

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ananya Bandyopadhyay

Death Reference No. 2 of 2017

STATE OF WEST BENGAL

...APPELLANT

Vs.

MUZAFFAR AHAMED RATHER @ ABU RAFA

...RESPONDENT

With

STATE OF WEST BENGAL

...APPELLANT

Vs.

MD. ABDULLAH @ ASGAR ALI @ AHAMED ALI @ ALI

...RESPONDENT

With

STATE OF WEST BENGAL

...APPELLANT

Vs.

MD. YOUNUS @ BILLAL

...RESPONDENT

WITH

C.R.A. No. 105 of 2017

MUZAFFAR AHAMED RATHER @ ABU RAFA

...APPELLANT

Vs.

STATE OF WEST BENGAL

...RESPONDENT

WITH

C.R.A. No. 198 of 2017

MD. ABDULLAH @ ASGAR ALI @ AHAMED ALI @ ALI

...APPELLANT

Vs.

STATE OF WEST BENGAL

...RESPONDENT

WITH

C.R.A. No. 264 of 2017

MD. YOUNUS @ BILLAL

...APPELLANT

Vs.

STATE OF WEST BENGAL

...RESPONDENT

WITH

Death Reference No. 1 of 2019

STATE OF WEST BENGAL

...APPELLANT

Vs.

SK. ABDUL NAYEEM @ SAMIR @ NAYYA @ ABU ALI & OTHERS

...RESPONDENT

WITH

C.R.A.(DB) No. 92 of 2022

SK. ABDUL NAYEEM @ SAMIR @ NAYYA @ ABU ALI

...APPELLANT

Vs.

STATE OF WEST BENGAL

...RESPONDENT

For the Appellant : Mr. Apalak Basu, Adv.
[in CRA (DB) 92/2022 &
D.R. 1 of 2019]
Mr. Sekhar Kumar Basu Sr. Advocate
Mr. Soubhik Mitter, Adv.
Mr. Avishek Sinha, Adv.
[in CRA 105/2017]
Mr. Kallol Mondal, Adv.
Ms. Sreyashee Biswas, Adv.
Mr. Krishan Ray, Adv.
[in CRA 264/2017 &
D.R. 2 of 2017]
Mr. Soubhik Mitter, Adv.
[in CRA 198/2017]

For the State : Mr. Neguive Ahmed, Ld. APP
Mr. Parthapratim Das, Adv.
Ms. Amita Gaur, Adv.
[in CRA (DB) 92/2022,
DR 2/2017 & DR 1/2019]

Mr. Swapan Banerjee, Adv.
Mr. Sanjay Bardhan, Adv.
Mr. Suman De, Adv.
[in CRA 105/2017
CRA 198/2017 &
CRA 264/2017]

Heard on : 19.05.2022, 02.08.2022, 03.08.2022,
08.08.2022, 12.08.2022, 16.08.2022,
22.08.2022, 30.08.2022, 22.09.2022

Judgment on : 14.11.2022

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Joymalya Bagchi, J.:-

Prosecution case:-

1. On 3rd April, 2007 at 13:05 hours on the basis of specific intelligence that a group of Pakistan trained Laskar-e-Toiba militants are likely to enter into India via Benapole-Petrapole Checkpost area, a party under the leadership of Company Commander Amit Yadav (P.W. 31) along with BSF officials laid ambush around Petrapole area. They observed four persons were moving suspiciously and confronted them. The said persons tried to escape and upon hot pursuit were captured. On being interrogated they revealed their names and identities.

2. On physical search the following articles were recovered.

- i) Md Younus –
 - a) Photo copy of identity card of Election commission of India containing picture of Md. Younus but prepared in the name of Md. Kadir R/O Begusaria (Bihar)
 - b) A purse containing 100 US Dollar bearing No.-C L 15057578 B
- ii) Md. Abdullah –
 - a) Fake I card of Chandra Sekhar Azad University of Agriculture and Technology, Kanpur having his photograph affixed by the name Ahmed Ali bearing No. 06 AGA 382
 - b) A code containing name of some person belonging to Kashmir and the key to the code.
 - c) A purse containing Rs.1,000 (Indian currency) and 100 U.S Dollars
- iii) Muzaffar Ahamed Rather –
 - a) Two fake I Cards of Chandra Sekhar Azad University of Agriculture & Technology Kanpur. Both having photo of Muzafar Ahmed but with two different names and one having address as Buland Sahar Road, Gaziabad and the other as Chakura, Pulwama, J&K

- b) 100 US dollars of following denomination.
 - 50 US Dollar bearing No. EF 34260883 A
 - 10 US Dollar bearing No. GK 19319944 A
 - 10 US Dollar bearing No. DF 28972754 B
 - 10 US Dollar bearing No. DC 77634025 A
 - 10 US Dollar bearing No. BB 49616969 B
 - 10 US Dollar bearing No. DA 08159775 A
- iv) Sk. Abdul Nayeem –
 - a) Driving licence No. WB-012006438800 with the name and address of Sk Samir at 40, Madan Mohan Barman Street, Kolkata, 700007.
 - b) A purse containing 1200 Rs. Indian currency and 250 US Dollars of following denomination.
 - 500 Rs. Note bearing No. 0 HA 086317
 - 500 Rs. Note bearing No. 8 CK 358159
 - 100 Rs. Note bearing No. 4 LQ 616207
 - 100 Rs. Note bearing No. 4 LQ 616206
 - 100 US Dollar bearing No. FL 60054211 B
 - 100 US Dollar bearing No. DB 97892537 A
 - 10 US Dollar bearing No. GL 07311336 A
 - 10 US Dollar bearing No. GG 29986181 A
 - 10 US Dollar bearing No. GK 19319946 A
 - 10 US Dollar bearing No. GK 19319951 A
 - 10 US Dollar bearing No. GK 19319945 A
 - c) One NOKIA Mobile without SIM.

Seizure memos were prepared with regard to the aforesaid recoveries.

3. On interrogation, arrested persons admitted they were members of Lashkar-e-Toiba (for short 'LeT') a militant outfit and had illegally entered the country.

4. Amit Yadav (P.W. 31) lodged written complaint at Bongaon police station resulting in registration of Bongaon P.S. case No.179/07 dated 04.04.07 under sections 121/121A/122/126/419/420/468/469/470/471/120B of IPC and under section 14 of Foreigners Act. Seized articles were handed over to Officer-in-charge Bongaon Police Station, Sanjit

Chakraborty (P.W. 12) and kept in the Malkhana under Officer-in-charge of Malkhana, Ajoy Kumar Pandey (P.W. 29).

5. P.W. 34 took over investigation of the case. He took custody of the appellants and re-seized the articles from Bongaon Police Station. He interrogated the appellants. Pursuant to interrogation of Sk. Abdul Nayeem on 06.04.2007, he searched his tenanted premises at 19, Madan Mohan Barman Street, Kolkata, 700007 and recovered following articles:-

- i) One ration card in the name of Md. Manjur (P.W. 20);
- ii) One ration card in the name of Md. Mehrab (P.W. 25), issued by rationing officer, Barabazar;
- iii) One electricity bill of CESC Ltd. in the name of Md. Manjur;
- iv) One xerox copy of Election Commission of India identity card in the name of Md. Manjur;
- v) One letter of Ministry of External Affairs, Regional Passport office in the name of Md. Mehrab;
- vi) One driving licence in the name of Md. Fahim;
- vii) One Election Commission of India Identity card in the name of Md. Kadir;
- viii) One membership card of Friend's United Club;
- ix) One visiting card in the name of Md. Rahamat Ali (Fruit Merchant);
- x) One electricity bill of CESC Ltd. for the month of January, 2007 in the name of Md. Manjur;
- xi) One rent slip in the name of Md. Manjur for the month of September, 2006;
- xii) One letter of Md. Mehrab dated 02.03.2007 in the name of Manager, Punjab National Bank;
- xiii) One letter of Electoral Registration Officer;
- xiv) One driving licence (Xerox copy) in the name of Sk. Samir;
- xv) One xerox copy of driving licence of Md. Mehrab;
- xvi) One xerox copy of driving licence of Md. Fahim;
- xvii) Two maps of West Bengal and the North Eastern States with 50 Anti-India leaflets in Urdu and English;
- xviii) One Cardboard box containing light brown sticky materials.

He forwarded Md. Younus, Md. Abdullah, Muzaffar Ahamed Rather for recording confessions before Judicial Magistrates (P.Ws. 35 and 36). The said appellants made confessions before the Magistrates. He sent the sticky brown substance for FSL examination. He made prayer for obtaining sanction from proper authority. He collected the confessional statement. He submitted initial charge-sheet.

6. Subsequently, Parthapratim Roy (P.W. 39) (2nd investigating officer) obtained FSL report. He also obtained sanction order and submitted supplementary charge-sheet under section 5(b) of the Explosive Substances Act against Sk. Abdul Nayeem.

Proceedings before the trial Court:-

7. The case was committed to the trial Court on 19.09.2007. On 16.05.2008, charges under sections 419, 420, 468, 469, 471, 121, 121A, 122, 124A, 120B of the IPC were framed against all the appellants. Charge under section 14 of the Foreigners Act was framed against Md. Younus and Md. Abdullah. During trial, on or about April, 2008 Md. Younus, Md. Abdullah and Muzaffar Ahamed Rather filed retraction petitions before the Court. Recording of prosecution evidence began. After examination of 31 prosecution witnesses, on 24.08.2014 Sk. Abdul Nayeem absconded. Warrant, proclamation and attachment were issued against him but he could not be apprehended. On 10.06.2015 the case against Sk. Abdul Nayeem was filed and the trial proceeded against other appellants. In conclusion of trial, trial Judge by judgment and order dated 16.01.2017 convicted the appellants, namely, Muzaffar Ahamed Rather @

Abu Rafa, Md. Abdullah @ Asgar Ali @ Ahamed Ali @ Ali and Md. Younus @ Billal for commission of offence punishable under sections 121, 121A, 122 and 120B of IPC. In addition thereto, Md. Abdullah and Md. Younus were convicted under section 14 of the Foreigners Act. By order dated 21.01.2017 all the said appellants were sentenced to death and directed to pay a fine of Rs. 50,000/- each.

8. Subsequently, Sk. Abdul Nayeem was re-arrested and produced before the trial Court. Trial against him was revived. On his prayer, certified copies of depositions and exhibited documents were handed over to him. Charge was re-framed adding section 5(b) of the Explosive Substances Act. On the consent of the parties, evidence of prosecution witnesses P.W. 32 to P.W. 39 recorded after his abscondence was adopted against him and he was given the opportunity to cross-examine the said witnesses. In conclusion of trial, by judgment and order dated 11.12.2018 appellant Sk. Abdul Nayeem @ Samir @ Nayya @ Abu Ali was convicted for commissions of offence punishable under sections 419, 420, 468, 471, 121, 121A, 122, 120B IPC and under section 5(b) of Explosive Substances Act. By order dated 15.12.2018 the said appellant was sentenced to death and directed to pay a fine of Rs. 50,000/-.

Appeals and references before this Court:-

9. Death Reference No. 2 of 2017 was made for confirmation of the sentence of death awarded to Muzaffar Ahamed Rather @ Abu Rafa, Md. Abdullah @ Asgar Ali @ Ahamed Ali @ Ali and Md. Younus @ Billal. Criminal Appeal No. 105 of 2017, Criminal Appeal No. 198 of 2017 and

Criminal Appeal No. 264 of 2017 were filed by Muzaffar Ahamed Rather @ Abu Rafa, Md. Abdullah @ Asgar Ali @ Ahamed Ali @ Ali and Md. Younus @ Billal respectively against their conviction and sentence, as aforesaid. Death Reference No. 1 of 2019 has been made for confirmation of death sentence of Sk. Abdul Nayeem @ Samir @ Nayya @ Abu Ali. The said appellant has assailed his conviction and sentence in Criminal Appeal (DB) 92 of 2022.

10. As the aforesaid death references and criminal appeals arise from the same prosecution case and are based on similar evidence on record, this Court proceeded to hear the references and appeals analogously. They are being disposed of together by this common judgment and order.

Prosecution evidence on record:-

11. Prosecution examined 39 witnesses. Prosecution evidence may be analysed as follows:-

a) Apprehension of appellants at Petrapole Border:-

Official witnesses:-

Witness Name and No.	Deposition of Witness
PW 31: Amit Yadav (Commander at BSF)	i) On 03.04.2007 he received secret information that some Pak trained militants are entering India through Petrapole Border. ii) He along with other officers laid ambush at the border. iii) They saw four people moving suspiciously. iv) They asked their identities but the suspects tried to run away. They were caught and the following documents were seized from Md. Abdullah:- 1. Fake ID Card of Chandra

	<p>Shekhar Azad, Agricultural University, Kanpur</p> <ol style="list-style-type: none"> 2. A code containing name of some person belonging to Kashmir and the key to the code 3. A purse containing two INR notes of 500/- and 100 USD <p>Materials seized from Muzaffar Ahamed Rather are:</p> <ol style="list-style-type: none"> 1. Two fake ID Cards of the same University, both having pictures of Muzaffar 2. 100 USD <p>Materials recovered from Sk. Abdul Nayeem are:</p> <ol style="list-style-type: none"> 1. One driving licence 2. A mobile phone without SIM 3. 250 USD and 1200 INR <p>Materials recovered from Md. Younus are:</p> <ol style="list-style-type: none"> 1. A purse containing 100 USD 2. Photo copy of identity card of Election commission of India containing picture of Md. Younus but prepared in the name of Md. Kadir <p>vi) Seizure lists were prepared (Exhibits 1, 2, 3 and 4)</p> <p>vii) He identified the appellants in Court.</p> <p>viii) He stated Md. Abdullah and Md. Younus are Pakistani nationals.</p>
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	<ul style="list-style-type: none"> ix) He lodged written complaint on 4th April, 2007 at Bongaon police station. x) He proved the complaint. xi) Seized materials were handed over to duty officer, Bongaon police station.
<p>PW 1: Manoj Kumar, (Inspector, BSF)</p>	<ul style="list-style-type: none"> i) He was a member of the team under the leadership of Amit Yadav (P.W. 31). ii) The team laid ambush on different sides of Petrapole border. iii) They chased and apprehended four persons. iv) Upon interrogation the apprehended persons disclosed their identities and made statements. v) Documents and articles were seized. Seizure list was prepared by P.W. 31 and he signed on seizure list. vi) Could not identify the appellants and was confused between Md. Abdullah and Muzaffar Ahmed Rather.
<p>PW 2: Ashok Chowdhury, (Head Constable, Haridaspur)</p> <p>PW 3: Yashwin Kumar, (Head Constable)</p> <p>PW 4: Bhagwan Singh, (Head Constable)</p> <p>PW 5: R. Ramkrishnan, (Constable)</p> <p>PW 6: Bineswar Kumar, (Constable)</p> <p>PW 7: Sanwar Hossain, (Constable)</p>	<ul style="list-style-type: none"> i) They were members of the team under P.W. 31. ii) They corroborated the evidence of P.Ws. 1 and 31. iii) They proved their signatures on the seizure list. iv) All the witnesses identified the appellants.

Local witnesses:-

Witness Name and No.	Deposition of Witness
PW 8: Sunil Mondal @ Sunu, (Grocery Shopowner) (Declared Hostile)	<ul style="list-style-type: none"> i) He has a grocery shop at the crossing of Petrapole. ii) In chief, he stated incident occurred on 4.3.2007 but during cross-examination he admitted he told the police incident occurred on 3.4.2007. iii) He admitted BSF jawans had arrested four accused persons and interrogated them. iv) On enquiry he came to know two were from Bangladesh and two were from Pakistan. v) They belonged to LeT.
PW 9: Deepa Mondal, (Resident at Petropole) (Declared Hostile)	<ul style="list-style-type: none"> i) Resident of Petrapole – initially, states unable to recall incident. ii) Subsequently, states she was preparing food – heard hue and cry. iii) Came out of the house and saw four persons arrested by BSF. iv) Identified the appellants. One of them was from Kashmir and other from Maharashtra.
PW 10: Beauty Mondal, (Resident at Petropole village)	<ul style="list-style-type: none"> i) On hearing the pandemonium, she went there where she saw 4 persons were arrested by BSF ii) Heard they came from Bangladesh to India. iii) Heard they belong to Jangi Sangathan. iv) Heard the names of Md. Abdullah and Md. Younus. v) That two of them belonged to India and two of them belonged to Pakistan. vi) Identified the appellants.
PW 11: Niranjn Mondal, (Resident at Petropole village)	<ul style="list-style-type: none"> i) He was returning from Jayantipur Hatkhola Bazar and saw pandemonium on the land

	<p>of his brother (PW8) and found that four persons have been arrested by BSF personnel.</p> <p>ii) Heard the accused saying they came from Bangladesh, two of them belonged to Pakistan and the other two belonged to India.</p> <p>iii) One of the four accuseds stated that he belonged to the jangisangathan Laskar-e-taiba, there were others villagers also present there.</p> <p>iv) One of them stated his name as Md. Younus, other was named as Md. Abdullah.</p> <p>v) Could identify two of the appellants.</p> <p>vi) During cross-examination, he stated he had two criminal cases pending against him.</p>
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b) Recovery from the rented house of Sk. Abdul Nayeem @ Samir:-

Witness Name and No.	Deposition of Witness
<p>PW 34: Arunava Mukherjee (Officer Incharge Special Operation Group, CID, WB)</p>	<p>i) He is the investigating officer.</p> <p>ii) He recorded the statement of Sk. Abdul Nayeem @ Samir.</p> <p>iii) Following his statement, he searched the rented premises of Sk. Abdul Nayeem @ Samir at 19, Madan Mohan Barman Street, Kolkata, 700007.</p> <p>iv) In the course of search, he recovered the following articles:-</p> <p style="padding-left: 40px;">a) One ration card in the name of Md. Manjur, another one in the name of Md. Mehrab.</p> <p style="padding-left: 40px;">b) One electricity bill of</p>

	<p>CESC in the name of Md. Manjur.</p> <p>c) Xerox of Election Commission of India ID Card in the name of Md. Manjur.</p> <p>d) One letter from Regional passport office addressed to Md. Mehrab.</p> <p>e) One driving licence in the name of Md. Fahim.</p> <p>f) One election commission ID card of Md. Kadir.</p> <p>g) One membership card of a club in the name of Sk. Samir.</p> <p>h) One visiting card in the name of Rehamat Ali, Fruit merchant.</p> <p>i) One electricity bill in the name of Md. Manjur for month of January, 2007.</p> <p>j) One rent slip in the name of Md. Manjur for the month of September, 2006.</p> <p>k) One letter of Md. Mehrab dated 2.3.2007 in the name of Manager of Punjab National Bank, Jakaria Street, Kolkata for cheque book for account No. 5202.</p> <p>l) One letter of electoral registration officer in the name of Md. Nazem.</p> <p>m) One driving licence in the</p>
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	<p>name of Sk Samir.</p> <p>n) Xerox copy of driving licence of Md. Mehrab.</p> <p>o) One Xerox copy of driving licence of Md. Fahim.</p> <p>p) Two maps of West Bengal and North Eastern State.</p> <p>q) 50 Anti-Indian Leaflets in Urdu and English.</p> <p>r) One empty cardboard box containing light brown sticky material.</p> <p>v) He prepared the seizure list marked as Exhibit 12.</p> <p>vi) Seized articles were packed, sealed and labelled.</p>
<p>PW 24: Pallab Kr. Ganguly, (Officer, Special Operation Group, CID, West Bengal)</p>	<p>i) On 06.04.2007 he accompanied P.W 34 along with Sk. Abdul Nayeem @ Samir at 19, Madan Mohan Barman Street, Kolkata, 700007 at 2nd floor.</p> <p>ii) As per identification of Sk. Abdul Nayeem @ Samir they entered his tenanted room and recovered various articles.</p> <p>iii) All the articles apart from the sticky substance were kept in an envelope which was sealed and labelled. The sticky substance kept in a separate envelope and labelled.</p> <p>iv) He proved his signature on a full scape paper.</p>
<p>PW 23: Ajit Sinha, (Businessman – independent witness)</p>	<p>i) He has a book binding business.</p> <p>ii) He went to Osman book house at Madan Mohan Barman Street.</p> <p>iii) He identified Sk. Abdul Nayeem</p>

	<p>@ Samir.</p> <p>iv) In his presence police recovered various articles including one liquid material from a wooden black coloured box.</p> <p>v) He signed on the seizure list.</p> <p>vi) In cross-examination, suggestion was given to P.W. 23 that he is a pocket witness and had deposited in other cases.</p> <p>vii) He admitted his signature was not on any of the seized items.</p>
PW 26: Mehtab Ahmed, (Landlord of Sk. Samir)	<p>i) He gave one room on rent to Sk. Samir on third floor of the house.</p> <p>ii) He had given the room on rent for three months.</p> <p>iii) His wife also came to stay with him.</p> <p>iv) During her stay, police came to the room.</p>
PW 20: Md. Manjur,(Uncle of Md. Mehrab) (Declared Hostile)	<p>i) Fruit seller by occupation</p> <p>ii) Md. Mehrab resides at 40, Madan Mohan Barrman Street</p> <p>iii) The said house is on tenancy and Md. Mustakin is the Landlord</p> <p>iv) Interrogated by CID</p> <p>v) Knows Sk. Samir as he used to bring fruits from UP and sold the same to his Mahajan, Md. Rehad for a commission of 6 %</p> <p>vi) Identified Sk. Samir</p> <p>vii) He has an elder brother Md. Nijam, who used to send mangoes from UP to Calcutta for sale</p> <p>viii) Sk. Samir used to reside as a tenant at 19, Madan Mohan Barman Street, Cal-7</p>
PW 21: Md. Nijam, (Brother of Md, Manjur)	<p>i) Resident of 40 Madan Mohan Barman Street.</p>

	<ul style="list-style-type: none"> ii) Fruit seller by occupation. iii) Samir used to bring mangoes from Maliabad, UP to Calcutta. iv) Witness failed to identify accused (Sk. Samir) as he disclosed himself as Md. Abdullah. v) He stated his eye sight has deteriorated.
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c) Judicial confessions of Muzaffar Ahamed Rather, Md. Abdullah and Md. Younus:-

Witness Name and No.	Deposition of Witness
PW 34: Arunava Mukherjee (Officer Incharge Special Operation Group, CID, WB)	i) He forwarded the three appellants to record judicial confession.
PW 35: Anjan Kumar Sengupta (Judicial Magistrate)	<ul style="list-style-type: none"> i) On 20.04.2007 recorded confession of Md. Abdullah. ii) Md. Abdullah is a resident of Pakistan (Exhibit 18). iii) On the same day recorded confession of Md. Younus. iv) Younus stated that he is a resident of Pakistan (Exhibit 19).
PW 36: Dipendra Nath Mishra, (ACJM, Bongaon PS)	i) On 24.04.2007, confessional statement of Muzaffar Ahamed was recorded as Exhibit 20.
PW 37: Abdul Hossain Laskar, (Constable, Bongaon Lockup)	i) He identified Md. Abdullah before Judicial Magistrate.

d) Steps during investigation:-

Witness Name and No.	Deposition of Witness
P.W. 12: Sanjit Chakraborty, Inspector In Charge, Bongaon Police	i) On 04.04.07 5:05 AM P.W. 31 produced four accused persons along with one seizure list and

Station)	<p>seized articles at the police station.</p> <p>ii) He received written complaint and drew a formal FIR (Exhibit 5).</p> <p>iii) He deposited the seized articles with officer-in-charge Malkhana.</p>
PW 29: Ajoy Kumar Pandey, (ASI, Bongaon PS)	<p>i) He received seized articles from Commander of BSF (P.W. 31).</p> <p>ii) On 4.4.07, PW. 34 re-seized the articles under a seizure list.</p> <p>iii) He signed on the seizure list.</p>
PW 33: SI Joy Roychowdhury, (Sub-Inspector, CID, West Bengal)	<p>i) On 4.4.07, he received the seized articles from SI Ajoy Kumar Pandey (P.W. 29).</p>
PW 27: Parthanath Majumder (Inspector, CID, West Bengal)	<p>i) He assisted P.W. 34 in the investigation.</p> <p>ii) As per his direction he seized the following articles:-</p> <ol style="list-style-type: none"> a) Bank account opening form of Md. Mehrab with photograph b) Ration card of Md. Mehrab c) Statement of account of Md. Mehrab.
PW 34: Arunava Mukherjee (Officer Incharge Special Operation Group, CID, WB)	<p>i) He went to the place of occurrence.</p> <p>ii) He prepared sketch map with index (Exhibit 17, 17/1).</p> <p>iii) He interrogated accused persons including Sk. Samir.</p> <p>iv) Pursuant to statement of Sk. Samir incriminating articles including 50 anti-Indian pamphlets in English and Urdu, one card board box containing brownish sticky</p>

	<p>material were recovered from his tenanted premise at 19, Madan Mohan Barman Street, Kolkata, 700007.</p> <p>v) He sent Sk. Samir and Muzzafar Ahamed Rather for narco-analysis test.</p> <p>vi) He did not receive report.</p> <p>vii) He sent brown sticky substance for FSL examination.</p> <p>viii) He did not receive report.</p> <p>ix) He forwarded Md. Abdullah, Md. Younus and Muzaffar Ahamed Rather for recording confession before Judicial Magistrate.</p> <p>x) He seized one account opening form in the name of Md. Sarfaraz and Sk. Samir from ICICI Bank.</p> <p>xi) He examined bank officials.</p> <p>xii) He collected verification report of Deputy Commissioner of Police, Special Branch in respect of passport in the name of Md. Manjur.</p> <p>xiii) He collected report from Chandra Sekhar Azad University with regard to verification of identity card in the name of Muzaffar Ahamed Rather and Md. Abdullah.</p> <p>xiv) He prayed for permission to prosecute accused persons under sections 121, 121A, 122, 124A read with section 120B IPC.</p> <p>xv) He obtained permission from proper authority.</p> <p>xvi) He submitted charge-sheet.</p> <p>xvii) He produced 50 leaflets in</p>
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	English and Urdu (Material Exhibit XI) in Court.
PW 39: Parthapratim Roy, (Inspector, CID, West Bengal)	<p>i) He collected copy of CFSL report in respect of brownish sticky substance.</p> <p>ii) He prayed for permission to prosecute Sk. Abdul Nayeem under section 5(b) of the Explosive Substances Act.</p> <p>iii) District Magistrate North 24 Parganas granted permission (Exhibit 22 and 22/1).</p> <p>iv) He submitted supplementary charge-sheet under section 5(b) of Explosive Substances Act against Sk. Nayeem.</p>
PW 38: Dr.Dilip Kumar Kuila, (Junior Scientific Officer, FSL)	<p>i) He was junior scientific officer at CFSL Laboratory, Government of India, Kolkata.</p> <p>ii) On 11.06.2007, he received a sealed packet bearing No.1814 labelled as 'Exhibit Mark A' containing some brown colour sticky material.</p> <p>iii) On examination he opined the material constituted Nitroglycerine, special category explosive substance.</p> <p>iv) He returned the remnants of Exhibit A in a sealed packet along with report dated 30.05.2008 (Exhibit 21).</p>

e) Sanction to prosecute:-

Witness Name and No.	Deposition of Witness
PW 30: Sukumar Bhattacharjee, (Joint Secretary to Government of West Bengal)	<p>i) He proved the sanction granted on 27.06.2007 under section 196 Cr.P.C. to prosecute the accused persons under section 121, 121A, 124A read with section 120B IPC</p>

	(Exhibit 13).
PW 39: Parthapratim Roy, (Inspector, CID, West Bengal)	i) He proved the sanction granted by District Magistrate to prosecute under section 5(b) of the Explosive Substance Act (Exhibit 22 and 22/1).

f) Other witnesses – verification of seizure documents:-

Documents seized	Witness
ICICI Bank Visa Card (seized from Sk. Nayeem at Petrapole Border)	<p>i) P.W. 13, Ritesh Kumar Jha, Branch Manager, ICICI Bank deposed card was issued by Chowringhee Branch for a joint account held by Md. Sarfaraz and Sk. Samir.</p> <p>ii) Account opening form of ICICI Bank, Chowringhee Branch in the name of Md. Sarfaraz and Sk. Samir and other documents duly signed including photograph of account holders were seized.</p> <p>iii) P.W. 14, Krishna Gupta, Assistant Manager, ICICI Bank identified the card issued by ICICI Bank.</p> <p>iv) P.W. 20, Md. Manjur stated he handed over his ration card and electric bill to Sk. Samir for his job at ICICI Bank.</p>
Letter from Regional Passport (seized from Nayeem's rented apartment)	<p>i) (P.W. 18), Monilal Mukherjee, Assistant Superintendent, Regional Passport Office deposed I.O. (P.W. 34) seized passport application form in the name of Md. Mehrab (P.W. 25) on which photograph of Sk. Nayeem was affixed and other documents.</p> <p>ii) P.W. 34 collected the verification report of Deputy Commissioner of Police, Special Branch of Kolkata with regard to passport of Md. Manjur but the same has not been exhibited.</p> <p>iii) P.W. 19, Sumit Ranjan Sarkar,</p>

	UDC Officer, Regional Passport Office was a witness to the seizure.
Fake university ID cards (seized from Md. Abdullah at Petrapole Border)	i) P.W. 34 (I.O.) deposed he collected verification report from Registrar of Chandra Shekhar Azad University of Agriculture and Technology, Kanpur, U.P. that the cards were not genuine but report had not been submitted in Court.
Letter of Md. Mehrab dated 2.3.2007 to Manager of Punjab National Bank, Zakaria Street, Kolkata (seized from Nayeem's residence)	i) Md. Mehrab (P.W. 25) stated his uncle Manjur (P.W. 20) had handed over his ration card to Sk. Samir. Md. Manjur (P.W. 20) corroborated this fact. ii) Asit Kumar Roy (P.W.15), officer, Punjab National Bank, Ballabh Das Sarda (P.W. 16), officiating officer, Punjab National Bank, Zakaria Street and Sanjay Sinha (P.W. 17), Branch Manager, Punjab National Bank deposed account opening form of Md. Mehrab and copy of ration card and Form 16 signed by Md. Mehrab were seized by Parthanath Majumdar (P.W. 27).
Driving licence in the name of Sk. Samir, Md. Fahim (seized from Petrapole and Nayeem's residence)	i) P.W. 15 (RTO) deposed number and name of the licence holders in the seized licences did not tally with the licence register.

Judicial confessions:-

(i) Analysis of evidence pertaining to the confessions:-

11. P.W. 34, Arunava Mukherjee, investigating officer deposed he forwarded Muzaffar Ahamed Rather, Md. Abdullah and Md. Younus to record judicial confession before Magistrates (P.Ws. 35 and 36).

12. P.W. 35, Anjan Kumar Sengupta, Judicial Magistrate on 20.04.2007 recorded the statement of Md. Abdullah @ Asgar Ali. Md. Abdullah spoke in Hindu and Urdu. P.W. 35 questioned him in Hindi mixed with Urdu. He warned the accused that he is not required to make confession and the confession may be used against him. He recorded the statement in Bengali script. He explained the statement to the accused who put his signature on the document. He proved the entire statement (Exhibit 18). In similar manner he recorded the statement of Md. Younus on 20.04.2007. He proved his statement (Exhibit 19). In cross-examination, he denied the suggestion he did not have knowledge of Hindi language or that he could not speak or understand Hindi.

13. P.W. 36, Diptendra Nath Mitra, Judicial Magistrate recorded the statement of one Muzaffar Ahamed Rather. The accused could speak in Hindi. He recorded the statement of the accused in Hindi phonetics but in Bengali script. The statement was read over and explained to the accused. He put his signature on each page. He proved the confession (Exhibit 20).

14. The gist of the confessions of the appellants Muzaffar Ahamed Rather, Md. Abdullah and Md. Younus are set out hereinbelow:-

- (i) Md. Abdullah alias Asgar Ali:-
 - a) *Was a teacher by profession at Karachi, Pakistan from February, 2005 to February, 2006.*
 - b) *Was unemployed thereafter.*
 - c) *In 2006 met one Abdul Rehman, member of Jamat-ul-Dawa, who used to give money to him.*
 - d) *Was sent by Abdul Rehman to Muzaffarabad where he was putting up at a place called 'Sowai Nala'.*

- e) *There were many people there. Jamat-ud-Dawa was originally a Lashkar organisation. By end of March he came to know that these people belonged to LeT.*
 - f) *He was asked about his Passport and was sent to Karachi to get his passport. He returned with his passport.*
 - g) *He was told his relatives are in India and he should accompany the other two accuseds because they were illiterate.*
 - h) *He was sent to Bangladesh with two other people.*
 - i) *He met one Ahmed there and later came to know that his actual name is Samir.*
 - j) *Reached Bangladesh border on 1st April. Samir had promised to escort them to Jammu from Kolkata via train after crossing the border.*
 - k) *They were provided with one Hussain Butt's address and his phone number (596347), who was to take them to their destination further and instruct them as to what is to be done.*
 - l) *A group of Lashkars are active here namely, Lashkar-e-Toiba.*
 - m) *He confessed his mistake of being in touch with LeT.*
 - n) *He admitted that he was a member of LeT and came to India for the first time.*
 - o) *He suspects Hussain Butt holding a high post in the LeT group.*
 - p) *He confessed that lashkaries have sent him to India.*
- (ii) Md. Younus:-
- a) *In 2005 during floods, members of Jamat-ul-dawa went to their place for distributing relief supplies. He met the members there.*

- b) *He was told by them that a hospital has been built and people were needed there. He was taken to Muzzafarabad along with them. Hospital was a make shift one. Thereafter, he returned back.*
- c) *On his second visit in October, 2006 he used to cook there.*
- d) *Upon returning back in the month of February 2007 he met two people, namely Hamza and Arfan, they asked him to join them and gave him a hefty sum in return.*
- e) *He was taken to Rawalpindi. He was told he will be sent to Bangladesh for some relief work which was going on. His Passport was arranged*
- f) *On 28th March, he was informed that he would have to leave for Dhaka on that day.*
- g) *At the time of his departure by Taxi, he was told that he is aged and hence if he dies due to any accident, drowning, fire or other causes that would be his achievement.*
- h) *He was told to get down at Dhaka and stay in a hotel. Md. Abdullah and Muzaffar accompanied him.*
- i) *One of them was given a phone number and Hamza gave a piece of paper to him in which something was written in Urdu. He was asked to keep it secretly and read it upon reaching Dhaka.*
- j) *On arriving, when he opened the piece of paper he found an Identity card. Md. Abdullah made a call on the said number. He was told a person by the name of Samir would receive them.*
- k) *On 1st April they reached the border along with Samir. Some unknown person helped them to cross the border.*
- l) *He was aware that they belonged to LeT group. He was well acquainted with the members of LeT group.*

- m) *Hamza and Arfan are members of LeT group. They told him that Samir will take them to Punjab and then were asked to go to Jammu.*
- n) *Muzaffar would introduce him to one Sadaque and he would brief him about his duties.*
- o) *One Asmanbhai trained him at Muzzafarabad to operate 'Kailashnikov'. The training period was of 21 days which included dismantling, re-assembling and to practice firing with 'Kailashnikov' gun.*
- p) *Others who were present there were also trained to operate the gun. Many guns were there.*
- q) *He was told why does he wish to come back, he has to die eventually and this way he will die and earn money.*

(iii) *Muzzafar Ahmed Rather:-*

- a) *He was a student of class IX. Two terrorists came at night and threatened him to accompany them otherwise he will be shot.*
- b) *He was held captive by them for 2-3 days and was threatened of being killed if he tried to escape. He tried to escape but was caught and beaten for 2-3 days. After 5-6 days he was taken to Pakistan after crossing the Indian Border.*
- c) *One Khalid admitted him to a Madrasa.*
- d) *Thereafter, he was given training to operate AK-47. They were taught charging hand grenades. He again tried to escape but was caught and were sent to the camp.*
- e) *After he got kidnapped his family members tried seeking help from the police but were stopped by the terrorist.*
- f) *They made arrangements for passport and sent him to Kashmir through Bangladesh.*
- g) *They were told an Indian boy would take them to Delhi from Bangladesh and then to Kashmir.*

- h) *All three accuseds came to India by Air Plane.*
- i) *They had a talk to one Hamza in Pakistan.*
- j) *Samir told them that he would escort them in crossing the border. Samir spoke to some town boy.*
- k) *The town boy helped them in crossing the border.*
- l) *After crossing the border Samir and Md. Abdullah were caught.*
- m) *He and Younus sat down after walking for some distance.*
- n) *Two police personnel asked them if they were with the others. He replied in the affirmative and was arrested.*

15. Learned Defence Counsels argued the confessions were not voluntary. Copies of the confessional statements were not supplied to them. Upon supply of the said statements, they were immediately retracted on 05.04.2008, 15.04.2008 and 17.04.2008. Although the appellants did not know Bengali, confessions were recorded in Bengali script. There are material contradictions in the confessions which militate against the very genesis of the prosecution case. In his confession, Md. Younus stated they had crossed the border on 01.04.2007 which wholly demolishes the prosecution case.

(ii) Non-supply of confessions:-

16. Firstly, with regard to non-supply of the confessional statements, I find from order dated 19.09.2007 copies of documents under section 207 Cr.P.C. were supplied to all the appellants. They ascribed their signatures on the order-sheet acknowledging receipt. Post commitment, appellant Sk. Nayeem raised a plea on 10.07.2009 that confessional statements had not been supplied to him. In view of endorsement in the order-sheet,

acknowledging receipt of copies of documents including confessions and exhibited documents under section 207 Cr.P.C., such plea appears to be an afterthought. Be that as it may, upon his re-arrest copies of depositions including the confessions were supplied to Sk. Nayeem afresh vide order dated 12.10.2018. He was also given the opportunity to cross-examine the Judicial Magistrates who recorded the confessions. Hence, I am of the opinion confessional statements were duly supplied to all appellants and they had the opportunity to cross-examine the prosecution witnesses and did not suffer prejudice on such score.

(iii) Judicial confessions:- Whether voluntary:

17. Appellants Muzaffar Ahamed Rather, Md. Younus and Md. Abdullah have retracted their confessions on 05.04.2008, 15.04.2008 and 17.04.2008 respectively. Such retractions were made belatedly after the lapse of one year. Apart from the delay in retracting the confessions, reason for their retraction is not convincing. It is merely alleged in the retraction petition they were pressurized by the police. However, the statements are bereft of any material particulars with regard to the manner and circumstances in which such pressure was exerted upon them. It may not be out of place to note in ***Bharat v. State of U.P.***¹ the Apex Court held as follows:-

“7. The law as to confessions is perhaps too widely stated. Confessions can be acted upon if the court is satisfied that they are voluntary and that they are true. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged in the context of the entire prosecution case. The confession must fit into the proved facts and not run counter to them. When the

¹ (1971) 3 SCC 950

voluntary character of the confession and its truth are accepted it is safe to rely on it. Indeed a confession, if it is voluntary and true and not made under any inducement or threat or promise, is the most patent piece of evidence against the maker. Retracted confession, however, stands on a slightly different footing. As the Privy Council once stated, in India it is the rule to find a confession and to find it retracted later. A court may take into account the retracted confession, but it must look for the reasons for the making of the confession as well as for its retraction, and must weigh the two to determine whether the retraction affects the voluntary nature of the confession or not. If the court is satisfied that it was retracted because of an after thought or advice, the retraction may not weigh with the court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its user. All the same, the courts do not act upon the retracted confession without finding assurance from some other sources as to the guilt of the accused. Therefore, it can be stated that a true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires the general assurance that the retraction was an after thought and that the earlier statement was true. This was laid down by this Court in an earlier case reported in Subramania Gounden v. State of Madras. (emphasis supplied)

18. Applying the ratio in the present case, I note not only were the retractions delayed but they were cryptic. It was merely stated that confessions were made upon pressure by police. How, when and in what manner such pressure was exerted is not explicit. Retractions do not inspire confidence and appear to have been made as an afterthought upon legal advice. On the other hand, due caution had been given to the appellants by the Magistrates before the confessions were recorded. Both the Magistrates warned the appellants they were not required to make the confessions and the confessions, if made, may be used against them. Appellants also denied they were making the confessions due to undue influence, fear or coercion. They emphatically stated they were making

the confessions voluntarily. They also gave reasons for making the confessions.

19. It is also argued appellants did not have legal representation during investigation. Hence, confessions are invalid. Absence of legal representation at the time of making confession by itself does not render the confession inadmissible in law. A confession which is found to be voluntary and truthful may be relied upon even if the accused did not have legal representation at the time when he made the confession. Scheme of the Code lays down an onerous duty on the Magistrate to caution the accused who is brought before him that he is not required to make a confession and if confession is made the same shall be used against him. The Magistrate is also required to satisfy himself that the accused is making confession voluntarily and not due to any undue influence, coercion or threat. He is to append a memorandum at the foot of confession that caution was duly administered to the accused and a certificate that confession which is recorded is a full and true account of the statement made. These requirements have been fully satisfied in the facts of the case. Appellants made elaborate statements disclosing their personal details and peculiar circumstances which had brought them in contact with 'LeT'. They also stated the manner in which they were recruited, trained and had illegally entered the country to pursue the objectives of 'LeT'. These elaborate narrations (including minor errors) prove the confessions were voluntary and not a product of tutoring.

20. In Indian Law, test of voluntariness of a confession is to be judged from the safeguards engrafted in the Code and not tested on the anvil of

availability of legal advice from a lawyer chosen by the accused as held in ***Ernest A. Miranda vs. State of Arizona***². This issue fell for decision in ***Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid vs. State of Maharashtra***³ wherein the Apex Court held as follows:-

“455. It is thus clear to us that the protection to the accused against any self-incrimination guaranteed by the Constitution is very strongly built into the Indian statutory framework and we see absolutely no reason to draw any help from the Miranda principles for providing protection against self-incrimination to the accused.”

21. The Court in ***Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid*** (supra) further clarified absence of legal representation during recording of confession would not vitiate trial and held as follows:-

“467. The object of the criminal law process is to find out the truth and not to shield the accused from the consequences of his wrongdoing. A defence lawyer has to conduct the trial on the basis of the materials lawfully collected in the course of investigation. The test to judge the constitutional and legal acceptability of a confession recorded under Section 164 CrPC is not whether the accused would have made the statement had he been sufficiently scared by the lawyer regarding the consequences of the confession. The true test is whether or not the confession is voluntary. If a doubt is created regarding the voluntariness of the confession, notwithstanding the safeguards stipulated in Section 164 it has to be trashed; but if a confession is established as voluntary it must be taken into account, not only constitutionally and legally but also morally.”

22. Hence, I hold judicial confessions of Md. Abdullah, Md. Younus and Muzaffar Ahamed Rather are voluntary in nature and not vitiated by threat, coercion or undue influence. Their retractions are belated and without any merit.

² 384 US 436 (1966)

³ AIR 2012 SC 3565

(iv) Truthfulness of the confessions:-

23. Confessions are corroborated by independent evidence on record. Official witnesses apprehended the appellants at the Petrapole Border. Their versions corroborate the confessions made by the appellants. P.W. 31 along with his team of officers being P.Ws. 1 to 7 proved the appellants were apprehended at Petrapole Border after illegally entering the country without valid documents. Fake documents regarding their identities were recovered from Sk. Nayeem. A fake driving licence purportedly in the name of Sk. Samir was recovered. Fake voter's identity card purportedly in the name of Md. Kadir was recovered from Md. Younus. Fake ID cards of Chandra Sekhar Azad University of Agriculture and Technology, Kanpur were recovered from Md. Abdullah and Muzaffar Ahamed Rather. P.Ws. 10 and 11 who are local people deposed they saw BSF personnel had arrested four persons who had come from Bangladesh. P.W. 10 identified all the appellants while P.W. 11 identified Md. Younus and Md. Abdullah in Court. Though the other local witnesses, that is, P.Ws. 8 and 9 were declared hostile, they supported the crux of the prosecution case and stated BSF jawans had arrested four persons who had illegally entered from Bangladesh at Petrapole Border. The hostile witnesses identified the appellants in Court. Some of the local witnesses, that is, P.Ws. 8, 10 and 11 stated they heard the appellants were members of 'LeT', a terrorist organization. Evidence of the aforesaid witnesses lend corroboration to the confessions of the appellants that they were member of 'LeT' and pursuant to a conspiracy the appellants had illegally entered the country from Bangladesh to pursue their objectives.

24. Judicial confessions of the three appellants, namely, Muzaffar Ahamed Rather, Md. Younus and Md. Abdullah are corroborative of one another. A slight variation in the confession of Md. Younus that they entered the country on 1st April, 2007 appears to be a slip of tongue. Juxtaposing the confession of Md. Younus with that of the other appellants would show the appellants had come to the border on 1st April, 2007 and, thereafter, entered India on 3rd April, 2007. By mistake Md. Younus stated they had crossed the border on 1st April, 2007. This is a minor lapse which does not erode the truthfulness of the confessions. On the other hand, such inadvertent error reinforces the truthfulness and authenticity of the confessions of the appellants before the Magistrate. Had these appellants being tutored to make statements, such error would not have crept into their statements. This circumstance lends further credence to the truthfulness of the confessions of the appellants, as aforesaid. Hence, I am of the opinion confessions of Muzaffar Ahamed Rather, Md. Younus and Md. Abdullah are not only voluntary but also truthful and may be relied upon.

(v) Whether the confessions may be used against Sk. Nayeem:-

25. It is strenuously argued on behalf of Sk. Nayeem the retracted judicial confessions of the other appellants cannot be used against him. In this regard, he relies on *Kashmira Singh vs. State of Punjab*⁴, *Haricharan Kurmi vs. State of Bihar*⁵ and *Pancho vs. State of Haryana*⁶.

⁴ AIR 1952 SC 159

⁵ AIR 1964 SC 1184

⁶ (2011) 10 SCC 165

26. There is no dispute with the proposition of law that a retracted confession cannot be used against a co-accused as substantive evidence. It may be used for corroboration of other incriminating evidence against the co-accused.

27. In **Kashmira Singh** (supra) the Apex Court succinctly enunciated the manner in which confession of an accused may be used against another:-

“10. ... The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.”

28. The aforesaid ratio was reiterated in **Haricharan Kurmi** (supra).

29. However, it is well-known conspiracies are hatched in secrecy and direct evidence of conspiracy is hardly available. It is not always possible to lead direct evidence about the manner of formation of conspiracy, persons who took part in it and the object of conspiracy. Such facts are necessarily matters of inference to be established through circumstances which occurred before, during and after the conspiracy is hatched. Hence, the Apex Court in subsequent authorities clarified to prove a charge of conspiracy, confession of a co-accused may be utilized in a slightly

nuanced manner. In **Baburao Bajirao Patil vs. State of Maharashtra**⁷ the Apex Court clarified the proposition as follows:-

“6. ... In a case of conspiracy in which only circumstantial evidence is forthcoming, when the broad features are proved by trustworthy evidence connecting all the links of a complete chain, then on isolated events the confessional statements of the co-accused lending assurance to the conclusions of the Court can be considered as relevant material and the principle laid down in the case of Hari Charan Kurmi would not vitiate the proceedings.”

30. In **Mohd. Khalid v. State of W.B.**⁸ the Court reiterated as follows:-

“27. Where trustworthy evidence establishing all links of circumstantial evidence is available the confession of a co-accused as to conspiracy even without corroborative evidence can be taken into consideration. (See Baburao Bajirao Patil v. State of Maharashtra.) It can in some cases be inferred from the acts and conduct of the parties. (See Shivnarayan Laxminarayan Joshi v. State of Maharashtra.)”

31. What emerges from the aforesaid ratios is when broad features of the case implicating the conspirators are established through convincing circumstantial evidence, confession of a co-accused without corroborating evidence may be used to prove existence of conspiracy and render assurance to the conclusion of the Court with regard to the culpability of the conspirators, notwithstanding the ratio propounded in **Kashmira Singh** (supra) and followed in **Haricharan Kurmi** (supra).

32. I have made an endeavour to examine the prosecution evidence led against Sk. Nayeem in the light of the aforesaid proposition of law. Firstly,

⁷ (1971) 3 SCC 432

⁸ (2022) 7 SCC 334

marshalling the independent evidence against Sk. Nayeem, it appears the prosecution has proved as follows:-

- (i) Sk. Nayeem is a resident of Maharashtra and not a local inhabitant;
- (ii) He was apprehended at Petrapole border with other appellants (two of whom are Pakistani nationals) after they had illegally entered the country;
- (iii) Fake driving licence standing in the name of one Sk. Samir was recovered from his possession;
- (iv) Other false documents, e.g. fake voter's identity card standing in the name of Md. Kadir bearing the photograph of Md. Younus and fake identity cards of Chandra Sekhar Azad University of Agriculture and Technology, Kanpur were recovered from other appellants;
- (v) No explanation is forthcoming from Sk. Nayeem why and under what circumstances he was present at Petrapole border when all of them were apprehended with fake documents relating to their identities.

33. These circumstances unerringly establish Sk. Nayeem had acted in concert with the other appellants who are members of a terrorist organization and they had illegally entered India with false documents. These broad features of the prosecution case being established through independent evidence, confessional statements of the other appellants

may be used to corroborate and lend assurance to the conclusion of the Court regarding culpability of Sk. Nayeem as a conspirator in the crime.

Recovery of incriminating articles including explosives whether proved:-

34. The other limb of the prosecution case is recovery of incriminating articles including anti-Indian pamphlets and explosives from the residence of Sk. Nayeem on 06.04.2007.

35. P.W. 34, investigating officer deposed he recorded the statement of Sk. Nayeem. Pursuant to his statement, he brought Sk. Nayeem to his rented apartment at 19, Madan Mohan Barman Street, Kolkata- 700007.

In the course of search, he found various articles as follows:-

- a) One ration card in the name of Md. Manjur, another one in the name of Md. Mehrab;
- b) One electricity bill of CESC in the name of Md. Manjur;
- c) Xerox of Election Commission of India ID Card in the name of Md. Manjur;
- d) One letter from Regional passport office addressed to Md. Mehrab;
- e) One driving licence in the name of Md. Fahim;
- f) One election commission ID card of Md. Kadir;
- g) One membership card in the name of Sk. Samir;
- h) One visiting card in the name of Rehmat Ali, Fruit merchant;
- i) One electricity bill in the name of Md. Manjur for month of January, 2007;
- j) One rent slip in the name of Md. Manjur for the month of September, 2006;
- k) One letter of Md. Mehrab dated 2.3.2007 in the name of Manager of Punjab National Bank, Jakaria Street, Kolkata for cheque book for account No. 5202;
- l) One letter of electoral registration officer in the name of Md. Nazem;
- m) One driving licence in the name of Sk Samir;
- n) Xerox of driving licence of Md. Mehrab;
- o) One Xerox of driving licence of Md. Fahim;

- p) Two maps of West Bengal and North Eastern State;
- q) 50 Anti-Indian Leaflets in Urdu and English;
- r) One empty cardboard box containing light brown sticky material.

He prepared a seizure list. Seized articles were packed, sealed and labelled.

36. P.W. 24, Pallab Kr. Ganguly, another police officer deposed he had accompanied P.W. 34 to the residence of Sk. Nayeem. As per identification of Sk. Nayeem, they entered the tenanted apartment and recovered various articles. He further deposed all the articles except the sticky substance was kept in an envelope which was sealed and labelled. The sticky substance was kept in a separate envelope and labelled. His signature does not appear on the seizure list (Exhibit 12). A plain paper containing a list of the seized articles bearing his signature was produced in Court as a label on the envelop where the articles were kept. Though the paper was exhibited as Exhibit 13 (with objection), learned Judge noted he was unwilling to accept the paper as label.

37. Seizure list (Exhibit 12) bears the signature of three independent witnesses, namely, Md. Manjur (P.W. 20), Ajit Sinha (P.W. 23) and one Ganesh Das (who had expired). During trial, Md. Manjur did not support the prosecution case with regard to recovery of articles from the rented room of Sk. Nayeem. He stated he was shown ration card, electricity bill, voter's ID card at the office of CID, Bhawani Bhawan and was made to sign a paper at the said office.

38. P.W. 23 deposed he is a book binder and had come to 19, Madan Mohan Barman Street, Kolkata- 700007 to go to Osman Book Shop in

connection with his business. At that time, he saw Sk. Samir open the lock of a room on the 2nd floor and police personnel recovered various articles including some liquid material from a black coloured wooden box. He signed on the seizure list. He identified nine out of eighteen seized articles in Court. He did not identify the fifty anti-Indian pamphlets in Urdu and English nor did he identify any black wooden box in Court. He was subjected to scathing cross-examination to show he was a pocket witness of the police and had deposed in various cases. Defence exhibited the deposition of the said witness in ST.1(1) 2008 before the 8th Additional Sessions Judges' Court, Alipore, South 24-Parganas. P.W. 23 tried to wriggle out of the situation by claiming the person who deposed in the other case was one Ajit Singha. He was called upon to produce his voter ID card but made false claim that it was stolen. The witness was further discredited when P.W. 24 admitted he had recorded statement of one Ajit Singha as a prosecution witness in connection with another case, i.e. Bally PS Case No. 18/07.

39. P.W. 26, Mehtab Ahmed deposed he is one of the owners of 19, Madan Mohan Barman Street, Kolkata- 700007. He further deposed Sk. Samir had taken a room on the 3rd floor of the house on rent. After sometime, his wife came and during her stay police had come to the room of Sk. Samir three times.

40. The aforesaid prosecution evidence regarding recovery of various articles including anti-Indian pamphlets and brown sticky substance kept in a cardboard box from the residence of Sk. Nayeem suffers from glaring inconsistencies.

41. Firstly, the room which had been let out to Sk. Nayeem and the manner of entry are shrouded in mystery. While P.W. 26 (landlord of the premises) deposed Sk. Samir was a tenant on the 3rd floor of the premises, P.Ws. 23 and 24 stated Sk. Samir had taken them to his room on the 2nd floor wherefrom various articles were recovered.

42. Manner of entry into the room is also unclear. P.W. 23, Ajit Sinha, independent witness stated Sk. Samir had opened the lock of the room with a key. None of the police witnesses, that is, P.Ws. 24 and 34 corroborate him in this regard. On the other hand, P.W. 26 stated wife of Sk. Nayeem was in the house when the police had come.

43. Presence of P.W. 24, Pallab Kr. Ganguly at the time of recovery is highly doubtful. His presence is not acknowledged by his colleague, the investigating officer (P.W. 34) who made the seizures. His signature also does not appear on the seizure list. A paper bearing his signature (Exhibit 13 with objection) was produced in Court claiming the same was a label inside the envelope where seized documents were kept. None of the envelopes containing either the seized documents or the sticky substance found in a cardboard box were produced in Court. Hence, the piece of paper bearing signature of P.W. 24 could not have been treated as a label on the said envelopes.

44. The sole independent witness, Ajit Sinha (P.W. 23) who supported the prosecution case is a pocket witness of the police. Though he made desperate efforts to wriggle out of the situation, his deposition in earlier cases as prosecution witness was exhibited. His claim that a different person had deposed in the earlier case runs hollow as the residential

address of P.W. 23 and the one who deposed in the earlier criminal cases are one and the same. He was also unable to produce any trade licence with regard to his book binding business. Deposition of this witness, therefore, requires to be taken with a pinch of salt. The other independent witness, that is, Md. Manjur (P.W. 20) did not support the prosecution case and claimed he was made to sign a paper at the CID Office, Bhawani Bhawan.

45. Finally, though P.W. 34 claimed the seized articles were sealed and labelled, none of the seized articles produced in Court bore any seal or label. Most importantly, fifty anti-national pamphlets in Urdu and English were produced for the first time during the deposition of the investigation officer, P.W. 34. Neither P.W. 34 nor P.W. 24 has identified the pamphlets in Court. None of the pamphlets belatedly produced in Court bear the signatures of these witnesses or the appellants. It would be improper to hold the anti-Indian pamphlets in Urdu and English produced in the Court by P.W. 34 had been seized from the room of Sk. Nayeem. With regard to the recovery of a cardboard box containing brown sticky substance from his room, it is apposite to note that the so-called cardboard box was never produced in Court. While P.W. 24 claimed the brown sticky substance was kept in a separate envelope, investigating officer, P.W. 34 who seized the articles does not corroborate his stance. He merely states all the seized articles were packed, sealed and labelled. So-called envelope wherein the brown sticky substance was kept has also not been produced in Court. These lacunae in the prosecution case regarding recovery of incriminating articles particularly fifty anti-national

posters in Urdu and English and brown sticky substance kept in a cardboard box cannot be washed away as remissness in investigation. Recovery of these articles from the conscious possession of Sk. Nayeem is fundamental to establish the common intention of the conspirators to wage war or to overthrow the Government by show of criminal force. Prosecution must establish through convincing and unimpeachable evidence whether the appellants had collected arms and ammunitions with the intention of waging war or overawing the State which show of criminal force. Access to arms and ammunitions of lethal nature by one of the conspirators is a '*sine que non*' to prove the charged offences. Recovery of various incriminating articles from the room of Sk. Nayeem including a brown sticky substance alleged to be an explosive is based on shaky foundation and cannot be said to have been proved beyond reasonable doubt.

Opinion of CFSL expert (P.W. 38) – whether live-link is established:-

46. Even for arguments sake if it is accepted that P.W. 34 recovered some brown sticky substance kept inside a cardboard box, the live-link between the substances so recovered and the one that was examined by P.W 38 at CFSL laboratory is not established. P.W. 24 claimed the brown sticky substance was kept inside a separate envelope. P.W. 34, the investigating officer, however, does not support his contention. He merely deposed the seized articles were packed, sealed and labelled. No envelope wherein the brown sticky substance was alleged to have been kept was produced in Court. Hence, it is unclear how the brown sticky substance

found inside a cardboard box was kept by the investigating officer (P.W. 34) prior to its dispatch for examination by CFSL expert.

47. As per prosecution case, brown sticky substance was recovered from Sk. Nayeem on 06.04.2007. Deposition of P.W. 38 (CFSL expert) and the report (Exhibit 21) shows the department received a sealed packet containing brown sticky material on 11.06.2007. There is a gap of over two months between date of recovery and receipt of the sample for examination. No evidence is forthcoming as to where and in what manner the seized substance was kept by the investigating officer for over two months prior to its dispatch. No contemporaneous document in the form of Malkhana register is produced to prove how seized substance was kept in safe custody during the interregnum ruling out any possibility of substitution. It is alleged the brown sticky substance contained Nitroglycerine. Nitroglycerine in liquid state is highly explosive and may explode with slight exposure to heat, shock, jerk etc. This makes it all the more imperative for the prosecution to establish in what manner the seized substance was stored for two months prior to its dispatch.

48. There are other inexplicable loose ends with regard to the dispatch of the seized article. Exhibit 21 shows that the sample had been forwarded by the Additional Chief Judicial Magistrate, Bongaon, North 24 Parganas. Perusal of the order-sheet of the Magistrate shows no permission had been obtained from the Court to send the seized articles for CFSL examination. Apart from a laconic statement made by P.W. 34 that he sent the sticky substance for CFSL examination, there is not even an iota of evidence with regard to the manner in which the sticky

substance was dispatched for CFSL examination. Even the messenger who is said to have carried the seized article for CFSL examination has not been examined.

49. Finally, there is an inordinate delay of about a year in examining the sample. From the deposition of P.W. 38 it appears the sample was received on 11.06.2007 but was examined between 13.05.2008 to 30.05.2008, that is, after lapse of about one year. He further deposed remnants of the sample were kept in a sealed envelope which was returned with the report through an authorised messenger, Shri Ahibhusan Mondal. The aforesaid person has not been examined. Neither the remnants of the sample examined nor the envelop in which it was sealed and returned were produced in Court. No explanation for non-examination of the person and non-production of remnants is offered by the prosecution.

50. P.W. 39, second investigating officer, claimed he collected the CFSL report from the Court, though the date of registration of the case mentioned in CFSL report (Exhibit 21) is 08.06.2007 and not 04.04.2007, that is, when the FIR was registered.

51. From the aforesaid discussion, I am constrained to hold there is an appalling paucity of reliable evidence with regard to the manner in which the seized article, that is, sticky substance was kept in the custody of the investigating agency for more than two months and how the same was dispatched for examination at the end of CFSL department. Breach in the live-link between the article seized and the one examined by CFSL expert severely impairs the prosecution case. In the absence of such link

evidence, it may not be safe to rely on the opinion of the CFSL expert that the seized material contained Nitroglycerine. Thus, prosecution has failed to prove beyond doubt recovery of incriminating materials, namely, anti-national pamphlets and sticky substance containing Nitroglycerine from the possession of one of the conspirators, namely, Sk. Nayeem.

Whether the convictions of the appellants are justified:-

(i) Conviction under section 121 IPC:-

52. It is settled law every admission is not a confession. A confession is an admission of guilt or of circumstances which disclose the ingredients of the offence. It is necessary to see whether the confessions made by the appellants before the Magistrates (Exhibits- 18, 19 and 20) disclose that they waged war or attempted/abetted to wage war against the Government of India punishable under sections 121 I.P.C.

53. Scrutiny of the aforesaid confessions show Md. Abdullah and Md. Younus are Pakistani nationals. Muzaffar Ahamed Rather was illegally taken to Pakistan. All of them were associated with 'LeT', a terrorist organization. Md. Younus and Muzaffar Ahamed Rather were given training in the use of AK-47, 'Kailashnikov' and hand grenades. They were told to go to Bangladesh and meet one Sk. Abdul Nayeem @ Samir who would help them to enter India and take them to Kashmir to pursue the objectives of the organization. One of them i.e. Md. Younus was told if he died it would be an achievement and he would be rewarded. All of them met Sk. Nayeem (co-appellant) and they illegally crossed the border. Thereafter, they were apprehended.

54. In *Nazir Khan And Others vs. State of Delhi*⁹ the Apex Court interpreted the expression 'waging war' by holding as follows:-

“31. Mere collection of men, arms and ammunitions does not amount to waging war.”

55. It further held as follows:-

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

56. In *Mohd. Jamiludin Nasir vs. State of West Bengal*¹⁰ the Supreme Court analyzed the concept of 'waging war' against the State from the pre-independent era till date. It culled out general principles which may be applied to determine when unlawful acts of an accused can be said to constitute waging war against the State:-

“160.1. The most important is the intention and purpose behind the defiance or raging against the Government.

160.2. Though the modus operandi of preparing for the offensive act against the Government may be quite akin to the preparation in a regular war, it is often said that the number of force, the manner in which they are arrayed, the arm and/or equipment are immaterial.

160.3. Even a limited number of persons who carry powerful explosives and missiles without regard to their own

⁹ (2003) 8 SCC 461

¹⁰ (2014) 7 SCC 443

safety can cause more devastating damage than a large group of persons armed with ordinary weapons or firearms.

160.4. There need not be the pomp or pageantry usually associated with war such as the offenders forming themselves in battle line and arraying in a war-like manner.

160.5. The court must be cautious in adopting an approach which has the effect of bringing within the fold of Section 121 all acts of lawlessness and violent acts resulting in destruction of public property, etc.

160.6. The moment it is found that the object sought to be attained is of a great public nature or has a political hue the offensive violent act targeted against the armed force and public officials should not be branded as acts of "waging war".

160.7. The expression "waging war" should not be stretched too far to hold that all acts of disrupting public order and peace irrespective of their magnitude and repercussions could be reckoned as acts of "waging war" against the Government.

160.8. A balanced and realistic approach is called in construing the expression "waging war" irrespective of how it was viewed in the long long past.

160.9. 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 "waging war".

160.10. Neither the number engaged nor the force employed nor the species of weapon with which they may be armed is really material to prove the offence of waging war."

57. It would be argued the appellants in their confessions have admitted to be associated with a terrorist organization, namely, 'LeT'. They also admitted some of them were given training in arms. They had illegally entered the country pursuant to the instructions from superiors in the said organization to pursue its objectives in Kashmir. Mere membership of a terrorist organization and every terrorist act may not amount to waging war against the State. These are overlapping concepts whose difference essentially lies in degree. The distinction is clarified in *Mohammed Ajmal Mohammad Amir Kasab alias ABU Mujahid* (supra)

wherein the Court referring to its earlier decision in *Navjot Sandhu* (supra) held as follows:-

“541. In *Navjot Sandhu* [(2005) 11 SCC 600 : 2005 SCC (Cri) 1715] , the issue of “waging war” against the Government of India has also been considered in relation to terrorist acts and in that regard the Court observed and held as follows:

“275. War, terrorism and violent acts to overawe the established Government have many things in common. It is not too easy to distinguish them....

276. It has been aptly said by Sir J.F. Stephen:

‘... Unlawful assemblies, riots, insurrections, rebellions, levying of war are offences which run into each other and not capable of being marked off by perfectly definite boundaries. All of them have in common one feature, namely, that the normal tranquillity of a civilised society is, in each of the cases mentioned, disturbed either by actual force or at least by the show and threat of it.’ [A History of the Criminal Law of England, Vol. 3 at p. 242.]

277. To this list has to be added ‘terrorist acts’ which are so conspicuous nowadays. 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.

278. It is seen that the first limb of Section 3(1) of POTA—

‘3. (1)(a) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever....’

and the acts of waging war have overlapping features. 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 121-A.”

542. This answers Mr Ramachandran's submissions to the effect that if an offence comes within the definition of “terrorist act” under Section 15 of the Unlawful Activities (Prevention) Act, it would automatically fall out of Section 121 of the Penal Code, as also his rather extreme submission that the incorporation of Chapter IV of the Unlawful Activities (Prevention) Act, 1967, should be viewed as deemed repeal of Section 121 of the Penal Code. As explained in Navjot Sandhu [(2005) 11 SCC 600 : 2005 SCC (Cri) 1715] , 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 Penal Code, including Section 121, basically cover different areas.” (emphasis supplied)

58. The most important thing is the ‘quo animo’ or the real intention for which the appellants assembled. The object for which the appellants entered the country is singularly important to discern whether their action would constitute an attempt to wage war or overwhelm the government with use of criminal force. A balanced and realistic approach is necessary to construe the expression and every act having the potentiality to disturb public order may not be reckoned as an act of waging war against the State. Target of attack chosen by the conspirators and the immediate objective sought to be achieved are equally important. But, neither the number of men engaged nor the force employed or the nature of weapon with which they may be armed is always definitive of their intention to wage war. Even a limited number of men who through stealth procure powerful explosives and missiles which may cause devastating damage to a large group of persons and thereby overwhelm the sovereign authority of the State through use of criminal force would constitute waging of war.

59. In the present case, recovery of incriminating articles, e.g. anti-Indian pamphlets and explosives from the residence of Sk. Nayeem have not been proved. Mere reliance on judicial confessions and apprehension of all the appellants at Petrapole after they had illegally entered India would not establish access of the appellants to destructive explosives and prove their potentiality to wage war.

60. Even an attempt to commit the crime has not been established. Commission of an offence constitutes of three parts. First, is the intention to commit the crime, that is, entertaining of requisite *mens rea* to commit the crime. Second, is the stage of preparation which is followed by a more proximate and definitive act which would constitute an attempt when the perpetrator is not successful due to circumstances beyond his control. A thin yet clear line of demarcation exists between ‘preparation’ and ‘attempt’.

61. In *Malkiat Singh And Another vs. State of Punjab*¹¹ the Apex Court underlined the difference in the following words:-

“7. The test for determining whether the act of the appellants constituted an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless.”

62. In *State of Maharashtra vs. Mohd Yakub*¹² distinction between ‘preparation’ and ‘attempt’ was enunciated as follows:-

“13. ... there is a distinction between “preparation” and “attempt”. Attempt begins where preparation ends. In sum, a person commits the offence of “attempt to commit a particular offence” when (i) he intends to commit that

¹¹ (1969) 1 SCC 157

¹² (1980) 3 SCC 57

particular offence and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.”

63. Whether an act or series of acts would constitute preparation or attempt to commit the crime is a mixed question of law and fact. To constitute an ‘attempt’, the overt act must not only be done with the intention to commit the crime but such act must have reasonable proximation and be done in the course of committing the crime. Evidence on record proves pursuant to an arrangement between themselves the appellants had illegally entered the country to pursue the objectives of a terrorist organization. But possession of explosives and other anti-national materials have not been established beyond doubt. Under such circumstances, the test of reasonable proximation and potentiality to commit the offence of waging war stands snapped. In this backdrop, it would not be correct to hold mere illegal entry of the appellants who are members of ‘LeT’ would constitute an attempt to commit the offence of waging war against the State.

(ii) Offence under section 121A IPC:-

64. Prosecution has argued the judicial confessions of Muzaffar Ahamed Rather, Md. Abdullah and Md. Younus and other evidence on record clearly establish a conspiracy was hatched amongst all the appellants to wage war or overawe the sovereign authority of the Government by show of criminal force. Three of the appellants were instructed by their handlers to go to Bangladesh and meet one Sk. Nayeem alias Sk. Samir. All of them met and pursuant to the conspiracy

hatched the trained mercenaries illegally entered India to pursue the objectives of 'LeT'. In view of its involvement with terrorist activities in the country, 'LeT' has been declared as a terrorist organization in India under the Unlawful Activities (Prevention) Act. The organisation has been declared as a terrorist organisation in other countries too. It has been declared as a foreign terrorist organization by United States as well as Great Britain in 2001. In 2002, Pakistan declared 'LeT' as a banned organization. United Nation has proscribed the group in 2005¹³. Appellants are associates of the said organization and subscribed to its violent objectives. Two of them were trained as mercenaries in use of powerful and dangerous weapons. Before undertaking the venture, one of them i.e. Md. Younus was told by his handler if he died it would be an achievement and he would be rewarded. These circumstances establish beyond doubt the sinister objective of the appellants was to illegally enter the country and overawe its sovereign authority in Kashmir by show of criminal force. To pursue this criminal objective, all of them entered into an arrangement to illegally enter the country and proceed to Kashmir.

65. Section 121A IPC makes the conspiracy to wage war or to overawe the sovereign authority of the Government by show of criminal force an offence. Offence of conspiracy is independent of the substantive offence itself. Crux of the offence lies in an agreement between two or more persons to do an unlawful act or an act by illegal means. To attract section 121A, it must be proved the conspirators entered into an

¹³ South Asia Terrorism Portal, "Lashkar-e-Toiba (LeT)" (<https://www.satp.org/terrorist-profile/india/lashkar-e-toiba-let>) accessed 1st November, 2022

agreement to wage war or to overawe the sovereign authority of the Government by show of criminal force. Agreement or arrangement between two or more persons to commit an offence is the heart and soul of the offence. Conspiracies are hatched in secrecy. There may not be direct evidence of existence of an agreement between the conspirators. Such agreement may be proved through circumstances before, during and after the occurrence to establish the complicity of each of the conspirators.

66. In *Ram Narayan Popli vs. Central Bureau of Investigation*¹⁴ the Apex Court held as follows:-

“342. ... For an offence punishable under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication”

67. It further held as follows:-

“343. No doubt, in the case of conspiracy there cannot be any direct evidence. The ingredients of offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing by illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.”

68. Similarly, in *Mohd. Usman Mohd. Hussain Maniyar v. State of Maharashtra*¹⁵ the Apex Court held as follows:-

“30. ... For an offence under Section 120-B, the prosecution need not necessarily prove that the perpetrators

¹⁴ (2003) 3 SCC 641

¹⁵ (1981) 2 SCC 443

expressly agreed to do or cause to be done the illegal act; the agreement may be proved by necessary implication.”

69. Judicial confessions of the conspirators show the meeting of minds between themselves to pursue their sinister objective by illegally entering the country as trained mercenaries and proceed to Kashmir to execute the objectives of the terrorist organization. Judicial confessions are corroborated by the apprehension of the conspirators at Petrapole border with fake identity documents.

70. Sk. Nayeem was apprehended with other appellants at Petrapole border. All of them were carrying fake identity documents. No explanation is forthcoming as to why the said appellant, a resident of Maharashtra, was present near the international border under suspicious circumstances with other appellants, two of whom were Pakistani nationals. These incriminating circumstances are corroborated by the judicial confessions of co-accuseds which lead to the irresistible inference of Sk. Nayeem being one of the conspirators.

71. It is argued neither judicial confessions nor other evidence on record show appellants had agreed to commit any specific act of violence far less one which would qualify as waging war. Failure to prove access to powerful explosives e.g. Nitroglycerine in the hands of one of the conspirators also causes an irreparable dent to the prosecution case.

72. In *Mohammad Irfan vs. State of Karnataka*¹⁶ the Apex Court held the word 'overawe' in section 121A IPC would imply creation of apprehension or situation of alarm. It held as follows:-

“58. As the text of the relevant Section shows, persons who plan to overawe the Central or the State Government by criminal force or show of criminal force would be guilty of offence of entering into conspiracy in terms of Section 121A of the IPC. The dictionary meaning of the expression “overawe” is to subdue or inhibit with a sense of awe. The expression “overawe” would thus imply creation of apprehension or situation of alarm and as rightly held by the Division Bench, it would not be necessary that the danger should be one of assassination of or of bodily injury to the members of the machinery or apparatus of the Government but the danger might as well be to public property or to the safety of members of the general public.”

73. Real object of the conspiracy is to be inferred from the attending circumstances before and after the conspiracy was hatched. In the present case, the conspirators were associates of a terrorist organization, namely, 'LeT' whose avowed objective is to strike terror and overawe the sovereign authority of the Government by show of criminal force. To pursue such objective the appellants, some of whom were trained mercenaries, had entered into a conspiracy to illegally enter the country and proceed to Kashmir. One of them had even been told by his handler if he lost his life it would be an achievement. The object of the conspiracy was to smuggle the trained mercenaries of 'LeT' into Kashmir and utilise them to overawe the sovereign authority of the State by use of terror and violence. The common intention of the conspirators to spread terror and awe among members of the public and thereby further the avowed objective of the terrorist organization, i.e. to overthrow sovereign control

¹⁶ 2022 SCC OnLine SC 856

over Kashmir clearly attracts section 121A of IPC. The fact that the conspirators were not aware of a specific target of attack does not erode their culpability with regard to the offence punishable under section 121A IPC. Hence, prosecution has been able to prove the offence punishable under section 121A IPC.

(iii) Conviction under section 122 IPC:-

74. Essential ingredients of the offence punishable under section 122 IPC are as follows:-

- “(i) collection of men, arms or ammunition etc.;**
- (ii) such collection etc., is with the intention of either waging war or being prepared to wage war;**
- (iii) participation of accused in such collection etc.;**
- (vi) such war was to be waged against the Government of India.”**

75. In the present case, charge under section 122 reads as follows:-

“That all of you members of LASKAR –E- TAIBA on or before 03-4-2007 at Petrapole (entered into India through Petrapole village), (near Haridebpur BOP) under Police Station – Bongaon, District – North 24 Parganas, collected ammunition etc. with the intention of waging war against the Govt. of India.”

76. Crux of the charge framed against the appellants is *“collection of ammunition etc. with the intention of waging war”*. Evidence on record show recovery of incriminating substances including Nitroglycerine has not been proved beyond reasonable doubt. As the factual foundation of the charge, namely, collection of ammunitions, that is, Nitroglycerine has not been proved, the charge cannot be said to have been established.

(iv) Conviction under section 5(b) of the Explosive Substances Act:-

77. Sk. Nayeem has also been convicted under section 5 of the Explosive Substances Act. As discussed earlier, recovery of explosives, i.e. Nitroglycerine from his room has not been proved beyond doubt. Link evidence between the substance allegedly recovered and the one that was examined at CFSL office has also not been established. Hence, the conviction under section 5(b) of the Explosive Substances Act is not maintainable.

(v) Conviction under section 14 of the Foreigners Act so far as Md. Younus and Md. Abdullah are concerned:-

78. Md. Younus and Md. Abdullah made confessions before Judicial Magistrate (P.W. 35). In their confessions, they admitted they are Pakistani Nationals and had illegally entered the country. Their retractions are belated and were rightly rejected by the Court below. Judicial confessions appear to be voluntary and truthful. They are corroborated by other evidence on record, namely, apprehension of the said appellants after crossing the international border with fake identity documents.

79. Though the substance of accusation stated in the body of the charge and the prosecution evidence led during trial show the appellants entered India without valid documents which is punishable under section 14A(b) of the Foreigners Act, charge was inadvertently framed under section 14 of the Foreigners Act and conviction was also recorded under the said provision of law. In view of the substance of accusation set out in the body of the charge and the prosecution evidence led, it is clear

appellants were fully aware of the prosecution case which is punishable under section 14A(b) of the Foreigners Act and reference to section 14 in the charge was an inadvertent error. As the appellants were fully aware of nature of accusation levelled against them, such error could not have occasioned failure of justice. Under such circumstances, even without altering the charge, the trial Court would have been entitled to convict the appellants under section 14A(b) of the Foreigners Act.

80. In the view of the aforesaid circumstances and as the said appellants have already undergone incarceration for more than 15 years, this Court instead of remanding the matter alters the finding of the trial Court on this score and records the conviction of the appellants under section 14A(b) of the Foreigners Act.

(vi) No finding on other charges:- whether implied acquittal?

81. I note that the trial Judge had not rendered a finding with regard to the charges under sections 419/420/468/469/471/124A IPC. When charges are framed under different heads, it is incumbent on the trial Court to record a finding on each head of charge. In the event, no finding is recorded in respect of a particular head of charge, appellants contend it would amount to an implied acquittal on such charge.

82. Doctrine of principle of implied acquittal implies, when from a reasonable and fair construction of the judgment as a whole a conclusion of acquittal may be inferred, though not expressly stated in the body of the judgment, the accused may be held to have been impliedly acquitted. Under such circumstances, the accused cannot be subjected to double jeopardy by an order of remand.

83. In *State of Maharashtra v. Shriram*¹⁷ the Bombay High Court elucidated the proposition in the following words:-

“14. It, therefore, follows that whether there is implied acquittal or not has to be inferred by placing the reasonable and fair construction on the judgment in issue. If so construed, if the judgment indicates that it exonerated the accused though not expressly stating so by referring to a particular charge, then nonetheless and notwithstanding the non-statement in that regard the judgment would be one of acquittal and would have the same force as is attached to a judgment specifically specifying offences of which accused is acquitted. Such approach is necessary to secure the ends of justice and also to subserve the concept of personal liberty under law. But for it, though the person may be specifically prosecuted and faced his trial he would be subject to double vexation only because there is omission in expression of recording acquittal at the end of his trial. The provisions of S. 403 of the old Cr. P.C. and S. 300 of the present Code and further the provisions like that of the one available in S. 26 of the General Clauses Act, 1897 equivalent to S. 27 of the Bombay General Clauses Act, 1904 are clearly meant to protect and safeguard the person accused of an offence from being doubly vexed with regard to trial of the same offence.”

84. Similarly, in *Kishan Singh vs. The King Emperor*¹⁸ the Privy Council invoked the principle of implied overruling with regard to charge under section 302 IPC when trial Court recorded finding of guilt of lesser offence punishable under section 304 IPC.

85. In the present case, charges with regard to which no finding was recorded primarily relate to cheating by impersonation and forgery. A reasonable construction of the judgment under appeal does not give rise to an inference that the view of the trial judge was exonerative on such counts. On the other hand, evidence on record shows the appellants were apprehended near the Petrapole border with fake identity documents. Such a situation cannot attract the doctrine of implied acquittal and it

¹⁷ 1978 SCC OnLine Bom 141

¹⁸ AIR 1928 PC 254

would ordinarily be incumbent on the appellate Court to remand the case for a decision by the trial Court on the aforesaid heads of charge. But in the present case three of the appellants have already suffered detention for more than 15 years and the other appellants i.e. Sk. Nayeem has undergone imprisonment for more than 11 years.

86. Under such circumstances, I am of the opinion it would not enure to the ends of justice to remand the case for recording a finding on the charges as aforesaid, when all the appellants have been found guilty of a graver offence and have already undergone incarceration for more than the maximum period of substantive sentence which could be awarded upon them provided the sentences were to run concurrently.

Sanction to prosecute:-

87. Appellants have argued the sanction to prosecute under section 196 of the Code of Criminal Procedure (Exhibit 13) is not a valid one. It is contended the facts giving rise to the offences are not disclosed in the sanction order. Sukumar Bhattacharjee (P.W. 30) who proved the sanction is also silent on such score. On the other hand, prosecution emphatically contended all documents and papers collected in the course of the investigation was placed before the sanctioning authority. Sanctioning authority considered the said materials and was pleased to grant sanction. These facts are evident from the sanction order as well as the deposition of P.W. 30. Sufficiency of material or the subjective satisfaction of the sanctioning authority cannot be gone into by this

Court. In a catena of cases¹⁹ the Apex Court held facts and circumstances giving rise to the offence must be placed before the sanctioning authority and the sanctioning authority upon applying its mind to such facts and circumstances may accord sanction. Whether all relevant materials were considered by the sanctioning authority must appear from the sanction order itself. In absence thereof, independent evidence may be led to prove such fact.

88. In *State of Maharashtra vs. Mahesh G. Jain*²⁰ the tests to determine a valid sanction have been set out:-

“14.1. It is incumbent on the prosecution to prove that the valid sanction has been granted by the sanctioning authority after being satisfied that a case for sanction has been made out.

14.2. The sanction order may expressly show that the sanctioning authority has perused the material placed before it and, after consideration of the circumstances, has granted sanction for prosecution.

14.3. The prosecution may prove by adducing the evidence that the material was placed before the sanctioning authority and its satisfaction was arrived at upon perusal of the material placed before it.

14.4. Grant of sanction is only an administrative function and the sanctioning authority is required to prima facie reach the satisfaction that relevant facts would constitute the offence.

14.5. The adequacy of material placed before the sanctioning authority cannot be gone into by the court as it does not sit in appeal over the sanction order.

14.6. If the sanctioning authority has perused all the materials placed before it and some of them have not been proved that would not vitiate the order of sanction.

¹⁹ Gokulchand Dwarkadas Morarka vs. The King, AIR 1948 PC 82; Jaswant Singh vs. State of Punjab, AIR 1958 SC 124; Mohd. Iqbal. Ahmed vs. State of Andhra Pradesh, AIR 1979 SC 677

²⁰ (2013) 8 SCC 119

14.7. The order of sanction is a prerequisite as it is intended to provide a safeguard to a public servant against frivolous and vexatious litigants, but simultaneously an order of sanction should not be construed in a pedantic manner and there should not be a hypertechnical approach to test its validity.”

89. In ***Central Bureau of Investigation vs. Ashok Kumar Aggrawal***²¹ the Apex Court held a sanction granted only on the basis of SP's report is not valid. All relevant materials collected during investigation including statement recorded under section 164, 161 Cr.P.C. must be placed before the sanctioning authority.

90. I have examined the sanction order as well as the deposition of P.W. 30. The sanction order clearly states that the materials collected in the course of investigation were placed before the sanctioning authority. After considering the said materials, the authority recorded its satisfaction and accorded sanction. P.W. 30, the then Joint Secretary (Home and Political Department), Government of West Bengal clarified the position by stating that upon consideration of the papers submitted by DIG, CID West Bengal, sanction was accorded. A combined reading of the sanction order (Exhibit 13) with the deposition of P.W. 30 shows all materials collected during investigation were placed before the sanctioning authority. He had duly considered the materials and accorded sanction. It is not open to this Court to examine the sufficiency of the materials. Nor the Court can sit in appeal over the subjective decision of the sanctioning authority. When the prosecution has adduced evidence that the sanctioning authority was appraised of all the materials collected

²¹ (2014) 14 SCC 295

during investigation and upon consideration of the same the sanctioning authority had recorded its satisfaction and accorded sanction to prosecute, I am of the opinion, absence of an elaborate narration in the sanction order would not invalidate it.

91. It is further contended sanctioning authority did not apply its mind to the facts of the case as the address of Muzaffar Ahamed Rather was incorrectly recorded in the order.

92. Reading the sanction order as a whole along with the evidence of P.W. 30, I am of the opinion this is an inadvertent error and has not caused prejudice to the appellants or occasioned failure of justice. A sanction order cannot be seen in a pedantic or hypertechnical manner. Every error in the sanction order would not render it invalid unless it causes prejudice to the appellants or occasions failure of justice. Muzaffar Ahamed Rather is not a foreign national. Hence, incorrect recording of his address is an inconsequential error and by no stretch of imagination could be said to have caused prejudice to the appellant. For the aforesaid reasons, I am of the opinion sanction to prosecute the appellants under section 196 Cr.P.C. is a valid one.

Conclusion:-

93. In the light of the aforesaid discussion, I acquit the appellants of the charges under sections 121 and 122 of IPC.

94. Sk. Nayeem is also acquitted of the charge under section 5(b) of the Explosive Substances Act.

94A. All the appellants are convicted of the offence punishable under section 121A of IPC.

94B. Md Younus and Md. Abdullah are also convicted under section 14A(b) of the Foreigners Act.

95. In view of the acquittal under section 121 of IPC, death sentence and fine of Rs. 50,000/- each, imposed on the appellants on such score are set aside.

96. This Court notes with dismay that the trial Court apart from awarding sentence of death on the count of section 121 of IPC, had not awarded sentence on any other count.

97. When the trial Court had found the appellants guilty of the graver offence punishable under section 121 of IPC and awarded the maximum sentence of death, the appellate Court under section 386 of Cr.P.C. is entitled to alter the finding of the trial Court on the score of conviction and award adequate sentence provided the same is not higher than the one awarded by the trial Court. Accordingly, this Court is entitled to award just and adequate punishment to the appellants on the counts of conviction recorded herein.

98. Offence under section 121A IPC deals with conspiracy to wage war or overawe the sovereign authority of a democratically elected government by show of criminal force. The offence is a grave one and involves indoctrinated members of a terrorist organisation whose purpose is to strike terror and destabilise the nation. Offence of such nature calls for deterrent punishment so as to discourage others from resorting to the path of terrorism. But unilateral imposition of maximum sentence

without considering the peculiar circumstances of the convict, namely, his position in the hierarchy of the terrorist organisation, extent of his involvement in the conspiracy and potentiality to strike terror would lead to undeserving martyrdom and feed fodder to further radicalisation. Hence, it is necessary to adopt a balanced approach and keep in mind all the aggravating and mitigating factors of the case while awarding a just punishment.

99. From the evidence on record it appears that the appellants are not men who were in the higher echelons of the terrorist organisation. They are foot soldiers who were recruited through allurement or coercion for the activities of the organisation. Md. Younus, a Pakistani national, was initially attracted by the altruistic activities of the organisation. Thereafter, on allurement of money he was indoctrinated and trained in use of arms. He is presently more than 66 years old and there is little possibility of his reverting to the path of terrorism. Md. Abdullah, the other Pakistani national, was a teacher by profession. He did not receive any training in use of arms and expressed his mistake in joining the terrorist organisation. Muzaffar Ahamed Rather was forcibly inducted into the terrorist organisation and given arms training. These mitigating circumstances show the appellants are not prominent players in the organisation and there is little possibility of their reverting to the path of terrorism. It is true Sk. Nayeem has criminal antecedent and criminal cases including one involving similar offences are pending against him. However, he has not been convicted in those cases. But no evidence is forthcoming that the said appellant had gone to Saudi Arabia in 2005 and

had met a Pakistani national. Nothing has been placed on record to show he is involved in the Bombay blast case or Mecca Masjid blast case. Recovery of explosives from his possession has also not been proved.

100. Balancing the aggravating and mitigating factors, I direct the appellants to be sentenced to suffer rigorous imprisonment for 10 years and pay a fine of Rs. 25,000/- each, in default, to suffer imprisonment for one year more for the offence punishable under section 121A of IPC.

101. Appellants Md. Younus and Md. Abdullah are also sentenced to suffer rigorous imprisonment for 5 years and pay a fine of Rs. 10,000/- each, in default, to suffer imprisonment for six months more for offence punishable under section 14A(b) of the Foreigners Act. Sentences are directed to run concurrently.

102. Period of detention suffered by the appellants during investigation, enquiry or trial shall be set off under Section 428 of the Code of Criminal Procedure.

103. As Md. Younus and Md. Abdullah have served out their sentences, appropriate authorities are directed to push them to their country of origin, that is, Pakistan.

104. Muzaffar Ahamed Rather having served out the sentence imposed upon him shall be forthwith released from custody, if not wanted in any other case.

105. Sk. Nayeem is facing trial in various courts. A production warrant has been issued by the learned Additional Sessions Judge-03, Patiala

House Courts, New Delhi for his production. He is directed to be forthwith produced before the Court concerned in execution of such warrant.

106. Death Reference No. 2 of 2017, Death Reference No. 1 of 2019 and Criminal Appeal No. 105 of 2017, Criminal Appeal No. 198 of 2017, Criminal Appeal No. 264 of 2017 and Criminal Appeal (DB) No. 92 of 2022 are accordingly disposed of.

107. A copy of the judgment along with L.C.R. be sent down to the trial Court at once for necessary action.

108. Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis upon compliance of all formalities.

I agree.

(Ananya Bandyopadhyay, J.)

(Joymalya Bagchi, J.)

PA