* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **CRL.A. 1411/2010**

% Reserved on: 3rd July, 2012
Decided on: 3rd September, 2012

FIROZ ABDUL LATIF GHASWALA & ANR. ..... Appellants
Through: Mr. N.D. Pancholi and Mr. Kahorwgam Zimik, Advocates.

versus

STATE GOVT. OF NCT OF DELHI ..... Respondent
Through: Mr. Manoj Ohri, APP for the State.

Coram:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this appeal the Appellants challenge the judgment dated 15th December, 2009 passed by the Learned Additional Sessions Judge convicting the Appellants for offences under Section 5 of the Explosive Substance Act, 1908 (in short ES Act) read with Sections 18 & 23 of the Unlawful Activities (Prevention) Act, 1957 (in short UAP Act) and Section 120B IPC and the order on sentence dated 16th December, 2009 directing them to undergo rigorous imprisonment for a period of 5 and 6 years respectively & fine of Rs.25,000/- each for offence under Section 5 of the ES Act, and 7 years rigorous imprisonment & fine of Rs.50,000/- for each offence under Section 18 & 23 of UAP Act and 5 years rigorous imprisonment under Section 120B IPC. In default of payment of fine they have been directed to undergo rigorous imprisonment for a period of one year on each count.

2. Learned counsel for the Appellant submits that the Appellants are not liable to be convicted for offences punishable under Section 18 & 23 of the

UAP Act. The said provisions are attracted only if the accused have committed terrorist attack punishable under Section 15 of the UAP Act. Reliance is placed on *Pulin Das Vs. State of Assam (2008) 2 SCC (Crl.) 520* to contend that only if the ingredients of terrorist attack are satisfied then one can be held guilty of committing such offences. The prosecution has failed to prove that there was any intention on the part of the Appellants as required by Section 15 of the UAP Act. Mere recovery of arms or explosive material is not the proof of intention to threaten sovereignty, integrity etc. of India. Reliance is placed on *State of Rajasthan Vs. Ajit Singh and ors. 2008 Crl.L.J. 364 (SC)* to contend that mere recovery of arms is not sufficient to prove that accused intended to use the same for terrorist activity. Further no case for enhanced penalty under Section 23 UAP Act is made out as there is no evidence that there was any intention to aid any terrorist. Further, there is no admissible evidence to show existence of any "terrorist" which may come within the definition of Section 15 read with Section 2(k) of the UAP Act. The disclosure made by Appellant No.1 Firoz Abdul Latiff Ghaswala that they were going to deliver the explosive material to one Abu Hamza, the alleged Pakistani national at Jawahar Lal Nehru stadium and the consequent encounter in which the alleged Abu Hamza was killed by the Police party is not admissible in evidence. There is evidence led qua the alleged encounter. Further, no documents regarding the same have been placed on record. The public witnesses PW-2 and PW3 who allegedly witnessed the recovery and the disclosure statements have not supported the prosecution case that an information about alleged terrorist Abu Hamza was given to the Police in their presence. It is the case of the prosecution that Abu Hamza was residing as a tenant under the assumed name of Rajesh in the house of Uttam Chand

Bareja PW-4 at Ballabhgarh, Haryana and huge recovery of arms and explosives was allegedly made from the said house within few hours of the said encounter on the night of 8th May, 2006 itself. However, the dead body of Abu Hamza has not been got identified by the said landlord Uttam Chand Bareja. There is no evidence to prove that the said Abu Hamza was a terrorist or a Pakistani national. The Appellants cannot be held guilty under Section 5 of the ES Act as the recovery is not reliable. The alleged public witnesses PW-2 and PW-3 were joined in the investigation only after the Appellants were apprehended. No effort was made to join public witnesses by the raiding party, though there was an advance information. Even while allegedly following the Appellants to the Railway quarter from where they were apprehended, no efforts were made to join any independent person. Reliance in this regard is placed on *Vijay Kumar vs. State 2007 (1) JCC 16 DB Delhi*. Further the testimony of the two public witnesses is not convincing and is contrary to the statements of the police witnesses. There is contradiction in the statement of the Police witnesses as well. Further, there is no evidence for conviction under Section 120B IPC as the allegations of conspiracy are vague in nature. It is therefore prayed that appeal be allowed. In the alternative it is stated that the total fine amount and sentence in default thereof being highly excessive, the same be reduced.

3. Learned APP on the other hand contends that every effort was made to join the public witnesses. PW-1 in his testimony has stated that 10 to 12 public persons were requested to join the investigation, however they refused. When the Appellants were apprehended, two public witnesses, who reached there, were made to join and they witnessed the search and seizure proceedings. Both the public witnesses have fully supported the case of the

prosecution. They have identified the Appellants and the case property. The disclosure of the Appellants leading to the discovery of the co-accused Abu Hamza near Jawahar Lal Nehru stadium, who died in the encounter and the recoveries made pursuant thereto are relevant and admissible under Section 27 of the Indian Evidence Act. The quantity of arms and ammunitions, the Appellants were carrying to supply to a Pakistani national clearly shows the intention. In a case of conspiracy the intention has to be inferred from the attending facts and circumstances. There is no contradiction in the testimonies of the police witnesses or between the public witnesses and the Police witnesses. Hence there is no merit in the appeal and the same be dismissed.

4. I have heard learned counsel for the parties and perused the record.

5. Briefly the prosecution case is that on 6th May, 2006 at about 4.30 PM a secret information was received in the office of Special Cell, Lodhi Colony that one Abdullah and one Mohd. Ali would be arriving by train Golden Temple Express at Hazrat Nizamuddin Railway Station and they would be in possession of explosive material. The said information was reduced in writing and information in this regard was sent to the senior officers. A team was constituted under the supervision of PW-1 Inspector Mohan Chand Sharma. At 6.50 PM the train arrived at Nizamuddin Railway Station. The informer identified the Appellants No.1 & 2 as Abdullah and Mohd. Ali respectively. PW-1 & PW-7 apprehended Appellant no.1 while S.I. Vinay Tyagi and Const. Balwant apprehended Appellant No.2 when they reached in front of the Railway quarters of block 22 & 26. They were also accompanied by PW-14 and PW-19 who were the members of the raiding party. Two public witnesses PW-2 Jai Prakash Kashyap and PW-3 Jai

Prakash Singh, who reached at the spot, were also associated in the investigation. During the search a blue colour bag Ex. P-3 was recovered from Appellant No.1 besides Rs. 50,000/- . The blue colour bag contained a sweet box containing 2 kg black colour explosive material. Samples were taken from the plastic container and marked as S1 & S2. The remnant and the samples were seized vide seizure memo Ex. PW1/A and sealed with the seal of RSS.

6. From the Appellant No.2 an orange colour bag Ex. P-5 was seized which contained 4 electronic detonators covered in white envelopes. They were sealed in plastic bottle with seal of RSS. A sweet box was also found wrapped containing 2 Kg of black colour explosive material. Two samples of 10 grams each were taken and sealed in separate pullandas with seal of RSS and marked as S3 & S4. The seizure memo Ex.PW1/B was prepared in this regard. Seizure memos were signed by the public witnesses. Seal of RSS after use was given to PW-7 which was returned on 24th May, 2006.

7. The Appellants disclosed that the explosive material was meant for one Abu Hamza, a Pakistani national who was to take delivery at 7.15 PM at Jawahar Lal Nehru Stadium. Senior officers were informed and a raid was conducted at Jawahar lal Nehru stadium where Abu Hamza came in a santro car. In an encounter Abu Hamza died. From the personal search of Abu Hamza one pocket diary containing slip of Rajesh Kumar and his address and one driving license in the name of Rajesh Kumar were also found. On a raid being conducted at the address mentioned in the slip, huge recoveries of arms and ammunitions were done. PW-4 Uttam Chand Bareja, the landlord of the premises identified the photo of Abu Hamza as Rajesh who was living in his house. On a rukka being sent an FIR was registered. After completion

of investigation and grant of sanction for prosecution for offences under Section 4/5 ES Act and under Section 196(1) Cr.P.C. for offences under Section 121/121A/122 and 123 IPC a charge-sheet was filed. PW-6 proved the time of arrival of the Golden Temple Express vide certificate Ex.PW-5/A. As per the report Ex.PW-12/A the material recovered was of special category explosive substance.

8. The Police witnesses PW1 SI Rajender Sahrawat, PW7 SI Dalip Kumar, PW10 Inspector Raj Pal Dabbas, PW13 SI Ravinder Tyagi and PW14 Inspector Ramesh Lamba have deposed that on 8th May, at about 4.30 p.m. specific information was received in the office of special cell, Lodhi Colony regarding one Abdulla and Mohd. Ali who were active members of LeT, that they were arriving from Golden Temple Express Train which would reach Hazarat Nizamuddin Railway Station and they were in possession of Explosive material. The information was recorded in the roznamacha. The matter was discussed with the Senior Officers of the Cell. Under the supervision of Inspector Mohan Chand Sharma, a team consisting of Inspector Sanjay Dutt, Inspector Badrish Dutt, SI Rahul, SI Vinay Tyagi, SI Ravinder Tyagi, SI Ramesh Lamba, SI Dharmender, SI Dalip, SI Pawan, SI Ashok Sharma, ASI Shahjan, ASI Sanjeev Lochan, ASI Anil Tyagi, HC Ajeet, HC Hansraj and other officials was constituted. At about 6.00 p.m. they reached in front of comsom restaurant outside Nizamuddin Railway Station. Informer also met them there. PW1 and Inspector Mohan Chand Sharma requested 10-12 public persons to join the raiding party but they refused to join the raiding party after giving some genuine excuses. They made enquiries from the Enquiry Counter about the arrival of the train and platform number. PW1 came to know that the train will come at 6.45 p.m. at

platform no. 3. They took position on platform no. 3. PW1 along with Inspector Mohan Chand Sharma and secret informer were standing near stairs of foot over bridge. The train arrived at 6.50 p.m. Accused Feroz Abdul Latif Ghaswala @ Abdulla was pointed out by the informer as Abdulla and accused Mohd. Ali Chipa as Mohd Ali, when they reached near the stairs of the foot over bridge. They followed both these accused persons till the accused came out from the railway station and started walking on foot towards Ashram. When both the accused persons reached in front of railway quarters of block 22 and 26 they overpowered both the accused persons. Recovery of explosive substance as detailed above was made.

9. PW2 and PW3 have deposed that on 8th May, 2006 they were strolling in the boundary of Railway Colony, where their quarter were situated. They heard some noise at a distance of about 10 meter away on the road. They found that two accused persons (Appellants) Feroz Abdul Latif Ghaswala @ Abdulla and Mohd. Ali Chhipa were apprehended by the police team. The bags of the accused persons were taken from them and were being checked. On checking those bags, some black colour material were recovered from the two bags and it was told to them that the same was explosive. Some other articles such as clothes, tooth paste etc. were also found. Two samples each of the black colour explosive material from each bag were taken and the remaining black colour explosive material was sealed in a pullanda with the seal of RSS. The other recovered articles were also seized and sealed in a pullanda with seal of RSS. One white envelope was also found in the orange bag containing four tubes having wires seems to be electronic device having wires wrapped around each such tube. Both the sweet boxes from which the material was recovered were found containing 2 kg each black colour

explosive material. Each electronic device was wrapped in cotton wool to avoid contact with each other and all the four electronic devices were put in a plastic container collectively and were sealed in a pullanda with the seal of RSS. Further accused Feroz Abdul Latif Ghaswala @ Abdulla was taken by the police team towards Jawahar Lal Nehru Stadium because someone was waiting there to whom the said black colour explosive material was to be handed over. Despite the lengthy cross-examination nothing material could be elicited from the testimony of the these witnesses.

10. PW8, the expert witness has deposed that on 22nd May, 2006 he was posted at CFSL, CBI, CGO Complex, Lodhi Road, New Delhi as Senior Scientific Officer, Grade-I (Ballistics)-cum-Assistant Chemical Examiner. On that day, 13 sealed parcels were received in CFSL, in connection with this case, which were marked to him for analysis. The parcels were marked as A, B, F, S1, S2, I and J1 to J7 and all were sealed with the seal of SKY. Various types of examinations were conducted in the Laboratory with the help of scientific aides. On the basis of physical examination, chemical analysis of barrel wash and test firing, he opined that two 7.62 mm/AK 56 assault rifles marked W1 and W2 contained in parcels no. A and B respectively were fire arms as defined in Arms Act and were in working order and these were used and fired. Six 7.62 mm/AK 56 assault rifle magazines marked M1 to M6 contained in parcel No. F were in working order and could be fitted in two 7.62 mm assault riffles marked W1 and W2 in question. One hundred and eight (180) 7.62 mm/AK 56 assault riffle cartridges marked C1 to C180 contained in parcel No. F were ammunitions as defined in Arms Act and were live ones. Parcel No. S1 contained Nitro Glycerin based high explosive present. Parcel No. S2 contained urea. Parcel

No. J1 to J6 contained Nitric Acid and parcel No. J7 contained Glycerin which are not explosive nor form competent improvised explosive device individually or collectively. Parcel No.I contained electronic gadgets namely fuses, resistances, ICs and printed circuit boards etc. and these items can be used to form components of improvised explosive devices. He exhibited his report as Ex.PW8/A.

11. Similarly, PW12 has deposed that on 22nd May, 2006 he was posted at CFSL, CBI, CGO Complex, Lodhi Road, New Delhi, as SSO (Ballistic) Grade II. On that day, five sealed parcels, out of which four parcels were marked from S1 to S4 and one parcel was marked D and they were sealed with the seal of RSS were received in CFSL and were marked to him for examination. He examined all the five parcels. Parcels S1 to S4 were found to contain black granules like material and parcel D contain four electric detonators. After examination, it was found that S1 and S4 contain RDX and PETL, which are high explosives as defined in ES Act. Parcel D was having live detonators and therefore, they are explosive substance as defined in ES Act. The report was exhibited as Ex.PW12/A. In his cross exanimation PW12 though stated that he did not remember to whom the letter dated 18th May, 2006 was referred to or who received the said five parcels for examination and from whom. The facts brought in cross-examination do not go to the root of the matter or effect the veracity of this witness.

12. The testimony of PW1 SI Rajender Sherawat and PW29 IO ACP Sanjeev Kumar Yadav is clear and cogent as they have stated that PW29 arrived at spot at about 7.50 when the custody of the Appellants was handed over to him. It is relevant to note that PW2 and PW3 the public witnesses

have deposed that on the relevant date they were present at the spot and 2kg of black colour material which was told to be an explosive was recovered from each of the Appellant, that is, Firoz Abdul and Mohd. Ali. This testimony is clear and cogent. Further the contradictions pointed out by the learned counsel for the defence is the testimony of PW2 and PW3 as regards the counting of money recovered from the Appellant is not material to dent the prosecution case.

13. Reliance on *Pulin Das @ Panna Koch vs. State of Assam, 2008 Cri.L.J 2070* SC is misconceived. In the said decision the Hon'ble Supreme Court was dealing with a conviction under Sections 3(1) & 3(2) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short 'TADA'). In the light of the facts therein and the ingredients of Section 3 of TADA their Lordships held that mere possession of arms and ammunitions cannot lead to the inference that a terrorist activity has been committed. In the present case the Appellants have been convicted for offences punishable under Section 18 and 23 of UPA Act which provide as under:-

> "18. Punishment for conspiracy, etc.- Whoever conspires or attempts to commit, or advocates, abets, advises or incites, directs or knowingly facilitates the commission of, a terrorist act or any act preparatory to the commission of 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.
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> 23. Enhanced penalties – (1) If any person with intent to aid any terrorist or a terrorist organisation or a terrorist gang contravenes any provision of, or any rule made under the Explosives Act, 1884 (4 of 1884) or the Explosive Substances Act, 1908 (6 of 1908) or the Inflammable Substances Act, 1952 (20 of 1952) or the Arms Act, 1959 (54 of 1959), or is in

> unauthorised possession of any bomb, dynamite or hazardous explosive substance or other lethal weapon or warfare, he shall, notwithstanding anything contained in any of the aforesaid Acts or the rules made thereunder, 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.
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> (2) Any person who with the intent to aid any terrorist, or a terrorist organisation or a terrorist gang attempts to contravene or abets, or does any act preparatory to contravention of any provision of any law or rule specified in sub-section (1), shall be deemed to have contravened that provision under sub-section (1) and the provisions of that sub-section in relation to such person, have effect subject to the modification that the reference to "imprisonment for life" therein shall be construed as a reference to "imprisonment for ten years".

14. A perusal of Section 18 UAP Act shows that it punishes conspiracy and acts to attempt, abet, advise the commission of a terrorist act or any act preparatory to the commission of a terrorist act. The possession and supply of large quantity of RDX with detonators is certainly an act preparatory to and to aid the commission of a terrorist act. Section 23 UPA Act provides for the enhanced penalty if a person is found in possession of explosive substance with intent to aid a terrorist.

15. The disclosure statements of the Appellants leading to the encounter of the deceased Abu Hamza and the recoveries of arms and ammunition from the flat where he resided are also relevant. Section 27 of the Indian Evidence Act reads as under:

> "27. How much of information received from accused may be proved.- Provided that, when any fact is deposed to as discovered in consequence of information received from a

person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

16. In *State (NCT of Delhi) vs. Navjot Sandhu @ Afsan Guru, (2005) 11 SCC 600* it was observed:

> "114. The interpretation of Section 27 of the Evidence Act has loomed large in the course of arguments. The controversy centred round two aspects:
>
> (*i*) Whether the discovery of fact referred to in Section 27 should be confined only to the discovery of a material object and the knowledge of the accused in relation thereto or the discovery could be in respect of his mental state or knowledge in relation to certain things — concrete or non-concrete.
>
> (*ii*) Whether it is necessary that the discovery of fact should be by the person making the disclosure or directly at his instance. The subsequent event of discovery by the police with the aid of information furnished by the accused — whether can be put against him under Section 27.
>
> These issues have arisen especially in the context of the disclosure statement (Ext. PW-66/13) of Gilani to the police. According to the prosecution, the information furnished by Gilani on certain aspects, for instance, that the particular cellphones belonged to the other accused, Afzal and Shaukat, that the Christian Colony room was arranged by Shaukat in order to accommodate the slain terrorist Mohammed, that police uniforms and explosives "were arranged" and that the names of the five deceased terrorists were so and so are relevant under Section 27 of the Evidence Act as they were confirmed to be true by subsequent investigation and they reveal the awareness and knowledge of Gilani in regard to all these facts, even though no material objects were recovered directly at his instance.

115. The arguments of the learned counsel for the State run as follows:

(*i*) The expression "discovery of fact" should be read with the definition of "fact" as contained in Section 3 of the Evidence Act which defines the "fact" as meaning and including "any thing, state of things, or relation of things, capable of being perceived by the senses" *and also includes* "any mental condition of which any person is conscious" (emphasis supplied). Thus, the definition comprehends both physical things as well as mental facts. Therefore, Section 27 can admit of discovery of a plain mental fact concerning the informant accused. In that sense, Section 27 will apply whenever there is discovery (not in the narrower sense of recovery of a material object) as long as the discovery amounts to be confirmatory in character guaranteeing the truth of the information given, the only limitation being that the police officer should not have had access to those facts earlier.

(*ii*) The application of the section is not contingent on the recovery of a physical object. Section 27 embodies the doctrine of confirmation by subsequent events. The fact investigated and found by the police consequent to the information disclosed by the accused amounts to confirmation of that piece of information. Only that piece of information, which is distinctly supported by confirmation, is rendered relevant and admissible under Section 27.

(*iii*) The physical object might have already been recovered, but the investigating agency may not have any clue as to the "state of things" that surrounded that physical object. In such an event, if upon the disclosure made such state of things or facts within his knowledge in relation to a physical object are discovered, then also, it can be said to be discovery of fact within the meaning of Section 27.

(*iv*) The other aspect is that the pointing out of a material object by the accused himself is not necessary in order to attribute the discovery to him. A person who makes a disclosure

may himself lead the investigating officer to the place where the object is concealed. That is one clear instance of discovery of fact. But the scope of Section 27 is wider. Even if the accused does not point out the place where the material object is kept, the police, on the basis of information furnished by him, may launch an investigation which confirms the information given by the accused. Even in such a case, the information furnished by the accused becomes admissible against him as per Section 27 provided the correctness of information is confirmed by a subsequent step in investigation. At the same time, facts discovered as a result of investigation should be such as are directly relatable to the information.

120. The history of case-law on the subject of confessions under Section 27 unfolds divergent views and approaches. The divergence was mainly on twin aspects: (*i*) Whether the facts contemplated by Section 27 are physical, material objects or the mental facts of which the accused giving the information could be said to be aware of. Some Judges have gone to the extent of holding that the discovery of concrete facts, that is to say material objects, which can be exhibited in the Court are alone covered by Section 27. (*ii*) The other controversy was on the point regarding the extent of admissibility of a disclosure statement. In some cases a view was taken that any information, which served to connect the object with the offence charged, was admissible under Section 27. The decision of the Privy Council in *Kottaya case* [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] which has been described as a *locus classicus*, had set at rest much of the controversy that centred round the interpretation of Section 27. To a great extent the legal position has got crystallised with the rendering of this decision. The authority of the Privy Council's decision has not been questioned in any of the decisions of the highest court either in the pre- or post-independence era. Right from the 1950s, till the advent of the new century and till date, the passages in this famous decision are being approvingly quoted and reiterated by the Judges of this Apex Court. Yet, there remain certain grey areas as demonstrated by the arguments advanced on behalf of the State.

121. The first requisite condition for utilising Section 27 in support of the prosecution case is that the investigating police officer should depose that he discovered a fact in consequence of the information received from an accused person in police custody. Thus, there must be a discovery of fact not within the knowledge of police officer as a consequence of information received. Of course, it is axiomatic that the information or disclosure should be free from any element of compulsion. The next component of Section 27 relates to the nature and extent of information that can be proved. It is only so much of the information as relates *distinctly to the fact thereby discovered* that can be proved and nothing more. It is explicitly clarified in the section that there is no taboo against receiving such information in evidence merely because it amounts to a confession. At the same time, the last clause makes it clear that it is not the confessional part that is admissible but it is only such information or part of it, which relates distinctly to the fact discovered by means of the information furnished. Thus, the information conveyed in the statement to the police ought to be dissected if necessary so as to admit only the information of the nature mentioned in the section. The rationale behind this provision is that, if a fact is actually discovered in consequence of the information supplied, it affords some guarantee that the information is true and can therefore be safely allowed to be admitted in evidence as an incriminating factor against the accused. As pointed out by the Privy Council in *Kottaya case* [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] : (AIR p. 70, para 10)

> "clearly the extent of the information admissible must depend on the exact nature of the fact discovered"

and the information must distinctly relate to that fact.

Elucidating the scope of this section, the Privy Council speaking through Sir John Beaumont said: (AIR p. 70, para 10)

> "*Normally* the section is brought into operation when a person in police custody produces from some place of

concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused."

(emphasis supplied)

We have emphasised the word "normally" because the illustrations given by the learned Judge are not exhaustive. The next point to be noted is that the Privy Council rejected the argument of the counsel appearing for the Crown that the fact discovered is the physical object produced and that any and every information which relates distinctly to that object can be proved. Upon this view, the information given by a person that the weapon produced is the one used by him in the commission of the murder will be admissible in its entirety. Such contention of the Crown's counsel was emphatically rejected with the following words: (AIR p. 70, para 10)

"If this be the effect of Section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect."

Then, Their Lordships proceeded to give a lucid exposition of the expression "fact discovered" in the following passage, which is quoted time and again by this Court: (AIR p. 70, para 10)

"In Their Lordships' view it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of

> the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. *It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge*, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed *A*' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."
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> (emphasis supplied)

125. We are of the view that *Kottaya case* [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] is an authority for the proposition that "discovery of fact" cannot be equated to the object produced or found. It is more than that. The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place.

126. We now turn our attention to the precedents of this Court which followed the track of *Kottaya case* [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] . The ratio of the decision in *Kottaya case* [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] reflected in the underlined [Ed.: Herein italicised] passage extracted supra [Ed.: In para 121, p. 701, above] was highlighted in several decisions of this Court.

127. The crux of the ratio in *Kottaya case* [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] was explained by this Court in *State of Maharashtra* v. *Damu* [(2000) 6 SCC 269 : 2000 SCC (Cri) 1088] . Thomas J. observed that: (SCC p. 283, para 35)

> "The decision of the Privy Council in *Pulukuri Kottaya* v. *Emperor* [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] is the most quoted authority for supporting the interpretation that the 'fact discovered' envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

In *Mohd. Inayatullah* v. *State of Maharashtra* [(1976) 1 SCC 828 : 1976 SCC (Cri) 199] , Sarkaria, J. while clarifying that the expression "fact discovered" in Section 27 is not restricted to a physical or material fact which can be perceived by the senses, and that it does include a mental fact, explained the meaning by giving the gist of what was laid down in *Pulukuri Kottaya case* [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] . The learned Judge, speaking for the Bench observed thus: (SCC p. 832, para 13)

> "Now it is fairly settled that the expression 'fact discovered' includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see *Pulukuri Kottaya* v. *Emperor* [AIR 1947 PC 67 : 48 Cri LJ 533 : 74 IA 65] ; *Udai Bhan* v. *State of U.P.* [1962 Supp (2) SCR 830 : AIR 1962 SC 1116 : (1962) 2 Cri LJ 251])."

132. The following observations are also crucial:

> "As explained by this Court as well as by the Privy Council, normally Section 27 is brought into operation where a person in police custody produces from some place of concealment some object said to be connected with the crime of which the informant is the accused. The concealment of the fact which is not known to the police is what is discovered by the information and lends assurance that the information was true. No witness with whom some material fact, such as the weapon of murder, stolen property or other incriminating article is not hidden, sold or kept and which is unknown to the police can be said to be discovered as a consequence of the information

> furnished by the accused. These examples however are only by way of illustration and are not exhaustive. What makes the information leading to the discovery of the witness admissible is the discovery from him of the thing sold to him or hidden or kept with him which the police did not know until the information was furnished to them by the accused. A witness cannot be said to be discovered if nothing is to be found or recovered from him as a consequence of the information furnished by the accused and the information which disclosed the identity of the witness will not be admissible."

Then follows the statement of law:

> "But even apart from the admissibility of the information under Section 27, the evidence of the Investigating Officer and the panchas that the accused had taken them to PW 11 and pointed him out and as corroborated by PW 11 himself would be admissible under Section 8 of the Evidence Act as conduct of the accused."

17. It is thus apparent even if the fact that the co-accused Abu Hamza was discovered at the instance of the Appellants is not admissible in evidence under Section 27 the Evidence Act, the same is admissible under Section 8 of the Evidence Act. Further the factum of the co-accused Abu Hamza waiting for the accused near Jawahar Lal Nehru Stadium is also admissible under Section 27 of the Evidence Act. PW1 and PW7 have clearly deposed that after the recovery of the explosives the Appellants disclosed that they were to deliver the explosives to one Abu Hamza, a Pakistani national who was waiting for them at Jawaharlal National Stadium. When the police party reached the spot they found the said Abu Hamza at Jawaharlal Nehru Stadium who died in the encounter. PW13 has categorically deposed that during the personal search of Abu Hamza one internal connection slip was

recovered in the name of Rajesh Kumar, R/o 44/9 Ballabhgarh, Haryana. The recovery of huge cache of arms was effected from the above mentioned house at Ballabhgarh, Haryana. PW4, the landlord has identified the deceased Abu Hamza as the same person who had taken his house on rent impersonating him as Rajesh Kumar are also admissible and relevant pieces of evidence.

18. The contention of the learned counsel for the Appellant that the recovery of arms is not sufficient to prove that the accused had to use the same for terrorist activity holds no ground. The act of accused being in possession of explosive (RDX) with live detonators which were to be supplied to Abu Hamza and subsequent recovery of cache of arms and ammunitions from the house where he stayed on rent clearly shows the intention of the Appellants. From the quality and quantity of explosives with the Appellants, a clear inference can be drawn that they entered into a conspiracy as well as committed acts preparatory to commission of a terrorist act and facilitate some terrorist activity. Thus the ingredients of the act of conspiracy stand duly proved.

19. Under Section 5 of ES Act the onus shifted on the Appellants to show that the possession was for a lawful object, after the initial burden of proving the possession of explosive substance had been discharged by the prosecution. The Appellants have failed to discharge the said burden.

20. Learned counsel for the Appellants is also concerned with the fine imposed and sentence awarded in default of payment of fine as the Appellants have almost undergone the substantive sentences. According to learned counsel the fine amount of Rs.25,000/- Rs.50,000/- and Rs.50,000/- for offences under Sections 5 ES Act and Sections 18 and 23 UAP Act

respectively are excessive. I do not find any infirmity on this count in the order on sentence passed by the learned Additional Sessions Judge.

21. The appeal is accordingly dismissed.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 03, 2012
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