

(2013) 05 GAU CK 0038

Gauhati High Court

Case No: Criminal Appeal No. 149 of 2008

State of Assam

APPELLANT

Vs

Javed Wakar @ Musaffa @
Mehraj @ Abdul Rahman Danish
(Md.)

RESPONDENT

Date of Decision: May 17, 2013

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 104, 232, 313, 378, 378(1)
- Foreigners Act, 1946 - Section 14
- Penal Code, 1860 (IPC) - Section 120B, 121, 121A, 122, 124A
- Prevention of Corruption Act, 1988 - Section 4
- Unlawful Activities (Prevention) Act, 1967 - Section 10, 13

Citation: (2013) 3 GLD 681 : (2013) 3 GLT 834

Hon'ble Judges: P.K. Musahary, J; Iqbal Ahmed Ansari, J

Bench: Division Bench

Advocate: D. Saikia, Addl. AG and Mr. K.A. Mazumdar, Addl. PP, for the Appellant; S.C. Biswas, Rafiqul Islam and Mr. P Katakey, for the Respondent

Final Decision: Dismissed

Judgement

P.K. Musahary, J.

This appeal has been preferred u/s 378(1) of the Cr.P.C. 1973 challenging the judgment and order dated 12.6.08 passed by the learned Addl. Sessions Judge (Fast Track Court) No. 4, Kamrup at Guwahati in Sessions Case No. 248(K)/02 acquitting all the accused respondents of the charges u/s 120-B/121-A/122/153-A/34 of the Indian Penal Code and also acquitting the accused/respondent No. 1 of the charges u/s 14 of the Foreigners Act, 1946. The prosecution case in brief is that on 7.8.1999, Sri D. Deka, Deputy Superintendent of Police of Panbazar Police Station lodged an FIR with the Panbazar Police Station alleging inter-alia that he deputed some police

personnel to keep watch on a group of four persons viz. (i) Md. Fasiullah Hussain @ Hamid Mahmood @ Khalid Mahmood (ii) Md. Javed Wakar @ Md. Musaffa @ Md. Mehraj @ Abdul Rahman Danish (iii) Moulana Hafiz Md. Akram Mallick @ Musaffar Hussain @ Atabulla @ Bhaijan (iv) Qari Salim Ahmed @ Abdul Aziz @ Sadat as they were moving in the city of Gauhati in a suspicious and clandestine manner and further they were making telephonic conversation with different persons in the country as well as abroad. The suspicious behaviour of the aforesaid persons was not above board and so they were formally arrested on 7.8.99. During interrogation of the said 4 (four) arrested accused/respondents, it came to light that Pakistan's Secret Service i.e. Inter Service Intelligence, hereinafter referred to as (ISI) deputed the said persons to commit mass disturbances and/or otherwise to wage war against the State and to spread enmity between different groups of people of the State and thereby to act prejudicial to maintenance of harmony. During interrogation it further came to light that the Accused/Respondents No. 1 and 3 are Pakistani Nationals and Pakistani Citizens and are apparently ISI Officers and they do not possess any passport or valid travel documents and have entered India illegally. Moulana Hafiz Md. Akram Malik (Accused/Respondent No. 5) hails from Kupwara District in Jammu and Kashmir and is an explosive expert of the militant outfit called Harkat-ul-Mujahideen. Qari Salim Ahmed (Accused/Respondent No. 4), is one of the most dreaded leaders of the outfit and the Chief Organizer of the Harkat-ul-Mujahideen in India. These persons were also in illegal possession of foreign currencies (US Dollars-3892 and Bangladeshi Takka 492). For this purpose, a large consignment of arms, RDX and other deadly explosive have been dispatched to Assam. These four persons have also been asked by the ISI to carry out a series of explosions on the Manali-Leh Highway in Jammu and Kashmir to cut-off military supplies and thus to wage war against the country.

During preliminary interrogation of the arrested accused persons it appeared that a very dangerous scheme was drawn up by the ISI and the fundamentalist terrorist groups to create massive disturbances in the State in collusion with certain militant groups of Assam. They are also understood to have hatched conspiracy to incite communal disturbances in the state by inciting misunderstanding and hatred amongst the innocent and law abiding Muslim citizens of the State against the non-Muslim population.

2. The Panbazar Police Station, on receipt of the formal FIR, registered a case, being Panbazar Police Station Case No. 321/99 u/s 121/121-A/153-A read with Section 14 of the Foreigners Act, 1946, read with Sections 10/13 of the Unlawful Activities (Prevention) Act, (UPA Act in short) and started investigation of the case. The police after completion of investigation submitted charge-sheet No. 74 dated 21.6.2000 against accused 1) Fasilullah Hussain, 2) Javed Wakhar, 3) Md. Bilal @ Nanu Miyan u/s 120-B/121/121-A/53-A IPC read with Section 14 of the Foreigners Act against accused 4) Moulana Hafiz, 5) Quari Salim 6) Abdul Mukit Choudhury, 7) Haji Bilaluddin and 8) Muslimuddin Ali, u/s 120-B/121/121-A/153-A IPC.

3. The accused/respondents on receipt of process from the court appeared before the Court of learned CJM, Kamrup, Guwahati but as the offences were exclusively triable by the court of Sessions, the learned CJM, aforesaid committed the case to the Court of Sessions, Kamrup, Guwahati and the said learned Sessions Judge, on administrative reason, transferred the case to the court of the AD-hoc Addl. Sessions Judge (FTC No. 3), Kamrup, Guwahati for disposal. The learned Ad-hoc Addl. Sessions Judge (FTC No. 3), Kamrup, Guwahati framed charges against the accused persons u/s 120-B/121-A/122/153-A/34 IPC which were read over and explained clearly to them, to which they pleaded not guilty and claimed to be tried. After framing of charge during trial, accused Muslimuddin Ali absconded and hence the case against him was filed and the learned Adhoc Addl. Sessions Judge proceeded with the trial against the other accused persons. After examination of six witnesses, the learned Addl. Sessions Judge (FTC No. 3), Kamrup, Guwahati returned the case to the learned Sessions Judge, Kamrup, Guwahati expressing his unwillingness to proceed with the case and then the learned Sessions Judge, Kamrup, Guwahati finally transferred the case to the Court of Additional Sessions Judge (FTC No. 4) for disposal.

4. The prosecution, in support of its case, examined as many as 14 witnesses but the defence examined none. The learned Addl. Sessions Judge (FTC No. 4), (the learned trial Court in short), after closure of the evidence, examined the Accused/Respondents u/s 313 Cr.P.C. and during such examination, the learned trial Court was of the view that an additional charge is to be framed against the Accused/Respondents No. 1, 2 and 3 and accordingly, an additional charge was framed against the said 3(three) Accused/Respondents No. 1, 2 and 3 u/s 14 of the Foreigners Act, 1946. The charge being read over and explained, they all pleaded not guilty. Both the prosecution and defence were given fair chance to examine and cross-examine the prosecution witnesses again but both the sides declined to adduce further evidence and as such the learned trial Court proceeded to hear the case on the point, as envisaged u/s 232 Cr.P.C. but, as the learned Court below did not consider it to be a case of no evidence, did not record an order of acquittal and therefore, the learned trial Court asked the accused/Respondents to enter upon their defence by adducing evidence but all the Accused/Respondents declined to examine any defence witness and as such the trial Court heard the final arguments of both sides.

5. The learned trial Court, on consideration of the oral and documentary evidence on record and upon hearing the parties, passed the impugned Judgment and order acquitting all the accused/respondents of the charges under Sections 120-B/121-A/122/153-A/34 IPC and also acquitting the accused Respondent No. 1 of the charges u/s 14 of the Foreigners Act, 1946, while convicting the accused/respondent No. 2 and 3 u/s 14 of the Foreigners Act, 1946 and sentencing them (Respondents No. 2 & 3) to undergo rigorous imprisonment for 5 (five) years and to pay a fine of Rs. 1,000/- each, in default to undergo rigorous imprisonment for another 6(six) months each.

6. Mr. D. Saikia, learned Addl. Advocate General, appearing for the State/Appellant, first of all, broadly submitted that the learned trial court failed to appreciate the evidence of prosecution witnesses, particularly PW-2, 4, 7, 8, 10, 11, 13 and 14 and came to a wrong conclusion in holding the accused-respondents not guilty and acquitting them of charges framed against them. According to him, the prosecution succeeded in proving the aforesaid charges against accused-respondents beyond all reasonable doubt and the learned trial court should have passed an order of conviction and sentence against them. He has taken us through the evidence of aforesaid prosecution witnesses and persuaded that all the charges against the respondents have been proved beyond reasonable doubt.

7. Taking us through the evidence of PW-2, Sri Atma Choudhury, Mr. Saikia submits that the said witness clearly stated in his examination-in-chief that he saw the police recovering US dollars and Bangladeshi currency notes from the possession of the accused respondent No. 1, 3, 4 and 5 and the said witness identified the accused respondents No. 5 in the dock and stated that he was present at the time of seizure of articles by police.

8. Turning to evidence of PW-4, Alkas Ali, an autorickshaw driver, it is submitted that the said witness deposed in the Court that while he was proceeding in his autorickshaw to Guwahati Railway Station, he stopped near me Reserve Bank of India Point seeing a huge gathering of people thereat. The said witness clearly deposed that he saw police personnel seizing articles from 4 (four) persons and preparing a seizure list (Ext.5) on which he put his signature as a seizure witness. He proved his signatures Ext.5(6), 5(7) and 5(8) appearing on the seizure list, Ext.5.

9. Mr. Saikia next takes us through the evidence of PW-7, Sri Ajit Hazarika, who is a businessman by profession. As an independent witness he clearly deposed that while he was going towards the railway station on foot, he saw a large gathering of people. Police apprehended some persons and recovered some articles from them. He was, however, not sure how many persons were apprehended by police. In his presence the police recovered US dollars, Bangladeshi and Indian currency notes and prepared seizure lists, Exts.3 to 5. The said witness also stated that the seized dollars and currency notes were produced in the court as Material Exts No. 1 to 8. The said witness further stated that at the time of seizure of the aforesaid articles, the police informed him that the persons from whom the aforesaid articles were seized, were all ISI agents.

10. The learned Addl. Advocate General submits that the trial court below failed to take into consideration the clinching pieces of oral and documentary evidence on record, namely Ext.5, the seizure list, wherein at Sl. No. 5 thereof, it is clearly mentioned that the accused respondent No. 1 was possessing an identity card issued, prima facie, by the Govt. of Pakistan and in spite of that the learned trial court relied on the address furnished in the charge-sheet of some other case i.e. Sessions Case No. 222(K)/04 which was not called for, for its perusal and verification

and to be satisfied that the accused-respondent No. 1 is not a citizen of India but a foreign national.

11. We have been taken through the evidence of PW-8, Sri Gouri Sankar Ram, who was posted as Second Officer of Panbazar Police Station on 7.8.09. He deposed that he was officiating as O/C at the relevant point of time. He testified that one Om Prakash Tewari was deployed to keep watch over few suspects who came out of Star Hotel at Ganeshguri, Dispur carrying one bag each and reached Guwahati Railway Station. From their movement it was suspected that they would leave Guwahati by train. On receiving the information, the DSP, Panbazar Division, arrived at the Railway Station along with the staff. AGD entry, being Panbazar P.S. GDE No. 243 dated 7.8.99, was made in connection with the aforesaid information. The aforesaid suspected persons were kept under surveillance and during the course of search, some objectionable documents were recovered from them and it could be ascertained that they were working as ISI agents. On being directed, PW-8 made necessary GD Entries in this regard. His signatures appear on the GD entries. He testified that he received the Ejahar from DSP Devendra Deka (PW-14), who took over the charge of investigation of the case. In the said Ejahar the respondents were shown as accused persons.

12. The prosecution greatly relied on the evidence of PW-11, Sri Kandarpa Kr. Nath who was serving as Inspector of Police in Special Operation Unit P.S. At the relevant point of time he was the IO of the SOU P.S. Case No. 1/99 which was registered under Sections 120B/121/121A/124A/122/153A IPC. He corroborated the evidence of PW-14, IO of this case, that he (Debendra Deka) DSP of Panbazar Division, seized copies of some seizure lists relating to the said SOU P.S. Case. He stated that the seized articles were kept under his custody and took photocopies thereof by himself. This witness had given the description of seized articles as under:

(1) One seizure list dated 25.8.99 made by S.I. Dilip Kr. Choudhury of SOU PS in connection with SOU P.S. case No. 1/99 u/s 120(B)/121/121(A)/124(A)/122/153(A) IPC covered by SOU M.R. No. 2/99.

(2) One seizure list dated 25.8.99 made by S.I. Dilip Kr. Choudhury of SOU PS in connection with SOU P.S. case No. 1/99 covered by SOU P.S.M.R. No. 3/99.

(3) One seizure list dated 4.10.99 made by Inspector K.K. Nath of SOU PS in connection with SOU P.S. case No. 1/99 covered by SOU P.S.M.R. No. 4/99.

He proved the seizure list, Ext. 12, and his signature, Ext. 12(1). He also testified that the accused person in the court was present in the court in connection with SOU P.S. Case No. 1/99 which was investigated by him. He could remember the names of accused as Fashiullah, Kafayatullah, Haji Bilal and Salim. He had forgotten the names of other accused persons due to long time gap. On being cross-examined he stated that he seized the articles from accused persons and the same were again seized by Sri Deben Deka, PW-14 from him. The seized articles, before being seized

from him by Deben Deka, IO, were kept in the "Malkhana" (storehouse) of SOU PS. He however did not know how the articles were kept because that was not a part of his duty. The said accused persons Fasiullah was interrogated by him at the police station and he had seen him in the dock on the date of deposition. In cross-examination this witness also stated that he did not mention the names of the accused persons whose names he mentioned at the time of deposition in the Court.

13. The learned trial court, according to Mr. Saikia, did not take into consideration the evidence of PW-10, Sri Satish Ch. Kundu, SI Bhaktinagar Police Station, Jalpaiguri District, West Bengal, who categorically stated that the IO of the present case visited the Bhaktinagar Police Station and seized 5(five) packets of samples kept in the Malkhana of Bhaktinagar Police Station vide Ext.6. The said samples contained RDX and as such it could be said that all the accused-respondents, in furtherance of their common intention and conspiracy, collected the RDX with a view to use the same against the people of the State of Assam and the country.

14. It is also submitted that the evidence of P.W.13, Sri Sadhan Kr. Bhowmik, who was posted at Islampur VV under CID West Bengal, was also not taken into consideration by the learned trial Court. The said witness stated that the IO of this case Sri Debendra Nath Deka visited the CID office and seized some documents in his presence which includes certified true copy of the carbon copy of information regarding seizure of RDX and other accessories for explosion, certified true copy of report carbon copy sent to the SDJM, Jalpaiguri by one Sri M.C. Gope, Inspector of Police, CID (WB) along with seizure list and crime report of FSL examination and certified copy of acknowledgement (photo copy) to SDJM, Jalpaiguri by the Director of CFSL, Calcutta-14. The said witness also stated that documents were seized from the possession of MC Gope, Inspector of CID who proved the same and marked as Ext.7. He also proved his signature, Ext.7(2), appearing on the said seizure list. It is further submitted that the learned trial court failed to appreciate the evidence of PW-14, Sri Debendra Nath Deka, who was the IO of the case. The IO in his deposition stated in details how he collected the informations and materials and how the police proceeded against the accused-respondents. According to learned Addl. Advocate General, the IO was thoroughly cross-examined by the defence but his evidence could not be demolished in any manner. In any case, it is argued that prosecution adduced cogent and reliable evidence fully establishing the charges against the accused respondents, yet the learned trial court erroneously held that the charges against them could not be proved and accordingly passed the impugned order acquitting all of them of charges u/s. 120B/121A/122/153A/34 IPC.

15. Mr. Saikia has referred to and relied on the following authorities:

(1) [State of Tripura Vs. Dr. Sankar Paul and Others](#), on parameters of High Court's power in an appeal against acquittal and principles laid down relating to Section 378 Cr.P.C. under which the High Court can review the entire evidence and arrive at its own conclusion interfering with findings of the trial court to ensure prevention of

miscarriage of justice and for the ends of justice:

- (2) [Abdul Rejjak Vs. State of Tripura](#) ;
- (3) [G. Parshwanath Vs. State of Karnataka](#) ;
- (4) [Gagan Kanojia and Another Vs. State of Punjab](#) ;
- (5) [Golakonda Venkateswara Rao Vs. State of Andhra Pradesh](#) ;
- (6) [State of Maharashtra Vs. Goraksha Ambaji Adsul](#) ;

The above authorities (2) to (6) have been cited in support of his submissions that (a) circumstantial evidence can sometime be more reliable than eye witness account, (b) in cases where evidence is purely circumstantial in nature, the facts and circumstances from which the conclusion of guilt is sought to be drawn, must be fully established beyond any reasonable doubt and as such circumstances must be consistent and must unerringly point to the guilt of the accused and the chain of circumstances must be established by the prosecution and (c) in such cases of circumstantial evidence, if prosecution can establish the chain of events to satisfy ingredients of commission of offence, accused would be liable to suffer consequences of his proven guilt.

- (7) [Smt. Runa Nath alias Rina Nath Vs. State of Tripura](#), in regard to charge of criminal conspiracy,
- (8) [State \(N.C.T. of Delhi\) Vs. Navjot Sandhu @ Afsan Guru](#) ;
- (9) [Girja Prasad \(Dead\) by LRs. Vs. State of Madhya Pradesh](#) ;
- (10) [State of Gujarat Vs. Anirudh singhh and another](#), in regard to evidence of police witness in criminal trial and permissibility of conviction unless corroborated by other evidence of independent witness,
- (11) [Mohinder Singh and Another Vs. State of Punjab and Others](#) , in regard to evidence of eye witness and assessment thereof by the court for conviction of the accused,
- (12) [State of U.P Vs. Chhoteylal](#), in regard to law that minor contradiction and inconsistencies are immaterial.
- (13) [Tarseem Kumar Vs. The Delhi Administration](#), pertaining to necessity and value of absence of motive in determining guilt of the accused and the effect of absence of motive in determining the case.

16. Per contra, Mr. S.C. Biswas, learned counsel for the accused/respondents, submits that the materials collected by the prosecution and the evidence adduced by it, do not prove the charges framed against the respondents beyond all reasonable doubt. The prosecution claims recovery and seizure of incriminating materials, more particularly, the US dollars and Bangladeshi currencies but there is

no independent eye witness to recovery and seizure thereof. PW-2, 4 and 7 are, no doubt independent witnesses, but they are not eye witnesses to recovery of the foreign currencies and other incriminating documents. Mr. Biswas strongly argued that the prosecution failed to prove the charge against the respondents beyond reasonable doubt and as such the learned trial court rightly acquitted all the accused respondents of the charges u/s 120-B/121A/122/153A/34 IPC. The learned trial court committed illegality in convicting accused respondent No. 3, Fasiullah Hussain @ Hamid Mahmood @ Khalid Mahmud; accused respondent No. 2, Md. Billal Mia @ Nanu Mia @ Jalil Lal Mia u/s 14 of the Foreigners Act.

17. The main charges framed against the respondents are:--

(I) that in between 31.7.99 to 7.8.99, in furtherance of their common intention, they agreed to do an illegal act of sabotage etc and in furtherance of the said agreement they carried foreign currency to commit the offence u/s 121(A) IPC punishable with imprisonment for life.

(II) that all the accused respondents, in between 31.7.99 to 7.8.99, in furtherance of their common intention, conspired to wage war against the Govt. of India by means of criminal force.

(III) that all the accused respondents, in between 31.7.99 to 7.8.99, in furtherance of their common intention by visible representations, attempted to promote feelings of enmity amongst the law abiding Muslim citizens of the State apart from non-Muslim population.

(IV) that accused respondents No. 2, Md. Bilal Mia @ Nanu Mia @ Jalil Lal Mia and accused respondent No. 3, Fasiullah Hussain @ Hamid Mahmood @ Khalid Mahmood, being not Indian citizens, entered India without any valid document, and thus they contravened the provision of the Foreigners Act.

18. The charge No. 1 to 4 above are co-related. The basic allegation against the respondents is that they have been planted by the Pakistani Inter Service Intelligence (in short ISI) and they have a greater plan to wage war against Govt. of India. The accused respondents have been deputed and engaged by the ISI and financed by the Govt. of Pakistan who carried out the act of subversion and sabotage by way of destroying the major installations or establishments and also by creating communal disturbance and tension amongst the Muslim and non-Muslim citizens of India

19. Before appreciation of evidence on record for the purpose of examining the correctness or otherwise of the findings of the learned trial court on the charges framed against the respondents, we would like to come to the genesis of the present case which is revealed from the FIR (Ext. 10), lodged by Sri Debendra Nath Deka, DSP, Panbazar Division (PW-14), on 7.8.99. The said DSP engaged some police personnel for conducting discreet enquiry as well as for keeping an eye on a group

of 4(four) persons who were seen moving around in the city of Guwahati in a suspicious manner for last few days. The identity of the aforesaid persons with their address were collected by police. They were (1) Fasiullah Hussian @ Hamid Mahmood @ Khalid Mahmud (accused respondent No. 3), resident of Hyderabad Sind, Pakistan; (2) Md. Javed Wakar @ Md. Musaffa @ Md. Mehraj @ Abdul Rahman Danish (accused respondent No. 1), resident of Pakistan; (3) Moulana Hafiz Md. Akram Mallik @ Musaffar Hussian @ Atabulla @ Bhaijan @ Abdul Awal, son of Md. Abdul Aziz (accused respondent No. 5) resident of village Mukam Shahwali, under police station and district - Kupawara, Jammu & Kashmir and (4) Qari Salim Ahmed, @ Abdul Aziz @ Sadat (accused respondent No. 4), resident of village Mehilki, District-Muzafarnagar, Uttar Pradesh. These persons were seen making telephone calls to certain persons located at different parts of the country and abroad. Due to suspicious movement and activities, they were arrested on 7.8.99 and during interrogation it came to light that they were deputed to Assam and other parts of India by Pakistani ISI for carrying out large-scale disturbances in Assam and other parts of the country. Amongst them, two persons namely Fasih Ulla and Javed Wakar are Pakistani citizens and understood to be officers of ISI. They do not possess Pass port or valid travel documents and have entered India illegally. Accused respondent No. 5, Maulana Hafiz Mohamad Akram, hails from Kupawara District of Jammu and Kashmir and is an explosive expert working for the militant outfit called HUM. Quari Salim (accused respondent No. 4), is one of the most dreaded leaders and chief organizer of the aforesaid outfit of India. All of them were in illegal possession of US dollars and Bangladeshi Takka. They were deputed to Assam for keeping in touch with certain members of the local unit of HUM and ULFA for carrying out disturbances in the State. During interrogation the aforesaid four persons disclosed before the police that chief Amir of the HUM and the officers of the ISI have entered into agreement with the aforesaid persons for causing acts of sabotage at public places and vital installations and for that purpose a large consignment of arms, RDX and other deadly explosives have been dispatched to Assam. The aforesaid accused persons have been assigned by the ISI to carry out a series of explosions on the Manali-Leh highway in Jammu & Kashmir to cut off military supplies and thus waging war against the country. They have already drawn up a very dangerous scheme to create massive disturbance in the State in collusion with certain local militant groups of Assam and hatched a conspiracy to incite communal disturbance in the State by spreading misunderstanding and haired amongst the innocent and law abiding citizens of the State against non-Muslim population.

20. The first informant, PW-14, proved the Ejahar he lodged and his signature appearing thereon as Exts. 10 & 10(2) respectively. In his deposition he has referred to and testified the statement and allegation made in the FIR. The details about how the aforesaid four accused persons were tailed and observed in the local hotels and how they were arrested, had been narrated in his examination-in-chief. In cross-examination he has revealed in more details how the police collected the

address and antecedents of the accused respondents.

21. The prosecution, in order to bring home the above charges framed against the accused respondents, examined as many as 14 witnesses including the IO. As per submission of the learned Addl. Advocate General, appreciation of evidence of PW-2, 4, 7, 8, 11, 13 and 14 definitely leads a court to hold the accused respondents guilty and convict them under the law. We would, therefore, like to examine and appreciate the evidence of the aforesaid prosecution witnesses.

22. PW-2, Sri Atma Choudhury, is an independent witness. His evidence is that he did not remember the exact date of the incident that took place in 1999. However he stated that around 6.30/7 PM (evening) on the date of occurrence, he was going towards the Railway Reservation Counter by riding a scooter. He halted his scooter as soon as he saw a gathering of police personnel and heard an uproar that some Pakistani and Kashmiri persons have been caught. He was present at the place of occurrence for about an hour. The police took out US dollars, Bangladeshi and Indian currencies, watch, calculator like digital diary from the bags of four persons and seized them. He saw those seized articles and on being asked by the police he put his signatures on the seizure list as a witness.

23. This witness could not tell the name of the accused but he could identify the accused in the dock pointing at him. He proved his signatures Ext. 1(1) and Ext. 1(2), appearing on Ext. 2, seizure list. He was a witness to seizure of 507 U.S. dollars seized vide seizure list, Ext. 3 and he proved his signatures thereon, Ext. 3(1) and Ext. 3(2). He was also a witness to seizure of 3100 U.S. dollars seized by police vide Ext. 4. He proved his signatures thereon which were marked as Ext. 4(1), Ext. 4(2) and Ext. 4(3). As per his deposition the police, vide Mat. Ext. 5, seized cassettes, hotel bills etc. Material Ext. 5 comprises a card of hotel Eden, money receipts of the said hotel, one paper containing Urdu text and another paper containing address of a person named Jashwant Singh of Aligarh, which reads "Bonali Das Tant, Iqbal Centre, eight floor." This witness further deposed that he put his signature as a seizure witness of Ext. 5. He proved his signatures as Ext. 5(1), 5(2), 5(3) and 5(4). In cross examination he stated that he counted the money seized by the police but he did not remember the number and denomination of the U.S. dollars and Bangladeshi takka. Nor could he say through which seizure list those foreign currencies had been seized. At the time of deposition he could not say what articles had been seized from each of those four persons. Apart from foreign currency notes those four persons were in possession of some clothes carried in bags but the police did not seize the chadors (clothes). He did not remember whether each of them carried a bag in their hands or not. Those articles were taken out from the bags but he did not know whether the bags in which the articles were carried, were seized or not. After the seizure, as deposed by this witness, the articles were packed with paper but he does not know whether or not the packets were sealed. He also does not remember what kind of paper was used to pack the articles. Nor does he remember whether he put his

signature on the papers in the court inasmuch as the said paper was not exhibited. He had not seen his signature on the said paper. He further stated that 3100 U.S. dollars were seized from the person named Salim who was not present in the court at the time of deposition. Police took down his statements but he does not remember where his statements were taken. He categorically stated that he does not know the names of the accused persons as he does not know them. He could not identify the accused persons before the police.

24. PW 4, Md. Alkas Ali, is another independent witness, on whose evidence the prosecution relied upon to prove the charges against the accused respondents. His few line evidence is that on 7.8.1999 he was driving an auto-rickshaw from Ganeshguri to railway station at Panbazar and on seeing a gathering of lot of people near the Reserve Bank of India, halted there. At that time police were seizing some articles and documents from four persons. The police prepared a seizure list, Ext. 5, and took his signature on it. He proved his signatures marked as Exts. 5(5), 5(6), 5(7) and 5(8). In reply to a single question put by the defence in cross examination, this witness stated that he did not see the seized articles in the court at the time of deposition.

25. PW 7, Sri Ajit Hazarika, is a businessman by profession, dealing in scraps. He is an independent witness, whose evidence has been relied upon by the prosecution. On the date of occurrence at around 6 or 7 PM, on 7.8.1999, he was going to railway station on foot through the front side of the Reserve Bank of India (RBI in short) building. Having seen a large gathering in front of the RBI, he went there. He found the police had already apprehended some persons and recovered some articles from them. He saw two of them being arrested by police but he could not say how many persons were apprehended. From the dresses of two apprehended persons it appeared to him that they belonged to Muslim community. On enquiry he was told by police that the said persons were ISI agents. He stated that the persons in the dock were similar to the persons apprehended by police but he could not say with certainty whether the accused persons in the dock at the time of deposition, are the same persons apprehended by the police on the date of occurrence. His evidence is that police seized some U.S. dollars and Bangladesh currency notes including Indian currencies worth Rs. 35/- along with other documents and a diary.

26. The said currency notes were seized vide seizure list, Ext. 5, which bears his signature, Ext. 5(9). Police also seized 100 U.S. dollars, Indian currency worth Rs. 387/-, one pocket book, one bank account book, one identity card and a yellow paper vide seizure list, Ext. 2 bearing his signature, Ext. 2(2). The police also seized 507 U.S. dollars, visiting card of Hotel Eden, visiting card of Sahab Trading and few other visiting cards, one money bag, cash memo etc. He put his signature on the seizure list, Ext. 3. He could identify and prove his signature thereon marked as Ext. 3(3). As per his evidence police also seized 3100 U.S. dollars, hotel receipts, some documents along with pocket diary and two cassettes from the place of occurrence

vide Ext. 4 on which he put his signature marked as Ext. 4(4). He also proved Exts.2, 3, 4 and 5 and Material Exts. 1, 2, 3, 6 & 7, through which the U.S. dollars and Bangladeshi currency notes were seized. Some cassettes were seized through Ext. 5 and Material Ext. 8. Hotel cards were seized vide Exts. 4 and 5. On being cross-examined, this witness stated that a lot of people had already gathered before he arrived at the place of occurrence. He does not know for how long those people were present. Police prevented the people from going near the place of occurrence. He does not know why and for what reason the police apprehended some people. He clearly stated that he did not see what articles the police recovered from each of the accused persons. His statement was not taken by police. He also clearly stated that he did not go through the seizure list nor did the police read it over to him. Police simply asked him to put signature as he was present at the time of seizure of articles. Accordingly he put his signature. The police also did not show from whom they had recovered the money. They simply told him that the accused persons were ISI agents. Further he stated that he could not say it for sure as to whether the money shown to him in the court are the ones seized by police. There was a noisy atmosphere at the place of occurrence. He does not know about the incident nor was he familiar with the accused persons and, therefore, he does not know as to why the police seized the articles.

27. Regarding recovery and seizure of U.S. dollars and Bangladeshi currencies along with other articles, the I.O., PW 14, Sri Debendra Deka, deposed that he recovered and seized 185 U.S. dollars from accused respondent No. 1, Md. Javed Wakar vide Ext. 5, 507 U.S. dollars and Bangladeshi currencies from accused respondent No. 3, Md. Fasi Ullah Hussaini vide seizure list, Ext. 3, 3100 U.S. dollars from accused respondent No. 4, Md. Quari Salim Ahmed @ Abdul Aziz @ Sadat and one U.S. dollar of 100 denomination from accused respondent No. 5, Md. Akram Mallick @ Mussaffa Hussain @ Abdul Awal vide seizure list, Ext. 2. He also deposed that Bangladeshi currencies amounting to 492 takka were recovered and seized from the accused respondent Javed Wakar vide Ext. 5. He proved the said U.S. dollars and Bangladeshi takka which were seized in presence of independent witnesses at the place of occurrence who had signed or put thumb impressions. He also proved his signatures appearing on the aforesaid seizure list. As per his evidence Material Ext. 1 is 507 U.S. dollars seized vide Ext. 3 and Material Ext. 2, is one U.S. dollar of 100 denomination. Material Ext. 3 is 3100 U.S. dollars seized vide Ext. 4. Material Ext. 6 is 185 US dollars seized vide Ext. 5. Material Ext. 7 is the currency notes of Bangladesh seized vide Ext. 5.

28. It is the case of the prosecution that the possession, recovery and seizure of U.S. dollars and Bangladeshi currencies have been proved inasmuch as the fact of recovery and seizure have been proved by the independent witnesses who were present at the time of seizure who put their signatures/thumb impressions on the seizure list and testified before the court that the recovery and seizure of the foreign currencies mentioned above, were made in their presence and they signed or put

their thumb impressions on the seizure list. The further case of the prosecution is that the accused respondents received the above foreign currencies from the ISI to execute the greater plan of waging war against the Govt. of India by demolishing important installations and establishments, creating communal disturbance/tension etc. The accused respondents concerned, as asserted by the prosecution, could not furnish any satisfactory explanation for possessing such foreign currencies. Nor have the said respondents concerned adduced any evidence establishing that they were not in possession of the foreign currencies and they were not liable to be held guilty.

29. We have thoroughly gone through the evidence and materials pertaining to the charge of illegal possession of U.S. dollars and Bangladeshi currencies by some accused respondents. We find that PW 2 is the key independent prosecution witness in respect of recovery and seizure of foreign currencies. He was a free-lancer (journalist) and a businessman by profession. He arrived at the Railway Reservation Counter at Panbazar near the Reserve Bank of India building. He arrived at the place of occurrence only after when the police were already in action and had taken out the incriminating articles from the bags of four accused persons. He was, in fact, not an eye witness to the actual recovery of the articles including the foreign currencies and that is the reason why he stated that he can not say what article had been seized from whom. The police party who seized the articles did not tell PW-2 as to from whose possession or bag the foreign currencies were recovered and seized. The seizure list, no doubt, was prepared at the place of occurrence but the signature of PW 2 was obtained without providing him the required informations about the particulars of the seized articles, particularly, the foreign currency notes, which are incriminating articles, and for which the Respondents are liable to be convicted and punished.

30. What is found to be an admitted factual position is that the seized U.S. dollars and the Bangladeshi currencies were not sent to expert or concerned authority to get them examined and have a report as to whether the said foreign currency notes were fake or genuine. The I.O. (PW 14), while being cross-examined, admitted this fact in his evidence inasmuch as he deposed that the seized "U.S. dollars and Bangladeshi takka were not examined by the RBI and the external ministry." There is no evidence on record that the said foreign currency notes were sent for examination by the aforesaid authorities. Nor is there any evidence on record that the I.O. made any request to the Magistrate concerned for sending the said foreign currency notes to the said authorities or any expert. The I.O. could not make any statement to that effect and he was not in a position whether any request for examining the foreign currency notes were refused. He stated that he had no other evidence to prove that such request was ever made and it was refused by the court. The I.O. even stated that he did not produce those articles (U.S. dollars and Bangladeshi takka) in the court. The evidence of the I.O. has proved the fact that the prosecution proceeded against the accused respondents No. 3, 4 and 5 without

obtaining any report from the expert or authorities concerned confirming the genuineness of the seized foreign currencies.

31. We have found that all the accused -respondents were arrested basically for their suspicious movement, contacts and possession of foreign currencies and other incriminating articles which have nothing to do with promoting enmity between different groups on grounds of religion, race etc. in the State of Assam or any part of the country. Except the bold statement, the prosecution has brought no material in support of the said allegations. The evidence on record does not reveal that the accused-respondents were engaged or indulged themselves in any action attracting offence u/s 153A IPC. The learned trial Court, in our considered view, rightly held that the charge u/s 153A IPC has not been established.

32. We have gone through the cases cited by the learned Addl. Advocate General as mentioned above. There is nothing to dispute on the power of High Court to review the entire evidence as enunciated in Sankar Paul's Case(supra). It was a case where the accused were acquitted although the confessional statement of the accused-persons recorded by Judicial Magistrate 1st Class was found to be involuntary and violative of Section 104 Cr.P.C. In the present case no such confessional statement of any accused-respondent was recorded. While accepting the parameters of the High Court's power in deciding the appeal against acquittal as laid down by this Court in the said case we are unable to agree with the learned Addl. Advocate General that any benefit could be given to the State reversing the order of acquittal to conviction of the respondents.

33. There is also no dispute on the law that circumstantial evidence can sometime be more reliable than the eye witness account. The case of Abdul Rejjak (supra) is a case where the accused-appellant, for some reason, killed his wife inside the house and when some neighbours, after hearing the hue and cry arrived at appellant's house, he fled away without answering the queries. The case of Parshwanath (supra) also relates to killing of wife and daughter by the husband/father by setting fire on the deceased inside the room. Incriminating circumstantial evidence was found against the accused-appellant and he was convicted by the learned trial Court. The Apex Court found no valid ground for interference with the order of conviction and dismissed the appeal. In Golakonda (supra) the appellant was last seen together with the deceased. The appellant was convicted and in appeal the Apex Court found no infirmity in the order. In Goraksha's case (supra), the son killed his father, step-mother and step-sister due to demand for partition of family agricultural land and other properties. Before the killing there was continuous quarrel with regard to division of property between the deceased father and the accused son. Circumstantial evidence in the aforesaid case relied upon by the appellant-State, prima facie, found to be against the accused-persons due to the factual position that the perpetrators are husband or son of the deceased and there are other evidence against the accused-husband. The present is not a case of

murder confined within the family members. As discussed earlier, there is no clinching circumstantial evidence for drawing inference or coming to a conclusion that the accused-respondents have committed or found involved in cases of criminal conspiracy, waging war against the Govt. of India or State of Assam and other crimes attracting punishment under Sections 120(B)/121/121/153A IPC.

34. There is also no dispute on the settled position of law that conviction in certain cases, could be ordered solely on the testimony of police officials without even corroborated by evidence of independent witness in material particulars. But, at the same time, law mandates that the rule of prudence may require more careful scrutiny of their evidence. We are afraid that the aforesaid principle of law as laid down in *Girja Prasad (supra)*, could be applied to the present case. In the above cited case, the accused appellant was convicted u/s 4 of the Prevention of Corruption Act. The police, in order to catch the accused red-handed in accepting the bribe, kept two currency notes of 100 Rupee denomination in the pocket of the complainant duly treated with chemical powder so that the accused could be caught. The trap party used chemicals and on analysis of the chemicals it was, *prima facie*, found that the accused was involved in taking bribe but the learned trial court, on sympathy, acquitted the accused. In appeal the High Court concerned set aside the order of acquittal and convicted the appellant in the appeal preferred by the accused. The Apex Court dismissed the appeal and upheld the conviction order passed by the High Court. In the case at hand, the facts and circumstances are quite different and no scientific method or technology was applied. The present case is not a case of detection of offering and taking bribe and there was no occasion for the Investigating Agency to take the help of any scientific method. It is a case of recovery and seizure of foreign currencies at a public place, and therefore, the prosecution is bound to examine independent witness(s) to seek corroboration of evidence of the police or official witnesses on the fact of recovery and seizure of such foreign currencies. The prosecution, no doubt, examined some independent witnesses in the present case but, unfortunately, the independent witnesses viz. PW 2, 4 and 7 did not fully support the prosecution case as discussed earlier. In our considered view, therefore, decision in the above cited case could not be pressed into service to support the above submission. The learned Addl. Advocate General persuaded us to accept that PW 2, 4 and 7 are eye witnesses and they have given cogent evidence corroborating the evidence of official witnesses in material particulars. Relying on the decision in *Mohinder Singh (supra)* he has also submitted that evidence of eye witness is of paramount importance and the Court should accept the evidence of independent witnesses, PW 2, 4 and 7 and convict the respondents reversing the order of acquittal. We are bound to repeat that PW 2, 4 and 7 are not eye witnesses to the fact of taking out the currency notes from the bags/possession of the respondents but only witnesses to preparation of the seizure lists in their presence. Those independent PWs were not witnesses to the fact of carrying the bag containing the alleged foreign currencies. The above cited case

relates to murder due to enmity where no independent witness was examined by the prosecution. That was a case where, due to some glaring discrepancies in the prosecution case, the court preferred to discuss the other circumstances produced by the prosecution before considering the evidence of eye witnesses in the background of those inconsistencies. The court departed from usual practice of giving preference over appreciating the evidence of eye witnesses. We fail to understand how the learned Addl. Advocate General could put the instant case on the same footing of above cited case and desires us to adopt the said approach.

35. In Anirudhsing's case (supra), a sitting MLA was done to death in the public gaze when full ceremonial Independence Day function was in progress in presence of Deputy Collector, Sub-Divisional Magistrate and other civil and police officers. Some police officers, who were present at the said function were examined as witnesses. It was held that merely because they are police officers, their evidence can not and must not be rejected outright as unreliable or unworthy of acceptance. However, it requires to be subjected to careful evaluation like any other witness of occurrence. There is nothing to dispute on the said proposition of law but having regard to the facts and circumstances of the said case, in our considered view, the above law would not be made fully applicable to the present case. The learned trial Court considered the merit of the evidence of independent witnesses and disbelieved the prosecution case. There is no approach made by the trial Court that the evidence should be rejected as unreliable or unworthy of acceptance merely because they are police officers. We are constrained to say that the facts and circumstances of the present case are not similar to the ones found in the above cited case.

36. We are, to be frank enough, still far from being satisfied ourselves that the evidence of independent P.Ws 2, 4, and 7 read with the evidence of official witnesses PW-8, 10, 11, 13, 14 as submitted by the learned Addl. Advocate General, have proved the charge of possession, recovery and seizure of foreign currencies from some accused persons, to be precise, from respondent No. 1, 3, 4 and 5. Even assuming, although not proved beyond reasonable doubt, that the said respondents were in possession of foreign currencies and the same were seized from them, in our view, it is not enough to hold that they were sent/deputed by the ISI with the said money (foreign currencies) as a part of criminal conspiracy to achieve the greater objective of the ISI to wage war against the Govt. of India through large scale act of sabotage and disturbances by promoting enmity between different sections of people, more specifically between Muslims and non-Muslims in the State. The vital fact that the accused respondents have connection or nexus with the ISI has not been proved by any cogent evidence, oral or documentary, far less the fact that they have been engaged by the ISI. The prosecution has entertained suspicion on the respondents as some of them have been found to have been hailing from Pakistan or Bangladesh and they are not in possession of passport or valid document showing their bona fide or valid reason or purpose to visit India. There is no doubt that some of the accused-respondents could not give any

acceptable explanation as to why they have visited the State of Assam without any valid document or passport. If it is to be believed that some of the accused respondents were in possession of some incriminating articles and even foreign currencies, we find it difficult to accept the story of the prosecution that the respondents entered into India or for that matter State of Assam, for waging war at the instance of ISI or in furtherance of the greater intention of the ISI to destabilize the country. No evidence has been led by the prosecution that the ISI is the mastermind behind sending of the accused respondents to this country and they have been moving in the State of Assam with the foreign currency notes and incriminating documents. There is also no evidence adduced by the prosecution that the ISI hatched criminal conspiracy and as a part of the said conspiracy the ISI sent the respondents to wage war against the Govt. of India or to cause disturbance and create communal tension in Indian society and the said respondents have been engaged to achieve the ISI's nefarious design. There is no substantial evidence proving the link of the accused respondents with the ISI and they have been present in Assam to execute the criminal conspiracy for attaining the greater aim at waging war against India.

37. The charge of Section 120B relates to punishment for committing offence of criminal conspiracy. In order to prove the charge of criminal conspiracy the prosecution has to establish that there was an agreement between the accused persons to do or cause to be done an illegal act or an act which is not illegal by illegal means. Law requires that there must be a meeting of minds. In the present case the accused respondents belong to different places, some of them even doubted to be citizens of Pakistan and Bangladesh. The prosecution led no evidence, direct or indirect, establishing the meeting of minds on the basis of which court can draw inference that they had come to Assam with a meeting of mind to carry out the object of the ISI. In this regard we may refer to [John Pandian Vs. State Rep. by Inspector of Police, T. Nadu](#), wherein it has been held that merely because accused has some things in his possession, possession of which he fails to explain, cannot be presumed to be outcome of an offence. So also some recovery of money would be of no consequence unless the prosecution comes out with a case and gives some prima facie evidence that the cash amount was a part of money that had a nexus with conspiracy. It was further held that staying together in hotel and travelling together from one place to another with unexplained money and articles cannot be a basis for conviction u/s 120B. The above cited case relates to a murder case, yet we are of the opinion that principle of law as laid down in the said case, so far it relates to charge of criminal conspiracy u/s 120B IPC, would be applicable.

38. Section 121A IPC provides punishment for committing offences against the State u/s 121 i.e. waging, or attempting to wage war, or abetting waging of war, against Govt. of India. For better appreciation, we refer ourselves to [Mohd. Arif @ Ashfaq Vs. State of NCT of Delhi](#). It is held therein that in such case involvement of more than one person, apart from meeting of minds, commission of crime must be proved. In

other words, unless there was a planning and participation of more than one person, the conspiracy of waging war against the State would not be possible. It was a case of terrorist attack on army at Red Fort, New Delhi, with well planned conspiracy which was given effect to after collecting a large quantity of arms and ammunitions. The Pakistani terrorists, in the said case, for execution of nefarious plan, entered in the guise of watching a show in the Red Fort and while doing so they supplied arms inside the Red Fort and it was after the show, taking advantage of darkness, they started shooting in which they killed the sentry and then other two persons who were soldiers and then taking further advantage of the darkness, they scaled over the wall and fled. That was indeed a pre- planned attack shocking the conscience of the entire nation and the community. In the present case the prosecution could not even, prima facie, show, not to speak of bringing home, that there was a definite plan prepared by the respondents in carrying out such attack on the defence personnel or destroy public installations or institutions as part of greater design/plan to wage war against India. No material is found that any act was done by the accused respondents against the State within the meaning of Section 121 IPC making the respondents liable to be convicted u/s 121A IPC.

39. Charge u/s 153A IPC provides punishment for promoting enmity between different groups of religions, race, place of birth, residence, language etc. or doing acts prejudicial to maintenance of peace and harmony.

40. We have noticed that the I.O., PW 14, collected materials against the accused-respondents from various sources including the cases already registered against them inside and outside the State of Assam and in the course of investigation he had taken much pain to contact the police stations and officers concerned and collected informations regarding seizure of incriminating articles to make out a case of criminal conspiracy, waging war against the country etc. All these charges are serious enough and the Investigating Agency is expected to take more care and seriousness in collecting the materials and proofs. We have noticed that the Investigating Agency was guided by emotion and surmises in collecting the materials without taking due care that the charges must be proved beyond reasonable doubt. The accused persons, as per the official witnesses, particularly PW 14, have been staying in various hotels and were moving in Guwahati in a suspicious manner with US dollars and Bangladeshi currencies and objectionable articles attracting the attention of the local police but it is not enough to hold them agents of the ISI. The prosecution, no doubt, have been able to establish at least two accused persons as foreign nationals as they foiled to produce passport and/or necessary valid documents authorising their presence in India but that alone is not sufficient to hold them that they entered India with criminal conspiracy and intention to wage war against the Govt. of India through disruptive and subversive activities and spreading communal hatred and promoting enmity amongst different groups on grounds of religion, race etc. We are not satisfied that the accused respondents individually or collectively, had done or carried out activities attracting

the offence under Sections 120(B)/121/121(A) or 153(A)/34 IPC at the instance or dictation of the ISI. We are also not satisfied that the prosecution has been able to prove the link or nexus of the accused-respondents with the ISI whose alleged aim is to destabilise the Indian society and overthrow the Govt. by waging war. Much has already been discussed in this regard and it needs no further discussion.

41. In the appreciation of evidence and on consideration of materials on record, we are fully satisfied that the prosecution miserably failed to establish the charges against the accused-respondents under Sections 120(B)/121/121(A)/153(A)/34 IPC beyond all shades of reasonable doubt as required in the criminal trial. We find no infirmity, error or illegality in the judgment and order in acquitting the accused-respondents under the aforesaid Sections of law, which is under challenge in this appeal, requiring interference by this Court and reversing the order of acquittal to conviction as demanded by the appellant-State.

42. In view of the above, we express our agreement with the findings and conclusion arrived at by the learned trial Court and, without a hesitation, uphold the order of acquittal under Sections 120(B)/121/121(A)/153(A)/34 IPC and order of conviction of accused-respondents No. 2 and 3 u/s 14 of the Foreigners Act, 1946. Appeal stands dismissed. Return the LCR forthwith.