State of Maharashtra

Vs

Som Nath Thapa

Criminal Appeal No. 480 of 1996 (In Spl. Leave Petn. (Cri) No. 2196 of 1995) with

Cri. Appeals Nos. 718, 793 and 810 of 1995 with Cri. A. No. 481 of 1996

(CJI A.M. Ahmadi, B.L. Hansaria, S.C. Sen JJ)

12.04.1996

JUDGEMENT

HANSARIA, J. :-

1.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 centres 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 whishers 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 (of 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 under 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) Amjed 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 S. 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 Ss. 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 as 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.
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> 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 narotics 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. Hawkesley, 1959 Criminal Law Report 211; and People v. Lauria 251 California Appeal 2d 471. Some assistance is derived from a judgment of this Court in Natwarlal Shankarlal Mody v. State of Bombay, (1963) 65 Bom LR 660 (661). The only other foreign decision we would be required to note is United States v. Feola, (1975) 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 Ajay Aggarwal v. Union of India, (1993) 3 SCC 609 : (1993 AIR SCW 1866) 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 the 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 States Supreme Court in Feola (1975 (420) US 671).

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 centre 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. He 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 (1963 (65) Bom LR 660) (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 direction - one was that of United States v. Falcone, (1940) 311 US 205 wherein sellers of large quantities of sugaryeast and canes were absolved from participation in a conspiracy among distillers who bought from them. In Direct Sales Co. v. United States (1942) 319 US 703, however, a wholesaler of drugs was convicted of conspiracy to violate 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 Flacone 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 (251 California Appeal 2d 471) from the decision in Direct Sales (1942 (319) US 703) 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 overy 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, carelessness, indifference lack of concern. There is informed and interested co-operation, stimulation, instigation".

16. The learned Judge, after examining the precedent in the field, thereafter held that some-times, 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 activity.

17. The Additional Solicitor General has, according to us, stolen a march over the counsel for the accused because of what was stated in Lauria'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 (1975 (420) US 671). 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 then observed that the same has to obtain with respect to conspiracy.

19. What had happened in Feola (1975 (420) US 671) 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 Yash Pal Mittal v. State of Punjab, (1977) 4 SCC 540 : (AIR 1977 SC 2433), which was noted in para 9 of Ajay Aggarwal's case (1993 AIR SCW 1866), 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 (1993 AIR SCW 1866) 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, 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 R. S. Naik v. A. R. Antulay, (1986) 2 SCC 716 : (AIR 1986 SC 2045).

27. Let us note the three pairs of sections Shri Jethmalani has in mind. These are Ss. 227 and 228 in so far as sessions trial is concerned; Ss. 239 and 240 relatable to trial of warrant cases; and Ss. 245(1) and (2) qua trial of summons cases. 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.
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> 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 (i), 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 under 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 S. 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, (AIR 1986 SC 2045), let the view expressed in state of Karnataka v. L. Muniswamy, (1977) 3 SCR 113 : (AIR 1977 SC 1489), be noted. Therein, Chandrachud, J. (as he then was) speaking for a three Judge Bench stated at page 119 (of SCR) : (at pp. 1493-94 of AIR), 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, (1989) 1 SCC 715),

which was quoted with approval in paragraph 78 of State of West Bengal v. Mohd. Khalid, (1995) 1 SCC 684 : (1995 AIR SCW 559), 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, (AIR 1986 SC 2045), Bhagwati, C.J., 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 had 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 Mohd. Iqbal v. State of Maharashtra, (1996) 1 JT (SC) 114, 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 sipte 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 inasmuch 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, hand granades 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 of 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 commit 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 under S. 3(3) of TADA (P) Act, 1987 and S. 120(B) of IPC read with Ss. 3(2) (i), (ii), 3(3), 3(4), 5 and 6 of TADA (P) Act, 1987, and read with Ss. 302, 307, 326, 324, 427, 435, 436, 201 and 212 of Indian Penal Code and offences u/Ss. 3 and 7 read with S. 25 (1A), (1B), (a) of the Arms Act, 1959, S. 9-B(1), (a), (b), (c) of the Explosives Act, 1884, Ss. 3, 4(a), (b), 5 and 6 of the Explosive Substances Act, 1908, and S. 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 acts 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 Mohmeed 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 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 under Section 3(3) of TADA (P) Act, 1987, and within my cognizance."

38. The aforesaid shows that the individual charge against Abu is that he ahd 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 under Section 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 inasmuch 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 was 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 CBI another contention to be advanced 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, (AIR 1977 SC 1489) (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 under Section 3(3) of TADA, we are of the 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 S. L. P. (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 subrubs 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 alias Ibrahim alias Tiger Abdul Razak Mamon 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 grenades 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 under Section 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, on-wards 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, hand granades 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 under Section 6 of TADA (P) 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 JT SC 540 : (1994 AIR SCW 3857), the appellant was rightly charged under Section 3(3) of TADA. Our attention is invited by the learned Addl. Solicitor General to the decisions of this Court in State of Maharashtra v. Abdul Hamid Haji Mohammed, (1994) 2 SCC 664 : (1994 AIR SCW 2930) and State of West Bengal v. Mohd. Khalid, (1995) 1 SCC 684 : (1995 AIR SCW 559), 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 ammunitions, 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 has 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 alias 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 alias 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 alias 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 alias Ibrahim alias 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 alias Ibrahim alias 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-employee P. B. Bali to Mushtaq alias Ibrahim alias Tiger Adbul 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, injuring 21 and huge loss of property worth Rs. 40 lacs; and that you thereby committed an offence punishable under Section 3(3) of the TADA (P) Act, 1987 and within any 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 Katha 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 fictitious names. Raju Kodi gave his men four Jeeps for transportation of Arms, Ammunition and RDX landed by Tiger Memon. These Jeeps were provided with 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 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 under Section 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 his 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 after 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 under Section 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 No. 793/95 stands dismissed.
Somnath Thapa

51. This appellant's role in the tragedy is of a higher order inasmuch 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 alias Ibrahim alias 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 alias Ibrahim alias Tiger Abdul Razak Memon and their associates for the purpose of committing terrorists acts by your non interference in spite 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 under Section 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 :

"(i) Association with Mohd. Dosa :

S. N. Thapa has been an associate of absconding accused Mohd. Dosa, who has played a major role in the conspriacy to cause bomb blasts. The Tel. Nos. (Res. and Officials) of S. N. Thapa have been found entered in the Tel. diary seized from Mohd. Hanif alias 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 Memon 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 handwriting 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-336) 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 Nakabani on the night of 30 and 31st Jan. 1993, at Purar Phata and Behan Phata on Mhasla-Goregoan 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 inform about it to his senior officers. He also did not submit 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 Bankat in the limits of Pune Customs and that he should personally verify. R. K. Singh, debuted custom officer for this job. On 4-2-93 another accused M. S. Syed, Customs Superintendent informed R. K. Singh that the smuggled goods had 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 :

Shri. S. K. Bhardwaj, Collector of Customs, (Prev.) issued a letter dt. 25-1-93, addressed to Shri. 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 along with 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 and 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 Shri. Thapa for nakabandi on 30th and 31st Jan., 1993, it is clear that Sh. Thapa had knowledge that arms were likely to be smuggled by Tiger Memon. He had in fact 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 Mhayla on the night of 2-2-93, Sh. Thapa intentionally sent a mis-leading 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-Nadeem 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. along with subordinate staff did see patroling from Shrivardhan to Bankot

from 21.00 hrs. of 2-2-93 to 00.70 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 along with 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 up to 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 Tusi :-

55. Shri Tulsi contended that Thapa had been forwarned 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 along with 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 customs 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 Door-darshan Centre 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 5-2-1993, 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 has 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

by these Inspectors, as that was under pressure of investigation undertaken subsequently by the C. B. I. We do not think that 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 up to 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 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 memon 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 under Section 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 S. L. P. (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 evidence collected in the course 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 Asim Azmi and Amjad Aziz Meherbux are allowed and they stand discharged. Appeals of Raju alias Rajucode Jain and Somnath Thapa are dismissed. The appeal of State is also dismissed.

63. Before parting, we may say that along with these appeals we had heard the case of one Mulchand Shah, being covered by S. L. P. (Crl.) No. 894 of 1993. But, by an order passed on 31-1-1996, that S. L. P. had been delinked from these cases, on the prayer of counsel for Shah and was ordered to be listed separately. So we have not not dealt with S. L. P. Order accordingly.