Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 535 OF 2009

Mohd. Ayub Dar ……..Appellant

Versus

State of J&K ……..Respondent

J U D G M E N T

V. S. Sirpurkar, J.:

1. Appellant Mohd. Ayub Dar S/o Abdul Ahad – Original accused no.1 challenges his conviction for the offence punishable under Section 3 (3) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (In short "TADA ACT"), as also for the offence punishable under Section 302 of the RPC. Originally, the five accused persons were tried in respect of murder of Mirwaiz Moulvi Farooq, which took place on 21.5.1990, at about 11 O' clock in the morning. Accused no. 2 Abdul Rehman Shigan and accused no.3 Abdulla Bangroo expired during pendency of the trial, while the other two accused persons namely Javed Ahmed Bhat @ Ajmal Khan @ Ditta s/o. Habibulla Bhat and Zahoor Ahmed @ Bilal @

Zana were untraceable. Thus, out of the five accused persons, we are concerned only with accused no.1 (appellant herein) Mohd. Ayub Dar S/o Abdul Ahad.

2. It so happened that on 21.5.1990, at about 11 O' clock in the morning, three unknown terrorists entered into the house of Mirwaiz Moulvi Farooq with the intention of killing him and Moulvi Farooq was severely injured by gun-shot. He, ultimately, succumbed to the injuries in Soura Hospital, Srinagar, and, therefore, the offence registered u/s. 307 of the RPC originally was converted into the offence u/s. 302 of the RPC on the same day. The initial investigation was done by Police Station, Nageen, which was thereafter transferred to CBI under the orders of the Government of India vide Notification No.228/3/90-AVD.II, dated 11.06.90. The house of Moulvi Farooq was in New Colony, Nageen, Shrinagar, known as '*Mirwaiz Manzil*', wherein one small doubled storeyed building was constructed for the purpose of residential Office of Mirwaiz. This small Office had two rooms on the ground floor and one big hall on the first floor. In one of the two rooms; on the ground floor, the Personal Assistant of Mirwaiz Moulvi Farooq used to sit and the second room was adjacent to the said room, which had office of Mirwaiz Moulvi Farooq. The entrance to the Office of Mirwaiz

Moulvi Farooq was from the room of his Personal Assistant.

3. It was the prosecution case that, due to popularity of Mirwaiz Moulvi Farooq, two terrorists outfits namely Jamt-e-Islami in general and Hizbul-Mujahideen in particular were apprehensive that Moulvi Farooq would eventually assume political leadership of Kashmir. They also viewed him as an agent of Government of India working against the interests of militant groups. Therefore, in the year 1990 itself, in the month of April, accused Abdulla Bangroo, Javed Ahmed Bhat @ Ajmal Khan @ Bitta and Mohd. Ayub Dar @ Ishfaq – present appellant, who belong to Hizbul Mujahideen, entered into a criminal conspiracy to eliminate Mirwaiz Moulvi Farooq. Accused Abdulla Bangroo, who was then heading Hizbul Mujahideen, instructed Javed Ahmed Bhat @ Ajmal Khan and Mohd. Ayub Dar @ Ishfaq – present appellant to plan elimination of Mirwaiz Moulvi Farooq. Javed Ahmed Bhat @ Ajmal Khan was then working as an Area Commander of Hizbul-Mujahideen in the downtown area of Srinagar; whereas the appellant/accused was working as a Group Commander in that very area. Later on, Abdul Rehman Shigan @ Inayat and Zahoor Ahmed @ Bilal @ Zana also joined the conspiracy. It came out in the investigation that, in the second week of May, 1990, under the

instructions of Javed Ahmed Bhat @ Ajmal Khan, Mohd. Ayub Dar @ Ishfaq – present appellant and Abdul Rehman Shigan @ Inayat had visited the residence of Moulvi Farooq at Nageen, Srinagar and had requested him for financial help to their militant organization i.e. Hizbul Mujahideen. Moulvi Farooq had agreed to help them and had asked them to meet after 2/3 days during the morning hours. Thereafter, two accused surveyed the area as per their plan and informed the details to Javed Ahmed Bhat @ Ajmal Khan. It was on 21.05.1990 that the three accused namely Mohd Ayub Dar @ Ishfaq (present appellant), Abdul Rehman Shingan @ Inayat and Zahoor Ahmed @ Bilal @ Zana armed with loaded pistol visited the 'Mirwaiz Manzil' at Nageen. Accused Javed Ahmed Bhat @ Bilal had instructed the appellant that, out of the three accused persons, Zahoor Ahmed @ Bilal would fire on Moulvi Farooq and the remaining two accused persons namely Ayub Dar i.e. present appellant and Abdul Rehman Shingan were to provide cover to Zahoor Ahmed @ Bilal. As per the plan, they all reached the gate of Mirwaiz Manzil and met Maqbool Shah, the gate-keeper (PW-16) and informed him that they wanted to meet Moulvi Farooq. Maqbool Shah (PW-16) then asked Gulam Qadir Sofi, the gardener, to take them to the Personal Assistant as he himself was going to the market.

Accordingly, the gardener – Gulam Qadir Sofi took the three to the Personal Assistant namely Saidur Rehman (PW-17), who asked them about their names and one of them disclosed his fake name as Gulzar Farooq r/o. Batmaloo. That name was written by the Personal Assistant on a slip of paper and the said slip was sent inside the room of Moulvi Farooq through the gardener Gulam Qadir Sofi. After sometime, Moulvi Farooq called the three accused inside the Office, on which Zahoor Ahmed @ Bilal entered the room of Moulvi Farooq and the remaining two accused persons including the present appellant took up position in the PA's room. On entering the room of Moulvi Farooq, Zahoor Ahmed @ Bilal fired several rounds on Moulvi Farooq from his pistol and immediately, accused Inayat also fired from his pistol in the air while coming out of PA's room, which hit the outside wall of the Office. On hearing the sound of firing, the gardener came inside the Office and tried to catch hold of Ishfaq, who was trying to escape. However, all the accused persons escaped giving a push to the Gardener Gulam Qadir Sofi. Accused Bilal also tried to run away, but he was caught by Gulam Qadir Sofi. There was a scuffle between the two, in which Bilal sustained an injury below his right eye. Later, after firing one round from his pistol, Bilal also

managed to escape. The accused persons ran towards Kashmir University, who were followed by Gulam Qadir Sofi upto the main road and near the University Gate, the assailants ran towards Soura through the University compound and reached Chhatargaon in the afternoon of 21.05.1990. They then reported killing of Moulvi Farooq to Abdulla Bangroo and Ajmal Khan. All the three accused persons were directed by Abdulla Bangroo and Ajmal Khan to go underground for sometime.

4. The prosecution urged that appellant Mohd Ayub Dar @ Ishfaq had visited Pakistan, where he was trained in the handling of firearms and explosives. He was involved in a number of other terrorists' cases and was arrested in Delhi by the Delhi Police on 6.5.1991. He was further arrested in the present case on 15.6.1991 by CBI. When his statement was recorded u/s. 15 of the TADA Act, he confessed the aforesaid crime and disclosed the names of other two assailants namely Abdul Rehman Sigan @ Inayat and Zahoor Ahmed @ Bilal. He also confessed regarding involvement of accused Abdulla Bangroo and Ajmal Khan in the crime.

5. Accused Abdul Rehman Singan @ Inayat, who was in the judicial custody in a case of CID, Srinagar, was also arrested in this case on 20.9.1990. He also

confessed the guilt and corroborated the statement made by the present appellant.

6. After he was fired, injured Mirwaiz Moulvi Farooq was removed to Sher-e-Kashmir Institute of Medical Sciences, Soura by Manzoor Ahmed and Saffad Ahmed, who were his brothers-in-law and Nazir Ahmed Dar, a servant. He was examined by Dr. Abdul Mazid and was immediately operated thereupon. Dr. Afzak Wani, Head of the Department of Neurosurgery, Institute of Medical Sciences, Soura was also consulted. But, at about 12.30 P.M., Mirwaiz Moulvi Farooq succumbed to the injuries in the hospital. Injury Report was prepared by Dr. Abdul Mazid. However, post mortem on the dead body could not be carried out as a very serious law and order situation ensued owing to death of Moulvi Farooq. A huge mob got collected at the spot and they demanded that the dead body of deceased be handed over to them without the post-mortem being carried out. The dead body was, ultimately handed over to the followers of Moulvi Farooq and the last rites were performed on the next day. His wearing apparels were seized and were referred to the Central Forensic Science Laboratory (C.F.S.L.) along with the bullets and empty cartridges seized from the place of occurrence. The C.F.S.L. opined that the wearing apparels were having holes corresponding to the

injuries of the deceased. It was further opined that the empty fired cartridges which were seized, as also the bullets seized from the place of occurrence were fired from two types of small arms. The facts suggested that the present accused/appellant and Abdul Rehman Shigan @ Inayat had committed an offence u/s. 302 r/w. section 34 of the RPC, while the other accused persons namely Abdulla Bangroo @ Khalid, Javed Ahmed Bhat @ Ajmal Khan along with Mohd. Ayub Dar @ Ishfaq (present appellant) and Zahoor Ahmed @ Bilal @ Zana and Abdul Rehman Shigan @ Inayat had committed an offence under Section 3 (3) of the TADA Act, 1987.

7. Under the above circumstances, the appellant/accused alone came to be charged. About 24 witnesses came to be examined and the confessional statement recorded by A. K. Suri (PW-2), who was then working as S.P., CBI, came to be relied upon by the prosecution. The statement came to be recorded on 27.6.1991 after the accused/appellant was brought from Delhi to Srinagar.

8. The trial Court considered the evidence of all the witnesses individually. The Court also took notice of the argument that copy of the First Information Report was not sent to the Court and came to the conclusion

that the contention raised by the defence was not correct. The Court further came to the conclusion that there was nothing suspicious regarding non-sending of the First Information Report. The trial Court also rejected the argument of the defence that there were inconsistencies and contradictions in the evidence of prosecution witnesses inter-se. It pointed out that the minor discrepancies could not and did not matter in this case. It was, in fact, observed that the defence was not able to point out any material contradiction in the evidence of witnesses during the course of arguments. The trial Court came to the conclusion that non-performance of post-mortem did not matter as it was clear that Moulvi Farooq died due to gun-shot injuries. In fact, the trial Court accepted the evidence of Dr. Mohd. Afzal Wani (PW-6). Ultimately, the trial Court also accepted the confession given by the appellant. Relying upon the evidence, the trial Court convicted the accused/appellant for the offence u/s. 3 (3) of the TADA Act and u/s. 302 of the RPC. After hearing the accused person on the question of sentence, the trial Court awarded imprisonment for life with a fine of Rs.6,000/- and in default of payment of fine, the appellant was directed to suffer further imprisonment for six months for the offence u/s. 302 of the RPC. The appellant is

also sentenced to undergo imprisonment for a period of five years and to pay a fine of Rs.5,000/- u/s. 3(3) of the TADA Act. In default of making the payment of fine, the accused was directed to undergo imprisonment for six months.

9. Lastly, the trial Court, following Section 374 of the J & K Code of Criminal Procedure, 1989, ordered that the imprisonment for life would be subject to confirmation by this Court since this Court is the appellate Court. It is this judgment which is being challenged before us.

10. Shri Sushil Kumar, learned Senior Counsel, initially raised a preliminary argument to the effect that the life imprisonment ordered by the trial Court was liable to be confirmed by the High Court and the same not having been done, this Court could not look into the question of legality of the life imprisonment. The argument is based on Section 374 of the Criminal Procedure Code as applicable in the State of Jammu and Kashmir, under which even a life imprisonment ordered by the Court in that State is required to be confirmed. The argument is, however, not correct inasmuch as it is specifically provided in Section 14 (3) of the TADA Act that the Designated Court shall, for the purpose of

trial of any offence, have all the powers of a Court of Session and shall try such offences as if it were the Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before the Court of Session. The word "Code" is defined u/s. 2 (b) of the TADA Act, wherein is it provided that the word "Code" means the Code of Criminal Procedure, 1973 (2 of 1974). Therefore, it is clear that the trial has to be conducted in accordance with the Criminal Procedure Code, 1973 and not in accordance with the Criminal Procedure Code as applicable to the State of Jammu and Kashmir. U/s. 19 (1) of the TADA Act, an appeal is provided against the judgment, sentence or order, not being an interlocutory order by a Designated Court to the Supreme Court of India. Sub-section (2) thereof provides that, except the cases mentioned under sub-section (1), no appeal or revision shall lie to any Court from any judgment, sentence or order including an interlocutory order of a Designated Court. Section 25 of the TADA Act provides that the provisions of the TADA Act or any Rule thereunder or any order made under any such rule shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the TADA Act or in any instrument having effect by virtue of any enactment other than this Act. In view of

these provisions on which Mr. Rawal, the learned Additional Solicitor General of CBI, relies upon, there will be no question of applicability of Section 374 of the Criminal Procedure Code as applicable to the State of Jammu and Kashmir. Realizing this, Shri Sushil Kumar, learned Senior Counsel did not seriously press this objection, though considerable arguments were tendered before the Court earlier. In that view of the matter, the first question raised by learned Senior Counsel Shri Sushil Kumar is decided against the defence.

11. The main thrust of the argument of the learned Senior Counsel appearing on behalf of the appellant was that the prosecution has failed to prove the offence u/s. 302 of the RPC independently of the confession. It was urged that, if the confession is ignored, then there would remain no material to involve the accused. It is pointed out that the accused also stood convicted for the offence u/s. 3 (3) of the TADA Act, wherein he was awarded a punishment of five years and to pay a fine of Rs.5,000/- in default to suffer further imprisonment for six months. It is pointed out that the accused had already served out the sentence of five years. The learned Senior Counsel, therefore, did not seriously challenge his conviction u/s. 3 (3) of the TADA Act and

instead, concentrated on the conviction for the offence u/s. 302 of the RPC. It was pointed out to us that there was no material to hold that the accused ever conspired or was a part of conspiracy to commit murder of Moulvi Farooq. The learned Senior Counsel urged that there was practically no evidence and the oral evidence tendered on behalf of the prosecution to prove the guilt of the appellant for both the offences was hopelessly vague and could not have been relied upon by the trial Court to convict the appellant of both the offences. The learned Senior Counsel took us through the evidence of prosecution witnesses and urged that the evidence of the witnesses is wholly unreliable and took the prosecution nowhere. By way of additional submission, the learned Senior Counsel urged that the trial Court erred in relying upon the confession recorded by A. K. Suri (PW-2) as the said confession could not have been accepted to be a genuine confession. It was urged that the said confession was neither in the language of the accused nor the accused had ever made any such confession, much less before the witness. It was then pointed out that the original of the Confession made was also not available nor was placed before the Court. It was further suggested that the oral evidence runs counter to the statement made in the confession and

therefore, the confession was untrustworthy.

12. Before considering the confession allegedly made by the appellant, we would take the stock of criticism made against the oral evidence. But even before that, to put the record straight, we would choose to place the clear-cut language of Section 3 (3) of the TADA Act, for which the appellant stands convicted. Section 3, sub section (3) of the TADA Act provides as under :

"whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine."

13. We have carefully examined the appeal memo filed u/s. 19 of the TADA Act. Very strangely, we do not find any challenge to the conviction u/s. 3 (3) of the TADA Act. All through, the challenge is to the conviction for the offence u/s. 302, as also to Section 120-B r/w. Section 3 of the RPC. Conviction u/s. 3(3) of the TADA Act was not seriously challenged by Shri Sushil Kumar, learned Senior Counsel; perhaps, because the accused has already suffered more than five years of imprisonment, which was the sentence awarded to him for that offence.

14. It is in the backdrop of this factual situation that the oral evidence would have to be considered.

15. It was not seriously contested that Moulvi Farooq died of bullet injuries and that this was a case of homicidal death. The first relevant witness amongst those who were present at the time of incident is Nazir Ahmed Dar S/o Mohd. Abdulla Dar (PW-11). He was a family servant in the house of Moulvi Shafat, who was the brother-in-law of Moulvi Farooq. He heard the sound of fire and went to see as to whether the sound of fire had come. He saw two persons jumping from the southern wall of Moulvi Farooq and going towards the southern side. He helped in arranging a vehicle and admitting Moulvi Farooq in the hospital. He was declared hostile as far as he failed to identify the accused. However, he admitted that he did not remember whether even the third person had also jumped from the wall. He also did not remember whether he has given description of the first man whom he saw jumping over the wall. He categorically suggested that the accused person in the Court was not there. His evidence is, therefore, of no consequence for the prosecution. The evidence of Zahid Ali Lone (PW-13), S/o Habib-ullah Lone, an Advocate by profession, is also of no consequence as he refused to even identify the accused and asserted that he did not see the accused. Mohd. Yasin s/o. Misri Khan (PW-14) was on the guard duty at the bungalow of Moulvi Farooq.

In his presence, empty cartridge cover was seized from the courtyard of Moulvi Farooq by one Gunwant Singh. The witnesses so far considered by us only go to show that Moulvi Farooq had died homicidal death due to fire and some three persons had entered his house on that day, who escaped.

16. The evidence of Salam-id-Din S/o Mohd. Maqbool Shah (PW-15) is also of no consequence as he had neither seen the deceased nor the assailants. He only came to know about death of Moulvi Farooq. This witness was the Public Relations Officer of Moulvi Farooq. Mohd. Maqbul Shah S/o Khazir Muhammad Shah (PW-16) was the peon of Moulvi Farooq, but he was not on the spot when the incident took place. Much was made of the evidence of this witness that he had not identified the two persons who had come to Moulvi Farooq in the morning. However, it is clear that the two persons that he was speaking about could not have been the accused persons as they had come at 9 O'clock to Moulvi's place and it is nobody's case that the accused persons had come at 9 O' clock in the morning. He had acted as a panch witness also. Saidur Rehman s/o. Amir Din (PW-17) was specifically referred by Shri Sushil Kumar, learned Senior Counsel. This witness was his Public Relations Officer (PRO)-cum-Personal Assistant (PA). According to

him, after the death of Moulvi Farooq, he continued to work as a P.R.O. of his son Moulvi Umar Farooq. He claimed that, on the fateful day, his peon informed that three persons wanted to meet Moulvi Saheb. They were brought in and were made to sit in the Office. Their names were asked and one of them stated his name to be Gulzar Farooq. He did not remember the other two names. He claims that he made the name slip of Gulzar Farooq with his own pen and sent the same to Moulvi Saheb. The said slip (Exhibit D-16) was shown to him. He identified the same. He also identified his own signature. According to him, all the three persons went inside. He was engaged in conversation on telephone. Then he heard the sound of fire and suddenly the door of Moulvi Saheb's room opened and those persons fled away. He saw that Moulvi Farooq was lying in a pool of blood. He then spoke about Moulvi Farooq being transfered to the hospital and his death. He has confirmed that, while fleeing away, he saw a revolver in the hand of one of the boys. He also confirmed that the peon Gulam caught hold of one of the men, but he got away while fleeing himself. Even this witness has not identified the accused/appellant in the Court. He specifically contended that, since the incident was 13 years old, it would be difficult for him to identify any of the three

persons. He specifically stated that there was nobody amongst them present in the Court. In fact, much could have been done by cross-examining this witness by the prosecution for the reasons unknown. Even that was not done.

17. Amjad Parvez Munir was examined as PW-18 who spoke about the seizures and the panchas. PW-19 is Javaid Firdous S/o Alam Din, who is resident of Lucknow and was a Professor working in the Kashmir University. There is nothing that he has spoken about the accused. In fact, we do not know why he was cross-examined. Same is the story about Shafat Ahmad (PW-20) S/o Late Moulvi Gulam Rasool, who is brother-in-law of deceased Late Moulvi Mohd. Farooq. He also did not see any man, though he heard the noise of fire-shots. His evidence also would be of no consequence except to prove that Moulvi Farooq was shot at and that he died in the hospital. Mohd. Tariq s/o. Gulam Hussain (PW-21) is another witness who is a witness on seizure of cover of bullet from the spot. Nothing has come out in his cross-examination. Methlas Kumar Jha is another witness who is posted as a Dy.S.P. CBI SFC II. He had acted as an Investigating Officer. He claimed to have received the FIR copy on 12.6.1990. He spoke about the murder having been admitted by Hizbul Mujahideen organisation. He further

spoke that Late Abdullah Bangroo, Ajmal Khan, Bilal, Ishfaq i.e. present appellant and Abdul Rehman Shigan were the accused of murder and that they entered into conspiracy to kill Moulvi Farooq. He then referred to the arrest made of the appellant by Delhi Police. He went to arrest Ayub Dar/present appellant in Delhi and brought him to Srinagar on police remand. He then asserted that, during the investigation, Ayub Dar confessed and stated that he wanted to make statement. He was then produced before the S.P. for recording his statement. He then confirmed that the statement was then recorded by the S.P. He identified the accused as the same person who was arrested and who gave his statement u/s. 15 of the TADA Act, which was recorded by the S.P. He pointed out that he also got recorded statement of accused Abdul Rehman Shigan u/s. 15 of the TADA Act as he was already arrested in some other case, in pursuance of the request made by accused Abdul Rehman Shigan. He was extensively cross-examined by the defence. He claimed to have received the whole file (Exhibit D-2) from Parvaiz Mirza SHO, P.S. Nageen. He identified the photo copy of FIR which was written in 19 lines. He also confirmed that the copy of FIR was sent to the Magistrate. He identified the FIR. Several inadmissible questions seem to have been asked to this witness about

the statements recorded u/s. 161, which are of no consequence. However, all that can be said about this witness is that he went to arrest the accused and produced him before the S.P. for recording his statement. There is no question asked on that aspect. It has again and again come in the cross-examination that he had produced the accused/appellant for recording his statement under the TADA Act; that the accused/appellant was under his custody and that his statement was recorded by the S.P. He asserted that the accused had requested him verbally for recording his statement and he also verbally brought the request of the accused to the attention of the S.P. According to him, the statement of accused was recorded on 27.6.1991 when the accused was produced at 11 O'clock in the morning before the S.P. for recording his statement. He claimed that he did not remain present there. After his statement was recorded, the accused was taken away by this witness. He also had collected second copy of the statement. In short, it cannot be said that the witnesses have identified the accused as one of the three persons who had killed Moulvi Farooq. Shri Sushil Kumar, learned Senior Counsel, therefore, is undoubtedly right when he says that if the other evidence is taken into account de-hors of the confession made, the

prosecution cannot claim to have proved the offence that the accused/appellant was one of the accused persons present along with the two other accused persons who had fired at Moulvi Farooq.

18. However, one thing is certain that the prosecution has been able to prove homicidal death of Moulvi Farooq by being shot at. Prosecution has proved that, on that day, at about 10.30, three persons had come. They had gone to the room of Moulvi Farooq and had fired. It is also proved that, it is due to those injuries that Moulvi Farooq died a homicidal death. True it is that no post mortem was conducted; however, prosecution has given proper explanation that the post mortem could not have been conducted due to angry public reaction. However, in-spite of that, there is good evidence to suggest that Moulvi Farooq died of the bullet injuries almost immediately after he was fired. All this could not have been possible unless the assailants had entered into conspiracy to murder Moulvi Farooq. It was in pursuance of that conspiracy alone that the assailants entered the chamber of Moulvi Farooq and fired at him. The evidence of P.R.O. is very clear in that context. The only question to be considered is whether this appellant was one of assailants. Seeing the prosecution evidence as it is, if all the three accused

came together and approached the chamber of Moulvi Farooq and one of them fired at him, there will be no question of only the individual liability. Everything was clear as sun-shine that three had come not with an idea to chat with Moulvi Farooq or to seek any favour from him, but they had come specifically with a specific design to eliminate Moulvi Farooq. We, therefore, do not find anything wrong in the verdict of guilt given by the trial Court so far as Section 3 (3) of the TADA Act is concerned. However, the question would still remain as to whether the appellant/accused was one of the assailants. That could have been proved by direct evidence firstly or alternatively or in addition to it, by the confession statement recorded u/s. 15 of the TADA Act. If the confession statement stands to the Acid test on credibility, voluntariness and truthfulness, then that would be sufficient to pin the guilt of the accused. Therefore, it is now to be examined as to whether the trial Court was justified in relying upon the statement u/s. 15 of the TADA Act.

19. Shri Sushil Kumar, learned Senior Counsel, firstly urged that the confession was shrouded in mystery inasmuch as it was not clear as to whether it was recorded and under what circumstances. He clearly criticized the same saying that it could have been

recorded on the video tapes, but was not done. He also pointed out that the confession was not recorded in the language of accused/appellant nor was it a true representation of what was stated. He pointed out that it was contradictory with the oral evidence and there were innate contradictions which went on to disprove its very credibility. Relying on Rule 15 (2) of the TADA Act, he pointed out that it was explained or interpreted to the maker. He further urged that the original of the confession is not on record. It was further urged that the whole confession is destroyed by the other evidence. Shri Sushil Kumar pointed out that, the confession, as it stands proved, is in English language and there was a clear-cut admission on the part of A. K. Suri (PW-2) that he had not explained the same to the accused. Basically, the argument of Shri Sushil Kumar was that the confession could not have been relied upon, insofar as the offences under the R.P.C. were concerned. According to the learned Counsel, the confession could be relied upon only for the offences under the TADA Act. The learned Counsel heavily relied on the language of Section 15.

20. As against this, Shri Rawal, learned ASG urged that there was clear-cut evidence on record that the accused spoke in English, in which language he confessed also.

He further pointed out that necessary caution was administered to the accused inasmuch as he was told that the said confession could be used in evidence against the accused/appellant. Learned ASG further contended that necessary circumstances were explained and signature was appended to the confession and, therefore, there was no question of rejecting the confession. As regards the last point urged by Shri Sushil Kumar, the learned ASG has pointed out that the question of admissibility of confession against the offences under the RPC was no more res-integra and was finally answered by this Court in a decision of Five Judges Bench reported in ***Kartar Singh Vs. State of Punjab [1994 (3) SCC 569]***. Besides this, Shri Rawal also pointed out that the oral evidence regarding the confession by A. K. Suri (PW-2) remained unchallenged in the cross-examination on behalf of the defence. He also pointed out that the confession was corroborated as the chit (Exhibit D-16) was brought on record. He answered the criticism of the learned Senior Counsel by pointing out that some witnesses were not examined as they were either dead or it was obvious that they were not present at the time of incident. It is this basis that the confession is now to be tested.

21. It will be better first to examine in detail the

oral evidence of A.K. Suri (PW-2). The said witness deposed regarding presence of the accused in the Court on 27.6.1991 and about his making confessional statement. The witness reiterated that the accused was asked number of questions regarding free will on the part of accused to make a confession. He also specifically asserted that he had informed the accused that he was not bound to make a confessional statement and that if he makes the one, the same would be read against him. The witness also reiterated that the accused was given time to ponder over and even after pondering over the issue of making the confessional statement, the accused, of his own free will, was prepared to give confessional statement which was recorded in his own words by the witness. The witness also identified signature of the accused. He had also produced a questionnaire and asserted that, even after the questionnaire was given to the accused, one and half hours' time was given to the accused to ponder over, which opportunity was utilized by the accused. The witness first proved his writing about being satisfied that the accused was prepared to offer confessional statement of his own free will and then proved the statement. He also reiterated that the accused put his signature on each and every page and after the statement

was recorded, it was read over and was understood by the accused, who, only after accepting the same to be correct, put the signatures. The witness was subjected to cross-examination by the defence. However, we are constrained to observe that his cross-examination was a lackluster. Some confusion was tried to be created regarding Exh. PWAK, a carbon copy and Exh.PWAK1 also not being done over the original and being made over a carbon copy. However, after seeing the documents and hearing Shri Rawal, we are convinced that there was no confusion and the original confession as well as the preliminary documents were made over to the Court. Some unnecessary questions were put to the effect that whether the witness was in uniform while recording the statement. Some insignificant circumstances were also brought that the word 'voluntary' was not written while recording preparedness of the appellant to record the confession. He asserted that he had dispatched the confessional statement report. The last suggestion given to the witness in the cross-examination was almost fatal to the defence which was to the effect that he did not interpret statement of the accused because the same was written in the language in which the accused gave it. He was again specifically asked about his satisfaction statement being on page No.10, to which he specifically

answered that the accused had finished his statement at page 9 and therefore, he wrote his satisfaction at page No.10. Again, almost at the end of the cross-examination, it has come that the witness had taken the statement in English and when the accused was talking to the witness, he was taking in English. In short, the whole cross-examination does not dent the case of the prosecution and it can be inferred that the criticism against the confession that it was not recorded in the language of the accused is not justified. There is absolutely no effort made by the defence to establish that the statement was not made in the language of the accused persons. Much was said by Shri Sushil Kumar, learned Senior Counsel that the Original statement is not on record. However, Shri Rawal, learned ASG painstakingly pointed out from the record that the confession cannot be foiled on that count and the original confession was very much available on the record.

22. Shri Sushil Kumar, learned Senior Counsel, had specifically raised a question regarding witnesses Gunwant Singh and Ghulam Qadir Sofi not being examined to corroborate any role ascribed to them. According to the learned Senior Counsel, non-examination of Gunwant Singh and Ghulam Qadir Sofi was extremely material and

created a dent in the prosecution story. Shri Rawal, learned ASG pointed out that, looking at the overall evidence of the witnesses, more particularly, all those who were present at the spot, it cannot be gathered that Gunwant Singh was present at the time of incident. Insofar as the evidence of Ghulam Qadir Sofi is concerned, it was pointed out by Saidur Rehman (PW-17) that said Ghulam Qadir Sofi was already dead at the time of trial. Therefore, the criticism levelled by the learned defence Counsel would be of no consequence.

23. Shri Sushil Kumar then urged that the so-called confession given by this appellant in other matter was disbelieved right upto the Supreme Court. He relied upon the decision in ***Mohd. Ayubdhar & Anr. Vs. State of NCT of Delhi [2000 (10) SCC 296]***. This was also a case where the charges were under Section 3, 4 and 5 of TADA Act alongwith Section 302 read with Section 120 IPC. This was a case where the cassette wherein the confession was recorded was destroyed. From the second cassette, it was seen that the concerned officer had not given any warning to the accused that he was not bound to make the statement. The officer also had categorically admitted that no specific warning had been given to the accused. It was on that basis that this Court did not choose to rely upon the confession. Shri

Sushil Kumar heavily relied on this ruling and urged to take the same course. We have already given our reasons for accepting the confession. In that view, we cannot rely on this judgment. We are unable to accept this contention for the simple reason that the facts of the said case in the reported decision are neither relevant nor admissible for the present purposes. Shri Sushil Kumar also relied on a reported decision in ***Prakash Kumar @ Prakash Bhutto Vs. State of Gujarat*** [***2007 (4) SCC 266]*** wherein the confession was disbelieved. We do not find any similarity between the facts in the afore-mentioned reported decision and the facts which have come in the present matter. The confession in this case was disbelieved on merits and it was made by the co-accused. The facts are clearly distinguishable. The learned Senior Counsel further relied on ***Abdulvahab Abdul Majid Shaikh & Ors. Vs. State of Gujarat etc. etc. [2007 (9) SCC 293]***, more particularly on observations in Paragraphs 9 and 13 thereof. However, the observations in Para 9 relate to the confession of the co-accused and its admissibility and reliability. The Court, in fact, relied upon the confession taking the view that there was no coercion, threat or any undue influence to the accused. The other facts are not apposite to the controversy. We, therefore, reject the contention of

the learned Senior Counsel.

24. Our attention was also drawn to the Constitution Bench decision reported in ***Kartar Singh Vs. State of Punjab [1994 (3) SCC 569]*** and more particularly, to the paragraphs 263 and 265 thereof. There can be no question about these principles which have been suggested by way of guidelines by this Court. In fact, at the end of the Paragraph 263 of the judgment, the Court has recommended that the Central Government should take note of the guidelines and incorporate them by appropriate amendments in the Act and the Rules. We have not been pointed out any such amendments either in the Act or in the Rules. However, when we see the guidelines laid down and compare them with the care taken in this case about the confession, we feel completely satisfied that the confession was properly recorded and it was also recorded in the free atmosphere, as A.K. Suri (PW-2) had given sufficient time to the accused for the reflection. The accused had also at no point of time complained regarding any coercion to any authority. The defence, as is apparent from examination of the appellant-accused under Section 313 of the Cr.P.C., is that he had not given any statement at all. In view of this, we do not think that the observations of this Court in Paragraphs 263 and 265

of the aforementioned decision would be of any consequence for the decision of this matter. In fact, in Paragraph 406 of the judgment, this Court has spoken about the importance of confession and the various aspects attached to it such as appearance of objectivity and necessity of removing the suspicion and has gone to the extent of saying that the provision itself is unfair, unjust and unconscionable, offending Articles 14 and 21 of the Constitution of India. This was in a minority judgment by Hon'ble K. Ramaswamy, J. Hon'ble Sahai, J., however, in Paragraph 456, went on to observe:-

> "The word 'offence' used in the article should be given its ordinary meaning. It applies as much to an offence committed under TADA as under any other Act. The word 'compelled' ordinarily means 'by force'. This may take place positively and negatively. When one forces one to act in a manner desired by him it is compelling him to do that thing."

His Lordship further observed that a confession made by an accused or obtained by him under coercion, suffers from infirmity unless it is made freely and voluntarily. His Lordship then found that Section 15 was violative of Articles 20(3) and 21 of the Constitution. Again the observations, though very strongly worded, do not become binding since constitutionality of Section 15 has been upheld by the

majority judgment authored by Hon'ble Pandian, J. We are quite mindful of the strength of the language used in the opinions expressed by two learned Judges. However, even with that, we cannot say that this confession suffers from any defects.

25. Similarly, our attention was also invited to a decision in ***State (NCT of Delhi) vs. Navjot Sandhu @ Afsan Guru etc. etc.*** [***2005 (11) SCC 600]*** (more particularly to para 185). This was again a judgment concerning the terrorist attack on the Parliament of India by five fidayeen militants. It may immediately be observed that this was not a case under TADA Act, but under the Prevention of Terrorism Act (POTA), 2002. Very heavy reliance was placed on Paragraph 185 therein, which deals with the lapses and violations of procedural safeguards guaranteed in the statute, on account of which the confessional statement of Afzal was not relied upon by this Court. The learned Senior Counsel was at pains to point out that in this case also, there were lapses and violations of procedural safeguards guaranteed in the statute. We, however, did not find any such lapses or violations which would affect the credibility of the confession. On the other hand, we found that the confession was fully acceptable and reliable.

26. A reference was made to the decision in ***State through Superintendent of Police, CBI/SIT Vs. Nalini & Ors. [1999 (5) SCC 253]***. However, we must observe that the learned Senior Counsel has not, in any manner, shown as to how any of the observations made therein apply to the present matter. We would leave the matter at that.

27. As against this, Shri Rawal, learned ASG highlighted two decisions before us, they being ***S.N. Dube Vs. N.B. Bhoir & Ors. [2000 (2) SCC 254]*** and ***Ravinder Singh alias Bittu Vs. State of Maharashtra [2002 (9) SCC 55]***. The other two decisions relied upon by learned ASG are ***Lokeman Shah & Anr. Vs. State of W.B. etc. etc. [2001 (5) SCC 235]*** and ***Abdulvahab Abdul Majid Shaikh & Ors. Vs. State of Gujarat etc. etc. (cited supra)***. Shri Rawal pointed out that in the decision in ***S.N. Dube Vs. N.B. Bhoir & Ors. (cited supra)***, in fact, the confession was recorded in the police station and as such, the guidelines provided in ***Kartar Singh Vs. State of Punjab (cited supra)*** were not strictly adhered to. Further, our attention was invited to the observations made by this Court in the following terms:-

"Therefore, merely because some of those guidelines were not followed while recording the confessions it cannot for that reason be held that the said confessions have lost their evidentiary value. If while recording the

confessions the police officer had followed all those guidelines also then that would have been a circumstance helpful in inferring that the confessions were made after full understanding and voluntarily."

It would, therefore, be clear, as rightly contended by Shri Rawal that merely because guidelines in ***Kartar Singh Vs. State of Punjab (cited supra)*** were not fully followed, that by itself does not wipe out the confession recorded. We have already given our reasons for holding that the confession was recorded by A.K. Suri (PW-2) taking full care and cautions which were required to observe while recording the confession. In ***Ravinder Singh alias Bittu Vs. State of Maharashtra (cited supra)***, it has been observed in Paragraph 19 that if the confession made by the accused is voluntary and truthful and relates to the accused himself, then no further corroboration is necessary and a conviction of the accused can be solely based on it. It has also been observed that such confessional statement is admissible as a substantive piece of evidence. It was further observed that the said confession need not be tested for the contradictions to be found in the confession of the co-accused. It is for that reason that even if the other oral evidence goes counter to the statements made in the confession, one's confession can be found to be voluntary and reliable and it can become the basis of

the conviction. In this case, there is ample corroboration to the confession in the oral evidence as well as the documentary evidence in shape of a chit, which is referred to in the said confession. There is a clear reference that the Personal Assistant, who was a non-Kashmiri and kept a beard, had sent a slip inside. Ultimately, that slip was found by the police, which corroborate the contents in the confession. In our opinion, that is a sufficient corroboration to the confession. In ***Lokeman Shah & Anr. Vs. State of W.B. etc. etc. (cited supra)***, this Court considered the confession which was under Section 164 Cr.P.C. Therefore, this case is not of much importance to us. In the last referred case of ***Abdulvahab Abdul Majid Shaikh & Ors. Vs. State of Gujarat etc. etc. (cited supra)***, a plea was raised that though the Chief Judicial Magistrate was readily available to record the confession, the police officer recorded the confession himself. This Court, in Paragraph 9 of the said judgment, observed as follows:-

"The crucial question is whether at the time when the accused was giving the statement he was subjected to coercion, threat or any undue influence or was offered any inducement to give any confession."

The Court ultimately came to the conclusion that

the confession did not suffer from these defects. In Paragraph 13 of the said judgment, the question of availability of the Chief Judicial Magistrate was discussed. Further the Court observed:-

"Under Section 15 of the TADA, a police officer is permitted to record the confessional statement of the accused and certain strict procedure is prescribed.
The appellants have no case that this procedure has in any way been violated. Merely because the confession was retracted, it may not be presumed that the same was not voluntary."

The confession was accepted by this Court and the appeal was dismissed.

28. All these cases suggest that the only test which the Court has to apply is whether the confession was voluntary and free of coercion, threat or inducement and whether sufficient caution is taken by the police officer who recorded the confession. Once the confession passes that test, it can become the basis of the conviction. We are completely convinced that the confession in this case was free from all the aforementioned defects and was voluntary.

29. We have gone through the complete confession as was given and we are of the clear opinion that the said confession was totally voluntary and all the necessary precautions were taken while recording the same. We are, therefore, of the opinion that the appellant had,

in fact, given the confession voluntarily and he was not, in any way, compelled to give the same. Once that position is clear, it only remains to be seen as to whether the said confession could be relied on exclusively for proving the offence u/s. 302 of the RPC.

30. A very substantial argument was raised before us that, considering the language of Section 15 of the TADA Act, the said confession could have been used only against the TADA Act offences namely Section 3 of the TADA Act which was charged against the accused/appellant and it cannot be used for a Non-TADA offence like Section 302 of the RPC and it could not even be read in order to prove the said offence. This question is already settled against the defence as we have earlier pointed out. Shri Sushil Kumar urged that we should at least make a reference to the larger Bench as the case was not correctly decided nor the Judgment was properly given. We are unable to accept the argument of Shri Sushil Kumar. The aforementioned judgment is by a three Judge Bench and is binding on us. This is apart from the fact that the facts relating to Section 3 (3) of the TADA Act and the facts relating to Section 302 of RPC are completely inter-mixed in this matter. They are the part of the same transaction. A plain reading of the confession clearly goes to show that the accused was

guilty of conspiring or attempting to commit or advocating, abetting, advising or inciting or knowingly facilitating the commission of a terrorist act or any act preparatory to a terrorist act. The act of killing Moulvi Farooq comes within the definition of 'terrorist act' as given in Section 2 (h) r/w. Section 3 (1) of the TADA Act inasmuch as, in order to achieve the objectives as described in Section 3 (1), Moulvi Farooq was put to death by firing at him. The confession in clearest possible terms and in detailed manner shows formation of a group of terrorists, who were in all seven in number. The confession of accused refers to the training in the use of fire arms and his visit to Pakistan in the year 1989 by crossing the border from Chowkibal side which is on Kupwara side. The appellant has given the whole outfit including the names of leader and other companions and the confession also refers to the fire arms brought by the group of terrorists from Pakistan and the training which was for bringing into effect the terrorist activities in the Kashmir valley. The appellant then gives a graphic account of the five terrorists' action in the years 1989 and 1990. The appellant also gives a detailed account about the members in the group who had taken active part in those activities. The last activity was about killing of

Mirwaiz Moulvi Farooq on 21.5.1991. While elaborating the 5th terrorist activity, it was confessed by the appellant that Moulvi Farooq was considered to be an agent of the CBI and the Government of India and two days prior to his death, one Abdulla Bangroo had ordered killing of Mohd. Farooq. At the time when these orders were given, Ajmal Khan and the appellant herein were with Abdullah Bangroo. It is clear from the confession that the whole modus operandi was discussed and after discussions, the task was given to himself, Bilal and Inayat. They had also visited the house of Moulvi Farooq and met the Chowkidar five days prior to the incident. They again visited the house of deceased where the appellant had a talk with deceased Moulvi Farooq and the financial help which he had promised for, was sought. The date and time for further meeting was decided at that time itself. He then gave reasons for not killing Moulvi Farooq on that day itself.

31. The appellant, thereafter, gave a complete story as to how they went to Moulvi's house and further that he was carrying a German pistol, Inayat was carrying a French pistol and Bilal was carrying a Chinese pistol. According to him, it was decided that it was Bilal who was to fire on Moulvi while appellant and Inayat were to give him protection from others. Detailed description

is thereafter given as to how they went from Naidyar by Shikara by giving Rs.20/- to him and how they came to Durgah Hazratbal. It has then come in the confession that from Hazratbal they walked down to the house of Moulvi Farooq and met the Chowkidar whom they had met earlier. A very significant fact is then stated that, after they met the Personal Assistant of Moulvi Saheb, the said Personal Assistant gave a slip and the Mali who had taken the chit inside came out and informed that Moulvi Saheb was calling them inside. Therefore, they all got up from the chair and Bilal went inside the room of Moulvi, while the appellant and Inayat took positions and took out guns and Inayat had also fired one round after Bilal had started firing inside Moulvi's room. The accused had also taken active part in ordering others to put their hands up. Thereafter, they ran away. He also confirmed that his shirt was held by Gulam Qadir Sofi, but he got himself released and ran away. The details of the act, of their movements after the act and about the chit totally convince that this confession of the accused was not only a voluntary confession but was truthful one. Anxiety on the part of the appellant to given press note after the act has also figured in the confession. It has also come in the confession of the appellant herein that the appellant got Rs.35,000/-

and he, therefore, went to Delhi to terrorise the Central Government. He then also referred to his activity in Delhi and his total stay in Delhi. It has come in the confession that their group carried out five bomb blasts in Delhi. A graphic description thereof has also come in the confession. It has also come in the confession that he had visited Pakistan, Lahore and Muzzaffarabad to meet other members of the group namely Hyder, Hanif Hyder, Nasir Khan and Yusuf Bangroo on a fake passport. The said confession also gives details that the said passport was issued in Sikar, Rajastan with Visa of Pakistan. He also gave details of the dress which he was wearing on the day when Moulvi was put to death. All these details cannot be said to simply have been imagined by A. K. Suri (PW 2) so as to include the same in the confession of the accused. In his examination under Section 313 of the Code of Criminal Procedure, the appellant has flatly denied of having made any statement, much less confessional statement to Shri A.K.Suri. His answer to a question is as follows :

"I was arrested by the Delhi. I didn't make any statement before Mr.Suri. Mr. Suri has indulged in making a wrong statement. In none of the cases, I made my statement. Mr. Suri, Company Officer of a case was a Supervising Officer. Whatever used to come in his heart, he used to do that. He was conducting all proceedings at Delhi. "

The afore-cited answer suggests that the appellant, at no point of time, had ever made any statement to Shri A. K. Suri either in Delhi or in Srinagar. Very strangely, however, in Ground A of the appeal, a portion of confessional statement is quoted as under:

> "Inayat came out of P. A.'s room and had also fired one round as Bilal started firing inside Moulvi's room. I had also taken up the position told the occupant of the P.A.'s room to hands up. "

Relying on this, the ground further says as under:

> "Such a conviction and sentence is prima facie wrong as the appellant at the best could be held guilty of abetting the crime of murder and not committing murder. Therefore, the life sentence imposed upon him under Section 302 RPC is wrong in law..... "

32. In view of the above, it is clear that the appellant herein on one hand has chosen to rely upon a part of the confession and on the other hand, he asserts that he had, at no point of time, made any confessional statement. We do not wish to rely on this circumstance. However, we have made mention of it only to show hollowness of defence on the part of the appellant.

33. Even otherwise, we are fully satisfied that the confession was indeed made by the appellant and the details given in the confession and the meticulous planning that went behind committing murder of Moulvi Farooq, which has been reflected in the confession, not

only render it voluntary, but truthful also. We are thoroughly convinced that this confession is not only a good, voluntary and truthful confession but a reliable one also and the trial Court has committed no mistake whatsoever in relying upon the said confession. Once we accept the confession made u/s. 15 of the TADA Act, there is no necessity of any other evidence being required. A very halting argument was made before us that the charge was only for the conspiracy and it was clear that the accused was convicted for the offence u/s. 302 of RPC simplicitor. We do not think that such an argument can be made when the appellant has taken part in the conspiracy. The way the appellant himself has worked in the success of the conspiracy, the way he has handled the guns and accompanied two other assailants to the house of Mirwaiz Moulvi Faooq and the manner in which the plan was executed convince us that the order is absolutely correct. We have not been able to see nor the learned Senior Counsel appearing on behalf of the appellant is able to point out any prejudice being caused on account of defect of charge, which question was not even argued before the trial Court. We do not find any merit in the instant appeal and proceed to dismiss the same. Consequently, the appeal is dismissed.

.....
J.

[V. S. Sirpurkar]

.....J.
[Dr. Mukundakam Sharma]

New Delhi;
July 21, 2010.