State of West Bengal and another Vs Mohammed Khalid and others

Court: Supreme Court of India

Date of Decision: Nov. 24, 1994

Acts Referred: Constitution of India, 1950 â€" Article 226, 227
Penal Code, 1860 (IPC) â€" Section 120B, 302, 307, 326, 436
Police Service (Appointment by Promotion) Regulations, 1955 â€" Regulation 5(5)
Terrorist and Disruptive A

Citation: AIR 1995 SC 785 : (1995) 2 ALT(Cri) 621 : (1995) 1 Crimes 397 : (1994) 7 JT 660 : (1994) 4 SCALE 1048 : (1995) 1 SCC 684 : (1994) 6 SCR 16 Supp : (1995) 1 UJ 469

Hon'ble Judges: S. Mohan, J; M.K. Mukherjee, J

Bench: Division Bench

Advocate: K.T.S. Tulsi, Additional Solicitor General, B.C. Ray, U.R. Lalit, S.C. Ghosh and Ranjan Ray, for the Appellant; Ram Jethmalani, Dipankar N.N. Goswami, N.R. Choudhary and Somnath Mukherjee, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

S. Mohan, J.
Criminal Appeal No. 327 of 1994 is directed against the judgment and order dated 13th April, 1994 of the High Court of

Calcutta in C.O. No. 9121 (W) of 1993.

2. Criminal Appeal No. 328 of 1994 is directed against the judgment and order dated 13th April, 1994 of the High Court of Calcutta in C.O. No.

8378 (W) of 1993.

3. Criminal Appeal No. 329 of 1994 is directed against the judgment and order dated 13th April, 1994 of the High Court of Calcutta in CO. No.

8378 (W) of 1993.

4. All these cases arise out of writ petitions filed in the High Court of Calcutta challenging the validity of sanction and taking cognizance of the cases

against each of the respondents by the Designated Court under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred

to as "TADA"). A further challenge in the writ petition was also made to the "vires" of TADA. The orders of sanction and taking cognizance were

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

5. To highlight the issue involved, it is enough if we advert to the facts in Criminal Appeal No. 328 of 1994 since C.O. No. 8377 (W) of 1993,

against which this appeal has been preferred, is the main case. The same decision was applied to Criminal Appeal Nos. 327 and 329 of 1994. The

short facts are as under:

6. On the evening of March 16, 1993, an explosion occurred at or near Premises No. 267, B.B. Ganguly Street, Calcutta. 69 persons died, 5 of

them died as a result of direct blast and 46 others were injured. The said premises and some other buildings adjoining it collapsed and/or were

badly damaged.

7. A compliant was lodged on March 17, 1993 regarding this incident by Mr. B.K. Chattopadhaya, Sub-Inspector attached to Bowbazar Police

Station. This complaint was treated as First Information Report. On that basis, case No. 84 dated 17.3.1993 was registered in the Police Station

under Sections 120B/436/326/307/302 Indian Penal Code and Sections 3 and 5 of the Explosive Substances Act. Having regard to the gravity of

the offence, the Commissioner of Police, Calcutta passed an order that the case shall be investigated by a team of high-ranking police officials. In

the course of investigation witnesses were examined, various seizures were made and confessions made by two of the accused, namely, Pannalal

Jaysora and Mohammed Gulzar were recorded by a learned Metropolitan Magistrate on April 7 and May 19, 1993 respectively. During

investigations it appeared that materials had transpired for prosecuting the accused under Sections 3 and 4 of TADA. On 3rd of May, 1993,

information to this effect was given to the learned Chief Metropolitan Magistrate, Calcutta. The learned Magistrate made a record of this fact and

observed that the investigating officer might proceed to investigate offences under TADA.

8. Upon completion of investigation, the police obtained sanction to prosecute under Sections 3 and 5 of the Explosive Substances Act from the

State Government. Sanction u/s 20A(2) of TADA from the Police Commissioner was also obtained. The charge-sheet was submitted on 14th

June, 1993, well within 90 days as is spoken to u/s 167(2)(a)(i) of the CrPC (hereinafter referred to as the ''Code'').

9. The sanction to prosecute under Sections 3 and 5 of the Explosive Substances Act and the sanction u/s 20A(2) were obtained on 11th of June,

1993. While granting sanction u/s 20A(2) of TADA it was mentioned that the records were placed before the sanctioning authority for examination

and perusal. It appeared that for the last 5/6 years accused Pannalal Jaysoara had been manufacturing bombs in the ''khas khas'' room on the first

floor of 267, B.B. Ganguly Street, Calcutta as and when required by accused Mohammed Rashid Khan, first respondent in Criminal Appeal No.

328 of 1994. Accused Jaysoara was introduced to other accused, namely, Mohammed Abdul Aziz, first respondent in Criminal Appeal No. 329

of 1994 and Lala alias Parvej Khan. Death of 69 persons, serious injuries to 46 persons and complete destruction of two-storeyed building and

partial collapse of other two and damage to five more buildings were caused by the accused by an explosion caused by bombs and huge quantities

of extremely dangerous nitro-glycerin based explosives which experts have opined to be dangerous to life and property. The sanctioning authority

mentioned inter alia that the intention of the accused was to strike terror on the people and/or to strike terror on a particular section of the people

and/or to adversely affect the harmony amongst the Hindus and the Muslims. It was also mentioned the accused had conspired and prepared to

commit disruptive activities. In the charge-sheet all the necessary ingredients under Sections 3(i) and 4 of TADA had been mentioned.

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

following prayers:

11. That the cognizance taken by learned Chief Metropolitan Magistrate, Calcutta, Respondent No. 7, in TADA Case No. 1 of 1993 arising out

of Section "H" (Bowbazar Police Station) Case No. 84 dated 17th March, 1993 and all subsequent proceedings thereto are illegal, void and

inoperative in law;

12. A writ in the nature of certiorari and/or an order of direction in the like nature commanding the respondents to transmit the records relating to

TADA Case pending before the said respondent to this Court;

13. A writ in the nature of prohibition and/or an order of direction in the like nature prohibiting the respondents and/or their agents and/or their

subordinate from proceeding any further with the TADA case;

14. A writ in the nature of mandamus to respondents to forbear from applying the provisions of TADA against him and from taking any action or

step there under and to release the petitioner from custody forthwith.

15. A declaration was also prayed for that TADA is violative of the Constitution and is liable to the struck down. But the High Court by its

impugned judgment held that TADA has been wrongly applied in the case and the orders of sanction and further taking cognizance by the

Designated Court on 14th June, 1993 was not proper, legal and valid and the same was quashed and set aside.

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

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

18. The High Court gravely erred in quashing the order, taking cognizance, by entering the area which is beyond the scope of jurisdiction under

Article 226 of the Constitution of India. The jurisdiction is confined to cases where the allegations before the Designated Court ex facie cannot

constitute an offence under TADA. The High Court cannot examine the merits of the allegations. In fact, what has been done by the High Court is

a laboured exercise of scrutinising the material placed before the Designated Court. In doing so, it entered into a debatable area and began the

process of appreciation of evidence admissibility of confession or pre-judgment on trial or determine the guilt or innocence of the accused. It has

made an analysis of the materials to determine the truth or otherwise of the allegations. It has conducted a virtual pre-trial at a pre-mature stage.

On that basis, it had come to a conclusion that there is no evidence in support of these allegations. The law is, the High Court must assume each of

the allegations made in the charge-sheet to be factually correct and examine the ingredients of the offence without adding or subtracting anything

there from.

19. In support of this submission, learned Counsel relies on 265151 wherein this Court has held, the High Court under Article 226 has no

jurisdiction to enter into a debatable area whether the direct accusation made in conjunction with the attendant circumstances, if proved to be true,

is likely to result in conviction for an offence under TADA. The moment there is a debatable area, in the case, it is not amenable to the writ

jurisdiction.

20. In 258809 it has been categorically laid down that the allegations made in the FIR or the complaint taken on their face value and accepted in its

entirety constitute an offence. The High Court is not justified in quashing the criminal proceedings. In 259157 his Court had ruled that writ petition

should not be entertained against charge-sheet while exercising jurisdiction. If the matter is considered on merits in the quite of prima facie

evidence, it would amount to a pre-trial. To the same effect are the following rulings:

1. 265151 .

2. 280703

3. 259157

4. Maninder Kaur v. Rajinder Singh, 1992 Supp (2) SCC 25

5. 297364

6. 258765

21. The next submission is, under Article 226 the High Court is not entitled to go into the validity or otherwise of the order granting sanction for

prosecution. The order of sanction is required to be proved by evidence in the course of trial. All objections with regard to validity or otherwise

could be raised there since witnesses are summoned to prove the order and they being subject to cross-examination. In this case, the order of

sanction, on the face of it, shows that the sanctioning authority had gone through all the reports, the recorded statements of witnesses, confessions

and seizure list and the opinion of experts. The High Court has to accept these averments on their face value. The correctness or otherwise of the

statement is only subject to proof during a trial. Therefore, the High Court is wrong in holding, there was non-application of mind. In the case of

P.P. Sharma (supra) it has been held, if all the facts of the case are not mentioned in the sanction order the same does not become invalid as the

prosecution can prove these facts in the course of trial.

22. The finding of the High Court that the affidavit of Mr. Sujit Kumar Sanyal is not proper because he was neither an investigating officer nor an

informant is contrary to record. It was brought to the notice of the High Court through the affidavit of the Commissioner of Police that the Special

Investigations Team had been set up on March 18, 1993 which was headed by Mr. Sujit Kumar Sanyal. Unfortunately, the affidavit of

Commissioner of Police was not taken into account. Therefore, the contrary findings are wrong. The High Court wrongly excluded from

consideration the effect of confession of the two accused for the reasons that the confession could not have been considered by the Designated

Court as the same remained in sealed cover. In this regard, it is submitted that charge-sheet specifically refers to the confession recorded by the

Magistrate u/s 164 of the Code.

23. The High Court has held in the impugned judgment that from the act of preparation and storage of bombs intention to commit offences under

TADA cannot be inferred as the motive was to defend the Muslims. This finding is shocking and is contrary to the well-established principles of

self-defence. Then again, the preparation and keeping of bombs are illegal. It tantamounts to terrorising the people. Therefore, this would be a

terrorist act u/s 3(1). If the Act itself is illegal it cannot be justified on the plea of self-defence. The question is whether a right of private defence

exists under Indian Penal Code or any other law. Further, Section 3(3) is also attracted.

24. this Court in 274546 has dealt with the right of self-defence.

25. The right of self-defence commences not before a reasonable apprehension arises in the mind of the accused.

26. The finding of the High Court that there are no materials in support of allegation of conspiracy u/s 3(3) proceeds on misappreciation of the

material and is contrary to the averments contained in the charge-sheet. It is not necessary to bring home the charge of conspiracy to establish the

time and the place of conspiracy or even the actual words of communication. It is not necessary to prove who entered into conspiracy and the

nature of conspiracy. The existence of conspiracy can be interfered from the conduct of the various accused prior to and subsequent to the

conspiracy. Existence of explosive materials is enough to prove the conspiracy when there was preparation for a large number of bombs. In

support of this submission, reliance is placed on 285203 dealing with the law relating to conspiracy. On the basis of this citation it is submitted,

even if the explosion has not taken place, the very possession of bomb would amount to conspiracy.

27. Then again, the High Court has clearly gone wrong in holding that there must be a break-down of law enforcing machinery. That would be a

condition precedent for prosecuting the accused for offences under TADA. This finding is contrary to the decision of this Court in Kartar Singh v.

State of Punjab, : 1994CriLJ3139 . In that ruling the legislative intention to bring TADA has been clearly spelt out. In paragraph 145 of the ruling

what has been observed is the ordinary procedural law was found to be inadequate by the Legislature and, therefore, the object of Legislature in

bringing in TADA may not be defeated or nullified. The interpretation of the High Court, if adopted, would clearly make the TADA unworkable.

Sections 3 and 4 of TADA are intended for the whole of India. It has nothing to do with the break-down of law enforcing machinery.

28. The High Court had gone on a totally incorrect premises when it quashed the order taking cognizance on the ground that it is not a reasoned

order. It is submitted that no reasons need be stated. Therefore, this approach of the High Court is clearly contrary to the following rulings of this

Court :

(1) 268288

(2) R.S. Nayak v. A.R. Antulay [1966] 2 SCC 716 .

(3) 276140 .

(4) 273784

29. Equally, the High Court erred in holding that the Court taking cognizance can only look at police report and nothing else. This is clearly

contrary to the ruling of this Court in 288512 . The report u/s 173(2) is accompanied by all the documents and statements. All of them can be

looked into. In support of the above submissions, it is urged that the judgment of the High Court is perverse and is liable to be set aside.

30. Mr. U.R. Lalit, learned senior counsel appearing for the appellants submits that a charge-sheet in criminal law is a mere narration. It is a

manifestation of evidence collected. No charge-sheet is ever construed in a restricted way, as has been done by the High Court. In this case the

High Court has grievously erred.

31. When a police report is filed cognizance is almost automatic. In fact, in 279562 this Court held when Section 190(1)(b) of the Code uses the

words ""may take cognizance"" it means, must take cognizance and that it has no discretion in the matter. In law, no reasons need be given for taking

cognizance u/s 193.

32. Mr. Ram Jethmalani, learned senior counsel, appearing on behalf of the respondents submits that a report of the police constitutes the facts

found as a result of investigation. u/s 173 of the Code the Court is called upon to take action. The report in the accompanying documents though

complementary must be held distinctive. In law, the report should contain the minimum. Should the report fail to bring out the ingredients of an

offence the same cannot be supplemented by other materials. Thus, the submission is, the report is relevant for the issue of process.

33. The impugned order is in two parts :

1. Taking cognizance; and

2. issuing a process.

34. The theory of curable irregularity cannot be applied except in revisional or appellate stage. Section 170(5) makes a clear distinction between

the report and documents along with the report. Section 190(1)(b) states : ""such facts constitute an offence."" Section 190 of the Code is controlled

by Section 20(A)(1) and (2) of TADA. Under such circumstances, the Court will have to examine whether the bar has been removed. In support

of this submission, reliance is placed on AIR 1948 82 (Privy Council) Though that case arose under Defence of India Rules, the ratio squarely

applies.

35. A cognizance which is barred cannot be overcome by a sanction. The Court must look at the validity of sanction. In this case, the sanction was

never produced before the Court. On the contrary, the Court took cognizance automatically. The specific case of these respondents before the

High Court was, there was no such sanction. The burden that the sanction was granted in relation to the facts constituting the offence has not been

discharged. While taking cognizance perusal of sanction is not mentioned. This order is conclusive.

36. The Commissioner of Police in his affidavit does not say that he handed it over to the Designated Court and that the Court returned to the

Police as there was no infrastructure for safe custody. On the basis of the affidavit it is submitted that no sanction was made. In criminal justice the

quantum of evidence at the time of issuing the process must be the same as the time of taking cognizance. Relying on 280304 it is urged that u/s

202 of the Code a plea of self-defence could be raised and the decision invited at the time of issuing process.

37. As regards the exercise of inherent jurisdiction in quashing u/s 482 of the Code it could be exercised in three cases:

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

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

(iii) When there is no legal evidence.

38. The High Court can interfere during investigation

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

(ii) after cognizance before charges are framed.

39. This can be done both under the inherent powers and Article 226 of the Constitution of India:

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

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

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

40. It is incorrect to contend that the High Court has appreciated the evidence. In order to determine whether the bar has been removed, it can

examine the same. As a matter of fact, this Court in 265151 has held memorial is necessary in deciding the abatement. Therefore, primarily the

Court has to decide whether an order of sanction exists or not.

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

(a) The order of sanction states that the Commissioner of Police ""accords sanction for prosecution."" Legally speaking, it should be for proceeding

under TADA and not for prosecution. It has been so laid down in Ram Kumar v. State of Haryana [1987] 2 SCC 476 .

(b) There is non-application of mind. In Gokulchand Dwarkadas Morarka (supra) it is held that ""there must be application of mind"" which ratio has

been accepted by this Court in 285083

Sections 3 and 4 of TADA contemplate various kinds of offences. Section 3(1) speaks of different types of offences. Therefore, there must be

application of mind as to what offences are alleged.

(c) The sanction order says ""and/or"". This is bad in law. It has been so laid down in Major Som Nath (supra). The sanctioning authority must

conform to the same standard as the court and decide conspiracy against each accused. The leading case on this aspect is Alvin Krulewitch v.

United States of America, 93 Law. Ed. 790 at 795. Relying on this ruling it is submitted the Court must insist on an admissible evidence against

each accused. To the same effect is Walli Mohammed v. The King AIR (1949) PC 103 .

42. If the bombs are intended for self-defence there is no mens rea. Consequently, there is no offence under TADA. Support is derived for this

proposition from 273784 . Where preparations are made to meet a communal frenzy, the respondents cannot be prosecuted under TADA.

43. Upholding the validity of the TADA this Court in Kartar Singh v. State of Punjab, : 1994CriLJ3139 held that the Act falls under Entry I of List

I, i.e., Defence of India. That being so, the offences under Sections 3 and 4 must relate to sovereignty and integrity of India. In Hitendra Vishnu

Thakur (supra) this Court in dealing with the definition of ""terrorism"" held: unless the Act complained of falls strictly within the letter and spirit of

Section 3(1) of TADA and is committed with the intention as envisaged by the Section the accused cannot be tried and convicted. Hence, it is

submitted the order of sanction must be examined in this light. The Designated Court must record the motive as postulated u/s 3(1). If, therefore,

dominant intention is self-defence, the matter will have to be viewed only from that angle. In 293672 this Court held that the accused could prove

in relation to offences which do not require mens rea, an innocent possession will not bring the offence u/s 5. Therefore, it is submitted in cases

where mens rea is required like Sections 3 and 4, it must relate to sovereignty and integrity of India. Hence, the Court will have to determine the

dominant intention as laid down in 283470 . In this case, the dominant intention is self-defence. Therefore, it will not constitute an offence under

TADA. In the charge-sheet/police report, the ingredients of neither Sections 3 and 4 are mentioned. The documents, if taken into consideration,

refer to two confessions. They would only point to self-defence.

44. Mr. Dipankar Ghosh, learned senior counsel, appearing on behalf of Rashid Khan, first respondent, in Criminal Appeal No. 328 of 1994,

adopting the argument of Mr. Ram Jethmalani would urge that there is no valid sanction u/s 3(1) in this case.

45. It is the duty of the sanctioning authority to apply its mind. In Indu Bhusan Chatterjee v. The State AIR (1965) Cal 430 it has been so laid

down. The order according sanction must give reasons. The necessity for giving reasons has been laid down in 268048 and again in 275978 . With

regard to motive and intention, the learned Counsel cites Black''s Law Dictionary.

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

taken to the impugned judgment.

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

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

(a) according sanction; and

(b) taking cognizance.

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

(a) non-application of mind;

(b) that it does not give reasons;

(c) that there is no mention that there is a break-down of law enforcement machinery;

(d) it does not speak of conspiracy.

48. Section 20A of TADA with regard to taking cognizance of offence postulates under Sub-section (2), that no court can take cognizance of any

offence under this Act without the previous sanction of the Inspector-General of Police, or as the case may be, the Commissioner of Police.

49. Such a provision relating to sanction is not new under criminal jurispurdence. Section 132 of the Code provides for sanction. This Section is a

bar to the prosecution of Police Officers under Sections 129, 130 or 131. The object is to protect responsible public servants against the institution

of possible vexatious and mala fide criminal proceedings for offences alleged to be committed by them while they are acting or purported to act as

such in the discharge of their official duty.

50. Section 197 contains a similar sanction. The object of the Section is to provide for two things, namely,

(1) to protect government servants against institution of vexatious proceedings, and

(2) to secure the well-considered opinion of a superior authority before a prosecution is lodged against them.

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

52. Similarly, when Section 20A(2) of TADA makes sanction necessary for taking cognizance is only to prevent abuse of power by authorities

concerned. It requires to be noted that this provision of Section 20A came to be inserted by Act 43 of 1993. Then, the question is as to the

meaning of taking cognizance. Section 190 of the Code talks of cognizance of offences by Magistrates. This expression has not been defined in the

Code. In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against

the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The

word ""cognizance"" indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from

initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of

cases and not of persons.

53. Cognizance is defined in Wharton''s Law Lexicon 14th Edition at page 209. It reads:

Cognizance (Judicial), knowledge upon which a judge is bound to act without having it proved in evidence; as the public statutes of the realm, the

ancient history of the realm, the order and course of proceedings in Parliament, the privileges of the House of Commons, the existence of war with

a foreign state, the several seals of the King, the Supreme Court and its jurisdiction, and many other things. A judge is not bound to take

cognizance of current events, however notorious, nor of the law of other countries.

54. It has, thus, reference to the hearing and determination of the case in connection with an offence. By the impugned judgment of the High Court

has quashed the orders of sanction and the Designated Court taking cognizance in the matter.

55. Before we go into the merits it is desirable to determine the limitations of power of the High Court under Article 226 in this Court. In the

265151 after holding that the High Court in writ petition under Article 226 can interfere only in extreme cases where charges ex facie do not

constitute offence under TADA it was held in paragraph 7 at pages 669-70 as under:

The first question is : Whether the High Court was empowered in the present case to invoke its jurisdiction under Article 226 of the Constitution to

examine the correctness of the view taken by the Designated Court and to quash the prosecution of the respondent under the TADA Act? Shri

Jethmalani contended, placing reliance on the decisions in 279362 and 280703 that in the facts of this case, the High Court had such a jurisdiction

since there is no accusation against the respondent in the charge-sheet filed in the Designated Court which, if believed, must result in his conviction

for an offence punishable under TADA Act. We are not impressed by this argument of Shri Jethmalani. It is no doubt true that in an extreme case if

the only accusation against the respondent prosecuted in the Designated Court in accordance with the provisions of TADA Act is such that ex

facie it cannot constitute an offence punishable under TADA Act, then the High Court may be justified in invoking the power under Article 226 of

the Constitution on the ground that the detention of the accused is not under the provisions of TADA Act. We may hasten to add that this can

happen only in extreme cases which would be rare and that power of the High Court is not exercisable in cases like the present where it may be

debatable whether the direct accusation made in conjunction with the attendant circumstances, if proved to be true, is likely to result in conviction

for an offence under TADA Act. The moment there is a debatable area in the case, it is not amenable to the writ jurisdiction of the High Court

under Article 226 of the Constitution and the gamut of the procedure prescribed under TADA Act must be followed, namely, raising the objection

before the Designated Court and, if necessary, challenging the order of the Designated Court by appeal in the Supreme Court as provided in

Section 19 of TADA Act. In view of the express provision of appeal to the Supreme Court against any judgment, sentence or order, not being an

interlocutory order of a Designated Court, there is no occasion for the High Court to examine merits of the order made by the Designated Court

that the Act applies. We have no doubt that in the present case wherein the High Court had to perform the laboured exercise of scrutinising the

material containing the accusation made against the respondent and the merits of the findings recorded by the Designated Court holding that the

provisions of TADA Act were attracted, there was sufficient indication that the writ jurisdiction of the High Court under Article 226 of the

Constitution was not available. The ratio of the decisions of this Court in R.P. Kapur and Bhajan Lai on which reliance is placed by Shri

Jethmalani, has no application to the facts of the present case. There was thus no justification for the High Court in the present case to exercise its

jurisdiction under Article 226 of the Constitution for examining the merits of the controversy much less for quashing the prosecution of respondent

Abdul Hamid in the Designated Court for offences punishable under TADA Act.

(emphasis supplied)

56. From the above quotation it is clear if there is a debatable area it is not amenable to writ jurisdiction under Article 226 of the Constitution of

India and the gamut of the procedure prescribed under TADA must be followed including challenging the order of the Designated Court u/s 19. It

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

57. In 280703 where a writ petition was filed to quash the first information report and also of the writ of prohibition restraining the police authority

from proceeding further into the investigation, the High Court concluded that the allegations do not constitute a cognizable offence. It further held

that the power of quashing a criminal proceeding should be exercised sparingly and with circumspection and, that too, in the rarest of rare cases;

that the Court will not be justified in embarking upon an inquiry as to the reliability or genuineness or otherwise of the allegations made in the first

information report or the complaint. It was further held where the allegations made in the first information report or the complaint even if they are

taken at their face value and accepted in the entirety do not prima facie constitute any offence or make out a case against the accused, then alone

the proceeding could be quashed.

58. In 259157 it is held:

At a stage when the police report u/s 173 Cr.P.C. has been forwarded to the Magistrate after completion of the investigation and the material

collected by the Investigating Officer is under the gaze of judicial scrutiny, the High Court would do well to discipline itself not to undertake

quashing proceedings in exercise of its inherent jurisdiction. In this case the High Court fell into grave error in appreciating the documents and

affidavits produced before it by treating them as evidence, delving into the disputed questions of fact in its jurisdiction under Article 226/227 and

pronouncing the respondents to be innocent and quashing the criminal proceedings by converting itself into a trial court. This was not at all a case

where High Court should have interfered in the exercise of its inherent jurisdiction. The appreciation of evidence is the function of the criminal

courts the Special Judge was seized of the matter. He had heard the argument on the question of cognisance and had reserved the orders. The

High Court did not even permit the Special Judge to pronounce the orders. The High Court, under the circumstances, could not have assumed

jurisdiction and put an end to the process of investigation and trial provided under the law.

...Entertaining the writ petitions against charge-sheet and considering the matter on merit on the guise of prima facie evidence to stand an accused

for trial amounts to pre-trial of a criminal trial under Articles 226 or 227 even before the competent Magistrate or the Sessions Court takes

cognizance of the offence. The charge-sheet and the evidence placed in support thereof form the base to take or refuse to take cognizance by the

competent court. It is not the case that no offence had been made out in the charge-sheets and the first information report. Grossest error of a

criminal case in exercising its extraordinary jurisdiction under Article 226....

59. In Maninder Kaur v. Rajinder Singh, 1992 Supp (2) SCC 25 this Court observed thus:

...The matter is plain and simple as on the state of complainant and her two witnesses, the learned Magistrate came to the opinion that there was

sufficient ground for proceeding with the complaint and he issued process against the accused-respondents. Now at this stage to judge the

sufficiently or otherwise of the ground for proceeding was beyond the power of the High Court so as to quash the proceedings u/s 482, Cr.P.C.

The value to be attached to the statement made by the appellant u/s 164, Cr.P.C was to be examined at the enquiry at the pre-charge stage and

possibly at the trial, if charge was to be framed....

60. In 297364 was held thus:

The complaint made by the Deputy Secretary to the Government of India to the CBI mentions different circumstances to show that the appellants

did not intend to carry on any business. In spite of the rejection of the application by the Stock Exchange, Calcutta they retained the share moneys

of the applicants with dishonest intention. Those allegations were investigated by the CBI and ultimately charge-sheet has been submitted. On basis

of that charge-sheet cognizance has been taken. In such a situation the quashing of the prosecution pending against the appellants only on the

ground that it was open to the applicants for shares to take recourse to the provisions of the Companies Act, cannot be accepted. It is a futile

attempt on the part of the appellants, to close the chapter before it has unfolded itself. It will be for the trial Court to examine whether on the

materials produced on behalf of the prosecution it is established that the appellants had issued the prospectus inviting applications in respect of

shares of the Company aforesaid with a dishonest intention, or having received the moneys from the applicants they had dishonestly retained or

misappropriated the same. That exercise cannot be performed either by the High Court or by this Court. If accepting the allegations made and

charges leveled on their face value, the Court had come to conclusion that no offence under the Penal Code was disclosed the matter would have

been different. this Court has repeatedly pointed out that the High Court should not, while exercising power u/s 482 of the code, usurp the

jurisdiction of the trial Court. The power u/s 482 of the Code has been vested in the High Court to quash a prosecution which amounts to abuse of

the process of the Court. But that power cannot be exercised by the High Court to hold a parallel trial, only on basis of the statements and

documents collected during investigation or inquiry, for purpose of expressing an opinion whether the accused concerned is likely to be punished if

the trial is allowed to proceed.

61. In 258765 this Court held:

It is trite that jurisdiction u/s 482 Cr.P.C., which saves the inherent power of the High Court, to make such orders as may be necessary to prevent

abuse of the process of any court or otherwise to secure the ends of justice, has to be exercised sparingly and with circumspection. In exercising

that jurisdiction the High Court should not embark upon an enquiry whether the allegations in the complaint are likely to be established by evidence

or not. That is the function of the trial Magistrate when the evidence comes before him. Though it is neither possible nor advisable to lay down any

inflexible rules to regulate that jurisdiction, one thing, however, appears clear and it is that when the High Court is called upon to exercise this

jurisdiction to quash a proceeding at the stage of the Magistrate taking cognizance of an offence the High Court is guided by the allegations,

whether those allegations, set out in the complaint or the charge-sheet, do not in law constitute or spell out any offence and that resort to criminal

proceedings would, in the circumstances, amount to an abuse of the process of the court or not.

(Emphasis supplied)

62. In 279218 it is reiterated:

63. It is, therefore, manifestly clear that proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or

the papers accompanying the same, no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are,

without adding or subtracting anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of its

powers u/s 482 of the present Code.

(Emphasis supplied)

64. In 278886 it was further made clear:

As to what would be the evidence against the respondents is not a matter to be considered at this stage and would have to be proved at the trial.

We have already held that for the purpose of quashing the proceedings only the allegations set forth in the complaint have to be seen and nothing

further.

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

1. Accused Md. Rashid Khan and his relatives reside at 43, B.B. Ganguly Street, Calcutta-12. He used to maintain a group of anti-socials. Local

people were scared of him and his men. No one dared to object or raise voice against them as all knew the consequences.

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

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

4. The investigation revealed that since last 5/6 years accused No. 3 Pannalal Jaysoara had been manufacturing bombs on the 1st floor of 267,

B.B. Ganguly Street as and when required by Accused No. 1 Md. Rashid Khan, the Satta Bookie. Kalloo @ Sarafraz Khan, a henchman of

Accused No. 1 picked up Accused No. 3 Pannalal Jaysoara first for preparing bombs for their group and through Accused Kalloo @ Sarafraz @

Khan. Accused No. 3 Pannalal Jaysoara was introduced with Accused No. 1 Md. Rashid Khan, Accused No. 2 Abdul Aziz, Accused No. 7

Lala @ Parwez Khan, Accused Zakrin and Accused No. 8/Parvez Imtiaz Khan. It also transpired that Accused Pannalal used to take cash Rs.

100/- regularly in every week either from Accused Rashid Khan or from Accused Kalloo @ Sarafraz Khan. Accused No. 3 Pannalal used to

receive the said money from the office of Accused Rashid Khan at 266, B.B. Ganguly Street.

This bomb manufacturing matter was supervised mainly by Accused Kalloo and Accused Lala (absconding) and sometimes by Accused Imtiaz

Khan (absconding). Accused Md. Rashid Khan, Abdul Aziz and Zakrin Khan used to visit the first floor of 267, B.B. Ganguly Street, also for the

same purpose.

After the communal riot in recent past between Hindus and Muslims in Bombay, Accused No. 1 Md. Rashid Khan became very worried for the

Muslims because, according to him, a large number of Muslims died at Bombay and the Local Government did nothing for their community and he

apprehended that such sort of communal riot might take place in Calcutta and Government may not stand by the side of Muslims like Bombay as a

result many Muslims would die. As such Accused Md. Rashid Khan hatched a conspiracy with his henchmen viz. Accused Kalloo, Lala, Zakrin,

Khalid, Murtaza, Aziz, Gulzar etc. to procure huge quantity of explosive materials for preparing large number of bombs with a view to kill the

Hindus in Calcutta by using those bombs through Muslim brothers.

(Emphasis supplied)

5. Pursuant to that conspiracy Accused No. 5 was entrusted with the task of procuring explosive materials. For this, Accused No. 1, Rashid

Khan, paid money to Accused No. 5 Md. Khalid through Accused Kalloo. Within a few days, Accused No. 5 Khalid, with the help of Accused

Hassu procured huge quantities of explosive materials and brought those to the first floor of 267, B.B. Ganguly Street, in two drums and two bags

and kept the same there with the help of Accused Murtaza, Gulzar, Tenia and Ukil. Again on 16.3.93 Accused Md. Khalid and Accused Hassu

brought explosive materials in two bags and with Accused Gulzar and Mustafa @ Murtuja came near the Sattagali at about 20/20.30 hrs. There

with the help of Accused Tenia, Ukil and Khurshid brought those bags inside the Khaskhas Godown on 1st floor of 267, B.B. Ganguly Street

through Satta Gali. At that time there were some other persons present in ""Satta Gali"" who saw this. Thereafter Accused Murtaza, Khalid and

Hassu & Khurshid kept two drums and four bags together and placed a plastic sheet. Accused Khalid and Hassu opened those bags and brought

out explosive materials and some small tin containers. Then Accused Tenia, Ukil, Hassu and Khurshid started mixing the explosive materials while

Accused Gulzar, Khalid and Murtaja started straining the materials. Accused Gulzar tried to open the lid of a drum but he was asked by Accused

Khalid and Accused Murtaza not to do so. As such he did not open the lid of the drum. Soon after Accused Nisar Gulzar, Khalid and Murtaza

were straining those explosive materials. Accused Lala, Kalloo and Imtiaz came inside the 1st floor of 267, B.B. Ganguly Street and supervised

this manufacturing process, owner of Khaskhas godown, E.M. Naushad and his men were present inside the 1st floor of the said building i.e.

inside his Godown cum residential place at that time. At about 21.00/21.30 hours of that night, an electrician of that locality who used to sleep in

the night inside the Khaskhas Godown regularly also came there but being rebuked by Accused Murtaza he left the Khaskhas Godown. Some

other people who used to stay during night were also present inside the Khaskhas Godown on that night.

6. Thereafter at intervals Accused Gulzar and Accused Khalid left that house for their destinations. All the street lights and lights inside Satta Gali

and lights on the 1st floor of 267, B.B. Ganguly Street and its surrounding areas were burning. A few persons were present inside Satta Gali then.

On the same morning, i.e., 16.3.93, Accused Kalloo with Accused Imtiaz went to the place of Accused Pannalal Jaysoara and asked him to come

to their place at Bowbazar Street for preparing bombs. At about 22.00/22.30 hours, on that day, Accused Pannalal came to the office of Accused

Md. Rashid Khan at 266, B.B. Ganguly Street. There he met Accused Aziz, Rashid, Lala and Zakrin who took him to the "Khaskhas Godown

cum Factory" located on the first floor of 267, B.B. Ganguly Street through Satta Gali where Accused Murtaza, Tenia, Nisar, Ukil, Hassu and

Khurshid were found preparing bombs and there was huge quantity of the mixture of explosive materials over a plastic sheet on the 1st floor of

267, B.B Ganguly Street besides number of empty small tin containers.

7. At about 23.00/23.30 hours on 16.3.93. Accused Pannalal, after preparing a few bombs came down and went out, being followed by a

witness. Accused Zakrin was found standing near the Satta Gali and Accused Md. Rashid Khan was then talking with two persons of Haberly

Lane, standing on the pavement in front of 266, B.B. Ganguly Street. At that time, Accused Pannalal went to Accused Rashid Khan and told him

that it would take long time, even up to the next day evening, to prepare bombs with all such huge quantity of explosive materials and asked

Accused Rashid Khan as to the necessity of preparing such large number of bombs. Accused Rashid Khan answered him in presence of those two

persons as to why large number of bombs were necessary referring to recent past Bombay Riot.

8. Then Accused No. 1 Md. Rashid Khan asked Accused No. 3, Pannalal, to start the work of preparation of bombs and thereafter went

towards his hotel "Shahi Darbar". After departure of Accused Rashid Khan Accused No. 3 Pannalal also left that place for his residence.

9. At about 23.59 hours on 16.3.93 the explosion took place resulting in death of 69 persons and 46 persons injured. Due to this explosion the

houses were either collapsed or damaged.

66. The facts also disclose that confessions were made by Accused 3, Pannalal and Accused 6, Md. Gulzar u/s 164 of the Code before the

Magistrate.

67. Now, we come to the order granting sanction. The order of sanction by the Commissioner of Police is dated 11.6.1993. It inter alia says:

WHEREAS, it appears from all the reports, recorded statements of witnesses, confessional statement of accused persons viz. Pannalal Jaysoara

and Md. Gulzar, the seizure lists, opinion of experts, order No. 4509-P dated 11.6.93 from the Joint Secretary to the Government of West Bengal

case diary etc. in connection with Bowbazar P.S. C/No. 84 dated 17.3.93 u/s 120B/436/302/307/326 I.P.C. u/s 3 & 5 E.S. Act, u/s 3 and TAD

A Act, placed before me, that on 16.3.93 at about 23.59 hours there was an explosion due to blast of bombs and explosive materials which

caused destruction of premises No. 267, B.B. Ganguly Street, Calcutta-12 and damage to premises No. 266, 268-A, 43/3, 42/1, B.B. Ganguly

Street, 1, Haberly Lane, 37, Robert Street, Calcutta -12 etc. and death of 69 persons and injuries to large number of people.

(Emphasis supplied)

Thereafter, it proceeds to say that the accused:

...with intent to strike terror in the people and/or to strike terror on a particular section of the people and/or to alienate a particular section of

people to adversely affect the harmony amongst the Hindus and Muslims were engaged in preparing and/or causing to be prepared, bombs, with

explosive substances and highly explosive materials by procuring them, which acts were likely to cause death or injuries to persons and loss of or

damaged to and/or destruction of properties and thereby committed terrorist acts.

(Emphasis supplied)

And WHEREAS it appears, from the aforesaid records and documents, that the aforesaid persons conspired and were preparing to commit

disruptive activities.

And WHEREAS, it appears after due consideration of all the records, documents etc. mentioned earlier, that the aforesaid persons by their acts

have committed offences punishable under Sections 3 and 4 of the Terrorist and Disruptive Activities (Prevention) Act, 1993.

(Emphasis supplied)

Now, therefore, on careful consideration of all the facts, materials and circumstances of the case and in exercise of the powers conferred upon me

by Section 20A(2) of the Terrorist and Disruptive Activities (Prevention) Act, 1993, I, Sri Tushar Kanti Talukdar, Commissioner of Police,

Calcutta, do hereby accord sanction for prosecution under Sections 3 and 4 of the Terrorist and Disruptive Activities (Prevention) Act, 1993 of

the following persons viz., (1) Md. Rashid Khan, son of Late Ramjan Khan, of 43, B.B. Ganguly Street, Calcutta-12.

On this, the Designated Court passed the following order on 14.6.63:

Received charge-sheet against the accused (1) Md. Rashid Khan, (2) Abdul Aziz C.K., (3) Pannalal Jaysoara, (4) Md. Mustafa @ Murtaza, (5)

Md. Khalid, (6) Md. Gulzar, (7) Md. Parvez Khan @ Parvez @ Lal and (8) Imtiaz Khan under Sections 120B/436/302/307/326 I.P.C., under

Sections 3 and 5 E.S. Act and under Sections 3 and 4 TADA Act Ltd. P.P. Sri Sisir Ghosh prays for taking cognizance. Heard. Perused the

Police papers. Cognizance taken. Accused Nos. 7 and 8 are reportedly absconding.

(Emphasis supplied)

Issue warrant of arrest against the accused Parvez Khan @ Md. Parvez Khan @ Parvez @ Lala and accused Imtiaz Khan. Fix 10.7.93 for E.R.

to date.

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

It has been specifically alleged that no sanction order was given by the Commissioner of Police-respondent No. 3 before the Designated Court

took cognizance on 14th June, 1993. The respondent No. 3 has not affirmed an affidavit denying the said allegations made by the petitioner. The

said affidavit affirmed by S.K. Sanyal also does not disclose that he was authorised to affirm the affidavit on behalf of the Commissioner of Police-

respondent No. 3.

There is, therefore, no specific denial by the Commissioner of Police of the averment in the writ petition that no sanction had been granted by him

prior to the Designated Court taking cognizance.

It is significant that although it is alleged in the said affidavit of S.K. Sanyal that he produced the case diary including the sanction order to the

Designated Court and the Designated Court returned the same to him for making copies as the Court did not have the necessary infrastructure, the

same is not recorded in the proceeding before the Designated Court nor there is any mention in the sanction order filed in Court and subsequently

returned as appears from the record of the Designated Court.

It further held:

...Even assuming that the original had been returned to the prosecution for making copies, the said fact should have also been recorded in the

Court"s record. In the absence of such recording of fact question may arise whether the said sanction order was placed before the designated

court.

...it will be noticed that the Police Report and this last page (which is page No. 14) is much lighter than the type impression in the proceeding 13

pages of the said report.

(Emphasis supplied)

...In my view this aspect of the matter is not so vital so as to effect the validity of the sanction order or for the purpose of taking cognizance and the

Writ Court should not enter, into the aforesaid controversy.

...It has, therefore, been suggested that the sanction is in respect of non-existent offences and that it is not a sanction in respect of any offence

under the TADA Act of 1987 as required by Section 20A(2) of the Act and that it is not a sanction in respect of offences under Sections 3 and 4

of the TADA Act of which cognizance was taken by the designated Court on June 14, 1993. The sanction in the aforesaid manner according to

the learned Advocate for the petitioner shows complete non-application of mind by the Commissioner of Police while making that order and

according to him the order of sanction is accordingly, bad.

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

(1) No intention to kill Hindus has been mentioned.

(2) Facts for taking action u/s 4 have not been set out.

(3) Threat to sovereignty and integrity has not been stated.

(4) Confession cannot be taken into account for inferring the intention.

(5) There is no whisper of an allegation of conspiracy.

(6) There is no mention that ordinary machinery has broken down.

69. After holding so, the order of the Designated Court dated 14.6.93 is quashed on the following grounds:

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

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

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

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

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

This order, however, will not prevent the respondent-State to take steps for making any fresh application for sanction before the Commissioner of

Police on the basis of fresh materials, if there be any, and accordingly to apply for taking of cognizance before the Designated Court on the basis of

such fresh materials if the same is permissible and if the respondent is so advised in accordance with law.

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

72. The affidavit of Mr. Tushar Kanti Talukdar, Commissioner of Police, Calcutta, which came to be filed pursuant to the permission granted by

the Court, categorically states that sanction was accorded by him. The Commissioner had gone through the voluminous records and came to the

conclusion on his own. It is further stated by him as under:

I state that I had examined in particular the statements of witnesses indicating that the accused persons along with others conspired to create

disharmony between the two major communities and over a period had systematically been collecting huge quantities of explosive substances to

use them whenever needed. In fact, on 16th March, 1993 one installment of two big bags of explosives had arrived at the place and were kept in

the khas khas room of 267, B.B. Ganguly Street. These two bags were in addition to two big bags and two drums that had arrived earlier and

stored in the same room. The statements of witnesses and confessional statements of two accused clearly indicate that the accused had no faith in

the established government. The accused men had openly declared that the Government had done nothing to protect the Muslims against the

Hindus in Bombay riots and in Calcutta the Government will also do nothing to protect the Muslims. It was declared that thus it was necessary to

arm the Muslims with huge quantities of bombs so that they could use those for their protection. The statements and confessions indicate that

bombs were being manufactured on that day to attain such object. One of the confessing accused, who is an expert in manufacturing bombs, had

stated in his confession that he was told by Rashid Khan to prepare bombs from such huge quantities of explosive substances. The accused in his

confession also stated that he told Rashid Khan that preparing bombs out of such huge quantities of explosives would not only take whole night of

16th March but would also need to next day till near about the evening. The materials also indicate that on that day while he left after preparing

some bombs, others continued to manufacture bombs out of explosive substances that had been collected. I was satisfied that the facts emerged

did call for prosecution under Sections 3 and 4 of TADA.

(Emphasis supplied)

73. It should also be stated, at this stage, that the High Court had overlooked the fact that Mr. Sujit Kumar Sanyal had sworn to the earlier

affidavit as the Head of the Special Investigating Team which has also been mentioned by the Commissioner. Merely because of the failure of the

Court to mention that it had perused the order of sanction while taking cognizance cannot lead to the conclusion that the existence of the order of

sanction could be doubted.

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

I say that on June 14, 1993 before the learned. Designated Court had passed the order taking cognizance I had placed all the papers including the

two sanctions and the statements recorded u/s 161 of the Code before the Court. I say that it was well within the competence of the learned Chief

Metropolitan Magistrate to be informed that investigation u/s 3 and 4 of TADA Act was being carried on and to correct the records by adding

Sections 3 and 4 of the said Act.

75. Again in paragraph 12, the Affidavit proceeds to state:

I further say that it was only in course of the investigation that materials indicating commission of offences under Sections 3 and 4 of the said Act of

1987 had transpired. I further say that after the cognizance had been taken on the basis of the charge-sheet and the materials collected after

investigation being the materials in the case diary which include two sanctions and the statements recorded u/s 161 of the Code and the documents

seized and various seizure lists the learned Designated Court issued warrant of arrest against the absconding accused persons.

Paragraph 13 mentions as follows:

I say that the sanction under the said TADA 1993 was granted on 11 June 1993 being No. 1 by the Commissioner of Police, Calcutta and under

the Explosives Substance Act on that day being 4509-P by the Government of West Bengal. I further say that the charge-sheet that was filed on

14.6.1993 has specifically mentioned that such sanction had already been obtained. It is categorically denied that the initiation and continuation of

the said criminal proceeding against the petitioner and before the Designated Court under the TADA and said order dated June 14, 1993 is illegal.

It is not necessary to mention in the order sheet that sanction was granted. It is emphatically denied that no sanction was given by the respondent

Nos. 3 and 4 or that the law enjoins a duty upon the Designated Court to record by an order the fact of having received such sanction.

76. There is no justification on the part of the High Court to ignore this affidavit because the Commissioner of Police, Calcutta had sworn to the

fact that a Special Investigation Team had been set up on March 18, 1993 which was headed by Sujit Kumar Sanyal.

77. The order of sanction, on the face of it, shows that the sanctioning authority had perused the police papers. The High Court had to necessarily

accept these averments on their face value. The correctness or otherwise of the statement could be gone into only at the time of trial. this Court in

259157 already referred to, held as under:

The sanction u/s 197 Cr.P.C is not an empty formality. It is essential that the provisions therein are to be observed with complete strictness. The

object of obtaining sanction is that the authority concerned should be able to consider for itself the material before the Investigation Officer, before

it comes to the conclusion that the prosecution in the circumstances be sanctioned or forbidden. To comply with the provisions of Section 197 it

must be proved that the sanction was given in respect of the facts constituting the offence charged. It is desirable that the facts should be referred

to on the face of the sanction. Section 197 does not require the sanction to be in any particular form. If the facts constituting the offence charged

are not shown on the face of the sanction, it is open to the prosecution, if challenged, to prove before the court that those facts were placed before

the sanctioning authority. It should be clear from the form of the sanction that the sanctioning authority considered the relevant material placed

before it and after a consideration of all the circumstances of the case it sanctioned the prosecution.

In the present case the investigation was complete on the date of sanction and police reports had been filed before the Magistrate. The sanctioning

authority has specifically mentioned in the sanction order that the papers and the case diary were taken into consideration before granting the

sanction. Case diary is a complete record of the police investigation. It contains total material in support or otherwise of the allegations. The

sanctioning authority having taken the case diary into consideration before the grant of sanction it cannot be said that there was non-application of

mind on the part of the sanctioning authority. It is nobody''s case that the averment in the sanction order to the effect that case diary was taken into

consideration by the competent authority, is incorrect. We, therefore, do not agree with the finding of the High Court and set aside the same.

(Emphasis supplied)

Finally, we are at a loss to understand as to why and on what reasoning the High Court assumed extraordinary jurisdiction under Article 226/227

of the Constitution of India at a stage when the Special Judge was seized of the matter.

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

79. It is true, as contended by Mr. Ram Jethmalani, there must be valid sanction, otherwise there is a bar to take cognizance. In Gokulchand

Dwarkadas Morarka v. The King AIR 35 (1948) P.C. 82 it was observed thus:

...The sanction to prosecute is an important matter; it constitutes a condition precedent to the institution of the prosecution and the Government

have an absolute discretion to grant or withhold their sanction. They are not, as the High Court seem to have thought, concerned merely to see that

the evidence discloses a prima facie case against the person sought to be prosecuted. They can refuse sanction on any ground which commends

itself to them, for example, that on political or economic grounds they regard a prosecution as inexpedient. Looked at as a matter of substance it is

plain that the Government cannot adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of

the facts of the case. Nor, in their Lordships" view, is a sanction given without reference to the facts constituting the offence a compliance with the

actual terms of Clause 23.

80. Reliance is placed by the learned Counsel on 273784 wherein at para this Court observed thus:

Section 227, introduced for the first time in the new Code, confers a special power on the Judge to discharge an accused at the threshold if "upon

consideration" of the record and documents he considers "that there is not sufficient ground" for proceeding against the accused. In other words

his consideration of the record and document at that stage is for the limited purpose of ascertaining whether or not there exists sufficient grounds

for proceeding with the trial against the accused. If he will frame a charge u/s 228, if not he will discharge the accused. It must be remembered that

this section was introduced in the Code to avoid waste of public time over cases which did not disclose a prima facie case and to save the accused

from avoidable harassment and expenditure.

(Emphasis supplied)

81. Equally, reliance is placed on 285537 . In paragraph 10, it is held as under:

It is wrong to say that at the stage of framing charges the court cannot apply its judicial mind to the consideration whether or not there is any

ground for presuming the commission of the offence by the accused. As observed in the latter case, the order framing a charge affects person"s

liberty substantially and therefore, it is the duty of the court to consider judicially whether the material warrants the framing of the charge. It cannot

blindly accept the decision of the prosecution that the accused be asked to face a trial.

82. In our considered view, certainly the Designated Court could do all these at the time of framing of charges and not the High Court under

Article 226, as has been done in the instant case.

83. We are not in a position to accept the submissions of the learned Counsel for the respondent that in order to find out whether a valid sanction

existed, the High Court had appreciated the findings.

84. Equally, much cannot be said of the fact that the order of sanction mentions ''sanction for prosecution''. Since it is stated ''sanction for

prosecution under Sections 3 and 4 of TADA Act'' it means only sanction to proceed under Sections 3 and 4 of TADA Act. The ruling of Ram

Kumar v. State of Haryana [1987] 2 SCC 476 dealt with the different situation as to the scope of sanction under Sections 132 and 197 of the

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

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

played by each of the accused.

86. In Alvin Krule witch v. United States of America, 93 Law Ed. 790 , it was held thus:

When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish prima facie the

conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against

all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a

hodgepodge of acts and statements brothers which he may never have authorized or intended or even known about, but which help to persuade

the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that

conspiracy existed.

(Emphasis supplied)

87. Hence, proving of conspiracy against each accused would arise only at the stage of the trial which is yet to commence in the instant case.

88. In Walli Mohammad v. The King a (1949) PC 103, it is held as under:

The statements of each prisoner are evidence against himself only and are inadmissible against his fellow accused. Consequently, the only safe

method of testing the strength of the case for the prosecution is to take each man''s case separately, neglect the evidence of the other and ask

whether the conflicting and inconsistent nature of the matters alleged and persons implicated combined with the admission that the accused man

was himself present is enough to justify a verdict against him. It may be possible that each is sheltering a third person and even if it be possible that

one of the two accused is guilty, there must be circumstances from which could be deduced which of the two is the guilty one. Though proof of

motive is not essential, it is a material consideration. But it is not legitimate to speculate as to possible but unproved motives.

The difficulty in all cases where two persons are accused of a crime and where the evidence against one is inadmissible against the other is that

however carefully assessors or a jury are directed and however firmly a Judge may steel his mind against being influenced against one by the

evidence admissible only against the other, nevertheless the mind may inadvertently be affected by the disclosures made by one of the accused to

the deteriment of the other.

Neither of these rulings would apply because the question of leading evidence by the prosecution in relation to conspiracy, as stated above, would

arise only during the stage of trial which is yet to commence in the instant case.

As to the fact of conspiracy, the charge-sheet clearly mentions the same. Therefore, factually, this finding is wrong. We are not in a position to

accept the argument of the learned Counsel for the respondent that if the bombs are for self-defence, there is no mens rea and therefore, no

offence under TADA. The finding of the High Court on this aspect is as under:

It may be noted that if according to the police report itself the reason or intention behind preparing and storing bombs was to defend the muslim

community in the event Or riot taking place by possible attack by Hindus because the Government would not take action as was done in Bombay,

it cannot possibly be inferred or said that the accused intended to strike terror or that he had any other intent specified under the TADA Act. It

has, however, been submitted by Mr. Roy in the course of his argument that there are statements of witnesses to the effect that the people of the

locality were "scared" of the accused, implying that they were considered as dangerous persons. It has been submitted further that assuming the

fact to be true, from this fact it does not follow that the accused entered into a conspiracy to prepare and store bombs with any of the intents

specified in Section 3(1) viz. to strike terror amongst the people or a section of the people. It must also be remembered that mens rea is an

essential ingredient of an offence.

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

90. We may usefully refer to Ajay Aggarwal"s case (supra). At pages 617-618 it is stated:

It is not necessary that each conspirator must know all the details of the scheme nor be a participant at every stage. It is necessary that they should

agree for design or object of the conspiracy. Conspiracy is conceived as having three elements: (1) agreement (2) between two or more persons

by whom the agreement is effected; and (3) a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means,

or one of the means by which that aim is to be accomplished. It is immaterial whether this is found in the ultimate objects. The common law

definition of ''criminal conspiracy'' was stated first by Lord Denman in Jones case that an indictment or conspiracy must ""charge a conspiracy to do

an unlawful act by unlawful means"" and was elaborated by Willies, J. on behalf of the judges while referring the question to the House of Lords in

Mucahy v. Reg and House of Lords in unanimous decision reiterated in Quinn v. Leathern.

conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act, or

to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to. carry it into effect, the

very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful; and

punishable if for a criminal object, or for the use of criminal means.

this Court in E.G. Barsay v. State of Bombay held:

The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act

agreed to be done has not been done. So too, it is an ingredient of the offence that all the parties should agree to do a single illegal act. It may

comprise the commission of a number of acts. u/s 43 of the Indian Penal Code, an act would be illegal if it is prohibited by law.

91. In Yash Pal Mittal v. State of Punjab the rule was laid as follows: (SCCP. 543, para 9)

...The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every

detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques

adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to

achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or

purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspiratOrs. In achieving the goal several

offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal

acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or over-shooting

by some of the conspiratOrs.

92. In Mohammad Usman Mohammad Hussain Maniyar v. State of Maharashtra it was held that for an offence u/s 120B IPC, the prosecution

need not necessarily prove that the conspirators expressly agreed to do or cause to be done the illegal act, the agreement may be proved by

necessary implication.

93. The very preparation of bombs and possession of bombs would tantamount to terrorising the people. If proved, it will be a terrorist act and

Sub-sections (1) and (3) of Section 3 of the Act may also be attracted. The existence of 26 live bombs is a clear indication of conspiracy.

94. As regards the non-mention of threat to sovereignty and integrity in sanction order, we think there is a misunderstanding. this Court in Kartar

Singh v. State of Punjab : 1994CriLJ3139 determined the legislative competence of the Parliament to enact this law. What is relied on by the

learned Counsel for the respondents is paragraph 72 of the said judgment. That states as follows:

The terrorism, the Act (TADA) contemplates, cannot be classified as mere disturbance of ''Public Order'' disturbing the ""even tempo of the life

community of any specified locality"" in the words of Hidayatulla, CJ in 279606 but it is much more, rather a grave emergent situation created either

by external forces particularly at the frontiers of this country or by anti-nationals throwing a challenge to the very existence and sovereignty of the

country in its democratic polity.

95. Again, in 258712 , it is stated in paragraph 7 as under:

Terrorism is one of the manifestations of increased lawlessness and cult of violence. Violence and crime constitute a threat to an established order

and are a revolt against a civilised society. ''Terrorism'' has not been defined under TADA nor is it possible to give a precise definition of

''terrorism'' or lay down what constitutes ''terrorism''. It may be possible to describe it as use of violence when its most important result is not

merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the

society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and

reach of the intended terrorist activity travels beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the

land and its main objective is to overawe the Government or disturb harmony of the society or ''terrorise'' people and the society and not only

those directly assaulted, with a view to disturb even tempo, peace and tranquility of the society and create a sense of fear and insecurity.

Again, in paragraph 14, this Court went on to hold:

Therefore, it is the obligation of the investigation agency to satisfy the Designated Court from the material collected by it during the investigation,

and not merely by the opinion formed by the investigating agency, that the activity of the "terrorist" falls strictly within the parameters of the

provisions of TADA before seeking to charge-sheet an accused under TADA. The Designated Court must record its satisfaction about the

existence of & primp facie case on the basis of the material on the record before it proceeds to frame a charge sheet against an accused for

offences covered by TADA.

96. Without proceeding further, all that we can say, in this case, is that the materials are enough to bring the case u/s 3(1) of the Act. Of course, in

order to establish this, evidence will have to be led in during the trial. Therefore, we restrain from making any further observation which may tend

to prejudice the parties. If that be so, the question of mentioning in the sanction order that the ordinary law has broken down, does not arise.

97. Coming to taking cognizance, it has been held by the High Court that it is not a reasoned order. We are of the view that the approach of the

High Court in this regard is clearly against the decision of this Court in Stree Atyachar Virodhi Parishad"s case (supra) in paragraph 14 as under:

It is in the trial, the guilt or the innocence of the accused will be determined and not at the time of framing of charge. The court, therefore, need not

undertake an elaborate enquiry in shifting and weighing the material. Nor is it necessary to delve deep into various aspects. All that the court has to

consider is whether the evidentiary material on record if generally accepted, would reasonably connect the accused with the crime. No more need

be enquired into.

98. Again, in Niranjan Singh K.S. Punjabi"s case (supra), it is stated at page 85 as under:

Again in Supdt. & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja, this Court observed in paragraph 18 of the judgment as

under:

The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at

the stage of Section 227 or 228 of the CrPC 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate,

which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged, may justify the framing

of charge against the accused in respect of the commission of that offence.

(Emphasis supplied)

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

looked at the same.

100. The other finding that what can be looked at is only the police report, cannot be sustained. In 288512 , it was held as under:

...The report as envisaged by Section 173(2) has to be accompanied as required by Sub-section (5) by all the documents and statements of the

witnesses therein mentioned. One cannot divorce the details which the report must contain as required by Sub-section (5) from its accompaniments

which are required to be submitted under Sub-section (5). The whole of its is submitted as a report to the Court. But even if a narrow construction

is adopted that the police report can only be what is prescribed in Section 173(2) there would be sufficient compliance if what is required to be

mentioned by the statute has been set down in the report. To say that all the details of the offence must be set out in the report u/s 173(2)

submitted by the police officer would be expecting him to do something more than what the Parliament has expected him to set out therein. If the

report with sufficient particularity and clarity specifies the contravention of the law which is the alleged offence, it would be sufficient compliance

with Section 11. The details which would be necessary to be proved to bring him the guilt to the accused would emerge at a later stage, when after

notice to the accused a charge is framed against him and further in the course of the trial.

101. The ruling 268048 cited by Mr. Dipankar Ghosh, has no application to the facts of this case because Regulation 5(5) of the Indian Public

Service (Appointment by Promotion) Regulations, 1955, in that case, required reasons to be recorded.

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

The acts which the accused persons did is the act of preparation and storage of bombs, which are undoubtedly made of explosive substances.

From these acts of preparation and storage of bombs, it cannot be inferred that the accused intended to kill the Hindus or strike terror amongst the

people or a section of the people, alienate a section of the people or adversely affect the harmony among different sections of the people. Such an

intent cannot be inferred from the mere preparation and storage of bombs. It may be noted in this connection that police report does not disclose

that the accused persons caused the explosion. As a consequence of the explosion which occurred on March 16, 1993 a large number of persons

who were killed were Muslims and not Hindus and even from the consequences of the explosion with which the accused have not been charged, it

cannot be inferred that accused who are alleged to have been responsible for the preparation and storage of the bombs, intended to kill Hindus, or

strike terror amongst a section of people or that they had any of the intents specified in Section 3(1) of the Act.

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

104. On intention and motive, we only need to refer to Corpus Juris Secundum (A Contemporary Statement of American Law, Volume 22. It is

held at page 116 (Criminal Law) as under:

Intention

a. In general

b. Specific or general intent crimes

a. In General

As actual intent to commit the particular crime toward which the act moves is a necessary element of an attempt to commit a crime. Although the

intent must be one in fact, not merely in law, and may not be inferred from the overt act alone, it may be inferred from the circumstances.

105. As regards motive in American Jurisprudence, Second Edition, Volume 21, in Section 133, it is stated as under:

Section 133 Motive

In criminal law motive may be defined as that which leads or tempts the mind to indulge in a criminal act or as the moving power which impels to

action for a definite result.

106. Tested in the light of the above, suffice it to hold the preparation and storage of bombs, as pointed out above, are per se illegal acts. The

intention that it was to defend the Muslims, is totally unwarranted. ""Bomb is not a toy or top to play with"". The further question is, when does the

so-called right of self-defence arise? The High Court should have assumed that each of the allegations made in the charge-sheet to be factually

correct and should have examined the ingredients of the offence. As rightly contended by Mr. U.R. Lalit, learned senior counsel, the charge-sheet

cannot be considered in a restricted way.

107. On a careful perusal of the judgment we are left with the impression that the High Court had indulged in a laboured exercise, without limiting

itself to the proper jurisdiction under Article 226 of the Constitution of India, in matters of this kind. We do not want to elaborate on the motive to

prepare bombs and the intention thereto since the trial is yet to commence.

108. For all the above reasons we have absolutely no hesitation in holding that the High Court has clearly exceeded its powers under Article 226

of the Constitution in quashing the orders of sanction and taking of cognizance. Therefore, we set aside the impugned judgment of the High Court

and direct the Designated Court to proceed with the case in accordance with the law with utmost expedition.

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