State of Maharashtra, Etc. Etc. Vs Som Nath Thapa, Etc. Etc.

Court: Supreme Court of India

Date of Decision: April 12, 1996

Acts Referred: Explosive Substances Act, 1908 â€" Section 3, 4, 5, 6
Explosives Act, 1884 â€" Section 9B
Penal Code, 1860 (IPC) â€" Section 109, 120
Terrorist and Disruptive Activities (Prevention) Act, 1987 â€" Section 1(4),

Citation: (1996) 3 AD 502 : AIR 1996 SC 1744 : (1996) 2 ALD(Cri) 207 : (1996) 98 BOMLR 513 : (1996) CriLJ 2448 : (1996) 2 Crimes 64 : (1996) 4 JT 615 : (1996) 3 SCALE 449 : (1996) 4 SCC 659 : (1996) 1 SCR 189 Supp

Hon'ble Judges: A. M. Ahmadii, C.J.; S.C. Sen, J; B.L. Hansaria, J

Bench: Full Bench

Advocate: K.T.S. Tulsi, Additional Solicitor General, Ram Jethmalani, Rajinder Singh, Adik Shirodkar and T.C. Sharma, for the Appellant;

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Hansaria, J.
Bombay of yesterday, Mumbai of today : financial capital of the nation. It woke as usual on 12th March, 1993. People

started for their places of work not knowing what was in their store. The terrorists and/or disruptionists, bent on breaking the backbone of the

nation (for reasons which need not be gone into) had, however, hatched a well laid-out conspiracy to cripple the country by striking at its financial

nerve. As Bombay set down to work, blasting of bombs, almost simultaneously, took place at important centers of commercial activities like Stock

Exchange, Air India, Zaveri Bazar, Katha Bazar and many luxurious hotels. A shocked Bombay and a stunned nation first tried to provide succour

to the victims as much as possible and then wanted to know the magnitude of the loss of life and property. It surpassed all imagination, as it was

ultimately found that the blasts left more than 250 persons dead, 730 injured and property worth about Rs. 27 crores destroyed. By all counts, it

was thus a great tragedy, and revolting also, as it was men-made.

2. All right thinking persons and well wishers of the nation started asking; Why it happened ? How could it happen ? We are not concerned in

these cases with why, but with how. The gigantic task led Bombay police despite its capability, to seek assistance of the CBI. An arduous and

painstaking investigation by a team of dedicated officials showed that the aforesaid bomb blasts were a result of deep rooted conspiracy -

concerted action of many, guided either by greed or vengeance. The finale of investigation consisted in charge-sheeting 145 persons (for whom 38

were shown as absconders) under various sections of the Penal Code and the Terrorists And Disruptive Activities (Prevention) Act, 1987

(TADA), hereinafter the Act also. The Designated Court constituted u/s 9 of the Act came to be seized of the matter and by its impugned order of

10.9.1995 it has framed charges against 127 persons, discharging at the same time 26. One died and two became approvers. (The total thus

comes to 146).

3. Of the charged accused, four : (1) Abu Asim Azmi; (2) Amjad Aziz Meharbaksh; (3) Raju alias Raju Code Jain; and (4) Somnath Thapa have

approached this Court having felt aggrieved at their having not been discharged. The State of Maharashtra has approached the Court seeking

cancellation of bail granted to appellant Thapa.

4. We were fortunate to have leading criminal lawyers of the country to assist us in the matter in as much as Shri Ram Jethmalani appeared for

Raju and Moolchand, Shri Rajinder Singh for Abu Azim Azmi, Shri R.K. Jain for Amzad Ali and Shri Shirodkar for appellant Thapa. The State

was represented by Addl. Solicitor General, Shri KTS Tulsi. Lengthy arguments were advanced by the learned counsel to sustain the stands taken

by them. We put on record our appreciation for the able assistance rendered by all.

5. The appeals call for examination of three questions of law. These are :

(a) What are the ingredients of ""criminal conspiracy"", as defined in Section 120-A of the Penal Code ?

(b) When can charge be framed ?

(c) What is the effect of repeal of TADA ?

6. After understanding and explaining the legal position, we would examine the cases of individual appellants and would see whether any of them

deserves to be discharged. We would then express our view whether bail of Thapa has to be cancelled and whether Moolchand has to be

released on bail.

Essential ingredients of criminal conspiracy :

7. It would be apposite to note at the threshold that Sections 120-A and 120-B, which are the two sections in Chapter V-A of the Code, came to

be introduced by Criminal Law Amendment Act of 1913. The Statement of Objects and Reasons stated that a need was felt for the same to make

conspiracy a substantive offence. In doing so the common law of England was borne in mind.

8. Section 120-A defines criminal conspiracy as below :

120-A. Definition of criminal conspiracy : When two or more persons agree to do, or cause to be done,-

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy :

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the

agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation : It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

9. This definition shows that conspiracy consists in either doing an illegal act or a legal act by illegal means. Shri Tulsi emphasised that we should

bear in mind the illegality of means as well. Group action being apparently involved, it was urged that division of performances in the chain of

actions as happens in smuggling of narcotics should also be taken note of by us. The Addl. Solicitor General was at pains in contending that

protection of the society from the dangers of concerted criminal activity may not be lost sight of by us.

10. Shri Ram Jethmalani, who addressed us principally on the questions of law involved, filed a compilation of relevant decisions for our benefits,

wherein the essential ingredients of criminal conspiracy have been spelt out. The decisions mainly relied by the learned counsel are R. v.

Howkesley, (1959) Cri LR 210 and People v. Lauria, 251 Cal 2d 471. Some assistance is derived from a judgment of this Court in Natwarlal

Shankarlal Mody v. State of Bombay, (1961) Bom LR 661. The only other foreign decision we would be required to note is United States v.

Feola, 420 US 671, referred to on behalf of the State. We would finally see what was held by a two Judge Bench of this Court in 285203 strongly

relied on by Shri Tulsi.

11. The thrust of Shri Ram Jethmalani''s argument is that to find a person guilty of conspiracy there has to be knowledge of either commission of

any illegal act by a co-conspirator or taking recourse to illegal means by the co-conspirator, along with the intent to further the illegal act or

facilitate the illegal means. Though at one stage the learned Addl. Solicitor General sought to contend that knowledge by itself would be enough,

he, on deeper thought, accepted that this would not be. But then, according to him, at times intent may be inferred from knowledge, specially when

no legitimate use of goods or services in question exists. To sustain this submission, he also relied on Lauria''s case. He has added a rider as well.

The same is that so far as knowledge is concerned, the prosecution, in a case of present nature cannot be called upon to establish that the

conspirator had knowledge that the goods in question would be used for blasting of bombs at Bombay. This follows, according to the Addl.

Solicitor, from the decision of the United State Supreme Court in Feola.

12. Let us first see what was held in Hawkesley. The facts of that case are that the accused was a partner with Z in a small taxi business. A and B,

two young men with some previous criminal record, who were fairly well known to Z but less well known to the prisoner, H, persuaded H to drive

them on credit from the taxi office in the center of the city at about 12.25 a.m. a distance of about five miles to the outskirts of the city. H did not

know that either A or B had criminal records. On the journey A and B informed H that the purpose of the journey was to break into a golf club. H

dropped A and B near the golf club and a police officer overheard one of them say, ""We will want you back in about an hour"". H never did return

to the golf club but returned to the city where he drove some other fares which had been previously booked after which he went home taking his

taxi with him.

A and B ran away from the golf club on being disturbed by the police and were later arrested together. A and B were charged with being in

possession of house-breaking implements by night and A, B and H were charged with conspiracy to break and enter the club. A and B pleaded

guilty"" to both counts and H pleaded ""not guilty"" to the count of conspiracy against him. When A and B were arrested a torch which was usually

kept in the taxi was found in their possession. H made a statement to the police in writing in which he said that on the journey he learnt that A and

B were ""Going to do the club"".

13. The evidence as to how a torch came into possession of A and B was conflicting. There was no evidence that the accused knew, until the

journey in the taxi had begun, that A and B intended to commit a criminal offence or that he had any reason to suspect that they intended to do so.

It was, therefore, held that there was no evidence as to conspiracy because of lack of evidence that the accused and A and B were acting in

concert or had agreed together to commit a criminal offence. It is brought to our notice that this Court in Natwar Lal''s case (supra) had also held

that knowledge of conspiracy is necessary as appears from what was stated at page 667 of the Report. Shri Jethmalani, therefore, submits that

mere knowledge that somebody would commit an offence would not be sufficient to establish a case of criminal conspiracy, unless there be

evidence to show that all had acted in concert or had agreed together to commit the offence in question.

14. The discussion in Lauria is more illuminating and its importance lies in the fact that learned counsel of both the sides have sought to place

reliance on this decision. Fleming, J., who decided the case, was confronted with two leading cases of the United States Supreme Court pointing in

opposite directions - one was that of United States v. Falcone, 311 US 205 wherein sellers of large quantities of sugary east and canes were

absolved from participation in a conspiracy among distillers who bought from them. In Direct Sales Co. v. United States, 319 US 703, however, a

wholesaler of drugs was convicted of conspiracy to vacate the federal narcotic laws by selling drugs in quantity to a co-accused physician who was

supplying them to addicts. The distinction between these two cases appeared primarily based on the proposition that distributors of such

dangerous products as drugs are required to exercise greater discrimination in conduct of their business than are distributors of innocuous

substances like sugar and yeast. Fleming, J., therefore, observed that in Falcone the seller''s knowledge of the illegal use of the goods was

insufficient by itself to make the seller privy to a conspiracy with the distillers who bought from them, whereas in Direct Sales, the conviction was

affirmed on showing that the drug wholesaler had actively promoted the sale of the drug (morphine sulphate) in quantity and had sold the same to a

physician who practised in a small town - the quantity being 300 times more than the normal requirement of the drug.

15. The following quotations in Lauria from the decision in Direct Sales is very pertinent :

All articles of commerce may be put to illegal ends.... But all do not have inherently the same susceptibility to harmful and illegal use...this difference

is important for two purposes. One is for making certain that the seller knows the buyer''s intended illegal use. The other is to show that by the sale

he intends to further, promote and cooperate in it. This intent, when given effect by overt act, is the gist of conspiracy. While it is not identical with

mere knowledge that another proposes unlawful action, it is not unrelated to such knowledge.... The step from knowledge to intent and agreement

may be taken. There is more than suspicion, more than knowledge, acquiescence, cerelessness, indifference, lack of conern. There is informed and

interested co-operation, stimulation, instigation.

16. The learned Judge, after examining the precedent in the field, hereafter held that sometimes, but not always, the criminal intent may be inferred

from the knowledge of the accused of the unlawful use made of the goods in question. He gave two illustrations to bring home the point, one of

which is that the intent may be inferred from knowledge, when no legitimate use for the goods or services exists. Being of this view, Fleming, J.

held that the respondent before him (Lauria) had knowledge of the criminal activities of the prostitutes, and the same was sufficient to charge him

with that fact, even though what Lauria had manifestly done was allowing them, who were actively plying their trade, to use his telephone. The

prosecution in that case had attempted to establish conspiracy by showing that Lauria was well aware that his co-defendants were prostitutes, who

had received business calls from customers through his telephone answering service, despite which Lauria continued to furnish them with such

service. This action of Lauria was regarded as sufficient to hold that he had conspired with the prostitute to further their criminal actifity.

17. The Additional Solicitor General has, according to us, stolen a march over the counsel for the accused because of what was stated in Latvia''s

case, as he is undoubtedly right in submitting that RDX, or for that matter bombs, cannot be put to any legitimate use but only to illegitimate use;

and it is RDX or bomb which was either handled or allowed to slip by the accused before us. So, this act by itself would establish the intent to use

the goods for illegitimate purpose.

18. Another decision to come to the assistance of the prosecution is Feola. This decision of the United States Supreme Court is important because

the issue presented in that case was whether knowledge that the intended victim was a federal officer essential to establish crime of conspiracy

under the relevant penal provision which made an assault upon a federal officer while engaged in the performance of his official duties, an offence.

Justice Blackmun, who delivered the opinion for the majority, held that in so far the substantial offence is concerned, to answer the question of

individual guilt or innocence, awareness of the official identity of the assault victim is irrelevant. It was observed that the same has to obtain with

respect to conspiracy.

19. What had happened in Feola was that he and his confederates had arranged for sale of heroin to buyers, who turned out to be undercover

agents for the Bureau of Narcotic and Dangerous Drugs. The planning of the group was to palm off on the purchasers, for a substantial sum, a

form of sugar in place of heroin and, should that ruse fail, simply to surprise their unwitting buyers and relieve them of the cash they had brought

along for payment. The plan failed when one agent on a suspicion being aroused, drew his revolver in time to counter an assault upon another agent

from the rear. So, instead of enjoying the rich benefits of a successful swindle, Feola and his associates found themselves charged, to their

undoubted surprise, with conspiring to assault and assaulting federal officers.

20. The plea taken by Feola was that he had no knowledge of the victim''s official identity and as such he could not have been guilty of conspiracy

charge. The Court was, therefore, first required to find out whether for the substantive offence of charge envisaged by the punishing section,

awareness of the official identity of the victim was relevant; and the majority answered the question in negative, because the offence consisted in

assaulting a federal officer on duty; and undoubtedly there was an assault and the victim was a federal officer on duty. The further step which the

majority took, and with respect rightly, was that the same logic would apply with respect to conspiracy offence.

21. The Additional Solicitor General has thus a point when he contended that to establish the charge of conspiracy in the present case, it would not

be necessary to establish that the accused knew that the RDX and/or bomb was/were meant to be used for bomb blast at Bombay, so long as

they knew that the material would be used for bomb blast in any part of the country.

22. As in the present case the bomb blast was a result of chain of actions, it is contended on behalf of the prosecution, on the strength of this

Court"s decision in 277053 , which was noted in para 9 of Ajay Aggarwal"s case, that of such a situation there may be division of performances

by plurality of means sometimes even unknown to one another; and in achieving the goal several offences may be committed by the conspirators

even unknown to the others. All that is relevant 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.

23. Our attention is pointedly invited by Shri Tulsi to what was stated in para 24 of Ajay Aggarwal"s case wherein Ramaswamy, J. stated that the

law has developed several or different models or technique to broach the scope of conspiracy. One such model is that of a chain, where each

party performs even without knowledge of the other, a role that aids succeeding parties in accomplishing the criminal objectives of the conspiracy.

The illustration given was what is done in the process of procuring and distributing narcotics or an illegal foreign drug for sale in different parts of

the globe. In such a case, smugglers, middlemen, retailers are privies to a single conspiracy to smuggle and distribute narcotics. The smugglers

know that the middlemen must sell to retailers; and the retailers know that the middlemen must buy from importers. Thus the conspirators at one

end at the chain know that the unlawful business would not, and could not, stop with their buyers, and those at the other end know that it had not

begun with their settlers. The action of each has to be considered as a spoke in the hub - there being a rim to bind all the spokes together in a

single conspiracy.

24. The aforesaid decisions, weighty as they are, lead us to conclude that to establish a charge of conspiracy knowledge about indulgence in either

an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may

be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the

goods or service in question could not be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be

necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the

collaborator would do, so long as it is known that the collaborator would put the goods or service to an unlawful use.

When can charge be framed ?

25. This legal question is not as knotty as the first one. This is for the reason that there are clinching decisions of this Court on this aspect of the

matter.

26. Shri Ram Jethmalani has urged that despite some variation in the language of three pairs of sections, which deal with the question of framing of

charge or discharge, being relatable to either a sessions trial or trial of warrant case or summons case, ultimately converge to a single conclusion,

namely that a prima facie case must be made out before charge can be framed. This is what was stated by a two-Judge Bench in 287190

27. Let us note the three pairs of sections Shri Jethmalani has in mind. These are Sections 227 and 228 in so far as sessions trial is concerned;

Sections 239 and 240 relatable to trial of warrant cases; and Sections 245(1) and (2) qua trial of summons case. They read as below :

Section 227 : Discharge - If, upon consideration of the record of the case and the documents submitted therein, and after hearing the submissions

of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall

discharge the accused and record his reasons for so doing.

Section 228 : Framing of Charge - (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for

presuming that the accused has committed an offence which -

(a) is not exclusively triable by the Court of Session, he may frame a charge against the accused and, by order, transfer the case for trial to the

Chief Judicial Magistrate, and thereupon the Chief Judicial Magistrate shall try the offence in accordance with the procedure for trial of warrant-

cases instituted on a police report;

(b) is exclusively trial by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under Clause (b) of Sub-section (1), the charge shall be read and explained to the accused and the

accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.

(Emphasis supplied)

Section 239 : When accused shall be discharged - If, upon considering the police report and the document sent with it u/s 173 and making such

examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being

heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so

doing.

Section 240 : Framing of charge - (1) if, upon such consideration, examination, if any, and hearing the Magistrate is of opinion that there is ground

for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his

opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to

be tried.

Section 245 : When accused shall be discharged - (1) If, upon taking all the evidence referred to in Section 244, the Magistrate considers, for

reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate

shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to

be recorded by such Magistrate, he considers the charge to be groundless.

28. Before adverting to what was stated in Antulay''s case, let the view expressed in 285537 be noted. Therein, Chandrachud, J. (as he then was)

speaking for a three Judge Bench stated at page 119 that at the stage of framing charge the Court has to apply its mind to the question whether or

not there is any ground for presuming the commission of the offence by the accused. As framing of charge affects a person''s liberty substantially,

need for proper consideration of material warranting such order was emphasised.

29. What was stated in this regard in Stree Atyachar Virodhi Parishad''s case, which was quoted with approval in paragraph 78 of 286019 is that

what the Court has to see, while considering the question of framing the charge, is whether the material brought on record would reasonably

connect the accused with the crime. No more is required to be inquired into.

30. In Antulay''s case, Bhagwati, CJ., opined, after noting the difference in the language of the three pairs of section, that despite the difference

there is no scope for doubt that at the stage at which the Court is required to consider the question of framing of charge, the test of ""prima facie

case has to be applied. According to Shri Jethmalani, a prima facie case can be said to have been made out when the evidence, unless rebutted,

would make the accused liable to conviction. In our view, better and clearer statement of law would be that if there is ground for presuming that

the accused has committed the offence, a court can justifiably say that a prima facie case against him exists, and so, frame charge against him for

committing that offence"".

31. Let us note the meaning of the word ""presume"". In Black''s Law Dictionary it has been defined to mean ""to believe or accept upon probable

evidence"". (Emphasis ours). In Shorter Oxford English Dictionary it has been mentioned that in law ""presume"" means ""to take as proved until

evidence to the contrary is forthcoming"", Stroud''s Legal Dictionary has quoted in this context a certain judgment according to which ""A

presumption is a probable consequence drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged.

(Emphasis supplied). In Law Lexicon by P. Ramanath Aiyer the same quotation finds place at page 1007 of 1987 edition.

32. The aforesaid shows that if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a

probable consequence, a case for framing of charge exists. To put it differently, if the Court were to think that the accused might have committed

the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent

that at the stage of framing of charge, probative value of the materials on record cannot be gone into; the materials brought on record by the

prosecution has to be accepted as true at that stage.

What is the effect of lapse of TADA ?

33. In the written submissions filed on behalf of appellant Moolchand, it has been urged that TADA having lapsed, Section 1(4) which saves, inter

alia, any investigation instituted before the Act expired, itself lapsed, because of which it is not open to the prosecution to place reliance on this

sub-section to continue the proceeding after expiry of TADA.

34. We find no force in the aforesaid submission and would refer in this connection to a recent three-Judge Bench decision of this Court in 298203

, in which it has been clearly held that in view of Section 1(4) of the Act, the framers of the Act had desired that even after its expiry, the

proceeding initiated under the Act should not come to an end without the final conclusion and determination, which have, therefore, to be continued

in spite of the expiry of the Act. According to the Bench, there is indeed no scope for a controversy as to whether any investigation, inquiry, trial in

respect of any offence alleged under TADA shall come to end as Sub-section (4) of Section (1) protects and keeps alive such investigation and

trial.

FACTUAL ASPECTS OF THE APPEALS

35. The legal question having been examined, we may advert to the facts of each appellant to decide whether a prima facie case against him exists,

requiring framing of charge, as has been ordered. Before we undertake this exercise, it may be pointed out that the learned Designated Court in his

impugned judgment, instead of examining the merits of the prosecution case qua the charged accused, has given reasons as to why he discharged

26 accused. A grievance has, therefore, been made by all the learned counsel appearing for the accused that this was not the legal approach to be

adopted. We find merit in this grievance in as much as the impugned order ought to have shown that the Designated Court applied its judicial mind

to the materials placed on record against the charged accused. This was necessary because framing of charge substantially affects the liberty of the

concerned person. Because of the large number of accused in the case (and this number being large as regards charged accused also), the court

below might have adopted the approach he had done. But we do not think it was right in doing so. Be that as it may, now that we have been

apprised by the prosecution regarding all the materials which were placed before the Designated Court against each of the appealing accused, we

propose to examine, whether on the basis of such materials, it can reasonably be held that a case of charge exists. We would do so separately for

each of the appellants.

36. At this stage, it may be pointed out that the trial court has, apart from framing individual charge, framed a general charge, which after naming all

the 127 charged accused, reads as under :

During the period from December, 1992 to April, 1993 at various places in Bombay, District Raigad and District Thane in India and outside India

in Dubai (U.A.E.), Pakistan, entered into a criminal conspiracy and/or were members of the said criminal conspiracy whose object was to commit

Terrorist Acts in India and that you all agreed to commit following illegal acts namely to commit terrorist acts with an intent to overawe the

Government as by Law established, to strike terror in the people, to alienate sections of the people and to adversely affect the harmony amongst

different sections of the people i.e. Hindus and Muslims by using bombs, dynamites, handgranades and other explosives substances like RDX or

inflammable substances or fire-arms like AK-56 rifles, Carbines, Pistols and other lethal weapons, in such a manner as to cause or as likely to

cause death of or injuries to any person or persons, loss of, damage to and destruction of private and public properties and disruption of supplies

of services essential to the life of the community, and to achieve the objectives of the conspiracy, you all agreed to smuggle fire-arms, ammunition,

detonators, handgranades and high explosives like RDX into India and to distribute the same amongst yourselves and your men of confidence for

the purpose of committing terrorist acts and for the said purpose to conceal and store all these arms, ammunition and explosives at such safe places

and amongst yourselves and with your men of confidence till its use for committing terrorist acts and achieving the objects of criminal conspiracy

and to dispose off the same as need arises. To organise training camps in Pakistan and in India to import and undergo weapon training in Handling

of arms, ammunitions and explosives to terrorist acts. To harbour and conceal terrorists/co-conspirators, and also to aid, abet and knowingly

facilitate the terrorist acts and/or any act preparatory to the commission of terrorist acts and to render any assistance financial or otherwise for

accomplishing the object of the conspiracy to commit terrorist acts, to do and commit any other illegal acts as were necessary for achieving the

aforesaid objectives of the criminal conspiracy and that on 12.3.1993 were successful in causing bomb explosions at Stock Exchange Building, Air

India Building, Hotel Centaur at Santacruz, Zaveri Bazar, Katha Bazar, Century Bazar at Worli, Petrol Pump adjoining Shiv Sena Bhavan, Plaza

Theatre and in lobbing handgranades at Macchimar Hindu Colony, Mahim and at Bay-52, Sahar International Airport which left more than 257

persons dead, 713 injured and property worth about Rs. 27.0 Crores destroyed, And attempted to cause Bomb explosions at Naigaum Cross

Road and Dhanji Street, all in the city of Bombay and its suburbs i.e. within Greater Bombay.

And thereby committed offences punishable u/s 3(3) of TADA (P) Act, 1987 and Section 120(B) of Indian Penal Code read with Sections 3(2)

(i), (ii) 3(3) 3(4) 5 and 6 of TADA (P) Act, 1987 and read with Sections 302 307 326 324 427 435 436 201 and 212 of Indian Penal Code and

offences u/s 3 and 7 read with Section 25(1A), (1B), (a) of the Arms Act, 1959, Section 9-B(1), (a), (b), (c) of the Explosives Act, 1884,

Section 3 4(a), (b) 5 and 6 of the Explosive Substances Act, 1908 and Section 4 of Prevention of Damage to Public Property Act, 1984 and

within my cognizance.

Abu Asim Azmi

37. The specific charge relating to this appellant is as below :

In addition to Charge First you accused Abu Asim Azmi is also charged for having committed the following offences in pursuance of the criminal

conspiracy in Charge First.

SECONDLY that you Abu Asim Azmi in pursuance of the aforesaid criminal conspiracy conspired advocated advised abetted and knowingly

facilitated the commission of terrorists act and acts preparatory to terrorists act i.e. bomb blast and such other act which were committed in

Bombay and its suburbs on 12.3.93 by agreeing to do any by doing the following overt acts.

(a) That you sent Sultan-E-Rome Ali Gul, Mohmed Iqbal Ibrahim, Shakeel Ahmed, Shah Nawaz Khan s/o Faiz Mohmed Khan, Abdul Aziz,

Manzoor Ahmed Mohmed Qureshi, Shaikh Mohmed Ethesham and Mohmed Shahid Nizamuddin Qureshi, to undergo weapon training at

Pakistan in furtherance of the objectives of the aforesaid criminal conspiracy by booking their tickets out of your own funds through M/s. Hans Air

Services which was done by your firm M/s. Abu Travels and that you thereby committed an offence punishable u/s 3(3) of TADA (P) Act, 1987

and within my cognizance.

38. The aforesaid shows that the individual charge against Abu is that he had done the act of booking the tickets of the persons named in the

charge; and this was done from his own funds through M/s. Hans Air Services. Learned Addl. Solicitor General states that the financial assistance

by this appellant would attract the mischief of Section 3(3) of TADA which, inter alia, punishes abetment of a terrorist act. This would be so

because of the enlarged definition of ""abet"" as given in Section 2(1)(a), whose Clause (iii) makes rendering of any assistance, whether financial or

otherwise, to a terrorist, an act of abetment. Our attention is also invited to Section 21(2) which has provided that in a prosecution for an offence

u/s 3(3) of the Act, if it is proved that the accused rendered any financial assistance to a person accused of, or reasonably suspected of, an offence

under that section, the Designated Court shall presume, unless the contrary is proved, that such person has committed the offence under that

provision.

39. Shri Rajinder Singh, appearing for this appellant, did not consider it necessary to contest the aforesaid legal position. His sole contention is that

the materials sought to be relied on by the prosecution in alleging that Abu had booked tickets out of his own funds, which is the gravamen of the

charge, has no legs to stand in as much as there are materials galore to show that the fund for booking the 11 air tickets for Dubai had come, not

from the fund of the appellant, but the money had been made available to the firm of the appellant, named Abu Travel Agency, by one Maulana

Bukhari about which Shamim Ahmed working as cashier in the firm has stated. His statement during investigation was that on 21.1.1993 two

persons had come to his office and handed over a sum of Rs. 1.15 lacs along with 11 passports by saying ""Bukhari Saheb Ne Bheja Hai"" (Bukhari

Saheb has sent). This was pursuant to the talk Shamim earlier had with Bukhari who had inquired as to whether the firm of the appellant could

arrange for 11 air tickets to Dubai, which was answered in affirmative. The firm of M/s. Hans Air Services were thereafter contacted and a sum of

Rs. 38,000 was paid in cash by the appellant and Rs. 73,000 through drafts whose numbers are on record. It, however, happened that one ticket

had to be cancelled on 11.3.1993; and because of this an amount of Rs. 9,939 was credited in the account of appellant''s firm in the books of M/s.

Hans Air Services. It is really this entry which has been pressed into service by Shri Tulsi to contend that the money for the journey had really been

paid by the appellant''s firm.

40. According to Shri Rajinder Singh, the fact of aforesaid credit was not brought to the notice of the appellant''s firm. Then, as the bomb blasts

took place on the next date i.e. 12th March and as Bukhari was shot dead in the meantime, the money could not have been returned to Bukhari. It

is, therefore, urged that the mere fact of the aforesaid amount having been credited in the name of the appellant''s firm in the books of M/s. Hans

Air Services cannot at all suggest, in view of the aforesaid statement of Shamim, which was duly corroborated by Iftikhar, who was working at the

relevant time as a clerk in M/s. Abu Travels, that the air journey of the 11 persons was financed by this appellant. The learned counsel has also

submitted that as the Bombay Police had not asked Shamim during interrogation about the source of money which had been paid to Hans Air

Services, Shamim had made no statement regarding that, which he had subsequently made when interrogated by the C.B.I. Another contention to

be advocated is that if the action of booking the tickets in question would have been a part of tainted activity, the sum of Rs. 73,000 would not

have been transmitted to Hans Air Services through drafts.

41. Though it appears intriguing as to why only part of the money was sent through bank and that too by more than one draft, the aforesaid facts

brought to our notice by Shri Rajender Singh do show that the only incriminating material, namely, crediting the amount of Rs. 9,939 in the account

of the appellants'' firm in the books of M/s Hans Air Services, is a weak circumstance to say that the appellant might have abetted the offences in

question, which is the real charge against him. We may state that as framing of charge affects a person''s liberty substantially, as pointed out in

Muniswamy''s case (supra), the materials on record must satisfy the mind of the Court framing the charge that the commission of offence by the

accused in question was probable. We do not think if a conclusion can reasonably be drawn only from the above-noted incriminating fact pressed

into service by the prosecution that the appellant might have abetted the offences in question. There being no material to frame individual charge u/s

3(3) of TADA, we are of opinion that the general charge qua this appellant has also to fail, as the only overt act attributed to him is the aforesaid

activity of booking tickets.

42. We, therefore, allow the appeal of this appellant, which arises out of SLP (Crl.) No. 3305 of 1995, and order for his discharge.

Amjad Aziz Meharbaksh

43. The individual charge against this appellant reads as below :

In addition to Charge First, you Amjad Abdul Aziz Meherbux is also charged for having committed the following offences in pursuance to the

criminal conspiracy described in Charge First :

SECONDLY : That you Amjad Abdul Aziz Meherbux in pursuance of the aforesaid criminal conspiracy and during the period January, 1993 to

February, 1993 knowingly facilitated the commission of terrorist act and acts preparatory to terrorist act i.e. bomb blast and such other acts which

were committed in Bombay and its suburbs on 12.3.1993 by doing the following overt acts :

That you permitted your co-accused Yakoob Abdul Razak Memon to park motor vehicles laden with arms, ammunition and explosives which

were part of the consignment smuggled into the country for committing terrorist act by Mushtaq @ Ibrahim @ Tiger Abdul Razak Memon and his

associates and were brought to your premises by co-accused Abdul Gani Ismail Turq, Asgar Yusuf Mukadam and Rafiq Madi and also handed

over suit cases containing hand granades and detonators to your co-accused Altaf Ali Mustaq Sayed at the instance of Yakoob Abdul Razak

Memon and thereby you committed an offence punishable u/s 3(3) of TADA (P) Act, 1987 and within my cognizance.

THIRDLY : That you Amjad Abdul Aziz Meherbux in pursuance of the aforesaid criminal conspiracy and during the period 3.2.1993 onwards

when arms, ammunition and explosives were smuggled into the country for committing terrorist act by Tiger Memon and his associates were in

possession of part of the consignment i.e. arms, ammunition, handgranades and explosives which were brought in motor vehicles and which were

parked in your compound at the instance of your co-accused Yakoob Abdul Razak Memon and, therefore, you were in possession of these arms,

ammunition, hand granades and explosives unauthorisedly in Greater Bombay with an intent to aid terrorists by contravening the provisions of

Arms Act, 1959, Explosives Act, 1884, Explosives Substances Act, 1908 and Explosives Rules, 1983 and thereby you committed an offence

Punishable u/s 6 of TADA Act, 1987 and within my cognizance.

AND I HEREBY direct that you all be tried by me on the said First Charge and Charges framed for the overt acts committed by you in course of

the same transaction i.e. in pursuance of the conspiracy.

44. A perusal of the aforesaid charge shows that the allegation against Amjad is that he had permitted co-accused Yakoob Abdul Razak Memon

to park motor vehicles laden with arms, ammunition and explosives in his premises; and that he was in possession of the same. Shri Tulsi contends

that this possession was ""conscious"" and as such in view of what has been held by the Constitution Bench in Sanjay Dutt"s case, 1994 (5) SC 910,

the appellant was rightly charged u/s 3(3) of TADA. Our attention is invited by the learned Addl. Solicitor General to the decisions of this Court in

265151 and 286019 wherein possession of bomb or AK-56 was held sufficient to attract mischief of TADA.

45. In refuting the aforesaid contentions, Shri Jain submitted that the materials on record show that after this appellant came to know about the

parking of the vehicles, which were loaded with arms and ammunition, he immediately asked Yakoob to remove the jeep from his compound, as

has been mentioned by the Designated Court itself in his order dated 25th September, 1993 by which he had released this appellant on bail. The

Designated Court had further observed in this connection that this conduct showed that the appellant was not agreeable to allow Yakoob to park

his vehicles in his compound, which showed that he had not intentionally aided Yakoob. The Designated Court had taken this view by relying on

what had been stated by this appellant in his confession, which was sufficiently corroborated by confession of the co-accused.

46. Shri Jain has, therefore, submitted, and rightly, that the conduct of the appellant is clearly indicative of the fact that he was neither in conscious

possession of the arms, ammunition etc. nor had he aided Yakoob Memon in any way in the terrorist act. We would, therefore, order for the

discharge of this appellant also by allowing his appeal numbered as Criminal Appeal 810 of 1994. The general charge would also fail qua this

appellant for the reason given while dealing with the case of the appellant Abu.

Raju @ Rajucode Jain

47. We may note the individual charge against this appellant which reads as below.

In addition to charge First, you accused Raju Laxmichand Jain @ Raju Kodi, is also charged for having committed the following offence in

pursuance to the criminal conspiracy described in Charge First :

SECONDLY : That you accused Raju Laxmichand Jain @ Raju Kodi in pursuance of the aforesaid criminal conspiracy and during the period

from December, 1992 to April, 1993 abetted and knowingly facilitated the commission of terrorists act and act preparatory to terrorist act i.e.

serial bomb blast and such other acts which were committed in Bombay and its suburbs on 12.3.1993 by agreeing to do and by doing the

following overt acts :

(a) That you are a close associate of Mushtaq @ Ibrahim @ Tiger Abdul Razak Memon;

(b) That you participated in smuggling, landing and transportation of arms, ammunition and explosives (RDX) which were smuggled into the

country by Mushtaq @ Ibrahim @ Tiger Abdul Razak Memon and his associates which landed at Shekhadi on 3rd and 7th February, 1993 by

sending your men and 4 jeeps for facilitating landing, transportation and distribution of arms, ammunition and explosives;

(c) That you lent Motor Scooter No. MP-14-B-5349 which was purchased by you in the name of your ex-employees P.B. Bali to Mushtaq @

Ibrahim @ Tiger Abdul Razak Memon and his associates which was planted as Motor Scooter Bomb at Katha Bazar on 12.3.1993 and

exploded at about 14.15 hours resulting in death of 4 persons, inuring 21 and huge loss of property worth 40 lacs;

and that you thereby committed an offence punishable u/s 3(3) of the TADA (P) Act, 1987 and within my cognizance.

48. Shri Tulsi has urged that there are sufficient materials on record to bring home the aforesaid charge. We were handed over a summary of these

materials reading as below :

(i) Association with Tiger Memon :

Raju Kodi, being the man of confidence of Tiger Memon, was dealing in disposal of smuggled gold and silver since long.

He purchased M/scooter in April 1992 and lent the same to Tiger Memon for smuggling activities and the same scooter was used as scooter

Bomb and exploded at Kathya Bazar.

The Registration papers of the said scooter were recovered at the instance of the Raju Kodi under a Panchanama dt. 12.7.1993.

Raju Kodi deposited Rs. 1,61,48,000 in the "Hathi" account maintained by co-accused Mulchand Shah and belonging to Tiger Memon during the

period from 7.11.1992 to 4.12.1992. The same amount was subsequently used by Tiger Memon for blast purpose. (The Hathi account note was

recovered at the instance of co-accused Mulchand Sampatraj Shah.

Raju Kodi purchased the said M/Scooter and 3 Jeeps under fictitious names.

Raju Kodi gave his men and four jeeps for transportation of Arms. Ammunition and RDX landed by Tiger Memon. These jeeps were provided

with special cavities to conceal the arms, ammunition and RDX. These Jeeps were recovered at his instance under Panchanama dated 1.6.1993.

These Jeeps were found with traces of RDX vide F.S.L. Reports.

(ii) The accused Azgar Yusuf Mukadam is narrating in his confessional statement about the association of the appellant with Tiger Memon and

dealing with him in smuggling activities and Hawala money.

(iii) The co-accused Mulchand Sampatraj Shah is narrating in his confessional statement about the association of the appellant with Tiger Memon

and dealing with him in smuggling activities and Hawala money.

(iv) The co-accused Salim Mira Moinddin Shaikh is narrating in his confessional statement about the association with Tiger Memon and his

smuggling activities.

(v) The co-accused viz. Abdul Gani Ismail Turk is narrating in his confession about association of the appellant with co-accused tiger Memon and

dealing in smuggling activities and Hawala money.

(vi) The co-accused Imtiyaz Yunusmiya Ghavate is narrating in his confession about association of the appellant with Tiger Memon and dealing in

smuggling activities and Hawala Money.

May it be stated that for the purpose of the present case, we cannot enter into the probative value of the statements made by different persons in

this regard tending to support the above.

49. The sole submission of Shri Jethmalani was that even if this appellant had knowledge about transportation of arms, ammunition and RDX

brought by Tiger Memon, it cannot be held in law that he played a part in the conspiracy, and so, the charge u/s 3(3) of the Act has to fail. The

materials do not establish even abetment. We are afraid this submission cannot be accepted because of the concept of conspiracy explained by us

above. Any reasonable person knowing about transportation of materials like RDX has to be imputed the intent of its use for illegal purpose - there

being no material to show that RDX can be put to any legal use. Further, as already held, the prosecution has no obligation under the law to

establish that the appellant had known that the RDX, and for that matter other objectionable materials would be used for the purpose of blasts

which had taken place in Bombay. The alleged fact that the jeeps provided by the appellant had cavities to conceal arms, ammunition and RDX,

and that the jeeps were recovered at the instance of the appellant on 1.6.1993 in which were found traces of RDX, would prima facie show that

the appellant had aided the terrorist act in question, even as per the definition of the word ""abet"" given in Section 109 of the Penal Code. The

alleged financial assistance provided would attract the enlarged definition of abetment given in Section 2(1)(a)(iii) of the Act.

50. Apropos the case of the prosecution that this appellant kept silence despite knowing about the aforesaid transportation from his driver, the

submission of Shri Jethmalani is that there is nothing to show as to when the appellant had known from his driver about this fact. The learned

counsel asked whether the information was given immediately after the driver had come back, or alter the bomb blasts had taken place or after he

was arrested ? May we mention that the fact of knowledge of the aforesaid transportation was known as per the confessional statement of the

appellant from his driver. The further statement in this context is that despite knowing this he had not disclosed to anybody about transportation,

which according to the appellant was due to the fear of police. Shri Jethmalani asked the just mentioned questions to persuade us to hold that there

was no criminality in the silence of the appellant in not informing the police about the transportation. Even if some allowance is made to this part of

the submission of the learned counsel, the law of conspiracy being as explained above, a prima facie case against this appellant u/s 3(3) of the Act

does exist. The individual charge as well as the general charge, therefore, must be maintained in so far as he is concerned. So, his appeal - the

same being Criminal Appeal 793/95 stands dismissed.

Somnath Thapa

51. This appellant''s role in the tragedy is of a higher order in as much as being an Addl. Collector of Customs, Preventive, the allegation is that he

facilitated movement of arms, ammunition and explosives which were smuggled into India by Dawood Ibrahim, Mohmed Dosa, Tiger Memon and

their associates. The Addl. Solicitor General was emphatic that a full proof case relating to framing of charge against him does exist. Shri Shirodkar

was equally emphatic in submitting that materials on record fall short of establishing a prima facie case against this appellant.

52. Let the additional charge framed against him be noted :

That you Somnath Kakaram Thapa during the period you were posted as Additional Collector of Customs, Preventive, Bombay and particularly

during the period January, 1993 to February, 1993 in pursuance of the aforesaid criminal conspiracy and in furtherance of its object abetted and

knowingly facilitated the commission of terrorists'' acts and acts preparatory to terrorists'' act i.e. bomb blast and such other acts which were

committed in Bombay and its suburbs on 12.3.93 by intentionally aiding and abetting Dawood Ibrahim Kaskar, Mohmed Dosa and Mushtaq @

Ibrahim @ Tiger Abdul Razak Memon and their associates and knowingly facilitated smuggling of arms, ammunition and explosives which were

smuggled into India by Dawood Ibrahim Kaskar, Mohmed Dosa, Mushtaq @ Ibrahim @ Tiger Abdul Razak Memon and their associates for the

purpose of committing terrorists acts by your non interference inspite of the fact that you had specific information and knowledge that arms

ammunition and explosives are being smuggled into the country by terrorists and as Additional Collector of Customs, Preventive you were legally

bound to prevent it and that you thereby committed an offence punishable u/s 3(3) of TADA (P) Act, 1987 and within my cognizance.

53. According to Shri Tulsi the following materials make out the prima facie case against this appellant :

(1) Association with Mohd. Dosa :

S.N. Thapa has been an associate of absconding accused Mohd. Dosa, who has played a major role in the conspiracy to cause bomb blasts. The

Tel. Nos. (Res. & Official) of S.N. Thapa have been found entered in the Tel. diary seized from Mohd. Hanif @ Raju, an employee of Mohd.

Dosa.

(ii) Association with Tiger Memon :

S.N. Thapa has been an associate of Tiger Memon the prime accused in the bomb blast case, who is still absconding. He has been facilitating the

smuggling activities of Tiger Memon against illegal gratification.

(iii) Meeting with Tiger Memon and Gist of Conversation recorded on Micro cassettes :

An absconding accused Yakub Abdul Razak Memon was arrested at New Delhi on 5.8.94. From his possession a number of documents and

articles were seized which include a manuscript of gist of conversation recorded on May 19, 1994 on Sony Micro cassettes, in the garden of the

house of Yakub Memon in Karachi (Pakistan). Accused Yakub Memon, Syed Arif (Pakistani National) Hazi Taufique Jaliawala (Pakistani

National) Tiger Memon, Suleman and Ayub Memon had participated in the conversation. This gist of conversation refers to various matters which

shows close association of Tiger Memon with Sh. Thapa. In the gist of conversation there is reference of ISI of Pakistan and Tiger Memon

speaking that one day Sh. Thapa had arrived at sea shore at the time of illegal landing and that Tiger Memon had paid him Rs. 22 lacs for allowing

the smuggling.

The investigation had established that the said gist of conversation is in the hand-writing of accused Yakub Memon. Independent witnesses and the

handwriting expert have proved his handwriting.

(iv) Statement of L.D. Mhatre, Customs Inspr. :

L.D. Mhatre introduced a source (witness code No. Q-3360) to S.N. Thapa and it was decided that the source would pass on information about

the illegal landings at Shekhadi to Sh. Thapa, through Mhatre and on receipt of the information Nakabandi may be kept at ""Sai Morba-Goregoan

Junction"" because that was the main exit point after the landing. The source gave an information of the landing to Mhatre on 29.1.93 and it was

passed on to Sh. Thapa by Mhatre. Thapa kept Nakabandi on the night of 30 & 31st Jan. 1993 at Purar Phata and Behan Phata on

MhaslaGoregoan Road leaving another route open for the escape of smuggled goods. He did not keep Nakabandi at the pre-arranged point. He

lifted the Nakabandi after two days without any specific reasons.

The source later on informed Thapa through Mhatre that on the night of 3.2.93 instead of silver some chemicals had landed at Shekhadi. Sh.

Thapa did not contact the source to ascertain further details. Nor did he informs about it to his senior officers. He also did not submitted the

Operations Report, as was required.

(v) Statement of Sh. R.K. Singh.

Shri R.K. Singh in his confession, has stated that on the night of 1.2.93 at about 2.00 A.M. Sh. Thapa gave him a telephonic message saying that

something had happened beyond Bankot in the limits of Pune Customs and that he should personally verify. R.K. Singh, deputed custom officers

for this job. On 4.2.93 another accused M.S. Syed, Customs Superintendent informed R.K. Singh that the smuggled goods and already passed.

R.K. Singh received Rs. 3 lacs as illegal gratification for the landing out of which he gave Rs. 1 lac to Sh. S.N. Thapa.

(vi) Awareness about landing :

Sh. S.K. Bhardwaj, Collector of Customs, (Prev.) issued a letter dt. 25.1.93 addressed to Sh. R.K. Singh and A.K. Hassan, Asstt. Collectors of

Customs, mentioning that intelligence had been received that big quantity of weapons would be smuggled into India by ISI alongwith gold and

silver and these were likely to be landed in next 15-30 days around Bombay, Shrivardhan, Bankot and Ratnagiri etc. The Collector of Customs

had directed the subordinate officers to keep a close watch & that all-time alert may be kept. The copy of this letter was also endorsed to Sh.

Thapa, who had seen it on 27.1.93.

In addition to the aforesaid letter from the statements of the customs officer, who had accompanied Sh. Thapa for nakabandi on 30th & 31st Jan.,

1993, it is clear that Sh. Thapa had knowledge that arms were likely to be smuggled by Tiger Memon. He had infact disclosed this information to

the subordinate officers at the time of nakabandi.

Sh. Thapa was conveyed by Sh. V.M. Doyphode, another Addl. Collector of Customs that landing of smuggled contrabands was about to take

place near Mhaysla on the night of 2.2.93. Sh. Thapa intentionally sent a a misleading wireless message that something had happened at Bankot

therefore, maximum alert to be kept in Alibagh region. Bankot is in a different direction and far away from Mhasala. Sh. Doyphode had not

mentioned about Bankot.

(vii) Vehicle and Vessel Log Book :

When Nakabandi was kept on 30.1.93 by Sh. Thapa, the Govt. Maruti Van No. MH-01-8579 was also taken by Sh. Thapa with him. However,

the investigation had disclosed that the pages of the log book for the period 26.1.93 to 16.2.93 were missing from the log book, as these had been

torn from it.

In Alibagh Div. of Customs Deptt. one patrol vessel A1-Nedeem is provided. A logbook is maintained for the vessel. The investigation had

disclosed that an entry dt. 2.2.93 has been made in the logbook showing the accused J.K. Gurav, Customs Inspr. alongwith subordinate staff did

see patroling from Shrivardhan to Bankot from 2100 hrs of 2.2.93 to 0070 hrs of 3.2.93. The entry is made by J.K. Gurav, which is not correct

because when compared with the entries made in the wireless logbook of Shrivardhan Customs office it is seen that patrolling commenced at 2345

hrs. on 2.2.93 and not on 2100 hrs. Inspr. Gurav is also an accused in the case, and had actively conspired alongwith accused S.N. Thapa and

other customs officers.

54. From the above gist it appears that the main allegation to establish the case against Thapa is his allowing the smuggling of the aforesaid goods

by not doing Nakabandi at the pre-arranged point but at some distance therefrom leaving an escape route for the smugglers to carry the goods

upto Bombay. To appreciate this case of the prosecution, it would be useful to know the topography of the area, as would appear from the

following rough sketch handed over by Shri Tulsi:

55. Shri Tulsi contended that Thapa had been forewarned by a communication of Shri S.K. Bhardwaj, Collector of Customs (Preventive) dated

25.1.93 addressed to S/Shri R.K. Singh and A.K. Hassan, Asstt. Collectors of Customs, that intelligence had been received that big quantity of

weapons would be smuggled into India by ISI alongwith gold and silver which were likely to land in next 15-30 days around Bombay,

Shrivardhan, Bankot and Ratnagiri etc., a copy of which was endorsed to Thapa, who had seen the same. In fact he disclosed this information to

his subordinate officers also. (The fact that Thapa had received a copy of the letter, about which Shri Shirodkar mentioned many a time, has no

significance as copy was apparently sent to apprise Thapa of the contents, requiring him to take such steps as would have been within the ken and

competence of a high custom official on the preventive side like him). It deserves to be noted that the information was not only about smuggling of

gold and silver alone, but of weapons and that too by the ISI- an agency alleged to be extremely inimical to India. This is not all. Indeed, there are

materials on record to show that Thapa had information about landing of RDX (described as ''Kala Sabun'' in the under-world) at Shekhadi and

Shrivardhan on 3.2.93. According to Addl. Solicitor General, Thapa had facilitated the movement or he used to receive fat sum of money from

Tiger Memon as quid pro quo for help in his smuggling activities.

56. Shri Shirodkar strongly refuted the contentions of the Addl. Solicitor General and, according to him, Nakabandi had been done at the places

suggested by the local officers like inspectors Agarkar and Kopikar, who had better knowledge of the place of the Nakabandi, and therefore, no

fault can be found with Thapa for having done Nakabandi at a wrong place. As to the motive ascribed, the submission was that to sustain the same

the only material is a gist of conversation found from the possession of absconding accused Yakub Memon who was arrested at New Delhi on

5.8.94. The conversation itself was recorded on a cassette, which, according to Shri Shirodkar, was not at all audible as was certified by the

Doordarshan center of Bombay. The learned counsel would also require us to bear in mind that Thapa had been granted bail not only by this Court

on 5.9.1994, but subsequently by the Designated Court on 7.2.1993, which had been done bearing in mind the materials which had come on

record till then.

57. A perusal of the statement made by aforesaid two Inspectors shows that they had made two statements at two points of time. The first of these

had been described as ""original statement"" by Shri Shirodkar in his written note and the second as ""further statement"". In the original statement,

these two Inspectors are said to have told Thapa, on being asked which would be crucial places for laying trap, that the same were Purar Phata

and Behan Phata, at which places trap was in fact laid. But then, in the further statement the Inspectors are said to have opined that watch should

be kept at Sai-Morba-Goregoan junction, because that was the main exit point for smuggling done at Shrivardhan and Shekhadi. Shri Shirodkar

would not like us to rely on what was stated subsequently be these Inspectors, as that was under pressure of investigation undertaken subsequently

by the C.B.I. We do not think the law permits us to find out at this stage as to which of the two versions given by two Inspectors is correct. We

have said so because at the stage of framing of charge probative value of the statement cannot be gone into, which would come to be decided at

the close of the trial. There is no doubt that if the subsequent statement be correct, Nakabandi was done not at the proper place, as that left Sai-

Morba Road free for the smugglers to carry the goods upto Bombay.

58. Shri Shirodkar submitted that the Nakabandi was organised at Purar Phata and Behan Phata also because a trap has to be laid at a little

distance from the crucial point so that it may not come to the notice of all and sundry, which may prove abortive, as information about the same

may be passed on to the smugglers. We do not propose to express any opinion on this submission also, as this would be a matter to be decided at

the trial when defence version of the case would be examined.

59. As to the motive sought to be established on the basis of a gist of the tape recorded conversation said to have been recovered from

absconding accused Yakub Memon, which contained the statement that one day Thapa had arrived at sea shore at the time of illegal landing and

Tiger Menon had paid him Rs. 22 lacs for allowing the smuggling, the submission of the learned counsel is that it is hard to believe that Yakub

Memon would have carried in his pocket a gist like the one at hand. Even if we were to give some benefit to the appellant on this score, that would

tend to demolish the case of the prosecution mainly relatable to motive, which is not required to be established to bring home an accusation. As to

Thapa, the allegation relates to facilitating movement of arms, RDX etc., which act would amount to abetment, as it would be an assistance, which

would attract Clause (iii) of Section 2(i)(a) of the Act, defining the word ''abet''. It may be noted that the individual charge against Thapa is for

commission of offence u/s 3(3) of TADA, which, inter alia, makes abetment punishable.

60. Shri Shirodkar submitted that the investigating agency wanted to rope in Thapa any how, which was apparent from the fact that it took

recourse to even manufacturing of evidence, as telephone number of Dawood Ibrahim was fed in the digital diary found at the residence of this

appellant on search being made. Shri Tulsi explained as to how this had happened. We do not propose to enter into this aspect of the matter,

except observing that investigation at times is either sluggish or over zealous - it may over shoot also.

61. All told, we are satisfied that charges were rightly framed against Thapa. This takes us to the State''s appeal arising out of SLP (Crl.) No. 2196

of 1995 in which the prayer is to cancel the bail of Thapa, which was ordered by this Court on April 5, 1994 and then by the Designated Court by

its order dated February 7, 1995. A perusal of this Court''s order shows that when it had examined the matter, charge-sheet had not been

submitted. It was, therefore, desired that the Designated Court should reconsider the matter with a view to finding out whether the evidenced

collected in the court of investigation showed his involvement. A perusal of Designated Court''s order shows that though according to it a case was

made out by the prosecution against Thapa, it took the view that there was want of material which could be tendered as substantive evidence to

prove association of Thapa with Tiger Memon and his associates. And so, it allowed Thapa to continue on bail. On these special facts, we are not

satisfied if a case for cancellation of bail has been made out, despite our taking the view that charges were rightly framed against him. The State''s

appeal is, therefore, dismissed.

Conclusion

62. To conclude, appeals of Abu Azim and Amjad Aziz Meherbux are allowed and they stand discharged. Appeals of Raju @ Rajucode Jain and

Somnath Thapa are dismissed. The appeal of State is also dismissed.

63. Before parting, we may say that alongwith these appeals we had heard the case of one Mulchand Shah, being covered by SLP (Crl.). No. 894

of 1995. But, by an order passed on 31.1.1.996 that SLP had been delinked from these cases, on the prayer of counsel for Shah and was

ordered to be listed separately. So we have not dealt with that SLP.