Chapter Two

Who Attacked Parliament?

The Prosecution Story

According to the prosecution, the conspiracy begins with Maulana Masood Azhar, the leader of Jaish-e-Mohammad based in Pakistan, instructing, at the instance of ISI, one Ghazi Baba, the Supreme Commander of the outfit in Kashmir, to carry out actions on important institutions of the Indian nation. To that end, Ghazi Baba directed one Tariq Ahmed to arrange for an operation. Tariq got in touch with Mohd. Afzal and motivated him to join the jehad for liberation of Kashmir. Subsequently, Afzal met Ghazi Baba and the plan was worked out. It was going to be a joint operation of Jaish-e-Mohammad and Lashkar-e-Taiba. Beginning with one Mohammad, Afzal arranged for several militants – Haider, Hamza, Raja and Rana – to bring huge quantities of arms, explosives and a laptop computer to Delhi in pre-arranged hideouts. In Delhi, the team got in touch with Afzal's cousin Shaukat Hussain Guru, Shaukat's wife Afsan Guru and S. A. R. Geelani, a lecturer of Arabic in Delhi University.

Afzal helped the militants buy the required chemicals and a Sujata mixer-grinder for making explosives. He was also actively involved in the purchases of a white ambassador car, a magnetic

red light used by VIPs, and a motorcycle for recee. In the beginning, the terrorists had their options open between Delhi Assembly, UK and US embassies, Parliament and the Airport; recee was conducted accordingly. However, Ghazi Baba instructed them over satellite telephone to settle for the Parliament. Once the details of the attack were firmed up, the explosives were duly made in the hideouts and the car was fitted with some of them. The laptop was used, among other things, to prepare a "Home Ministry" security sticker and identity cards for each of the terrorists. In a final meeting on the night of 12 December 2001, the militants handed over Rs. 10 lacs to Afzal, Shaukat and Geelani for their part in the conspiracy; they also handed over the laptop to be returned to Ghazi Baba.

The militants started off in the car towards Parliament complex at about ten in the morning of December 13. Just before and during the attack, the militants got in touch with Afzal over mobile phones repeatedly to instruct him to watch television to find out the presence and location of VVIPs inside the parliament. Afzal failed to do so as he was in the Azadpur market where there was no electricity; so, he instructed Shaukat to do so. However, the militants started their operation without waiting for this information. Once they went inside the complex after clearing security with the "Home Ministry" sticker and the VIP light on their car, they tried to park the car near Gate No. 11 of the complex, which is used by the Vice-President of India. As the car was reversing, it hit the main car of the Vice-President's carcade. In the ensuing commotion, the terrorists got out of the car, started shooting indiscriminately and attempted to run towards the building. As the security forces assigned to the complex got alerted, exchange of fire started. All the five terrorists and nine other people including some from the security forces died on the spot; sixteen persons from the security forces were injured. The event was over in less than half an hour.

Subsequently Shaukat met Afzal at Azadpur. Together they started off for Srinagar in a truck registered under the name of Shaukat's wife Afsan. The police picked them up on 15 December, 2001 along with the laptop with accessories, a mobile phone and Rs. 10 lacs. The police could trace them in Srinagar because, once the attack was over, the police found mobile phones and slips of paper with phone numbers written on them as well as a large quantity of unused arms, ammunitions, explosive devices, identity cards etc.

They found that mobile 98114-89429, a Delhi number, was given as contact number in all the identity cards. From the call records of this number they found that it was in touch with the mobile numbers found on the dead terrorists as well as with two other Delhi numbers 98115-73506 and 98100-81228. The number 98114-89429 and the numbers found on the dead terrorists were in touch with satellite phones in Kashmir; the mobiles found on the terrorists were also in touch with numbers in Pakistan, Dubai, and Switzerland. Out of all the prominent numbers only one mobile number 98100-81228 was found to be a regular mobile card of AIRTEL, which stood in the name of Sayed Abdul Rehman Geelani, resident of 535, Mukherjee Nagar, Delhi. As the mobile 98114-89429 was found switched off, they intercepted 98115-73506 and 98100-81228.

On 14 December, they located an incoming call from Kashmir to the mobile 98100-81228 in which the receiver of the call said things in Kashmiri to the effect that he supported the attack. On that basis Geelani was arrested from his house on 15 December. Later in the evening of 14 December they located another incoming call from Kashmir this time to the mobile 98115-73506. Upon his arrest, Geelani admitted to his knowledge and participation in the crime; he also told the police that the mobile 98114-89429 belonged to Mohammad Afzal and 98115-73506 to

Shaukat Hussain Guru. The police located Shaukat's house at Geelani's instance.

In the house the police found Shaukat's wife Afsan Guru alongwith the mobile 98115-73506. They found another mobile no. 98104-46375. Afsan admitted to her knowledge of the attack and named her husband and Mohammad Afzal as conspirators. She also clarified that the call from Kashmir the previous evening was from Shaukat. Once the police learned about Afzal and Shaukat and their location in Srinagar, they informed the police in Kashmir who arrested Afzal and Shaukat and seized the laptop, Rupees 10 lacs and a mobile phone *without* its SIM card bearing the number 98114-89429.

Once they were brought back to Delhi, they made disclosure statements which led to the hideouts, the shops and the seizure of chemicals, detonators etc. Also, Afzal identified each of the five dead militants lying in the morgue. Finally, Afzal and Shaukat made detailed confessions on 21 December 2001 after sections of POTA were introduced into the case on 19 December 2001. From these confessions, the police put together the conspiracy theory as summarized above. The seizure of a sticker with "we hate India" write-up, mention of huge sums of hawala money in Afzal's confession, and Shaukat's admiration for Osama Bin Laden mentioned in his confession added telling touches to the story.

On the basis of this story, the Special Court awarded death sentences to Mohd. Afzal, Shaukat Hussain Guru and S. A. R. Geelani, while Ms. Afsan Guru was given rigorous imprisonment (R.I.) for five years.

Planning and Operational parts: We will examine this conspiracy theory from a variety of directions in this work. For now, we note a significant division between two broad parts of the theory. The first part consists of the sequence of events that begins in Pakistan at the instance of the ISI and Maulana Masood Azhar,

proceeds via Ghazi Baba and Tariq Ahmed to the recruitment of individual terrorists from JeM and LeT, and ends with the five terrorists moving into pre-arranged shelters in Delhi with arms, ammunition and explosive material brought from Kashmir. For convenience, we call this the *Planning Part*. The second part consists of the preparations for the attack from these shelters. This part includes the survey of targets, purchase of additional explosive material, car and motorcycles, uniforms and other items, preparation of ID cards and stickers, and, finally, the attack itself. For convenience, we call this the *Operational Part*.

This division is significant because, as we will see ('A surrendered militant'), *the only evidence for the Planning Part is Afzal's confession under POTA*. As noted in the prosecution story, the police did claim to recover mobile phones from the dead terrorists which were allegedly used to communicate with numbers in Pakistan, Dubai, Kashmir and Switzerland. Arguably, an investigation into these call-records could have given the police some indication of the Planning Part independently of Afzal's confession. The police claimed to have made two efforts to secure this information; *both the efforts failed*.

First, to secure the details of communication between mobiles used by the dead terrorists (via the Internet) and numbers in Kashmir, "a request was made to the 'AIRTEL' for getting the details in this regard but the AIRTEL could not furnish the same due to technical non-feasibility" (Annexure 1). Second, "a request for obtaining the call details of the International telephone numbers and satellite phone numbers, which have figured during the investigation of the case, has been made to INTERPOL, but the report is still awaited" (Annexure 1). However, no report from the Interpol or any other relevant international agency was ever submitted as evidence. In the absence of any other corroborating evidence, the entire weight of the Planning Part thus rests on the credibility of Afzal's confession.

In particular, Afzal's confession is the only evidence regarding the identity of the five dead terrorists: their names and the terrorist organizations they belonged to. Obviously, since all the attackers died during the attack, the attack itself cannot be linked to any prior conspiracy without this crucial information. The problem is that Afzal himself denied any knowledge of the identity of the dead terrorists subsequently in his statement u/s 313 Cr.P.C.: "I had not identified any terrorist. Police told me the names of terrorists and forced me to identify" (Annexure 5). Statements of the accused are recorded in court u/s 313 Cr.P.C when the accused get the final chance to reply to questions put by the court. It is important to emphasize that this statement, unlike confession under POTA, is made by an accused before the court rather than before a police officer; also, this statement is made when an accused is in judicial custody, not in police custody. We return to this statement and the confession.

In search of some 'independent' evidence on this crucial matter, the Special Judge of the POTA Court claimed that the dead persons were Pakistanis since no Indian came forward to claim their bodies (Annexure 11, para 220)! As a matter of fact, neither did any Pakistani through the good offices of the Government of Pakistan. Outside the judicial proceedings, the then Home Minister L. K. Advani volunteered an 'evidence' in Parliament with his statement that "the dead men looked like Pakistanis." "Does Advani look like a Pakistani? Musharraf like an Indian? We need Toba Tek Singh to decide," Nandita Haksar and Kumar Sanjay Singh suggested.[1]

The Operational Part in contrast was flooded with alleged material evidence to which the police had independent access at the scene of the attack itself. It is not unreasonable to expect, therefore, that with proper investigation the police might have been able to find witnesses from among the shopkeepers, landlords,

and the like, to locate the hideouts and the incriminating material stored there. In fact, according to the police, the car dealer, who sold the attack vehicle to the terrorists, came forward within hours of the attack after he learnt about it from television (Annexure 1). From such investigation, the police might have been able to piece together much of the Operational Part without help from Afzal. To that extent, Afzal's disclosure and confession only made the task easier for the police.

However, a construction of just this part of the story would have fallen far short of an *explanation* of the event; for, it would have missed details about meetings, motivation, source of funding etc. without which an explanation would have remained essentially incomplete. *These details can only be reached from the testimony of at least one of the participants*. In that, the construction would have failed to link the attack to international terrorism.

For example, the construction could have simply meant that five unidentified and deranged young persons, inspired by sundry films, were out on a dark adventure for instant fame and a large sum of ransom money.[2] The sheer amateurishness of the attack – discussed below in 'Incredible features' – could be a pointer in that direction. In that sense, Mohammad Afzal's testimony turned a possibly mindless criminal adventure into an awesome terrorist attack. Mohammad Afzal is central to the prosecution story.

Plan of examination: Given the distinction between the planning and the operational parts, and the pivotal role of Mohd. Afzal's confessional statement in the prosecution story, we will examine the story as follows.

1. *Grave Charges*: In 'The Story Disputed,' we will show that, despite the apparent abundance of evidence against the accused produced by the prosecution, a team of very eminent lawyers challenged almost every aspect of both the investigation and the trial in severely critical terms. The charges ranged from fabrication and concoction of evidence to palpable mistrial. The gravity of the charges suggests at least that the prosecution story can not be taken for granted. We are thus led to examine both the over-all coherence of the story and the validity of its major parts.
2. *Implausible Explanation*: Next, in 'Incredible Features,' we show with concrete examples that even if we grant validity to the individual parts of the story, these parts just do not cohere as a plausible explanation of the attack. This suggests that significant parts of the story can not be true. The suggestion is strengthened by the fact that, in each case of incredibility, a credible explanation is available if we assume, *pace* defence, that much of the evidence is fabricated. Combining the effect of (1) and (2), we are led to examine the more significant individual pieces of evidence.
3. *Poverty of Evidence*: In 'Acquittal of Geelani,' we show that the judgment of the High Court itself contains a direct critique of the evidence produced against the accused. Although S.A.R. Geelani was found guilty on eleven counts and was awarded death sentences by the Special Court, the High Court *acquitted* him of all charges by summarily dismissing each piece of evidence produced against him. We discuss the judgment to illustrate the absurd features of evidence with which Geelani was sentenced to death. Geelani's trial raises grave doubts about the rest of the trial.
4. *Fabricated Documents*: In 'Arrest Memos,' the basic issue is that, given the centrality of Mohd. Afzal, the prosecution needs to document the chain of evidence which led from the scene of attack to the arrest of Mohd. Afzal. As noted, some mobile phones and call-records, allegedly linking the accused with the terrorists, enabled the police to organize a sequence of arrests culminating in Afzal. We show in detail that each piece

of evidence, including the arrest and recoveries themselves, are seriously questionable; in fact, and as noted by the High Court, parts of this sequence are certainly fabricated and/or illegal. In particular, the credibility of police witnesses is questionable. This part of the prosecution's story linking Mohd. Afzal to the terrorists collapses.

5. *Dubious independent evidence*: The credibility of the prosecution story thus depends on the material evidence recovered from the hideouts, and on the veracity of the confessions. Keeping to the former, the police allegedly recovered large quantities of incriminating material from the hideouts, and traced them to the shops from where these were allegedly purchased. Almost the entire weight of this set of evidence depends on the credibility of public witnesses such as landlords and shopkeepers. In "Procured' Witnesses,' we show in detail that crucial safeguards were routinely violated by the police. Further, there are palpable incredibilities and contradictions in the depositions of almost every public witness, giving rise to the possibility that they were deposing under duress.
6. *Forced Confessions*: Thus, not only that the confessions are not supported by independent evidence, the entire weight of the prosecution's case in fact depends on the veracity of these confessions, especially Afzal's. In 'A Surrendered Militant,' we note first that these confessions were deliberately recorded under POTA before a police official, rather than before a judicial magistrate. Next, we raise a series of queries and corroborating evidence to suggest that the confessions were extracted under torture. Further, the confessions are flatly in contradiction with the statements u/s 313 Cr. P.C. made by the same accused. We show that Afzal's 313 is largely credible in that (a) the courts admitted some of the statements, (b) the statements suggest honesty and truthfulness, and (c) the statements lend much credibility to an otherwise incredible story. Finally, parts of Afzal's 313, when conjoined and interpreted, raise dark issues about the complicity of the security agencies in the conspiracy.
7. *Vitiated Trial*: The cumulative effect of the preceding problems is that the entire proceedings were patently unjust for the accused. In addition, it is pointed out that (a) Mohd. Afzal never had proper legal representation at the trial stage, (b) effectively, he was never given a chance to narrate his side of the story, although the court mechanically recorded his statement 313.

It follows not only that the prosecution story is essentially unproven, large-scale fabrication, concoction and denial of natural justice characterized the proceedings.

The Story Disputed

The prosecution's case and the Special Court judgment did not go unchallenged. Despite the heap of evidence noted above, two very seniors lawyers, Mr. Ram Jethmalani and Mr. Shanti Bhushan, both former Union Ministers of Law, agreed to defend S. A. R. Geelani and Shaukat Guru respectively in the High Court without charging any fees; the noted lawyer Mr. Colin Gonsalvis defended Afzal. Lawyers of the stature of Ms. Kamini Jaiswal, Ms. Nitya Ramakrishnan, and Ms. Nandita Haksar assisted the senior lawyers in the High Court; Ms. Ramakrishnan also appeared for Afsan Guru. Here we record only some of the general observations on the Special Court trial by some of these eminent lawyers and others to give a sense of the broad issues that arose from this trial. Specific objections, as detailed in Annexures 12, 14 and 17, will be discussed later as we proceed.

In his submission before the High Court on behalf of the appellant S. A. R. Geelani, Ram Jethmalani contended: "This is a case of no evidence. The law of evidence has been treated as non-existent. The provisions of the Code of Criminal Procedure and Evidence Act have been flagrantly violated. Serious objections remain undisposed of." Elaborating, Jethmalani held that "the cognizance of the various offences charged has been taken without the sanctions required by Section 196 of the Code of Criminal Procedure or Section 5 of POTA or Section 7 of the Explosive Substances Act." As a result, "the evidence discloses total non application of mind and an unforgivable frivolity of attitude when the law enjoins careful and serious analysis and appraisal of evidence before granting the sanctions." Hence, "the purported sanctions are void and the trial totally without jurisdiction and a nullity."

Commenting on the investigation, Jethmalani argued that it "is riddled with illegality. The evidence discloses concoction and fabrication. All these have been grossed one and have resulted in a grave miscarriage of justice." About the charges, the senior counsel held that they are "illegal." In fact, "some charges are so ridiculous that the proceedings are deprived of the solemnity of a serious criminal trial … All the charges of offence under Chapter VI of the Indian Penal Code are bad in law."

About the legal defence available to the accused, Jethmalani observed that "in capital cases particularly those that arouse public prejudice and anger against the accused making it difficult for them to arrange for their own defense, it was the duty of the Court to provide adequate defence at State expense." However, "this duty was not performed and the record discloses that the accused never got proper and adequate legal assistance."

In sum, "the howlers including callous and gross carelessness, the irregularities, the illegalities at every stage and exhibitions of prejudice and hostility against the accused at every step place the trial court and its conduct of the trial far below the standards required by Article 21. This whole trial is unconstitutional, illegal and void."[3]

In his submission on behalf of Shaukat Hussain Guru, Shanti Bhushan contended that his client "has been falsely implicated in the conspiracy case by the investigating agency." The agency has not only "gone out of its way in concocting evidence," it "had even gone to the extent of forging and fabricating important documents for framing the appellants and police officials had clearly given perjured evidence." "In fact," the senior counsel emphasized, "even according to the findings recorded by the Special Judge himself the investigating officers had clearly fabricated documents and given perjured evidence."

According to the Senior Counsel, "the investigating officials have clearly committed offences punishable imprisonment with life under Section 194 and 195 of I.P.C." "When such a serious offence has been committed by the investigating officials," Shanti Bhusan continued, "it is only by having them punished that such fabrication of documents and the giving of perjured evidence can be stopped by the Court." Furthermore, since "the investigating officials were prepared to forge and fabricate documents against the appellants," it follows that "the only evidence on which reliance could still be placed by the Court would be evidence totally independent of these investigating officers."[4]

In their meticulous review of the trial at the Special Court, the Peoples Union for Democratic Rights (PUDR) worked through the case file to observe that the trial "brings out several anomalies, discrepancies, inconsistencies and misconstructions in vital areas of evidence which undermine the conclusions arrived at in the judgment." After a careful analysis of the evidence against the accused, PUDR reached the conclusion that "the combined effect of all the above goes a long way in demolishing the prosecution's case

against the accused": "there is no evidence which unerringly implicates them or whose authenticity is beyond reproach." Thus, they noted that "the judgment claims a degree of certainty in its conclusions, which does not in fact exist."

Reflecting specifically on the fact that the Parliament attack case was the first trial under POTA, PUDR observed that the "anti-democratic" character of this law "became more evident in the course of the trial." Linking the law to the uncertain character of the evidence produced against the accused, PUDR thought that "it is perhaps inherent in a trial under POTA that the accused is disabled to a point where rules of evidence become pliable and conjecture can take over and death sentences become easy to award." Moreover, "in the present political and ideological atmosphere, where the very act of applying POTA prejudges the action, the rights of the accused are treated as an especially dispensable commodity." As a result, a combination of "an unjust law and unfair trial" has "in all probability ended up committing a grievous error sentencing three men to death and a woman to five years of RI on dubious evidence and shoddy investigations" (Annexure 12).

Focusing on the Special Court Judge S. N. Dhingra, Nandita Haksar observed that "one is struck by the fact that he makes so many presumptions, all of them in favour of the investigating agencies and against the accused" (Annexure 14). For example, concerning the objection that the police did not follow procedures and may have tampered with the evidence, the judge remarked: "There is no reason to disbelieve the testimony of any of the police officers as none of police officers were having any kind of enmity against any of the accused persons" (Annexure 11, para 179). With respect to the contention of the defence that the witnesses produced by the police, such as the shopkeepers, were "procured witnesses," the judge asserted that it "has not been shown that any of the shopkeeper had any kind of enmity against the accused and wanted to implicate him in false case" (Annexure 11, para 113).

"None of the presumptions made by Shri S. N. Dhingra," Haksar comments, "are either sanctioned under the ordinary criminal law or even under the POTA. The judge justifies the violation of rules, regulations and procedures by the police by reference to the seriousness of the offence and denies the accused their rights under the law. Implicit in his reasoning is that the accused are enemies of the Government of India and therefore they have no right to the protections and safeguards provided under the law or under the Constitution." In this, Haksar notes, "the Judge is coming close to the way US President Bush and his lawyers are trying to characterize 'terrorists' as 'unlawful combatants' who are not entitled to the protection of the Bill of Rights. This reasoning has been criticized on the ground that it defeats the entire concept of fair trial."

The judgement, Haksar concludes, "is chilling reading." The Special Judge "has shown scant respect for the principles and ideals of human rights enshrined in our Constitution by the Founding Fathers." "If his judgement is upheld," Haksar fears, "it would lay the foundation for a police state where every citizen would be a potential victim of institutionalized repression" (Annexure 14).

To summarize, the following general concerns about the trial arose:

— some documents were forged
— some evidence was fabricated and concocted
— some sanctions were frivolous and unauthorized
— vital procedures were not followed
— the investigation was shoddy, often callous
— the trial judge was biased and prejudiced, and
— the human, Constitutional and legal rights of the accused were violated

Our concern is that, with such grave complaints against almost every aspect of the investigation and the trial, it is unlikely

that the prosecution's story is wholly true. If the story is false even in parts, it is of utmost importance to find out whether the remaining (true) parts, if any, amount to a satisfactory explanation of the event. In other words, we simply cannot take the prosecution's conspiracy theory for granted.

Incredible Features

A preliminary problem with the story is that, even if we take the individual pieces of the evidence offered to support it to be valid, the cumulative effect of some of the evidence looks incredible from considerations of truth and coherence. Notice that these concerns do not fall under the jurisdiction of the courts; their only concern is to see that the chain of evidence as presented by the prosecution stands unrefuted, and that it proves the guilt of the accused *beyond reasonable doubt*. Thus, the courts did not raise concerns of overall credibility; hence, they were not raised at all since there was no commission of inquiry, and the media followed the police. Yet, concerns like these are immensely significant for reaching a plausible explanation of the event. We will illustrate these points as we proceed. We will study three examples.

Example One: Consider some of the features of the attack itself. By any measure, the attack was so embarrassingly flawed that the police had to come up with some explanation of why it failed. Thus, according to a very senior police officer, "clearly the militants were inexperienced, especially the driver of the Ambassador." This is illustrated by the fact that, first, the militant-driver alerted the guards as he drove "too fast"; then he mistook a "vacant area" for a parking lot. On being challenged by the Security Guards, "he lost his nerve, took a U-turn to return to the main carriage way and in doing so rammed into one of the cars in Vice President Krishan Kant's convoy."[5]

"Thankfully," the officer continued, "the impact loosened the wires of the detonator in the Ambassador which was to be used to blow up the porch of Parliament," thereby turning the "wired-up car" into "a dud." This observation clearly suggests that the "wiring-up" of the car with explosive material was a job poorly done such that a mild collision loosened the entire detonating system. "With their plan going awry," the officer hypothesized, "the suicide squad panicked," jumped out and started firing, "thus revealing their deadly game prematurely." Moreover, "they made the mistake of splitting up, becoming easy targets." The official concluded that "they obviously didn't have a pre-determined plan and started spraying bullets in all directions"; in fact, "they had no fall-back plan either." Finally, although the terrorists were laced with explosives, they did not blow themselves up as they died, enabling the police to recover active mobile phones, identity cards and paper slips with phone numbers written on them.

The plan fell apart because, according to the same officer, "much of the lack of coordination was caused by the extreme secrecy and the delay in selecting the target … The militants had prepared two plans — of attacking either the airport or Parliament … Mohammad got the message to head for Parliament just minutes before the attack." Is this explanation credible in view of the rest of the story?

First, according to Afzal's confession (which is the only evidence at issue), the attack on Parliament was supposed to be a joint operation of two dreaded terrorist organizations, Jaish-e-Mohammad and Lashkar-e-Toiba, under the overall guidance of ISI (Annexure 1, Annexure 2). We can form some idea of the sophistication in planning and operation of these organizations by recalling the hijacking of IC-814 in December 1999. That extremely complex operation involving three states (India, Pakistan and Afghanistan), several airports, management of hundreds of

passengers and crew, and nerve-racking negotiations conducted for weeks in biting cold, virtually brought the Indian state down to its knees as the Union Minister Jaswant Singh was compelled to accompany the terrorist Masood Azhar to Kandahar.

It is not unreasonable to guess that the Parliament attack was designed to be perhaps the most ambitious terrorist action contemplated by these organizations. In fact, according to Afzal again, one of the terrorists, Mohammad (also known as "Burger"), who was the alleged leader of the Parliament attack team, was involved in the IC-814 operation as well (Annexure 1). Yet, according to the senior officer, the militants, who "didn't have a pre-determined plan", were "clearly" inexperienced in that they "panicked" and revealed their "deadly game prematurely" by "spraying bullets in all directions."

Furthermore, the explanation that the plan went astray because "Mohammad got the message to head for Parliament just minutes before the attack" does not match either Afzal's confession or what the police itself stated in the chargesheet. According to the chargesheet, a lot of people knew about the plan to attack Parliament much in advance. For example, Geelani was said to have stated that "meetings were held in the house of Saukat in Mukharjee Nagar and in these meetings Shaukat Hussain and Mohd. Afzal along with all the deceased terrorists used to be present and discuss the plan to carry out attack on Parliament House." Even Afsan allegedly stated that "she was aware of the plan of terrorist to attack Parliament House because a number of meeting were held in her house." In fact, "Afzal purchased a black Yamaha motorcycle No. HR-51E-5768" apparently exclusively "to conduct recee of Parliament House … They conducted repeated recee of Parliament House and the areas around it" (Annexure 1).

In his confession under POTA, Afzal did say, as noted above, that several targets were surveyed in the beginning. However, "after conducting recee of all the targets, Mohammad informed Ghazi Baba who told him that they must strike at the Parliament." Accordingly, "a trial meeting was held in the house of Shaukat in which all were present and the plans for attack on Parliament House was finalized." Only then was the Ambassador car, the attack vehicle, was purchased on 11.12.2001 – two days before the attack. Finally, in the night meeting on 12.12.2001 Mohammad told Afzal that "they are going to conduct a Fidayeen attack on Parliament House on 13.12.2001" (Annexure 2).

We must conclude, therefore, that if the chargesheet and Afzal's confession are valid, then the idea that Mohammad got the message to head for Parliament "just minutes before the attack" is a figment of police's imagination just to placate the general public in view of the palpable amateurishness of the operation. If the explanation given by the police is false, then the attack just does not square up with the profile of the terrorist organizations at issue.

As an aside, we just note, for what it is worth, that Maulana Masood Azhar, the leader of Jaish-e-Mohammad, reportedly denied any involvement with the attack soon after the event. Quoting reports that mounds of explosives were brought to be used in the attack, he said it was impossible for the militants to transport such a huge quantity of explosives.[6] On the other hand, General Javed Ashraf Qazi, the former chief of Pakistan's ISI, reportedly told a joint sitting of Pakistani Parliament more than two years later that "we must not be afraid of admitting that Jaish was involved in the deaths of thousands of innocent Kashmiris, bombing the Indian Parliament, (journalist) Daniel Pearl's murder and attempts on President Musharraf's life."[7]

What took Qazi so long to say this? What does it mean for Qazi to "admit" that Jaish was involved? Was Qazi's selective list of terrorist outrages just a statement of fact or was it politically aligned to the changed circumstances involving India, Pakistan, the US

and the Iraq war? Recalling that the Delhi police, via Afzal, claimed that Lashkar-e-Toiba was equally involved, why didn't Qazi implicate Lashkar-e-Toiba with Parliament attack when he did mention Lashkar-e-Toiba's "harmful" role in Kashmir in the same speech? What is the truth?[8]

Before we proceed, note that the issues of amateurishness and inexperience do not concern the courts of law. As long as there is evidence, admitted and proven under the law, that some people committed a crime and that these people were conspiratorially linked to some other people, the case is upheld. From the legal point of view, it does not matter if the commission of the crime showed signs of naivete or if the actions of the criminals do not match the presumed profile of the organization they belong to. However, they do matter for establishing the truth.

Example Two: The absence of a "pre-determined plan" seemed to have affected other aspects – such as communication between the attackers and co-conspirators – of the terrorist operation as well. As noted, the terrorists allegedly got in touch with Afzal over mobile phones just prior to and during the attack. According to Afzal's confession, when the terrorists were "in the vicinity" of Parliament House, they wanted him to find out "about the presence of various VVIPs inside Parliament House." Afzal failed to do so since he was in the Azadpur market where there was no electricity!! After 25 minutes Mohammad called again with the same demand. Only then Afzal informed Mohammad about the lack of electricity and asked for some more time. At that point Afzal instructed Shaukat to watch TV and call him back with the information. However, Shaukat states in his confession that by the time "I switched on the TV I received another call from Afzal that the mission is on." Apparently then the terrorists had decided to go ahead with the attack even before they received the information they were insisting upon.

Just what was the relevance of this piece of information for the terrorists just minutes before the attack? Why should they bother about this detail when they were allegedly planning to secure the entire Parliament which was in session in any case? Could Afzal (or Shaukat) have gleaned this specific information on demand from TV? What was Afzal doing in Azadpur market at a time like this? Why wasn't this supposedly crucial task pre-arranged? Finally, if the information was so crucial for the success of the attack, why did the terrorists go ahead without it?

Example 3: Afzal and Shaukat were found guilty of conspiring in a terrorist act and waging of war of horrendous proportions. According to the High Court judgment, Mohd. Afzal was a part to the conspiracy to attack Parliament when it was in session, he was instrumental in the smuggling of arms and ammunitions, he had actively purchased the chemicals (Annexure 16, para 400). Shaukat Guru's involvement was more than mere knowledge, acquiescence, carelessness, indifference or lack of concern, there is clear and cogent evidence of informed and interested co-operation, simulation and instigation (Annexure 16, para 402). Both were accused of working in close co-operation with a group of hardened foreign terrorists with the aim to cause damage to the sovereignty and integrity of India. These words suggest a certain criminal profile of the accused. Now, according to the police, they behaved as follows.

Afzal and Shaukat drove out of Delhi in an easily identifiable vehicle, namely, a truck registered in the name of Shaukat's wife, to reach Kashmir via the difficult mountain roads filled with the slush and snow of winter. Were these plausible choices of vehicle and immediate destination for terrorists escaping from such a high-profile crime? Since the news was immediately on TV, Afzal and Shaukat knew that the attack had failed and the terrorists had been found intact and dead. So, there was every likelihood for the

police to recover the mobiles, trace the numbers and post surveillance.

However, instead of disappearing in thin air, they continued onwards towards Kashmir in that truck. Not only that. On completion of the journey, Shaukat called his wife 36 hours after the attack to tell her that he had reached Srinagar safely. We reproduce the entire conversation that the police claimed to have intercepted at Annexure 16 (para 341).

The veracity of this conversation was much discussed in the courts. However, everyone seemed to agree that, if the conversation is true, then it showed that Afsan was scared and that she was concerned about Shaukat's safety; the Hon'ble judges of the High Court also thought that Afsan and Shaukat were "talking between the lines" (Annexure 16, para 342). In what follows, we do not concede the veracity of the call; we simply assume that the said conversation took place.

The point of interest – not discussed so far – is that, apart from the amazing fact that Shaukat had called his wife at all, he continued the conversation even after being warned by Afsan; in fact, he advised Afsan to call him back later in the night. Moreover, even after being warned by Afsan at about 8.00 in the evening, they did not flee but stayed put in the Srinagar Mandi for the whole night. In the morning, they drove out of the Mandi in the same truck with the laptop, the mobile and the huge sum of money, and proceeded onwards presumably to meet Ghazi Baba when they were picked up near a police station.

How can these parts of the evidence be valid and the story they generate so incredible at the same time? Moreover, if these parts of the total body of evidence make the narrative incredible, why should the rest of the parts of the evidence be viewed as credible? We emphasize again that these concerns about credibility do not fall under the jurisdiction of the courts; if Afzal and Shaukat

behaved like overconfident fools, it was their problem. Yet, concerns like these are immensely significant for reaching a plausible explanation of the event: how can organizations like the Jaish recruit such overconfident fools for their most ambitious terrorist operation?

An alternative perspective: The incredibility factors of these examples get immediately removed if we adopt an alternative perspective. In that perspective, let us imagine that the evidence and the interpretation produced by the police in these examples are in fact *false*, although the evidence is *needed* by the police for sealing crucial joints of a preferred conspiracy theory.

This perspective assumes obviously that the police is capable of massive fabrication to meet its own ends, rather than serving the law. It is unlikely that the courts of law will routinely adopt this alternative perspective, unless specifically asked to do so. The courts may – and often do – reprimand investigating agencies for shoddy work, not adhering strictly to the law, minor fabrications etc. But, *other things being equal*, they are not likely to adopt the alternative perspective to question the entire functioning of an agency in a particular case. The investigative agencies, even under nomal circumstances, are themselves viewed as arms of the law; hence, the police and the courts form a natural mutuality.[9] The mutuality is likely to tighten in *abnormal* circumstances such as terrorism and national security. The entire burden in these circumstances is then on the defence to show that other things are not equal. In case of large-scale fabrication in abnormal circumstances, the task is nearly impossible given heightened mutuality, and the vast powers of the police over instruments of intimidation and repression. This is where a commission of inquiry takes precedence over a court of law.

Returning to the incredible features of the examples discussed above, suppose that a group of amateurs carried out the attack (at

whose instance we do not know); that is, suppose that five unidentified and deranged young persons, inspired by sundry films, were out on a dark adventure for instant fame and a large sum of ransom money. It will then be false that JeM and LeT were behind the attack, notwithstanding Afzal's confessional statement. However, the police needed this part of Afzal's statement to portray the attack as a familiar international terrorist operation. More importantly, from the police point of view, the ascription of the attack to JeM and LeT via Afzal's confession *closes the case around Afzal*.

Again, suppose that the terrorists never made those phone-calls to Afzal regarding the VVIPs; that is, suppose either that the relevant call-records produced by the police are false or that the evidence linking Afzal to the mobile no. 98114-89429 is false or both. Then the incredibility of the content of those calls disappears simply because these calls wouldn't have been made. However, the police needed this evidence to link Afzal and, in turn, Shaukat directly to the attack itself, rather than depending wholly on questionable witnesses and confessional statements.

Incidentally, PUDR questioned the call-records of two calls that might be viewed as relevant for their timing for the issue in hand. PUDR observed that "the Call Detail Record (CDR) shows that at 11.19.14 am on December 13, two calls were made simultaneously from the same calling number 89429 (Afzal's) to the same called number 73506 (Shaukat's) but were made on handsets with different IMEI numbers. The same phenomenon was repeated at 11.32.40 the same day. The IMEI number is a unique number each cellular handset has and which is transmitted each time the phone is operated. It is therefore impossible for this phenomenon to occur unless the Call Detail Records have been doctored" (Annexures 12). In a later report published after the High Court judgment, PUDR maintained the observation (Annexure, 17). Are these the two calls Afzal supposedly made to Shaukat regarding the presence of VVIPs in Parliament?

Finally, suppose it is false that Afzal and Shaukat were *conspirators* fleeing from the area of the crime. Then it is perfectly intelligible that they made a routine trip between the Azadpur and the Srinagar wholesale markets as part of their regular fruit-trade (supposing of course that they made the trip together or individually at all). This also explains the phone call: husband calling wife after reaching another city. We emphasize once again that the argument that follows is entirely conditional: we interpret the call as produced by the police *assuming* its veracity. As we will see, there is much evidence to suggest that the entire call-record is fake; in fact, there are reasons to believe that the mobile phone, including the said SIM card, was planted in Afsan's hand.

Turning to the content of the call, unknown to Shaukat, Afsan was already in custody; hence, she was compelled to say things which in turn were construed as knowledge of conspiracy. Let me explain. We will see that the time of Afsan's arrest is in dispute ('Arrest Memos' below). According to the police, Afsan was arrested on 15 December morning at Geelani's instance (Annexure 1). According to Afsan, corroborated by Geelani's wife, she was in fact arrested around 6.00 P.M. on the 14th itself (Annexure 7). Thus, she could have received the call while in custody. Interestingly, the prosecution itself cited the following part of Afsan's statement u/s 313 Cr. P. C. to assert that she received the phone call from her husband: "It is correct. I enquired as to what has been brought in truck. *I talked to him in police custody*" (Annexure 16, para 248 (c), emphasis added).[10]

No wonder she was scared and she wanted to save her husband by "talking between the lines."[11] *Ignorant of all this*, Shaukat didn't quite get the message, and wanted her to call back later in the night. Notice that this interpretation of the conversation be-

tween Shaukat and Afsan not only removes the concerned incredibility, it in fact lends additional weight to (a) Shaukat's innocence, and (b) Afsan's arrest on the 14th itself. In fact, *it suggests Afzal's innocence as well* since Shaukat was hardly likely to accompany Afzal innocently if Afzal was escaping from the crime.

Furthermore, there is another feature of the call that could indicate Afzal's innocence. Near the end of the call, Afsan asked, "Reached safely?" to which Shaukat replied, "Yes Yes." Then Afsan asked, "And Chotu?" to which again Shaukat replied "Yes Yes" (Annexure 16, para 341). "Chotu" happens to be Afzal's byname. Now, if Afzal and Shaukat were travelling *together* in the truck, Afsan's query sounds pointless; it makes sense if they were travelling separately. In his statement u/s 313 Cr. P.C., Afzal stated that he left his apartment in Delhi on 12.12.2001 with some bags after handing over the keys to the landlady, and telling her that he would bring his family after Id (Annexure 5). In his statement, he also said that he went to Srinagar alone by bus. A natural inference is that he left for Srinagar on 12.12.2001 itself, i.e., *the day before the attack*. Since he was supposed to have reached Srinagar already by himself, Afsan's separate query as to whether Chotu had (also) reached safely makes sense.

Recall that Mohammad Afzal – in fact, the confession extracted from him – was central to the prosecution story. Once the police was able to explain how they reached him, the rest of the theory fell in place by the sheer weight of a single testimony. In order to reach Afzal, therefore, *beginning* with the regular mobile-holder Geelani who allegedly took them to Afsan, the police was compelled to construe an otherwise innocuous trip as principal conspirators escaping from the area of crime. In other words, what was needed had to be superimposed on what actually transpired. Under the perspective in hand, a series of falsities thus ensued – calls from terrorists to Afzal, Geelani's arrest, Afsan's arrest, interpretation of the phone-call, Afzal and Shaukat's arrests, recovery of material including the mobile, etc. – to protect the original falsity that Afzal and Shaukat were conspirators, rather than regular fruit-traders. We return to this ('Arrest Memos' below).

The massive conflict between the incredible police story and the credible alternative perspective – when read with the stringent criticism of every aspect of the trial by eminent lawyers and PUDR – gives rise to the new apprehension that the prosecution story is not only likely to be partly false, but false in crucial respects.

Acquittal of Geelani

The deep problems with the character and quality of evidence produced by the prosecution in the Parliament attack case was officially illustrated in the trial of S. A. R. Geelani, the lecturer in Arabic in Delhi University. On 29 October, 2003, the Indian judicial system added a feather to its cap when the Hon'ble High Court *acquitted Geelani of all charges*. The Special Court had earlier found him guilty of "conspiracy to attack the parliament, wage war against the government of India, murder and grievous hurt," and had awarded him two death sentences among other punishments. In the trial, the prosecution produced three crucial pieces of evidence against Geelani.

Confession of co-accused: The first piece concerned the confessions of the co-accused Afzal and Shaukat both of whom implicated Geelani, as noted; Shaukat in fact implicated his wife, pregnant with their first child. However, in contrast to the earlier anti-terrorist legislation TADA, confession of an accused is not admissible against the co-accused in POTA (Annexure 16, paras 376, 377). Thus the High Court set the evidence aside (Annexure 16, para 411). Yet, despite the well-known provision of POTA, both the police and the prosecution used the confessions of Afzal and Shaukat against Geelani.

It is interesting that the Special Court judge used the confessions against Geelani if only "to lend assurance to other circumstantial evidence." For example, he held that even though whether Geelani attended some meetings with the terrorists the night before the attack "cannot be inferred" from the confessional statements, the statements apparently "lend assurance" to a phone-call he had allegedly made around that time showing that "Geelani was very much alive to the preparations going on for attack" (Annexure 11, para 230). In effect, disputes about the content and veracity of alleged phone-calls (see below) was settled against the accused by drawing on the confessional statements of co-accused.

Conversation with half-brother: The second piece concerned a telephonic conversation in Kashmiri, which the police intercepted, between Geelani and his half-brother in Kashmir in the afternoon of 14 December 2001. The handling of this piece of evidence gives a telling indication of how the trial was conducted in the Special Court; hence, we will study this evidence in some detail. According to the transcript of this conversation produced by the prosecution, the half-brother had asked, "What have you done in Delhi?", to which Geelani had allegedly replied, "This was necessary." According to the prosecution, this conversation revealed Geelani's involvement in the attack.

The defence raised a variety of objections. The police version was based on a verbal translation into Hindusthani done by Rashid, a fifth class pass Kashmiri fruit-seller, which was then written down by a policeman; the transcript of the original Kashmiri conversation was never submitted. These facts need to be kept in mind in what follows.

In any case, there were serious problems with the quality of the tape: the expert witness produced by the prosecution observed that the "voice was inaudible due to high interfering background noise"; the High Court, who called for the original tape, remarked

that "the voice was so inaudible that we could not make head or tail of the conversation" (Annexure 16, para 346). Rashid listened to the tape 2-3 times in an ordinary cassette player inside a noisy police station. Significantly, Rashid insisted that there were no English words in the conversation.

The defence produced two expert witnesses: Sanjay Kak, a Kashmiri and a film-maker and, thus, an audio-visual expert; Sampat Prakash, a noted trade union leader in Kashmir, part of his job is to transcribe speeches and writings back and forth between Kashmiri and other languages. The defence witnesses had to listen to the tape very carefully for nearly a dozen times to ascertain its content. According to these witnesses, the Kashmiri equivalent of "This was necessary" does not occur in the original tape at all, but the English words "syllabus and prospectus" clearly do. According to the transcript produced by the two defence witnesses, the part of the conversation mentioned above ran as follows.

> Caller (brother): What has happened?
> Receiver (Geelani): What, in Delhi?
> Caller: What has happened in Delhi?
> Receiver: Ha! Ha! Ha! (laughing)

As the defence explained the whole conversation, Geelani's half-brother had called because he wanted Geelani to send some syllabus and prospectus for medical entrance examinations in Delhi. During the call, the stated portion of the conversation took place because the brother had heard of a mild rift between Geelani and his wife regarding their visit to Kashmir for Id (Annexure 4). Geelani's wife testified in court that, since Geelani had refused to go as he did not have holidays, she had complained over phone to her mother-in-law (Annexure 7). Geelani avoided a discussion of a personal issue with his brother, much younger than him, by simply laughing the matter away (Annexures 12, 13, 14). The half-

brother wouldn't have imagined that his mild curiosity would lead to death sentences for his elder brother.

The Special Court judge thought otherwise. First, he admitted the credibility of the fruit-seller since Kabir, Tulsidas and others were famous literary figures without being formally educated. In fact, he held that it is a graduate or a post-graduate, "who after acquiring knowledge of English starts forgetting his mother tongue and can speak only in Hinglish, Chinglish or Kashinglish" (Annexure 11, para 204). Second, he rejected the contention of the expert witnesses produced by the defence that the Kashmiri equivalent of "What has happened in Delhi?" could be a reference to anything, including a quarrel between Geelani and his wife over the cancellation of the trip to Srinagar for Id. Recall that the testimony of Geelani's wife to the effect that she had a quarrel with her husband gave a natural interpretation to the conversation between Geelani and his half-brother (Annexure 7). Without giving any reasons, the judge held that "She is not a trustworthy witness at all and her testimony cannot be relied" (Annexure 11, para 237).

Instead, according to the learned judge, the query "What has happened in Delhi?", "only relates to the incident in Delhi." *He even brought in his personal knowledge in this regard*: "This court had no knowledge of Kashmiri language and had to take some lessons in Kashmiri language" (Annexure 11, para 202). Third, he viewed both the defence witnesses as "interested witnesses." Sanjay Kak did not qualify because he is a member of the "All India Defence Committee for fair trial of SAR Gilani;" Sampat Prakash failed to qualify since he was "known to one Mr. Balraj Puri," a Convenor of Peoples Union for Civil Liberties (Annexure 11, 202). Thus, a membership or any other connection with civil rights organizations committed to defend the rights of accused persons disqualifies a person from being a (disinterested) witness.

Nandita Haksar explains the issue: "None of these people are 'interested' witnesses as ordinarily understood in criminal law. They have an impeccable reputation for integrity and patriotism. They are not related to the accused," and Kak and Prakash did not know Geelani personally; in fact, Kak and Prakash did not even know each other before the case. "They are textbook disinterested witnesses. The definition of a disinterested witness is: Impartial, fair-minded; unbiased. A disinterested witness is one 'who has no personal interest in the case being tried or the matter at issue and is legally competent to give testimony'" (Annexure 14). Both Sanjay Kak and Sampat Prakash eminently qualify under these guidelines.

The High Court deliberated on the said conversation as follows. First, "the prosecution witness, Rashid, who prepared a transcript of the tape is fifth class pass and it was not his profession to prepare transcript of taped conversation. The possibility of his being in error cannot be ruled out. Benefit of doubt must go to the defence" (Annexure 16, para 346). Second, regarding the disputed portion of the conversation cited above, the judges held: "This part of the talk is undoubtedly in colloquial style. The conclusion drawn by the prosecution can hardly be contended, much less accepted" (Annexure 16, para 348).

Third, and most important, "even assuming the prosecution version to be correct, [we had] come to the conclusion that there was nothing which could incriminate Gilani as far as the conversation is concerned" (Annexure 16, para 408). Suppose for the sake of argument that Geelani did utter "This was necessary" and it related to the Parliament attack. But for this utterance to imply that Geelani *participated* in the attack, the knowledge of Geelani's participation has to be ascribed to his half-brother for him to ask the *relevant* question, which in turn implicates the half-brother as well. However, it was never the prosecution's case that the half-

brother was also involved; hence, no inference about Geelani's participation in the attack can be made. For this reason, we are refraining from reproducing the three versions of the said conversation.

The Special judge, however, not only held that "This conversation confirmed the involvement of the accused in the conspiracy," he did not limit his observation to the Parliament attack case since, according to the learned judge, Geelani "considered that such kind of attacks were necessary from time to time" (Annexure 11, para 237).

Acquaintance with co-accused: The third piece of evidence concerned some telephonic conversation between Geelani, Afzal and Shaukat during the presumed period of conspiracy. Geelani never denied his acquaintance with Afzal and Shaukat since they all came from the Baramullah district of Kashmir, and were fellow students at Delhi University. Geelani had conducted the 'nikah,' the Muslim marriage ceremony, between Shaukat and Afsan. This explains why Geelani and Shaukat might have called each other first once they acquired their phones (Annexure 16, para 405).

Further, the period under consideration was also the period of Ramzan when Muslims get in touch with each other to plan religious programmes. Thus, if the said midnight call did take place, there could be a perfectly legitimate explanation for it: it was the night of Shab-e-Kadr when Muslims call on each other to pray for their well-being. The judges observed that mere acquaintance, even during this period, does not prove complicity in the conspiracy (Annexure 16, para 405). Therefore, with respect to this "only piece of evidence" against Geelani, the Hon'ble judges contended that "this circumstance … do not even remotely, far less definitely and unerringly, point towards the guilt of the accused" (Annexure 16, para 412).

Each of the pieces of evidence brought against Geelani by the prosecution was thus summarily dismissed by the High Court. In this connection, it is tempting indeed to recall the words of Ram Jethmalani: "This is a case of no evidence," "the evidence discloses total non application of mind and an unforgivable frivolity of attitude." The 'frivolity of attitude' was further illustrated in what the Special judge thought of Geelani.

Role of Geelani: It is important to recall that according to the police and the obliging media, Geelani was thought to be the local mastermind, the intellectual leader of the conspiracy ('Role of the Media' above). Although *this charge was not specifically mentioned in the chargesheet or by the prosecution*, the Special judge reached a similar view of Geelani. Interestingly, as noted, this 'mastermind' image of Geelani was also portrayed at length in the film *December 13* telecast by Zee TV three days before the judgment was announced. The learned judge seemed to have developed this view in two broad steps.

He argued first, essentially on the basis of an ill-written 'love letter,' that the deceased terrorists were "hardly educated" (Annexure 11, para 42).[12] Then the judge referred to a "very neatly prepared" note found with the deceased terrorists that gave the topography of Parliament. This suggested to him that the terrorists were getting "active help" from the other co-accused, and Geelani was "the most educated among them" (Annexure 11, para 238). Also, according to the learned judge, "it is a matter of common knowledge that terrorists are able to hire and convince even best brains also for jehad" (Annexure 11, para 239). So a lecturer of Arabic and scholar of Urdu poetry was "hired" to prepare the topography of Parliament "very neatly."

Second, he furnished his own account of the phone-call allegedly made by Geelani "on the night intervening 12th and 13th Dec.01": "so he made this call … to know the final result of the

meeting, as to whether the next date is the target date or not," even though "this call has not been explained by accused Geelani"(Annexure 11, para 230). How could Geelani "explain" a call when he was never told its content? Yet, the judge somehow knew why Geelani made that call! Having thus established Geelani's active role in the conspiracy, the judge offered his own unsupported explanation of why Geelani refused to visit Kashmir: "It seems that the programme of going to Eid was cancelled by accused Gilani not because of paucity of holidays but because he was hopeful that the five terrorists would succeed in capturing parliament and he had envisaged a role for himself thereafter" (Annexure 11, para 236). That is why perhaps Geelani was so eager to learn about the outcome of the decisive meeting: "he had envisaged a role for himself thereafter."

With his outright acquittal, not on technical grounds, but on sheer lack of evidence, a hole appears in the case insofar as Geelani's role in the conspiracy – as ascribed to him by the Special judge – is concerned.

Arrest Memos

Notwithstanding the views of the Special judge and the media on Geelani's role, the fact remains that neither the chargesheet nor the prosecution assigned any specific role(s) to Geelani in the conspiracy to attack Parliament; the same holds for Afsan Guru. In that sense, the acquittals of Geelani and Afsan by the High Court did not make any substantive difference to the conspiracy theory advanced by the prosecution. Moreover, the evidence discussed so far in connection with the Geelani trial in the preceding section did not give rise to any momentous concern about concoction and fabrication of evidence,[13] although the study of that trial did show the prosecution and the judge in poor light.

No doubt, the conduct of the Geelani trial is enough ground for skepticism about the trials of Afzal and Shaukat as well. Since the police, the prosecution and the Special Court have been horribly wrong in one part of the case, why should we now believe that they have been vindicated for the other parts? Nonetheless, the skepticism needs to be supported with more direct empirical argumentation.

Significantly, the trial of Geelani also brought out at least one direct instance of fabrication of crucial evidence by the investigating agency that has a large bearing on the conspiracy theory. According to the Hon'ble judges of the High Court themselves, "a very disturbing feature pertaining to the arrest of the accused persons has been noted by us" (Annexure 16, para 250, 255). They observed that "the prosecution stands discredited qua the time of arrest of accused S. A. R. Geelani and accused Afsan Guru" (Annexure 16, para 251).

The issue is this. According to the prosecution, Geelani was arrested first on 15 December 2001 at about 10 A.M., Afsan Guru was subsequently arrested at about 10.45 A.M., and Afzal and Shaukat were arrested at Srinagar at 11.30 A.M. on the same day. Thus, as noted earlier, the police finally reached Afzal through this sequence of arrests beginning with Geelani, whom the police could trace first because he held a registered mobile phone. Obviously, the sequence had a bearing on how the police came to learn of the conspiracy. *Each of these arrests were vigorously contested by the defence*.

It is a mandatory requirement that an arrest memo is prepared upon the arrest of a person. The memo needs to be signed by a public witness or a near relative and attested by the arrestee. As PUDR documented in detail, the requirement was violated for each of the arrests (Annexure 12):

— In the case of Afzal and Shaukat's arrest in Srinagar, it is indeed curious that the J&K police chose not to arrest them at the Parampura fruit mandi, where they were first located by the police, and where plenty of witnesses would be available. They were arrested later from an area where there were no public witnesses.
— In other cases viz. Gilani and Afsan, it is also quite surprising that the police did not find witnesses, even when the locality where the two lived is densely populated and the houses were inhabited by other tenants as well.
— Curiously, neither of the two sub-inspectors who live in the same building as Shaukat and Afsan were called during the arrests or search of premises or to identify anyone suspected to be part of the conspiracy. Moreover, Gilani's house was not even searched, which is odd, for someone suspected of participating in this kind of conspiracy.

In Geelani's case, the defence counsel Ram Jethmalani pointed out that the arrest memo for Geelani was not produced (Annexure 16, para 247 (c)). According to Geelani's statement u/s 313 Cr. P. C., he was arrested on the afternoon of 14.12.2001 after being dragged out of a bus near Khalsa College on the Mall Road in North Delhi (Annexure 4). Subsequently, he was taken to an undisclosed location and tortured; later he was made to sign on blank papers. This was corroborated by Geelani's wife, Arifa, who testified that she, alongwith her two children and her brother, were also picked up by the police in the evening of 14.12.2001. In the police station Arifa saw her husband with injuries showing torture. She also stated that Geelani's brother, Bismillah, was also in custody by that evening and was forced to sign papers (Annexure 7).

The High Court judges note that, after they "perused the case diaries," they found that the arrest memos of Geelani, Afzal and Shaukat were attested by Bismillah since "Mohd. Afzal's and Shaukat's arrest memos have been prepared at Delhi" after they were picked up by the J&K police in Srinagar on 15.12.2001 and brought back to Delhi by the Delhi police. Thus, the witness to the arrests was himself in "illegal confinement" when he was forced to "sign papers" (Annexure 16, para 251).

Another fact that seems to support Geelani's arrest on 14.12.2001 is that Geelani's mobile phone was found switched off since 1.03 P.M. of that day. A natural explanation is that the phone was with the police. However, the Special judge held that "the accused had smelled about the surveillance and taken care not to make any call" (Annexure 11, para 79). If Geelani was guilty, we would expect him to switch off his phone as soon as he knew on 13.12.2001 itself that the attack had failed and active mobiles and phone numbers had been seized from the terrorists. Why should he wait for over a day until he "smelled about the surveillance?" Taking all of Geelani's statement, Geelani's wife's statement, Afsan's statement, Bismillah's illegal confinement, and the switched off mobile, two facts seem to stand out: (a) Geelani was illegally arrested on 14.12.2001, and (b) his arrest memo for 15.12.2001 was fabricated.

As noted earlier, Afsan also stated that she was arrested on 14.12.2001 at about 6.00 in the evening. This was not only corroborated by Arifa who saw Afsan in the police car in which Arifa and her children were taken away on 14.12.2001 (Annexure 7), her presence in custody on 14.12.2001 lends a natural interpretation to the telephonic conversation with her husband, as we saw ('Incredible features' above). It follows that the police version of Afsan's arrest was false as well, as noted by both the Special Court and the High Court.

The facts around the arrests of Afzal and Shaukat are more complicated. The defence pointed out that the Delhi police's ver-

sion of their arrests at Srinagar at about 11.30 A.M. on 15.12.2001, *after securing information from Afsan at 10.45 A.M. about their location*, must be false. This is because, according to the J&K police, they received information from Delhi police at about 5.45 in the morning of 15.12.2002; thereafter, the truck was located at about 8.00 A.M., and Afzal and Shaukat were arrested at about 11.00 A.M (Annexure 12). In other words, it is false either that the truck was located upon securing information from Afsan or that Afsan was reached only at about 10.30 A.M. at Geelani's instance.

However, the preferred sequence can still be resurrected by admitting that Geelani was arrested first on 14.12.2001 afternoon; Afsan was arrested next the same evening at the instance of Geelani; Afzal and Shaukat were arrested last when crucial recoveries (the laptop, Rupees Ten lacs, mobile phone etc.) were made. This seems to be the prosecution's revised position that retains the sequence of arrests while changing their timings (Annexure 16, para 248). The are several problems with this position.

First, it is unclear as to how the police reached Geelani in the first place. As Basharat Peer reports, "Geelani's lawyer pointed out that the phone records" from AIRTEL "cited by the police" that allegedly enabled them to locate Geelani "were dated December 17, 2001. It left many wondering how the police could arrest the accused teacher two days before it got the phone records that "led" them to him. The prosecution had no explanation to offer" (Annexure 13). However, as the PUDR complained, the judges gave the benefit of doubt to the prosecution by ruling that the "date of 17.12.2001 on the Air Tel letter was a typographical error" (Annexure 17). We will see later ('A Surrendred Militant') that this AIRTEL letter also contradicted the official claim that POTO was introduced in the case only on 19.12.01, since the letter dated 17.12 cited POTO clauses in reference. The suggestion that the date was a typographical error does not explain both the points

simultaneously. If the letter was actually written after 19.12, it saves the POTO issue, but then the arrest issue gets even murkier, and vice-versa.

Second, it is questionable how the police reached Afsan. PUDR states: "Gilani's disclosure memo - the first statement given by an accused when arrested - … makes no mention of any mobile phones let alone the identification of their owners. He reiterated the same in his statement under 313 Cr.P.C (the accused's response to questions put by the court). Gilani also denied having led the police to Shaukat's house, he has also rejected the prosecution's claims that when confronted by the evidence of certain calls on his cell phone, he told the police that 9811489429 belonged to Afzal and 9811573506 belonged to Shaukat. Significantly, the disclosure statement bears out the above since there is no reference to any mobile phone or their alleged owners" (Annexure 12).

This part of Geelani's disclosure appears to be corroborated from a totally different direction. It seems incredible that the five terrorists carried only three mobile handsets among themselves although there were six SIM cards available, four of them with Mohammad alone! Could it be that there in fact were five handsets as expected, but two of them were not shown and 'placed' in the hands of Afsan and Afzal? If that is so, then Geelani could not have recognized the two numbers presented to him.

Third, if Afsan was already in custody between 6.00 P.M. and 7.00 P.M. on 14.12.2001, the police could not have reached her by dint of the call from Shaukat that came only at 8.15 that evening. As Afsan said, she received the call while in custody. The call, as we will presently see, and in fact the ownership of mobile 9811573506, as just noted, are suspect.

In any case, there are two further problems with this call. Since 9811573506 was operated on a cash card, that is, it was not a regular connection, it is hard to see how the police could locate

Afsan or anyone else on the basis of the call alone. Moreover, there is a serious problem with the veracity of this call. As the High Court judges pointed out, there is a discrepancy between the duration of the call in the call-records and the duration of the conversation in the tape produced by the police. The expert witness to whom the taped conversation between Shaukat and Afsan was sent for analysis testified that the conversation itself lasted 74 seconds. According to the call records, the entire call lasted 49 seconds only. This led the judges to conclude that "this call has to be ignored" since the "discrepancy was not explained by the prosecution even during oral arguments at the bar" (Annexure 16, para 340).[14] Significantly, in the same tape, the expert was also sent extensive voice samples taken from the accused where the accused were made to utter expressions that were found in the transcript produced by the police. In any case, if Geelani did not disclose and if the call "has to be ignored," how did the police reach Afsan?

Fourth, the prosecution claimed that Afsan was arrested at about 10.45 A.M. on 15.12.2001. It claimed further that immediately the information about the truck was flashed to J&K police, who tracked the truck and arrested Afzal and Shaukat by 11.30. A.M. – in 45 minutes flat. If true, this ought to be counted as impressive police action. However, on the revised scenario, Afsan was arrested sometime during the evening of 14.12.2001. Yet, the J&K police was informed about the truck only at 5.30 A.M. – some ten hours later. What took them so long in a case like this? What was the source of their assurance, if any, that the alleged fugitives will stay on at the market for the whole night? Moreover, the J&K police took another six hours to arrest them ostensibly on the ground that they did not want to make the arrests in a marketplace.

Fifth, Afzal and Shaukat also denied the prosecution's story of their arrests in their statements recorded u/s 313 of Cr.P.C. Ac-

cording to Afzal, he was arrested alone at a bus stop in Srinagar; Shaukat claimed that he was arrested near his house on the evening of 14 December 2001 (Annexures 5, 6). What do we make of these claims? As noted, their arrest memos were prepared in Delhi and the witness himself was in illegal confinement. Thus, the entire weight of the prosecution's case depends on the depositions by the J&K police, PW-61, PW-62. As noted also, there is material contradiction between these depositions and the claim of the Delhi police regarding the time when the J&K police was alerted by the Delhi police (Annexure 12). The prosecution explained the discrepancy as follows: "PW-61 and PW-62 were overzealous in their testimony and it was natural human conduct to take credit" (Annexure 16, para 248 (f)). If J&K police was "overzealous," and Delhi police was preparing illegal arrest memos, how do we ascertain when Afzal and Shaukat were arrested?

With little to go by, we can only conjecture. We noted Afzal's claim in his statement u/s 313 that he traveled alone to Srinagar, perhaps leaving Delhi on 12.12.2001. Suppose he was visiting Kashmir on his own errand as an agent of medical equipment, and to bring his family to Delhi after Id. Once Shaukat reached Srinagar Mandi with his load of bananas (Annexure 6), he could have inquired about Afzal either directly from Afzal or from some common acquaintance. This gave a natural explanation of Afsan's query about Chotu, thereby raising the credibility of Afzal's statement 313. In this statement, he also said that he was picked up by J&K police alone from a bus stop from where he was planning to go to Baramullah to meet his family. Given that Afzal and Shaukat had *separate* errands in Kashmir, this statement sounds credible. Following this line of conjecture, Shaukat was also arrested alone perhaps with his truck somewhere in Srinagar. Once they were separately arrested, they were brought to the police station, and the rest of the story followed.

The conjecture is somewhat obfuscated by the fact that in his statement u/s 313, Shaukat denied that he went to Srinagar at all, and that he was picked up near his house in Delhi in the evening of 14.12.2001 at a time he did not remember (Annexure 6). Now, this statement is false *if* it is true that he made that phone-call from Srinagar, on 14.12.2001.[15] Supposing it to be false, the senior counsel Shanti Bhusan explained it as follows: "It is well known that even an innocent accused person is many a time inclined to deny facts which he thinks might create suspicion against him and such conduct has always been regarded as normal conduct even from an innocent person."[16] Thus, other things being equal, there is no immediate need to revise the conjecture proposed above.

Unless new evidence is brought up, the cumulative effect of the five problems with the prosecution's story of arrests does give the impression that four persons were picked up separately without any delineable sequence. In other words, if these arrests weren't made at random, they seem to be *pre-planned* rather than based on a chain of leading evidence – the "evidence" following after the decision to arrest them was already made.

Two very disturbing consequences follow from the preceding line of thinking. An explanation of how the police reached Afzal – the central character in the conspiracy theory offered by the police – at the said bus stand becomes an enigma. Since Afzal's confessional statement under POTO serves as the only basis for the *planning part* of the prosecution's story (see 'Prosecution Story' above), a plausible explanation of how the police reached him is a significant requirement for the sustenance of the prosecution's case. With doubts accumulating as above, it is no longer possible to take this part of the case for granted.

Also, notice that the line of thinking finds Afzal alone at the bus stand, and Shaukat alone with his truck. This separation of the truck from Afzal raises doubts as to the alleged seizures from

the truck – the laptop, Rs. 10 lacs, and the mobile phone among other things. According to the police, as noted, the circumstance of these seizures coincides with the circumstance of the arrests of Afzal and Shaukat in the truck.

No doubt the arrest of a person and recoveries made from him are distinct facts (Annexure 16, para 255). But in this specific case, the two facts seem to be so intimately glued that the falsity in one respect raises doubts about the truth of the other. For example, is it credible that Afzal would leave Shaukat alone with all that incriminating material in his truck? Alternatively, is it credible that Afzal himself was carrying the laptop, audio video camera, CDs adaptor, digital audio and video recorder, memory stick and instruction manuals alongwith 23 wads of currency amounting to Rupees 10 lacs on his person? Who was carrying what and how?[17]

These doubts are compounded by the fact that (a) the seizure memos were not attested by any public witness, (b) serious doubts remain as to whether the laptop computer was tampered with (Annexure 12), (c) the SIM card of the mobile phone allegedly belonging to Afzal was never found (Annexure 12). In addition, except for his confessional statement, there is no direct evidence that links Afzal with this crucial mobile number. In his statement 313 Afzal denied all these recoveries from him, including the recovery of the mobile (Annexure 5).

Pursuing (c), the mystery of this mobile, PUDR pointed out that "The story of this significant telephone number gets even more curious, if one looks at the testimony of Kamal Kishore (PW 49) who claims to have sold a Motorola phone and SIM of 9811489429 to Afzal on 4.12.01. He had no record of any kind relating to the sale receipt to show what he had sold, if anything, to Afzal. The call records for the number, however, show that the phone had been in use since 6 November 2001! Which is to say

that the card was sold a month after it came in to use! Since this number is the key link that implicated Afzal and through him the others, the contradiction between the prosecution witness's claimed date of sale and, person it was sold to, and the date of activation raises a question about the credibility of this witness" (Annexure 12). In turn, the evidence regarding phone calls allegedly made from and received in this instrument, especially to and from the terrorists, stands discredited.

In any case, the Hon'ble judges note that the instrument allegedly recovered from Afzal was frequently in the hands of the terrorists themselves (Annexure 16, para 399/5). As a consequence, we can no longer trace the phone-calls made from this instrument, notably, the calls made and received from satellite phones in Kashmir, phones in Dubai, Pakistan, Germany etc. to Afzal himself. Furthermore, as noted, it is incredible that, in a terrorist operation of this scale, only three of the five terrorists carried mobile handsets, although six SIM cards – four with Mohammad alone – were recovered from the site. In sum, (i) the mobile can not be definitively placed with Afzal, (ii) the mobile was frequently used by the terrorists, (iii) Afzal denied ownership of the mobile. Whose mobile was this?

'Procured' Witnesses

The preceding examination of the arrests and the related recoveries raise serious questions about the credibility of police witnesses in Delhi and in J&K. We also know that there are other serious problems with the prosecution's case: (1) there is an apprehension of foul-play in the conduct of the investigation, (2) much of the evidence makes crucial joints of the story incredible. What then remains of the prosecution's case except for the confessions?

The prosecution of course produced a series of independent evidence in the form of seizure memos supported by exhibits, pointing memos, records of phone calls, police witnesses, expert witnesses and other public witnesses to prove the case. Although we did cast doubt already on much of the evidence concerning seizures, phone-calls, police witnesses etc., we have no space and competence for discussing this body of evidence in full. Nonetheless, much of the credibility of independent evidence depends on the credibility of public witnesses who testified about the alleged hideouts, meetings, purchases and recoveries. Some indication of the general picture regarding the credibility of public witnesses may be reached by drawing inferences from an adverse comment on the police recorded in the High Court judgment.

The Hon'ble judges note the "disturbing feature" of trial by the media in which Mohd. Afzal was "brazenly paraded before the press" (Annexure 16, para 139). During the parade, Afzal confessed to his active participation in the conspiracy, but exonerated Geelani from any involvement, as noted. The whole thing was recorded on videotape. In full view of the assembled press, the investigating officer ACP Rajbir Singh castigated Afzal for absolving Geelani. Next day, as noted, Afzal implicated Geelani in the conspiracy. We have discussed the role of the media in this affair. In addition, it is important to note that not only was Afzal made to 'confess' before the media, the accused were shown repeatedly on television since their arrest, with police proclaiming that they had solved the case.

But why did the police take this route? Was it "overzealousness," acts for "taking credit," or was there an attempt by the police, led by ACP Rajbir Singh, to influence the prosecution witnesses? The Hon'ble judges of the High Court observed as follows: "Accused persons are exposed to public glare through T.V. and in case where Test Identification Parade or the accused person being identified by witnesses (as in the present case) arise, the case of the prosecution is vulnerable to be attacked on the ground of

exposure of the accused persons to public glare, weakening the impact of the identification" (Annexure 16, para 139).

This is partly a technical issue on which we have no competence. However, sheer commonsense dictates that if an accused is presented repeatedly in the entire mainstream visual media as guilty, not only are the viewers likely to 'retain' the face in their memory, they will associate the face with the crime. PUDR, who had examined the issue in depth, observed, "when people have been described by the police as implicated, the natural psychological tendency is to then 'recognize' them as involved" (Annexure 17).

The problem is aggravated when "given the prevalent stereotypes about Islamic, especially Kashmiri terrorism, witnesses are very likely to be biased" (Annexure 17). In this connection, it is important to recall the mass hysteria that ensued after the attack on Parliament. We discussed in detail the role of the media in fomenting this hysteria ('Role of the Media' above). As noted, India was nearly at war with Pakistan and POTA became the law of the land.

Given this prejudicial atmosphere, would it have been possible for hapless landlords and petty shopkeepers to withstand pressures, if any, brought against them by the police? PUDR observed: "While theoretically the witnesses should have no reason for falsely implicating the accused, no one can deny that the police in India wield tremendous power and the public – especially, shopkeepers – would feel it unwise to go against the police" (Annexure 17). If you are a landlord and you are told that terrorists had been hiding in your premises, what options do you have except obey orders? If you are a petty shopkeeper selling bomb-making ingredients such as ammonium nitrate and aluminium powder to all and sundry,[18] perhaps without proper trade documents, can you refuse to testify falsely if you are told that otherwise you may be charged with supplying incriminating material

to terrorists? How difficult would it be for the police to fabricate each of these links in the story?

If the police scrupulously maintained the required procedures for identification, some of the general problems noted above might have been addressed in part. For example, PUDR argued that "the depositions of the vendors make it clear that Afzal was brought to them for identification, and introduced as someone connected with the attack on Parliament. In other words, they were not called in to the Special Cell and asked to identify him on their own, which would have made the identification foolproof" (Annexure 12). That is, instead of organizing the required Test Identification Parades, "The 15 witnesses who identified the accused were provided prior knowledge of the identity of the accused as those involved in the attack on the Parliament" (Annexure 12). With this general picture in mind, we document some of the disturbing facts involving public witnesses recorded by PUDR (Annexure 12).

1. SAR Gilani's landlord PW 39 Naresh Gulati … identifies Afzal and Shaukat in court as persons who "used to visit the house of SAR Gilani." It is significant that this witness goes on to say that several other people including lecturers and students visited Gilani and that he "might have seen Afzal and Shaukat visiting Jalani [sic] 2-3 times during the period he stayed in my house" (i.e. almost eleven months).
2. We recall once again the testimony of Kamal Kishore (PW 49) who claims to have sold a Motorola phone and SIM of 9811489429 to Afzal on 4.12.01. He had no record of any kind relating to the sale receipt to show what he had sold, if anything, to Afzal. The call records for the number, however, show that the phone had been in use since 6 November 2001! Which is to say that the card was sold a month after it came in to use!

3. In his first statement to the police on the 16 December 2001 under 161 CrPC (the first statement by a witness to the police in which he or she is bound to tell the truth and which the police is bound to record truthfully), Mr. Malhotra (landlord at Gandhi Vihar) claimed simply that on 13th morning he saw five boys (not named) getting into a white ambassador and driving off. Seven months later in court, he claimed "On 13.12.02, Mohammad Afzal, Shaukat and four more persons had left the premises around 10 am."
4. Photos of the dead militants (with mutilated faces) were shown to 2 witnesses (PW 34, Subhash Chand Malhotra, landlord of the Gandhi Vihar house and PW 45, Tejpal Kharbanda, Shaukat and Afsan's landlord in Mukherjee Nagar). While showing of photographs of the dead is legitimate, the point is that in order to lend authenticity to the identification the witnesses must select the photographs from a pack and the prints must be clearly showing the face. There was, however, no attempt at identification here since only photographs of the deceased were shown to the witnesses. Thus only affirmation was demanded of the witnesses. But what is even more unusual is that the witnesses were then asked whether the persons found in the photos were seen in the company of the accused. When Tejpal Kharbanda (PW 45), Shaukat's landlord, was first shown photos of the dead men on the 17th, he 'recognizes' them but makes no mention of seeing them at Shaukat's house *two-three days prior* to Parliament attack. Yet nine months later, his memory seems to have improved to the extent that he recalls them as having accompanied Afzal to Shaukat's house during those critical days before the attack.
5. Motorcycle salesman, Sushil Kumar (PW 29) identified Shaukat on 18.12.01. In his statement under CrPC 161 that day, Sushil Kumar said that on the day Afzal and others came to the shop to purchase the motorcycle, Shaukat was standing at a distance. Eight months later, during his court deposition on 16.7.02, he identified Shaukat unambiguously as one of the three men who came to purchase the motorcycle. Sushil Kumar's identification of Afsan Guru in the Special Cell as one of the four persons who came to his shop to purchase the motorcycle does not hold ground since TIP procedure was not followed. Moreover, later in the court Sushil Kumar expressed inability in identifying Afsan as the woman among the four, stating that the woman was standing at some distance.

The list goes on: the defence argued that all public witnesses presented by the prosecution were "procured."

A Surrendered Militant

We have already cited extensively both from Afzal's confessional statement under POTA (Annexure 2) and his statement u/s 313 Cr. P. C. (Annexure 5). We saw that, in the absence of any independent evidence, the *planning part* of the prosecution's case depends entirely on this confession. We also saw that, in the absence of or the questionable character of evidence produced for some of the *operational part* as well, the prosecution depended ultimately on this confession. For example, the issues of the phone-calls made by the terrorists to Afzal before and during the attack, Afzal and Shaukat travelling together to Srinagar in the truck, their arrests and the attendant recoveries, and much else, were ultimately settled in favour of the prosecution by dint of Afzal's confession. Finally, we also saw that the confession and the statement 313 massively contradict each other. Thus, we need to examine these two documents closely with an eye towards their truth.

Consider first the credibility of the confessions. As noted, Afzal's confession enabled the police not only to nail him down, but also

to fill all the blanks of an otherwise incomplete story; Shaukat's confession is essentially contained in Afzal's confession (Annexure 16, para 368). In his confession, Afzal told a full story of how he got acquainted with the terrorists, his meetings with Ghazi Baba and Tariq, his determination to help the cause of Jehad, his knowledge of what the terrorists were upto, the guidance from across the border, etc. Interestingly, although he did not take part in the attack itself, he was not only made privy to, he in fact remembered the exact number of arms and ammunitions brought by the terrorists from Kashmir in their holdall: 4 AK Rifles, 12 loaded magazines, 1 grenade launcher, 3 pistols with spare magazines, 15 hand grenades, 15 grenade shell, two packs of electronic detonators, two transreceivers and radio active detonation devices and explosives. These statements of the confession, *not proved by any independent evidence*, complete the chain of evidence for the prosecution.

It is important to note that the charges under POTA (then POTO) were officially introduced only on 19 December 2001, that is, six days after the event and the confessions under POTO were recorded on 21 December 2003. "Officially" because the defence showed that the provisions of POTO were in use from the very beginning. For example, the AIRTEL letter of 17 December 2001 "responding to a police request for the call records, refers to Section 3/4/5/21/22 POTO. It is inconceivable that AirTel would make up these sections on their own" (Annexure 17). Could it be that, although POTO was in *de facto* use, it could not be introduced *de jure* because most of the safeguards sanctioned under POTO were violated (Annexures 17)? Why then was POTO needed at all at a later date?

The police had already gathered most of the alleged facts of the case before 19 December. These included identification of the terrorists by Afzal in the morgue, disclosure of the hideouts by

Afzal, seizure of chemicals, detonators etc. from these premises, pointing of the shops by Afzal from where the chemicals, Sujata mixer etc. have been bought, pointing of the agencies from where the attack vehicle and the motorcycle for recee were purchased, as well as the material on telephone conversations.

Moreover, displaying incredible loquacity, both Afzal and Shaukat had poured out everything they knew about the conspiracy in their disclosure statements immediately after their arrest. Also, experts had already been assigned the task of analyzing the chemicals seized from the premises and the scene of attack, and securing information from the laptop seized on 15 December 2001 when Afzal and Shaukat were allegedly arrested in Srinagar. In sum, the confessions themselves did not contain anything that was not already available to the police on independent investigation based on the earlier disclosures.

Why then were the confessions, allowed by POTO, needed? Could it be that the confessions provided the necessary link to complete the chain of evidence which was otherwise lacking at that stage from independent evidence alone? In fact, could it be that the confession was the only method available to the police to lend credibility to what was claimed to be independent evidence, as we saw in some cases above? In any case, there are several reasons for doubting the credibility of the confessions.

First, as the Hon'ble judges of the High Court note, confessions are also admissible under general law provided that they are recorded before a designated magistrate. Since Afzal and Shaukat allegedly expressed their willingness to confess to everything in their disclosures of 16 December, why wasn't this method used in the present case to rule out the charge of fabrication and involuntariness in the extraction of confessions repeatedly raised by the defence and by civil rights organizations? Specifically, why did the police *wait* for POTA to be introduced on 19 December and con-

fessions under POTA recorded on 21 December? Could it be that the immensely significant chain of events detailed in the confession, which tell the *only* narrative of the attack on Parliament, and without which the case against the accused is less than complete, could not have been procured without the convenience of POTA that allows the recording of confessions before a police officer of a certain rank? In particular, could it be that the confession the police wanted to secure could not have passed the strict safeguards before a designated magistrate?

The possibility that the confessions were extracted under torture arises from another direction. The Deputy Commissioner of Police, Special Cell, Mr. Ashok Chand, who was empowered to record the confessions, gave a written order to his subordinate Assistant Commissioner of Police, Special Cell, Mr. Rajbir Singh to produce the accused before the DCP at 11.30 A.M. on 21 December 2001. As such, Mohammad Afzal, Shaukat Guru and SAR Geelani were produced at the appointed time. However, Geelani refused to make a confessional statement, and his statement to this effect was recorded by 11.55 A.M.

Then, instead of producing the next accused before the DCP for the confessions, they were taken away and brought back over three hours later when the recording of Shaukat's confession started at 3.30 P.M.; recording of Afzal's confession started at 7.10 P.M. A plausible explanation is that, after Geelani refused to confess, the other two accused were subjected to further torture so that they fell in line before the recordings were resumed. As for the credibility of the DCP who recorded the confessions, Geelani says in his statement u/s 313 Cr. P.C. that he was tortured after his illegal arrest by the ACP Rajbir Singh in the presence of the DCP Ashok Chand (Annexure 4).[19] In any case, as the head of the Special Cell, DCP Ashok Chand was obviously in the know of the case, and was familiar with the history of the accused. In effect, the investigating

official also acted as a "judge" for recording the confessions of the accused brought before him by his colleague in office.

The PUDR reports (Annexures 12, 17) contain stringent criticisms of procedures that allow extraction of confessions under POTA: "It is in the Court's acceptance of the confessions made by Afzal and Shaukat that we see the challenge posed by POTA to the very concept of a fair trial. … The gravest danger of POTA is that it gives free rein to police torture in order to extract suitable 'confessions'" (Annexure 17). There is growing evidence that investigating agencies often use the provisions of POTA to fit fabricated evidence with confessions extracted under torture.[20] Why should the Delhi police be exempted from this charge given their proven record of concoction of evidence in this case itself? The defence also raised this issue repeatedly, but the courts chose to accept the confessions presumably because of the heightened mutuality discussed earlier ('Incredible features' above).

Second, as discussed earlier ('Role of the media' above), the High Court judges noted a palpable discrepancy in the confession. The day before the confession, Afzal had said, in full view of the media, that S.A.R. Geelani was not a party to the conspiracy (Annexure 16, para 113). Yet, in his confession recorded the next day, Afzal held Geelani responsible, a palpably false statement in view of what transpired later in the proceedings. From this the defence justly inferred that the confession was made under duress. Was Afzal a free agent during those early turbulent days right after the attack when he was in police custody before *and* after the making of the confession? Could he afford to refuse the recording of his confession at that stage when he had already done the rounds with the police, allegedly incriminating himself in everything that the police wanted?

These queries are compounded by the fact, as repeatedly noted in the judgment, that Afzal is a surrendered militant (e.g., Annex-

ure 16, para 368). A surrendered militant, especially in the context of terrorism in Kashmir, is a person who is likely to be compelled to do things against his will. Unfortunately, in the High Court judgment, we have not been told either about the circumstances of his surrender and the arrangements, if any, that he entered into with the security forces to buy his survival. Even then, at the very least, the confession of such a person ought to be viewed in a light different from that applicable to a 'normally' accused person. As noted, this aspect of the maker of the confession has not been looked into by the Hon'ble judges.

Be that as it may, the location of statements, concerning Afzal's militant past, in the judgments is most interesting. Both the Special and High Court judgments, as well as the chargesheet, record the fact that Afzal is a surrendered militant. Now this statement appears in Afzal's confession as well as in his statement u/s 313 Cr. P.C. As noted, the statement u/s 313 Cr. P.C., unlike confession under POTA, is made by an accused before the court rather than before a police officer; also, this statement is made when an accused is in judicial custody, not in police custody.

It is interesting that the Special Court judgment also recorded the fact that "a surrendered terrorist has to mark his attendance with regular intervals at the STF, J&K" (Annexure 12, para 222). "STF, J&K" stands for Special Task Force, Jammu and Kashmir, a shadowy counter-insurgency outfit of the state. To our knowledge, this fact is stated *only* in Afzal's statement u/s 313 Cr. P.C. In the same paragraph, the judgment also used this statement to record the fact that Afzal called Shaukat from Kashmir to hire a room, although the judge failed to mention that in this statement Afzal wanted Shaukat to hire a room for *Afzal* so that he could bring his family to Delhi after Id. With these citations, therefore, the Special Court judgment lend credibility to the statement u/s 313 Cr.P.C. In fact, the Special Court cited this statement fairly frequently and selectively, as in the above, whenever it suited his argument.

Furthermore, there are manifest instances of honesty and truthfulness in Afzal's statement 313. For example, Afzal did not shy away from admitting the possibly incriminating fact that he accompanied Mohammad when the latter purchased a second-hand ambassador car. When his lawyer attempted to deny this fact during the trial, Afzal intervened to insist that he indeed accompanied Mohammad.

Pursuing the relevant paragraph of this statement then, we learn about the circumstances of Afzal's surrender in 1993 in detail. Afzal states:

— he was frequently asked by the STF to work for them
— he often paid large sums of money to the STF to avoid and/or escape detention; he was detained as late as in 2000
— he was asked to become a Special Police Officer, which is an euphemism for "Police Informer"
— he met one Tariq *in the STF camp*
— this Tariq was already working for the STF and he wanted Afzal to join the force as well
— Afzal was introduced to one Mohammad by Tariq *also in the STF camp*
— Tariq persuaded him to take Mohammad to Delhi from where Mohammad was planning to go abroad. But Afzal denied that he arranged any residence for Mohammad. Note that Afzal admitted to bringing one of the terrorists, Mohammad, to Delhi from Kashmir in his confession as well.

A number of disturbing consequences follow. First, Afzal was in close touch with the security agencies throughout the period 1993 to at least 2000. Second, three of the persons allegedly involved in the attack – **Tariq, Afzal, Mohammad**: *the mastermind,*

the link, the leader of the attack – originated from the STF camp itself. Third, if the statement u/s 313 is true, the confession is false except for those few claims that occur in the statement as well. Recall that several statements of the confession were found to be independently dubious earlier on grounds of credibility, while many statements from the statement 313, that contradicted the relevant statements of the confession, added to credibility in the alternative perspective ('Incredible features' and 'Arrest Memos' above).

In the rest of his statement 313, Afzal denied every aspect of his involvement in the conspiracy to which he had allegedly confessed earlier. For example, as noted earlier, he stated that "*I had not identified any terrorist. Police told me the names of terrorists and forced me to identify*." If Afzal is telling the truth, either the names of the terrorists announced to the nation are fictitious or the police knew the terrorists. Needless to say, Afzal also stated that the police made him sign the disclosure and the confession under torture. For example, he stated that the accused were not presented before the designated magistrate for the verification of the confessions; they were made to sit in the police van outside while the investigating officer went inside to get the seal of approval to the pre-written documents.

Let us recount again what the nation had been told exclusively in Afzal's voice: the names of five unidentified dead persons kept in the morgue, that they were Pak nationals, that they were members of JeM and LeT, that they came to Delhi for a 'fidayeen' attack under the command of one Ghazi Baba, that the plan was supervised by one public offender Tariq, that the five terrorists brought the huge cache of arms and ammunition for the said purpose – **the planning part**. *All this because Afzal says so*. There is not an iota of independent evidence supporting any of these crucial links of the narrative. As noted, Afzal denied everything in his statement u/s 313 Cr.P.C.

Unfair Trial

In sum, it is difficult to resist the conclusion that almost every part of the prosecution's case is seriously flawed. Charges of fabrication (call-records) and concoction of documents (arrest memos), possible tampering with (laptop, tapes) and planting of (laptop, Rs. Ten lacs, mobiles) physical evidence, intimidation of witnesses (Bismillah, landlords, shopkeepers), forced extraction of disclosure and confessional statements (Afzal, Shaukat), and the like, seem to get progressively substantiated as we look deeper into the case. In the process, the rights of the accused were irreparably harmed.

In addition, their rights were damaged in the conduct of the trial itself. We consider just two examples among many.[21] Mohammad Afzal's trial was especially vitiated because, although his case was the most complex, he never had proper legal representation at the Special Court. "In capital cases," Ram Jethmalani observed, "particularly those that arouse public prejudice and anger against the accused making it difficult for them to arrange for their own defence, it was the duty of the Court to provide adequate defence at State expense." Afzal in fact submitted a list of lawyers he wanted for his defence. "The Court instead appointed an 'amicus'. This is not known to our law and practice." Afzal expressed his dissatisfaction with his lawyer repeatedly. The *amicus*, Neeraj Bansal, did not even pay a visit to his client: "his presence and participation have caused confusion and prejudice vitiating the trial," Jethmalani complained.[22]

In a moving statement pleading for fair trial for her husband, Afzal's wife Ms. Tabassum says, "The court appointed a lawyer who never took instructions from Afzal, or cross examined the prosecution witnesses. That lawyer was communal and showed his hatred for my husband. When my husband told Judge Dhingra

that he did not want that lawyer the judge ignored him. In fact my husband went totally undefended in the trial court. When ever my husband wished to say something the judge would not hear him out and the judge showed his communal bias in open court." "I believe," Tabassum complains, "that no one has heard my husband's story."

The story Tabassum tells "is the story of many young Kashmiri couples. Our story represents the tragedy facing our people." "Like thousands of other youth," Afzal went to Pakistan for training and stayed there for a little while. However, "he was disillusioned by the differences between different groups and he did not support pro-Pakistani groups." "My husband wanted to return to normal life and with that intention he surrendered to the BSF." In 1997 Afzal started a small business of medicines and surgical instruments in Kashmir; in 1998, Afzal and Tabassum were married. Afzal was 28, Tabassum just 18; soon they had a child whom they named "Ghalib."

However, "throughout the period that we lived in Kashmir the Indian security forces continuously harassed Afzal and told him to spy on people they suspected of being militants. One Major Ram Mohan Roy of 22 Rashtriya Rifles tortured Afzal and gave him electric shocks in his private parts." "Another time he was taken to the STF (State Task Force) camp Palhalan Pattan. Some days later they took him to the Humhama STF camp. In that camp the officers, DSP Vinay Gupta and DSP Darinder Singh demanded Rs one lakh. We are not a rich family and we had to sell everything, including the little gold I got on my marriage to save Afzal from the torture. Afzal was kept in freezing water and petrol was put into his anus. One officer Shanti Singh hanged my husband upside down for hours naked and in the cold. They gave electric shocks in his penis and he had to have treatment for days." "Afzal wanted to live quietly with his family but the STF would not allow him."

On Afzal's decision to move to Delhi, Tabassum states, "It was under these conditions that forced Afzal to leave his home, family and settle in Delhi. He struggled hard to earn a living and he had decided to bring me and our four-year old son, Ghalib, to Delhi. Like any other family we dreamed of living together peacefully and bringing up our children, giving them a good education and seeing them grow up to be good human beings. That dream was cut short when once again the STF got hold of my husband in Delhi. The STF told my husband to bring one man Mohammad to Delhi from Kashmir. He met Mohammad and one other man Tariq there at the STF camp. He did not know anything about the men and he had no idea why he was being asked to do the job."[23]

Significantly, Tabassum's report substantiates Afzal's statement u/s 313 Cr. P.C. In that sense, Afzal's story had in fact been "told" on paper, but, as Tabassum states, "the court chose to believe half his statement about bringing Mohammad but not the bit that he was told to do so by the STF" (see Annexure 11, para 224). We saw that the statement 313 of the accused should have played a crucial role in the case in the sense that this provision of law enables the accused to display his mind with a high degree of voluntariness. Yet, these statements hardly played a role in the actual proceedings since the courts decided to rely mostly on the confessions which these statements refute. Speaking of Afzal, Nandita Haksar asked: "If he can be sentenced to death on three counts on the basis of his own confession, why can we not believe the other part of his story recorded in the court under section 313 of the Criminal Procedure Code?"[24]

In fact, senior counsel Ram Jethmalani pointed out that "the most vital safeguard for the accused is Section 313 of the Code." Yet, he said, "circumstances which ought to have been put to the accused were never put to him for his explanation and if necessary cross-examination of witnesses and leading of defence evidence."[25]

"Instead," Jethmalani complained, "non-existing circumstances were put to him." "Principles of natural justice," he concluded, "have been thrown to the winds resulting in miscarriage of justice."[26]

Appeal for Parliamentary Inquiry

It is a source of great concern that the series of doubts on the prosecution story raised in this write-up do seem to naturally arise after a perusal of the case. Until these grave doubts are addressed to the satisfaction of the nation, we do not yet know who attacked Parliament on that fateful day. Could it be that the real culprits are still at large? In fact, when these doubts are read with proven acts of fabrication of evidence on the part of the police, it is difficult to dispel the apprehension of an elaborate scheme to restrict the case exclusively to the four accused, with Mohd. Afzal as the main link.

The alleged terrorists died on the spot; their alleged mastermind in Kashmir, one Ghazi Baba, reportedly also died in a recent encounter, and the dead don't speak: where is Tariq? Was there a real Ghazi Baba at all with his "camp" deep in the mountains of Kashmir guarded by scores of heavily-armed militants, or was the terrifying image "constructed" only for the purpose of the case, to be eliminated when the purpose was served? Is there an attempt here to *close* the story around Afzal, a past militant, and thus a natural suspect?[27] If these conjectures are true, is it possible for the concerned officers of the investigating agency to come up with this extraordinary attempt on their own without directions from higher authorities?

The biggest problem with the Parliament attack case is that the simplest and the most familiar explanation of the event isn't likely to be true. *Any other explanation is fraught with immensely disturbing consequences for the functioning of the Indian state and, hence, for the health of Indian democracy*.

The simplest explanation of course is the prosecution story that some well-known international terrorist organization with known grouse against India planned a dramatic terrorist attack not only to boost its image, but also to cause severe damage to Indian democracy. To that end, they organized some local support, brought in arms and ammunition, and carried out the attack.

It can be argued that this story is essentially true even if it was accompanied by shoddy and callous investigation, prejudice against the accused, and compulsions of the climate. This argument *does not* exonerate the law enforcing system from further scrutiny, especially in view of the massive violation of rights of the accused. Even if the investigation and the trial were merely shoddy and callous, they were so at a scale that raises serious questions on the fairness of the justice system. Still, it will be immensely reassuring if this argument broadly holds. Does it hold?

As our analysis has brought out, our suspicion is that the prosecution's story is unlikely to hold in major respects from what we currently know. What we saw did not seem to amount merely to "shoddy and callous" investigation. It gave the impression of an elaborate scheme of fabrication and concoction on the part of the investigating agency. To recall a few cases: *each* arrest memo was fabricated, *no* recoveries were attested by reliable public witnesses, *no* public witness was asked to identify the accused on the basis of proper methods of identification, *every* disclosure and confessional statement was likely to have been secured under torture. The only explanation of this display of chilling arrogance is that the investigating agency must have thought that it can get away with anything in the prejudicial atmosphere created largely by the State in the name of "war on terrorism." In fact, it did get away with awesome lies through two successive judicial proceedings.

To be explicit, once we set the prosecution story aside, it is difficult to escape the thought that the investigating agencies themselves planned and executed their own conspiracy at least for a part of the case. On one extreme, this could mean just that the investigating agencies took advantage of a genuine terrorist attack by falsely incriminating the accused to bolster their own image, and to close the case which they could not have otherwise solved from their resources. But, on the other extreme, reminiscent of the infamous *Reichstag Fire* in Nazi Germany,[28] it could also imply the stunning prospect of the state actually planning the attack itself. Virtually, an indefinite number of possibilities obtain in between. We just do not know.

In a recent interview, the eminent lawyer Shanti Bhusan complained that the government "pushed us to the brink of a nuclear war" following the attack on Parliament. However, "the police failed to crack the case" as "all the five militants died in the attack." So the police, Shanti Bhusan suggested, "framed people" in order "to create a conspiracy case." Later in the interview, Shanti Bhusan observed that "an inquiry commission is instituted when the government does not know the real truth of some incident, when there are different versions, and in order to get correct information."[29]

Since the "police failed to crack the case," we do not "know the real truth." In fact, Shanti Bhusan is suggesting that it seems most likely that the absence of "real truth" was attempted to be filled up with an imaginary conspiracy case. According to Shanti Bhusan's criterion, it follows that the Parliament attack case demands an inquiry commission on two counts:

(a) the law-enforcing system failed to ascertain the truth, and
(b) a false conspiracy theory was used instead to push the country to "the brink of a nuclear war."

The Parliament attack case, thus, cries out for a comprehensive inquiry. To our knowledge, there have been exactly two demands for inquiry into the attack, both far removed from the mainstream.[30] On December 17, 2001, that is four days after the attack, the Hurriyat Conference organized a public demonstration in Kashmir, protesting against the arrest of four Kashmiris and demanding a full-fledged inquiry.[31] More recently, after reviewing the High Court judgment on the Parliament attack case, the lawyer-activist Nandita Haksar has raised this demand eloquently in a little magazine:

> We must demand that the government table a full report on the facts relating to the attack on Parliament. We have a right to know who actually attacked our Parliament. Why have we not made this demand? Out of a sense of nationalism? Are matters of national security best left to the state, no matter what its character?[32]

The point to note is that Haksar, who has been closely associated with the Parliament attack case since the beginning, has reasons to believe, even after the High Court judgment in the case nearly two years later, that we do not know "who actually attacked our Parliament." Yet, as noted, this historical question basically remained unasked. As documented in this essay, except for a handful of individuals and human rights forums, the general response to the Parliament attack case illustrates massive failure of institutions in India committed to democratic and secular values of our Constitution: the media, the judiciary, the executive, the human rights commission, and the political parties. What accounts for this failure of probity on a national scale?

Haksar's phrase "a sense of nationalism" explains the phenomenon. For our purposes here, the phrase may be understood with the following example. It is well-known that the media in India gave full support to the US invasion of Afghanistan; television chan-

nels actually designed "war rooms" from where the daily bombings and other atrocities were gleefully covered. But this did not prevent democratic and anti-imperialist individuals and groups, including the parties of the left, from joining the rest of the world in impressive anti-war demonstrations, despite almost total blackout of these events by the media. Dozens of writer-activists simply shifted to alternative media to express their anger with the US, and their solidarity with the people of Afghanistan. Many authors protested against the abject violations of human rights in Afghanistan and in Guantanamo Bay. In fact, these anti-war protests continued well into the period in which all democratic voices fell silent when it came to the Parliament attack case.

The only explanation is that the US, after all, is a state distinct from ours; it is easy to condemn the US. So, we signed, demonstrated and marched in protest against US aggression on the rest of the world. We wrote and circulated papers on the lies about al-Queda connections and weapons of mass destruction. We examined the extraordinary facts unraveled in the Butler commission report on the war on Iraq, and the Ken commission report on 9/11, and criticized both for the failure to draw the unsavoury conclusions from these facts that stare in the face.[33] However, when a terrorist attack is perceived to be directed against "our nation," universal norms of dissent are forfeited in favour of concerns about "sovereignty" and "national security"; as Haksar pointed out, we left "matters of national security" to the state, "no matter what its character" even when extraordinary facts stared in the face.

Under the circumstance, it is not surprising that the capitulation of liberal-democratic sections paved the way for the right-wing forces to disseminate a malignant version of "nationalism" virtually unopposed. It also enabled these forces to brand the handful of individuals, who stood up against the wall of silence, as terrorists and foreign collaborators. When the death sentences were

announced by the Special Court in December, 2002, V. K. Malhotra, the spokesperson of the BJP, recommended punishment under POTA for those who had opposed the death sentence on the grounds that they were agents of Pakistan's spy agency, the Inter-Services Intelligence.[34] When Ram Jethmalani agreed to defend Geelani in the High Court, Shiv Sena activists vandalised his office, burnt his effigy as a "traitor", and threatened him with "consequences" if he honoured his promise.

After the High Court acquitted S. A. R. Geelani and Afsan Guru from all charges, an editorial in a prominent newspaper stated: "In this context, the unconcealed glee with which some of this country's self-proclaimed champions of human rights have reacted to the acquittals leaves a foul taste in the mouth. One wonders what matters most to them, the security and the integrity of the country or the well-being of people accused of undermining both."[35] Notice that the editorial continued to accuse Geelani and Afsan Guru libelously of "undermining" the security and the integrity of the country after they were acquitted by the court.[36] No one, not even the left, made any public protest, not to speak of taking the newspaper to the courts.

Stupefied by the troubling issue of terrorism, erstwhile institutions of democracy allowed – perhaps even encouraged – the police and the related agencies of the state to play havoc with the system of justice, preparing the ground thus for further erosion of democracy, and the consequent growth of fascism and terrorism. The only civilized method of reversing this trend is to subject these institutions and agencies to a just critique. It "is beyond hypocritical," Arundhati Roy writes, to talk of "justice without unmasking the institutions and the systems that perpetrate injustice."[37] "We surrender both democracy and humanity," observes John Pilger, "if we refuse to question and probe the hidden agendas and unaccountable secret power structures at the heart of 'democratic governments'."[38]

These disturbing concerns do not pertain to the Supreme Court where the Parliament attack case currently rests, as noted. Hence, the new government will do well to initiate the long-delayed inquiry into them. The inquiry is best conducted by a joint parliamentary committee for at least two reasons:

1. Since the attack concerned Indian Parliament itself, the highest forum of Indian democracy, it is fitting that Parliament examine the entire gamut of issues from its own resources. Parliamentary committees enjoy the maximum transparency, support and representation of the people of India.
2. The inquiry ought to cover every aspect of the functioning of each institution that was involved with the case: the media, the police, the executive and the judiciary – especially the functioning of investigating agencies, and Special Courts in POTA cases. Hence, for the sake of transparency, the inquiry *can not* be left in the hands of the "watchdogs" of these institutions such as the Human Rights Commission, Law Commission, Police Commission, and Press Council.

We mentioned earlier that, under the extreme right-wing government led by the BJP, the period between September 2001 and May 2004 was perhaps the darkest period in contemporary India in terms of erosion of democratic institutions and rights, assaults on the basic livelihood of people, and violent attacks on the minorities. Despite unconcealed support to this government by the Indian elite and the media, the people of India voted out this government in the general elections of May 2004. The vote was widely seen as a verdict for democracy, communal harmony and social justice.

In response to the will of the people, the new United Progressive Alliance government, in its Common Minimum Programme, has promised to "preserve, protect and promote social harmony

and to enforce the law without fear or favour to deal with all obscurantist and fundamentalist elements who seek to disturb social amity and peace." It has also pledged to the people of this country "to provide a government that is corruption-free, transparent and accountable at all times, to provide an administration that is responsible and responsive at all times."[39] Specifically, the Union Home Minister, Mr. Shivraj Patil, has asserted in Parliament that the main tools of the UPA Government in dealing with terrorism would be dialogue, good governance, social justice, economic growth and the cooperation of the people.[40]

After the judgment of the Special Court, a committee of teachers of Delhi University warned that the Parliament attack case is a "test case for the Indian legal system and its ability to deliver justice. In fact, Indian democracy itself is on trial" (Annexure 15). The trial of democracy continues after the High Court judgment. Whether the "trial" finally culminates in the delivery of justice, or leads to even further erosion of democracy, will depend on how the new government upholds its solemn pledges to the people of India.

Notes & References

[1] Nandita Haksar and K. Sanjay Singh, "December 13," Seminar 521, January 2003, p. 121.

[2] We are reminded of the boy in US who, in a bid to emulate the terrorist attack on 9-11 drove a single-engine plane into a building, and died in the process.

[3] Written Submissions on behalf of S. A. R. Gilani, Murder Reference 1 of 2003, presented by Shri Ram Jethmalani, Senior Advocate.

[4] Written Submissions on behalf of Shaukat Hussain Guru, In Murder Reference 1 of 2003 & Criminal Appeal 36 of 2003, presented by Shri Shanti Bhushan, Senior Advocate.

[5] "Terrorists panicked, gave the game away," Times News Network, 17 December 2001.

[6] "Jaish denies hand in attack on Parliament," The Times of India, 17 December 2001.

[7] "Ex-ISI head accepts Jaish hand in Parliament attack", Rediff.Com, 6 March 2004.

[8] On this crucial question, the media simply followed the police version, as with the rest of the case. For example, in "Kandahar gave Qaida a boost", The Times of India, 5 February 2004, the senior journalist Siddharth Varadrajan states, without citing any source, that the "December 13, 2001 attack on Parliament" was "the handiwork of the JeM."

[9] See, for example, the citation from Supreme Court judgment 613, 2000 (vii) A.D. Government of NCT of Delhi Vs. Sunil in Annexure 16, para 259.

[10] This statement does not amount to Afsan's admission of the phone-call. As the defence clarified later, she was mentioning her talking to her husband in person inside the custody.

[11] Obviously, she wouldn't have been allowed by the police to report that she was in custody.

[12] In fact, the "We hate India" sticker found at the scene of attack does not fare much better (Annexure 11, para 5). Why didn't the terrorists take Geelani's help in composing this momentous note for posterity?

[13] With the possible exception of tampering with the tape with respect to the Kashmiri equivalent of "It was necessary," as noted.

[14] However, the judges proceeded to discuss the conversation to show that, even if the conversation was valid, it did not implicate Afsan (Annexure 16, paras 341, 342, 419).

[15] Also, Shaukat's signature was allegedly found on disclosure memos prepared by J&K police at Srinagar. Should we depend on these documents anymore? Recall that we did not concede the veracity of this call.

[16] Written Submissions on behalf of Shaukat Hussain Guru, In Murder Reference 1 of 2003 & Criminal Appeal 36 of 2003, presented by Shri Shanti Bhushan, Senior Advocate, p. 46.

[17] The seizure memo, listing items recovered from the personal search of Afzal, records the following: a pocket diary containing some phone numbers, a key, a wrist-watch, some negatives of photographs, an identity card, and Rupees 2500/-. Interestingly, the phone numbers and the key were not subjected to further investigation.

[18] No doubt Ammonium Nitrate and Aluminium powder can be mixed in the right proportion with some other chemicals to produce high explosives. But individually these are harmless, common chemicals which can be purchased in any quantity from the open market without a permit, and without even a proper record of the transactions (Annexure 16, para 62).

Aluminium powder is widely used in paints (Butani, Dictionary of Science, pp. 13), while Ammonium Nitrate is the "most common nitrogenous component of artificial fertilizers" (Encyclopedia Britannica, Micropedia I, pp. 319). These common uses of the said chemicals were also noted in the judgement of the Sessions court (Annexure 11, paras 102, 106).

[19] See my "Confessions were forced in the Dec. 13 Case", South Asian Citizens Wire, 17 October 2004.

[20] Vijay Nagaraj, Amnesty International (India), in Blurred Lines, a film by Sujata Venkateswaran and Ruksh Chatterjee. Also, "Use of POTA against Dalit and Adivasi's in District Sonbhadra, U.P.", UP Agrarian Reform & Labour Rights Campaign Committee – both presented before People's Tribunal on POTA, New Delhi, 13 March 2004.

[21] See Annexures 12, 14, 17 for more.

[22] Written Submissions on behalf of S. A. R. Gilani, Murder Reference 1 of 2003, presented by Shri Ram Jethmalani, Senior Advocate.

[23] "A wife's appeal for justice", Kashmir Times, 21 October 2004.

[24] Nandita Haksar, "The many faces of nationalism", Seminar 533, January 2004, p.101.

[25] For example, once Afzal claimed that he left his flat in Delhi on 12.12.2001, he was never asked to detail his whereabouts during the period between his leaving the flat and getting arrested at a bus stop on 15.12.2001.

[26] Written Submissions on behalf of S. A. R. Gilani, Murder Reference 1 of 2003, presented by Shri Ram Jethmalani, Senior Advocate.

[27] On other hand, it is incredible that a renegade, with close links with the STF, would be trusted by terrorist organizations for such an important action. Tabassum states, "You will not perhaps realise that it is very difficult to live as a surrendered militant in Kashmir" (Annexure 18).

[28] See Alan Bullock, Hitler: A Study in Tyranny, Pelican, 1962, p. 262-77.

[29] Tehelka: The People's Paper, 16 October 2004, p. 21.

[30] Most recently, the demand was also raised in my "Who attacked Parliament?", Revolutionary Democracy, Vol. X, No.2, September 2004.

[31] Rediff.com, 17 December 2001.

[32] Nandita Haksar, "The many faces of nationalism", Seminar 533, January 2004, p. 101.

[33] John Pilger, "Iraq: the unthinkable becomes normal," New Statesman, 15 November 2004.

[34] Peer, "Victims of December 13", The Guardian, 5 July 2003, p. 35 (Annexure 13).

[35] "Go on appeal", Editorial, The Pioneer, 31 October 2003.

[36] The same newspaper had much else to say about "Human Rightswalas" that are essentially unprintable; see Chandan Mitra, "Go 'home', Geelani & friends", The Pioneer, 30 October 2003.

[37] Arundhati Roy, "Peace", Znet, 7 November 2004.

[38] John Pilger, "Iraq: the unthinkable becomes normal," New Statesman, 15 November 2004.

[39] For the full text of the Common Minimum Programme, see The Hindu, 28 May, 2004.