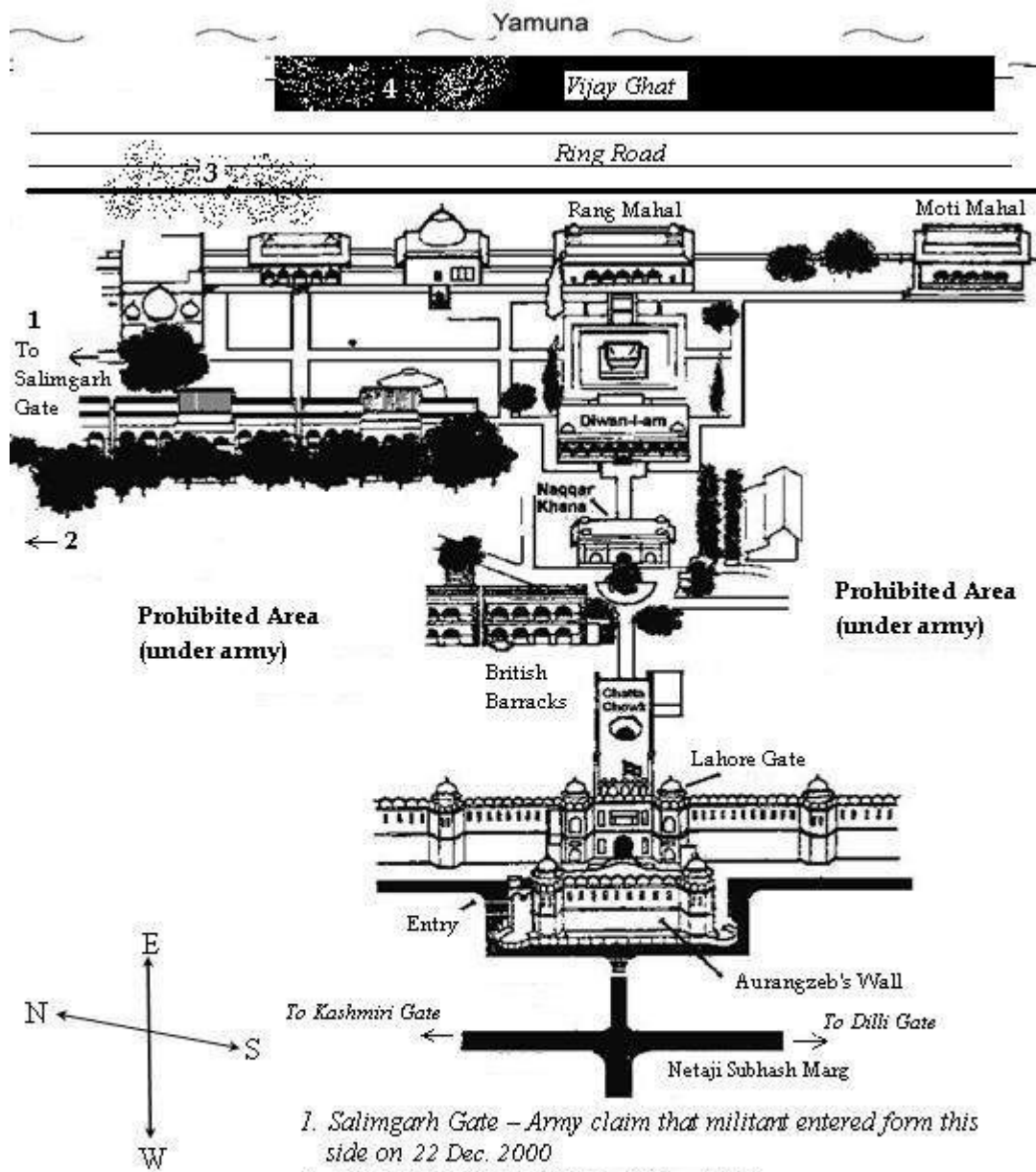




# An Unfair Verdict

*A Critique  
of the  
Red Fort Attack Judgment*

**Peoples Union for Democratic Rights  
Delhi, December 2006**



1. Salimgarh Gate – Army claim that militant entered from this side on 22 Dec. 2000
2. Firing takes place here on 22 Dec. 2000
3. Search takes place – night of 22-23 Dec., 2000  
Weapon recovery shown on 26/12/2000
4. Vijay Ghat – Weapon found on 23 December 2000

Note: Map not to Scale

**Sketch depicting Red Fort areas open to public**

ON FRIDAY, 22 DECEMBER 2000, at about 9 p.m., a firing incident took place inside the Red Fort at Delhi which housed, since 1857 and until recently, an Army garrison. Three Army personnel of the 7<sup>th</sup> Battalion of the Rajputana Rifles, namely, Sentry Abdullah Thakur, Naik Ashok Kumar and Rifleman Uma Shankar, died in the attack. While those who perpetrated the crime escaped, subsequent investigation conducted by the police led to an alleged Lashkar-e-Tayeba (LeT) militant Md. Ashfaq, who was arrested on late night of 25<sup>th</sup> December along with his wife Rehmana. It is claimed that on the basis of the information received from him, the police killed another alleged LeT militant in an encounter on 26<sup>th</sup> morning. Facts disclosed by Ashfaq are also said to have led to the arrests of a number of other persons said to have been involved in the conspiracy to attack the Red Fort. A number of key accused were also charged for 'waging war' against the Indian State.

After a trial which concluded in October 2005, main accused Md. Ashfaq was convicted on various counts including waging war and conspiracy to commit murder and was sentenced to death. Four accused were acquitted while another six accused were convicted for various offences and sentenced to imprisonment terms between 7 to 10 years. The case is presently before the High Court on appeal by the various accused and also for confirmation of the death sentence.

There is little doubt that vulnerable sections of our population are disadvantaged in defending themselves in criminal cases. This disadvantage is compounded by what they are charged under, what passes for a genre of law called anti-terrorist legislation. This has been previously noted by PUDR

in several reports including those relating to Parliament Attack and the Rajiv Gandhi Assassination. However, in the context of the current obsession with 'terrorism', 'distinctive discrimination' is not restricted to anti-terrorist legislation alone, but also permeates into the "ordinary" judicial process conducted under the Indian Penal Code etc. Thus once a person is accused of being involved in a "terrorist" attack or charged with "waging war" or even for "criminal conspiracy to wage war", it results in the judiciary relaxing procedures and providing the investigating agency as well as the prosecution with wide latitude.

The attack on the Red Fort is one such instance. Given the symbolism of hoisting of the Indian tri-colour at the Fort annually on Independence Day, an attack inside the Red Fort is seen to represent, symbolically at least, an attack on the country's independence. Given such passions and prestige, we therefore decided to not just examine the Judgement in this case but also the entire trial records. As a civil liberties group our main objective in analysing the trial record and the Judgement is not to arrive at the "truth". Given that the prosecution is likely to produce information that it perceives to be supporting its case, the truth, in so far as the attack on Red Fort is concerned, is unlikely to be known from court-records. We do not know if the real perpetrators actually escaped and those who were convicted were either innocent or peripherally involved.

Verily under the adversarial system of trial it is the evidence presented which determines the case for and against an accused. The evidence presented, testimonies recorded and the judgement pronounced were therefore analysed to see whether our criminal justice system lived up to its self-image to provide "fair trial" and whether the 'facts' as presented by the prosecution were proved beyond reasonable doubt so to establish the guilt of the accused persons.

What we do know is that evidence placed before the trial court - its very nature and the manner of discovery of facts in critical areas does not complete the chain of circumstances required to prove guilt. Evidence presented by the prosecution and, by and large, accepted by the Judge suffers from such impurities that it does not, beyond reasonable doubt, establish their involvement. In fact the perusal of the Judgement of the Trial Court shows clearly that the conviction of the other accused relies heavily on the conviction of Ashfaq for conspiring in the attack on Red Fort. As detailed later in the report, the entire case establishing Ashfaq's guilt, or the extent of his involvement, is itself doubtful. The house of cards, carefully built by the prosecution, so to speak, therefore collapses.

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## **I. 22<sup>nd</sup> December and the Prosecution Story**

### **The Incident and Aftermath**

On the night of 22<sup>nd</sup> December, Capt. SP Patvardhan, who was posted at Red Fort and was inside the Officers Mess, heard a firing. According to him, two intruders had entered Red Fort from Saleem Garh/Yamuna bridge direction and after firing at the Sentry, Naik and the Rifleman they ran towards the ASI Museum complex. By then the Army's quick reaction team had reached the spot and began firing at the intruders. At this point the two intruders escaped into a wooded area close to the Ring Road. The police was informed and SI Rajinder Singh and Ct Jitendra from Kotwali PS reached the spot by 9.25 pm. They were followed by SHO Kotwali, Ins. Roop Lal.

The area was sealed and was inspected the same night once the inquest papers, sketch map etc were prepared. Before the search began Capt SP Patvardhan handed over to Inspector Roop Lal three magazines including 28 live cartridges and 40 empty cartridges that had been found inside the fort. Search continued through the night until early hours of the morning with the help of search lights, dog squad, bomb disposal squad, crime team and a photographer. One polythene bag containing Indian currency worth Rs. 1415 and a paper slip with mobile number 98-112-78510 was found along with a 50 feet rope and a cap.

Surveillance was mounted on the movements of the owner of the mobile phone number, and call details revealed that phone calls had been made to both landline # 2720223 installed at 308 A DDA Flat Ghazipur and to 6315904 installed at 18-C Gaffur Nagar, Okhla where a computer firm "Knowledge Plus Computer centre" was located. The firm was owned by one Md Arif @ Ashfaq. On the evening of 25.12.00, on receiving a tip that Md Arif was to visit Ghazipur, a raid was conducted at 308 A DDA flat where three ladies were found. The police party decided to wait

and at 12.40 am of 26.12.00 Ashfaq was nabbed on his arrival.

The first FIR was registered on 22.12.00, No.688/2000 at PS Kotwali under Sections 186/353/302/34/307 IPC (obstructing and assaulting public servant, murder, attempt to murder and common intent) and 25/27 Arms Act. On 23/12/00 investigation of the case was transferred to Special Cell of Delhi Police. On 26/12/00 alleged LeT militant Md Arif @ Ashfaq was arrested vide FIR No. 419/2000 u/s 25 Arms Act at PS Kalyanpuri. A case vide FIR No. 630 DP26/12/2000 u/s 307/353/186/IPC, 25/27 Explosives Act was registered at PS New friends Colony. On 11/09/01 District Judge HR Malhotra passed orders for a joint trial of the three cases and charges framed against 11 arrested accused u/s 302/307/186/353/120B/121/121A/216/201 (waging war, criminal conspiracy, conspiring to commit certain offences against the state, harbouring and false information) along with 420/468/471/474 (cheating, forgery, use of forged document and possessing forged document) IPC, 25/27/54/59 of Arms Act, Sec 14 of Foreigners Act and 4/5 of Explosives Substance Act. The first chargesheet was filed on 20.2.2001 followed by seven supplementary chargesheets on 22.3.01, 11.6.01, 16.6.01, 26.6.01, 12.10.01, 4.12.01, and 5.12.01.

Charges against 11 accused were framed on 4/12/02. On 26/9/03 Delhi High Court ordered day to day trial. Prosecution examined 235 witnesses in all. The trial concluded on 24/10/05 in which the court acquitted 4 whilst convicting the remaining 7. On 31/10/05 Addl. Sessions Judge, O P Saini pronounced his sentence. In July 2006, the Delhi High Court admitted an appeal and revision petition by prosecution seeking enhancement of punishment from life imprisonment to death for two of the accused and life term for three others. All the accused have also appealed to the High Court against the trial court's verdict.



### **In Search of a Story: *the prosecution account***

According to the prosecution, Mohammad Arif @ Ashfaq was a resident of Abbotabad, Pakistan. In December 1999, he entered India illegally at the instance of Abu Bilal, the then Dy Commander of LeT, and initially took shelter in the residence of Nazir Ahmed Quasid in Srinagar with arms and ammunition. In January-February 2000, he came to Delhi with another militant, Abu Haider with the specific intention of setting up a base. He came in contact with Babar Mohsin, a half Kashmiri, who resided in Jama Masjid and who familiarized Ashfaq with the city and helped him with accommodation. Ashfaq went back to Srinagar and returned in May 2000 when he set up a computer center (Knowledge Plus) and rented two rooms in Okhla (one in the house of Nain Singh and another in Gian Chand's house). It is alleged that he rented the premises of Knowledge Plus from Sadakat Ali who was fully aware of his intentions.

From May 2000 onwards, Ashfaq got busy with his attempts to procure illegal documents for his stay in Delhi. With the help of Devender Singh and Rajiv Malhotra (employees of two driving schools) he procured a fake driving license from Ghaziabad Transport Authority. More fake documents were obtained: a learner's license and two ration cards (with different addresses) and more individuals were bribed and who willingly connived such as Matloob Alam (owner of a FPS) and Mool Chand Sharma (ration Inspector, Okhla) and Shehanshah Alam (for ration card with Ghaziabad address and learner's license at Jungpura).

With his ration card, he opened a bank account at HDFC, New Friends Colony for purposes of hawala transactions. The prosecution alleges that he collected hawala money from two individuals, Sabarullah and Sher Zaman to the tune of 36 lakhs. He deposited this money in the accounts belonging to the Quasids (Nazir Ahmed and his son,

Farookh) and one in the account of Bilal Ahmed Kawa in different banks in Connaught Place. Some of the hawala money was also deposited in his account in HDFC, New Friends. The Quasids would withdraw the money in Srinagar and disburse it to LeT militants for terrorist acts. Nine bank slips in Ashfaq's hand and 40 cheques signed by the Quasids prove that nearly 30 lakhs were transferred by Ashfaq to the Srinagar accounts of the Quasids.

Between May 2000 and December 2000, the prosecution shows evidence of three mobile numbers that Ashfaq used: 98-102-63721 which was activated on 16/6/00 and disconnected on 20/9/0; 98-112-42154 which was in operation till end November; and 98-110-78510 which was activated in late October and disconnected on 23<sup>rd</sup> December, the day after the attack. These mobile phones were used to connect with other conspirators and hawala racketeers.

In early December he married Rehmana Yusuf Farukhi. It is alleged that since she was older and sick, he persuaded her to marry him by making her a part of the conspiracy and paid Rs. 2.8 lakhs into her account.

### **The Conspiracy**

Within this background, the prosecution knits the deeper story of conspiracy. It is said that the conspiracy to 'wage war' and attack the army camp in Red Fort was first hatched in December 1999 at the residence of the Quasids in Srinagar where 14 militants of the LeT met: 7 Pakistani nationals (including Ashfaq), 2 Afغانis, 4 Kashmiris (including the Quasid father and son who were actively involved in Hawala disbursement) and 1 Indian national, a resident of Lucknow. The actual attack on the Red Fort was planned in December 2000 and was directed by Abu Suffian the Distt Commander of LeT in Srinagar. Accordingly in early December Abu Haider, the same who brought Ashfaq to Delhi, came and stayed in Ashfaq's rented accommodation in Gian Singh's house. The Dy Commander, Abu Bilal told Ashfaq over phone that a suicide squad

(fiyadeens) would arrive and on 13<sup>th</sup> December he arrived with two militants with arms and ammunition, and they all stayed in the same residence. Because one of them fell sick, Abu Haider brought two more militants who also stayed in Gian Singh's house. On 21<sup>st</sup> and 22<sup>nd</sup> they conducted a reconnaissance of the Red Fort and on the evening of 22<sup>nd</sup> six of them (Ashfaq, Bilal, Haider and three fiyadeens: Abu Shaugar, Abu Shamal and Abu Shaad) entered the Red Fort through Lahori Gate. They bought tickets for the English show of Light and Sound and at 8.30 p.m. four of them (Ashfaq, Bilal, Shaugar and Haider) left the Red Fort. The two remaining militants (Shamal and Shaad) went to attack the army camp.

After the attack the two militants jumped out of the rear wall of the Red Fort where the other four were waiting. Abu Shamal threw down his bandoleer, rifle, two magazines and a knife in the bushes and Saad threw his rifle at Vijay Ghat. Ashfaq then called the BBC office here in Delhi and told them about the LeT led attack on Red Fort. All six returned to the rented accommodation in Gian Singh's house. On 24<sup>th</sup> December, four of them returned to

Srinagar and Shamal was left in Gian Singh's house to keep a watch. Ashfaq, of course, remained in Delhi. Ashfaq was arrested while entering Rehmana's house in Ghazipur on the night of 25<sup>th</sup> December while Shamal was shot dead in Gian Singh's house in the early hours of 26<sup>th</sup> morning.

Thus, according to the prosecution, a large number of persons were involved in the conspiracy at various stages and levels. 22 persons were alleged to be involved in this plot of which 8 persons were declared proclaimed offenders and 3 were shot dead in different encounters. The remaining 11 were arrested beginning with Ashfaq. Ashfaq's arrest and subsequent disclosures led to the arrest of the others. While Ashfaq and his wife Rehmana were arrested on the night of 25<sup>th</sup> itself, Devender Singh, and Shehenshah Alam and Babar Mohsin were arrested on the 4<sup>th</sup> of January; Rajiv Malhotra on the 7<sup>th</sup> of January; the Quasids were formally arrested from Kot Balwal jail, Jammu on 29<sup>th</sup> March; Matloob Alam and Mool Chand Sharma on 13<sup>th</sup> April; and Sadakat Ali on 22<sup>nd</sup> December 2001.

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## II. **Waging War**

### ***Evidence Produced and Judgement Pronounced***

When adjudicating on the nature and quality of the circumstantial evidence, Para 357 of the judgement reads, "This is a case, which is based entirely on circumstantial evidence. There is absolutely no direct evidence against any of the accused. The circumstantial evidence is to be weighed very carefully before arriving at the guilt or otherwise of the accused." Following this the Court discusses the relevant law in this regard, as propounded in various Supreme Court Judgements:

1. The circumstances from which the conclusion is drawn should be fully established. The circumstances 'must or should' and not 'may be' established.

2. The facts so established should be consistent *only* with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except the accused is guilty.
3. The circumstances should be of a conclusive nature and tendency.
4. There must be a chain of evidence so complete as to not leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

The Court further observed that in other Judgements, the requirement was also that the circumstantial evidence "unerringly" point



towards the guilt of the accused and “if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.”

This then must be the test for the evidence put forward by the prosecution in the instant case. How sound is the prosecution theory and how fair the judgement of the Court? Relying wholly on circumstantial evidence, the Judge holds Ashfaq guilty of perpetrating the attack on the Red Fort on 22<sup>nd</sup> December 2000 and guilty of being a LeT conspirator whose aim was to destabilize the nation. The story of a Pakistani national illegally entering India, setting up a base in Delhi, engaging in *hawala* transactions is part and parcel of this conspiracy. Along with Ashfaq, the Quasids are held guilty for being a part of the same conspiracy and for financing militants belonging to the LeT. This chapter therefore examines the evidentiary value of the various circumstantial evidence against those found guilty of the conspiracy, particularly as to whether a complete chain of evidence pointing unerringly towards the guilt was shown, and further whether there was no other hypothesis except the guilt that explained such circumstances?

### **The case against Md. Arif @ Ashfaq**

Early on in his findings, the Trial Judge holds that accused Md. Arif @ Ashfaq and three other Pakistani nationals and their associates, “entered India illegally fully armed with sophisticated weapons and ammunition”. While this had been the story of the prosecution, there had been no evidence led to support the same. In so far as the illegal entry was concerned, the finding is understandable in that it was an admitted fact that Ashfaq entered the country illegally through Nepal. However even though there is no evidence put forward by the Prosecution on whether he was alone or with various others, or that he was armed and that too with *sophisticated weapons and ammunition*, the learned Judge had no difficulty in finding that these facts were indeed

established. This is an illustration of how even though claiming to be ruling on evidence; the Court presumes certain facts when dealing with Pakistani “terrorists”. Read with the manner in which the Court ignores key questions and lapses in the prosecution case, such presumptions raise doubts of the fairness of the trial.

In finding Md. Arif @ Ashfaq guilty, the trial court has noted that the recovery of a slip bearing the mobile no. 9811278150 from the Red Fort on 22-23<sup>rd</sup> December linked Ashfaq to the attack as this number belonged to him. Records of the ‘location cell ID’ establish that on December 22, the said mobile was inside Red Fort when a call was made to BBC at Srinagar and at the back of Red Fort when call was made to BBC office in Delhi. Furthermore the same mobile is said to have been recovered from him after this arrest on 25<sup>th</sup> night.

Besides the above, according to the Judgement the police recovered a 9 mm pistol from his pocket after his arrest along with some currency. His arrest and disclosure led to the raid and encounter at G-73 Muradi Road house where Abu Shamal was killed on the morning of 26<sup>th</sup> December. Ashfaq was part of the police team. Inside the premises one AK 56, one magazine with 30 cartridges, two hand grenades, one bandoleer and military uniform were seized. Again, on the basis of the same disclosure, one AK 56, two magazines, one bandoleer and 5 hand grenades were recovered from the eastern side of Red Fort on 26<sup>th</sup> itself. A second disclosure statement on 30<sup>th</sup> December led to the recovery of 3 hand grenades in the presence of a public witness from Jamia Milia Islamia (a university in Delhi) on 1<sup>st</sup> January. The recovery of the mobile phone, pistol and subsequent disclosure to raids and recoveries were held to be sufficient to establish his linkage with the attack on the Red Fort. The Trial Judge was not merely convinced of the guilt of the accused Md Arif @ Ashfaq but insisted that he “was not only part of the conspiracy to wage war against

<b>Charges and Punishment</b>	
<b>Charges</b>	<b>Punishment</b>
<b><i>Md. Arif @Ashfaq</i></b>	
<b>120-B</b> <b>121-A</b> <b>121</b> <b>420 r/w 120-B</b> <b>468 r/w 120-B</b> <b>471 r/w 120-B</b> <b>474 r/w 120-B</b> <b>302 r/w 120-B</b> <b>186 r/w 120-B</b> <b>353 r/w 120-B</b> <b>25/27, Arms Act</b> <b>4/5 Explosive</b> <b>Substances Act</b> <b>14, Foreigners Act</b>	10 RI + 25K (or 1 RI) Death + 1 lakh (or 3 RI) 7 RI + 10K (or 1 RI) 7 RI + 10K (or 1 RI) 7 RI + 10K (or 1 RI) 7 RI + 10K (or 1 RI) Death + 3 Lakhs (or 5 RI) Death + 3 Lakhs (or 5 RI) 2 RI + 10K (or 1 RI) 3 RI + 10K (or 1 RI) Life + 25K (or 1 RI) 5 RI + + 25K (or 1 RI)
<b><i>Rehmana Farooqui</i></b>	
120-B <b>216 r/w 120-B</b> <b>118 (ADDED)</b>	7 RI + 10K (or 1 RI) 7 RI + 10K (or 1 RI)
<b><i>Nazir Qasid</i></b>	
<b>120-B</b> <b>121-A</b> <b>121</b> 216 r/w 120-B (Charges were amended - not clear to what)	Life + 25K (or 1 RI) 10 RI + 25K (or 1 RI) Life + 50K (or 2 RI)
<b><i>Farooq Qasid</i></b>	
<b>120-B</b> <b>121-A</b> <b>121</b> 216 r/w 120-B (Charges were amended - not clear to what)	Life + 25K (or 1 RI) 10 RI + 25K (or 1 RI) Life + 50K (or 2 RI)
<b><i>Babbar Mohsin</i></b>	
120-B <b>216 r/w 120-B</b> <b>118 (ADDED)</b>	7 RI + 10K (or 1 RI) 7 RI + 10K (or 1 RI)

<b><i>Devender Singh</i></b>	
120-B 420 r/w 120-B 468 r/w 120-B 471 r/w 120-B 474 r/w 120-B	None
<b><i>Shehenshah Alam</i></b>	
120-B 420 r/w 120-B 468 r/w 120-B 471 r/w 120-B 474 r/w 120-B	None
<b><i>Rajeev Kumar Malhotra</i></b>	
120-B 420 r/w 120-B 468 r/w 120-B 471 r/w 120-B 474 r/w 120-B	None
<b><i>Mool Chand Sharma</i></b>	
120-B 420 r/w 120-B 468 r/w 120-B 471 r/w 120-B 474 r/w 120-B	None
<b><i>Matloob Alam</i></b>	
120-B <b>420 r/w 120-B</b> <b>468 r/w 120-B</b> 471 r/w 120-B 474 r/w 120-B <b>420</b> <b>468</b> 474	7 RI + 10K (or 1 RI) 7 RI + 10K (or 1 RI)  7 RI + 10K (or 1 RI) 7 RI + 10K (or 1 RI)
<b><i>Sadakat Ali</i></b>	
120-B <b>216 r/w 120-B</b> <b>118 (ADDED)</b> <b>188</b> <b>14, Foreigners Act</b>	7 RI + 10K (or 1 RI) 7 RI + 10K (or 1 RI) 6 mths + 1K 5 RI + 10K (or 1 RI)

**Note:** Where unstated, section nos. refer to IPC  
**Bold** indicates 'found guilty'.  
 Death sentence subject to confirmation by the High Court.  
 All sentences to run concurrently.

Govt. of India but also actually participated in the firing inside Red Fort”.

Since he played a key role in the conspiracy, his associates in Delhi become important. According to the police, his second disclosure led to the arrest of Babar Mohsin and his wife’s role and that of Sadakat Ali (the landlord of the computer firm, Knowledge Plus) were also established in aiding and abetting him. The Judgement also noted that he led the police team to Srinagar in early January to establish the participation of the Quasids in the conspiracy. Besides this, the prosecution placed the evidence of fake driving licenses and ration card as proof of his conspiracy to set up a base for the LeT in Delhi. Nine bank slips apparently signed by him were put forward as proof of his involvement in hawala transactions.

The judgement records 15 points raised by the prosecution that eventually find that “a bare perusal of the aforesaid pieces of evidence would show that there was a conspiracy to wage war against the Government of India....and this point is self evident and requires no further elaboration”. (page 240) However some key questions relating to the evidence against accused Ashfaq remain unanswered in the Judgement and require more careful appreciation.

**(i) Slip of Paper**

When noting the “brief facts of the case”, the Court observes (page 26), “a paper slip with telephone number 98 112 78510 written on it fell out of the pocket of Abu Saad near the wall of the Red Fort”. This is was claimed by the prosecution, and virtually impossible to prove given that there was no direct witness who saw the slip fall out of that individual’s pocket. Yet the Judge has found this to be a proved ‘fact’, despite their being no evidence led to prove the point. Even if one believes the police version that the slip was found at the site, there is no basis or evidence to conclude that the slip infact fell out of the pocket of Abu Saad and not another attacker. It is arguable whether that would make much difference to the prosecution

case, but this is a typical example of how the Trial Court has no problem finding prosecution claims to be ‘facts’ even in the absence of any supporting evidence.

There is further confusion, however, as to who found this slip. In his evidence, SI Sanjay Kumar (PW 183) claims that he found the slip on the night of 22-23 December 2000. However Inspector Mool Chand Sharma (PW 229) also claims that he found the slip on the morning of 23 December, since in the “darkness” nothing was visible. The same witness does not mention that the paper slip was “handed over to him” for investigation”. But the Judge arrives at the conclusion that the slip of paper with the mobile number was “handed over to” PW 229.

Though the Judgement records that this contradiction was pointed out a number of times and is clear from cross-examination of PWs 183, 217, 234 and others, the learned Judge finds, “contradiction in the timings given by the different witnesses about the finding of the aforesaid paper slip is not of much importance as it itself is of no importance, but only provided a clue about the culprits”. While it is technically correct in that the slip of paper is in itself not the vital evidence, it is important to note that the Judge ignores these contradictions even though the defence had claimed that the slip of paper was planted by the police.

As in the parliament attack case, a dubious and conveniently found mobile number lead is instrumental in the police investigation. In fact, the importance of the slip in this case cannot be understated as it is the very foundation on which the police began its investigation against Ashfaq and in the absence of the slip, there would have been nothing to point towards Ashfaq. It is perhaps for this very reason that the Judgement works very hard to explain the contradiction; “Even otherwise, the version of different witnesses regarding the finding of the slip is no so much contradictory as it was found in the early hours of the morning of 23-12-00 and on account of the winter season, these witnesses may have deposed about timing as per their own personal

Judgement without being mechanical”.

**(ii) Recovery of Phone**

The Trial court gives less importance to doubts about the finding of the slip arguing that the subsequent recovery of the same mobile phone from the accused proves the veracity of the slip. However the Court completely ignores that the recovery of the mobile phone from Ashfaq is even more astounding. Therefore the Court uses one dubious fact to support another dubious fact – a clear illustration of the Court building a house of cards.

The police claim that when accused Ashfaq was apprehended from Ghazipur on night of 25-26 December 2000, a search was conducted and a pistol was found from right dub of his pajama. After that he was whisked away to Okhla where he remained in police custody from 2.15 am to 6 am during which an encounter took place at around 5.15 am in which Abu Shamal was killed. As per the police version, accused Ashfaq is then brought back to Ghazipur and another search of his person reveals a mobile phone from the same right dub of his kurta – a mobile phone that mysteriously seems to have been missed in the ‘cursory search’ conducted at the time of arrest.

On one hand we are expected to believe that the accused was known to be a dreaded LeT terrorist from Pakistan and the mastermind behind the Red Fort attack, and yet the Police after raiding and arresting him, conducts so cursory a search that a mobile phone instrument is not found and indeed left on his person for another 4 hours, even though one pistol was recovered from the same right side of his kurta. Needless to add, there is no explanation given as to why the accused was carrying around a mobile phone instrument with a SIM card that was deactivated and therefore not in use after 22-23 December 2000, as per the prosecution’s own records. These discrepancies in the ‘recovery’ become more glaring when viewed against the defence claim that Ashfaq never owned a mobile phone and the mobile phone ‘recovered’ from him was

planted. In conversation with PUDR, his wife Rehmana and other family members too strongly asserted that Ashfaq never had a mobile phone. Furthermore given the timing of the second search and subsequent recovery after the encounter at Abu Shamal’s house Okhla, the possibility as to whether the mobile phone was recovered from the Okhla house cannot be ruled out.

Unfortunately such doubts have not concerned the Judge, who has brushed aside all these concerns by finding, “the record suggests that accused was in possession and use of mobile telephone.” The Judgement relies on the statements made by Amir Irfan Mansoori (PW 37), Faisal Md Khan (PW 56) and Rashid Ali (PW 232) for the same. However none of the witnesses have stated what his mobile number was although they were familiar with him either as neighbours or business partner. The claim that the mobile phone recovered from him was the same number ‘found’ in the Red Fort is based solely on the questionable evidence of the police.

The mobile instrument also raises other questions. ACP, Hawa Singh (PW 228) states that accused Ashfaq is said to have “disclosed” that he bought the “new Motorola set, card No. 98-112-78510 from Zakir Nagar STD” in December, logically on or prior to 11 December 2000 when the said instrument came into operation. However it is not clear where the police investigation into this led, as no witness was summoned with respect to this sale. Given the questionable manner in which the mobile phone and the number on the slip were recovered, such evidence of sale of the mobile phone would have indeed been clinching and helped pin the crime on Ashfaq squarely. There is absolutely no explanation for this failure in investigation.

The fact that the defence denied that he owned mobile and therefore failed to cross examine any of these witnesses who claimed he had one, cannot be used to claim that the mobile phone owned by him was the same as the one used during and after the attack on Red

## **MOBILE FACTS**

Mobiles phones play a vital role in serious crime as also their investigations by the police. A GSM mobile phone has two essential and severable parts – the handset which has a unique digit IMEI number, and a SIM card that also has a unique digit number. SIM cards can be used on different handsets/instruments, and call records can show which particular instrument was using which particular SIM card, to which number the call was made and also the location of the caller. A scientific analysis of mobile phone both in terms of calls made, location of calls and instruments used is a useful means to show physical link between persons. For instance if two persons are using instruments which have used SIM cards interchangeably, it would mean that the two persons have either exchanged SIM cards or instruments implying physical proximity between the two persons.

In this case the prosecution found a slip of paper with the telephone number # 78510 at the site of the incident. From the call records of this phone number, they apparently found that the SIM card of this number had been used by another phone instrument numbering 445. This second instrument (#445), besides using the SIM of #78510 had also used another SIM – phone number # 42154. It was on examining the call records of this second number i.e. # 42154 that the police found “regular” calls made to landline telephones at Ghazipur and Knowledge Plus in Okhla.

Importantly while the police chose to investigate these ‘regular’ numbers (called from the second phone # 42154), there is little detail of who were the persons called from the first phone #78510 itself. Despite making a few references to calls being made to Kashmir and Pakistan, there is nothing more given in the police investigation, much less whether such persons called from the phone with the number found at the site of the incident, were interrogated or questioned by the police. Thus while mobile phones were important to the case in theory, the manner in which these the phone records were investigated of the police suggests that the intention was not to find out the ‘truth’, but much like in the Parliament case, target particular individuals. The lapses therefore appear more intentional rather than sloppy investigation.

When the phone with SIM no. 78510 is ‘recovered’ from Ashfaq, 4-5 hours after his arrest, it is being used on handset/instrument # 449. As per the records produced by the prosecution this phone instrument used the 78510 SIM from 11<sup>th</sup> December to 23<sup>rd</sup> December. From 26<sup>th</sup> October (when the number was first activated) till 14<sup>th</sup> November, the same SIM card was being used by handset no 445. No call records are made available to the Court from 15<sup>th</sup> November to 10<sup>th</sup> December.

The Judge accepts the prosecution allegation that Ashfaq was the owner as the instrument # 449 was recovered from him with SIM # 78510 and also as the call records show that instrument 445 was used for another SIM card # 2154, which is stated to also belong to Ashfaq. In all, Ashfaq is said to have used 3 instruments (445, 447 and 449). The calls made seem to suggest that he had frequently been in touch with persons who were later implicated.

However the call details of handset 445 clearly show that after 13<sup>th</sup> October, it was never used for #42154 and instrument no 447 was used between 13<sup>th</sup> October and 29<sup>th</sup>

November (when this number was deactivated). In short, the period when #78510 was active (26/10—23/12), the handsets used for both SIM cards are different and do not show overlap or constant exchange (which is what would happen if handsets were being exchanged). Therefore it is not tenable to establish Ashfaq as the owner of #78510 on the basis of hand set usage.

The various instruments and the various SIM cards involved appear to have sufficiently confused the Court as well. In that Judge himself wrongly finds, “It is on record that a large number of calls were made from mobile phone number #78150 to the aforesaid two addresses [Knowledge Plus and Ghazipur]” (Page 313). This is completely contradicted by the call details of the SIM which do not reveal any calls to the aforesaid locations. As mentioned above, the calls to Ghazipur and Knowledge Plus were made from the second phone (#42154). Carelessness, non application of mind, prejudice or all of the above? A serious lapse in any case, much less a capital case.



Fort. At best, it establishes that Ashfaq had a mobile phone. There is nothing to support the police claim that this was the same phone used by the attackers except the alleged recovery. In fact instead of giving benefit of doubt to the accused in a capital case, the Judge goes to great lengths to accord benefit to the prosecution. Despite such serious questions about the recovery of the mobile phone, the Court finds, "the weight of the evidence is so much that some discrepancies here and there in the course of investigation cannot render the recovery of the mobile set from the accused unbelievable". In other words, the value of finding of the mobile set from the accused is seen as so essential to the prosecution case that any evidence that it was planted cannot be accepted.

### **(iii) The Incriminating Letter**

Another piece of evidence which is used to link Ashfaq to the conspiracy is the letter which incidentally also brings Babar Mohsin into the said conspiracy. The prosecution alleges that a letter was written by accused Ashfaq to accused Babar Mohsin to thank him for his role in helping with the recce and initial assistance in Delhi. This letter, allegedly written in March 2000 was 'discovered' on 7.1.01 from the dickey of the motorcycle of Babar Mohsin on 7.1.2001, three days after his arrest. It was argued by the defence that the recovery was false as it defied imagination that LeT terrorists involved in a secret conspiracy would keep such self-incriminating material in a casual manner for over nine months in a motorcycle parked outside. It was also argued that the motorcycle did not even have a lockable dickey,

### **Why the Canary Sang**

Prosecution claims that Ashfaq was apprehended at 0040 hrs on 26 December 2000. Assuming that the following search and arrest paperwork takes 30-45 minutes, it leaves only about 45 minutes for questioning given that as per the prosecution accused Ashfaq is taken to Okhla at 2.15. It appears unlikely that in that brief period, a LeT operative who masterminded the daring attack, obliged his captors and sang like a canary giving them relevant details including the hideout of Abu Shamal at G-73 Muradi Road, Okhla. This must raise questions about the effective interrogation techniques employed by Special Cell. This is also relevant given that the defence raised the issue of torture in police custody and forcing the accused to sign on blank papers and writing a number of letters. However the Judge noted that there was no evidence of the same. The learned Judge further added, "Even if there is some torture or illegality committed by the police officials in the course of investigation, the same does not render the evidence inadmissible."

The Judgement cites a number of other Judgements quoted in the Parliament Attack Judgement where the courts have held that irregularity in arrest or investigation will not result in the trial being set aside. However all the Judgements are completely distinguishable as they relate to irregularities which cannot be equated with torture. Reducing torture to a *mere* irregularity and the danger of allowing evidence to be admissible even when torture has taken place cannot be understated.

A key reason for disallowing confessional statements made to police is the torture that is employed to ensure the 'confessions'. However by allowing 'evidence' tainted by torture to be admissible in the Court, the Courts are allowing through the back-door what is not allowed through the front, also ignoring the very object to the safeguards provided in the Evidence Act against confessions to the Police. Such an approach by the Courts, de-facto, introduces provisions similar to those of confession in TADA/POTA that were seen to be too dangerous to even exist in the current security legislation – the Unlawful Activities (Prevention) Act, 1967. The current legal position – where a confession made under torture is not admissible, but disclosures leading to recoveries may be admissible therefore defeats the very object of prohibiting torture and in fact even encourages the police to extract information relating to recoveries by using torture.



as stated by the prosecution witnesses, but a mere canvas bag hanging on the side. The Court however rejected this argument holding, "It is of no use whether the attachment attached to the motorcycle is called a canvas bag or a dickey". The learned Judge appears to have missed the point that the difference is not one of name or of inaccuracy alone, but of the very nature of the two attachments. A dickey is a secure and lockable location while a canvas bag is accessible to all and not the kind of place confidential correspondence is likely to be hidden in.

Furthermore while the Judge has believed the evidence that the letter was in the handwriting of accused Ashfaq, he has completely ignored the explanation that the police had forced him to write a number of letters while in custody (see Statement of the Accused, made before the Court under Section 313, CrPC). Babar Mohsin too refused to sign the seized letter when it was shown to him in custody.

The question of the contents of the letter too is important. The letter was said to be written in early March 2000 by Ashfaq in which he thanks Mohsin for 'help rendered'. The letter was apparently read and translated from urdu by a passerby whose identity remains unknown and whose signature was not taken by police. The translator then further disappears and is not produced as a witness in court. The admissibility of the translation and thereby the contents of the letter is therefore doubtful. The Judge is rather indulgent of the prosecution and ignores this as inconsequential.

More interesting is what the prosecution alleges the contents to be. Apparently, not only did Ashfaq thank Mohsin for 'help rendered', but he also conveniently mentioned the names of the LeT high command, Abu Bilal and Abu Haider! Generally speaking people do not use nom de guerre and then sign their own names; and in this case, for Ashfaq to have casually used the code names of fellow conspirators and then signed in his own name, is a dead give away. Either, LeT is careless or quite innocent

of the need to maintain secrecy! The Judge, of course, ignores such doubts.

Given that there is no mention of any future plans, the defence in fact, further pointed out that the letter was innocuous. The same has been noted in the Judgement, "It is also correct that, taken by itself, the contents of the letter ...appear to be innocuous as they merely convey thanks to Babar Mohsin from accused Md. Arif @ Ashfaq". However the learned Judge further observed, "But it must be noted that letter was written by one accused to another when the conspiracy was on foot an in existence" suggesting thereby that the during a conspiracy any letter written by one accused to another accused must, irrespective of content, be an incriminating circumstance against both the accused.

#### *(iv) Other recoveries*

Agreeing with the prosecution, the Judgement notes that it was at "the instance of the accused Md Arif @ Ashfaq, one AK-36 rifle, four hand grenades, detonators, bandoleer etc were recovered from behind the Red Fort on 26.12.2000 immediately after his arrest". Such recovery appears incredible given that the same eastern side from where the weapons are said to be recovered was thoroughly searched on 23 December 2000 according to PWs 183, 217, 229, 125, 202, 70, 149 and 234. Moreover according to PWs 234, 218 and 228 even sniffer dogs too employed for the search. Furthermore this is also the same area where weekly Sunday bazaar was held on 24 December 2000. It is not made clear by the prosecution how these weapons were found a full four days after the attack - completely missed in the extensive searches previously carried out and also missed by the hundreds of persons attending the weekly Sunday bazaar on 24<sup>th</sup> December. Such concerns however find no place in the Judgement as they appear to have not raised sufficient doubt of the veracity of the disclosure statement and the subsequent "recovery" in the mind of the Judge. The absence of any public witnesses too has been rejected by the Judge who noted that the accused had signed the

## *A riddle wrapped in a mystery inside an enigma*

### **The story of Ashfaq**

While Ashfaq's Pakistani citizenship is admitted, other information is not as clear. Why did he come to India, at whose behest and what was he doing in Delhi? Ashfaq provides answers to some of these questions. While the Court has ignored most of these answers completely, they do appear to be corroborated by other evidence.

In the statement of the accused (u/s 313, CrPC) in the court, when asked if he had anything to say (Q. no. 392), Ashfaq stated, "*I used to work for 'X' branch, RAW [Research and Analysis Wing of the Cabinet Secretariat] since 1997. In the last days of June 2000, I had come to Kathmandu to give some documents to Sanjeev Gupta and I had reached there from Pakistan by a PIA flight on my passport no. 634417. In Pakistan, there is political party by the name of Pakhtoon milli party and RAW is supporting that party for the last 30-35 years. Sh Sagri Khan was member of that party and he was arrested by the police of Pakistan along with my younger brother. I received this news in Kathmandu and I spoke to Sh Sanjeev Gupta in this regard. My cousin had also advised me not to return to Pakistan for time being. Thereafter, Sh Sanjeev Gupta advised me to go to India and accompanied me upto Raxol and from there I came to India by train. He gave me the address of Nain Singh and telephoned Nain Singh on 6834454 for accommodating me. Thereafter Nain Singh gave me a room in his house for my stay. He advised me not to tell my real name and address to anyone and to disclose myself as a resident of Jammu. Nain Singh used to do the business of money lending and I used to help in maintaining his accounts. After about one and a half month, I asked Nain Singh to get me some job as my money had already run out. Thereafter he got me opened the computer centre. Thereafter Nain Singh got sent some money through Sanjeev Gupta and the amount was around seven lacs, but Nain Singh did not disclose about receiving this huge amount... Thereafter I contacted my family and they asked to speak to Sanjeev Gupta who told me about sending Rs six lacs fifty thousand/seven lacs to Nain Singh. Thereafter on the asking of Sanjeev Gupta, Nain Singh got my bank account opened in HDFC bank... One Chaman Lal in Chandni Chowk and one Sardarji in Karol Bagh are also engaged in the business of money lending and I used to collect money from them on behalf of Nain Singh. On the birthday party of his son, Nain Singh got me introduced to Ins RS Bhasin and Ins Ved Prakash... On 25.12.2000 Nain Singh called me from computer centre to his house. Thereafter, those two persons who were in plainclothes and had come to my house in a white Maruti Zen car took me to a flat in Lodhi Colony, where both the inspectors along with one Sikh officer (were) present... I was interrogated by them about my entire background. Thereafter I was dropped at the house of Nain Singh... Nain Singh was not present at his house but his wife informed me about the telephonic call received from my in-laws at Ghazipur regarding dinner in the evening. I tried to make a call to my in-laws but could not get through. Thereafter I took a bus and reached the house of my in-laws. I asked my in-laws whether they had made a call to which they replied in negatives. I had reached there at about 8 to 8.30 pm and had finished our dinner at 10.00 pm when the police party raided the house...*"

The RAW angle is further substantiated when in his testimony in Court, Nain Singh (PW 20) states that he is working as Senior Field Assistant in the Cabinet Secretariat. While he denies working as an Intelligence man in the Cabinet Secretariat, he states, "*I cannot disclose whether I am working for RAW*".

Despite being asked specifically, Nain Singh states that he can not disclose his official address or those of the offices visited by him and adds, "I can not say whether I am not disclosing these addresses as my identity in the public would be disclosed." Curiously he also claims that he cannot produce his identity card in open court and the testimony records that the I-Card was shown only to the Judge. No formal exemption appears to have been pleaded and accepted. The findings of the Judge on the identity card too are unknown as none of the above is referred to in the Judgement of the court despite being present in the records of the cross examination in the Court. *(continued)*

The fact that an alleged LeT militant was living in the house of a RAW agent leads to many questions. These have not bothered the learned Judge. In fact the only reference made to Ashfaq's alleged RAW background was a sarcastic reference at Page 306 when the Judge observes that Ashfaq is obviously educated as he has claimed to a RAW agent. The Court does not give any importance to the above statement of Ashfaq made in the Court despite the fact that it explains various incriminating circumstances against Ashfaq. Not only that but the statement also answers another vital question, one that the Prosecution does not. What was Ashfaq's place of residence in the last few months? The prosecution leads no evidence to show where he was staying but states blandly that Ashfaq resided with Rehmana. In response to question no. 55, Ashfaq categorically states "*I stayed in the house of Mr Nain Singh from June/July 2000 till the date of my arrest on the recommendation of Mr Sanjeev Gupta, but not on rent.*"

The exact relationship between Ashfaq and Nain Singh is murky, at best.

The investigation has clearly not looked into such aspects of the case, despite this providing a reasonable hypothesis for the various facts. There is much in the account of well known prisoners who escaped concocted cases mounted against them such as Iftakhar Geelani and SAR Geelani as well as their account of fellow prisoners in Tihar jail which suggests that it is possible to falsely implicate a person, manufacture and plant evidence. Such instances do not allow us the comfort of rejecting them outright.

The implications of a Pakistani citizen alleged to be a LeT militant, living in the house of a RAW agent who also assists him with money and a job, are perhaps too vast for this report. Yet the manner in which the Court has completely overlooked these questions, even where the Prosecution has no better evidence to support its claims, raises serious doubts about the fairness of the trial and the conviction being a foregone conclusion – once his Pakistani identity is admitted and he is charged of being a terrorist.

disclosure statements even though the defence had argued that no disclosure statements whatsoever were made by the accused. Claims of torture too have not bothered the honourable Judge!

To place Ashfaq within a broader conspiracy, the prosecution also relied upon his identification of Abu Bilal from a negative that was recovered from his wallet. The discovery of this negative from Ashfaq's wallet on 28.12.2000 is fascinating, as it appears that the police were following an incremental approach in their search of accused Ashfaq. It took only a few minutes after his arrest on late 25<sup>th</sup> night-early 26<sup>th</sup> morning to find the pistol in the pocket, a few hours to find the mobile instrument in the same pocket, and then a further two days to find a negative of a photograph from his wallet. Neither the prosecution nor the Judgement has any explanation for these lapses and delays nor is there any satisfactory response for why an undercover LeT operative master-minding a secret attack in Delhi would carry with him the negative photograph of a well-known and recognised Deputy Commander of LeT in his wallet.

#### *(v) Where did Ashfaq stay?*

The prosecution has no story to offer as to where Ashfaq stayed up to his time of arrest. Surely, Ashfaq's residence is a very relevant question since he is supposed to have masterminded the attack on the Red Fort. The prosecution claimed that Babar Mohsin helped Ashfaq in getting accommodation and that he stayed in the house of Risalat Beg (PW 25). He subsequently stayed in the house of Nain Singh (PW 20) and also at Gian Chand's house (PW 21). However, Sadakat Ali, the owner of Knowledge Plus is held guilty for having rented his premises to a foreigner and also for having done so with full knowledge of Ashfaq's plans of conspiracy to wage war. Equally, Babar Mohsin is held guilty for helping Ashfaq with his accommodation as he was aware of Ashfaq's plans. Why are Sadakat Ali and Babar

Mohsin singled out over others? Not only is there no coherent chronology, but the fact that a number of witnesses contradict each other makes the already existing story even weaker.

One witness, Azim Malik (PW 31) stated that he knew Ashfaq from April 2000 as he had met him in the company of Yunus Khan (PW 4) who was a tenant in Risalet Beg's house. Ashfaq's business partner, Faizal Khan (PW 56) stated that Ashfaq was introduced to Nain Singh by Azim Malik and that he rented a room in May 2000. Faizal was also a tenant of Nain Singh and said that Singh knew that Ashfaq was from J&K. Azim Malik's statement raises doubts as both Yunus Khan and his landlord, Risalet Beg denied knowing Ashfaq. In fact, they claimed that they had never seen him prior to seeing him in court. It is important to remember that the prosecution's contention was that Babar Mohsin helped Ashfaq with accommodation and had introduced him to Yunus Khan for renting a room at Risalet Beg's house. Azim Malik cannot, in any case, be trusted as he said that he went home for Ramzan in October; Ramzan happened a whole month later, that year. Gian Chand deposed that his house was rented by one Rashid on 6<sup>th</sup> December 2000 and that Ashfaq used to visit the house. Even Gian Chand confirmed that Ashfaq used to stay at Nain Singh's house.

Not only is there no clarity as to how long Ashfaq stayed in Nain Singh's house, but no story exists as to where he was before he rented a room at Nain Singh's. Significantly, the few people who should have been examined were not: Nain Singh and Rashid (the tenant of Gian Chand who knew Ashfaq). Thus where, when and for how long Ashfaq stayed in Delhi is nowhere clarified and neither SK Sand nor ACP Hawa Singh has anything to say on where Ashfaq stayed prior to his arrest.

The Judge himself accepts that Ashfaq could not have stayed in his computer centre, that the address given in his ration card is false and yet he concludes that "it is safe to conclude that he used to stay at the aforesaid house

(Rehmana's house) and was provided shelter by accused Rehamana Yusuf Farukhi knowing fully well about his identity as a Pak National and object to carry out militant activities...." (pp 326). On what basis such a conclusion was arrived (or jumped to) is not clear given the above lack of clarity and further given that Ashfaq had stated that up to the arrest, he was staying in the mysterious Nain Singh's house. And yet, Sadakat Ali and Babar Mohsin are held responsible for assisting Ashfaq with his accommodation.

### **The Quasids: Co-conspirators?**

The prosecution stated that the Quasids (father and son, Nazir and Farukh) were members of LeT and had entered the conspiracy to wage war against the government of India. Their house was used as a shelter and the conspiracy to attack the Red Fort was held there. The prosecution produced evidence of phone records show that the Quasids and Ashfaq were in contact with each other. They also produced evidence of three bank accounts belonging to Nazir Ahmed Quasid, Farukh Ahmed Quasid and Bilal Ahmad Kawa in Standard Chartered Grindleys Bank and showed that these were used for receiving hawala transactions. The prosecution's contention was that the money was disbursed to various militants. The defence denied that the three accounts belonged to the Quasids and, in their 313 statements, the Quasids reiterated the same.

The Judge accepts the fact of telephonic contact, that a huge amount of money (over 29 lakhs) was deposited by Ashfaq in a relatively short period and also the fact that 40 cheques were signed by the Quasids and disbursed to others. The Judge concludes that "By receiving such a huge amount of money and by distributing the same to different militants in collusion with Md Arif@ Ashfaq, they have actively abetted the waging of war against the Government of India" (para 430, p. 320). The Judge convicts them for waging war (121),



conspiracy for waging war (121A) and criminal conspiracy (120B)

**(i) Links with main accused**

Clearly, in the case of the Quasids, the link with Ashfaq is crucial to establish the fact that they were indeed involved in the conspiracy to wage war. But, the chain of events does not show 'beyond reasonable doubt' their role as conspirators. There is no material evidence to prove that the conspiracy was indeed hatched in their house or that it was used as a shelter. In fact, the weakness of this part of the story is so evident that even the Judge accepts that there is no legally admissible evidence to prove that Ashfaq and other co accused used the house as a shelter. The prosecution claim that the money deposited in their accounts was further disbursed to militants is not proved as the cheques were signed as bearers' cheques. Who these 40 recipients are is nowhere established let alone the fact that they were LeT militants. Further, the claim that the Quasids and Ashfaq were in regular touch is also questionable. The Judge says, "Md. Arif@Ashfaq also used to be in telephonic contact with them". Yet, the call records show just *one* phone call allegedly made by Ashfaq in June 2000. Given the fact that the whole story of Ashfaq owning three mobile phones which were used for hatching the conspiracy and in carrying out the attack is doubtful (see box, Mobile Phones), this 'fact' of telephonic contact is, also, not above doubt. Questions such as, did the mobile phone belong to Ashfaq or, was the caller indeed Ashfaq, persist.

**(ii) Interrogation**

The Quasids were arrested on 2<sup>nd</sup> January and kept in the custody of SOG, Srinagar under Public Safety Act registered in PS. Sadar, Srinagar. Thereafter, as per detention order passed by DM Budgam dated 5.2.2001, they were detained for a period of 24 months and sent to Kot Balwal jail in Jammu. Their detention was quashed by the J&K High Court dated 4/9/2001 and 26/11/2001. In the first week of January 2002 the Quasids were brought

to Delhi. Thus, the Quasids were already arrested when the Delhi police reached Srinagar, supposedly on 9<sup>th</sup> January. Their interrogation by the Delhi police is most astonishing as it is nowhere clear as to who interrogated them, when and where. IO, SK Sand is not clear himself as to whether he reached Srinagar on 9<sup>th</sup> morning as he contradicts himself several times on his mode of travel, namely BSF plane and train. In his cross examination, he retracted from his earlier statement that he had traveled from Delhi to Srinagar by a BSF plane and admitted that he traveled by train. Since he nowhere mentions the date of departure, it can be assumed that he traveled sometime on the 9<sup>th</sup> of January. If this is so, then it is impossible for him to have reached Srinagar the following morning as there is only one night train to Jammu and given the state of the Jawahar tunnel between Jammu nad Srinagar during winter months, he could never have arrived at Srinagar on 9<sup>th</sup> morning. Yet, SK Sand says that on 9<sup>th</sup> January, in his disclosure, Nazir Ahmed Quasid said, "he was a hard core militant of LeT....". (Such a statement would, of course, be inadmissible as it would amount to a confession in custody. And not just any custody but that of Special Operations Group, which acquired notoriety in J&K for its extra-legal methods) Further, Nazir Quasid said that he provided shelter and the wireless set kept in his house was used by LeT members to communicate with the bosses in Pakistan. SK Sand's also states that Nazir Ahmad Quasid disclosed to him that "he used to speak to the militants through his telephone number 436188". (There is no call record to back this claim).

But the question is when did SK Sand interrogate them? When did SK Sand return to Delhi is also unclear as he states that he conducted a raid on 12<sup>th</sup> January in Delhi whilst his team insists that they returned only on the 14<sup>th</sup>! Even more puzzling is the fact that two other policemen from Delhi police claim that they received permission from the CJM, Delhi to interrogate the Quasids on 19<sup>th</sup> March 2001

and that they interrogated them on 28<sup>th</sup> March at Jammu. These policemen were also with SK Sand when he went to Srinagar in January but nowhere do they state that SK Sand interrogated the Quasids. However, the fact of this confusion as to who actually interrogated the Quasids not deemed significant by the Judge and no attention is paid to this.

### ***(iii) Pager message***

It was the contention of I.O. SK Sand that the person, Niyaz ud Din, who was killed in an encounter in J&K on 27.12.2000 during an ambush was Abu Suffiyan and that the pager found on him carried the names of Quasids. Thus the Quasids are linked to the Red Fort Case and implicated by the fact that one of the conspirators was Abu Suffiyan who was none other than Niyaz ud Din who died on 27.12.2000 at Srinagar's Tangpora by pass at around 8.30 am. But there is no evidence that establishes the identity of Niyaz ud Din Qureshi (resident of Sadar Bazaar, Delhi) as Abu Suffiyan. More importantly, police records show that six months later, 27.06.01, the wireless set allegedly found in the Quasids house at the time of their arrest in early January 2001 had not been examined by experts. Further, the wireless show no record of messages received from the pager said to belong to Niyaz ud din Qureshi. For six months J&K police, in a high profile case, did not get important recoveries scrutinised by experts was bad enough. But what was worse is the fact that the pager on which prosecution placed such hopes turned out to contain no message. Thus from where did I.O. SK Sund get the information linking Niyaz ud Din Qureshi to Abu Sufiyan? And how did Quasids get implicated through the pager when no records were ever made available? This too is never explained.

### ***(iv) Money Transfer***

Within the chain of events the main evidence that supposedly links Quasids with Ashfaq is the presence of nine deposit slips

signed by Ashfaq confirming the transfer of 29 lakhs to their accounts. The Judge not only rejects the Quasids denial (313 statement) but also holds that "the accused are concealing the facts and are attempting to disown the documentary evidence available on the file against them." Further, Insp. SK Sand says that "(o)n going through the cheques I found that Md Arif @ Ashfaq had deposited a total amount of Rs 29.50 lakhs through Hawala in the three accounts". If money was deposited by Ashfaq in Quasid's account through cheques, how does this become hawala transaction and implicate the Quasids? If he means the cash deposit as shown in the bank statement, then Ashfaq's bank records in Delhi are needed. In this regard, the police claim that they recovered one slip signed by Ashfaq from Ghazipur residence (Rehmana's house) on the night of the arrest and eight others were provided by the Standard Chartered Bank, Delhi, in which Ashfaq allegedly had an account and which he used for the transfer to Srinagar.

Significantly, the slip that was recovered from Ghazipur was "deposited by RK Traders on 8.11.00" in the a/c of Nazir & Sons for an amount of 5 lakhs. When SK Sand was asked in his cross examination about the identity of RK Traders he said that no investigation was carried out "about RK Traders, Saleem Khan and Aslam". Who are RK Traders, Saleem Khan and Aslam and what is their link with Ashfaq and Quasids? Why were the Quasids never asked and why did the police never investigate this? Why was it automatically presumed that Ashfaq had transferred the entire amount of 29 lakhs from his account in Delhi to that of the Quasids?

### ***(v) Use of Logic***

Presumably the evidence gathered should lead to inference of the Quasids' involvement; yet the evidence, cannot establish their role in the conspiracy. But the Judge holds otherwise. He says that "The transfer of such huge amount of money without any reason to the accused and the distribution of the same by the accused to different persons including transfer to each



other, does not show that this transfer was for an innocuous purpose, that too from a person, who has been proved to be involved in waging war against Government of India as well as attacking Army camp inside Red Fort....” (pp.319). The Judge buttresses his findings by also noting allegations of the prosecution that Ashfaq “used to collect Hawala money from Delhi and the same was transferred to the militants of LeT at Sri Nagar Nazir Ahamd Quasid, Farukh Ahmed Quasid and Bilal Ahmad Kawa (PO).” The Judge also records that Ashfaq had admitted in his 313 statement that he used to collect some money on behalf of Nain Singh from one sardarji in Karol Bagh who was in the business of money-lending. While the Judge rejects the Nain Singh link as not being borne out of the record, the remainder has been used against the accused.

The Judge overlooks the issue of confusion in interrogation, doesn’t think it necessary to explain how one phone call is enough of a proof of contact between Ashfaq and them, believes entirely that the money was disbursed to militants by the Quasids, rejects their denial of ownership of bank accounts, and does not think it fit to explain the identity and link with RK Traders. In short, the Judge believes entirely the prosecution story of the Quasids involvement and guilt.

Accordingly, their guilt is established *only* from their link with Ashfaq. And because Ashfaq according to the Judge was involved and a participant in the conspiracy to wage war and the attack on Red Fort, ergo the Quasids are not mere hawala operators but guilty of the conspiracy to wage war! As the Judge says “Why accused Md Arif @ Ashfaq would deposit such huge amount in their accounts within such a short period if he was not connected with them?” (pp.318). Thus even when the Judge accepts that there is no legally tenable case that Ashfaq ever took shelter in their house and there is record of just one telephone call made to Quasids from a mobile phone, whose ownership remains shrouded in some doubt, linkages are said to have been

established. In other words once Ashfaq’s guilt is proved in the eyes of the Judge certain assumptions are made: that the Quasids are guilty; that hawala means financing militants; that the said militant organization is LeT; that the conspiracy was hatched in Srinagar in their house in so far as “circumstances suggest that they had also an active role in sending accused Md Arif @ Ashfaq to Delhi” (pp320). Accordingly, evidence is shown: one phone call from Ashfaq’s mobile is proof enough of their contact; signatures on cheques establish that the recipients were militants; and most importantly, Ashfaq’s disclosures provide the rest of the story – the nitty gritty of conspiracy and how and where it was hatched. How else can the Judge arrive at the conclusion that “the chain of events has been established which connects the aforesaid accused i.e. Md Arif@Ashfaq, Nazir Ahmed Quasid and Farukh Ahmed Quasid and this chain has been established on the basis of facts and circumstances, which have been clearly proved on the file beyond reasonable doubt” (para 491, p. 367)? Not quite, your honour!

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### III. **Concealing, Harboursing and Assisting** *The Case against the Others*

#### **Rehmana**

The prosecution alleged that Rehmana's residence at Ghazipur came under suspicion as the phone record of Ashfaq's mobile (9811242154) showed that Ashfaq had made and received calls from this residence. Rehmana was arrested the same night as her husband from her residence. Her mother and her sister (who was arrested from her office) were detained and then released.

The evidence against her is the amount of 2.8 lakhs which was deposited in her account by Ashfaq. Further, her marriage with Ashfaq is a proof of her willingness to conceal and shelter him. The judgement records that in spite of her medical condition (spinal problem) and her age (she was older) she was ready to marry him. Many recoveries were made such as ration card, driving license, cheque book of HDFC bank and ATM card of Md Arif, three pay-in-slips, a personal diary, a digital diary and some other articles. According to the Judge, the recovery of Ashfaq's bank slip of 5 lakhs, diary, visa form and the negative of Abu Bilal should have made her "suspicious to know the reality of her would be husband. But she ignored all these things as she was willing to harbour accused Md. Arif@ Ashfaq knowing his reality that he was a LeT militant and a Pak national and who entered India illegally to carry out militant activities." (p. 325). The Judge however, holds that the prosecution argument that Rehmana (like Sadakat Ali and Babar Mohsin) was actively involved in the conspiracy as unsubstantiated as "a careful analysis of facts do not suggest that the three accused were in agreement with him (Ashfaq) to commit crimes of murder etc." (p. 344) Accordingly, he convicts her under S. 118 (concealment of offender for the commission of crime) and S. 216 (harbouring) IPC.

#### *(i) Recoveries from Ghazipur*

The Judge dismisses the defence claim that nothing was recovered from Rehmana's house as he accepts the 'categorical deposition' of Insp. Ved Prakash (PW 173) who said that "the said articles were recovered from the house of Rehmana Yusuf Farukhi at the time of the arrest of accused Md. Arif @ Ashfaq". However, the Judge ignores the fact that there weren't any public witnesses during the search and that the police had complete access to the house. In fact, the suspicion that the police could have planted the necessary evidence cannot be totally ruled out. It is not surprising that there is contradiction regarding the recovery of the negative of Abu Bilal. While P.S. Dhillon (PW 86) claims to have recovered the negative from Ashfaq's wallet which was in turn recovered by Inspector Ved Prakash (PW 173) from Rehmana's residence on 26<sup>th</sup> December, PW 173 himself is silent on the whole issue of this recovery from Rehmana's house. Yet, the Judge notes that "a negative Ex PW 86/B of Abu Bilal, identified by accused Mohd. Arif @ Ashfaq, was also recovered from her house". How?

#### *(ii) Marriage, the convenient plot*

Rehmana's marriage with Ashfaq is held against her as she was older, had a medical condition and accepted a fairly large sum of money from him. The prosecution argued that that since she was older and had a medical condition, her reasons for marriage were motivated and that she agreed to marry Ashfaq because he offered her money and that she supported him either by staying silent or by harbouring and concealing him in her residence at Ghazipur. What is striking is that neither the prosecution nor the Judge reflects on the bias against her for it is prejudicial to believe that only 'normal' people marry without motives. Also, that the wife should automatically 'know'

### **Ghazipur, 22<sup>nd</sup> December**

308 A DDA at Ghazipur was a single room tenement (7ftx 10ft) and it is impossible for three ladies and two men to reside in the small space. This is evident from a visit to the flat itself. Rehmana lives here with her mother and sister; her brother also visits the family from time to time. On the night of 22<sup>nd</sup> December, Rehman was in this room with her mother, brother and husband, Ashfaq. According to her, her husband had come in the evening and they were together because it was the time of Ramzan. Since the house was very small her husband did not stay with her but would be there especially in the evenings. She says that on 25<sup>th</sup> December, sometime around 10 p.m. she went to the bathroom across a small courtyard outside the living room. She was startled to see some men sitting on the low wall of the courtyard. She ran back and bolted the door as she thought that they were burglars. The men outside knocked and almost broke down the door. They were arrested almost immediately; her mother and brother were also arrested. There was no lady constable. Rehmana claimed that besides her own documents were seized; none of those pertaining to Ashfaq were recovered from her house. She also maintained (and so did her sister) that Ashfaq never owned a mobile phone.

*Rehmana met the PUDR team when she was out on bail in March 2006*

everything that the husband is engaged in, shows a complete lack of understanding of marital relations and exaggerates the notion of familial complicity in any crime. The story that she accepted money because she was aware of Ashfaq's plans does not take into account that it could have been deposited for the purchase of a flat for the two of them and not necessarily an evidence of conspiracy. Also from Ashfaq's point of view, it wouldn't make any logistic sense why he should marry Rehmana so close to the time of the attack on the Red Fort. Indeed, if his intention was to set up base in Delhi, for which he needed legal documents, then he ought to have married much before. But the Judge does not bother with any of these questions.

#### **(iii) S. 216**

The Judge sentences Rehmana u/s 216 of IPC for harbouring Ashfaq. However, with respect to the conviction of harbouring, it is clear that Section 216 provides an exemption from harbouring to husband or the wife of the person to be apprehended. Further it is the case of the prosecution itself that Rehmana and Ashfaq were married and the Judgement does not find to the contrary. Therefore it is not possible to hold Rehmana guilty of harbouring post 8 December 2000 – the date of the

marriage. This is also noted by the Judgement on Page 343 which all the same argues that this would not be a complete defence as "she harboured him much before the date". In this respect it is important to point out that it is the case of the Prosecution itself that Rehmana and Ashfaq were only known to each other after her matrimonial advertisement in the newspaper on 8 October 2000. It would thus be relevant to see what specific material may be evidence of her guilt between 8 October and 8 December 2000, when she got married, and comes under the exception to Section 216.

The fact that Ashfaq was arrested from her house, not conclusive anyway of 'harbouring', would no longer be relevant given that it was after the marriage and neither would any of the recovered items as they do not indicate pre-December harbouring. That leaves only the amount transferred in the bank in November by Ashfaq, and there the Judge has this to say, " "Nobody would pay such a huge amount for no reason to a woman who is not even fit for marriage unless one is willing to do something illegal and Rehmana Yusuf Farukhi became a willing party to it." Is this a case of clear and convincing evidence beyond reasonable doubt, or a perfect illustration of patriarchal mindset and bias?

But, perhaps the most interesting insight that the judgement offers is the refusal to state categorically that Rehmana had indeed married Ashfaq on the 8<sup>th</sup> of December and that thereafter they lived as husband and wife. It is the prosecution's case that they were married on 8<sup>th</sup> December; the defence maintains it, but the Judge? There are references to 'her would-be husband' but not to her 'husband'. Milord, did she marry Ashfaq or not?

### **Babar Mohsin**

In early 2000, Babar Mohsin was a student in Jamia Milia who resided in Jama Masjid area. His mother is Kashmiri and according to the prosecution, his conduct comes under scrutiny as he allegedly helped Ashfaq with accommodation. The prosecution also claimed that he provided other assistance during Ashfaq's early trip to Delhi including recce of potential targets with full knowledge of his intentions. Ashfaq's disclosure statement of 30.12.2000 led to the arrest of Babar Mohsin. The Judge says "I find that accused Md Arif @Ashfaq made disclosure statement Ex PW 28/A on 30.12.2000 in which accused Babar (Mohsin) was named... " (pp 276). The prosecution produced a letter that had been recovered from the 'dicky' of the motor cycle belonging to Mohsin which was seized on 7<sup>th</sup> January. This letter was written by Ashfaq after his initial stay in Delhi and it thanks Babar Mohsin for help rendered. Further, the testimony of one witness Mohd. Ahmad (PW 225) claimed that Babar Moshin and Sadakat Ali were in close touch with Ashfaq during his stay in Delhi. The Judge relies on his testimony and concludes that "these repeated meetings cannot be explained away as innocuous or inadvertent as apparently there is no relationship between these three accused, which could facilitate these meetings" (para 448, p. 334). Thus, Mohsin was aware of the identity of Ashfaq and his motives and concealed the same. He is sentenced under S. 118 & 216 IPC.

A careful perusal of the 'facts' show that

the case against Mohsin is far from convincing. For instance, PW 28 SI Abhinendra Jain says that it was Ashfaq's disclosure statement on 30.12.00 wherein he mentions that he had stayed with Babar Mohsin when he first came to Delhi. There is however, no mention of the time of year when he came. Further there is no mention whatsoever about writing a letter to Mohsin or the latter taking him around Delhi on his motorcycle. The police team goes to the Jama Masjid area on 3<sup>rd</sup> January with Ashfaq to where Mohsin actually stayed. On that day no search is undertaken of the house and the motorcycle is not recovered. Next day, i.e. 4.1.2001, Babar Mohsin is arrested. On 5.1.2001 his disclosure statement is recorded. Again there is no mention of letter written by Ashfaq to him. On 7.1.2001 Babar Mohsin takes the police party to his house in Jama Masjid. The time according to PW 28, is 6.30 pm. No search is carried out of his house but motor cycle is seized. And in that motor cycle they claim to find the incriminating letter. PW 10, ASI Chand who was present testified that he cannot describe the house of Mohsin. He couldn't tell how many rooms there were or the size of the house. This confirms that no site plan was prepared; no photographs taken – of either the house or the motorcycle. Although family members were present their signatures were not taken on any of the documents recovered including the letter. In fact even Babar Mohsin did not sign on the letter that was allegedly found and PW 10 ASI Chand said that he did not see PW 28, Abhinendra Jain, sign his name. Thus there is no reference to letter prior to its fortuitous discovery on 7.01. 2001 from Babar Mohsin's motor cycle cloth bag and was not signed by the accused or any other witness!

The prosecution claimed that it was Babar Mohsin who took Ashfaq to Yunus Khan (PW 4) and asked for help to find a place for Ashfaq. It is their case that Babar Mohsin then took Ashfaq to Risalat Beg who got him a place in Zakir Nagar where Ashfaq first stayed. But significantly, both witnesses deny seeing Ashfaq with Babar Mohsin. However, PW 25

Risalat Beg denied knowing Babar Mohsin and refuted the police claim that they had brought Babar Mohsin to his house on 8.1.2001 for “nishan dehi”!

So once again the only evidence against Babar Mohsin is the letter found in the ‘dickey’ of his motor cycle – a recovery that in itself is doubtful and has been discussed previously, and the testimony of (PW 225), one Md. Ahmed that he had seen Babar Mohsin and Ashfaq in company of Sadakat Ali. Interestingly Md Ahmed appears on the scene six months after the attack on Red Fort and for the police, fortuitously. His emergence is related to the case against Sadakat Ali whose case is discussed below.

### Sadakat Ali

Sadakat Ali is the landlord of 18-C Gaffar Nagar, Okhla which Ashfaq rented from him to set up a computer firm called Knowledge Plus with a partner, Faisal Mohd Khan. He did not inform the police that he had let out his premises to a foreigner. His conduct after the incident was suspicious as he nowhere contacted the police to inform that his tenant was involved in such a grave incident. Further, call records show regular contact between his

residence number and Ashfaq’s mobile (9811242154). The deposition of Md Ahmed proves that the three accused (Ashfaq, Mohsin and Ali) were known to meet each other. Accordingly, the Judge holds Sadakat Ali as guilty under S. 216, 118, 188 (disobedience to order promulgated by public servant) IPC and S. 14, Foreigner’s Act.

The indictment of Sadakat Ali is based on the testimony of the same witness. Six months after the incident, on 15<sup>th</sup> May 2001, one Mohammad Ahmed (PW 225) wrote a letter to the Home Minister and Commissioner of Delhi Police. Thereafter he gave a statement to the police on 7.6.2001. In the letter Ahmed informs the police that he came to know from “his friend” (who too is said to be a police informer) that Sadakat Ali was “assisting the terrorists”. While he claimed that he wrote this letter in March 2001 the complaint carries the date 15<sup>th</sup> May 2001. Since he was illiterate he claims that he got the letter drafted in English from some unknown person. Following this complaint, he says a police officer came to him in June 2001. In his cross examination, Ahmed admits that he and Sadakat Ali had an altercation on 19.03.01. In other words, there was dispute between PW 225 and the accused

<b>Those Who Got Away</b>				
<b>Name</b>	<b>Crime</b>	<b>Prosecution's charge</b>	<b>Trial court's verdict</b>	<b>Comments</b>
Nain Singh (PW 20)	Rented house to Ashfaq	None	None	Rented house to a foreigner. Singh worked in the Cabinet Secretary as Senior Field Assistant.
Gian Chand (PW 21)	Rented house to friend of Ashfaq and latter also resided there	None	None	Encounter in which Abu Shamal was killed happened in his house
Mool Chand Sharma	Forgery of ration card of Ashfaq	guilty for conspiracy	Exonerated as witness who was unreliable	Same witness deposed for Matloob Alam for the same crime and Alam is held guilty



Sadakāt Ali. He admits to cases filed against each other. He also lets out that he is a police informer. Neither in his letter dated 15.5.2001 nor in his statement recorded under Sec. 161 of Cr PC dated 7.6.2001 does he mention anything about anyone else. It is during his examination in the Court, nearly four years later, that he claims to recognize both Babar Mohsin and Ashfaq as the people whom he had seen visiting Sadakat Ali's house. Curiously, no TIP was done where Md Ahmed, if he was aboveboard could have identified Babar Mohsin and Ashfaq as the two accused who according to him visited Sadakat Ali. Yet, the Judge accepts his testimony!

The Judge 'humanely' defends Ahmed who is illiterate and had to get his complaint drafted by some one else. "In these circumstances, it cannot be said that the complaint is vague and the level of literacy is reflected in the language of the complaint also". (para 445, p.332) When the defense submits that the letter is motivated and is written because

Ahmed is a litigant against Sadakat Ali, the Judge defends Ahmed and says that the litigation was started by Sadakat Ali after he came to know that Ahmed had written a complaint against him. He is, however, silent on the fact that Sadakat Ali had filed a complaint against the I.O, SK Sand. And when it is pointed out that Ahmed is a police informer, the Judge brushes it aside by saying, "It is no offence to be a police informer and this alone is not sufficient to diminish the evidentiary value of his statement" (p. 332) It is important to note that in the case 109/2001 filed by Md. Ahmad against Sadakat Ali and his family, the Metropolitan Magistrate in his decision dated 6/12/2003 notes that "Md. Ahmad in my considered opinion ...does not inspire confidence" and dismissed the case against the accused which included Sadakat Ali.

Astonishingly, in his cross examination S.K. Sand (PW 230), denies any knowledge of the fact that Sadakat Ali had filed a complaint

### ***Exonerated by the Court:***

#### **Devender Singh, Rajeev Malhotra and Shehenshah Alam**

The prosecution's charge against the three is that they helped Ashfaq in procuring a fake driving license. Devender Singh was the manager of Seven Star Motor Driving College at Sarai Jullena where Ashfaq had obtained driving lessons and had paid Singh a sum of 2000 rupees for the fake license. Devender Singh contacted his cousin Rajeev Malhotra who was the owner of Star Motor Driving College at Ghaziabad and paid him 900 rupees for the same purpose. Rajeev Malhotra contacted Shehenshah Alam, an employee of his firm who obtained the fake license from Ghaziabad Transport Authority for Ashfaq. The prosecution alleged that the above three had knowingly entered the conspiracy. However, the license that was issued was not fake, and had been done on the basis of the learner's license and ration card submitted by Ashfaq. The Judge accepts the fact that in order to obtain the driver's license, Ashfaq had forged a learner's license and ration card and these documents were used to obtain the driver's license from GTA. The above three were not connected with the forgery and hence, their role in the conspiracy is not established. The Judge concludes that "as such he in conspiracy with unknown persons induced and cheated the Transport Authority into issuing a driving license to him". (p. 361)

Towards the end of the judgement, the Judge observes, "I also hold that the prosecution in proving its case beyond reasonable doubt against accused Md Arif @ Ashfaq @ Abu Hamad, Nazir Ahmad Quasid, Farukh Ahmad Quasid, Rehmana Yusuf Farukhi, Sadakat Ali, Babar Mohsin and Matloob Alam. However, prosecution has not been successful in proving the charges against accused Devender Singh, Rajeev Malhotra, Shehenshah Alam and Mool Chand Sharma beyond reasonable doubt" (para 492, page 368-9)



against him on 09.04.01 with the Commissioner of Police, Delhi. He also feigns ignorance about a complaint filed by Sadakat Ali against Mohammed Ahmed on 22.05.01 which was recorded on 24.05.01. He claims he knew nothing about a FIR 109/2001 registered in PS Hauz Qazi against the son of Md Ahmad and that the son, Shahzad was arrested under section 107/51 of Cr PC.

Nevertheless, on the strength of this letter and the other letter recovered (see, *Incriminating letter*), Babar Mohsin is indicted. Nobody besides Mohammad Ahmed had said that Sadakat Ali and Babar Mohsin knew each other and had seen the duo with Ashfaq. In his testimony, Inspector S.K. Sand was categorical that Sadakat Ali was a “desperate bad character” of Kamla Market PS. The inference is obvious and deserves no comments.

### **Matloob Alam**

The way in which this petty forger gets behind bars for much more than cheating is amazing. Matloob Alam used to run a Fair Price shop at Okhla and Mool Chand Sharma was the Inspector of the area. The prosecution claimed that this was not a mere case of cheating and forgery but that both Alam and Sharma actively aided Ashfaq in procuring a fake ration card with an Okhla address. As far as Matloob Alam is concerned, the fact that he forged ration cards for two other people is established. He is therefore held guilty for cheating and forgery. Next, the Judge finds through the testimony of PW 174, Kushal Kumar that the handwriting on Ashfaq’s fake ration card is Alam’s. The prosecution argues that Alam had forged as many as 32 ration cards and cheated various public persons. However, the Judge finds more than what the prosecution establishes and says that Alam forged Ashfaq’s ration card and ‘helped’ him with an Indian identity. This is particularly bewildering since it was the very case of the prosecution that Alam was regular dealer in fake ration cards and had arranged those for a number of people.

The Judge lets off Mool Chand Sharma because the testimony of PW 174, Kushal Kumar is ‘unreliable’. Kushal Kumar was first cited as an accused in this case but not charge sheeted. His testimony is good enough to indict Matloob Alam but not Mool Chand Sharma! The Judge says, “I find it difficult to put reliance on the testimony of PW 174 as far as Mool Chand Sharma is concerned...But it is clearly established that accused Matloob in conspiracy with accused Md Arif@Ashfaq committed forgery” (, p 366). Matloob Alam is indicted and sentenced under S. 420 and 468 IPC.

Why is Sadakat Ali convicted but Nain Singh and Gian Chand not even held under suspicion? Why is Matloob Alam guilty but not the Inspector who was also implicated?

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## IV.

## Our findings

The decision to hang Ashfaq, to give life imprisonment to two others and to give seven years rigorous imprisonment to four others—this outcome of the trial is not only excessive but grossly unfair. After all, on what basis has the Trial Judge arrived at this conclusion? In fact, the very process by which the police detected the phone number at the site, established Ashfaq as the owner of the mobile phone and recovered it from him is a process that illustrates both sloppy investigation as well as biases and presumptions that work within it. As we have tried to show there is much doubt about finding of the slip with the telephone number and the recovery of the mobile that establishes Ashfaq as a participant in the attack on the Red Fort. Recoveries claimed on the basis of his disclosure statements too raise many questions. His involvement in hawala transaction leaves far too many questions unanswered. The letter fortuitously found in Babar Mohsin's motor cycle, which is both used to show that Ashfaq was in Delhi in February-March 2000 and also indict Babar Mohsin is not mentioned in the disclosure statement of either Ashfaq dated 30.12.2000, on which so much of prosecution case rests. And nor does Babar Mohsin's "disclosure" mention any letter received by him from Ashfaq. Mohd Ahmad the mysterious witness that the police relies on to nail Sadakat Ali and use as corroborative evidence against Ashfaq and Babar Mohsin is prejudiced and full of contradiction. Given that there is no coherent prosecution story regarding his Ashfaq's stay in Delhi, it is hard to believe that he came early in the year and stayed a considerable part of the year masterminding the attack on the Red Fort.

The prosecution case against the Quasids is also full of loose threads and holes. That they have money in their account may be plausible but that they are necessarily LeT financiers and conspirators in this attack on the Red Fort has not been substantiated. The case of telephonic

contact that the Judge accepts is flimsy and wholly inadequate. The motives that the prosecution attributes to Babar Mohsin and Rehmana are unfortunate to say the least. The Judge nowhere thinks it prudent to question the prosecution's claim that the money deposited in Rehmana's account by Ashfaq could have any other reason, other than payment for concealing Ashfaq's intention. As we have shown above, Babar Mohsin has been dragged into this case on extremely unconvincing and weak evidence and yet, the Judge accepts the prosecution's incredible story of the 'incriminating letter'. The prosecution's bias is clear in indicting Sadakat Ali while shielding Nain Singh, or in convicting Matloob Alam and in exonerating Mool Chand Sharma.

The flagrant disregard to procedures that ought to be followed are also overlooked by the Judge. The interrogation of the Quasids is a case in point which has been pointed out above. Seizures shown cannot be treated as genuine for non compliance with procedures but it does not matter. Recoveries shown appear doubtful but Judge remains unmoved. Not all recoveries made on the basis of disclosures made by Ashfaq are done in the presence of public witnesses. In fact, the Judge defends the lack of public witnesses by saying that it is common knowledge that the members of the public are not willing to join such proceedings. He further defends it by saying that it is not a legal requirement if the version of the police is otherwise reliable. But, this is precisely the point. How is it accepted that the version given by the police with regard to the recovery of arms near and in Red Fort after the attack is reliable? The Judge even overlooks allegations of torture against Ashfaq by saying that there isn't any evidence and further states that if "there is some torture or illegality committed by the police officials in the course of investigation, the same does not render the evidence inadmissible". So, illegal means are justified or underplayed either because there

isn't 'hard proof' of torture or because they lead to evidence. The defence claimed that Rehmana was arrested without the presence of a lady constable, that she was kept in illegal custody and that the recoveries made in her house are not true. The Judge simply dismisses all these arguments and instead accepts the prosecution version entirely as he is convinced that whether

it be torture or irregularities police ought not to be dis-believed!

The latitude that is given to the police during this investigation is worth noting. SK Sand's interrogation of the Quasids in January has already been discussed above to show the complete lack of procedures. Equally, the fact that the letter written by Ashfaq to Mohsin which was discovered three days later after Mohsin's arrest is never explained. No information is given as to who the translator was or why wasn't his signature ever taken. In his cross examination, SK Sand hotly denied that there was any communal bias in his investigation. But, is one totally sure? Sadakat Ali is guilty because he let out his premises with foreknowledge. But, Gian Chand and Nain Singh did not. As shown above, there is no concrete evidence to show why the other two were not. Unless, there is another reason: the communal stereotyping of landlords and tenants. And why should it be assumed that the police and the judiciary are always above societal representation of people?

Precisely. This case, clearly illustrates that the biases in the investigation and lack of procedures result in a case of insufficient evidence. On the basis of such an investigation, the prosecution prepares a full blown story of conspiracy, waging war, concealment and harbouring of the chief offender. An entire side story of hawala transactions is hitched on to this story. Three encounters happen in which the offenders are killed and no questions are asked. By the prosecution's own admission, Ashfaq worked for the 'real' culprits who masterminded the show and evaded arrest. The fact that they are shown as 'proclaimed offenders' does not mean that the prosecution as well as the judiciary can hang the next man they can lay their hands on. Unfortunately, that is what seems to have happened.

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### ***Are the courts listening?***

It is ironic that while the Parliament attack case occupies a central position in the Judge's exposition on this case, the Judge seems to have overlooked the story of Navjot Sandhu, the wife of accused Shaukat Guru. Navjot was implicated and was charge sheeted and convicted by the Sessions court under S. 123 IPC (concealing with intent to facilitate design to wage war) in December 2002. She had already been arrested a year before and the punishment which the court served her was 5 yrs of rigorous imprisonment. Almost a year later in 2003 she was acquitted by the High Court on the grounds that the prosecution had not established that she had knowledge of the conspiracy and had failed to inform the police. Navjot was pregnant at the time of her arrest and delivered a child in jail in 2002. Her condition was a traumatic one and even after her acquittal, her rehabilitation has been very painful and incomplete.

As in the case of Navjot, Rehmana's conviction rests on her being a wife of the accused. Her involvement, or even knowledge of, or harbouring and concealing of the accused have not been established. Rehmana, whose is currently out on bail feels that that her life has been ruined; the social stigma of being the wife of an accused (and no ordinary accused at that) leaves her with very little hope as far as her future is concerned. In law, there is no provision for compensation for wrongful incarceration unless one is able to show mala- fide intention. But what about the psychological damage that Navjot has undergone? In the case of Rehmana, the road to justice is still a long way off. Are the courts listening?

## V.

## Conclusion

Once prosecution charges a person for waging war under IPC 121 and for conspiracy under IPC 121A, there is a willing suspension of disbelief within the judiciary, and the trial court in particular. Procedures which are meant to both protect the accused as well as meant to strengthen evidentiary value of the prosecution's case are given a go by. The Red Fort case is an illustration of this.

We believe that it is the strict observance of procedure governing collection of evidence, seizures, recoveries, depositions, that not only provides protection to the accused but also creates a guideline/ benchmark for the prosecution in so far as their compliance with procedures enhances the calibre and credibility of the evidence presented before a trial court. Conversely by relaxing procedures, doubts are cast on the trial and the larger criminal justice system itself. This undermines belief in the 'rule of law' because it neither satisfies the victims of the crime nor the accused when doubts are cast on the evidence or when quality of the evidence gets undermined due to sheer callousness. In fact when rules are relaxed or wide latitude extended to the police in the name of bringing "terrorists" to justice, what suffers is not just fight against mass murders and heinous crimes, but justice itself as it literally discourages the police from rigorous scientific investigation. Just to cite an example, use of third-degree methods of investigation to collect evidence casts doubt on truthfulness of the account and effectively reduces police investigation into the real events that transpires, often leaving the original offender untraced. This means that not only may an innocent person be

unfairly charged and tried, but also that the real offender may remain free and 'on the loose'.

Fair trial does not mean final acquittal or reducing conviction. It determines what happens to person/s who are accused if, at the end of the day, they are acquitted of the charges. The years spent fighting the case takes its toll, materially and mentally on them and they do not suffer alone, their families and friends do too. Let alone receive compensation, for which there is no provision unless it can be shown that there was mala fide in the conduct of investigation and prosecution (something rather difficult to accomplish), they have to fend for themselves. To rebuild their shattered lives. Of starting all over again. In other words, while we welcome prosecution of perpetrators of crime, we are convinced that making up a false case or inventing evidence that shows the involvement of the accused to be more than what it actually is, is itself tantamount to subversion of justice. It tends to encourage arbitrary proclivities of the authorities, who can implicate any person or to go for overkill, simply because they know that even if the accused are acquitted of charges or charges get eventually reduced, there is little chance that any action would be taken against them. Course of justice against arbitrary or malafide actions of authorities is excruciatingly long, painfully slow and encounters the wall of official indifference. The rule of law then becomes a mere fig leaf for encouraging reign of lawlessness. This we believe is most harmful for any constitutional democracy

Where linkages are shown, what they reveal is far less than what is claimed by the prosecution. In fact, some of the people

appear to have been dragged into the circle of conspirators only on the basis of assumption of guilt of Ashfaq as a kingpin of this conspiracy. But if that is in doubt their links cannot be made into facts of conspiracy. For instance Babar Mohsin could not have received a letter written by Ashfaq in March 2000, if Ashfaq was not even in Delhi prior to May-June 2000! What is strange is that for the reasons about the guilt of Sadakat Ali to be taken seriously, then why was no action taken against Nain Singh (PW 20), Gian Chand (PW 21) or Rashid Ali (PW 232)?

The conduct of the investigators too escapes any indictment. I.O SK Sand changes his testimony again and again and clearly less than truthful in key areas but the Judge finds nothing wrong. Public witnesses are not part of many a recovery, arrest and seizure.

Then there is soft-peddaling of some witnesses especially PW 20 and non-pursuit of any other line of investigation that leaves many a question unanswered. It is strange why PW 20, Nain Singh's involvement was never pursued. The question whether Ashfaq was a double agent who escaped to India via Nepal from Pakistan via Nepal with the help of RAW as he claims and therefore lived with Nain Singh, is never pursued. The possible activities of the RAW or counter-espionage which could include cultivation of hawala operators for the sake of tracing money trail and/or monitoring activities of LeT and JeM is also completely side stepped. Using Ashfaq, a Pakistani, for such activities would be perfect foil. This apart the very fact that a dreaded "terrorist" lived for much of the period of conspiracy in Nain Singh's house and he remained oblivious of it appears far-fetched. These may appear as red herring because it is

difficult to get evidence of such wheeling-dealings by RAW or IB etc and without evidence these accusations appear flights of imagination. But there is much in the account of well known prisoners who escaped concocted cases mounted against them such as Iftekhar Geelani and SAR Geelani as well as their account of fellow prisoners in Tihar jail which suggests that it is possible to falsely implicate a person, manufacture and plant evidence. Such instances do not allow us the comfort of rejecting them outright.

Notwithstanding this, however, we are convinced that such is the sloppiness in investigation as well as collection and collation of evidence, some in fact marred by likelihood of torture that to award death penalty to Ashfaq on the basis of such evidence and a weak chain of circumstances amounts to an indictment of the Indian criminal justice system and its capacity to offer 'fair trial'. In fact the prosecution case is questionable in the case of Quasids who have been awarded life sentences. And most unfair in so far as Rehmana, Babar Mohsin, Sadakat Ali and Matloob Alam are concerned. What ought to have been done by the police, the prosecution and by the Judge, will now have to wait for the intervention of the higher court, if it too chooses not to be swept by the wave of cracking down on terrorism.

Perhaps higher judiciary would eventually rectify the mistakes. But at what cost to those who suffer the pain and ignominy of being accused and put through the grind that Indian criminal justice system has come to represent?

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