the Constitution of India;

(ii)after cognizance before charges are framed.

This can be done both under the inherent powers and Article 226 of the constitution of India:

(a) on account of the existence of legal bar or where there is no material for issuing process or action;

(b) there is not enough/no legal evidence;

(c) after charges are framed when there is legal evidence to sustain the charges.

16 AIR 1948 PC 82, 83 : 52 CWN 325 : 49 Cri LJ 261 17 AIR 1960 SC 11 13 : 1960 Cri LJ 1499

32. It is incorrect to contend that the High Court has appreciated the evidence. In order to determine whether the bar has been removed, it can examine the same. As a matter of fact, this Court in State of Maharashtra v. Abdul Hamid Haji Mohammed1 (SCC at p. 669) has held that mens rea is necessary in deciding the abetment. Therefore, primarily the Court has to decide whether an order of sanction exists or not.

33. The sanction in this case is void for the following reasons:

(a)The order of sanction states that the Commissioner of Police "accords sanction for prosecution". Legally speaking, it should be for proceeding under TADA and not for prosecution. It has been so laid down in Ram Kumar v. State of Haryana Is.

(b)There is non-application of mind. In Gokulchand Dwarkadas Morarka16 it is held that "there must be application of mind" which ratio has been accepted by this Court in Major Som Nath v. Union of India 19.

Sections 3 and 4 of TADA contemplate various kinds of offences. Section 3(1) speaks of different types of offences. Therefore, there must be application of mind as to what offences are alleged.

(c)The sanction order says "and/or". This is bad in law. It has been so laid down in Major Som Nathl9. The sanctioning authority must conform to the same standard as the court and decide conspiracy against each accused. The leading case on this aspect is Alvin Krulewitch v. United States20. Relying on this ruling it is submitted the Court must insist on an admissible evidence against each accused. To the same effect is Walli Mohammad v. King21.

34.If the bombs are intended for self-defence there is no mens rea. Consequently, there is no offence under TADA. Support is derived for this proposition from Niranjan Singh Karam Singh v. Jitendra

Bhimraj Bijjaya 1' (SCC at pages 87-

88). Where preparations are made to meet a communal frenzy, the respondents cannot be prosecuted under TADA.

35. Upholding the validity of the TADA this Court in Kartar Singh v. State of Punjab9 held that the Act falls under Entry I of List I, i.e., Defence of India. That being so, the offences under Sections 3 and 4 must relate to sovereignty and integrity of India. In Hitendra Vishnu Thakur22 this Court in dealing with the definition of 'terrorism' held: Unless the Act complained or falls strictly within the letter and spirit of Section 3(1) of TADA and is committed with the intention as envisaged by that section the accused cannot 1 (1994) 2 SCC 664: 1994 SCC (Cri) 595 18 (1987) 1 SCC 476, 478 : 1987 SCC (Cri) 190 16AIR 1948 PC 82, 83 :52 CWN 325: 49 Cri LJ 261 19(1971) 2 SCC 387 : 1971 SCC (Cri) 559 : AIR 1971 SC 1910 20 93 L Ed 790, 795 : 336 US 440 (1948) 21 AIR 1949 PC 103, 104 :50 Cri LJ 340 13 (1990) 4 SCC 76, para 7 : 1991 SCC (Cri) 47 9(1994) 3 SCC 569 : 1994 SCC (Cri) 899 : JT (1994) 2 SC 423 22 Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 SCC 602 1994 SCC (Cri) 1087 be tried and convicted. Hence, it is submitted the order of sanction must be examined in this light. The Designated Court must record the motive as postulated under Section 3(1). If, therefore, the dominant intention is selfdefence, the matter will have to be viewed only from that angle. In Sanjay Dutt v. State through CBI23 this Court held that the accused could prove in relation to offences which do not require mens rea, an innocent possession will not bring the offence under Section 5. Therefore, it is submitted in cases where mens rea is required like Sections 3 and 4, it must relate to sovereignty and integrity of India. Hence, the Court will have to determine the dominant intention as laid down in Mathuri v. State of Punjab24. In this case, the dominant intention is self-defence. Therefore, it will not constitute an offence under TADA. In the `harge-sheet/police report, the ingredients of neither Sections 3 nor 4 are mentioned. The documents, if taken into consideration, refer to two confessions. They would only point to selfdefence.

36.Mr Dipankar Ghosh, learned Senior Counsel, appearing on behalf of Rashid Khan, first respondent, in Criminal Appeal No. 328 of 1994, adopting the argument of Mr Ram Jethmalani would urge that there is no valid sanction under Section 3(1) in this case.

37.It is the duty of the sanctioning authority to apply its mind. In Indu Bhusan Chatterjee v. State25 it has been so laid down. The order according sanction must give reasons. The necessity for giving reasons has been laid down in Uma Charan v. State of M.p26 and again in Siemens Engg. & Mfg. Co. of India Ltd. v. Union of India27. With regard to motive and intention, the learned counsel cites Black's Law Dictionary.

38.Therefore, in this case, the intention was not to terrorise. On the contrary, it is only by way of self- defence. Therefore, no exception could be taken to the impugned judgment.

39. Having regard to the arguments the following points arise for our determination:

1.The scope of the jurisdiction of the High Court under Article 226 to interfere with:

(a) according sanction; and

(b) taking cognizance.

2. Whether the order of sanction is bad in law for:

(a) non-application of mind;

(b) that it does not give reasons;

(c) that there is no mention that there is a breakdown of law enforcement machinery;

23 (1994) 5 SCC 410 : 1994 SCC (Cri) 1433 :(1994) 3 Scale 24 (1964) 5 SCR 916: AIR 1964 SC 986 :(1964) 2 Cri LJ 57 25 AIR 1955 Cal 430 26 (1981) 4 SCC 102, 105 1981 SCC (L&S) 582: (1982) 1 SCR 353, 358 27 (1976) 2 SCC 981, 986 AIR 1976 SC 1785, 1789

(d) it does not speak of conspiracy.

40. Section 20-A of TADA with regard to taking cognizance of offence postulates under sub-section (2), that no court can take cognizance of any offence under this Act without the previous sanction of the Inspector General of Police, or as the case may be, the Commissioner of Police.

41. Such a provision relating to sanction is not new under criminal jurisprudence. Section 132 of the Code provides for sanction. This section is a bar to the prosecution of police officers under Sections 129, 130 or 131. The object is to protect responsible public servants against the institution of possible vexatious and mala fide criminal proceedings for offences alleged to be committed by them while they are acting or purported to act as such in the discharge of their official duty.

42. Section 197 contains a similar sanction. The object of the section is to provide for two things, namely, (1) to protect government servants against institution of vexatious proceedings, and (2) to secure the well-considered opinion of a superior authority before a prosecution is lodged against them.

Similar provisions are found in other enactments, for example, Prevention of Corruption Act, 1947.

43. Similarly, when Section 20-A(2) of TADA makes sanction necessary for taking cognizance - it is only to prevent abuse of power by authorities concerned. It requires to be noted that this provision of Section 20-A came to be inserted by Act 43 of 1993. Then, the question is as to the meaning of taking cognizance. Section 190 of the Code talks of cognizance of offences by Magistrates. This expression has not been defined in the Code. In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word 'cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of

proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons.

44.Cognizance is defined in Wharton's Law Lexicon 14th Edn., at page 209. It reads:

> "Cognizance (Judicial), knowledge upon which a judge is bound to act without having it proved in evidence: as the public statutes of the realm, the ancient history of the realm, the order and course of proceedings in Parliament, the privileges of the House of Commons, the existence of war with a foreign State, the several seals of the King, the Supreme Court and its jurisdiction, and many other things. A judge is not bound to take cognizance of current events, however notorious, nor of the law of other countries."

It has, thus, reference to the hearing and determination of the case in connection with an offence. By the impugned judgment the High Court has quashed the orders of sanction and the Designated Court taking cognizance in the matter.

45.Before we go into the merits it is desirable to determine the limitations of power of the High Court under Article 226 in this regard. In the State of Maharashtra v. Abdul Hamid Haji Mohammed1 after holding that the High Court in writ petition under Article 226 can interfere only in extreme cases where charges ex facie do not constitute offence under TADA it was held in paragraph 7 at pages 669-70 as under:

> "The first question is : Whether the High Court was empowered in the present case to invoke its jurisdiction under Article 226 of the Constitution to examine the correctness of the view taken by the Designated Court and to quash the prosecution of the respondent under the TADA Act? Shri Jethmalani contended, placing reliance on the decisions in R.P Kapur v. State of Punjab28 and State of Haryana v. Bhajan Lal2 that in the facts of this case, the High Court had such a jurisdiction since there is no accusation against the respondent in the charge-sheet filed in the Designated Court which, if believed, must result in his conviction for an offence punishable under TADA Act. We are not impressed by this argument of Shri Jethmalani. It is no doubt true that in an extreme case if the only accusation against the respondent prosecuted in the Designated Court in accordance with the provisions of TADA Act is such that ex facie it cannot constitute an offence punishable under TADA Act, then the High Court may be justified in invoking the power under Article 226 of the Constitution on the ground that the detention of the accused is not under the provisions of TADA Act. We may hasten to add that this can happen only in extreme cases which would be rare and that power of the High Court is not exercisable in cases like the present where it may be debatable whether the direct accusation made in conjunction with the attendant circumstances, if proved to be true, is likely to result in conviction for an offence under TADA Act. The moment there is a debatable area in the case, it is not amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution and the gamut of the procedure prescribed under

TADA Act must be followed, namely, raising the objection before the Designated Court and, if necessary, challenging the order of the Designated Court by appeal in the Supreme Court as provided in Section 19 of TADA Act. In view of the express provision of appeal to the Supreme Court against any judgment, sentence or order, not being an interlocutory order of a Designated Court, there is no occasion for the High Court to examine merits of the order made by the Designated Court that the Act applies.

1 (1994) 2 SCC 664 1994 SCC (Cri) 595 28 (1960) 3 SCR 388 AIR 1960 SC 866: 1960 Cri LJ 1239 2 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426 We have no doubt that in the present case wherein the High Court had to perform the laboured exercise of scrutinising the material containing the accusation made against the respondent and the merits of the findings recorded by the Designated Court holding that the provisions of TADA Act were attracted, there was sufficient indication that the writ jurisdiction of the High Court under Article 226 of the Constitution was not available. The ratio of the decisions of this Court in R.P Kapur28 and Bhajan Lal2 on which reliance is placed by Shri Jethmalani, has no application to the facts of the present case. There was thus no justification for the High Court in the present case to exercise its jurisdiction under Article 226 of the Constitution for examining the merits of the controversy much less for quashing the prosecution of Respondent Abdul Hamid in the Designated Court for offences punishable under TADA Act."

(emphasis supplied) From the above quotation it is clear if there is a debatable area it is not amenable to writ jurisdiction under Article 226 of the Constitution of India and the gamut of the procedure prescribed under TADA must be followed including challenging the order of the Designated Court under Section

19. It is also clear that the High Court cannot perform a laboured exercise of scrutinising the materials.

46.In State of Haryana v. Bhajan Lal2 where a writ petition was filed to quash the first information report and also of the writ of prohibition restraining the police authority from proceeding further into the investigation, the High Court concluded that the allegations do not constitute a cognizable offence. It further held that the power of quashing a criminal proceeding should be exercised sparingly and with circumspection and, that too, in the rarest of rare cases; that the Court will not be justified in embarking upon an inquiry as to the reliability or genuineness or otherwise of the allegations made in the first information report or the complaint. It was further held that where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in the entirety, do not prima facie constitute any offence or make out a case against the accused, then alone the proceeding could be quashed.

47.In State of Bihar v. PP Sharma3 (at SCC pages 224-225, headnote) it is held:

"At a stage when the police report under Section 173 CrPC has been forwarded to the Magistrate after completion of the investigation and the material collected by the Investigating Officer is under the gaze of judicial scrutiny, the High Court would do well to discipline itself not to undertake quashing proceedings in exercise of its inherent jurisdiction. In this case the High Court fell into grave error in appreciating the documents and affidavits produced before it by treating them as 28 (1960) 3 SCR 388: AIR 1960 SC 866: 1960 Cri LJ 1239 2 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426 3 1992 Supp (1) SCC 222: 1992 SCC (Cri) 192 evidence, delving into the disputed questions of fact in its jurisdiction' under Articles 226/227 and pronouncing the respondents to be innocent and quashing the criminal proceedings by converting itself into a trial court. This was not at all a case where High Court should have interfered in the exercise of its inherent jurisdiction. The appreciation of evidence is the function of the criminal courts the Special Judge was seized of the matter. He had heard the arguments on the question of cognizance and had reserved the orders. The High Court did not even permit the Special Judge to pronounce the orders. The High Court, under the circumstances, could not have assumed jurisdiction and put an end to the process of investigation and trial provided under the law.

Entertaining the writ petitions against charge-sheet and considering the matter on merit on the guise of prima facie evidence to stand an accused for trial amounts to pre- trial of a criminal trial under Article 226 or 227 even before the competent Magistrate or the Sessions Court takes cognizance of the offence. The charge-sheet and the evidence placed in support thereof form the base to take or refuse to take cognizance by the competent court. It is not the case that no offence had been made out in ,the charge- sheets and the first information report. Grossest error of law has been committed by the High Court in making pre-trial of a criminal case in exercising its extraordinary jurisdiction under Article 226."

48. In Maninder Kaur v. Rajinder Singh4 (at SCC page 26, para 4) this Court observed thus:

"The matter is plain and simple as on the statement of complainant and her two witnesses, the learned Magistrate came to the opinion that there was sufficient ground for proceeding in the complaint and he issued process against the accused-respondents. Now at that stage to judge the sufficiency or otherwise of the ground for proceeding was beyond the power of the High Court so as to quash the proceedings under Section 482, CrPC. The value to be attached to the statement made by the appellant under Section 164, CrPC was to be examined at the enquiry at the pre- charge stage and possibly at the trial, if charge was to be framed."

49.In Radhey Shyam Khemka v. State of Bihar5 (at SCC pp. 59- 60, para 8) it was held thus :

"The complaint made by the Deputy Secretary to the Government of India to the CBI mentions different circumstances to show that the appellants did not intend to carry on any business. In spite of the rejection of the application by the Stock Exchange,

Calcutta they retained the share moneys of the applicants with dishonest intention. Those allegations were investigated by the CBI and ultimately chargesheet has been submitted. On basis of that charge-sheet cognizance has been taken. In such a situation the quashing of the prosecution pending 4 1992 Supp (2) SCC 25 : 1992 SCC (Cri) 5(1993) 3 SCC 54: 1993 SCC (Cri) 591 against the appellants only on the ground that it was open to the applicants for shares to take recourse to the provisions of the Companies Act, cannot be accepted. It is a futile attempt on the part of the appellants, to close the chapter before it has unfolded itself. It will be for the trial court to examine whether on the materials produced on behalf of the prosecution it is established that the appellants had issued the prospectus inviting applications in respect of shares of the Company aforesaid with a dishonest intention, or having received the moneys from the applicants they had dishonestly retained or misappropriated the same. That exercise cannot be performed either by the High Court or by this Court. If accepting the allegations made and charges levelled on their face value, the Court had come to conclusion that no offence under the Penal Code was disclosed the matter would have been different. This Court has repeatedly pointed out that the High Court should not, while exercising power under Section 482 of the Code, usurp the jurisdiction of the trial court. The power under Section 482 of the Code has been vested in the High Court to quash a prosecution which amounts to abuse of the process of the court. But that power cannot be exercised by the High Court to hold a parallel trial, only on basis of the statements and documents collected during investigation or inquiry, for purpose of expressing an opinion whether the accused concerned is likely to be punished if the trial is allowed to proceed."

50.In State of Bihar v. Murad Ali Khan6 (at SCC pages 662- 663, para 15)this Court held:

"It is trite that jurisdiction under Section 482 CrPC, which saves the inherent power of the High Court, to make such orders as may be necessary to prevent abuse of the process of any court or otherwise to secure the ends of justice, has to be exercised sparingly and with circumspection. In exercising that jurisdiction the High Court should not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence or not. That is the function of the trial Magistrate when the evidence comes before him. Though it is neither possible nor advisable to lay down any inflexible rules to regulate that jurisdiction, one thing, however, appears clear and it is that when the High Court is called upon to exercise this jurisdiction to quash a proceeding at the stage of the Magistrate taking cognizance of an offence the High Court is guided by the allegations, whether those allegations, set out in the complaint or the charge-sheet, do not in law constitute or spell out any offence and that resort to criminal proceedings would, in the circumstances, amount to an abuse of the process of the court or not."

(emphasis supplied)

51. In Municipal Corpn. of Delhi v. Ram Kishan Rohtagi29 (at SCC p. 6, para 10) it is reiterated:

6 (1988) 4 SCC 655 : 1989 SCC (Cri) 27 29 (1983) 1 SCC 1 : 1983 SCC (Cri) 115 "It is, therefore, manifestly clear that proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are, without adding or subtracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of its powers under Section 482 of the present Code." (emphasis supplied)

52. In Municipal Corpn. of Delhi v. Purshotam Dass Jhunjunwala30 (at SCC p. 10, para 5) it was further made clear:

> "As to what would be the evidence against the respondents is not a matter to be considered at this stage and would have to be proved at the trial. We have already held that for the purpose of quashing the proceedings only the allegations set forth in the complaint have to be seen and nothing further."

53. In this legal background we will analyse the facts as contained in the charge-sheet:

1. Accused Mohd. Rashid Khan and his relatives reside at 43, B.B. Ganguly Street, Calcutta-12. He used to maintain a group of antisocials. Local people were scared of him and his men. No one dared to object or raise voice against them as all knew the consequences.

2. The said Mohd. Rashid Khan had his office in Premises No. 266, B.B. Ganguly Street.

3.Accused Rashid Khan, a Satta Bookie, used to run his satta business inside Satta Gali at Premises Nos. 266 and 267, B.B. Ganguly Street.

4. The investigation revealed that since last 5/6 years Accused 3 Pannalal Jaysoara had been manufacturing bombs on the first floor of 267, B.B. Ganguly Street as and when required by Accused 1 Md. Rashid Khan, the Satta Bookie. Kalloo @ Sarafaraz Khan, a henchman of Accused 1 picked up Accused 3 Pannalal Jaysoara first for preparing bombs for their group and through accused Kalloo @ Sarafaraz Khan, Accused 3 Pannalal Jaysoara was introduced to Accused 1 Md. Rashid Khan, Accused 2 Abdul Aziz, Accused 7 Lala @ Parwez Khan, accused Zakrin and Accused 8 Parvez Imtiaz Khan. It also transpired that accused Pannalal used to take cash Rs 100 regularly every week either from accused Rashid Khan or from accused Kalloo @ Sarafaraz Khan. Accused 3 Pannalal used to receive the said money from the office of accused Rashid Khan at 266, B.B. Ganguly Street.

5. This bomb-manufacturing matter was supervised mainly by accused Kalloo and accused Lala (absconding) and sometimes by accused Imtiaz Khan (absconding). Accused Md. Rashid Khan, Abdul Aziz and Zakrin Khan used to visit the first floor of 267, B.B. Ganguly Street, also for the same purpose.

30 (1983) 1 SCC 9: 1983 SCC (Cri) 123

6. After the communal riot in recent past between Hindus and Muslims in Bombay, Accused 1 Md. Rashid Khan became very worried for the Muslims because, according to him, a large number of Muslims died at Bombay and the local Government did nothing for their community and he apprehended that such sort of communal riot might take place in Calcutta and Government may not stand by the side of Muslims as in Bombay as a result many Muslims would die. As such accused Md. Rashid Khan hatched a conspiracy with his henchmen viz. accused Kalloo, Lala, Zakrin, Khalid, Murtaza, Aziz, Gulzar etc. to procure huge quantity of explosive materials for preparing large number of bombs with a view to kill the Hindus in Calcutta by using those bombs through Muslim brothers. (emphasis supplied)

7. Pursuant to that conspiracy Accused 5 was entrusted with the task of procuring explosive materials. For this, Accused 1, Rashid Khan, paid money to Accused 5 Md. Khalid through accused Kalloo. Within a few days, Accused 5 Khalid, with the help of accused Hassu procured huge quantities of explosive materials and brought those to the first floor of 267, B.B. Ganguly Street, in two drums and two bags and kept the same there with the help of accused Murtaza, Gulzar, Tenia and Ukil. Again on 16-3-1993 accused Md. Khalid and accused Hassu brought explosive materials in two bags and with accused Gulzar and Mustafa @ Murtaza came near the Satta Gali at about 20/20.30 hrs. There with the help of accused Tenia, Ukil and Khurshid brought those bags inside the Khaskhas Godown on first floor of 267, B.B. Ganguly Street through Satta Gali. At that time there were some other persons present in Satta Gali who saw this. Thereafter accused Murtaza, Khalid and Hassu and Khurshid kept two drums and four bags together and placed a plastic sheet. Accused Khalid and Hassu opened those bags and brought out explosive materials and some small tin containers. Then accused Tenia, Ukil, Hassu and Khurshid started mixing the explosive materials while accused Gulzar, Khalid and Murtaza started straining the materials. Accused Gulzar tried to open the lid of a drum but he was asked by accused Khalid and accused Murtaza not to do so. As such he did not open the lid of the drum. Soon after accused Nisar Gulzar, Khalid and Murtaza were straining those explosive materials. Accused Lala, Kalloo and Imtiaz came inside the first floor of 267, B.B. Ganguly Street and supervised this manufacturing process. Owner of Khaskhas Godown, E.M. Naushad and his men were present inside the first floor of the said building i.e. inside his godown-cum-residential place at that time. At about 21.00/21.30 hours of that night, an electrician of that locality who used to sleep in the night inside the Khaskhas Godown regularly also came there but being rebuked by accused Murtaza he left the Khaskhas Godown. Some other people who used to stay during night were also present inside the Khaskhas Godown on that night.

8. Thereafter at intervals accused Gulzar and accused Khalid left that house for their destinations. All the street lights and lights inside Satta Gali and lights on the first floor of 267, B.B. Ganguly Street and its surrounding areas were burning. A few persons were present inside Satta Gali then. On the same morning, i.e., 16-3-1993, accused Kalloo with accused Imtiaz went to the place of accused Pannalal Jaysoara and asked him to come to their place at Bowbazar Street for preparing bombs. At about 22.00/22.30 hours, on that day, accused Pannalal came to the office of accused Md. Rashid Khan at 266, B.B. Ganguly Street. There he met accused Aziz, Rashid, Lala and Zakrin who took him to the "Khaskhas Godown-cum-Factory" located on the first floor of 267, B.B. Ganguly Street through Satta Gali where accused Murtaza, Tenia, Nisar, Ukil, Hassu and Khurshid were found preparing bombs and there was huge quantity of the mixture of explosive materials over a

plastic sheet on the first floor of 267, B.B. Ganguly Street besides a number of empty small tin containers.

9. At about 23.00/23.30 hours on 16-3-1993, accused Pannalal, after preparing a few bombs came down and went out, being followed by a witness. Accused Zakrin was found standing near the Satta Gali and accused Md. Rashid Khan was then talking with two persons of Haberly Lane, standing on the pavement in front of 266, B.B. Ganguly Street. At that time, accused Pannalal went to accused Rashid Khan and told him that it would take long time, even up to the next day evening, to prepare bombs - with all such huge quantity of explosive materials and asked accused Rashid Khan as to the necessity of preparing such large number of bombs. Accused Rashid Khan answered him in presence of those two persons as to why large number of bombs were necessary referring to recent past Bombay Riot.

10. Then Accused 1 Mohammed Rashid Khan asked Accused 3, Pannalal, to start the work of preparation of bombs and thereafter went towards his hotel "Shahi Darbar". After departure of accused Rashid Khan, Accused 3 Pannalal also left that place for his residence.

11. At about 23.59 hours on 16-3-1993 the explosion took place resulting in death of 69 persons and 46 persons injured. Due to this explosion the houses either collapsed or got damaged.

The facts also disclose that confessions were made by Accused 3, Pannalal and Accused 6, Md. Gulzar under Section 164 of the Code before the Magistrate.

54. Now, we come to the order granting sanction. The order of sanction by the Commissioner of Police is dated 11-6- 1993. It inter alia says:

> "WHEREAS, it appears from all the reports, recorded statements of witnesses, confessional statement of accused persons viz. Pannalal Jaysoara and Md. Gulzar, the seizure lists, opinion of experts, Order No. 4509-P dated 11- 6-1993 from the Joint Secretary to the Government of West Bengal case diary etc. in connection with Bowbazar PS. C/No. 84 dated 17-3-1993 under Sections 120-B/436130213071- 326 IPC, under Sections 3 and 5 of Explosive Substances Act, under Section 3 and TADA Act, placed before me, that on 16-3-1993 at about 23.59 hours there was an explosion due to blast of bombs and explosive materials which caused destruction of Premises No. 267, B.B.

Ganguly Street, Calcutta-12 and damage to Premises Nos. 266, 268-A, 43/3, 42/1, B.B. Ganguly Street, 1, Haberly Lane, 37, Robert Street, Calcutta-12 etc. and death of 69 persons and injuries to large number of people." (emphasis supplied) Thereafter, it proceeds to say that the accused:

> "... with intent to strike terror in the people and/or to strike terror in a particular section of the people and/or to alienate a particular section of people, to adversely affect the harmony amongst the Hindus and Muslims were engaged in preparing and/or causing to be prepared, bombs, with explosive substances and highly

explosive materials by procuring them, which acts were likely to cause death or injuries to persons and loss of or damage to and/or destruction of properties and thereby committed terrorist acts, (emphasis supplied) AND WHEREAS it appears, from the aforesaid records and documents, that the aforesaid persons conspired and were preparing to commit disruptive activities.

AND WHEREAS, it appears after due consideration of all the records, documents etc. mentioned earlier, that the aforesaid persons by their acts have committed offences punishable under Sections 3 and 4 of the Terrorist and Disruptive Activities (Prevention) Act, 1993.

(emphasis supplied) Now, therefore, on careful consideration of all the facts, materials and circumstances of the case and in exercise of the powers conferred upon me by Section 20-A(2) of the Terrorist and Disruptive Activities (Prevention) Act, 1993, I, Shri Tushar Kanti Talukdar, Commissioner of Police, Calcutta, do hereby accord sanction for prosecution under Sections 3 and 4 of the Terrorist and Disruptive Activities (Prevention) Act, 1993 of the following persons, viz., (1) Md. Rashid Khan, son of late Ramzan Khan, of 43, B.B. Ganguly Street, Calcutta- 1 2."

55. On this, the Designated Court passed the following order on 14-6-1963:

"Received charge-sheet against the accused (1) Md. Rashid Khan, (2) Abdul Aziz C.K., (3) Pannalal Jaysoara, (4) Md. Mustafa @ Murtaza @ Murtaja, (5) Md. Khalid, (6) Md. Gulzar, (7) Md. Parvez Khan @ Parwez @ Lala and (8) Imtiaz Khan under Sections 120-

B/436/302/307/326 IPC, under Sections 3 and 5, E.S. Act and under Sections 3 and 4, TADA Act. PP Shri Sisir Ghosh prays for taking cognizance. Heard. Perused the police papers. Cognizance taken. Accused 7 and 8 are reportedly absconding. (emphasis supplied) Issue warrant of arrest against accused Parvez Khan @ Md. Parvez Khan @ Parwez @ Lala and accused Imtiaz Khan. Fix 10-7-1993 for E.R. to date."

56.The High Court in the impugned judgment criticises the order of sanction. It inter alia holds :

"It has been specifically alleged that no sanction order was given by the Commissioner of Police - Respondent 3 before the Designated Court took cognizance on 14-6-1993. Respondent 3 has not affirmed an affidavit denying the said allegations made by the petitioner. The said affidavit affirmed by S.K. Sanyal also does not disclose that he was authorised to affirm the affidavit on behalf of the Commissioner of Police - Respondent 3. There is, therefore, no specific denial by the Commissioner of Police of the averment in the writ petition that no sanction had been granted by him prior to the Designated Court taking cognizance.

> It is significant that although it is alleged in the said affidavit of S.K. Sanyal that he produced the case diary including the sanction order to the Designated Court and the Designated Court returned the same to him for making copies as the Court did not have the necessary infrastructure, the same is not recorded in the proceeding before the Designated Court nor there is any mention in the sanction order filed in Court and subsequently returned as appears from the record of the Designated Court."

It further held:

> "Even assuming that the original had been returned to the prosecution for making copies, the said fact should have also been recorded in the court's record. In the absence of such recording of fact question may arise whether the said sanction order was placed before the Designated Court.
>
> * * * ... it will be noticed that the Police Report and this last page (which is page no. 14) is much lighter than the type impression in the preceding 13 pages of the said report. (emphasis supplied) In my view this aspect of the matter is not so vital so as to affect the validity of the sanction order or for the purpose of taking cognizance and the writ court should not enter into the aforesaid controversy. It has, therefore, been suggested that the sanction is in respect of non-existent offences and that it is not a sanction in respect of any offence under the TADA Act of 1987 as required by Section 20-A(2) of the Act and that it is not a sanction in respect of offences under Sections 3 and 4 of the TADA Act of which cognizance was taken by the Designated Court on 14-6-1993. The sanction in the aforesaid manner according to the learned advocate for the petitioner shows complete nonapplication of mind by the Commissioner of Police while making that order and according to him the order of sanction is accordingly, bad."

It further proceeds to hold that the order of sanction suffers from the following infirmities:

> (1) No intention to kill Hindus has been mentioned.
>
> (2) Facts for taking action under Section 4 have not been set out.
>
> (3) Threat to sovereignty and integrity has not been stated.
>
> (4) Confession cannot be taken into account for inferring the intention.
>
> (5) There is no whisper of an allegation of conspiracy.
>
> (6) There is no mention that ordinary machinery has broken down.

After holding so, the order of the Designated Court dated 14-6-1993 is quashed on the following grounds:

(1) Order taking cognizance does not show that the sanction to prosecute was considered. Reasons for taking cognizance have not been recorded.

(2) The order does not show that confessions were perused.

(3) The Court while taking cognizance cannot refer to any material other than police report.

(4) Intention to commit offence under TADA cannot be inferred as the motive was to defend Muslims.

57. The High Court, after quashing the order of sanction and taking cognizance ordered as follows:

"This order, however, will not prevent the respondent-State to take steps for making any fresh application for sanction before the Commissioner of Police on the basis of fresh materials, if there be any, and accordingly to apply for taking of cognizance before the Designated Court on the basis of such fresh materials if the same is permissible and if the respondent is so advised in accordance with law."

From the above analysis of the judgment, it is clear what actually the High Court has done is to appreciate the evidence at the pre-trial stage.

58.The affidavit of Mr Tushar Kanti Talukdar, Commissioner of Police, Calcutta, which came to be filed pursuant to the permission granted by the Court, categorically states that sanction was accorded by him. The Commissioner had gone through the voluminous records and came to the conclusion on his own. It is further stated by him as under:

"I state that I had examined in particular the statements of witnesses indicating that the accused persons along with others conspired to create disharmony between the two major communities and over a period had systematically been collecting huge quantities of explosive substances to use them whenever needed. In fact, on 16-3-1993 one instalment of two big bags of explosives had arrived at the place and were kept in the khaskhas room of 267, B.B. Ganguly Street. These two bags were in addition to two big bags and two drums that had arrived earlier and stored in the same room. The statements of witnesses and confessional statements of two accused clearly indicate that the accused had no faith in the established Government. The accused men had openly declared that the Government had done nothing to protect the Muslims against the Hindus in Bombay riots and in Calcutta the Government will also do nothing to protect the Muslims. It was declared that thus it was necessary to arm the Muslims with huge quantities of bombs so that they could use those for their protection. The statements and confessions indicate that bombs were being manufactured on that day to attain such object. One of the confessing accused, who is an expert in manufacturing bombs, had stated in his confession that he was told by Rashid Khan to prepare bombs from such huge quantities of explosive substances.

> The accused in his confession also stated that he told Rashid Khan that preparing bombs out of such huge quantities of explosives would not only take whole night of 16th March but would also need to next day till near about the evening. The materials also indicate that on that day while he left after preparing some bombs, others continued to manufacture bombs out of explosive substances that had been collected. I was satisfied that the facts emerged did call for prosecution under Sections 3 and 4 of TADA. " (emphasis supplied)

59.It should also be stated, at this stage, that the High Court had overlooked the fact that Mr Sujit Kumar Sanyal had sworn to the earlier affidavit as the Head of the Special Investigating Team which has also been mentioned by the Commissioner. Merely because of the failure of the Court to mention that it had perused the order of sanction while taking cognizance cannot lead to the conclusion that the existence of the order of sanction could be doubted.

60.The finding that there was no order of sanction is not correct factually. The affidavit of Sujit Kumar Sanyal clearly states as under:

> "I say that on 14-6-1993 before the learned Designated Court had passed the order taking cognizance I had placed all the papers including the two sanctions and the statements recorded under Section 161 of the Code before the Court. I say that it was well within the competence of the learned Chief Metropolitan Magistrate to be informed that investigation under Sections 3 and 4 of TADA Act was being carried on and to correct the records by adding Sections 3 and 4 of the said Act." Again in paragraph 12, the affidavit proceeds to state:
>
> "I further say that it was only in course of the investigation that materials indicating commission of offences under Sections 3 and 4 of the said Act of 1987 had transpired. I further say that after the cognizance had been taken on the basis of the charge-sheet and the materials collected after investigation being the materials in the case diary which include two sanctions and the statements recorded under Section 161 of the Code and the documents seized and various seizure lists the learned Designated Court issued warrant of arrest against the absconding accused persons."
>
> Paragraph 13 mentions as follows: "I say that the sanction under the said TADA 1993 was granted on 11-6-1993 being No. 1 by the Commissioner of Police, Calcutta and under the Explosive Substances Act on that day being 4509-P by the Government of West Bengal. I further say that the charge-sheet that was filed on 14-6-1993 has specifically mentioned that such sanction had already been obtained. It is categorically denied that the initiation and continuation of the said criminal proceeding against the petitioner and before the Designated Court under the TADA and said order dated 14-6-1993 is illegal. It is not necessary to mention in the order sheet that sanction was granted. It is emphatically denied that no sanction was given by Respondents 3 and 4 or that the law enjoins a duty upon the Designated Court to record by an order the fact of having received such sanction."

61.There is no justification on the part of the High Court to ignore this affidavit because the Commissioner of Police, Calcutta had sworn to the fact that a Special Investigation Team had been set up on 18-3-1993 which was headed by Sujit Kumar Sanyal.

62.The order of sanction, on the face of it, shows that the sanctioning authority had perused the police papers. The High Court had to necessarily accept these averments on their face value. The correctness or otherwise of the statement could be gone into only at the time of trial. This Court in State of Bihar v. PP Sharma, IAS3 already referred to, held as under: (SCC pp. 250-25 1, paras 27, 28 and 3 1) "The sanction under Section 197 CrPC is not an empty formality. It is essential that the provisions therein are to be observed with complete strictness. The object of obtaining sanction is that the authority concerned should be able to consider for itself the material before the Investigating Officer, before it comes to the conclusion that the prosecution in the circumstances be sanctioned or forbidden. To comply with the provisions of Section 197 it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is desirable that the facts should be referred to on the face of the sanction Section 197 does not require the sanction to be in any particular form. If the facts constituting the offence charged are not shown on the face of the sanction, it is open to the prosecution, if challenged, to prove before the court that those facts were placed before the sanctioning authority. It should be clear from the form of the sanction that the sanctioning authority considered the relevant material placed before it and after a consideration of all the circumstances of the case it sanctioned the prosecution.

In the present case the investigation was complete on the date of sanction and police reports had been filed before the Magistrate. The sanctioning authority has specifically mentioned in the sanction order that the papers and the case diary were taken into consideration before granting the sanction. Case diary is a complete record of the police investigation. It contains total material in support or otherwise of the allegations. The sanctioning authority having taken the case diary into 3 1992 Supp (1) SCC 222: 1992 SCC (Cri) 192 consideration before the grant of sanction it cannot be said that there was non-application of mind on the part of the sanctioning authority. It is nobody's case that the averment in the sanction order to the effect that case diary was taken into consideration by the competent authority, is incorrect. We, therefore, do not agree with the finding of the High Court and set aside the same.

(emphasis supplied) Finally, we are at a loss to understand as to why and on what reasoning the High Court assumed extraordinary jurisdiction under Articles 226/227 of the Constitution of India at a stage when the Special Judge was seized of the matter."

In view of this decision, the approach of the High Court under Article 226 is clearly wrong.

63. It is true, as contended by Mr Ram Jethmalani, there must be valid sanction, otherwise there is a bar to take cognizance. In Gokulchand Dwarkadas Morarka v. King 16 it was observed thus: (AIR at p. 84) "The sanction to prosecute is an important matter; it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction. They are not, as the High Court seem to have thought, concerned merely to see that the evidence discloses a prima facie case against the person sought to be prosecuted. They can refuse

sanction on any ground which commends itself to them, for example, that on political or economic grounds they regard a prosecution as inexpedient. Looked at as a matter of substance it is plain that the Government cannot adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of the facts of the case. Nor, in their Lordships' view, is a sanction given without reference to the facts constituting the offence a compliance with the actual terms of clause 23."

64. Reliance is placed by the learned counsel on Niranjan Singh K.S. Punjabi v. Jitendra Bhimraj Bijjaya13 (SCC at page 83) wherein at para 5 this Court observed thus:

> "Section 227, introduced for the first time in the new Code, confers a special power on the Judge to discharge an accused at the threshold if ,upon consideration' of the record and documents he considers 'that there is not sufficient ground' for proceeding against the accused. In other words his consideration of the record and document at that stage is for the limited purpose of ascertaining whether or not there exists sufficient grounds for proceeding with the trial against the accused. If he comes to the conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228, if not he will discharge the accused. It must be remembered that this section was introduced in the Code to 16 AIR 1948 PC 82, 83 :52 CWN 325 :49 Cri LJ 13 (1990) 4 SCC 76, para 7 : 1991 SCC (Cri) 47 avoid waste of public time over cases which did not disclose a prima facie case and to save the accused from avoidable harassment and expenditure." (emphasis supplied)

65.Equally, reliance is placed on State of Karnataka v. L. Muniswamy31 In para 10, p. 704, it is held as under:

> "[I]t is wrong to say that at the stage of framing charges the court cannot apply its judicial mind to the consideration whether or not there is any ground for presuming the commission of the offence by the accused. As observed in the latter case, the order framing a charge affects a person's liberty substantially and therefore, it is the duty of the court to consider judicially whether the material warrants the framing of the charge. It cannot blindly accept the decision of the prosecution that the accused be asked to face a trial."

66.In our considered view, certainly the Designated Court could do all these at the time of framing of charges and not the High Court under Article 226, as has been done in the instant case.

67.We are not in a position to accept the submissions of the learned counsel for the respondent that in order to find out whether a valid sanction existed, the High Court had appreciated the findings.

68.Equally, much cannot be said of the fact that the order of sanction mentions "sanction for prosecution", since it is stated "sanction for prosecution under Sections 3 and 4 of TADA Act" means only sanction to proceed under Sections 3 and 4 of TADA Act. The ruling of Ram Kumar v. State of Haryana18, dealt with the different situation as to the scope of sanction under Sections 132 and 197

of the Code. In the case of a public servant, both the sanctions were necessary. That judgment has no application to the present case.

69.Having regard to the various acts of expressed conspiracy, it has to be "and/or". It is only during the trial the prosecution has to prove the part played by each of the accused.

70. In Alvin Krulewitch v. United States20, it was held thus:(L Ep. 799) "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish prima facie the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other 31 (1977) 2 SCC 699: 1977 SCC (Cri) 404 18 (1987) 1 SCC 476, 478 : 1987 SCC (Cri) 190 20 93 L Ed 790, 795 : 336 US 440 (1948) words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed." (emphasis supplied) Hence, proving of conspiracy against each accused would arise only at the stage of the trial which is yet to commence in the instant case.

71. In Walli Mohammad v. King21 it is held as under:

> "The statements of each prisoner are evidence against himself only and are inadmissible against his fellow accused. Consequently, the only safe method of testing the strength of the case for the prosecution is to take each man's case separately, neglect the evidence of the other and ask whether the conflicting and inconsistent nature of the matters alleged and persons implicated combined with the admission that the accused man was himself present is enough to justify a verdict against him. It may be possible that each is sheltering a third person and even if it be possible that one of the two accused is guilty, there must be circumstances from which could be deduced which of the two is the guilty one. Though proof of motive is not essential, it is a material consideration. But it is not legitimate to speculate as to possible but unproved motives.
>
> The difficulty in all cases where two persons are accused of a crime and where the evidence against one is inadmissible against the other is that however carefully assessors or a jury are directed and however firmly a Judge may steel his mind against being influenced against one by the evidence admissible only against the other, nevertheless the mind may inadvertently be affected by the disclosures made by one of the accused to the detriment of the other."

Neither of these rulings would apply because the question of leading evidence by the prosecution in relation to conspiracy, as stated above, would arise only during the stage of trial which is yet to commence in the instant case.

72. As to the fact of conspiracy, the charge-sheet clearly mentions the same. Therefore, factually, this finding is wrong. We are not in a position to accept the argument of the learned counsel for the respondent that if the bombs are for self-defence, there is no mens rea and therefore, no offence under TADA. The finding of the High Court on this aspect is as under:

> "It may be noted that if according to the police report itself the reason or intention behind preparing and storing bombs was to defend the Muslim community in the event or riot taking place by possible attack by Hindus because the Government would not take action as was done in Bombay, it cannot possibly be inferred or said that the accused intended to strike terror or that he had any other intent specified under the TADA Act. It has, however, been submitted by Mr Roy in the course of his argument that there are statements of witnesses to the effect that the people of the locality were 'scared' of the accused, implying that they were considered as dangerous persons. It has been submitted further that 21 AIR 1949 PC 103, 104 : 50 Cri LJ 340 assuming the fact to be true, from this fact it does not follow that the accused entered into a conspiracy to prepare and store bombs with any of the intents specified in Section 3(1) viz. to strike terror amongst the people or a section of the people. It must also be remembered that mens rea is an essential ingredient of an offence."

The least we can say is that this finding is shocking.

73.We may usefully refer to Ajay Aggarwal case8. At pages 617-618, paras 8-10 it is stated:

> "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. Reg32 and House of Lords in unanimous decision reiterated in Quinn v. Leathem33:
>
> `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 rests 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; and punishable if for a criminal object, or for the use of criminal means.'
>
> 9. This Court in E. G. Barsay v. State of Bombay34 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 Punjab35 the rule was laid as follows: (SCC p. 543, para 9) 8(1993) 3 SCC 609, 617 : 1993 SCC (Cri) 961 32 (1868) LR 3 ML 306 33 1901 AC 495 : (1900-3) All ER Rep 1 : 85 LT 289 34 (1962) 2 SCR 195 : AIR 1961 SC 1762: (1961) 2 Cri LJ 35 (1977) 4 SCC 540: 1978 SCC (Cri) 5 `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.'

10. In Mohammad Usman Mohammad Hussain Maniyar v. State of Maharashtra36 it was held that for an offence under Section 120-B IPC, the prosecution need not necessarily prove that the conspirators expressly agreed to do or cause to be done the illegal act, the agreement may be proved by necessary implication."

74.The very preparation of bombs and possession of bombs would tantamount to terrorising the people. If proved, it will be a terrorist act and sub-sections (1) and (3) of Section 3 of the Act may also be attracted. The existence of 26 live bombs is a clear indication of conspiracy.

75.As regards the non-mention of threat to sovereignty and integrity in sanction order, we think there is a misunderstanding. This Court in Kartar Singh v. State of Punjab9 (at SCC p. 633) determined the legislative competence of Parliament to enact this law. What is relied on by the learned counsel for the respondents is paragraph 68 of the said judgment. That states as follows: (SCC pp. 633-34) "The terrorism, the Act (TADA) contemplates, cannot be classified as mere disturbance of 'public order' disturbing the 'even tempo of the life community of any specified locality'

- in the words of Hidayatullah, C.J. in Arun Ghosh v. State of W.B.37 but it is much more, rather a grave emergent situation created either by external forces particularly at the frontiers of this country or by anti-nationals throwing a challenge to the very existence and sovereignty of the country in its democratic polity."

76.Again, in Hitendra Vishnu Thakur v. State of Maharashtra22 it is stated in para 7 at p. 618 as under: 36 (1981) 2 SCC 443 : 1981 SCC (Cri) 477 9 (1994) 3 SCC 569: 1994 SCC (Cri) 899 : JT (1994)

2 SC 423 37 (1970) 1 SCC 98 : 1970 SCC (Cri) 67 22 (1994) 4 SCC 602: 1994 SCC (Cri) 1087 " 'Terrorism' is one of the manifestations of increased lawlessness and cult of violence. Violence and crime constitute a threat to an established order and are a revolt against a civilised society. 'Terrorism' has not been defined under TADA nor is it possible to give a precise definition of 'terrorism' or lay down what constitutes 'terrorism'. It may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travels beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb harmony of the society or 'terrorise' people and the society and not only those directly assaulted, with a view t o disturb even tempo, peace and tranquillity of the society and create a sense of fear and insecurity."

Again, in (para 14, p. 623), this Court went on to hold:

"Therefore, it is the obligation of the investigating agency to satisfy the Designated Court from the material collected by it during the investigation, and not merely by the opinion formed by the investigating agency, that the activity of the 'terrorist' falls strictly within the parameters of the provisions of TADA before seeking to charge- sheet an accused under TADA. The Designated Court must record its satisfaction about the existence of a prima facie case on the basis of the material on the record before it proceeds to frame a charge-sheet against an accused for offences covered by TADA." (emphasis in original)

77.Without proceeding further, all that we can say, in this case, is that the materials are enough to bring the case under Section 3(1) of the Act. Of course, in order to establish this, evidence will have to be led in during the trial. Therefore, we restrain from making any further observation which may tend to prejudice the parties. If that be so, the question of mentioning in the sanction order that the ordinary law has broken down, does not arise.

78.Coming to taking cognizance, it has been held by the High Court that it is not a reasoned order. We are of the view that the approach of the High Court in this regard is clearly against the decision of this Court in Stree Atyachar Virodhi Parishad case10 in (para 14, p. 72 1), which is as under:

> "It is in the trial, the guilt or the innocence of the accused will be determined and not at the time of framing of charge. The court, therefore, need not undertake an elaborate enquiry in sifting and weighing the material. Nor is it necessary to delve deep into various aspects. All that the court has to consider is whether the evidentiary material on record if generally accepted, would reasonably connect the accused with the crime. No more need be enquired into." 10 (1989) 1 SCC 715, para 14 : 1989 SCC (Cri)

79. Again, in Niranjan Singh K.S. Punjabi case13 it is stated at (SCC page 85, para 7), as under:

> "Again in Supdt. & Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja38, this Court observed in paragraph 18 of the judgmen t as under:
>
> "The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged, may justify the framing of charge against the accused in respect of the commission of that offence." (emphasis supplied)

80.The confessional statements of the two accused were very much there before the Court. There is no reason to believe that the Court had not looked at the same.

81.The other finding that what can be looked at is only the police report, cannot be sustained. In Satya Narain Musadi v. State of Biharl4 (SCC at pages 157-158, para 10) it was held as under:

> "The report as envisaged by Section 173(2) has to be accompanied as required by sub-section (5) by all the documents and statements of the witnesses therein mentioned. One cannot divorce the details which the report must contain as required by sub-section (5) from its accompaniments which are required to be submitted under sub-section (5). The whole of it is submitted as a report to the Court. But even if a narrow construction is adopted that the police report can only be what is prescribed in Section 173(2) there would be sufficient compliance if what is required to be mentioned by the statute has been set down in the report. To say that all the details of the offence must be set out in the report under Section 173(2) submitted by the police officer would be expecting him to do something more than what Parliament has expected him to set out therein. If the report with sufficient particularity and clarity specifies the contravention of the law which is the alleged offence, it would be sufficient compliance with Section 11. The details which would be necessary to be proved to bring home the guilt to the accused would emerge at a later stage, when after notice to the accused a charge is framed against him and further in the course of the trial."

82. The ruling Uma Charan v. State of M.p26 cited by Mr Dipankar Ghosh, has no application to the facts of this case because Regulation 5(5) of 13 (1990) 4 SCC 76, para 7 : 1991 SCC (Cri) 47 38 (1979) 4 SCC 274: 1979 SCC (Cri) 1038 14 (1980) 3 SCC 152, paras 9 & 10: 1980 SCC (Cri) 660 26 (1981) 4 SCC 102, 105 : 1981 SCC (L&S) 582: (1982) 1 SCR 353, 358 the Indian Public Service (Appointment by Promotion) Regulations, 1955, in that case, required reasons to be recorded.

83.That is not the position here. Hence, that is clearly distinguishable. The High Court has found in the impugned judgment as follows:

> "The acts which the accused persons did is the act of preparation and storage of bombs, which are undoubtedly made of explosive substances. From these acts of preparation and storage of bombs, it cannot be inferred that the accused intended to kill the Hindus or strike terror amongst the people or a section of the people, alienate a section of the people or adversely affect the harmony among different sections of the people. Such an intent cannot be inferred from the mere preparation and storage of bombs. It may be noted in this connection that police report does not disclose that the accused persons caused the explosion. As a consequence of the explosion which occurred on 16-3-1993 a large number of persons who were killed were Muslims and not Hindus and even from the consequences of the explosion with which the accused have not been charged, it cannot be inferred that accused who are alleged to have been responsible for the preparation and storage of the bombs, intended to kill Hindus, or strike terror amongst a section of people or that they had any of the intents specified in Section 3(1) of the Act."

We are clearly of the opinion that this is a perverse reasoning.

84.On intention and motive, we only need to refer to Corpus Juris Secundum (A Contemporary Statement of American Law), Volume 22. It is held at page 116 (Criminal Law) as under:

> "Intention
>
> (a) In general
>
> (b) Specific or general intent crimes
>
> (a)In general.- As actual intent to commit the particular crime toward which the act moves is a necessary element of an attempt to commit a crime. Although the intent must be one in fact, not merely in law, and may not be inferred from the overt act alone, it may be inferred from the circumstances."

85.As regards motive in American Jurisprudence, 2nd Edn., Vol. 21, in Section 133, it is stated as under:

> "133. Motive.- In criminal law motive may be defined as that which leads or tempts the mind to indulge in a criminal act or as the moving power which impels to action for a definite result."

86.Tested in the light of the above, suffice it to hold the preparation and storage of bombs, as pointed out above, are per se illegal acts. The intention that it was to defend the Muslims, is totally unwarranted. "Bomb is not a toy or top to play with". The further question is, when does the so-called right of self-defence arise? The High Court should have assumed that each of the allegations made in the charge-sheet to be factually correct and should have examined the ingredients of the offence. As rightly contended by Mr U.R.

Lalit, learned Senior Counsel, the charge-sheet cannot be considered in a restricted way.

87.On a careful perusal of the judgment we are left with the impression that the High Court had indulged in a laboured exercise, without limiting itself to the proper jurisdiction under Article 226 of the Constitution of India, in matters of this kind. We do not want to elaborate on the motive to prepare bombs and the intention thereto since the trial is yet to commence.

88.For all the above reasons we have absolutely no hesitation in holding that the High Court has clearly exceeded its powers under Article 226 of the Constitution in quashing the orders of sanction and taking of cognizance. Therefore, we set aside the impugned judgment of the High Court and direct the Designated Court to proceed with the case in accordance with the law with utmost expedition.

89. In the result, the criminal appeals are allowed accordingly.