

State Vs. Bashir Ahmed Ponnu and Ors

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Court : Delhi

Decided On : Dec-08-2014

Judge : Mukta Gupta

Appellant : State

Respondent : Bashir Ahmed Ponnu and Ors

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment Reserved on: October 10, 2014 Judgment Delivered on: December 08, 2014 % + CRL.A. 1065/2014 STATE Represented by: Appellant Mr.Varun Goswami, APP for the State with SI Dalip Kumar, Spl.Cell/NDR. versus BASHIR AHMED PONNU & ORS Respondent Represented by: Mr.Dinesh Sharma, Advocate for Respondent Nos.1 to 3. Ms.Saahila Lamba, Advocate for Respondent No.4. CORAM: HON'BLE MR. JUSTICE PRADEEP NANDRAJOG HON'BLE MS. JUSTICE MUKTA GUPTA MUKTA GUPTA, J.

1. The State is aggrieved by the decision of the learned Additional Sessions Judge acquitting the respondents Bashir Ahmed Ponnu, Fayaz Ahmed Lone, Abdul Majeed Baba and Shahid Gafoor for the offences punishable under Section 120B/121/121-A/122/123 IPC & Section 17/18/20/21/23 of Unlawful Activities (Prevention) Act (in short the UAP Act), acquitting Bashir Ahmed for offence punishable under Section 489(B)/489 (C) of IPC and Shahid Gafoor for offences punishable under Section 186/353/307 of IPC and Section 25/27 of the Arms Act,

though Shahid Gafoor stands convicted for offence punishable under Section 14 of the Foreigners Act.

2. The prosecution case in nutshell is that in the first week of January 2007 a secret information was received that Commander of Pakistan based banned militant organization Jaish-e-Mohammad (JeM) having code name Alpha-9 had instructed one Haider (code name-Doctor) r/o Pakistan and District Commander of Sopore area in J&K to carry out Fidayeen attack at some prominent places in the national capital and for this purpose fidayeens would be sent from Pakistan through Indo-Bangladesh border. On enquiries made, further information was received that Haider @ Doctor was planning to send arms, ammunition and explosives to the fidayeens in the Capital from J&K. On February 04, 2007 at 2.00 PM a specific information was received in the office of Special Cell/ NDR, Lodhi Colony, New Delhi that the said Haider @ Doctor had sent one Bashir r/o Sopore, J&K along with two other Kashmiri militants from Kashmir valley, who were having huge consignment of arms, ammunition and explosive material in their possession, which was to be delivered to a Pakistani Fidayeen in Delhi and they would be coming to Delhi by Malwa Express and delivering the consignment to the Pakistani fidayeen at Deen Dayal Upadhyaya Marg (DDU Marg), Rouse Avenue near the Ranjeet Singh Flyover and in case raid is conducted they can be apprehended along with consignment of arms, ammunition and explosive material. A raiding team was constituted and it was found that Bashir Ahmed Ponnu @ Maulvi, Fayaz Ahmed Lone and Abdul Majeed Baba, who came by Malwa Express, met Shahid Gafoor and passed on the consignments when they were all apprehended. Bashir, Fayaz and Abdul were overpowered, however Shahid Gafoor tried to run away after firing on the police officials and thus cross-firing ensued in which none was hurt. Finally Gafoor was apprehended and PETN explosives, timer, non-electronic silver colour detonators, hand grenades and 100 notes of 500 rupees currency notes were recovered besides 10,000 USD.

3. The defence of the respondents is of false implication and they themselves appeared as defence witnesses. Bashir stated that he was doing the business of fruits at Sopore bus stand, J&K. In the last week of January 2007 when he was coming from Calcutta to Srinagar by Malda Express, while he was purchasing food

items at Ambala Railway Station, he was illegally detained by the officials of Special Cell and falsely implicated. He denied the recoveries from him including 100 notes of USD of denomination 100/- each. Similarly, Fayaz stated that on January 28, 2007 he was in Ludhiana in relation to his business of Kashmiri Shawls where he was apprehended by officials of Special Cell, brought to Delhi and falsely implicated. Shahid stated that he was doing the business of readymade garments and had gone to Kathmandu from where he was apprehended by the officials of Special Cell, brought to Delhi and kept in illegal detention from January 13, 2007. Abdul Majeed Baba deposed that he was doing the business of fruits in Fruit Mandi and was coming from Calcutta to New Delhi by Rajdhani Express and when he reached the New Delhi Railway station on January 29, 2007 he was apprehended, illegally detained and falsely implicated.

4. Prosecution to prove its case examined 24 witnesses. The main witnesses of the prosecution are SI Dalip Kumar PW-1, SI Rahul Kumar PW-2, SI Devender Singh PW-14, Inspector Sanjay Dutt PW-16, Inspector Subhash Vats PW-20, DCP Alok Kumar PW-23 and Addl. DCP Sanjeev Yadav PW-24 who are the members of the raiding party and had apprehended the accused persons. Besides the same PW-3 Vinit Sharma the owner of STD/PCO Booth, and PW-5 Jitender who was a public witnesses are also relevant witnesses.

5. Full contours of the evidence of the prosecution has been spoken of by SI Dalip Kumar PW-1 who deposed that in the first week of January 2007 an information was received that Alpha-9, Commander of JeM instructed Haider @ Doctor, the District Commander of JeM in Sopore Area of J&K to carry out the fidayeen attack at prominent place in national capital and thus some fidayeen were sent through Indo Bangladesh border. To develop this information a team led by Inspector Mohan Chand Sharma which included him i.e. Dalip Kumar and other staff of Special Cell under the supervision of ACP Sanjeev Yadav was formed. Technical surveillance was mounted and contacts were developed. On February 04, 2007 at about 2.00 PM a specific information was received telephonically in the office of Special Cell that on the instructions of said Commander of JeM, the District Commander Haider (code name Doctor) has sent one Bashir Ahmed r/o Sopore with two other Kashmiri militants with huge amount of arms and ammunition and

explosive material etc. to Delhi to hand over the same to the Pakistani Fidayeen terrorist at DDU Marg near Ranjeet Singh Flyover, Rouse Avenue, Delhi. All the three JeM militants would come by Malwa Express at New Delhi Railway Station. A team led by Inspector Mohan Chand under the supervision of ACP Sanjeev Yadav and DCP Special Cell Ashok Kumar including Dalip Kumar, Inspector Badrish Dutt, Inspector Sanjay Dutt, Inspector Subhash Vats, SI Rahul Kumar, SI Devender Singh, SI Ramesh Lamba, SI Kailash Singh Bisht, SI Rakesh Malik and other police staff left the office of Special Cell, Lodhi Colony in four private cars, three official vehicles and three two wheelers at around 6.00 PM. The team reached near New Delhi Station Ajmeri Gate near Wimpy Restaurant at around 6.35 PM where they met the secret informer. Malwa Express was to arrive at 8.30 PM at platform No.3. 7-8 passersby were requested to join the raiding team, however none agreed except one namely Jitender r/o Shahdara. Part of the team took position near the stairs of over-bridge at platform No.3 and part of the team was deployed at DDU Marg near Ranjeet Singh Flyover. At about 9.05 PM Malwa Express arrived at platform No.3 and the passengers alighted from the train. At about 9.10 PM the informer pointed out three passengers out of which he recognised one as Bashir Ahmed. All three of them came out of the station from Ajmeri Gate side where Bashir went to a STD booth and made a call. The team members secretly followed all three of them and Inspector Subhash Vats in the meantime found out the contact number where Bashir Ahmed had made the call. He was informed that Bashir Ahmed had made a STD call at J&K number. After making the call the three started moving towards DDU Marg via Bhavbhuti Marg Minto Road and reached the bus stop at DDU Marg near Ranjeet Singh flyover where a person having a black colour bag on his shoulder was already present. The said Bashir Ahmed met that person and took out a card board box from inside his bag and handed over the same to him. The person checked the card board box after opening the same. Immediately the raiding party asked them to surrender disclosing them their identity. The person who was present at the bus stop and to whom the card board box was handed over whose name later was revealed as Shahid Gafoor r/o Pakistan left his bag and card board box on the footpath; took out his pistol and started to run towards ITO while firing on the police party. Police party also retaliated. In the meantime the other three i.e.

Bashir Ahmed Ponu, Fayaz Ahmed Lone and Abdul Majeed Baba were apprehended by members of the raiding team. Shahid Gafoor took position behind a tree situated on the way to Arya Samaj Mandir at DDU Marg and fired on the police party. After 15 minutes the firing stopped and then the militant was asked to surrender on which he threw his pistol on the way and came out from the back side of the tree when he was overpowered.

6. SI Dalip Kumar further deposed that from the pistol of Shahid Gafoor live cartridge was found in the barrel and one live cartridge was found in the magazine while one empty magazine was also found lying near the pistol. The recovered pistol and the live cartridges were seized and sealed. Then the card board shoe box lying on the footpath was checked in which a black polythene was recovered which had 30 slabs of yellow colour PETN explosive material. Each slab was wrapped in separate transparent polythene. Beneath the recovered explosive, a transparent plastic container was recovered in which four non-electronic silver coloured detonators and a timer was recovered. A wad of 100 notes of the denomination of `500/- was recovered in the same card board box. The recovered explosive material was weighed which was found to be 3 Kg out of which 2 samples of 10 gram each were taken out and kept in black colour small plastic containers and converted into a cloth parcels. The remaining recovered 2.980 kg was kept in the small black colour polythene and converted into a sealed parcel. The recovered four non-electric detonators were kept in separate plastic container and sealed. Similarly, the timer and the notes were also sealed. The blue and grey colour bag in possession of Bashir was checked which contained a wad of hundred USD of denomination hundred each which were wrapped in a yellow colour envelope and concealed in the bottom pocket of the bag beneath the other clothes and other articles. The same were also seized and sealed. The bag recovered from Fayaz was also checked which contained a stainless steel container recovered under the clothes from which a black colour polythene was recovered which had four black colour hand grenades with brown colour packing tape wrapped on all the hand grenades. The suitcase with Abdul Majeed was checked which contained two hand grenades one blue colour and the other of military green colour kept in black colour polythene. The same was also seized and sealed. The black colour canvas bag which was thrown by Shahid Gafoor was

also seized and sealed. The other witnesses of the raiding party as noted above also deposed in sync with SI Dalip Kumar except minor variations which are bound to be there in the testimony of the witnesses.

7. The learned trial court acquitted the respondents on the basis of the following findings:

A) No witness has been examined by the prosecution in corroboration to the fact of the special staff team visiting J & K and West Bengal for development of secret information in January, 2007. B) DD entry recorded in respect of secret information having been received in January, 2007 and the first DD entry recorded on 04.02.2007 have not been proved nor any related documents were ever placed on record or exhibited. C-i) According to PW-24 the Investigating Officer Mr. Sanjeev Kumar Yadav, STD slip Exhibit PX-2 seized from the accused No.1 Bashir was pasted on seizure memo, however the said fact is contradicted by PW3 Vineet. C-ii) Identification of Bashir Ahmed by PW-3 in the police station is against the established procedure of law and since no TIP was conducted, identification of accused Bashir by PW-3 cannot help the prosecution. C-iii) PW-3 himself gave a clean chit to Bashir Ahmed when he did not find anything suspicious about him. Moreover, no one will carry the STD slip with him so as to create evidence against him. Further no other person was examined by prosecution to strengthen the fact that Bashir Ahmed came to STD booth of PW-3 to make call to Pakistan. D-i) During the firing by the accused Shahid Gafoor, why only the police officials wearing Bullet Proff (BP) jackets were hit and not the ones without BP jackets?. D-ii) Further why no bullet hit accused Shahid Gafoor even on his feet despite such heavy firing on him. D-iii) Further no witness has stated that any bullet was found near the tree or seized behind which Gafoor was hiding and firing. D-iv) Further one of the empty cartridge fired by Shahid Gafoor was picked from the ground but it had no mark DUST or SOIL in terms of deposition of PW-4 (CFSL A.R.Arora) D-v) Further why no bullets were found in any of the BP jackets when PW-4 examined the same?. E-i) Despite the palpable danger involved, PW-6 Jitender did not ask for BP jacket despite being present on the spot at the time of firing. E-ii) Contradiction in statement of PW-6, PW-12, PW-8 to PW-10 and PW-20 as to how many police officials actually wearing BP jackets. F-i) The identity of PW-6

has been disputed by defence arguing that his signatures on exhibits PW-1/A to PW1/C are different than the ones on his deposition in the court and the name of his father is differing on different dates of deposition. F-ii) How PW-6 identified the secret informer when admittedly no police official was in uniform?. F-iii) Why PW-6 never stated about fire shots having hit 4 members of the police team?. F-iv) According to PW-6 the accused names were Bashir, Lambu and Chotu and however this fact is nowhere mentioned in any of the documents relied upon by the prosecution. F-v) According to the prosecution 10,000 USD were recovered from the possession of one of the accused, but PW-6 stated that the said recovery of 50,000 USD was made from the bag. F-vi) PW-6 has stated that his statement was recorded by SI Dalip Kumar at 01.30 AM that how rukka was recovered at 03.00 AM F-vii) PW-6 did not know the colour or print of the shoe box, he did not know the documents signed by him were in Hindi, English or Urdu, whether the seal was of plastic wood, iron. G) Despite the danger of Fidayeen and Bomb, no bomb disposal squad was requisitioned or informed knowing well that no one in the team could defuse the bomb. H) As per the requirement of law, the seal after use is to be handed over to the public witness where he has been joined in the investigation but in the instant matter it was not handed over to PW5 who was the only public witness in the instant matter which seal was handed over to PW2, though the abovesaid was also contradicted by PW5 by stating that the seal was handed over to PW1. I) Colour of the detonators yellow by PW-6, silver by other witness, further colour of hand grenades brown by PW-6, but prosecution says black. J) Despite PCR having reached the spot, no witness from PCR or local Police was joined in investigation nor cited as witness. K) IO PW-24 being party to all proceedings, right from receipt of information till the raid should not have been the investigator of his own case thus causing prejudice to accused. AIR 1995 SC2339L) The prominent places of Delhi to be attack were not named or known to the entire police team. M) The FIR was registered at 03.00 AM in the morning of 05.02.2007 and in terms of the procedure FIR is required to be put up before the learned MM within 24 hours however, the same was put before the learned MM at 10.00 AM on 06.02.2007 and this delay has not been explained?. N) The railway ticket being unreserved ticket could have been issued to anyone and it is highly unbelievable that accused would travel in general compartment with explosives

and cash as well as US dollars in their bags. O) The photographs taken during the operation of seizure etc. were not produced during trial and were sought to be brought on record belatedly and none of the witnesses claimed that the photographs were taken during their examination. P) The railway authorities were not informed about the fact that accused were travelling in MALWA express coming to Delhi with explosives. Q) Discrepancy in the version of witnesses about the police team leaving the spot after the operation and other formalities i.e. 1.30 AM, 02.00 AM, 03.00 AM, 05.00 AM and 07.00 AM. R) 161 Cr.P.C. statement of PW-6 Jitender was recorded by SI Dalip Kumar at 01.30 AM, however according to record the same was recorded by PW-24 at 03.00 AM. S) Though PW-6 has signed the seizure memos of explosives etc. recovered as witness, he is not a witness to personal search memo and arrest memos of the accused.

8. T) Though the accused were apprehended between 09.30 and 10.00 PM of 04.02.2007 their arrest was done at 05.00 AM on 05.02.2007. U) Unexplained delay of 16 days in sending exhibits/ parcels from Malkhana to FSL. V) Despite recovery of highly explosive material, MHC (M) was not informed or directed to take precautions nor steps were taken for diffusion or destruction of the same in time which raises suspicion. W) There was no legal evidence to substantiate the US Dollars were fake except the report of US embassy which is hit by Section 62 of the Evidence Act.

The legal position with regard to interference by the High Court in an appeal against acquittal is well settled. The principles to be kept in mind by the Appellate Court while dealing with the appeals against the order of acquittal have been laid down by the Supreme Court in the decision reported as (2010) 6 SCC 1 Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi) as under:

(i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded. (ii) The appellate court in an appeal against acquittal can review the entire evidence and come to its own conclusions. (iii) The appellate court can also review the trial court's conclusion with respect to both facts and law. (iv) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by

giving cogent and adequate reasons set aside the judgment of acquittal. (v) An order of acquittal is to be interfered with only when there are compelling and substantial reasons for doing so. If the order is clearly unreasonable, it is a compelling reason for interference. (vi) While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities, it can reappraise the evidence to arrive at its own conclusion. (vii) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed.

9. On marshalling of evidence it is thus to be seen whether the findings arrived at by the learned trial court are cogent and convincing or perverse and whether there are compelling and substantial reasons for interfering with the order of acquittal and whether in all probabilities the order of acquittal cannot be sustained. PERVERSE FINDINGS¹⁰ Finding (A) of the learned Trial Court that no witness was examined by the prosecution to corroborate the fact that Special Staff team visited J&K and West Bengal to develop secret information in January 2007 is a wholly perverse finding. Besides investigation, prevention and surveillance is an important task of the police. Besides technical surveillance, surveillance is kept by using anonymous methods and in case the factum that surveillance is being kept and information developed is revealed the very purpose for which the surveillance is kept would be defeated. Thus there would be hardly evidence with the police to corroborate their actions during surveillance.

11. Some of the findings of the learned trial court are factually incorrect resulting in consequent perverse findings as is demonstrated hereinafter. Learned trial court in its finding No.E(ii) held that there was contradiction in the statement of PW-6, PW-12, PW-8 to PW-10 and PW-20 as to how many police officials were actually wearing bullet proof jackets. A perusal of the record would show that only PW-6

and PW-20 deposed with regard to the police officers wearing the bullet proof jackets. There is no statement of PW-8 Rakesh Kumar, PW-9 Jitender, PW-10 SI Nanak Chand in this regard. As a matter of fact PW-12 was not even a member of the raiding team and is Deputy Secretary (Home) Govt. of NCTD who had forwarded the sanction for prosecution. PW-6 Jitender deposed that the police was not putting the bullet proof jacket when he met them and had put the same at 9.15 PM and about 7-8 police personnel put the bullet proof jacket and they took it off at about 11/11.30 PM. As far as he was concerned, he did not ask for bullet proof jacket. PW-20 Inspector Satish Vats stated that DCP Special Cell, Inspector Sanjay Dutt, Inspector Mohan Chand Sharma and SI Dalip Kumar were wearing bullet proof jackets. However, in his cross-examination he stated that DCP, ACP, Inspector Mohan Chand Sharma, Inspector Sanjay Dutt and some other members of the raiding party were wearing bullet proof jacket and he did not recollect whether SI Dalip was wearing the bullet proof jacket or not. The testimony of PW-1, PW-2, PW-14 and PW-16 has been ignored by the learned trial court on this count. PW-1 SI Dalip Kumar stated that there were 35 police personnel present and there were only 9 to 10 bullet proof jackets. Further PW-2 SI Rahul Kumar stated that DCP, ACP, Inspector Mohan Chand Sharma and Inspector Dalip were hit by the bullet fired by the person but saved because of bullet proof jackets. He further stated that all these four bullet proof jackets were seized vide memo Ex.PW-2/B and sealed. In cross-examination, he stated that about 8 to 10 members of the raiding party were wearing bullet proof jackets and the public witness was not wearing the bullet proof jacket. PW-14 SI Devender Singh stated that DCP Alok Kumar, ACP Sanjeev Kumar, Inspector M.C.Sharma, SI Dalip Kumar and 2-3 more members of the raiding party had worn bullet proof jackets and the bullet proof jacket was not given to the public witness Jitender. PW-16 Inspector Sanjay Dutt deposed that he along with Inspector Mohan Chand Sharma Alok Kumar and SI Dalip Kumar who were nearest to Shahid Gafoor were hit with the bullet fired by Shahid Gafoor but were saved due to bullet proof jackets. Thus a perusal of the statements of all these witnesses would show that the consistent version of the prosecution witnesses was that around 8 to 10 police personnel were wearing bullet proof jackets and no bullet proof jacket was given to Jitender the public witness and that four officers who were in front i.e. DCP Alok Kumar,

ACP Sanjeev Kumar, Inspector Mohan Chand Sharma and SI Dalip were hit by bullets but were saved due to bullet proof jackets.

12. A sequel to these are the findings No.D(i) & E(i) of the learned trial court. It is a matter of common knowledge that whenever firing operations take place, all officers or the assailants as the case may be are not in the front and strategies are adopted as to whom the cover fire is to be given. Thus the people who are in the range of attack only are in the need of wearing bullet proof jackets. A public witness would be kept in a cover at the end and thus he would not need a bullet proof jacket. Thus the findings D(i) and E(i) of the learned trial court that why only police officials wearing bullet proof jackets were hit and why despite palpable danger involved, PW6 Jitender was not asked for bullet proof jacket are perverse.

13. Further findings No.D(ii) to D(iv) & F(iii) are also perverse and need to be rejected. The purpose of the police officials was to apprehend Shahid Gafoor while he was running away and not to kill him and thus all efforts are made to ensure that no bullet is hit in the counter attack and at the same time the assailants arms and ammunitions are got exhausted so that he can be apprehended. Thus the finding that why no bullet hit accused Shahid Gafoor even on his feet despite such heavy firing is perverse as the firing was not to hit him but to apprehend him. The finding that no witness stated that any bullet was found near the tree or seized behind which Gafoor was hiding ignores the seizure memo Ex.PW-2/A which speaks about the recovery of 13 empty cartridges of 9 MM and 7 empty cartridges of 30 bore recovered from the spot. 13 empty cartridges belonged to the weapons used by the police officials and 7 empty cartridges belonged to the weapon used by Shahid Gafoor. The same were duly seized, sealed and exhibited during the trial. Further one of the empty cartridges fired by Shahid Gafoor which was picked from the ground had no dust or soil on it as per PW-4 CFSL Expert Shri A.R.Arora. The same would not belie the prosecution case as the mud was not wet and the dust could not have been detected as the cartridges was kept in pullanda of clothes when they were seized, thus the dust if any would have been wiped off by the same. Witnesses including public witness Jitender have consistently stated about the firing which took place between Shahid Gafoor and the police party. While noting in finding D(v) that no bullets were found in any of the BP jackets

when examined by PW-4, the learned trial court failed to notice the detailed FSL report which on examining the four bullet proof jackets noticed bullet holes on it. The four bullet proof jackets on which bullet had hit were duly exhibited. The opinion of the expert regarding bullet proof mark on the jackets proves the case of the prosecution and it is not necessary that all or any bullet should get stuck in the bullet proof jackets. Further, merely because PW-6 did not depose about the fire shots having hit the four members of the police team would not discredit the version of the other witnesses. In such a detailed exercise it is not necessary for each witness to observe each and every fact and by passage of time certain facts do skip while deposing as memory fades and nobody is expected to narrate the version in a parrot like version.

14. The findings No.F(i) and F(ii) are also perverse. PW-6 Jitender stated that the police officials duly introduced him and he joined the raiding party. Thus a person who was an outsider would have been known to him as a Secret informer and he could have identified him. Further a witness is required to state facts in issue and not everything which can be possibly foreseen by the defence to find the loopholes. Merely because PW-6 signed differently on the exhibits and in deposition, the finding of disputed identity of PW-6 is unwarranted especially when this fact has not been put to PW-6 Jitender in his cross-examination that he is not the same person who was present during the search operation and the incident. Further the learned trial judge lost sight of the fact that PW-6 Jitender clearly stated that he did not want to disclose his full details as the accused persons had been intimidating him during the course of hearing and thus he even did not produce his ID Card but offered to show the same to the learned court, which also explains his signing the statement by putting the initials before court.

15. The findings (G), (P) and (V) of the learned trial court that despite the danger of Fidayeen and bomb, no bomb disposal squad was requisitioned or informed knowing well that no one in the team could defuse the bomb; railway authorities were not informed about the fact that accused were travelling in Malwa Express coming to Delhi with explosives and that the MHC (M) was not informed or directed to take precautions nor steps were taken for diffusion or destruction of the same in time which raises suspicion are wholly perverse. The information received

on February 04, 2007 at about 2.00 PM was that on the instructions of the Commander of JeM, the District Commander Haider (code name Doctor) has sent one Bashir Ahmed r/o Sopore with two other Kashmiri militants with huge amount of arms and ammunition and explosive material etc. to Delhi to hand over the same to a Pakistani Fidayeen (terrorist) at DDU Marg near Ranjeet Singh Flyover, Rouse Avenue, Delhi. Thus, the information was of carrying arms, ammunitions and explosive materials and not that an explosion would be caused. The trial court failed to notice the distinction between a ready to use explosive being carried and being carried explosive material in an unassembled form which cannot explode being carried and thus there was no need of bomb disposal squad or informing the railway authorities or cautioning the MHC(M). The learned Trial Court failed to notice the distinction between primary explosives, secondary explosives and the propellants. In general, the primary and secondary explosives detonate and the propellants deflagrate. Primary explosives such as mercury fulminates/lead styphnate/ lead azide are considered very sensitive explosives and can detonate even when subjected to a spark, flame, friction or a heated wire which causes a crystal to reach its ignition temperature. However, the secondary explosives which are PETN (Pentaerythritol Tetranitrate), RDS (Cyclotrimethylenetrinitramine), TNT (Trinitrotoluene) and HNS (Hexanitro Stilbene) are less sensitive to most initiation stimuli than primary explosives and are thus safe to carry. The initiation of secondary explosives generally requires the shock wave energy from a primary explosive. Further a secondary explosive will not detonate when subjected to a spark, flame or a hot wire as will a primary explosive. Secondary explosives like PETN or RDX will cause a deflagration only under certain confined and continuous conditions. Thus the secondary explosives which are less sensitive are used in a wide variety of applications and are safer to handle and store. It is thus common knowledge that till the point explosion is to be caused the secondary explosives, the detonators, the timers etc., are all stored in separated conditions and only on being combined can be used as an explosive along with electrical fitting completing the circuit when they are to be exploded.

16. The finding (L) of the learned Trial Court that the prominent places of Delhi to be attacked were not known to the entire police team is also perverse. The said prominent places to be attacked would not be even known to all the accused and

are generally informed to the last player in action through the people who are commanding such actions.

17. The finding (N) of the learned trial court that it was highly unbelievable that the accused would travel in general compartment with explosives and cash as well as US dollars in their bags with unreserved tickets is also perverse. The best course for any person committing unlawful activity is to mix up with the crowd in the general compartment than in the first-class or second-class compartment and get away unidentified. **FACTUALLY INCORRECT FINDING**18 The finding F(iv) of learned trial court that the names of Bashir, Lambu and Chotu are nowhere mentioned in any of the documents relied by the prosecution and hence how PW-6 came to know about the same is wholly erroneous and factually incorrect finding. PW-6 Jitender has deposed that accused persons disclosed their names as Bashir, Lambu and Chotu. Further the seizure memo Ex.PW-1/D which is duly signed by PW-6 Jitender as witness mentions the names of all accused from whom recoveries were made and the memo is also signed by all the accused on the same page where-after PW-6 Jitender has signed (page 468 of the paper book). **ERRONEOUS FINDING/ INCORRECT APPRECIATION**19 As regards findings No.F(v) and (W) all the witnesses have stated with regard to recovery of 10,000 USD and the seizure memo as well as the report of the Embassy also proves the same. Merely because in his testimony PW-6 stated that the recovery was of 50,000 USD the version of prosecution would not be belied. Further the report of the US Embassy with regard to the currency being fake has been exhibited as PX-5 along with the photocopies of the currency notes. No objection has been taken to the mode of proof of the said document during the trial and hence in view of the decision reported as (2003) 8 SCC752R.V.E.Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple & Anr. no challenge to the proof of the document can be made at this stage. CrI.A.No.1065/2014 Learned counsel for the Page 19 of 49 respondents during the course of arguments and in the written submissions have stated that they never objected to the admissibility of this document under Section 62 of the Indian Evidence Act as held by the learned trial court but under Section 162 of the Cr.P.C.

20. Finding No.(J) that PCR officials or local police personnel were not joined in the investigation is also based on incorrect appreciation of facts as PCR officials and local police had reached the spot after the incident had occurred. They were not the eye-witnesses to the incident or recoveries and thus were not required to be examined and cited as witnesses.

21. The finding F(vii) of the learned trial court that PW-6 did not know the colour or print of the shoe box, whether the documents signed by him were in Hindi, English or Urdu and whether the seal was of plastic, wood or iron is erroneous based on incorrect appreciation of evidence. PW-6 deposed that shoe box lying at the spot was printed but he did not remember its colour. He further stated that he could not tell as to what was printed on the said box. There is a lot of difference in not knowing whether it was coloured or printed and not remembering the print. Further PW-6 in his cross-examination stated that he did not remember whether the documents which he signed were in Hindi, English or Urdu and not that he did not see those documents. He clarified that he had read the contents of the documents and some of the documents were mentioning the recovered articles/ substance. He clarified that he could not read Urdu and he did not remember if he had signed any paper written in Urdu. He clarified that he signed his statement in English. Further with regard to the seal also he stated that he did not remember whether the same was made of plastic, wooden or iron and not that he did not see it. This witness further clarified that SI Dalip Kumar did the writing work at the spot and also identified the spot in the site plan shown to him. He further clarified that SI Dalip Kumar obtained his signatures on the papers at different time at the spot only, thereby showing as and when any document was prepared, signatures of PW-6 were taken. Further the question in cross-examination whether you signed the documents were in Hindi, English or Urdu was a vague question put and thus no specific answer could be given to the same as the witness had signed a number of documents. It is inappropriate to draw an inference of vagueness from the testimony of a witness on the basis of answers to vague and sweeping questions.

22. Finding No.(I) regarding variation in the deposition of the witnesses that PW-6 deposed that the colour of the detonators were yellow whereas other deposed that

the same were silver and PW-6 deposed the colour of hand grenades was brown whereas prosecution says black is also erroneous based on incorrect appreciation of facts. Inspector Sanjay Dutt PW-16, SI Dalip Kumar PW-1, SI Rahul Kumar PW-2, ACP Sanjeev Kumar PW-24 have all stated that four black colour hand grenades with light brown colour tape over the lever were recovered from the possession of Fayaz Ahmed Lone whereas Jitender has given no colour of the same and only in crossexamination stated that the hand grenades were of brown colour. This is because the lever of the grenades had a brown colour tape wrapped on them. Further all the witnesses have stated the detonators were of silver colour whereas PW-6 states it to be yellow. It may be noted that PETN recovered was yellow and thus confusion to PW-6 who was a common public man unaware of the different explosives cant be ruled out.

23. Finding No.(M) that the FIR was not sent to the Magistrate on February 05, 2007 itself is also erroneous and is factually incorrect in noting that the FIR was registered at 03.00 AM which is the time when rukka was sent on February 05, 2007. It is to be noted that on February 05, 2007 itself the respondents were produced before the learned CMM along with the case diaries which obviously had the FIR as well. It was only an additional copy of the FIR which was sent to the Ilaka Magistrate.

24. Finding Nos.C-(i) and (iii) are also erroneous. The contradiction sought to be introduced with regard to seizure of the slip Ex.PX-2 as deposed by PW-24 ACP Sanjeev Yadav that it was pasted on the seizure memo which is contradicted by PW-3 Vinit is also incorrect as when the STD booth slip was seized from Bashir, Vinit was not present. He only identified the slip which was issued by him at the shop which obviously was not pasted at that time. Further the findings of the learned trial court that why would Bashir keep the STD slip in his pocket to create evidence and that no other witness was examined to strengthen the fact that Bashir came to the STD booth of PW-3 to make the call are also erroneous. Bashir was not in the knowledge that he being followed or he will be apprehended and keeping the receipts in the pocket is a natural course of conduct except where people are in the habit of throwing the document then and there. Further it is not necessary that at all times in a day there are a number of people at the STD booth

to make phone calls and thus it was not possible for either the investigating agency to get other people to identify Bashir having made phone calls from the STD booth of PW-3. The learned trial court failed to appreciate that law does not require corroboration of the corroborative evidence. The onus on the prosecution is to prove the fact in issue beyond reasonable doubt by substantive evidence and if possible by corroboration of the same and not to further corroborate even the corroborative evidence.

25. The findings of the learned trial court at F(vi) and (Q) with regard to discrepancy in the version of the witnesses leaving the spot and recording the statement of PW-6 at 1.30 AM whereas rukka was sent at 3.00 AM is erroneous. The witnesses were not expected to give exact time and a rough estimation of time could only be given by them. The rukka was sent at 3.00 AM and as per PW-24 his statement was recorded at 3.00 AM. Further PW6 stated that he returned back home at 4.00 AM the next day, thus fortifying that he was present throughout the proceedings even after the rukka was dispatched.

26. The findings (S) and (T) of the learned trial court that though PW-6 had signed the seizure memos of the explosives recovered as witness but he did not witness personal search memo and arrest memo and though accused were apprehended between 9.30PM and 10.00 PM on February 04, 2007 their arrest was done at 5.00 AM on February 05, 2007 are also erroneous. The proceedings at the spot are bound to take time. Though the process of apprehension started at around 9.30 PM on February 04, 2007 however the accused try to flee away. Bashir Ahmed, Fayaz Ahmed and Abdul Majeed were apprehended but Shahid Gafoor tried to run away after firing on the police officials and thus counter firing ensued resulting in apprehension of the accused Shahid only at around 11.30 PM where after seizure memos were prepared which were duly witnessed by PW-6 and rukka was sent at 3.00 AM on February 05, 2007 where after statement of PW-6 was recorded and PW-6 left the spot. The formal arrest of the accused was the final culmination of the proceedings which took place at 5.00 AM on February 05, 2007 by which time PW-6 had already left and thus he could not have witnessed the personal search memo and arrest memo of the accused. REMAINDER FINDINGS27 With regard to finding No.(K) no doubt PW-24 ACP Sanjeev Kumar

was a member of the raiding party, however he was not the complainant since in the present case the entire investigation was carried out then and there at the spot and was required to be carried out by an officer not below the rank of ACP, thus PW-24 conducted the investigation and he not being the complainant, the investigation conducted by a member of the raiding team would not vitiate the proceedings. In the decision reported as AIR 1995 SC2339 Megha Singh Vs. State of Haryana relied upon by the learned trial court the police officer who conducted the search of the accused and recovered the pistol and the cartridges and on whose complaint First Information Report was lodged conducted the investigation. In the light of these facts the Court held that the officer was not only the complainant in the case but carried on the investigation and examined witnesses under Section 161 Cr.P.C. and such practices to say the least should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation. In the present case, since the offences under the provisions of the Unlawful Activities (Prevention) Act, 1967 were also involved, the investigation was required to be conducted by an officer not below the rank of ACP. PW-24 ACP Sanjeev Kumar though a member of the raiding party was not the complainant. The first information report was lodged on the complaint of SI Dalip Kumar and thus the decision in the case of Megha Singh has no application to the facts of the present case. Dealing with a similar situation in the decision reported as (2005) 5 SCC151 State of Rajasthan Vs. Ram Chandra wherein the member of the raiding team gave the notice under Section 50 NDPS Act and the High Court acquitted the accused on the ground that when a member of the raiding party complies with the provisions of Section 50 the same was not sufficient compliance of Section 50 of the NDPS Act and thus vitiated the proceedings, the Supreme Court held that the High Court proceeded on the basis that there may be bias on the part of the officer because he was accompanying the officer authorized to conduct search, however such a presumption is not legally available and the question of prejudice or bias has to be established and not inferred. In the decisions reported as (2004) 5 SCC230 S. Jeevanantham Vs. State and (2004) 5 SCC223 State Vs. V. Jayapaul the Court did not accept the plea that an officer who was the complainant cannot be the investigating officer on the ground that the question of prejudice or bias has to be established and not inferred and in any

event there cannot be any legal presumption in that regard. As noted above in the present case the investigating officer was not the complainant but only a member of the raiding party.

28. The finding that no witness deposed that the photographs were taken is factually incorrect as PW-1 deposed that at the time of apprehension of the accused persons and at the time of preparing the seizure memo and the process of the seizure, the photographs of that scene were taken by one of the team members. No doubt the prosecution has failed to exhibit the DD entry recorded on February 04, 2007 and the photographs as noted in the findings (B) and (O) but the same are lying on the trial court record. Even it placed belatedly the trial court could have got them exhibited as per law as PW-1 had already deposed in this regard in his testimony. In the decision reported as (2004) 4 SCC158Zahira Habibulla H.Sheikh & Anr. Vs. State of Gujarat & Ors. the Supreme Court held that if deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies, Court has to deal with the same with iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the Court to ensure that full material facts are brought on record so that there might not be miscarriage of justice. The Court further held that the trial should be a search for the truth and not about technicalities and the Presiding Judge must cease to be a spectator and a mere recording machine and should become a participant in the trial evincing intelligence, active interest and eliciting all relevant materials necessary for reaching the correct conclusion to find out the truth and administer justice with fairness and impartiality both to the parties and to the community.

29. The finding of the learned Trial Court (C-ii) that since no TIP was conducted the identification of Bashir by PW-3 Vinit was of no help is also erroneous. No doubt there is a lapse on the part of prosecution in not having got conducted the TIP of Bashir by Vinit PW-3, however it is trite law that dock identification is substantive evidence and TIP is only an aid in investigation. It is accordingly considered a safe rule of prudence to look for corroboration of the sworn testimony of the witnesses in Court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence,

however, is subject to exceptions when, for example, the Court is impressed by a particular witness on whose testimony it can safely rely without search of other corroborations. Failure to hold a test identification parade would not make inadmissible the identification in Court and the weight to be attached to such identification should be a matter for the Court of fact and in appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See 2005 (9) SCC631Munshi Singh Gautam (D) & Ors. Vs. State of M.P.). In the absence of TIP the identification by the witness in the Court has to be seen with caution whether the witness had sufficient time to see the accused or not. In the present case Bashir Ahmed made a phone call from the STD booth of Vinit PW-3 and thus Vinit had sufficient time to see the Bashir. Not being a case of fleeting a glimpse the identification in the Court for the first time by PW-3 Vinita can be relied upon.

30. The finding (H) of the learned trial court that the seal after use was not handed over to PW-6 as is the requirement of law is erroneous. This finding is also factually incorrect in noting that the seal after use was handed over to PW-2. As per the deposition, seal after use was handed over to SI Raman Lamba. Though there are some decisions of the Single Benches of this Court who have considered the non-handing over of the seal after use to a public person as a lapse however there is no mandate of law that seal after use has to be handed over to the public witness. The legal position as to whether in the absence of any mandatory or even a directory provision in whole of the Criminal P.C. and the Punjab Police Rules requiring that the seal used by the Investigating Officer for sealing case property must be handed over to a third person forthwith and further that in cases where it might at all have been so done then the non-official must be put into the witness-box and any failure to do so would vitiate the whole proceedings was considered by a full Bench of Punjab and Haryana High Court in the decision reported as 1982 CrL.L.J.

1176 Piara Singh Vs. State of Punjab. It is held that it was not mandatory for the Investigating Police Officer to hand over the seal used by him for sealing the incriminating articles and the samples to a non-official immediately or soon thereafter and that the nonappearance or non-production of such a non-official

who was entrusted with the seal would by itself be not fatal to the prosecution case. We are in agreement with the said decision and would note the relevant paras of the full Bench decision in Piara Singh as under:

9. Even the requirement of sealing the case puppetry, when made into a parcel, far from in any way advancing the stand of the petitioner that the Investigation Officer must be immediately divested of the seal used therefore appears to be a clear pointer to the contrary. Though these rules expressly visualise and provide in detail for the taking into possession and custody of case property and the marking labelling and sealing thereof in order to fix their identity and prevent any mixing up or tampering with the same, yet it is not even remotely hinted anywhere in the statutory provision that after sealing the parcel the seal with which the wax is imprinted should immediately be handed over to anyone else for any prescribed period of time. Therefore the absence of any mandate in this context would show that it is not the requirement of the law that the seal used for imprinting the wax on the parcel must be ousted from the possession of the Investigating Officer, The statutory provisions do not seem to presume any inherent or inveterate suspicion of the responsible Investigating Officers upon whose efficiency and integrity the investigation into the cognizable crime inevitably rests.

10. Nor is there any indication in the whole gamut of the provisions of the Criminal P. C, and the Punjab Police Rules as also in any executive instructions issued in this context that in those cases where such a seal might have been entrusted to a non-official, the latter must necessarily be produced as a witness Similarly I find no basis in the aforesaid provisions for the elongated stance that unless such witness is produced the whole case of the prosecution even though resting otherwise on cast iron foundation must crumble to the ground because of this infirmity alone. Without further enlarging on this aspect, it deserves notice that the learned Counsel for the petitioner was compelled to concede that there is neither any mandatory nor even a directory provision requiring that the seal used by the Investigating Officer must be handed over to a third person forthwith and further that in cases where it might at all have been so done then the non-official must be put into the witnessbox and any failure to do so would vitiate the whole proceedings.

12. That the law does not visualise a plethora of seals with every Investigating Officer to be handed over to non-officials after their use and to remain in their custody. for an unlimited or unspecified period is otherwise manifest when viewed from another angle as well. It was conceded by the learned Counsel for the petitioner that in the varied gamut of the statute and the Rules in this context there is no specific provision that each Investigating Officer must be officially provided with a large number of individual and personal seals which alone would make it possible for them to comply with the stand taken by the learned Counsel. In fact the admitted stand before us was that even though the relevant instructions do provide for the articles in that investigating kit of the Police Officials but herein also there is no requirement of any official seal. It is plain that there is no provision of either providing a large number of personal official seals to the Investigating Officer or further that these should be handed over to private persons for an unspecified period of time. Therefore the statutory provisions seem to be a clear pointer to the contrary to what is sought to be advocated on behalf of the petitioners by their learned Counsel.

13. Now apart from the absence and indeed the contraindications from the statutory provisions themselves I am impelled by the undermentioned fourfold reason (to be _ elaborated hereinafter) to take the view that the stand taken on behalf of the petitioners is not only counter productive but for ought one knows might well be fraught with public mischief: (i) The basis of the whole argument stems from an inveterate and ingrained suspicion and assumption that responsible police officers would tamper with the seals and forge and fabricate evidence with regard to the case property in their custody, (ii) There can be no guarantee that the non-official to whom such a seal is entrusted would be one of unimpeachable integrity far above a responsible police official amenable to administrative discipline. Consequently even the handing over of such a seal in no way ensures its being misused, (iii) There can be no warranty that the seal so entrusted to a third person cannot be duplicated. (iv) If the police officers are to be entrusted with a plethora of official seals there can be no guarantee or possibility that all of them would be beyond duplication and substantially and materially different from each other, 14. What first calls for notice in this context is the fact that the seal used in the course of investigation by responsible police officials would obviously be

governmental property and there is neither a mandate nor any inference for passing them on to private persons. The relevant provisions of para 22.16(2) of the Rules are indicative that the whole purpose thereof is that the sealed property should bear the imprint of the seal of a responsible police officer who is enjoined with the safe custody thereof and disposal in accordance with law. In a way, therefore responsibility is cast on the police officer whose seal has been used that the parcel or the seal does not pass into irresponsible hands. The whole thrust of the provisions seems to be to cast the burden on the responsible police officer for the safe custody of the parcel and case property. To direct on the contrary that such a seal should be handed over during the material period to any non-official is something which may absolve the concerned officer of further responsibility without resting the same in law on any other. Such a view would provide no guarantee that the person to whom the seal is entrusted would necessarily be of a higher calibre and integrity. It had to be conceded before us that any third person entrusted with such a seal is under no legal obligation or discipline to keep it under safe custody or not allow it to be passed on into unworthy hands bent upon tampering with the case property. Nor can it be ensured that such a person would not himself become a party to any design or attempt to do so at some stage. In essence the argument on behalf of the petitioner seem to lead to anomalous results in the sense that the handing over of the seal to a third person would absolve the responsible police official who is within the bounds of discipline and administrative control, and pass it into the hands which are not amenable to any legal or administrative liability and about whose conduct there can be neither any guarantee nor the sanction of punitive action.

15. Again the argument ab inconvenient in this contest also calls for pointed notice. It was not disputed before us that in a busy police station, worth the name, occasions may arise for sealing property or parcels etc. to the extent of a hundred times or more within a month. Can it be made the requirement of the law that every time a seal is used for the sealing of a parcel or property the same should be handed over to a non-official and a fresh or new seal be manufactured for sealing the next parcel or in any case the property in the succeeding cases. Is a police official who has once used the seal and handed it over to the third person then barred to proceed with the investigation and sealing the case property or the

samples thereof till he gets manufactured another seal for the said purpose?. Where is the guarantee that the new seal made would not be identical or similar and thus totally distinguishable from the first one?. By what method can it possibly be ensured that the hundreds of seals that may become necessary in this context would be so individually distinguishable from each other in order to prevent any similarity in the imprints on the sealing wax for detecting any alleged tampering with the sealed samples. It appears to me that accepting the stance taken on behalf of the petitioner may well hamstring the responsible police officer from continuing with the investigation and official functions and in the ultimate analysis lead to no meaningful results worth the name for ensuring the purity of investigation.

16. Equally then I am unable to see how the mere handing over of a seal to a third person by the Investigating Officer would in any way ensure or guarantee against the tampering. It appears to me that the whole argument herein stems from an inveterate and deeply ingrained mistrust of public officials which is sought to be elongated to the length of criminality, This approach has been repeatedly disapproved and dispelled by the final Court. In *Aher Raja Khima v. State of Saurashtra*, AIR 1956 SC217(1956 CriLJ421Para 40), Chandrasekhara Aiyar J., has observed as follows : The presumption that person acts honestly applies as much in favour of a police officer as of other persons, and it is not a judicial approach to distrust and suspect him without good grounds therefor. Such an attitude could do neither credit to the magistracy nor good to the public. It can only run down the prestige of the police administration."

31. The finding (U) of the learned trial court that there was unexplained delay of 16 days in sending exhibits/parcels from Malkhana to FSL is erroneous and does not dent the prosecution case as before sending the said specimen to the FSL, necessary formalities are to be done and in view of the heavy pendency at the FSL priority letters are also required to be got issued. The trial court has sought to discard the prosecution case also on the ground that there was unexplained delay of 16 days in sending exhibits of parcels from malkhana to FSL. In the decision reported as (2008) 8 SCC557Hardip Singh Vs. State of Punjab the Supreme Court held that so far as the question of delay in sending the samples to the FSL is

concerned, the same in our opinion has no consequence for the fact that the recovery of the said sample from the possession of the appellant stands proved and established by cogent and reliable evidence led in the trial. The case property was kept in safe custody till it was deposited in the custody of chemical examiner Chandigarh who found the seals intact which proves and establishes that there was no tampering with the aforesaid seals in the sample at any stage and thus the delay of about 40 days in sending the sample did not and could not have caused any prejudice to the appellant therein. In the present case despite lengthy cross-examination it could not be demonstrated that there was any tampering of the seals or that the case property was not kept intact in the malkhana. A perusal of the record shows that on February 05, 2007 ASI Paramjeet Singh PW-21 MHC(M) at Police Station Special Cell Lodhi Colony received 21 sealed parcels mark as PT, S-1 & S-2, Ex.1 to Ex.15 and P-1, M-1 and the last parcel not being marked. ACP Sanjeev Yadav deposited the said parcels duly sealed along with CFSL form and on February 20, 2007 six sealed parcels out of which four sealed with the seal of DK mark as PT, S-1, Ex.2 & Ex.3 and the two remaining parcels marked as M-1 and without mark were sent to the CFSL office through HC Krishna Ram who appeared as PW-15. On March 21, 2007 Ct.Ran Singh along with SI Dalip Kumar took 5 sealed parcels duly sealed with the seal of DK from the malkhana to the officers of NSG Samal Khan where the hand grenades were destroyed in the presence of two public witnesses and the certificate issued. Further Ct.Nagender Kumar PW-18 took two sealed parcels from MHC(M) Police Station Special Cell of which one parcel contained four bullet proof jackets and the second arms and ammunitions and deposited the same in CFSL. The suggestion to ASI Paramjeet Singh MHC(M) is not that the seals on the samples were tampered with but that all these pullandas were sealed in the malkhana before February 05, 2007 and that all the accused persons were already in police custody before February 04, 2007 which fact was denied by the I.O. Similarly, the other three witnesses i.e. Ct.Nagender PW-18, HC Krishna Ram PW-15, Ct.Ran Singh PW-5 have also not been suggested that there was any tampering with the seals when the parcels were in their custody.

32. In view of the aforesaid discussion it is clearly demonstrable that the findings of the learned trial court as discussed from aforementioned paragraphs 10 to 26

did not warrant the acquittal of the respondents. The rest of the findings from paragraphs 27 to 31 also in view of the legal position as explained in the corresponding paragraphs do not warrant an acquittal in view of the cogent and convincing evidence as noted in the preceding paragraphs of the judgment. No doubt that while convicting an accused for serious offences stricter standards should be applied, however the prosecution is required to prove its case beyond reasonable doubt and not with hundred-percent proof. Variations in the testimony of the witnesses are bound to take place in view of the differences in observability, power to retain facts and to be able to depose the same after a passage of time. The legal position regarding burden of proof on the prosecution is well settled and we need just note a few decisions thereon. In the decision reported as (2002) 8 SCC372Sardul Singh Vs. State of Haryana it was held:

8. There cannot be a prosecution case with a cast-iron perfection in all respects and it is obligatory for the courts to analyse, sift and assess the evidence on record, with particular reference to its trustworthiness and truthfulness, by a process of dispassionate judicial scrutiny adopting an objective and reasonable appreciation of the same, without being obsessed by an air of total suspicion of the case of the prosecution. What is to be insisted upon is not implicit proof. It has often been said that evidence of interested witnesses should be scrutinized more carefully to find out whether it has a ring of truth and if found acceptable and seems to inspire confidence, too, in the mind of the court, the same cannot be discarded totally merely on account of certain variations or infirmities pointed or even additions and embellishments noticed, unless they are of such nature as to undermine the substratum of the evidence and found to be tainted to the core. Courts have a duty to undertake a complete and comprehensive appreciation of all vital features of the case and the entire evidence with reference to the broad and reasonable probabilities of the case also in their attempt to find out proof beyond reasonable doubt.

In the decision reported as (1992) 2 SCC86State of U.P. Vs. Ashok Kumar Srivastava it was held:

9.The circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. But this is not to say that the prosecution must meet any and every hypothesis put forward by the accused however farfetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise.

33. Thus in our opinion the impugned judgment of the learned trial court acquitting the respondents of the offences charged is erroneous in law.

34. From the evidence on record it is proved that Bashir Ahmed Ponnu, Fayaz Ahmad Lone and Abdul Majid Baba together came in Malwa Express and alighted at New Delhi Railway Station at Platform No.3. A phone call was made by Bashir Ahmed from the STD Booth of Vinit PW-3 outside the station from the Ajmeri Gate side. Shahid Gafoor met three of them at DDU Marg, near Ranjeet Singh Flyover and was having one black colour bag on his shoulder. Bashir Ahmed took out a cardboard box from his bag and handed over the same to Shahid Gafoor who checked the same after opening when the police team after disclosing their identity asked them to surrender. On this Shahid Gafoor left his bag and cardboard box on the footpath, took out a pistol and started running towards ITO while firing on the police party. However, Bashir Ahmed Ponnu, Fayaz Ahmed Lone and Abdul Majid Baba were apprehended. After Shahid Gafoor was overpowered, barrel of his pistol was checked wherein one live cartridge was found. Thus the live cartridge and the pistol were seized. On opening the cardboard shoe box lying on the footpath near the bus stop, a black polythene was recovered which had 30 slabs of yellow colour of PETN explosive material, each slab was wrapped in a separate transparent polythene. Beneath the recovered explosive a transparent plastic container was recovered in which four nonelectronic silver colour detonators and a timer was recovered along with 100 notes of `500/- denomination. The recovered explosive material was weighed which was found to be 3 kg out of which two samples of 10 grams each were taken out and kept in a black colour small plastic container and the same were converted into a cloth parcel and were sealed with the seal of DK and marked as S1 and S2. The remaining recovered 2.980 kg

explosive was kept in the same black colour polythene and the same cardboard box and was converted into a sealed parcel with the seal of DK and marked as Ex.1. The recovered four non-electronic detonators were kept in a separate plastic container and converted into a white cloth sealed pullanda sealed with the seal of DK and marked as Ex.2. The recovered timer on which OK600 was written was kept back in the same recovered plastic container and converted into a white cloth pullanda sealed with the seal of DK and marked as Ex.3. The recovered wad of hundred notes of `500/- was also converted into a white colour cloth parcel sealed with the seal of DK and marked as Ex.4. Thereafter the blue and grey colour bag recovered from the possession of accused Bashir Ahmed was checked in which a wad of hundred US dollars in the denomination of hundred each was recovered which were wrapped in a yellow colour envelope which was concealed in the bottom pocket of the bag beneath the clothes and other articles. The recovered wad of US dollars was converted into a cloth parcel pullanda sealed with the help of thread and was marked as Ex.5. The other articles found in the bag of Bashir Ahmed Ponnu were kept back in the bag and the bag was converted into a parcel with the help of white cloth strip and marked as Ex.6. The blue, black and green colour Adidas make bag recovered from the possession of accused Fayaz Ahmad Lone was checked in which a stainless steel container was recovered under the clothes and other articles. On opening the stainless steel container it had a black colour polythene from which four black colour hand grenades were recovered on which brown colour packing tape was wrapped on the lever of all the recovered hand grenades. All the recovered hand grenades were kept in four separate pullandas and converted into white cloth pullandas and marked as Ex.7 to 10. The black colour polythene from which the aforesaid four hand grenades were recovered was kept back in the same stainless steel container and converted into a white cloth pullanda and marked as Ex.11. All the other articles including the clothes were kept back in the recovered bag of Fayaz Ahmad Lone and the bag was sealed with the help of white cloth strip and marked as Ex.12. Thereafter the brown colour suitcase make Aristocrat recovered from the possession of accused Abdul Mazid Baba was checked in which a plastic container was recovered with yellow colour lid in which two hand grenades, one blue colour and other of military green colour were found in a black colour polythene. Brown colour packing tape

was wrapped on the lever of both the recovered hand grenades. The recovered hand grenades and the black colour polythene were kept back in the same plastic container and converted into a white cloth parcel sealed with the seal of DK and marked as Ex.13. All the other articles recovered from the suitcase were kept back in the suitcase and the same was sealed with the seal of DK with the help of white cloth strip and marked as Ex.14. Thereafter the black colour canvas bag which was thrown by accused Shahid Gafoor at the bus stop was checked in which some clothes and personal belongings were found. All the articles were kept back in the same black colour canvas bag and sealed with the help of white cloth strip and marked as Ex.15. CFSL form was filled. The seizure memos were got signed by the witnesses and the accused. These facts have been duly deposed by the members of the raiding team party and the public witness.

35. PW-2 SI Rahul Kumar deposed that he took the sealed pullanda of US dollars and handed over the same to Mr.C.Reed Beckmayor Security Officer of US Embassy Chanakyapuri. Mr. Reed opened the sealed pullanda in his presence and photocopied each note. Mr.Reed handed over to him the photocopies of the notes along with the receipt on May 01, 2007. SI Rahul Kumar again visited the US Embassy and collected the report. CrI.A.No.1065/2014 photocopies of the notes in US dollar recovered were exhibited as Ex.PX4 along with the report of the US Embassy Ex.PX5. As per the report the currency notes sent to the US Embassy were counterfeit as poor quality paper was utilised and the embedded water mark, micro printing, embedded security thread, ultraviolet properties and optical variable ink were absent.

36. The CFSL report Ex.4/A opined the .30 pistol empty magazine and cartridge cases to be arms and ammunitions. It was further opined that the seven .30 fired cartridge cases were fired from the pistol recovered from Shahid Gafoor. It was also opined that the physico chemical analysis and TLC method confirmed the presence of CE based High Explosive in the contents of Parcel No.S1, the four plain detonators were live ones, the electronic timer device contained in Parcel No.Ex.3 was in working condition and that the contents of parcel No.S-1, Ex.-2, Ex.-3 can form components of Improvised Explosive Device (IED) and were therefore, Explosive substance as defined in the Explosive Substance Act, 1908.

The six hand grenades recovered were taken and destroyed at Demolition Range Manesar and certificates in this regard were issued vide Ex.PW-19/A and Ex.PW-19/B. Vide Ex.PW-4/B it was opined that four bullet proof jackets were having holes. BP-1 was having two holes on its front, whereas BP-2, BP-3 and BP-4 were having one hole each on their front side.

37. The defence of Bashir Ahmed Ponnu who appeared at DW-1 is that he was doing the business of fruits at Sopore bus stand, J&K and in the last week of January 2007 while he was coming from Calcutta to Srinagar by Malda Express train and was purchasing food items at Ambala Railway station, the officials of Special Cell who were in civil clothes apprehended him and brought him to Delhi and illegally detained him and later falsely implicated him in this case. Fayaz Ahmed Lone who appeared as DW-2 has deposed that he was doing the business of Kashmiri Shawl and was in Ludhiana in connection thereof when on January 28, 2007 he was apprehended and illegally detained by the officials of the Special Cell in civil clothes and brought to Delhi and later falsely implicated in this case. Abdul Majeed Baba who appeared as DW-4 deposed that he was a resident of Village Magrepora, PS Sopor, District Baramulla, J&K and was doing the business of fruits in Fruit Mandi, J&K. On January 29, 2007 he was coming from Calcutta to New Delhi by Rajdhani Express. When he reached New Delhi Railway station and came out of the station and was waiting for an auto he was apprehended by the officials of Special Cell who were in civil clothes and illegally detained and later falsely implicated him in this case. None of the respondents have produced any document with regard to their travel. Fayaz has not shown any document as to where he was staying in Ludhiana. No evidence has been produced which would cast a doubt on their apprehension on February 04, 2007 at DDU Marg, Delhi. Thus we are of the opinion that the defence of the respondents of being illegally detained and falsely implicated is not substantiated even by preponderance of probabilities. Shahid Gafoor appeared as DW-3 and deposed that on January 13, 2007 he had gone to Kathmandu in connection with business of readymade garments. The officials of Special Cell who were in civil clothes apprehended him and brought him to Delhi, illegally detained him and later falsely implicated him in this case. No document has been shown by Shahid Gafoor showing his entry into Nepal. Moreover the officials of Delhi Police or for that matter of fact any police

officer from India are not permitted to go to Kathmandu and to conduct raids and this endeavour would have been caught at the immigration counter. Thus we find no reason to accept the defence of the respondents which has not been proved even by preponderance of probability.

38. OFFENCES COMMITTED BY THE RESPONDENTS. A. The learned Trial Court has convicted Shahid Gafoor for the offence punishable under Section 14 Foreigners Act which we need not go into as no appeal has been filed by Shahid Gafoor challenging the same. B. From the evidence as noted above the prosecution has proved beyond reasonable doubt that Bashir Ahmed Ponnu was in possession of 100 notes of US dollars of denomination of 100 each which he had reasons to believe to be counterfeit and which may have been used as genuine and thus we convict Bashir Ahmed Ponnu for the offences punishable under Section 489B and 489C IPC. C. From the evidence as recorded above it has also been proved beyond reasonable doubt that Shahid Gafoor was in possession of a pistol of .30 bore and cartridges which were opined to be arms and ammunitions as per the report Ex.4/A and that Shahid Gafoor used the said arms and ammunitions to fire at the raiding party when they sought to apprehend him and 5 of the bullets hit 4 officers on their bullet proof jackets and in the absence of bullet proof jackets the injuries would have caused death of the officers and is therefore guilty of committing an act with the intention of causing murder of the Police officers. Shahid Gafoor is thus convicted for the offences punishable under Section 186/353/307 IPC and Section 25/27 Arms Act. D. The legal position with regard to the principles to be applied for ascertaining whether an offence of waging war or attempting to wage war or abetting waging war against the Government of India has been committed or not has been succinctly culled out in the decision reported as (2014) 7 SCC443Mohd. Jamiludin Nasir Vs. State of West Bengal wherein the following principles to be applied were laid down:

160. A close reading of the aboveresferred to paragraphs is sufficient for anyone to understand the concept and to apply the same in a given case in order to find out as to how the sentence can be imposed in such cases. Having read the above well-laid down principles, we can cull out the following general principles to be applied:

160. 1. The most important is the intention and purpose behind the defiance or raging against the Government. 160.2. Though the modus operandi of preparing for the offensive act against the Government may be quite akin to the preparation in a regular war, it is often said that the number of force, the manner in which they are arrayed, the arm and/or equipment are immaterial. 160.3. Even a limited number of persons who carry powerful explosives and missiles without regard to their own safety can cause more devastating damage than a large group of persons armed with ordinary weapons or firearms. 160.4. There need not be the pomp or pageantry usually associated with war such as the offenders forming themselves in battle line and arraying in a war-like manner. 160.5. The court must be cautious in adopting an approach which has the effect of bringing within the fold of Section 121 all acts of lawlessness and violent acts resulting in destruction of public property, etc. 160.6. The moment it is found that the object sought to be attained is of a great public nature or has a political hue the offensive violent act targeted against the armed force and public officials should not be branded as acts of waging war. 160.7. The expression waging war should not be stretched too far to hold that all acts of disrupting public order and peace irrespective of their magnitude and repercussions could be reckoned as acts of waging war against the Government. 160.8. A balanced and realistic approach is called in construing the expression waging war irrespective of how it was viewed in the long long past. 160.9. An organised movement attended with violence and attacks against the public officials and armed forces while agitating for the repeal of an unpopular law or for preventing burdensome taxes were viewed as acts of treason in the form of waging war. 160.10. Neither the number engaged nor the force employed nor the species of weapon with which they may be armed is really material to prove the offence of waging war. 160.11. The single most important factor should be to think that in a case that is being considered of waging or attempting to wage war against the Government of India, what is the target of attack chosen by the conspirators and the immediate objective sought to be achieved thereby. 160.12. The planned operations if executed what is the extent of disaster spelt out to the whole nation. Whether a war like situation lingering for days or weeks would have prevailed and such offensive acts of unimaginable description and devastation would have posed a challenge to the Government and the democratic institutions

for the protection of which the Government of the day stands. 160.13. Was it a mere desperate act of a small group of persons who were sure to meet with death is to ignore the obvious realities and to stultify the wider connotation of the expression of war chosen by the drafters of IPC. 160.14. The undoubted objective and the determination of the offenders was to impinge on the sovereign authority of the nation and its Government.

In this decision the Supreme Court was dealing with a case involving completed action and thus the magnitude of the offence, the place where the attack was conducted and the purpose was known. In the present case, the acts of Bashir Ahmed Ponnu, Fayaz Ahmed, Abdul Majeed Baba and Shahid Gafoor were preparatory to the commission of the offence of waging war and abetting the same, by entering into a criminal conspiracy and concealing with the intent to facilitate waging of war. The respondents were in possession of 3kgs of PETN, 6 hand grenades, 4 electronic detonators and 1 timer. From the fact that arms, ammunitions and explosive substance which were capable of mass destruction were handed over to Shahid Gafoor, who was the Pakistani national and had unauthorizedly entered the Indian Territory, it will be prudent and reasonable to draw an inference of criminal conspiracy to wage war against India. The prosecution has thus proved beyond reasonable doubt that Bashir Ahmed Ponnu, Fayaz Ahmed Lone, Abdul Majeed Baba and Shahid Gafoor entered into a criminal conspiracy to wage war against the country and collected arms, ammunitions and explosives with the intention to wage war and concealed the design thereof. Thus they are found guilty and convicted of offences punishable under Sections 120B IPC read with Sections 121/121A/122/123 IPC. E. All the four respondents i.e. Bashir Ahmed Ponnu, Fayaz Ahmed Lone, Abdul Majeed Baba and Shahid Gafoor have also conspired knowingly to facilitate the commission of a terrorist act and have carried out an act preparatory to the commission of a terrorist act wherein Bashir Ahmed, Fayaz Ahmed and Abdul Majeed collected and brought the explosive substance and handed over the same to Shahid Gafoor and are thus held guilty and convicted of offence punishable under Section 18 of the Unlawful Activities (Prevention) Act 1967. F. Though in the present case there is no material evidence before this Court to show that the respondents are members of a terrorist organisation, however from the acts of the

respondents, which have been proved beyond reasonable doubt, it is evidently proved that they can be termed as members of a terrorist group/gang. A Division Bench of this Court in the decision reported as 206 (2014) DLT578(DB) Raees-Uz-Zama & Anr. Vs. State NCT of Delhi considering a paramateria provision Section 3(5) of Prevention of Terrorism Act, 2002 (POTA) held that from the conduct, nature and quantum of recoveries made and the interaction of A2 and A3 therein with A1 without doubt makes them a member of terrorist gang involved in terrorist acts. In the decision reported as 2013 (1) GLT880Redaul Hussain Khan Vs. The National Investigation Agency it was held:

87. At this stage, the concept, behind the amendments, can also be gauged by understanding the meaning of terrorist gang. Section 2 (1) defines terrorist gang to mean any association, other than terrorist organization, whether systematic or otherwise, which is concerned with, or involved in, terrorist act. What Section 2 (1) provides is that any organization, other than terrorist organization, which is connected with, or involved in, terrorist act, in a systematic manner or otherwise, would be regarded as terrorist gang.

88. The intent behind introducing such a definition for terrorist gang, on a bare reading, is, perhaps, to stop those technical pleas, which may be raised with respect to previous formal declaration as is required under Section 3 of the UA (P) Act or under Section 35 of the UA (P) Act, be it the amendments made in the year 2004 or amendments made in the year 2008, for offences relating to an unlawful assembly or a terrorist organization. The terms like any association, other than terrorist organisation, in Section 2 (1), convey a meaning that even though there exists an association of individuals and even though such an association is not a terrorist organization, mentioned in the Schedule to the UA (P) Act, such an association may nevertheless be treated as terrorist gang if the association is concerned with, or involved in, terrorist act irrespective of the fact whether the association is systematic in its functioning or otherwise. When we speak of an 'organization', the term conveys a unit of people, systematically structured and managed, to meet a need or to pursue collective goals on a continuing basis. Organizations have a management structure that determines relationship between functions and positions and an organization, therefore, includes roles,

responsibilities and authorities assigned to carry out defined tasks. It is for this particular reason that the UA (P) Act, as amended in 2004 and retained in 2008, provides that the power to declare an organization as a terrorist organization is vested only in the Central Government and it can be done after conducting an exercise into the activities of an organization.

89. The term, systematic or otherwise, has been deliberately used in Section 2 (1) in order to ensure that even when the structure of an association is organized or systematic, it would not be permitted to take a plea that since the association is systematic, it is, in fact, an organization and since such an organization, having not been mentioned in the Schedule to the UA (P) Act, a membership of such an organization cannot amount to an offence punishable under Section 20 of the UA (P) Act, for, we have pointed out that systematic or otherwise, so long as an association is concerned with, or involved in, terrorist act, it would be a terrorist gang within the meaning of Section 2(1). A situation may arise, where evidence is found regarding a conspiracy, among several persons, to commit terrorist act and such a conspiracy is not entered into for an isolated event, but for a long period of time. In such circumstances, if such an association or a group of individuals is not a scheduled terrorist organization, it would become difficult to prosecute the members of such an association. No wonder, therefore, that the concept of terrorist gang has been introduced by Section 2(1) as a broad based definition so as to make membership of even a terrorist gang punishable under Section 20 of the UA(P) Act.

90. Thus, the legislature appears to have deliberately diluted the form and type of association and has concentrated more on the ultimate object of the association, i.e., an association, which is concerned with, or involved in, terrorist act. Section 20 of the UA (P) Act, as amended in the year 2004 and retained in the Act of 2008, provides punishment for being a member of such a terrorist gang.

91. It would not be out of place to mention here that the term 'member', when used in the context of an individual, in a group, conveys several meaning like, comrade, confederate, constituent, co-operator, co-partner, team-mate, etc. When the term 'member' is used with reference to a criminal gang, it would mean that the

individual forms part of a combination, alliance, network, conspiracy or understanding, amongst certain individuals, with an established hierarchy, which engages itself in a course or pattern of criminal activity.

92. On the basis of above discussions, it can be held that for holding a person a terrorist or to hold a person a member of terrorist gang, there is no requirement of any formal declaration either under Section 3 or under Section 35 of the UA(P) Act. A declaration, under Section 3 or under Section 35 of the UA(P) Act, as it stands today, is necessary only for terrorist organizations and unlawful associations.

Thus all the four respondents i.e. Bashir Ahmed Ponnu, Fayaz Ahmed Lone, Abdul Majeed Baba and Shahid Gafoor having acted as members of a terrorist gang involving and facilitating in the commission of a terrorist activity are convicted for the offence punishable under Section 20 of the Unlawful Activities (Prevention) Act, 1967. G. From the evidence on record and the recovery of the currency notes it has been proved beyond reasonable that all the four respondents i.e. Bashir Ahmed Ponnu, Fayaz Ahmed Lone, Abdul Majeed Baba and Shahid Gafoor committed the conspiracy to raise funds as a terrorist gang to facilitate the commission of a terrorist activity and are thus convicted for the offence punishable under Section 17 of the Unlawful Activities Prevention Act. H. From the evidence on record it has also been proved beyond reasonable doubt that all the four respondents i.e. Bashir Ahmed Ponnu, Fayaz Ahmed Lone, Abdul Majeed Baba and Shahid Gafoor have been found in conscious possession of the explosive substances as defined under the Explosive Substance Act and are thus held guilty for the offences punishable under Section 4/5 of the Explosive Substance Act.

39. The respondents are thus required to be heard on the quantum of sentence. The respondents Bashir Ahmed Ponnu, Fayaz Ahmed and Abdul Majeed Baba will appear before this Court on December 12, 2014 on which date Shahid Gafoor will also be produced by the Superintendent, Seva Sadan Lampur before this Court.

40. List the appeal on December 12, 2014. (MUKTA GUPTA) JUDGE (PRADEEP NANDRAJOG) JUDGE DECEMBER08 2014 ga