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

RESERVED ON: 18.05.2012
PRONOUNCED ON: 22.11.2012

\+ **DEATH SENTENCE REF. 2/2010**

STATE ..... Petitioner

Through: Mr. Pawan Sharma, Standing Counsel (Crl), for the State with Mr. Harsh Prabhakar, Advocate.

Versus

MOHD. NAUSHAD & ORS. ..... Respondents

Through: Mr. K.K. Manan with Mr. Mustafa Arif, Advocates.
Ms. Kamini Jaiswal with Mr. Abhimanue Shrestha, Advocates for A-5, 6 & 9.

CRL.A. 948/2010, CRL. M. (BAIL) 1121/2010

JAVED AHMED KHAN @ CHHOTA JAVED ..... Appellant

Through: Ms. Kamini Jaiswal with Mr. Abhimanue Shrestha, Advocate.

versus

THE STATE ..... Respondent

Through: Mr. Pawan Sharma, Standing Counsel (Crl), for the State with Mr. Harsh Prabhakar, Advocate.

CRL.A. 949/2010

MOHD. NAUSHAD ..... Appellant

Through: Mr. K.K. Manan with Mr. Mustafa Arif, Advocates.

Versus

THE STATE ..... Respondent

Through: Mr. Pawan Sharma, Standing Counsel (Crl), for the State with Mr. Harsh Prabhakar, Advocate.

CRL.A. 950/2010

MIRZA NISSAR HUSSAIN @ NAZA ..... Appellant

Through: Ms. Kamini Jaiswal with Mr. Abhimanue Shrestha, Advocates.

Versus

THE STATE ..... Respondent

Through: Mr. Pawan Sharma, Standing Counsel (Crl), for the State with Mr. Harsh Prabhakar, Advocate.

CRL.A. 951/2010

MOHD. ALI BHATT @ KILLE .... Appellant

Through: Ms. Kamini Jaiswal with Mr. Abhimanue Shrestha, Advocates.

Versus

THE STATE .... Respondent

Through: Mr. Pawan Sharma, Standing Counsel (Crl), for the State with Mr. Harsh Prabhakar, Advocate.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE G.P. MITTAL

MR. JUSTICE S.RAVINDRA BHAT

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1. These four appeals and one death reference arise out of a common judgment and order of learned Additional Sessions Judge dated 08-04-2010, whereby the Appellants viz. Naushad (A-3), Mirza Nissar Hussain @ Naza (A-5), Mohd. Ali Bhatt @ Killey (A-6), Javed Ahmed Khan (A-9) were convicted. A-3 was convicted under section 120-B, section 411 and section 302/307/436 read with section 120-B IPC. He was also convicted under Section 5 of the Explosives Substances Act. A-5 and A-6 were convicted under section 120-B, section 411 and section 302/307/436 read with section 120-B IPC. A-3, A-5 and A-6 were awarded death as also awarded further sentences under cognate for the lesser offences they were charged with. Javed (A-9) was convicted under section 120-B and section 302/307/436 read with section 120-B IPC and was awarded the sentence of imprisonment for life which was directed to run concurrently with sentences for lower offences and fine. All the appellants claimed to be aggrieved and have appealed to the Court against their convictions and sentences; since three of

them have been awarded the death sentence, the learned Trial Court has referred the sentence for confirmation in terms of the provisions of Section 368 Cr.P.C.

I Brief outline of facts

2. Before an elaborate discussion of the evidence and documents presented before the Court, it would be necessary to recapitulate the salient facts. On 21.05.1996, a bomb blast took place in Central Market, Lajpat Nagar at 6.30 PM. This incident resulted in 13 deaths and 38 injuries, besides extensive loss to properties, both moveable and immoveable. PW-21 was the first to inform the Police Station about the incident; he witnessed the incident and reported to the police on the basis of which the FIR was lodged. Soon thereafter, investigation into the incident started. The same evening there were media reports that Jammu Kashmir Islamic Front (JKIF, in short) had claimed responsibility for the horrific event. The police traced the calls received by TV Channels - Zee News etc. The calls had emanated from two different telephone numbers in the Kashmir Valley. The Jammu Kashmir Police was intimated about these facts; and the police were provided with the two telephone numbers apparently used were i.e. 22315 and 33221; the first was registered in the name of A-1's (Farooq Ahmed Khan's) father and the second was installed in the house of A-2 (Farida Dar). Those two accused were arrested on 24.05.1996 by the J&K Police. The Delhi Police were intimated about this fact. Consequently, PW-49 Jasbir Malik formally arrested them on 25-5-1996 on behalf of the Delhi Police and brought them from Srinagar. The said two accused were produced before the Metropolitan Magistrate, Patiala House on 26-5-1996 and their

remand was obtained.

3. The prosecution claimed that the Police obtained a break-through with the arrest of A-9 Javed on 01.06.1996 at Ahmedabad by the Gujrat Police. It was alleged that he made disclosure statement (produced before the Trial Court as Ex. PW-99/B). In the disclosure statement, he revealed the details of the various stages in which the explosives were brought into India and also revealed the names of the master mind behind the bomb blast, which included Bilal Ahmed Beg (A-11), Juber @ Mehrazuddin (A-12), Mohd. Ashraf Bhatt (A-14), Javed Kariwar @ Javed Ahmed Goojri (A-15), Ibrahim Abdul Razak Menan @ Muslaq @ Tiger Menon (A-16) and Daud Hassan Sheikh (A-17). A-11 to A-17 were declared proclaimed offenders; A-13, who was also a proclaimed offender during trial, admittedly died during the proceedings. On the basis of the information disclosed by A-9 Javed, the police claims to have verified certain facts from PW-13Wazid Kasai during the investigation, as well as from Pappi (who deposed as PW-14) during the trial. It was also alleged that in the statements recorded under Section 161 Cr.P.C, these two witnesses partially lent corroboration to Javed's disclosure statement vis-a-vis handing over of explosive materials by Javed to other conspirators which were ultimately used in the bombing incident of 21.05.1996. It was alleged that during the course of these statements, A-3's name cropped up as one of the key figures instrumental for the bomb blast. It is alleged that several unavailing attempts were made to nab Naushad; the police claims to have kept a watch near his house. Ultimately on 14.06.1996, upon the receipt of a tipoff, the police arrested Naushad (A-3) along with Mirza Iftekar (A-4) from the New Delhi Railway

Station at 7:40 PM trying to board the Vaishali Express to Gorakhpur. The prosecution further alleged that on the basis of disclosure statements by A-3 Naushad, several vital incriminating materials in the form of explosives (2 slabs of RDX, 1 timer, 1 iron solder , 1 wire cutter, 2 araldite tubes**,** 1 gas cylinder and 1 detonator) were seized. Similarly recoveries of incriminating material were allegedly made at the behest of A-4. Both these recoveries were made on 15.06.1996.

4. The prosecution further alleged that on the basis of disclosure statements by said two accused, it obtained information regarding the whereabouts of other two accused i.e. Mirza Nissar Hussain, A-5 (hereafter referred to as 'Naza') and Mohd. Ali Bhatt, A-6 (hereafter referred to as 'Killey'). The police party apparently went to Gorakhpur on 16.06.1996. Killey and Latif Ahmed (A-7 who was ultimately acquitted by the impugned judgment after the trial) were arrested. It was also alleged that A-3 and A-4 had accompanied the police when the said two accused Killey and Latif were arrested on 16.06.1996. Allegedly, the latter two were identified and pointed out by A-3 and A-4. The police, on the basis of disclosure statement by Latif Ahmed (A-7) recovered a torn half of a two rupee note, which was a key to obtain funds for Naushad (A-3), from a *hawala* transaction from one Mangal Chand in Delhi. The prosecution alleged that on the basis of further information received on 17.06.1996 the police party went to Mussourie and arrested A-5 Naza.

5. It was further alleged that on the basis of disclosure statements recorded by A-6 and A-7, a police party went to Shalimar Bagh, Delhi on 17.06.1996; the place was identified by the accused, from where a torn half

two rupee note was recovered (at the behest of A-7) from Mangal Chand, who handed over Rupees one lakh in cash to A-4 to be given to A-3 (Naushad). The Seizure Memo in respect of the said money was prepared that day and later produced during the trial. The appellants claimed to have sent another party to Gorakhpur on 18.06.1996 to seize relevant extracts of the guest house records as well as the railway reservations chart dated 27.05.1996 (pertaining to Shaheed Express) to prove that Naushad had travelled from Gorakhpur to Delhi.

6. In the meanwhile, Javed (A-9) and Nikka (A-10) along with two others were detained in Ahmedabad. Javed, A-9 and Nikka, A-10 were transferred to Jaipur where they were needed in connection with another pending case involving trial for the offence punishable under Section 307, IPC. The prosecution case is that there was a bomb blast at Dausa, Rajasthan soon after bomb blast in Lajpat Nagar, Delhi. On 19.07.1996 the concerned Magistrate Bhagwan Das (PW-100) at Jaipur recorded a judicial confession of Javed, A-9 (Ex.PW-100/A) wherein Javed narrated the sequence of events which he was aware of, implicating various accused as well as identifying their roles. Apparently, A-9 and A-10 were kept in custody and eventually formally arrested by the Delhi Police on 26.07.1996.

7. The prosecution went on to investigate the matter further, obtained the opinion of various experts including explosives experts and after collecting all other materials filed the charge sheet against 10 accused who stood trial. All of them claimed they were not guilty. The prosecution relied on the testimonies of 107 witnesses and also several material exhibits which included seizure memo, pointing out memos, disclosure statements,

confessional statements of A-9 (Ex. 100/A). After the statement on behalf of the accused, under Section 313, Cr PC was recorded, Naushad chose to lead evidence in defence and relied upon the testimonies of the two witnesses - Shri Mukesh, a Section Officer, National Human Rights Commission (NHRC) DW-1 and Shri Arun Kumar Sharma, Public Relation Inspector DW-2.

8. After considering the statements on behalf of the parties and the materials placed before it, the Trial Court convicted the four appellants before this Court and acquitted A-4, A-7, A-8 and A-10 of the charges. A-1 and A-2 were convicted under Sections 5 and 7 of Explosive Act and were sentenced to undergo 7 years imprisonment.

9. Two accused Farooq Ahmed Khan A-1 and Farida Dar A-2 did not appeal against their conviction and sentence.

II Brief Summary of the Trial Court findings

10. The Trial Court convicted A-1 on the basis of recovery of articles, pursuant to his disclosure statement Ex. PW-39/B recorded on 04.06.1996 in Delhi. The prosecution witnesses relied upon by the Trial Court in this regard were PW-18 Inspector Pawan Kumar and PW-19 Prem Ballabh Dhayani, BSF Srinagar. They deposed that A-1 took them along with other police and BSF Personnel to his house at Janglat Mandi and pointed out to a safe which was locked. The lock was broken and one AK-56 and two magazines containing 59 rounds were recovered. Additionally, explosives weighing more than 1 kg were recovered from a polythene bag. These were seized under memo Ex. PW 18/A. The Trial Court also found that

documents were seized and recorded in a memo Ex. PW 18/B. The documents recovered were produced as Ex. PW 19/1 to 19/8. The Trial Court also believed PW-22 SI Arvind Verma who accompanied PW 18 and 19 and searched A-1's house which led to seizure to documents Ex. A/1 to A/8. These documents pertained to installation of telephone (which was used to communicate to the news channels in Delhi to claim responsibility for the bomb blast on 21.05.1996) and other related documents to prove the permanent residence of A-1. Likewise, the recoveries made pursuant to disclosure statements of A-2, including explosives, and the records relating to the telephone, were held sufficient to implicate that accused with the incident.

11. As far as Naushad (A-3) was concerned, the Trial Court relied on the testimony of PW-9, PW-39 and PW-101 (all police officials) to prove the circumstances under which he was arrested. More importantly, it was held that the disclosure statement of this accused (Ex. PW-31/B) leading to the recovery of two RDX slabs weighing 1 kilo 50 grams, a detonator with wire, an alarm clock, a gas cylinder, a polythene bag containing iron solder, a screw driver, a plier, a cutter, two araldite tubes an electric tape and a wire, had been proved by the testimonies of PW-31, PW-41 and PW-101. These articles were recovered at the behest of A-3 Naushad from the DDA flat where he lived on 15-6-1996 and were taken into custody through seizure memo Ex. PW-31/A. The prosecution had also relied on the testimony of PW-92; but that witness turned hostile. The Court did not believe the allegation of A-3 that he had, in fact, been detained on 28-5-1996, and had been illegally confined. The said appellant's version, sought to be

corroborated by reliance on the evidence from an official of the National Human Rights Commission about having received a complaint from Naushad's father in that regard, was not held proved. The Trial Court held that the purchase of the yellow coloured wire (a circumstance listed as No. 20 against the accused) was held not proved through the testimony of PW-32, who could not identify Naushad. This finding is at para 269 of the impugned judgment. However, in the conclusion recorded, the Trial Court (erroneously, and perhaps by oversight) listed that this circumstance was proved against Naushad (A-3). A very important circumstance held to be incriminating against Naushad was the circumstance of the stolen Maruti car (which belonged to PW-8) having been parked on 19-5-2006 at Lajpat Nagar, near a shop named *"Dulhan Dupatta"*. The prosecution relied on the testimony of PW-31 and PW-39, the police officials who claimed that the said accused had been taken to the said premises, on 18-6-1996 after arrest, and were identified by the shop keeper, PW-61. The said individual, PW-61 was declared hostile; in his cross examination, he could identify the accused Naushad. This witness PW-61 initially denied having signed anything, but in cross examination by prosecution, admitted to the memo Ex. PW-31/R. This was held to be sufficient identification of the accused Naushad to amount to proof that he had visited the area two days before the incident, on 19th May, 1996, and had parked a Maruti car, and had later accompanied the police party on 18-6-1996. The recovery of a car duplicate key (Ex. P-7, seized through memo Ex. PW-31/F) was sought to be proved through the testimonies of police witnesses PW-31, PW-39 and PW-101. The Trial Court held that this was not an incriminating circumstance, since the key was recovered from an open place, accessible easily, and was not

corroborated by an independent witness. The Trial Court held that the testimonies of PW-31, PW-36 and PW-39 (police witnesses) to say that the accused Naushad had led them (along with A-5) on 19-6-1996 to the shop where gas cylinders had been purchased. The shop keeper, PW-54 did not support the prosecution but admitted, in cross examination with leave of court (by the prosecution) that he had signed the "pointing out memo" PW-31/M, which recorded the visit of the police party, with the said two accused. This circumstance was held to have been proved, against Naushad. Similarly, the admission to having signed on a pointing out memo, by PW-64, from whose shop a key was obtained by A-3 and A-5, was held to amount to proof that the accused had gone to his shop on 19-6-1996, during the course of investigation. Here again, apart from the testimony of PW-64 - who could not identify the accused – the prosecution relied on the testimonies of police witnesses PW-31 and PW-39. In an identical fashion, the Trial Court held that the circumstance of A-3 and A-5 having pointed out the shop (of PW-58) on 19-6-1996, from where the soldering iron had been purchased, and memo Ex. PW-31/K recorded, was proved (again PW-58, the shop keeper, could not identify the accused as the individuals who had visited the shop after the bomb blast, during investigation). The Court relied on the testimonies of PW-31 and PW-39.

12. As regards Naza (A-5) the Trial Court held that his involvement and culpability was proved by the prosecution through various circumstances. These were the confessional statement by A-9 (Ex. PW-100/A) which specifically named A-5, and how he accompanied that accused from Kathmandu; delivery of the bag containing bombs and explosives in the

house of PW-13. The Court further held that in the disclosure statement A-5 had mentioned having travelled to Delhi on 10-5-1996, in Royal Nepal Airways, which was held to have been proved by the testimony of PW-67, who produced the photocopy of the passenger list (Mark 67/A) - the list contained A-5's name. It was held that since this circumstance was not known to the police, the disclosure statement Ex. PW-23/B to that extent was admissible, as it related to a fact discovered pursuant to accused's statement, under Section 27 Evidence Act. The Trial Court held that the circumstance regarding pointing out of the shop from where a wall clock was purchased, on 17-5-1996, was proved through a part of the disclosure statement (of A-5) Ex. PW-23/B, and the memo Ex. PW-31/H, which was signed by PW-48 and PW-50. The testimony of PW-101 was relied on to say that the accused led the police party to the shops on 19th June, 1996 – a circumstance unknown to the investigation team at that time, and therefore, admissible and relevant in law. The testimony of PW-61, even though he could not identify A-5 with certainty, was held sufficient to incriminate A-5 as it implicated him, on the basis of his disclosure statement Ex. PW-23/B, to the extent it admitted that the Maruti car was parked on 19-5-1996, two days before the blast, in front of the said witnesses' (i.e. PW-61's) shop. The memo pointing out the shop of PW-60 from where a nine volt battery was purchased (Ex. PW-31/L) and the deposition of PW-31 as well as PW-39 were held sufficient to prove that A-5 took the police to the shop of PW-60, pursuant to the disclosure statement PW-23/B and that PW-60 admitted to the memo, even though he could not identify the accused. As with A-3, in the case of A-5 to, the Trial Court found the pointing out of the shop (of PW-58) on 19-6-1996, (from where the soldering iron had been purchased,

and where memo Ex. PW-31/K was recorded), stood proved (again PW-58, the shop keeper, could not identify the accused as the individuals who had visited the shop after the bomb blast, during investigation). The Court relied on the testimonies of PW-31 and PW-39. It was further held that the testimony of PW-38 proved that two individuals – which included A-5 had visited his shop in May, 1996 with a nine volt battery, asking him to fix the terminals by soldering for which he charged Rs. 5/-. The prosecution had alleged that this fact was revealed by A-5 in his disclosure statement Ex. PW-23/B; the visit by the accused, with the police party, and his pointing out the shop, was recorded in memo Ex PW-31/N.

13. The impugned judgment held that A-6 Killey was criminally responsible being a member of the conspiracy that masterminded the bomb blast on 21.05.1996. The first circumstance relied upon in this regard was the confessional statement of A-9 (Javed Khan) i.e. Ex.PW-100/A which named Killey. Ex.PW-100/A mentioned that on 10.05.1996 Javed senior had sent A-5 to Delhi and that he (A-9), Javed senior, A-6 and A-13 started for Delhi from Kathmandu on 11.05.1996. Upon reaching the border on 12.5.1996, he (A-9) stayed there while the others moved ahead. After delivering ammunitions at the residence of PW-13 and on his return he found that Javed senior, A-6 and A-13 had reached Kathmandu. On 19.5.1996, A-6 and A-13 went back to Delhi, when he enquired from Javed senior why they had gone back, he was informed that work could not be completed due to some defect. The second circumstance relied upon was the pointing out of the shop, from where a "Jayco" make wall clock was purchased, pursuant to the disclosure statement (of A-6) i.e. Ex.PW-16/I.

Here the evidence relied upon was identical i.e. the testimonies of PWs-48 and 50 and the memo Ex.PW-31/H. The testimonies of PW-31 and PW-39 too were relied upon. As in the case of A-5, the disclosure statement of A-6, Ex.PW-16/I was relied upon to say that the shop of PW-60, from where 9 volt battery was purchased, had been pointed out during the investigation by the accused A-6, on 19.6.1996. The testimony of PW-60 as well as memo Ex.PW-31/L was relied upon. The other circumstance held to have been established to connect A-6 with the crime is the soldering of two terminals on the 9 volt battery from the shop of PW-38, Vijay Electronics. Here that part of the disclosure statement, Ex.PW-16/G, which led the police team to the shop of PW-38 and the latter pointing out the accused in the course of the investigation (though the witness was unsure about the identity during the trial), were relied upon. The memo Ex.PW-31/N was also relied upon by the Trial Court. The prosecution had relied on and the Trial Court agreed with its submission in this regard that the testimony of PW-61 in front of whose shop (*Dulhan Dupatta*) the Maruti 800 car was parked on 19.5.1996, two days before the bomb blast, was proved by pointing out memo Ex.PW-31/R prepared on 19.6.1996. It was held that even though PW-61 could not identify A-6, the fact remained that the memo recorded the name of A-6 and was admitted by PW-61. The Court further held that this circumstance was unknown to the police and was discovered pursuant to the disclosure statement by the accused and, therefore, relevant under Section-27 of the Evidence Act. In the same series, the Trial Court further held that the response of A-8 (the individual whose Maruti 800 car was stolen on 18.5.1996) on 17.6.96 by A-6 and A-3 and the drawing up of a memo had been proved.

14. The conviction of A-9 Javed was premised largely upon the confessional statement Ex.PW-100/A. It was found by the Trial Court that the confession was made voluntarily in FIR No.39/1996 PS Gandhi Nagar, Jaipur in which it was alleged that Javed was guilty of committing offence under Section-307/427/120B, IPC. The Trial Court held that Javed's entering Delhi and staying in Satyam Hotel on 14.5.1996 had been established. The Trial Court relied upon the testimony of PW-99, PW-100 and PW-101. It was held that A-9's graphic details how on 13.5.1996 he left the Nepal border for Delhi and reached the next morning and went to the residence of PW-13. He could not hand over the bag to A-5 and instead handed it over to some woman saying that it contained clothes. He returned to Kathmandu on 15.5.1996 and reached there on 17.5.1996. According to his statement, co-accused Javed sr., A-6 and A-13 had also reached Kathmandu before he went there. Arrest of A-9 on 24.5.1996 was held to be proved. Similarly, the disclosure statement made by him pursuant to his arrest on 1.6.1996 after the Gujarat police informed the Delhi Police in this regard was held to be proved. The Trial Court held that before the disclosure statement of A-9, the Delhi Police was unaware regarding the whereabouts of PW-13 Wajid Kasai. This vital clue led to the breakthrough and further investigation, which finally led to successful completion of investigation.

15. The Trial Court held that the sequence of events, which included the confessional statement of A-9 - which was admissible in law - the disclosure statements made by the accused, the recoveries effected and the corroborative material gathered during the investigation clearly established

the criminal conspiracy on their part along with the co-accused who had absconded and did not stand trial. The object of this conspiracy was not only the bomb blast incident, which occurred on 21.5.1996 evening at Lajpat Nagar but also to engineer several other similar incidents to threaten the integrity of the country and challenge its sovereignty.

16. The Trial Court found that A-3, A-5, A-6 and A-9 were guilty for the offences punishable under Section 120B read with Sections 302, 307 and 436, IPC. Naushad (A-3) was also held guilty and convicted for the offence punishable under Section 5 of the Explosive Substance Act. A-5 and A-6 were also held guilty for the offence punishable under Section 411, IPC. A-1 and A-2 were held guilty and convicted for the offences punishable under Section 5 of the Explosive Substance Act. A-1 was further convicted for the offence punishable under Section 25 of the Arms Act.

III Appellants' contentions

(a) Arguments on behalf of accused Mohd. Naushad (A-3)

17. Shri K.K. Manan, counsel for Mohd. Naushad (A-3) submitted that the prosecution's case against Mohd. Naushad is suspect right from its inception. Relying on Ex.PW-99/B-1 Javed's statement recorded under Section 161, Cr.P.C. during the investigation, it was highlighted that the said accused A-9 did not even mentioned Naushad in that document. Learned counsel submitted that this gap is fatal to the prosecution story because in the absence of any information, the role and involvement of Naushad was never established. Learned counsel urged that even if Javed's statement about his having gone to Wajid (PW-13's) house on reaching Delhi were to

be believed, the disclosure statement of PW-13 Wajid is completely bereft of any particulars as to the identity and the place and the address of Naushad. Even if this fact were to be ignored, the prosecution's version that it was unsuccessful in nabbing Naushad for more than ten days, i.e. after coming to know about Javed's statement on 3.6.1996, is unbelievable. In this connection, it was argued that the Trial Court has completely ignored and discarded the testimony of DW-1 and DW-2 who had deposed that Naushad was abducted or illegally detained by the police on 28.5.1996. The testimonies of these two independent witnesses showed that Naushad's father had sent a complaint to the National Human Rights Commission (NHRC) immediately upon his son being detained without any charges. These two officials who deposed as defence witnesses established that the complaint was indeed sent and received contemporaneously in the end of May/early June. This gave a lie to the entire prosecution story about Naushad having gone into hiding and absconding from the police.

18. Learned counsel for the Naushad further relied upon Mark-A/2, the statement of PW-13 recorded by the Delhi Police. The said witness had clearly stated that Javed Khan knew Naushad, yet Javed himself had not named either in the disclosure or confessional statement of A-9. This completely belied the prosecution theory about having come to know about Naushad and his role, through PW-13. Once that witness resiled from the prosecution version and did not support its theory about having been approached by Javed, or having told the police regarding involvement of Naushad, there was no evidence linking Naushad with the bomb incident.

19. Arguing further, it was submitted that the entire prosecution story how

A-3 was nabbed and arrested on 14.06.1996 is unbelievable and shrouded in suspicion. Learned counsel submitted that if in fact PW-13 had been interrogated by the police as claimed by them and further to it, it was found (as per statements of police witnesses PW-101 and 105) that A-3's house at Turkman Gate was locked for 5-6 days, it was unbelievable that no attempt would have been made to search the premises, especially in view of the suspicion against A-3. It was submitted that the police theory about A-3 having fled and hidden himself in Gorakhpur in this context cannot be believed. It was argued that the entire story of Naushad's arrest from Platform no. 4 of the New Delhi railway station when he was allegedly boarding the train for Gorakhpur on 14.6.1996 was not proved. Learned counsel highlighted that even though PW-16, PW-39 and PW-101 claimed to have witnessed the incident and also further alleged that P.P. Singh (PW-105) was present, the latter did not corroborate this at all. Learned counsel further argued that the arrest of the A-3 is suspect for the reason that PW-16 Inspector Rajender Gautam – who corroborated the allegations regarding arrest from railway platform in line with the testimony of PW-39 and 101, also mentioned that some disclosure statement was recorded the same day on the platform; according to the witness the disclosure statement was Ex.PW-16/D. However, no such disclosure statement was exhibited by the witness. It was submitted that PW-39 Inspector Hare Ram Malik did not support the testimony of PW-16 as regards the recording of the disclosure statement Ex.PW-16/D. It was further argued that very important circumstance which negates the prosecution's story about the arrest of A-3 and A-4 is the fact that though PW-41 and PW-43 were mentioned as members of the police party at the time of arrest in the railway

station particularly by PW-39 and 101, these two witnesses were silent and did not corroborate the prosecution story. It was argued that therefore even though the prosecution mentioned that PW-16, PW-39, PW-41, PW-43, PW-101 and PW-105, only three witnesses i.e. PW-16, PW-39 and PW-101 supported that version. On the other hand, PW-105 and the other witnesses i.e. PW-41 and PW-43 were silent about their presence and having witnessed the arrest.

20. The Appellant's counsel also attacked the entire prosecution allegations about the arrest of Naushad and A-4 on 14.6.1996 by arguing that if in fact the police were in hot pursuit of these two accused, no reason is attributed why independent witnesses were not associated at the time of the arrests. All witnesses who claimed to have been present and to have witnessed the nabbing of A-3 and A-4, admitted that the arrest took place on a crowded railway platform. No attempt was made to associate any independent witness. On the other hand, the two defence witnesses DW-1 and DW-2 had proved that A-3's father had addressed a complaint to the NHRC alleging police highhandedness with Naushad's wife on 28.5.96 and his illegal arrest and detention from that day onwards. The prosecution could not dislodge their testimonies; they were known to be the independent witnesses. In these circumstances, the Trial Court fell into error in believing the testimonies of police witnesses and unreasonably discarding that of the defence witnesses. Learned counsel submitted that the settled law that equal weightage has to be given to the testimonies of prosecution and defence witnesses and if the defence witnesses are credible and support a reasonable point of view, that is to be preferred to the prosecution version.

Learned counsel submitted that in this context the lack of corroboration by independent witnesses in regard to other circumstances such as pointing out of shop from where the car number plates were made (para 255 of the impugned judgment); pointing out of shop from where the Araldite tubes were purchased (para-259-261of the impugned judgment), was held to be fatal to the prosecution case, resulting in the Trial Court discarding such circumstance. This application of contradictory and discrepant standards was a serious error, particularly when the prosecution admitted that independent witnesses were available and could have been approached or joined at the time of arrest of the A-3 and A-4 on 14.6.1996.

21. It was argued that the single most important evidence alleged against the appellant Mohd. Naushad (A-3) was the recovery of explosive and other articles. Learned counsel submitted that the recovery of explosives was sought to be proved through the testimony of three police witnesses PW-31, PW-41 and PW-101. The police also importantly relied upon the testimony of PW-92, a neighbour and an independent witness. This witness very crucially did not support the prosecution story at all as regard the recoveries made from the premises of Mohd. Naushad (A-3) i.e. DDA Flats, Turkman Gate. This single discrepancy or contradiction in the evidence was sufficient for the Court to discard the allegations regarding recovery of these articles. Learned counsel submitted that the Trial Court, however, erroneously held that even though PW-92 denied having witnessed the recovery, the fact that he mentioned that the police visited Naushad's premises and that he was made to sign the statement under Section 161 Cr.P.C., were factors that could be taken into consideration and that the

testimony of the police witnesses proved the recovery of explosives. It was submitted that if the prosecution story about police awareness regarding Naushad's involvement pursuant to the disclosure statement made by Javed on 2.6.1996 and the subsequent information gathered by Wajid, were to be believed, it was highly improbable that no measures would have been taken to search the premises of Naushad. The Trial Court, urged the counsel, overlooked this vital circumstance, i.e. absence of any explanation why the police did not deem it appropriate to search and seize incriminating articles from the premises of Naushad which was known to him before his alleged arrest on 14.6.1996. Elaborating on this aspect, learned counsel submitted that if in fact the police had strong reasons to suspect A-3's role in the bomb blast, it would have been natural and reasonable for them to raid and seize every incriminating material from that suspect's known premises. Instead the police theory that the premises were kept under watch for about ten days, believing it unprotected and potentially containing dangerous explosive substances, was an extremely improbable story. The prosecution quoted an explanation for this; none was forthcoming during the trial. The only inference therefore was that the explosive and other incriminating articles were not there and had been planted in the premises.

22. Learned counsel highlighted that the recovery pursuant to the alleged disclosure by Naushad on 15.6.1996 is also suspect because none of the witnesses i.e. neither PW-31, PW-41 nor PW-101 mentioned that the premises which had been locked when the police went earlier (leading them to keep a watch over it) was broken open. In fact PW-31 could not recollect if the door was open or closed. None of the witnesses mentioned that the

appellant A-3 facilitated opening of the lock or that the lock was forced open. In these circumstances, it was reasonable to infer that the premises were open and under the control of the police – a circumstance that ought to have weighed with the Trial Court in rejecting the alleged recoveries altogether.

23. It was submitted that the prosecution allegations that A-3 had stayed in Gupta Hotel, Gorakhpur on 28.5.1996 was a circumstance that could not be held proved having regard to the state of evidence. In this context, learned counsel argued that PW-40 had deposed that they obtained a photocopy of the railway reservation chart on 27.5.96 of Shaheed Express from Indian Railways Ex.PW-40/A which was seized by memo Ex.PW-40/D. This chart showed Naushad's name in the waiting list RAC-12. However, the person from whom he got the chart photocopy recorded (an official of the Indian Railways i.e Mr. Chakaravorty) was not examined in Court. Similarly, the seizure of the photocopy of the visitor's book Ex.PW-40/C seized under memo Ex.PW-40/D showing details about Mohd. Naushad and the original of that book Ex.PW-40/1 from Gupta Hotel and another original visitor's book from Hotel Budha where A-5 andA-6 had allegedly stayed, was not proved in the eyes of law. It was argued that neither PW-82 nor PW-83 identified Naushad; PW-83 merely stated that according to the records one Naushad had stayed in the hotel. It was submitted that the Trial Court's findings and observations from paras 209 to 216 that A-3 had stayed in Gupta Hotel on 27.5.1996 and that the photocopy of chart of railways Ex.PW-40/A stood proved, are entirely based on mis-appreciation of evidence and the legal position. Learned counsel

emphasized that it was the prosecution's duty to prove each circumstance i.e. Naushad travelling in the train at the relevant time, his stay at Gorakhpur and his identification by the witnesses. Neither the railway reservation chart was produced in original – only an alleged photocopy was relied upon, nor was the official who gave the photocopy examined in the court. Furthermore, the two witnesses who could have testified that Naushad stayed in Gorakhpur at the relevant time in the end of May, 1996, did not identify him in Court nor even the prosecution attempted A-3's identification by them. In these circumstances, there was no material for the Court to conclude that A-3 was not in Delhi but at Gorakhpur on 28.5.1996. Learned counsel argued in this context that the Trial Court entirely relied upon the absence of cross examination on behalf of of A-3, ignoring entirely the lack of positive evidence by the prosecution to prove those facts. It was submitted that the Court's findings and observations are entirely at variance with its conclusion with respect to handwriting analysis. In this respect, learned counsel relied upon the CFSL report Ex.PW-94/A which stated that the authorship the specimen signatures and writings could not be fixed and established to be that of the person who wrote on the visitor book of Gupta Hotel on 27.5.1996. The Trial Court's findings in this regard are as follows: -

> *"404. Similarly, the prosecution failed to prove if handwriting on the visitor's book at sl. No.112 of Gupta Hotel and Tourist Lodge, Gorakhpur, 27.5.1996 was in the handwriting of A-3"*

24. It was further submitted that even though the testimonies of PW-40 and PW-60 showed that the former had visited the Gorakhpur twice and the latter went there once, the witnesses were unable to recall the relevant D.D.

entries regarding their movements. Learned counsel submitted that 17 circumstances were put against A-3 Mohd. Naushad and the Trial Court rejected 9 of them but proceeded to hold that 8 circumstances had been proved, which not only were conclusive but of such nature as to implicate him as having been responsible for the bomb blast and leaded to impose the extreme sentence of death. Learned counsel submitted that the 9 circumstances which were held not to have been proved were the recovery of keys at the instance of A-5 and A-6. The prosecution had relied upon the testimonies of PW-31, PW-39, PW-64 and PW-101. PW-64 was an independent witness and a key maker who did not support the allegations. The Court held that no independent witness was associated with the alleged recovery which was made from a open place accessible to the public at large. The Court also held that the alleged recovery was made more than a month after the incident. It, therefore, rejected Ex.PW-13/J, the pointing out memo, the key Ex.P-7and the Seizure memo Ex.PW-31/F. In a similar manner the evidence of the same prosecution witnesses regarding pointing out of the shop by A-3 and A-6 where the duplicate number plates of the car was prepared was rejected by the Trial Court in para 256 of its judgment. Referring to para 225 of the impugned judgment, learned counsel submitted that the prosecution witnesses had contradicted themselves and that there was no documentary proof in that regard. The TIP of the case property had not been conducted and even independent witnesses from the adjoining shops had not been joined at the time of preparation of memo Ex.PW-31. Likewise the recovery of the car front and rear number plats at the instance of A-3, A-5 & A-6 were rejected by the Trial Court in paras-288-289 of the judgment. The Court rejected the testimonies of the official witnesses

PW-31, PW-39 and PW-101 and held that no independent witnesses had been joined; that the alleged recoveries were from the open place, accessible to all, that no TIP proceedings were conducted, associating PW-8, owner of the car and that the prosecution did not prove that the number plates Ex.P-4 and P-5 were originals. It was also argued that the Court rejected the fourth circumstance namely pointing out of the place in House No.134, Zakir Nagar allegedly by A-2, A-5 & A-6 in para-278 of its judgment. The memo Ex.PW-33/S was not believed on the ground of absence of any independent witness; that the place was open and accessible to the public; that it was owned by Mirza Maqbool Hussain who was not joined in the investigation, etc.

25. It was argued next by learned counsel for the appellant that the alleged arrest of A-7 and recoveries of a torn 2 rupee currency note at the pointing out of the A-3 was rejected by the Trial Court in para-195 of its judgment. The Court noticed that no independent witness was joined at Gorakhpur at the time of A-7's arrest and recovery of the torn 2 rupee note. Very crucially the Court also noticed that PW-16, the policeman was declared hostile and that the prosecution suggested that he was won over by the accused. Furthermore, the court noticed that alleged currency note did not have any distinct identification and that the prosecution story in that regard was unbelievable. Recovery of stepeny from A-8's house was similarly rejected and the pointing out of the house of A-8 as well as pointing out by A-3 of various places was rejected by the Trial Court.

26. It was submitted that as against this, the Court applied an entirely different yardstick in believing the prosecution version regarding pointing

out by PW-61 of the appellant. It was submitted that concededly the prosecution case itself was that the appellant was arrested on 14.6.1996. If in fact, he was seen by PW-61, owner of the *"Dulhan Dupatta"* Shop on 19.6.1996 during investigation, that by itself, proved nothing. The prosecution did not conduct any TIP nor associate PW-61 in such proceedings, which alone would have lent assurance to any identification of the accused at the relevant time. Here, learned counsel argued that PW-61 did not identify A-3 Naushad in his examination-in-chief. The prosecutor sought permission of the Court to put leading questions to the witness, who was examined in Court on 7.10.2004, i.e., about 8½ years after the incident. It was submitted that contrary to the ready acceptance of the alleged identification of A-3 alone during the trial by the Court, the impugned judgment rejected another circumstance i.e. the pointing out of the shop from where Araldite tubes were purchased. The reasoning in that regard is at Paras 260-261 of the impugned judgment where it was held that the absence of TIP and improbability of a shopkeeper remembering the faces of those who visit his premises, 8-9 years after the incident, was fatal. Learned counsel submitted that there was no difference in the character of the two circumstances of pointing out because in the alleged pointing out Ex.PW-31/R, the witness denied all the suggestions as to what had been stated by the accused in his presence on 19.6.1996, regarding their involvement and knowledge. The witness also failed to identify Naza and Killey. Yet the Trial Court chose to accept the said witnesses' testimony which was riddled with suspicion, entirely on the basis of his testimony in cross examination as regards identification of Naushad (A-3) as the person who had parked the car on 19.5.1996 and as the individual who made the

disclosure and pointed out the place which was recorded in the memo Ex.PW-31/R. The counsel again emphasized the fact that even if the statement Ex.PW-31/R was recorded, it was inadmissible in evidence since it amounted to an extra judicial confession.

27. Learned counsel argued that as regards all the other incriminating circumstances held to have been proved, the Court entirely relied upon the testimony of official witnesses even though independent witnesses did not support the prosecution story. It was submitted that the approach of the Trial Court in relying on the pointing out memo Ex.PW-31/M was at variance with the testimony of PW-54 and the testimony of PW-64 who denied the circumstance about the recovery of the key as well as the pointing out memo of PW-31A, despite PW-58 not being able to identify the accused were assailed as contrary to law. Learned counsel submitted that wherever independent witnesses were sought to be joined in the proceedings or produced in the court but had resiled and contradicted the prosecution story, the Trial Court refused to heed their testimonies and went on unreasonably to accept the version of the police witnesses. This was done almost entirely on the basis that such independent witnesses had admitted to signing the "pointing out" memo which, therefore, were held to be admissible as leading to proof of knowledge of a place or a fact. It was urged that this approach of the Court is without any legal support because such "pointing out" memos do not fall within the exception carved out under Section-27 of the Evidence Act. Learned counsel relied on the Privy Council decision reported as *Pulukuri Kotayya v. Emperor* (AIR 1947 PC 67), and argued that a *'fact discovered'* within the meaning of Section 27 cannot be equated to an object

produced; and that a fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. The court's observation that *"Information about to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered.."* was, in that context, relied on. Reliance was also placed on the decision reported as *Inspector of Police, Tamil Nadu v Balaprasanna* 2008 (11) SCC 645 and *Jaffar Hussain Dastagir v State of Maharastra* 1969 (2) SCC 872.

(b) Arguments of Mirza Nisar Hussain @ Naza (A-5)

28. Learned counsel for Naza submitted that as against the seventeen circumstances alleged against that appellant, the prosecution's case was disbelieved in regard to nine of them. These nine were the circumstance relating to arrest of the appellant, the pointing out of the shop where an araldite tube was purchased, pointing out of the shop from where a wire was purchased, pointing out of the place at Zakir Nagar, where the stolen Maruti car was allegedly parked, recovery of the car key, recovery of the front and rear number plates of the said stolen car, pointing out of the place of incident, telephone calls allegedly made by A-5 to A-7, and an alleged recovery from a house. All these nine circumstances – which included the most important circumstance relating to arrest of A-5 were disbelieved. However, argued counsel, completely ignoring that these circumstances were intrinsic links to the prosecution case, which was entirely circumstantial, the impugned judgment recorded A-5's conviction on the basis of other evidence. The most prominent among these was the "pointing

out" of the shop *Dulhan dupatta,* allegedly on 19-6-1996, by the accused A-5 during course of investigation. The other circumstances held to have been proved were the pointing out of the shop, from where a nine volt battery was purchased, pointing out of another shop from where a battery was soldered; pointing out of a shop from where a clock was purchased, pointing out of the shop from where the gas cylinder was purchased, and pointing out of the shop or place where duplicate car key was made, and from where a soldering iron was purchased.

29. Elaborating the submissions, learned counsel urged that the pointing out circumstance, pertaining to the *Dulhan dupatta* shop was based on the prosecution theory that the accused, including A-5 had taken the police party to that shop on 19-6-1996. The police version was that they did not know previous to the pointing out on that day, that the accused had made an abortive attempt at exploding a bomb in Lajpat Nagar on 19-5-1996. That day, when the stolen Maruti car was being parked in front of the shop *Dulhan Dupatta,* the shopkeeper, PW-61 objected. This fact was known to the police, when the accused led them to the shop, an event recorded in the pointing out memo Ex. PW-31/R, witnessed by the said shopkeeper. Learned counsel submitted that the Trial Court fell into grave error in not giving any weightage to the fact that even after the witness was permitted to be cross examined, he could not identify the appellant A-5 with any certainty. Despite this fatal lacuna, the impugned judgment believed the prosecution version that the accused had visited Lajpat Nagar on 19th May, 1996, and attempted to explode a bomb, unsuccessfully. It was emphasized that this circumstance was held to be extremely important, to establish A-5's

involvement in the conspiracy, and despite the failure of PW-61 to identify that accused, the Court held the circumstance proved, almost entirely on the basis of police witnesses' testimony. It was submitted – like in the case of A-3 - that such "pointing out" could not be a conduct incriminating any accused, and therefore not relevant under Section 8 Evidence Act, or admissible under Section 27. Learned counsel stressed on the fact that the shop was in central Lajpat Nagar, and its shopkeepers were accessible. Therefore, it could not be a place unknown to the public at large.

30. The Counsel submitted that arrest of Naza (A-5) from Minerva Hotel, Mussorie was not believed as the prosecution was unable to prove the date, time and place of arrest beyond reasonable doubt. The Counsel submitted that the prosecution failed to explain why the staff members and owner of Minerva Hotel, Mussorie were not joined in the investigation and made witnesses' to the personal search and arrest. The arrest was allegedly made from Minerva Hotel yet no staff/manager of the hotel was joined as a witness to the arrest memo. Furthermore, records i.e. hotel register of Minerva hotel was also not seized. The prosecution did not bring anything on record regarding the number of days accused Naza (A-5) stayed in Minerva hotel; or prove the purpose of his visit to Minerva hotel. There was no documentary evidence to prove that the accused had in fact stayed at Minerva hotel, Mussorie. The witnesses to Naza's (A-5's) arrest are PW-23 Insp. Puran Singh and PW-43 Insp. Virender Singh, both of whom gave different versions regarding their departure from Delhi to Mussorie. PW-23 Insp. Puran Singh in his examination-in-chief stated that he along with his team left Delhi for Mussorie on 17.06.1996 whereas in his

cross-examination he stated that they reached Mussorie in the night intervening 16/17.06.1996; this, submitted the counsel, is not possible. PW-43 Insp. Virender Singh stated that they left Delhi for Mussorie on 16.06.1996 at about noon and reached Mussorie in the wee hours of the morning. Therefore both the witnesses' have given a different departure date for Mussorie. Furthermore, PW-43 Insp. Virender Singh in his deposition mentioned that HC Yamin Khan was also with the police team in Mussorie; however, HC Yamin Khan was not made a prosecution witness. The Counsel further urged that no documentary evidence was brought on record to show the presence of PW-23 and PW-43 in Mussorie on 17.06.1996. The DD Entry allegedly made at the PS in Mussorie regarding the apprehension of the accused was not produced on the record. Accused Naza (A-5) was not produced before any court in Mussorie. No incriminating article was recovered from the said accused at the time of his personal search. In this background, urged counsel, the finding of the Trial Court that the prosecution was unable to prove the date, time and place of arrest of A-5, and yet go on to hold that:

> *"The fact however, remains that A-5 was arrested in this case and was brought to Delhi. A-5 has claimed that he was arrested from Nepal on 08.06.1996. However, no evidence on that aspect has also come to accept the plea of A-5 that he was arrested from Nepal on 08.06.1996 and was kept in illegal detention till 17.06.1996."*

is erroneous and unsustainable.

31. It was urged that having noticed the grave discrepancies in the prosecution story about A-5's arrest, it was inconceivable that he was present, along with the police party and A-3 when they allegedly went to

Lajpat Nagar, and pointed out *Dulhan Dupatta,* on 17-6-1996. Learned counsel submitted that the disclosure statement of A-5 (Ex. PW-16/J) was allegedly recorded on 30-6-1996, and sought to be proved by PW-16, but in reply to leading questions put by the prosecution. These circumstances put together with the fact that unlike other "pointing out" memos which recorded that the accused had been taken with their faces muffled to the concerned place, the relevant memo did not record that; neither did PW-61 depose to that aspect. As a result, this "pointing out" memo was not an incriminating circumstance. Lastly, argued learned counsel, since the disclosure statement of A-3 recorded on 15-6-1996, mentioned about the shop and who all allegedly visited it on 19-5-1996, the subsequent pointing out did not lead to discovery of any fact, nor could be said to be corroborative of it, at least as far as A-5 was concerned, to be admissible under Section 27 of the Evidence Act. In these circumstances, the only permissible method to lend assurance about veracity of the prosecution version would have been to conduct a TIP of the accused, and join PW-61 in it, which was concededly not done in the case.

32. It was argued that the Trial Court fell into error in believing various pointing out memos (Ex. PW-31/H, PW-31/K, PW-31/L and PW-31/N) even though the concerned independent shop keepers and witnesses (PW-48, PW-50, PW-58 and PW-38) could not identify A-5 as the individual who had visited their premises during the investigation, in June, 1996, and pointed out their shops or premises, from where, various articles, deemed incriminatory, were purchased, or services, such as soldering of wires, etc, were got for a price. It was submitted that the lack of prosecution's effort to

get identification through reliable TIP proceedings, either of the accused, by the witnesses, or of the articles, was adversely commented upon by the Trial Court. However, it nevertheless proceeded to hold that such pointing out memos incriminated A-5 as one of the conspirators responsible for the crime. Learned counsel relied on the observations of the Trial Court to the following effect:

> *"...the investigation conducted by the police in this case is highly defective. At no stage the police opted to put any of the accused persons for TIP from the prosecution witnesses. The prosecution has miserably failed to justify as to why no TIP of the case property recovered in this case or that f the accused persons arrested in this case conducted from the prosecution witnesses. The case of the prosecution is that the accused persons led the police team a various places during investigation and pointing out various places from where they had arranged articles for preparation of cylinder bomb planted in the Maruti car in question. However, at no stage police bothered to get any of the accused persons arrested in this case to be identified in judicial TIP proceedings from the prosecution witnesses..."*

33. Learned counsel argued that the starting point for the Trial Court in this case, to hold that A-5 was guilty, was the confessional statement of A-9, Javed (Ex. PW-100/A). Counsel urged that this was an erroneous approach, and that such confessional statement is invariably treated as a weak circumstance or evidence and at best could be considered corroborative, if other incriminating circumstances are in fact proved. In this regard, learned counsel relied on the decision reported as *Hari Charan Kurmi v State of Bihar* 1964 (6) SCR 623. It was argued that the Trial Court adopted an approach of blind adherence to the said alleged confessional statement, without first satisfying itself if all the corroborating materials and facts had

been proved.

34. Counsel urged that courts in India have to follow, without exception, the rule of proof beyond reasonable doubt, being the constant burden which the prosecution labours under, in all criminal cases, regardless of whether they are based on direct or circumstantial evidence. Counsel relied on the rule applicable, enunciated in *Hanumant Govind Nargundkar v State of MP* AIR 1952 SC 343 and *Sharad Birdichand Sarda v State of Maharastra* 1984 (4) SCC 116, that each circumstance alleged must be conclusively proved, that all links in the chain of circumstances must equally conclusively be established and that every circumstance so proved should unerringly and categorically prove that the accused was responsible for the crime, and that all hypothesis of his innocence has been ruled out by the prosecution, during the trial. Counsel relied on the ruling in *State v Mahendra Singh Dahiya* 2011 (3) SCC 109 that regardless of the gravity or shocking nature of the crime, the court should be careful in analyzing all evidence, and should adopt a balanced approach, eschewing emotion.

(c) Arguments on behalf of Mohd Ali Bhat @ Killey (A-6)

35. Learned counsel for A-6 Killey adopted the submissions made on behalf of the appellants Naushad and Naza, stating that the circumstances alleged against Killey were almost entirely similar and identical to those accused. It was urged that so far as the arrest of Killey was concerned, the Trial Court had disbelieved the prosecution story. The most important incriminating circumstance put against Killey was the deposition of PW-61 and the alleged "pointing out" that the accused had visited his shop on 18-6-1996, during investigation, with a police party. It was submitted that

the witness could not identify A-6 Killey, even after prompting by the prosecution, in the course of leading questions put to him, with permission of the court. Such being the case, the Trial Court fell into a grave error in holding that the statement of that witness, allegedly made during the investigation, under Section 161 could be taken as proved. In doing so, the Court entirely based its conclusions on the testimonies of police witnesses and discarded the deposition of the only independent prosecution witness.

36. It was argued that similarly, the Trial Court fell into error, in holding that the pointing out of the shop from where a nine volt battery had been allegedly purchased had been proved. In this regard, learned counsel relied on the testimony of PW-60; he failed to corroborate the prosecution version about the said pointing out. Counsel submitted that even during cross examination (by the prosecution, with leave of court) the witness refused to identify A-6, stating:

> *"I however, told the police that one of those two accused persons, namely Mirza Nisar Hussain @ Nasa who is present in court might have purchased from me. It is wrong to suggest that I categorically identified accused Mohd. Ali Bhat @ Mohd. Killey as the only person who came at my shop with accused Mirza Hussain @ Naza for purchasing battery on 21-5-1996 when police removed the muffler from his face.."*

It was submitted that the Trial Court fell into grave error in rejecting the testimony of an independent prosecution witness, and wholly relying on the police witness, as regards the fact that a battery had allegedly been purchased from his shop. The police were admittedly not witnesses (to the actual event), and exclusive reliance on an inadmissible statement of a witness, who refused to corroborate the prosecution, was unsustainable in

law.

37. It was argued that the circumstance of pointing out of the shop from where the *Jayco* wall clock was bought was similarly not proved and the Trial Court erred in rejecting the evidence of independent witnesses. Counsel highlighted that in the entire testimony of PW-48, the witness denied that the three accused, including Killey had visited his shop with the police during investigation identifying it (the shop) as the place from where the clock was purchased. The witness was cross examined by the prosecution, and he nevertheless denied that any of the three accused had gone to his shop with the police. In a similar manner, PW-50 could not, despite suggestion, identify all or any of the accused as individuals who had gone to buy the wall clock. Therefore, the Court could not legitimately have concluded that this circumstance was proved. Learned counsel adopted the submissions made on behalf of the other accused/appellants regarding the infirmity in the findings of the Trial Court with respect to pointing out of the shop from where the soldering iron had been purchased, and its reliance upon the deposition of PW-58, who claimed that he could identify those persons, but, in fact, did not identify any of the accused in court with certainty, but did so with doubt.

38. It was further argued that the Trial Court fell into error in relying on the confessional statement of Javed (Ex. PW-100/A) without any corroboration of its contents. In this regard, it was submitted that such confessional statements cannot, by their own weight, and in absence of any other supporting or corroborative material result in a conviction.

39. Counsel for Killey argued that the Trial Court's approach was

contradictory and opposed to settled principles regarding appreciation of evidence in criminal cases. It was urged that many circumstances were held not proved, and many pointing out memos rejected, on the ground that independent witnesses were not associated, or TIP of the accused or articles not conducted. Yet, the same standard was selectively used, and entirely ignored while accepting pointing out memos which were not supported by independent witnesses; similarly, recovery of articles that were not subjected to TIP and were by all accounts common, or commonly available, were held to have been proved. This inconsistent approach, submitted counsel, pointed to the Trial Court's anxiety to somehow convict A-6. Neither did any witness identify him, positively, or hesitatingly; all independent witness produced and expected to implicate him, did not identify him. The Trial Court should have held that the prosecution had not proved the circumstances alleged against him, beyond reasonable doubt, and acquitted him, on an application of established principles of criminal law. However, submitted counsel, not only was Killey convicted as charged, but shockingly imposed the extreme penalty of death sentence. The impugned judgment has therefore resulted in manifest miscarriage of justice.

(d) Arguments on behalf of Javed Khan (A-9)

40. Ms. Kamini Jaiswal, Learned counsel argued that A-9 was convicted mainly on the ground of his alleged judicial confession Ex.PW-100/A, made on 19.7.1996. It was argued that there was scanty material to corroborate the prosecution allegations about Javed Khan's role in the crime apart from the said confession. It was contended that the said appellant was arrested – as per the prosecution – on 1.6.1996 by the Gujarat Police; he made his

disclosure statement the same day (Ex.PW-99/B). The alleged disclosure statement was made on 1.6.1996. Between that date i.e.1.6.1996 and 19.7.1996, no judicial confession was recorded; very significantly, A-9 continued to remain in police custody, first with the Gujarat Police and later the Rajasthan Police. The Delhi Police did not make any effort to arrest Javed despite the said disclosure statement made on 1.6.1996. His formal arrest was made by Delhi Police on 26.7.1996 after his judicial confession. This rendered his confession questionable. Learned counsel underlined that for a judicial confession to be admissible, the Court has to be satisfied that it was made voluntarily. It was argued in this context that the queries put to A-9, by the concerned Magistrate PW-100 were formal and ritualistic and he continued to be in police custody right up to the day prior to his making the confession. Learned counsel relied upon the text of Section-164 Cr.P.C. and contended that confession by an individual accused of one offence, in relation to another offence which is not under investigation by the authorities and over which the Magistrate cannot exercise the jurisdiction, is not within the contemplation of the provision and, therefore, inadmissible. It was argued in other words that the so called confession by A-9 who was not even charged with the offence pertaining to the incident at Delhi nor named as an accused, in the course of an entirely alien proceedings, concerning unrelated charges in an entirely different incident, was, therefore, inadmissible. Learned counsel relied upon the Privy Council decision in *Pakala Narayana Swamy v. Emperor,* AIR 1939 PC 47. Learned counsel also relied upon the decision reported as *Sunder Lal Kanhaiya Lal Bhatija v. State of Maharashtra*, 2010 (4) SCC 414.

41. It was also argued that merely because PW-100 deposed during the proceedings about his satisfaction that A-9's alleged confession was made voluntarily, the prosecution was not absolved from proving beyond reasonable doubt that such confession was indeed trustworthy and that it was not made under duress. It was submitted that the confession was suspect because the prosecution made no attempt to address a very important issue which is that the most important facts were revealed to the Gujarat Police allegedly on 1.6.1996. Further, A-9 continued to be in police custody throughout and was arrested by the Delhi Police despite his alleged disclosure – which was highly incriminating – only on 27.7.1996. This delay in the arrest and the nine weeks delay in making the confession had not been explained at all. These important discrepancies had to be kept in mind that while considering that PW-100 did not record as to who had identified A-9 on 19.7.1996 when the confession was made before him, and he did not even record the order sheet or separate proceedings about which policeman had accompanied the accused A-9 on the two occasions when he went to Court 17.7.1996 and 19.7.1996. Learned counsel relied upon the decision reported as *Inspector of Police v. Bala Prasanna*, 2008 (10) SCC 645 and *Rammi v. State of Madhya Pradesh*, 1999 (8) SCC 649. It was emphasized that the unexplained delay in the making of the confession coupled with the unexplained delay in arrest of the accused, seen together with the omissions and gaps in the testimony of PW-100, put reasonable question marks over the voluntariness of the confession by A-9, as to render it inadmissible.

42. It was next submitted that even if for arguments sake it was assumed

that the prosecution had proved that the confession Ex.PW-100/A was in fact admissible, there were other doubts highlighted during the trial which ought to have impelled the Court to hold that he was not proved to be guilty beyond reasonable doubt. In this regard it was argued that the testimonies of PW-98 and PW-99 as regards the date of arrest of A-9 were at variance. PW-99's testimony suggested that contrary to the prosecution's case, the Gujarat Police had information regarding whereabouts of A-9 and A-10 on 24.5.1996 and that they were arrested on 25.5.1996. This gave a lie to the prosecution version that these two accused were arrested on 1.6.1996, which was plainly overlooked by the Trial Court.

43. Contending that the confessional statement by itself is considered weak to sustain a conviction, learned counsel argued that there should be external corroboration of its contents in the form of recoveries and other objective facts. Counsel urged that in the present case, such external factors alleged against A-9 were not proved at all and that the facts so proved were so inconsequential that conviction could not rest on them. Elaborating the submission, it was urged that the only proof with regard to facts mentioned in the confession, adduced in the form of evidence by the prosecution was that Javed Khan had stayed in Delhi for a day on 14.5.1996 at Satyam Hotel. Counsel urged that the prosecution had relied upon the testimonies of PW-3, PW-46 and PW-101. It was submitted that the testimony of PW-46 Rajan Arora, proprietor of the Satyam Hotel, did not inspire any confidence. Although he claimed that A-9 stayed in his hotel for a day on 14.5.1996, yet no documentary evidence in that regard in the form of hotel register or extracts from it or counterfoil of cash memo/receipt were produced. The

witness did not even remember if any such document had been seized by the police. Counsel highlighted that witness had deposed in Court on 20.5.2004 i.e. eight years after the incident; applying the reasoning of the Court with regard to "pointing out" memo and the improbability of a witness identifying the accused after such length of time, it was argued that the deposition of PW-46 could be hardly trustworthy enough to amount to proof of the circumstance alleged. It was submitted that even otherwise the mere fact that Javed had stayed for a day in Paharganj, New Delhi a week before the incident (assuming this fact to have been proved) cannot be considered incriminating at all.

44. Learned counsel submitted that A-9 was accused of delivering ammunitions used by A-3and A-5 at the residence of PW-13. However, that prosecution witness turned hostile and denied any delivery of weapons alleged. He even denied that A-9 had visited him. Similarly, PW-14 also denied that A-9 had visited their house. In these circumstances, there was no proof that A-9 had left any arms or ammunitions or for that matter any material with the said witnesses, which facilitated the commission of the crime or any other crime. The testimonies of police witnesses as regard what was stated by PW-13 and PW-14 could not be looked into since it amounted to hearsay evidence and the said witnesses were not on trial. Since the witnesses denied what was attributed to them in the form of statements under Section-161 Cr.P.C., the circumstance that A-9 visited them and delivered arms or ammunitions could not be said to have been proved. It was, therefore, urged that the Trial Court's observations with regard to Delhi Police being able to trace PW-13 as a result of the disclosure statement

recorded by A-9 on 1.6.1996 was of no avail at all.

45. It was argued further that the Trial Court fell into error in holding that no material existed to infer that the Delhi Police had even met A-9 prior to recording of the confessional statement. The evidence produced before the Court showed that Delhi Police had interrogated A-9 on 3.6.96 soon after getting the message from Gujarat Police. Counsel highlighted the fact that A-9 was acquitted by the competent Court in Gujarat of all charges since the prosecution there failed to establish that he was the conspirator along with others for commission of the offence punishable under Section 120B IPC. Furthermore, no incriminating material was found to connect him with the offence alleged by the Gujarat Police. The charges against the accused, argued the counsel, included offences punishable under Section 120B, 121, 121 (A), 122 and 123 IPC. All these were noticed by Trial Court in para 425 of the impugned judgment. Similarly, the Trial Court was also aware of the fact that A-9 was arrested under FIR No.39/1996 and produced before the Jaipur Court on account of his involvement in some offence for which he had in fact been discharged under Section-169 Cr.P.C.

46. It was argued that taken together all the circumstances alleged against A-9 were not proved; the confessional statement attributed to him (Ex.PW-100/A) was inadmissible because it was plainly not voluntarily and the other external circumstances allegedly corroborated of the contents of the said judicial confession had not been proved. In any event, some circumstances even if proved could not result in conviction. As a result, argued the learned counsel, the Trial Court misdirected itself in law in placing such heavy reliance on the confessional statement and treating it as a

gospel truth contrary to the settled legal position.

IV Submissions of the prosecution

47. Mr. Pawan Sharma, learned Standing counsel for the State, appearing for the prosecution, argued that the bomb blast occurred on 21-5-1996, at Pushpa Market, Lajpat Nagar at 6.30 PM in car No.DL-2CF-5854, which was stolen on 18.05.96. In the blast high explosives were used. 13 persons died and 38 received injuries. The police was informed and FIR was recorded on the basis of the statement of PW-21 Subhash. The FIR was proved at Ex.PW1/A. It was urged that the case is based on circumstantial evidence and the prosecution was able to piece together overwhelming materials to prove that the four appellants before the court in the present case, i.e A-3, A-5, A-6 and A-9, were guilty, beyond reasonable doubt. Counsel submitted that even though all accused could not be arrested and brought to face trial, the prosecution successfully proved all the elements of conspiracy, and the incriminating circumstances, alleged against each Appellant. It was highlighted that the Court took care in keeping in mind the settled rule in circumstantial evidence based cases regarding conclusive proof of each circumstance, proof of all links, and elimination of every hypothesis consistent with the accused's innocence. Counsel submitted that the appellants had not been successful in establishing that the impugned judgment contained any substantial or compelling error, requiring appellate consideration.

48. Counsel urged that on the day of the blast itself, i.e 21-5-1996, between 8 and 9 PM phone calls were received from Anant Nag, Jammu & Kashmir, at various media offices in New Delhi, and JKLF took

responsibility for the incident. It was submitted that this was proved by PW-68 Vinod Kapari of Zee TV and PW-74 of PTI who deposed that phone calls received were made from telephone No.22135. The prosecution showed that the said number was installed in the name Mohd. Farukh's (A-1's) father and the connection had STD facility. It was found that A-1 and A-2 were in constant touch with each other through telephone numbers 22135 and 33221. The second telephone was installed in the house of A-2 and about 31 calls were made by A-1 and A-2. In this connection, submitted the counsel, PW-97, one Makroo of BSNL, J&K proved that telephone number 22135 had STD facility. Counsel urged that PW-105 ACP P.P. Singh proved the said calls by proving the billing record of the two phones. Other witnesses, i.e. PW-106 Subhash Chander and PW-107 Sanjeev Kumar (both of BSNL, J&K) too proved the record through fax billing of the said numbers. On 24.5.96, A-1 and A-2 were arrested by the J& K police in FIR No.162/94, P.S. Sher Garhi. A fax was sent by J& K Police along with wireless message (Ex.PW-78/A, Ex.PW-78/B and Ex.PW-78/C) to the Delhi Police. PW-78 Farukh Khan, SSP, J &K deposed before the Trial Court about those facts.

49. Counsel submitted that on 25.5.96, pursuant to information from J&K Police A-1 and A-2 were arrested by Inspector Jabir Malik of Special Staff, Delhi Police who was examined in the trial as PW-49. This was corroborated by PW-25. A-1 and A-2 were brought to Delhi. Investigation of the case was transferred to PW-101 Inspector Paras Nath who was posted at Operational Cell, Delhi Police. Next, on 1.6.96 four persons namely Javed Khan (A-9), Asadullah @ Abdul Gani (A-10), Rasid Ahmed and Makbool Bhatt were

apprehended by the Ahmedabad Police in case FIR No.12/96 under Sections 120B/307 IPC near Roopali Cinema, Ahmedabad. The said four were nabbed by the Ahmedabad Police on the basis of earlier information received by them that some suspicious individuals stayed at Ankul Hotel. The police party raided that hotel but despite the entries made in the hotel register (in the name of Mohd. Rasid), no one was found. Thereafter the continuous search was made by the police and ultimately on 1.6.96, four persons were apprehended and arrested. At the time of arrest a *panchnama* was prepared, and another *panchnama* of the contents of a digital diary recovered from the accused was prepared. PW-98 and PW-99 deposed about these facts before the Trial Court. It was submitted that the appellant's argument that they were detained on 24.5.96, was put to the Gujarat police, PW-98 and PW-99, but denied by them. It was submitted that the accused's argument about false arrest of Javed is without substance, because there was in fact no contradiction between the testimonies of the witnesses PW-98 and PW-99. Furthermore, the prosecution was not bound to prove what the accused did between 24th May, 1996 and the date of their arrest, i.e. 1-6-1996, since that was not in issue. On the other hand, submitted counsel, the appellants did not lead any evidence to falsify that they were arrested on 1-6-1996.

50. It was submitted that Javed A-9, made a disclosure statement that on 14.5.96 he had gone to Delhi and delivered highly explosive materials at the house of Wazid Kasai (PW-13) at Turkman Gate, Delhi. He had stayed in Hotel Satyam, on 14-5-1996 – a fact disclosed in the disclosure statement Ex.PW18/F. PW-46 Rajan Arora of Satyam Hotel correctly identified

Javed as the person who stayed in his hotel on 14.5.96. This fact was also revealed in the judicial confession made by Javed later, on 19-7-1996.

51. On 2.6.96 after getting information from the Ahmedabad Police, Delhi police went to the premises of Wazid Kasai, and recorded his and his sister Pappi's statement under Section 161, Cr.P.C. Both named Naushad (A-3) and other accused in their statement by revealing that he (A-3) used to meet other Kashmiri boys. They further stated that Javed handed over a bag in their house which was delivered by them to other two accused. Wajid was examined as PW-13 during trial; he did not support the prosecution case. Ms. Pappi was also examined as PW-14 and she too did not support the prosecution case. Their testimonies were later corroborated by the judicial confession of Javed (Ex. PW-100/A) made before the Learned ACJM, Jaipur. Soon after the information was received from PW-13 and PW-14, the police started searching for Naushad but A-3 was untraceable till 14.6.96. The police also reached at his house but no search was made there because of the possibility of A-3 absconding like other accused, who were later declared PO and are still absconders. Around this time, on 3-6-1996, PW-34 Harender Singh went to J&K and searched the house of Javed Kariwar to ascertain whether he was available. However, he was not there. One passport was seized from his house. From the house of Javed Kariwar and Mohd Ashraf in J&K, some documents and photographs were seized. The seizures were proved as Ex.PW-34/A, Ex.PW-34/B, Ex.PW-34/C and Ex.PW-34/A1 and Ex.PW-34/C1 to C4. It was submitted that on 4.6.96, PW-91 Inspector Ram Chander went to Ahmedabad and interrogated Javed and Mohd. Gani @ Asadullah who were in the custody of Ahmedabad

Police, but their interrogation could not be completed because accused Javed was sent to Jaipur. PW-91 Ram Chander was sent to Ahmedabad after getting information from the local state Police (Ex.PW-91/A and Ex.PW-91/B). It was argued that the testimony of this witness was not challenged by the defence. The same day, on 4.6.96, police recorded the disclosure statements of A1 and A2 Ex.PW-39/A and Ex.PW-39/B. This was deposed to by PW-39. In these statements A-1 and A-2 stated that they could help recover explosives from their houses. PW-18 Inspector Pawan Kumar and PW-19 P.B. Dhiyani of BSF, J &K went to the houses of A-1 and A-2, from where RDX was seized; the seizure memo was Ex.PW18/C. The recovery from the house of A-1 was Ex.PW-15/A. Other documents seized from the house of A-1 were by memo Ex.PW-18/B. The latter recovery was made on 7.6.96 in the presence of a senior officer of BSF, J&K i.e. PW-19 P.B. Dhiyani. He fully supported the prosecution case. It was submitted that this was supported even by the defence, which stated that the recovery and raid were conducted under supervision of M.S. Sharma, Jt Director.

52. Mr. Sharma argued that on 14.6.96, based on secret information, a police party consisting of PW-16 Rajinder Gautam, PW-39 Inspector Hari Ram Malik, Insp. Paras Nath (PW-101) and P.P. Singh (PW-105) went to Platform No.4 New Delhi Railway Station, from where Naushad (A-3) and Mirza Iftikhar Hussain @ Saba (A-4) were nabbed. From Naushad a railway ticket for two passengers was seized by the police through memo Ex.PW-101/4. The State Counsel submitted that the doubts raised about the arrest of A-3 and A-4 especially that no member of the public was joined by

the police prior to their arrest is baseless. Reliance was placed on the judgments reported as *Tahir v. State* 1996 (3) SCC 338; *Aher Raja Khima v State of Saurastra* AIR 1956 SC 217; *State of Kerala v M.M. Mathew* 1978 (4) SCC 65; *Anter Singh v State of Rajasthan* 2004 (10) SCC 657 to contend that the testimony of police witnesses cannot be discarded and that there is no principle that they have to be supported by public witness.

53. Counsel also submitted that the alternative theory about the real detention (of A-3) having taken place on 28-5-1996, by placing reliance on the testimonies of two defence witnesses, cannot be accepted. It was argued, in this context, that A-3's father, who is alleged to have complained to NHRC, did not step into the witness box, to say that he had actually sent the complaint; he did not depose that his son was illegally detained since 28-5-1996. On the other hand, there was sufficient corroborative material to reject the defence theory, by way of the testimonies of PW-82 and PW-83, independent witnesses (apart from the deposition of police witnesses) that Naushad had checked into a guest house, on 28th May, 1996, after leaving Delhi on 18.6.1996 PW-40 SI Baljeet Singh went to Gorakhpur and collected the Railway chart from the concerned official of Railway. The chart was seized as Ex.PW40/A. The name of Naushad (A-3) was mentioned in it; the chart, a computer printout of the original, was duly proved by PW-40 SI Baljeet. PW-40 also collected the records of Gupta Hotel, where Naushad had stayed on 27.5.96 and the memo was proved as Ex.PW40/C. The documents collected from Gupta Hotel were sent to the handwriting expert along with the specimen handwriting of accused Naushad. PW-94 Deepa Verma proved the handwriting report. The report corroborates that

the specimen handwriting of A-3 matched with the questioned handwriting. It was urged that the Trial Court wrongly excluded this part of evidence on the ground that specimen handwriting was not taken by the police before the learned Magistrate, which is a legally untenable view. Further, argued the learned counsel for the State, the deposition of PW-92 (despite his turning hostile) showed that on 16th June, 1996, the police had gone to the DDA flats where A-3 lived, and made the recoveries. It was submitted that these findings by the Trial Court were sound, and could not be faulted. Counsel submitted, on the strength of the judgments reported as *Joseph v State of Kerala* 2000 (5) SCC 197, *State of Maharastra v Suresh,* 2000 (1) SCC 471 and *Deonandan Mishra v State of Bihar* AIR 1955 SC 801 that whenever accused furnish false *alibi* or explanation (in reply to queries under Section 313 Cr PC) such circumstances can be considered as adverse to them.

54. Learned counsel stated that on 15.6.96 police recorded the disclosure statements of the accused persons, and the same were proved as PW-31/A and PW-31/B. Both A-3 and A-4 revealed about their going to Gorakhpur to meet Killey and Latif to receive money. A-3 also disclosed that he could assist in recovery of explosives and other materials used in preparing bombs. On 16.6.96, A-3 Naushad led the police party to his house resulting in recovery of RDX, detonators, a gas cylinder and other materials. These were proved by the prosecution through the testimonies of PW-101 and other members of the raiding party. A public witness namely Sama (PW-92) was also joined at the time of recovery. He was examined before the Trial Court but did not support the prosecution case, but supported the defence of A-3. He made improvements to aid the accused. It is submitted that in such cases,

having regard to the conduct of the witness, he cannot be considered a truthful witness and that he deposed under the influence of the accused. Therefore, the Trial Court did not commit any error in refusing to give credence to his testimony; it was correct in law, to believe the testimony of PW-101, PW31 and other members of the police party. Learned counsel submitted that so far as the allegation of the appellant about the improbability (in A-3 keeping dangerous explosives in his house, and that the police would not have kept quiet, after receiving knowledge from PW-13 in that regard), the prosecution is not under a duty to meet every hypothesis of the defence, so long as it proves the allegations made against the accused. In this regard, counsel relied on the ruling reported as *State of UP v Ashok Kumar Srivastava* 1992 (2) SCC 86.

55. It was argued that after disclosure statements were recorded, on 16.6.96, a police party went to Gorakhpur, from where Killey (A-5) and Latif (A-7) were arrested by PW-36 Inspector Rajeshwar Kumar. From the possession of Latif, a two rupee currency note was seized; the number of that note was mentioned by the police in the seizure memo Ex.PW16/F. The disclosure statements of Killey and Latif were recorded by the police (PW-16/I and PW-16/H). These facts were proved by PW-16 Insp. Rajinder Gautam. In their statements both Killey and Latif disclosed that two Rupees currency note was to be used for obtaining *hawala* money from one Mangal Chand of Shalimar Bagh. They further revealed that Nisar Husain @ Naza (A-6) was in Minerva Hotel, Musoorie. Learned counsel submitted that though the Trial Court held that the manner of arresting A-5 and A-7 was not established conclusively, it correctly deduced that the

prosecution's failure or lapse in this regard could not help A-5. Counsel highlighted that the acquittal of A-7 was on more substantial grounds, and not just on one solitary circumstance. In this context, counsel relied on the judgments reported as *Leela Ram v State of Haryana* 1999 (9) SCC 525; *Karnel Singh v State of M.P.* 1995 (5) SCC 518 and *Visweswaran v State* 2003 (6) SCC 73.

56. On 17.6.96, based on information received from Killey and Latif, a raid was conducted at BJ/24, Shalimar Bagh i.e. the flat of Mangal Chand. The accused Iftikar @ Saba (A-4) was directed to hand over the two rupee currency note to Mangal Chand to get *hawala* money, which was to be given to A-3 (according to the disclosure of the accused). At the time of raid, PW-35 Raj Kumar (an independent witness) was joined as a member of the raiding party; he duly corroborated the prosecution story. In addition, SI Sanjay Kumar, PW-17, Inspector Paras Nath, PW-101 also proved this fact. The seizure memos were proved as Ex.PW-17/A, Ex.PW-17/B and Ex.PW-17/C1 to C-100. Rs.1,00,000/-, which were delivered by Mangal Chand, was also seized. After seizure, the seal was handed over to public witness PW-35. Mangal Chand was cited as a prosecution witness but not examined due to unavailability during trial. Omission to examine, Mangal Chand (submitted counsel) is not fatal to the prosecution case because the State made several efforts to produce him during trial. After recovery of Rs.1,00,000/- from Mangal Chand (which was handed over to accused Iftikhar), a letter (No.1191/ACP/OC/SR dated 17.6.96) was sent by the police for taking appropriate action against Mangal Chand for violation of provisions of Foreign Exchange Regulation Act. Relying on the decisions

reported as *Birendra Rai v State of Bihar* 2005 (9) SCC 719, *Takhaji Hiraji v. Thakore Kubersing Chamansing,* (2001) 6 SCC 145 to say that only if a material witness, who is an essential part of the prosecution case, is not examined, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, can the prosecution case be termed as suffering from a deficiency and that withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution. However, in the present case, Mangal Chand could not be traced despite all efforts and there was an independent witness, PW-35 who supported the prosecution story.

57. The learned counsel for the State submitted that on 17.6.96, A-3, A-5 and A-6 led the police party, after disclosing that the stepney of a stolen car was given to Makbool Shah (A-8) a resident of Jangpura, Bhogal. The police party reached the house of Makbool Shah with PW-8 Atul Nath, owner of the car. The stepney was seized by Ex.PW-8/C (identification memo) and PW-8 identified the article. PW-8 did not support the prosecution case during trial; he was, however, cross-examined by the Ld. APP when he admitted part of the facts stated by him during the investigation. The testimony of PW-8 and the other relevant police witnesses established that the police party went to Makbool Shah's house on the basis of the information given by the accused. Makbool Shah was arrested and some documents were also seized by the police from his house by memo Ex.PW-7/A. Photographs showing closeness between accused persons was also seized. Clothes and documents of A-1 were also seized by the police

from the house of Makbool and one torn air ticket issued by Royal Nepal Airlines in the name of Mirza Nisar Hussain (A-5, Naza) dated 10.5.96 too was seized by the police. It was next submitted that A-5 was arrested on 17.6.96 by PW-23 Inspector Puran Singh from Minerva Hotel, Mussorie and he recorded his disclosure statement Ex.PW-23/B. The Trial Court concluded that the prosecution was unable to prove the manner, time and place of arrest of Naza. The Trial Court held that he was brought to Delhi by PW-23 Puran Singh from Mussorie. DD No.2 was made by Inspector Puran Singh at P.S. Mussorie, District Dehradun, Uttranchal on 17.6.96 at 12.10 AM. It was argued that the findings of the court in this regard are contrary to evidence and the law, because there was no reason to disbelieve the testimony of the witnesses, merely because they were police officers.

58. It was argued that during the course of investigation, the accused led the police parties to various places, and pointed them out, such as *Dulhan Dupatta,* a shop at Lajpat Nagar, where they had parked the stolen Maruti car on 19-5-1996, the shop from where an araldite tube was purchased, another place where a nine volt battery was bought, another where yellow coloured wire was bought, and yet another place where the wire was soldered. The shop from where the soldering iron was bought, as well as the place from where gas cylinders, and another shop from where a clock was purchased, were pointed out as well. All these were witnessed by shop owners or employees who were independent and deposed in court. It was submitted that the veracity of these were also established by the fact that articles mentioned in the pointing out statements (all recorded on 18th June, 1996) had been recovered at the time of arrest of A-3. All the "pointing out" memos are admissible, and were rightly relied on by the Trial Court, which

relied on the decision of the Supreme Court, in *State (NCT of Delhi) v. Navjot Sandhu @ Afzal Guru,* 2005 (11) SCC 600. The submission of the appellants that the "pointing out" memos could not be relied on, because the relevant witnesses, i.e. PW-38, PW-48, PW-50 and PW-58, as well as PW-61 had not categorically identified the accused, or such of them who had visited the shop just before the bomb blast, and had later accompanied the police, during investigation, was refuted. Counsel for the State submitted that all the witnesses unfailingly acknowledged signing on the pointing out memos, and also that the accused had visited them during the investigation. The accused were identified during course of leading questions put by the prosecution, during the trial. These were supported by the testimonies of PW-31, PW-39 and PW-101, all of whom were consistent with the prosecution story. It was submitted that taken in totality, the purchase of various articles, which were used for, or facilitated the manufacture and explosion of the bomb, on the day of the incident, i.e. 21-5-1996 and the pointing out of shops during investigation, all fell in the category of "facts discovered" and were therefore, admissible under Section 27 of the Evidence Act; they also constituted accused's conduct, which could be proved, and was deemed relevant, under Section 8. The counsel argued that there was no infirmity in regard to the Trial Court's findings, or approach on this aspect.

59. Counsel for the state submitted that on 26.6.96, the police recovered explosive substances from the house of Killey and Naza, which were proved as Ex.PW17/G and Ex.PW17/H; they were deposed to by PW-17 SI Sanjay Kumar.

60. It was next submitted that on 19.7.96 A-9 (who was initially arrested by the Gujarat Police in case FIR No.12/96 at Ahmedabad, and was later transferred to the jurisdiction of a Court at Jaipur) made his judicial confession to PW-100 Shri Bhagwan, Additional Chief Judicial Magistrate Jaipur. He confessed about his involvement in the crime, and the role of other co-accused persons in the Lajpat Nagar bomb blast. The judicial confession (Ex. PW-100/A) was proved by PW-100. It was submitted that the confession was recorded by the Judge in a proper manner after putting all relevant questions to A-9, and after satisfying himself that the accused thought over his decision, and had given it voluntarily. Learned counsel submitted that the appellant's argument that the confession was made under duress is without merit because it was never retracted by the A-9 before the Judge at Jaipur or during the entire trial of the case. Ex.PW100/A, A-9's judicial confession is sufficient for convicting him, as well as A-3, A-5 and A-6. A-9 and A-10 (Asadulla) were arrested in connection with this case, by the Delhi Police, on 26.7.96. During his disclosure statement, A-9 had mentioned about his stay at Satyam Hotel. This statement was produced and proved as PW-18/F. A-9 pointed out to Satyam Hotel and was correctly identified by PW-46 Rajan Arora, the hotel manager during the trial.

61. It was submitted that the prosecution had proved the complete chain of circumstances, that is to say:

(1) Even though A-1 and A-2 were acquitted of the charges under Section 302, yet they were convicted under the Explosives Act. The State submits that despite this, the Court should consider the evidence as a whole, despite acquittal of some accused by the Trial Court. As the appellate Court, the High Court may not agree with the acquittal, and can take a different view,

at least while appraising the evidence vis-à-vis the appellants, who were convicted.

(i) It was submitted that A-1 and A-2 were brought to Delhi after their arrest by PW-49 on 25.5.96. Both were arrested after getting information from J&K police.

(ii) A huge recovery of explosives was made from their houses in the presence of PW-19 P.B. Dhyani, a responsible officer of BSF, pursuant to the disclosure of the said accused. PW-18 Inspector Pawan Kumar supported these facts.

(iii) The arrest of A-9 and A-10 by the Ahmedabad police and intimation sent to Delhi Police was proved by PW-98 and PW-99. The Ahmedabad Police recorded the disclosure statements of A-9 and A-10. Javed A-9 had stated that a bag was handed over at the house of one Wajid Kasai (PW-13) resident of Turkman Gate, Delhi.

(iv) The Police went to Wajid Kasai's house and recorded his statement, as well as that of his sister Pappi under Section 161, Cr.P.C. Both had corroborated the statement of A-9 in his disclosure statement. Wajid and Pappi named A-3 and their statements were recorded under Section 161 Cr.P.C.

(v) Despite search A-9 was not available at his house and was missing.

(vi) PW-91 Insp. Ram Chander went to Ahmedabad and interrogated A-9 and A-10 on 4.6.96. Investigation could not be completed as A-9 was sent to Jaipur.

(vii) On 14.6.96 A-3 and A-4 were apprehended by the police from New Delhi Railway platform, No.4, New Delhi Railway Station, when both were going to Gorakhpur. A railway ticket for two persons was also seized by the police from the possession of A-3. This was proved by PW-16, PW-39, PW-101 and PW-105.

(viii) On 15.6.96, disclosure of A-3 was recorded and thereafter his house was searched and huge recovery of RDX slabs, detonator, a gas cylinder and some wires were made by the police.

(ix) After disclosure statements of A-3 and A-4, the police went to Gorakhpur and arrested A-6 and A-7. From the possession of A-7, a two rupee currency note was seized (seizure memo Ex.PW-16/F). PW-16 Inspector Rajinder Gautam and PW-24 SI Hari Singh deposed to those facts before the Trial Court. A-7 disclosed that a two rupee currency note was to be used for obtaining one lakh i.e. *hawala* money from Mangal Chand at Shalimar Bagh through A-4.

(x) Pursuant to the disclosure statement of A-6 and A-7, a police team reached Shalimar Bagh Flat, where Mangal Chand gave Rs. One lakh, to accused Iftikhar (A-4) after exchanging the two rupee currency note. PW-35 Raj Kumar a public witness supported the prosecution case on this aspect.

(xi) The prosecution established that A-3 stayed at Gupta Hotel, Gorakhpur, on 27.5.96. Some questioned handwriting and specimen handwriting of A-3 were found to be similar by the expert PW-94 who gave the report Ex.PW-94/A.

(xii) The prosecution also proved the railway chart, which contained A-3's name. This chart was not disputed by the appellants. It is also submitted that A-3's argument that he was picked by the police during the night intervening 28/29.5.96 from his house, when he came from Gorakhpur on 27.5.96 is without merit.

(xiii) PW-23 Inspector Puran Singh proved that A-5 was brought to Delhi from Mussoorie after his arrest there.

(xiv) Pursuant to the disclosure statements of A-3, A-5 and A-6, a police party reached at the house of A-8 and recovered stepney of a stolen car (a circumstance partly supported by PW-8). Certain documents were also seized by the police along with a torn air ticket bearing the name of A-5 dated 10.5.96 issued by the Royal Airlines, Nepal. The photograph was attempted to be torn by accused Makbool Shah (A-8) while the police party raided his house.

(xv) The prosecution proved the recovery of Rs. One lacs and currency note of rupees two at the house of Mangal Chand at Shalimar Bagh.

(xvi) The recovery of a drill machine has also been proved by the prosecution.

(xvii) PW-61 Suneet Kumar proved that the stolen car was parked in front of his shop on 19.5.96. He was able to identify A-3 with certainty and A-5 with some doubt.

(xviii) The prosecution proved the pointing out memos of Rajesh Kumar's shop (M/s. Ganesh Electronics) Corner, 21, Central Road, Bhogal, and disclosed that a 9 Volt battery was purchased by A-5 and A-6.

(xix) The pointing out memo of shop "Jayco Watch" seller by A-5 and A-6 which was proved by PW-48 Parmod Kumar and PW-50 Yogesh, during their examination by the police under Section-161 Cr.P.C.; they, turned hostile during trial. Yet this circumstance was proved because the concerned police officers corroborated the event.

(xx) Pointing out memo of M/s. Unique Agency by A-3 and A-5 from where the gas cylinders were purchased too was proved.
(xxi) The pointing out memo of the shop where from duplicate key was prepared at the behest of A-3 and A-5 were proved.
(xxii) The pointing out memo of a shop from where a solder iron and solder were purchased by A-3 and A-5 was proved.
(xxiii) The prosecution also proved the judicial confession of A-9 Javed, which was made to the ACJM, Jaipur, and which is Ex.PW-100/A.
(xxiv) The pointing out memo of a shop where from the wires were fixed by the shop owner to the 9 volt battery at Bhogal was also proved.
(xxv) The prosecution proved that the Maruti car of PW-8 (which was stolen on 18.5.96 from Nizamuddin area) was used for causing bomb blast. This fact is corroborated by the CFSL Report.
(xxvi) The prosecution proved the stay of accused Javed at Satyam Hotel, Delhi. PW-46 Rajan Arora correctly identified accused Javed. This corroborated his disclosure statement.
(xxvii) It is submitted that the false pleas/false explanation given by the accused person can be linked as additional circumstances which supply the missing link in the chain of circumstances.

It is submitted that all the persons are liable to be convicted on the basis of the evidence and circumstances proved by the prosecution. It is also submitted that judicial confession of A-9 is admissible in evidence and can be used against other accused persons also for their conviction by virtue of Section 30 of the Evidence Act.

V Circumstantial evidence – Courts' approach

62. The preceding discussion reveals that the case entirely hinges on appreciation of the circumstances. A brief discussion about the approach of the Court, in respect of circumstantial evidence is here called for. The phrase "men may lie, but circumstances do not" is well worn. Yet, to get to the truth, the essential requirement of proving the prosecution allegations, beyond reasonable doubt, does not change; the courts are unwaveringly committed to that standard or threshold of proof, in cases involving

circumstantial evidence as in the case of direct evidence. To place the matter in perspective, since the mind tends to boggle, a few tests have been mandated in a string of judicial decisions. Thus, in *Hanumant v. State of Madhya Pradesh,* AIR 1953 SC 343, the Supreme Court indicated the correct approach of the Courts, in the following words:

> *"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."*

This approach has been consistently followed and applied in several other judgments, notable among them being *Tufail v. State of Uttar Pradesh,* (1969) 3 SCC 198; *Ramgopal v. State of Maharashtra,* AIR 1972 SC 656 and in *Sharad Birdhichand Sarda v. State of Maharastra,* 1984 (4) SCC 116. *Sarda* an authority on this and other important aspects of criminal justice/law, put the matter in a lucid terms:

> *"152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*
>
> *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*
>
> *It may be noted here that this Court indicated that the*

circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved as was held by this Court in Shivaji Sahebrao Bobade v. State of Maharashtra 1973CriLJ1783 where the following observations were made:

> *"certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."*

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

63. The Trial Court had, in its judgment, listed out 40 circumstances which were relevant. Different sets of circumstances pertained to each accused; in some cases, the circumstances overlapped. This Court first proposes to outline the depositions of the key witnesses, relied on by the prosecution in this case, and thereafter discuss the incriminating circumstances alleged against each accused/Appellant before summarizing

the conclusions and analysis of the law on various aspects involved in these appeals.

VI Discussion of Evidence led on behalf of the Prosecution

64. The prosecution had relied on the testimony of 107 witnesses, and a large number of exhibits, including CFSL reports. The Court proposes to discuss the evidence of some of the principal witnesses.

65. The first important witness for the prosecution is PW-8, Atul Nath. He deposed that he was the owner of a Maruti Car, registered as No. DL-2CF-5854. His car used to be cleaned by one Bishan, who told him that two or three days before the incident, the car was missing; this was reported. The FIR was proved as Ex. PW-8/A. He was later informed by the police that the car was used in the bombing incident. In cross examination by the prosecution, (with leave of the court) the witness admitted that the car was stolen on 17/18-5-1996, and that Bishan had told him that prior to that the petrol tank cap (cover) was missing. He denied the suggestion that Naushad (A-3) Killey (A-6) and Naza (A-5) led to recovery of the car stepney, on 17-6-1996, or that he had identified it. He was asked to see the car stepney, the ownership of which he claimed in court, but refused to identify the rim. He also denied having made the statement, Ex. PW-8/C.

66. PW-11 Nafiz was a shop owner who used to carry on business near that of A-3 Naushad. He resiled completely from the statement made under Section 161, Cr. PC; he even denied having made such a statement. The prosecution sought to suggest to him (with permission of court) that on 14-5-1996 he had seen Naushad getting a 5 kg gas cylinder drilled and had

enquired the purpose for doing so. He stated that 10-12 days later, after Naushad's arrest, he was produced near his shop. Similarly, PW-12's testimony (Naushad's neighbor) was hostile to the prosecution, which sought to prove that he had seen 2-3 Kashmiri youth in the company of Naushad on 14-5-1996. He also denied the suggestion that those three persons were later identified by him in police custody. He deposed, on the other hand, that on 28th or 29th of May, 1996, 10-12 policemen had visited the neighborhood and taken him as well as Ikram away to the police station.

67. PW-13 Wajid and PW-14 Pappi (his sister) were crucial prosecution witness. A word here about the role played by them: According to the prosecution, these witnesses' house was used as a transit point or heaven, and even a place where information and articles such as explosives changed hands. The prosecution had alleged that he was known to Riyaz, Javed Karval, Nissar Ahmed, and Killey. It was alleged that A-9 had handed over a bag containing explosives to PW-14 when this witness was not at home, on 14-5-1996. However, strangely, this witness was not made an accused. The witness was downright hostile, and denied having recorded any statement under Section 161 Cr. PC. He denied knowing Killey and Mirza Iftikar Hussein, and that they had stayed in his premises as tenants in 1993 and vacated it in 1994 or that they shifted to Zakir Nagar; he denied having visited them. He denied having been in contact with Javed and Killey, or that on 14-5-1996, Javed Karawal had visited his house with someone and handed over a bag to his sister Pappi. He denied having been introduced to the other person as Riyaz. He denied knowledge of the bag, or that Javed Karwal, Mohd Killey and Mirza Nissar Ahmed had gone to his house later.

He denied having been told by them that they would visit Naushad later, or that Javed Karawal and Mirza Nissar having gone later at 10 PM and taken away a bag with them. PW-14 too denied any knowledge about visits by Javed, A-9, or that he or someone else had handed over a bag to her on 14-5-1996.

68. PW-15 was the car attendant who was present on the day when the explosion took place at Lajpat Nagar. He did not support the prosecution which attributed to him knowledge that Naushad, Killey and Naza were present; he also did not identify them during the trial, despite cross examination as a hostile witness by the prosecution.

69. PW-16 Insp. Rajender Gautam deposed that on 14/6/1996 he along with Insp. Paras Nath, (PW-101) Insp. Suresh Chander, SI Surender Verma etc. joined the investigation of the case. At about 6:20 PM, PW 101 got secret information that A3 along with his companion, a Kashmiri youth would be going to Gorakpur in Vaishali express. He organized a team and they all reached at New Delhi Railway station. ACP PP Singh also joined the police party at New Delhi Railway Station. They all reached Platform no. 4 of New Delhi Railway Station and held a '*nakabandi*'. At about 7:30 PM, on the pointing out of the informer, A3 and A 4 were apprehended. Both were interrogated by Insp. Paras Nath and they were arrested. Their personal search memos Ex. PW16/A and 16/B were prepared. Though the witness was a police personnel, significantly he was declared hostile, because he did not testify about many particulars. In cross examination by the prosecution, he said that he had witnessed the arrest of A-6 and A-7 and witnessed the personal search memos (in relation to them) Ex. PW-16/D and

PW-16-E; he also claimed – in cross examination by prosecution – to have witnessed the recovery of a Rs. 2 note (seized by Memo Ex. PW-16/F). Similarly, he agreed to the prosecution's suggestion about having witnessed the disclosure statements of Latif (Ex. PW-16/H) and Killey (Ex. PW-16/I). He stated further that Javed and A-6 were arrested in his presence. He agreed with the suggestion that Latif and Killey were arrested in his presence, given by the prosecution. However, he also stated that due to passage of time, he could not identify Killey and Latif. He admitted in prosecution's cross examination that Mirza Hussai had made disclosure statement Ex. PW-16/J, and pointed out Shop No. 3/32 at Bhogal, through memo Ex. PW-16/K, and Killey pointed out to Shop No. C-1/59, Lajpat Nagar which was evidenced by Ex PW-16/B. The witness was extensively cross examined about where the police party was present before moving to New Delhi Railway station, whether other passengers and members of the public were present on the railway platform, whether the entire paperwork was done on the railway station; if so how long it took to complete, etc. The witness was unaware if anyone was arrested from Gorakhpur, nor knew the name of the police station at Gorakhpur from whose jurisdiction any such arrest took place, or even the locality from where any such arrest took place; he said it was near the Gorakhpur railway station. He said that the Manager of the hotel was joined by the IO and that an entry existed in the register. He was not aware if any departure or arrival entries existed in respect of movement, in the DD register of the local Gorakhpur police station. According to him, the Delhi police had gone to Gorakhpur in a private car; however no evidence to show that was produced.

70. PW17 SI Sanjay Kumar deposed that on 17/6/1996, A3, A-5 and A6 took the police at Jangpura, Bhogal and pointed out a house on the second floor of the building. The house belonged to A8. These accused disclosed that the car stepney could be recovered from there. They thereafter got recovered the car stepney Ex.P1, which was lying on the '*tand'* of the room belonging to A8. This stepney was seized by seizure memo Ex. PW 8/B. He also deposed that on 17/6/1996, he with A-4, and another police official reached at B-J24, Shalimar Bagh. There he accompanied A4; he had a two rupee currency note and he (PW-17) went inside the room. A-4 gave that two rupee currency note to Mangal Chand. Mangal Chand verified the currency note and gave Rs. 1 lakh in a packet to A-4. The witness gave premeditated signal to remaining members of the raiding party. The other police staff reached inside and recovered that two rupee currency note from the pocket of Mangal Chand and the currency notes of Rs. 1 lac were also sealed with the seal of RPG. Seal after use was handed over to the public witness (PW-35) who witnessed the whole happening. Handing over memo Ex. PW 17/B, recovery memo of two rupee currency note Ex. PW 17/A and recovery memo of Rs. 1 lac Ex. PW 17/C were prepared. 10 packets of Rs. 100 notes were produced before the court as Ex PW 17/C1 to C10. He identified A-4 as Saba as well as the currency note (Ex. PW-17/D). He also went to Srinagar, to the houses of Killey, Naza and Latif; he stated that explosives weighing 500 gms with detonator and a red wire were recovered from one accused's house. All these were sealed and seized by Memo Ex. PW-17/F. He was not aware of his name or identity. He further said that two IEDs were recovered from Latif's house (Ex. PW-17/G). From Naza's house a hand grenade was discovered, and seized by Memo PW-17/H. He

was able to correctly identify A-8 and A-10 during the course of his deposition, before the Trial Court. The witness was cross examined by the prosecution; at this stage, he admitted that from Syed Maqbool Shah's residence a kit bag was recovered which contained a telephone book, having the numbers of A-1, A-2, Bilal Beg, Jubair, Latif and Javed, as well as a visiting card of Javed. Other than these, a passport size photograph of Naushad, and driving license of Naza were recovered. He proved the disclosure statement of Syed Maqbool Shah (Ex. PW-17/I). He deposed to being a witness to A-9's arrest, on 26-7-1996 and also to witnessing his personal search memo (Ex. PW-17/N).

71. PW-36 deposed that on 15.06.1996 at 2.30 PM when he was posted in the Special Cell, he along with PW-16, PW-24 ASI Hari Singh and SI Baljeet Singh, together with Naushad and Saba left for Gorakhpur in two vehicles to arrest Naza and Latif and reached there the next day around 08:00 AM. They had information that the two accused Naza and Latif would be at Budha Hotel opposite Gorakhpur Railway Station with money. Nakabandi was done opposite the Hotel at 10:15 AM; two persons came out from near the railway station and at the pointing out of Naushad and Saba, both were apprehended. They were Killey and Latif Ahmed (Killey A-6 and Latif Ahmed A-7). Upon their personal search, two rupee note bearing No.66M571634 were taken into possession. This was to be used to take money from Mangal Chand in Shalimar Bagh in Delhi. Information of their arrest was made and their disclosure statement was recorded. The witness claims that DD No.28 was made at Gorakhpur camp Police Station at 12:50 PM.

72. The witness mentioned that on 19.06.1996, he accompanied the police company with Inspector Hari Ram in the morning when Naushad, Iftikhar and Naza started pointing out places from where they purchased wall clock which was used as a timer, soldering iron and gas cylinder. He stated that the said three accused pointed out Imperial Gramophone Company, 1388, Chandni Chowk from where they bought Jayco made wall clock for ` 180/-. The receipt book was produced by the salesman, which had been issued on 14.05.1996. It was taken into possession by the police. The pointing out and seizure memo were signed by Yogesh Gupta, owner of the shop and a salesman. Naza and Naushad also pointed out Imperial Sound Service, 8A, Lajpat Rai Market where they claimed to have purchased soldering iron and rod; pointing out memo was prepared by Inspector Hari Ram. The witness with SI Surender Kumar and Jitender Kumar signed the memo. Similarly, Naushad and Naza led the police to Unique Agency, the owner of which was Kamal Ahmed who was sitting at the counter. They claimed that they have purchased the two gas cylinders from him. The witness signed pointing out memo prepared by Inspector Hari Ram. The witness prepared the personal search memo Ex. PW-16/A of Killey. Seizure memo Ex.PW-16/F in respect of seizure of Rupee two currency note which was produced as Ex.PX and Ex.PW16/E was the personal search memo of Latif Ahmed. Similarly, the witnesses prove Ex.PW-16/H and Ex.PW-16/I, memo of disclosure statements of Latif Ahmed and Killey.

73. In cross examination, the witness admitted that he did not remember the DD entry by which he joined the investigation and that this was not noted in the case diary. The case diary also did not contain any DD entry

with regard to registration of vehicle and proceeding to Gorakhpur. He admitted to not himself recording any disclosure statement of Naushad and Iftikhar and that the area Police Station was not intimated after the Delhi Police party reached there. He admitted that no site plan was prepared regarding the place of points or recovery but clarified that the accused were apprehended outside the road opposite the Budha Hotel. He also stated that as regards the pointing out of various places by the two accused, they had not mentioned about it during the proceedings conducted on 15.6.1996.

74. PW-38 Vijay Kapoor deposed to be the owner of an electronic shop at Jangpura, Bhogal. He stated that in 1996 sometime maybe in the month of May, two persons went to his shop with the 9 volt battery wanting to fix two wires on its terminal by soldering them. This was done by his employee and he charged Rs. 5/-. He pointed out towards Mirza Nisar Hussain (A-5) as one of them but was unsure about Killey. He stated that the two persons who had got the job done had gone to his shop a month later accompanied by police and that this was recorded in a pointing out memo Ex.PW-13/N which bore his signatures. In the cross examination, he deposed that a statement was made and his signatures were obtained on blank papers at Lodhi Road office. He also stated that the statement of the employee who did the soldering was not recorded and that he was not called by the police at any time to identify the two accused.

75. PW-39 Inspector Hari Ram Malik was posted in the Operation Cell, Lodhi Colony; he deposed that on 4.6.1996, A-1 and A-2 were in police custody and interrogated in his presence. Their disclosure statement contained his signatures. He was again joined in the investigation on

14.6.1996 along with PW-16 Inspector Suresh Chander, SI Surender Verma, SI Virender Singh, SI Arvind Verma, Constable Onkar Singh and PW-101 went to Jama Masjid near Urdu bazaar where at about 06:20 PM, information was received that Naushad with one other boy would go to Gorakh Pur from New Delhi Railway Station by Vaishali Express and that from there they would proceed to Nepal. PW-101 organized a raiding party and informed ACP P.P. Singh on phone. All of them reached the Railway Station; P.P. Singh also reached there. On enquiring from PW-101 they were told that Vaishali Express would leave the station at 07:45 PM from platform no.4. At 07:20 trap was laid at platform no.4.(1) On the pointing out of informer (At about **07:35** PM), Naushad and Saba were apprehended. They were arrested and a personal search was conducted (Ex.PW-16/A and Ex.PW-16/B). Disclosure statement of A-4 was recorded (Ex.PW-16/C) in the Operation Cell. The witness signed it. The witness joined investigation again on 18.6.1996 with PW-1. On that day, A-3, A-4 and A-5 were in police custody and taken for investigation. A-3, A-6 and A-5 pointed out a sub-lane near house no.A-51, Nizamuddin East from where they had stolen the cap of petrol tank of Maruti car no.DL2C F5854. This pointing out memo was recorded at Ex.31/Q. Then A-5 and A-6 pointed the place in Pushpa Market near the Fountain Park which was recorded in Memo Ex.PW-31/T. Subsequently, Naushad (A-3), Naza (A-5), Mohd. Ali Bhat and Killey (A-6) pointed a place at the north side of the Galib Road and ruins near Lal Mahal. Later, these three pointed the place where they had thrown number plate Ex.P-5 which was recorded by seizure memo Ex.PW-31/E. Similarly, another number plate was recovered from the ruins pointed out earlier (Ex.P-4). The three accused were later taken to

Connaught Place where they pointed out shop No.11-12B, Yusuf Zaheer Market from where they got two number plates DL 4C 1895 prepared. This was recorded in memo Ex.PW-31/R. The accused pointed out the place opposite shop no.D-II/3, Central Lajpat Rai Market, Ex.PW-31/R and then took the police party at the place behind bushes Nizamuddin bus stop and Arab Ki Sarai from where the car key was recovered by memo Ex.PW-31/F. The key was produced as Ex.P-7. The witness took over the investigation of the case on 19.06.1996. He along with members of the police staff and four accused, i.e. A-3, A-4, A-5 and A-6 pointed out Vijay Electronics, shop-89, Masjid Road, Jangpura, Ex.PW-31/N. A-3 and A-5 pointed out a shop Unique Agencies (No.2610, Chooriwala) recorded as Ex.PW-31/M. Naza and Killey (A-5 & A-6) pointed out Ganesh Electronics in Jangpura Road (Ex.PW-31/L). Then Naza and Killey (A-5 and A-6) pointed out Imperial Gramophone Company at Chandni Chowk Ex.PW-31/H. One Yogesh Gupta, proprietor of the shop produced a carbon copy of the bill book which was taken into possession. The bill book was produced as Ex.G-1. The accused Naushad, A-3, A-4, A-5 and A-6 pointed out the place in front of Mini Arts at Chawri Bazar where one Mohd. Rizwan was sitting and making duplicate keys (Ex.PW-31/J). Similarly A-4 and A-5 pointed Imperial Sound and Service, Stall-8B, Lajpat Rai Market by pointing out memo Ex.PW-31/A. The witness recorded the statement of witnesses and further investigation was handed over to PW-101.

76. In cross examination, the witness deposed that he did not remember whether the car owner or any of his family members was joined during the

proceedings on 18.6.1996. He was also not aware if the TIP of any of the accused was conducted earlier to 18.06.1996. He denied the suggestion that Naushad was arrested on 28-29.5.1996 and not on 14.6.1996. He deposed that only at Lajpat Nagar a public witness was associated in the proceedings. He also deposed that eight documents were prepared in his presence on 18.06.1996.

77. PW-40 SI Baljeet Singh deposed to going to Gorakhpur on 18.6.1996 for obtaining photocopy of the reservation chart containing Naushad's name in Shaheed Express for 27.5.1996. The name was in the waiting list - RAC-12. He also recorded the statement of one Chakravorty who had given the photocopy. He obtained photocopy of the visitor's book of Gupta Hotel in Gorakhpur which contained the entry pertaining to Naushad's stay. He recorded the statement of an employee of Gupta Hotel. ASI Inderpal was with him and he said that on 29.6.1996 he again went to Gorakhpur. This time with Ct. Surender where he seized two original visitor's books; one was seized from Gupta Hotel and other from Budha Hotel. He recorded the statement of witnesses from where the visitor register was seized and returned to Delhi. The visitor book of Budha Hotel contained the entries of Surender Thapa and Javed etc. Photocopy of the reservation chart was seized by memo Ex.PW-40/B. The photocopy of the Gupta Hotel extracts was placed on record as Ex.PW-40/C and seizure memo of the visitor register of Gupta Hotel was Ex.PW40/C and that of Budha Hotel as Ex.PW-40/F.

78. In cross examination, the witness admitted that DD entry was made and he was handed over the investigation of the case orally. His statement

was not recorded regarding his investigation at Gorakhpur. He claimed to have applied for obtaining reservation chart on 27.5.1996 but that was not placed on the record. He did not remember having recorded the statement of Manager of Gupta Hotel. He did not also remember Naushad's address written in the visitor book. Further he could not recollect the DD number in respect of his visit to Gorakhpur on 29.6.1996.

79. PW-41, Insp. Suresh Chander Addl. SHO, Kalkaji deposed to being posted at the Operation Cell, Lodhi Colony, on 15.05.96 and joining the raiding party along with Insp. Nath. At about 4 AM, he went with the raiding party and A-3 Naushad to P-7, DDA Flats, Turkman Gate, Delhi where that accused pointed out the first floor of the flat and pointed out a trunk placed on four bricks in an unauthorized constructed portion. He took out a green colored polythene bag from under the trunk. Two RDX bricks were in that trunk; they weighed one kg and one fifty gram. The bricks were again put in the bag and were sealed in a cloth *pulanda* with and seal "PP". He also assisted in the recovery of a black coloured black dial timer watch Casio Quartz, Japanese make from the showcase of the drawing room. This too was sealed with the some seal PP and numbered 2. Naushad then produced a red colour polythene bag from the top of the showcase; it was printed in Srinagar. Seven items were recovered from it i.e. iron solder, pliers, wire cutter, some wires of two colours, light tube, screw and one black coloured wire. These articles too were kept in the same bag and were sealed in a *pulanda* as PP and given Serial No.3. A-3 produced an aluminum detonator which had two wires coming out; it was sealed in a pulanda as PP and was given number 4. Naushad also produced a green coloured gas cylinder from

under the kitchen slab in the flat. The witness said that Naushad disclosed that this cylinder had been purchased along with the one used for the bomb blast, along with Naza from Churiwalan. All the articles were taken into possession through a recovery memo. The seal after use was handed over to SI Surinder Kumar. The witness deposed that on 15.06.96, the accused had made a disclosure Ex. PW 13/B on the basis of which the above-said recoveries were effected. He stated that the disclosure Ex. PW 13/B bears his signatures at Point B. These articles were produced in court, and identified.

80. PW- 43 Ins. Virender Singh, District Crime Cell, North District deposed that on 06.06.96 he was posted in the Operation Cell, Lodhi Colony as Sub Inspector. He was sent for bringing the photographs of scene of occurrence of Lajpat Nagar but photographs were not ready. He went back and informed Ins. Paras Nath and other senior officers. He deposed to having gone, on 07.06.96 to Satyam Hotel, Paharganj to trace A-9; he made enquiries from the hotel staff and had showed photographs of the accused to the staff. It transpired that Javed had not stayed in that hotel. He also mentioned having conduced inquest of one of the deceased victims of the blast. He said that on 16.06.06 he went with Ins. Puran Singh to Mussoorie; HC Yamin Khan accompanied them. He said that on 17.06.96 accused Mirza Nisar Hussain Naza was arrested from Minerva Hotel, Mall Road, Musoorie. The witness identified the personal search memo (Ex. PW-23/A) of that. The accused was brought to Delhi; his interrogation was conducted in Delhi. During interrogation he made the disclosure statement Ex. P.W 23/8. In cross examination, he admitted that the accused was arrested by

Insp. Puran Singh and not by him and that no employee or the owner of Minerva Hotel, Musoorie was a witness to the arrest. He did not know if the IO had asked the Mall Road *chowkie* in charge to join the investigation. No record of the Minerva Hotel of the occupants of the room from where the accused was arrested was seized in his presence. He admitted that no departure entry was made and no arrest memo prepared.

81. PW 46 Rajan Arora deposed that he was running a guest house under the name "Satyam Hotel" in Paharganj; that on 14.05.96 Javed, – whom the witness identified in court- stayed at his hotel, with a Nepalese boy for a day and checked out the next day before noon. They occupied either room No. 104 or 106 on first floor. In cross examination, he admitted that the guest house had a record of guests or a guest register, which contained details of people staying in the hotel. He could not remember whether the police had taken into possession the guest register pertaining to the entry related to the stay of the accused in the guest house; he did not bring the guest house register to court. He stated that though Javed had not checked in his hotel in his presence on the given date however he saw him next day when this accused checked out from the hotel and paid the bill. He clarified that the bill amount or room charges were collected by him; he could not remember the bill amount.

82. PW 48 Parmod Kumar used to repair watches. He deposed that on 14.05.96, while under the employment of Imperial Gramaphone Company, Chandni Chowk he sold a Jayco Alam Wall Clock for Rs.182 to a customer aged about 19-20 years. The witness said that the said customer appeared to be Latif. He was not sure about the identity. A receipt was issued for the sale

of the clock by the witness of which a carbon copy was produced. He further deposed that on 19.06.96 a police team came to his shop which was led by the customer who had purchased that watch – may be accused Latif. His shop was pointed out by the accused as the shop where from he had purchased the wall clock. He produced the sale receipt book (Ex. G-1) to the police containing the carbon copy of the sale receipt i.e. Ex. P.-48/A which the police took into possession vide Memo Ex. P.W 31/G.

83. The prosecution sought permission to cross examine the witness as he resiled from his statement made to the police. He admitted that two persons led the police team to his shop on 19.06.96 and that the names of the said two persons were disclosed to the witness by the police as Mirza Nisar Hussai @ Naza and Mohd. Ali Bhat @ Mohmood Killey. He denied that the said two persons were in muffled faces when they went to the shop with the police and that their faces were got un-muffled after they went to the shop for getting them identified or that he had identified those two persons, as the one who had gone to his shop on 14.05.96 for purchasing the wall clock. He denied making any statement to the police; he denied the statement Ex.PW 48/AQ. The witness denied Ex. PW 48/A made to the police. He declined to identify the accused, and also denied the suggestion about that in the cross examination.

84. He admitted during cross examination that at the time of issuing a receipt, it would first be issued and then the counter foil or inner receipt. He also admitted that there was some over writing at point X.1, X2 and X 3 in Ex. PW 48/A but that was because the pen pressure did not work properly. No other receipt was issued by him from receipt book Ex. G1 which did not

show anywhere that it pertained to his shop.

85. PW 50 Sh. Yogesh Kumar Gupta, owned a shop "Imperial Gramaphone" Company at 1388, Chandni Chowk Delhi. He deposed that on 14.05.96 two boys had taken a round shaped Jayco wall clock from his sales man Parmod. After 20/22 days i.e. 19.06.96 two police men, with 2 persons went there and talked with Parmod, who told the police that those two persons had taken a wall clock from him. The bill book belonged to his shop and in the carbon copy of the bill Ex. PW. 48/A had been issued by his salesman Parmod Kumar; Bill book G-1 was seized by police by memo Ex. P.W 31/H. He could not identify those two boys; he only knew that they were two Kashmiri looking, well-built and well-dressed boys. The prosecution was permitted to cross- examine this witness. He denied that the police had not told him the names of the two boys in his presence; he admitted that Ex. P.W 31/H was signed by him only after it was completely written. The names of the two boys appeared in the said memo and he had signed the memo after recording the same. He could not identify Naza and Killey as the two boys who had led police team to his shop on 19.06.96. In cross examination, he stated that his business was only to trade in watches and clocks. He stated that the police did not ask for any invoice or the purchase bill pertaining to the clock. He did not bring during the trial, any document showing that the clock was purchased his shop from the manufacturer. Name or purchaser was not written on the cash memo of the clock. He deposed that the two boys and the police had brought the sale receipt of the clock on 19.06.96 and it was only on that basis that he told the police that a clock had been purchased from his shop. He stated that police

had prepared Ex. PW 31/H and got his signature on it. On 19.06.96, police had recorded my statement and of one of my salesman.

86. PW 52 Mohd. Alam, Saeeduddin, 34 years, shop keeper r/o 521, Gali Matia Mahal, Jama Masjid deposed that he owned a general store under the name of M/s. Deluxe Store, Matia Mahal, Jama Masjid. He deposed that about 8-9 years before the court hearing date, some person in civil dress came to his shop and asked him about someone purchasing araldite whom he told that he did not remember any specific instance as several customers used to visit his shop and make purchases. The police prepared some documents and he signed it on their asking. The prosecution was permitted to cross examine this witness. He denied having made statement Mark 52/A to the police. He denied the incident of any visit of the said two accused along with the police to his shop and pointing out of it (the shop) by the accused persons.

87. PW 54 Mahmood Karnul deposed to carrying on business in a gas agency "M/s. Unique Agencies" till October, 1996 at 2610 Chuddi Walan; he also used to sell gas cylinders other home appliances, burners etc. He stated that in May 1996 two persons came to his shop to purchase a gas cylinder. No gas cylinder was available with him that day. He asked them to deposit the price of the gas cylinder and return the next day to collect the gas cylinder. The two individuals deposited Rs.290/- and the next day they returned and collected an empty gas cylinder. He deposed that on 19.06.1996, some police personnel went to his shop and took him to their office in Lodhi Colony; he told them what he had deposed in court. The witness was shown the cylinder Ex. P. Z which he denied as being the one

which he sold to the said persons. He claimed that he could identify the two persons; however, he failed to identify the accused in Court. The prosecution then sought leave to cross examine him after declaring him hostile. The witness denied the suggestion that the two individuals had booked two cylinders and paid Rs.580/- and were delivered two cylinders the next day. He denied his previous statement to that effect to the police, and was confronted with statement Ex. P.W 54/A where it was so recorded. He also denied the suggestion that the said two persons had led the police team to his shop on 19.06.96 and had pointed out his shop as the place from where they had purchased two gas cylinders; he denied his previous statement to that effect, to the police. He volunteered that the two persons had not come to his shop, but could not say if they had pointed out towards his shop from some distance. He admitted his signature on the pointing out memo Ex. P.W 31/M at point B but stated that this document was already written and was not read over to him when he signed it. He admitted being told names of the said two persons by police as Naushad and Naza. He, however, remembered only the name of Mohd. Naushad. He denied that Naushad, and Naza had visited his shop and were given the gas cylinders on 14.05.96. He denied that he was not identifying the accused persons intentionally having been won over by them or under fear. He denied the suggestion that cylinder Ex. P. A was the same out of the two cylinders which he had sold to the said two persons. He clarified that the cylinder Ex. P. Z was not green in colour.

88. PW- 58. Jitender Pal Singh, carrying on business in electronics spare parts, and resident of GH-13/269 Pachim Vihar, Delhi deposed to carrying on business in Stall No. 8A called Imperial Sound and Service. He stated

that on 19.06.96, some policemen along with one or two public persons went to his shop and he was told that one soldering iron and solder was purchased from his shop by the said persons. He had sold a solder and a solder iron for Rs.35/-; however, he could not identify the accused as the purchasers of the articles because of lapse of time. After being declared hostile, during the prosecution's cross examination, he said that his statement was recorded by the police, in which he mentioned that Naushad and Naza had accompanied the police and they had purchased solder iron and solder on 13.05.96. He admitted that the said two persons had gone with muffled faces and they were seen by him only when their faces were un-muffled in his presence by the police. He stated that he had admitted and told the police that the said two persons who went to his shop and purchased a solder iron and a solder wire from him. He said that it was possible that one of those two persons was Naushad (pointed out by the Ld. APP to the witness). But he could not say anything about Naza. He identified the soldering Iron Ex. 21. His statement was recorded on 19.06.96 in the police office. Memo Ex. PW 31/K was also signed by me in the special cell office around 12 noon the two persons were shown to him by the police when they were sitting in the police vehicle of his shop and he had accompanied them to the special cell office in the same vehicle. Soldering Irons like Ex. 21 were available from other shops also. He was not shown this soldering iron by the police in the special cell office; he did not tell in his statement as to what the brand of the soldering iron was.

89. PW-60 Rajesh Kumar, deposed that he had been running an electrical shop with the name "Ganesh Electrical", situated at shop No.21, Jangpura

for the last 10 years. He deposed that on 21.05.1996 two persons had purchased 9 volt battery of "Entiser" make for Rs. 95/- He further deposed that on 19.06.1996 two accused persons alongwith police came to his shop and one of the accused persons identified his shop and stated that he had purchased the abovementioned battery from his shop. PW-60 stated that he did not know the names of the accused but one of them was having a *"massa"* (scar) on his face. He stated that he may be able to identify the accused persons.

90. PW-60 pointed towards accused Mirza Nissar Hussain and stated that he "might be" one of the two persons who had been brought by the police to his shop and who had told the police that he had purchased the battery from his (PW-60's) shop. He further stated that he did not even have a faint idea with respect to the other accused person who had been brought by the police to his shop. He stated that the police may have recorded his statement when they took him away. In the cross-examination by the Ld. APP, PW-60 denied the suggestion that on 19.06.1996 accused Mirza Nissar Hussain and Mohd. Killey came to his shop with the police party and pointed out his shop and identified him as the person from whom the 9 volt battery was purchased on 21.05.96 by them and their associate Javed Karivav and Riaz @ Mulla. The witness volunteered and stated that the two accused persons had been brought near his shop in a Maruti van and the accused persons kept sitting in the car with muffled faces; he was called from his shop and was made to sit in the car and thereafter the faces of the two accused person were un-muffled. He further stated that he was asked whether the said two accused persons had purchased battery from his shop to which he replied

that if they are saying they purchased battery from his shop then they may be correct. He further stated that it was not possible for him to remember each and every customer by face; he told the police that accused Mirza Nissar Hussain might have purchased battery from him.

91. In his further cross-examination by the Ld. APP, he denied that he had categorically identified accused Mohd. Killey as the other person who had come to his shop along with accused Mirza Nissar Hussain on 21.05.1996. He denied the suggestion that he was deliberately refusing to identify accused Mohd.Killey. The witness admitted that he told the police that the battery used in the blast was purchased from his shop. He admitted that when the accused persons pointed out his shop and identified him, the police prepared Ex.PW-31/L which was signed by him and the accused persons. He denied that he was deliberately deviating from his statement u/s 161 Cr.PC.

92. In the cross-examination by the defense Counsel the witness stated that after picking him up, the Van picked up a man from Vijay Electronics and from there they were taken to PS-Lodi Road. He stated that he was at the PS for about 1 ½ hour and there were 2-3 more persons just like him who were called to the PS; one of them was a Sikh gentleman. He further admitted that he had no personal knowledge that the battery purchased from him by the accused persons was used in a blast at any place; he was told by the police in PS Lodi Colony that the battery purchased from him was used in the blast after getting soldering done from Vijay Electronics.

93. PW-61 Sumit Kumar stated that he had a shop in Central Market, Lajpat Nagar named *"Dulhan Dupatta"* situated at D-II/35, Lajpat Nagar and that on Sunday at around 2-2:30 PM, when he was in his shop, 3-4

persons parked a white Maruti-800 in front of his shop despite his objections; ultimately they removed it from there and parked it four shops away. He stated that as far as he could remember registration number of the car was 1895 and that two days later he came to know that a bomb blast had taken place in a Maruti car and that later the police had visited his shop and that "*about a month later police had visited my shop when I was away and my younger brother Sanjeev was only available at the shop. My brother told me that three police officials who came to my shop were accompanied by 3-4 persons. I don't know anything else about this case or about the bomb blast in Lajpat Nagar*".

94. The witness was then declared hostile and cross examined, by the prosecution. Crucially, he denied the suggestion that on 18.6.1996, A-3, A-5 and A-6 led the police to his shop in his premises in his presence and also denied the suggestion that in his presence all the said accused pointed out the place in front of his shop. He also denied that on 19.5.1996 at about 6:30 PM they had marked a stolen Maruti car and that a cylinder bomb was fitted in the car. He denied all suggestions as to when the accused persons had told him in the presence about a timer fitted with a bomb etc. He also denied that the police had prepared the pointing out memo Ex.PW-31/R. He stated that the memo was already prepared by the police. He later stated that he had identified the two accused persons on 18.6.1996 when they pointed out a place in front of his shop, that he had told the police that they were the same persons who had parked the car on 19.5.1996 and that they had quarreled with him. He agreed that the suggestion that on 20.5.1996 when he opened the shop the car was not parked there and that he deposed

wrongly on account of the confusion. He then stated that he could identify three accused persons if shown to him. The Court then recorded *"thereafter this witness has rightly identified the accused Mohd. Naushad with certainty and has identified the accused Mirza Nisar Hussain @ Naza with some degree of doubt in the same and that this witness had not identified the third accused at all."* In cross examination, he stated that he had signed on the pointing out memo Ex.PW-31/R in the Police Station where he went on receiving a message to reach PS Lodhi Colony, through his brother. He admitted that no site plan was drawn at the place where the accused had parked the car. He denied that he had any interaction with the accused a few days prior to occurrence of the bomb blast.

95. PW-82 Daya Shanker Lal Gupta, owner of Gupta Hotel, Gorakhpur deposed that on 18.061996 police took 2 photocopies of the hotel register (visitors book) and it was seized by Ex.PW-40/D. He further deposed that the photocopy shows name of the guest Mohd. Naushad s/o Abdul Rashid P-11 DDA Flats, Turkman Gate, Delhi at serial no. 1285; he visited his hotel on 27.05.1996 and stayed in room no. 14.

96. PW-83 Vijay Kumar Gupta, hotel manager at Gupta Hotel and Tourist Lodge, Gorakhpur deposed that on 27.05.1996 one visitor Mohd. Naushad s/o Abdul Rashid P-11 DDA Flats, Turkman Gate, Delhi visited our hotel and stayed in room no. 14 from 9/10 AM to 9:30 PM; he himself made the entry in the visitors register at serial no. 1285. He further deposed that on 29.06.1996 Delhi Police seized the visitors book by memo Ex.PW-40/E and Ex.PW-66/A; original register is Ex.PW-66/I.

97. PW-98 B.R. Patil, DSP, Gujarat Police deposed that in May 1996

while he was posted as DSP, ATS Ahmedabad, he received a TP stating that there was information that a person namely Asadullah alongwith Rashid had crossed the border at Nepal and that they would be going to Gujarat for explosions in Ahmedabad. Insp. Rajvanshi's (PW-99's) team started searching for these persons in Ahmedabad. He further deposed that on 01.06.1996, Insp. Rajvanshi (PW-99) found 4 persons who disclosed their names as Asadullah (A-10), Rashid Ahmed, Juber Bhatt (Zulfikar) and Javed Khan (A-9). These 4 persons were interrogated by PW-99 and a FIR 12/1996 was lodged against them u/s 120B, 121, 122 IPC. He further deposed that on 02.06.1996 further investigation of the case was handed over to him (PW-98); PW-99 had prepared the personal search memos and seizure memos of the accused. A digital diary was seized from Asadullah (A-10) and a *panchnama* regarding the same was prepared on 01.06.1996. PW-98 identified accused Javed (A-9) and pointed to another accused and identified him as Asadullah (A-10), however the accused said his name was Abdul Gunny Goni to which the witness stated that Asadullah is one of *alias* of Abdul Gunny Goni. PW-98 further deposed that during the investigation accused Javed (A-9) made a disclosure statement regarding the bomb blast at Lajpat Nagar, New Delhi before Insp. Rajvanshi (PW-99); the Senior Officers of Delhi Police were intimated.

98. In his cross-examination, he stated that his statement was recorded by the Delhi Police when he was handing over all the documents they had collected during the investigation. He further stated that he had told the Delhi Police that the documents were in the handwriting of Insp. Rajvanshi. He admitted that he had been told the names of the accused persons

mentioned in his examination in chief by the Insp Rajvanshi. He denied the suggestion that the accused were arrested on 24.05.1996.

99. PW-99 B.M. Rajvanshi, Gujarat Police deposed that on 24.08.1995 he was posted in the Anti-Terrorist Squad, Ahmedabad, Gujarat and that on 23.05.1996 he was ordered by the Deputy Inspector General of Police, ATS to look into intelligence received regarding two terrorists Asadullah and Rashid entering India from Nepal. The tele-printer message and fax received by the Director General of Gujarat Police stated that these two terrorists would be coming to Ahmedabad *via* Mumbai and Kathmandu and that they would be renting a house in Ahmedabad and will plan explosions in big markets in Ahmedabad. To look into this intelligence, two teams were formed; SI Wagela led the first team and the second team was led by PW-99. He further deposed that on 25.06.1996 SI Wagela's team checked Anukul Guest House and there in the hotel register they found an entry of four persons who had come from Kathmandu via Mumbai on 24.06.1996 and they had left the hotel on 25.06.1996. PW-99 further deposed that SI Wagela informed him about the same and thereafter PW-99 went to the hotel and saw the name Rashid in the hotel register. He deposed that they were searching for the said 4 persons and at around noon they found 4 suspicious persons near *Rupali Cinema* and he brought them to the ATS office. He deposed that under the supervision of DIG Sainkia Sahib, ACP BR Patil and other police officers interrogation was done. He further deposed that after interrogation it was discovered that the 4 persons had come from Kathmandu with the intention to sabotage the city. Suspicious materials like digital diary and suspicious literature was seized from them; panchnama was made on

01.06.1996 from 17:30 to 19:15. He further deposed that the 4 persons who were arrested were Asadullah (A-10), Rashid, Javed Khan (A-9) and Maqbool Butt. An FIR bearing no 12/1996 was lodged against them u/s 120B, 121, 122 IPC and Section 14 Foreigners Act.

100. PW-99 further deposed that Asadullah made a disclosure statement in which he gave details about how the conspiracy to cause sabotage in India was hatched in Pakistan. Asadullah also stated that he had sent Javed (A-9) to Delhi with 8 to 9 kgs explosives and that Javed (A-9) gave them to Wajid Kasai's (PW-13's) sister and then Naza (A-5) committed a blast in Lajpat Nagar market on 21.05.1996. He further deposed that the fact that Asadullah and Javed were involved in the Lajpat Nagar blast was disclosed by both the accused. He further deposed that he prepared both the disclosure statements and they were placed in the judicial file of FIR No. 12/96. He identified Javed Khan (A-9) and pointed to another accused and identified him as Asadullah (A-10), however the accused says his name is Abdul Gunny Goni to which the witness states that Asadullah is one of alias of Abdul Gunny Goni.

101. PW-100 Bhagwan Das, Addl. CJM, Jaipur deposed that he recorded the confessional statement of Javed Khan. He stated that on 17.07.1996, Javed Khan, whose confessional statement had to be recorded u/s 164 Cr.PC in FIR No. 39/1196, was produced before him from Central Jail, Jaipur. He further deposed that before recording his confessional statement to satisfy that he wanted to absolutely freely and voluntarily make a statement and to comply with Section 164 Cr.PC certain queries were made from him. It was explained to Javed Khan that he was not bound to make any confessional

statement and that if he did, it may be used against him as evidence. He further deposed that 15 questions were put to Javed Khan to satisfy that he was willing to make the statement voluntarily and that there was no threat, fear, inducement or promise; his reply was recorded. The witness stated that he felt that some more time should be given to Javed Khan to think and decide whether he wants to make any statement or not; he was sent back to Central Jail and 19.07.1996 was fixed for recording his statement.

102. He deposed that on 19.07.1996 Javed Khan was again produced before him in the Court and he again on that day to ascertain and satisfy that he is willing to make the statement freely and voluntarily and to comply with the provisions of Section 164 Cr.PC questioned him and explained to him that he is not bound to make any statement and that if he will make a statement it may be used in evidence against him. He further deposed that from Javed Khan's reply he was satisfied that he wanted to make his statement voluntarily and freely. The witness stated that Javed Khan was not given any threat and he was not under any fear; no promise or inducement had been given to him make the statement. He further deposed that he recorded his statement and whatever was stated by Javed Khan was recorded by him *in toto*; the statement was read over and explained to Javed Khan which he accepted to be true and correct. He further stated that as per Section 164 Cr.PC, he made a note on the statement that Javed Khan has been explained that he is not bound to make any statement and that if he makes a statement it may be read in evidence against him. The witness stated that the statement was recorded in his handwriting and the certified copy is Ex.PW-100/A. Javed Khan signed on each page.

103. PW-101 Insp. Paras Nath deposed that on 26.05.1996 he was posted in Special Cell Ashok Vihar and he took over the investigation of the present case and obtained all documents prepared by the previous IO and also took over the custody of accused Farida Dar and Farooq Ahmed. He further stated that on 02.06.1996 at around 08:30 AM, ACP P.P Singh informed him that 2 accused persons (Javed Khan and Abdul Gonny @ Assadullah) wanted in the present case were arrested by the Ahmedabad police. He further deposed that accused Javed Khan made a disclosure statement before the Ahmedabad police and stated that he (Javed Khan) delivered 8 kgs of RDX at the residence of Wazid Kasai situated at Turkman Gate, Delhi. The witness further deposed that he alongwith other police officials traced Wazid Kasai's house and at about 12 in the noon they alongwith ACP PP Singh went to Wazid Kasai's house and interrogated him. He further stated that Wazid Kasai informed them that he knew Javed Khan through Mohd. Naushad, r/o DDA Flats, Turkman Gate, Delhi. They alongwith Wazid Kasai went to Mohd. Naushad's house but found that itwas locked; the neighbours informed them that the house had been locked for the past 5/6 days. PW-101 further deposed that on 14.06.1996 he alongwith Insp. Hari Ram Malik, Insp. Rajinder Gautam, Insp Suresh Chand, SI Suresh Verma, Arvind Verma, Virender, Const. Onkar, Const Satveer and driver were trying to trace the accused persons and at about 06:20 PM they received secret information that accused Mohd.Naushad alongwith one Kashmiri boy involved in the blast were going to Gorakhpur by Vaishali Express from New Delhi railway station and from Gorakhpur they were going to go to Nepal. He further stated that on receiving this information he informed ACP PP Singh on the phone and at around 6:00 PM he alongwith his team

reached New Delhi railway station; 06:55 PM ACP reached there. He further deposed that upon enquiry it was learnt that Vaishali Express would leave from Platform No. 4 at 7:45 PM. He along with his team, ACP and secret informer reached Platform No.4 at about 07:20 PM and waited for the accused. At about 07:35 PM the secret informer pointed towards two persons near the general coach and identified them as the persons about whom he had information. The two persons were apprehended and formal enquires were conducted in the presence of the ACP. The said persons were accused Mohd. Naushad and Iftikar Hussain Mirza @ Saba. He further stated that accused Saba informed them that he was involved in the blast and was going to Nepal with Mohd. Naushad; Saba also stated that he had to give accused Mohd. Naushasd Rs. 1 Lakh for the blast and they were going to Gorakhpur where accused Mohd. Killey and Nisar Hussain were staying in Budha Hotel. The accused Saba further stated that Mohd. Killey and Nissar Hussain had to give Rs. 1 lakh to Saba and Naushad. The witness further stated that from the search of accused Mohd. Naushad one open ticket from Delhi to Gorakhpur of second class was recovered. Accused Mohd.Naushad and Saba made disclosure statements Ex.PW-31/B and Ex.PW-16/C.

104. He further deposed that Mohd. Naushad in pursuance of his disclosure statement led them to his house at Turkman Gate and got recovered 1.150 kgs of RDX , one detonator and one 5 kg LPG Cylinder. The witness further deposed that thereafter in the early morning Insp. Rajeshwar took both the accused to Gorakhpur in the official vehicle to arrest the other accused persons. On 16.06.1996 Insp Rajeshwar informed the ACP from Gorakhpur

that accused Killey and Latif were present there whereas accused Naza was in Mussorie; on receipt of this information Insp. Puran Singh alongwith his team left for Mussorie to arrest Naza. Both the teams reached Delhi from Gorakhpur and Mussorie on 17.06.1996; the three accused persons made separate disclosure statements and accused Naza got recovered one stepny of a Maruti car from a house in Jungpura; the owner of the Maruti car was called and he identified the stepny as his. One black coloured bag containing accused Farooq's identity card, visiting card of Javed Kariwav, telephone diary having the accused person's phone numbers was also recovered from the house. Accused Syed Maqbool Shah had an air ticket for Kathmandu to Delhi which he tried to destroy but it was snatched from him and seized. Thereafter, the accused persons were brought to Special Cell Lodhi Colony. Accused Maqbool Shah made a disclosure statement and stated that the stepney was given to him by accused Naza and it belonged to the car in which the blast took place. The witness further stated that he alongwith his team went to Shalimar Bagh with accused Saba to recover Rs. 1 Lakh. He stated that at the time of accused Killey and Latif's arrest in Gorakhpur, inspector Rajeshwar recovered one currency note of Rs. 2; on showing that note Rs. 1 Lakh was to be delivered. He further deposed that accused Saba was handed over the Rs. 2 note in the presence of a public witness Raj Kumar and accused Saba alongwith Raj Kumar and SI Sanjay Kumar went to Shalimar Bagh. He deposed that in lieu of the 2 Re note Mangal Chand was to give Rs. 1 Lakh and at about 2/2:15 PM he alongwith his team seized the Rs 1 lakh produced by Saba.

105. PW-101 deposed that on 18.06.1996 Mohd. Naushad pointed out

"Raja Car Number Plates" in Connaught Place and informed them that on 16.05.1996 he got a number plate (bearing No. DL 4C 1895) prepared from there and affixed it on the stolen Maruti car used in the blast. He further deposed that Mohd. Naushad and Naza pointed out M/S Deluxe Store and stated that on 13.05.1996 they purchased one Araldite tube and they pointed towards Mohd. Alam and stated that they purchased it from him; the tube was used in pasting the bottom of the gas cylinder after filling the same with explosives. He further deposed that thereafter Mohd. Naushad and Naza pointed out M/s Vakil Cable Store and identified Mohd. Naseem at the counter and stated that on 13.05.1996 they had purchased two meters of yellow coloured wire from him; the wire was used to connect the timer and detonator with the battery. Mohd. Naushad also pointed out M/s Uni Star Fans Refrigerator Shop and identified Mohd. Aslam as the person from whom on 14.05.1996 they took one drill machine. Mohd. Naushad, Killey and Naza then pointed out a sub-lane in East Nizamuddin and informed them that in the night of 15.06.1996 they stole a petrol tank cap of a maruti car for getting a duplicate key made; with the help of the duplicate key they stole the Maruti car on the night intervening 17/18.05.96 and affixed the fake number plate on it.

106. The witness further deposed that the three accused persons pointed out House No. 134, Zakir Nagar which belonged to Mirza Maqbool Hussain and stated that they parked the stolen car there for several days before the blast. They then pointed at a spot in front of M/s Dulhan, a shop in Lajpat Nagar market and stated that on 19.05.1996 at around 6 PM they had parked the car with cylinder bomb there but due to weak battery the blast could not take

place. He further deposed that the accused persons pointed out a place in Galib Road and informed the police that on the night intervening 17/18.05.1996, they had changed the number plate of the Maruti car there and had thrown the actual front number plate in the Lal Mahal Khandar; they got recovered the front number plate. The accused also got recovered the original rear number plate from under Lodhi fly over. He further deposed that the accused got recovered the duplicate key used to steal the Maruti car from behind the bushes at Nizamuddin ITI Arab Ki Sarai bus stop. Accused Naza and Killey pointed out the place of occurrence i.e. Pushpa Market, Lajpat Nagar and stated that on 21.05.1996 at around 6/6.15 PM they both parked the car with the cylinder bomb and after about 15-20 minutes, the blast occurred.

107. PW-101 further deposed that on 26.06.1996 Insp. Jagmal Singh alongwith his team took accused Naza, Killey and Latif to Srinagar for further recoveries and they came back to Delhi on 30.06.1996. He further deposed that on 26.07.1996 Javed Khan and Asadullah were brought to Delhi by Insp. Pooran Singh and Insp. Rajinder Gautam. PW-101 arrested them. He further deposed that on 04.08.1996 Javed Khan pointed out Room No. 106 in Satyam Hotel, Pahar Ganj and informed the police that on 14.05.1996 he alongwith his associate Sonu Nepali stayed there and kept then in the evening handed over the bag with explosives to Wazid; Javed Khan also identified Rajan Arora to whom he had paid the room rent. He stated that accused Naza pointed out shop no. 3/32 in Bhogal Delhi and informed the police that on 19.05.1996 in the evening he telephoned Latif in Kathmandu from there. The witness identified all the case property shown to

him.

108. In his cross-examination by the Defence Counsel the witness admitted that ACP PP Singh was with him at the time of accused Naushad's arrest. He further stated that information about accused Naushad and Mirza Iftikar boarding Vaishali Express for Gorakhpur was received by him and informed his superiors about the same on the telephone; no DD was written with regard to this information. He further admitted that before leaving for the railway station no inquiry was made from the railway station regarding departure of Vaishali Express and no help was taken from Railway Protection Force or the railway staff in apprehending the accused persons; no assistance was sought from IST crime and railways and NDLS railway station. He further admitted that he did not know how many bogies were there in Vaishali Express. They entered from Ajmere Gate side of the railway station and went to platform no. 4. He further admitted that he did not obtain the statement of the ticket clerk or railway authority to ascertain the place of issue of the ticket. He reached the railway station at 6:50 PM and ACP PP Singh reached at 6:55 PM. He admitted that the ticket was purchased from the railway station counter at 7:14 PM. He denied that it is incorrect that Naushad was picked up from his home on 29.05.1996. He admitted that a FIR about the recovery of explosives from Naushad's residence was not got registered with the local police station. He denied the suggestion that it is a planted case. He further admitted that he did not know the individual weight of the two slabs of RDX recovered from Naushad's house and they did not spot test the RDX with the kit available at the spot. He further admitted that he did not obtain the opinion from any expert as to

how RDX could be filled into gas cylinder; he did not know if RDX could be filled into the gas cylinder with the help of a drill machine. He did not take an expert opinion on the power and strength of the drill machine.

109. He further admitted that he had never been to Gorakhpur and he did not know whether Budha Hotel was situated outside the railway station as stated to by Insp. Rajeshwar. He further stated that Insp Rajeshwar got the DD entered for his departure from Gorakhpur but he had not seen the DD and nor was it produced with the challan. He further stated that he had not seen any DD entry made by Insp. Rajeshwar after he returned back to Delhi. He further admitted that Insp. Puran Singh is a dismissed inspector of Delhi Police. He further admitted that Insp. Pawan Kumar, a witness in this case was suspended for illegal gratification during the trial of this case. He further admitted that Insp. Puran Singh did not hand over any DD of his departure from Delhi or entry into Mussoorie; no transit remand of accused Mohd. Killey and Latif was obtained from the Gorakhpur court. He further admitted that even accused Mirza Nisar Hussain was brought without transit remand from Mussorie. He further stated that he had arrested one Riaz Sheikh @ Mulla from Jaipur who had been instrumental in fixing the battery for the blast. He admitted that accused Mulla died in judicial custody but denied the suggestion that the cause of death was the injuries he received during interrogation. He further admitted that accused Syed Maqbool Shah was arrested on 17.06.1996 and certain incriminating documents such as boarding card, torn ticket in the name of MN Hussain dated 12.05.1996, stepney of the stolen car were recovered from him. Accused Syed Maqbool Shah's disclosure statement was recorded after his arrest. He further

admitted that although a police team was sent to Ahmedabad, they did not seek police custody remand of accused Asadullah and Javed Khan.

110. In his further cross-examination, he stated that Rs. 2 currency note was given to him by Insp. Rajeshwar, who had recovered it from accused Latif. He further admitted that he did not arrest Mangal Chand in this case. He further admitted that he did not conduct a search of Mangal Chand's house though he disclosed that he was dealing in *"hawala"*. He further admitted that he did not know if many key makers used to sit in Lajpat Nagar at that time. He denied the suggestion that all accused were arrested before the actual date of arrest shown.

111. The witness was then recalled for further examination in chief (u/s 311 of Cr.P.C) on 26.08.2009, more than 12 years after the blast; in this part of his deposition he deposed about call details made to the news channel, so far as it pertained to the first two accused, A-1 and A-2. That part of the discussion is irrelevant because it does not involve the present appellants, in any manner; the said accused have not appealed to this court, in respect of the conviction under the Explosives Act; they were acquitted of the charges under Section 120-B IPC; the state has not appealed against that decision.

112. PW-105 ACP PP Singh deposed that investigation of this case was transferred to Special Cell on 26.05.1996 alongwith accused Farida Dar and Farooq; he handed over the investigation as well as the custody of the accused to Insp. Paras Nath. He further deposed that he handed over all the papers and retained some miscellaneous papers with him which included a FAX copy of the billing detail of telephone no. 22135 of Anantnag, J&K. He further stated that he handed over the billing details to Insp. Paras Nath on

04.06.1996. In his cross examination he denied the suggestion that Insp. Pawan Kumar was suspended during the pendency of this case and that he is deliberately withholding facts from the Court.

VII Discussion of circumstances

113. For the sake of convenience, a tabular statement containing the circumstances alleged against the accused, and found to have been proved by the Trial Court, along with reference to the paragraphs in the impugned judgment, is shown below.

S. No.	**Circumstance No.**	**Particulars**	**Accused involved**	**Remarks**	**Judgment of the Trial Court (para nos.)**
1.	9	Arrest of A-3 and A-4	A-3 & A-4	Held **proved**	169-180
2.	10	Recovery of explosives etc. from residence of A-3 Naushad	A-3	Held **proved**	181-193
3.	11	Arrest of A-7 and recovery of two rupee note	Against A-7	Held **not proved; proof of arrest held to be irrelevant**	194-204

4.	12	Arrest of A-6	A-6	Held **proved but not incriminating against him**	205-207
5.	13	Naushad's stay at Gupta Hotel in Gorakpur	A-3	Held **proved**	208-216
6.	14	Arrest of A-5 at Mussourie	A-5	Held **not proved.** Held **prosecution did not prove A-5's arrest from Mussourie on 17.06.1996.**	217-223
7.	15	Recovery of stepney from A-8's house	A-8	**Not proved**	224-230
8.	16	Recovery of articles belonging to A-1 from the house of A-8	Incriminating as against A-1 and A-8	Held **not proved**	231-242
9.	17	Recovery of Rs. One lac	Against A-4	Held **proved.** But held **circumstance was incriminating as against A-3**.	243-251
10.	18	Pointing-out of shop from where duplicate number plates were prepared	A-3 and A-6	Held **not proved**	252-256

11.	19	Pointing-out of M/s. Deluxe Store, from where Araldite Tube was purchased	A-3 and A-5	Held **not proved**	257-261
12.	20	Pointing-out of shop from where wire was purchased	A-3 and A-5	Held **not proved**	262-269
13.	21	Pointing-out of shop from where drill machine was purchased	A-3	**Inconclusive finding but treated as having been proved in para 243 of the Trial Court's judgment.**	270-276
14.	22	Pointing-out of place where car was parked, i.e. No.134, Gali No. 21, Zakir Nagar, Delhi	A-3, A-5 and A-6	**Not proved**	277-278
15.	23	Pointing-out of the shop "Dulhan Dupatta"	A-3, A-5 and A-6	**Proved**	279-285
	24	**The Trial Court appears to have skipped the sequence and omitted Circumstance No. 24**			
16.	25	Recovery of front and rear number plates	A-3, A-5 and A-6	**Not proved**	286-290

17.	26	Recovery of a key	A-3, A-5 and A-6	**Not proved; even otherwise not incriminating as it did not connect the accused with the crime.**	291-295
18.	26 *(Numb-er here again appears to be wrong in the Trial Court judgment)*	Pointing-out of place of incident	A-5 and A-6	**Not proved. Not incriminating**	296-298
19.	27	Pointing-out of shop from where 9-Volt battery was purchased	A-5 and A-6	Held **proved**	299-308
20.	28	Soldering of the battery to the two wires	A-5 and A-6	Held **proved**	309-316
21.	29	Pointing-out of shop from where clock was purchased	A-5 and A-6	Held **proved**	317-329
22.	30	Pointing-out of M/s.	A-3 and	Held **proved**	330-338

		Unique Agencies	A-5		
23.	31	Pointing-out of shop from where duplicate key was prepared	A-3 and A-5	Held **proved**	339-342
24.	32	Pointing-out of shop from where solder was purchased	A-3 and A-5	Held **proved**	343-351
25.	33	House search	A-9, A-14 and A-15	**Not proved; not incriminating against A-9**	352-354
26	34	Confessional statement of A-9	A-9	Held **proved**	355-367
27.	35	A-9's stay at Satyam Hotel	A-9	Held **proved**	368-378
28.	36	A-5's travel from Kathmandu to Delhi	A-5	Held **proved**	379-381
29.	37	CFSL reports	A-2 and A-3	Held **proved**	382-400
30.	38	Handwriting report	A-1 and A-3	Held **not proved**	401-406
31.	39	Use of car	Against all accused	Held **proved**	407-414
32.	40	Arrest of A-9	A-9	Held **proved**	415-417
33.	41	Arrest of A-10	A-10	**Not proved but nothing**	418-433

				incriminating otherwise against A-10	
34.	42	Sanction		**Proved**	434-435
35.	43	Recoveries at the instance of A-5, A-6 and A-7 at Srinagar	A-5, A-6 and A-7	**Not proved**	436-455
36.	44	Telephone calls by A-5 to A-7 on 19.05.1996	A-5 and A-7	**Not proved**	456-457

(a) Discussion with regard to incriminating circumstances in respect of A-3 Naushad

114. The Trial Court had listed 17 circumstances alleged against A-3, Mohd. Naushad. Of these, it was held that the prosecution was unable to prove nine circumstances.

115. One circumstance (Circumstance No. 26 – para 291 of the impugned judgment) pertained to recovery of the car key at the instance of A-3, A-5 and A-6. This was sought to be proved by the testimonies of PWs-31, 39 and 101. The seizure memo was Ex.PW-31/F. Mohd. Rizwan, the key maker was crucial for proving this circumstance; he did not support the prosecution and was declared hostile. The prosecution suggestions (to that witness) as to the identity of the three accused, i.e. A-3, A-5 and A-6 were denied. PW-64 (Mohd. Rizwan) also denied that he knew the identity of the accused. He was unable to identify them in Court. The Court was skeptical about these circumstances since the recovery of key itself was alleged to have taken place after a month.

116. The second circumstance (Circumstance No. 18 – para 252 of the impugned judgment) alleged against A-3 and A-6 was the identification of place from where duplicate number plate of the stolen car had been prepared. Again, for these, PWs-31, 39 and 101 were examined. What emerged during the investigation was that one Asgar Ali was allegedly at the shop when the two accused (A-3 and A-6) pointed out the place. However, that individual, i.e. Asgar Ali was never produced during the trial. The Court rejected this circumstance, finding contradictions in the testimonies of prosecution witnesses about which of the accused led the team to the shop. Moreover, no documentary proof was either collected or produced in support of the allegation that the number plates had been obtained; there was no documentary proof as to the existence of the shop or its owner. Most importantly, no number plate recovered during the investigation was ever shown to any witness and even the Test Identification Parade (TIP) of the case property or of the accused persons for the purpose of identification by the individual, (who allegedly prepared the number plate) was conducted. Lastly, the Court noticed that no independent witness from the adjoining shop at the time of preparation of the identification memo (Ex.PW-31/R) was joined during investigation or trial.

117. The third circumstance, (Circumstance No. 25 – para 286 of the impugned judgment) i.e. recovery of front and rear number plates at the behest of A-3, A-5 and A-6 and their allegedly pointing-out that place was sought to be proved by placing reliance on Ex.PW-31/D, 31/E and two number plates, Ex.PW-4 and 5 (i.e. the original number plates). Here again, the official witnesses were PW-31, 39 and 101. The Trial Court rejected this

circumstance and held that the prosecution was unable to prove it. The reasons were that no independent witness was joined at the time of alleged recovery; even the recovery memos (Ex.PW-31/D and 31/E) did not mention the time at which the articles were recovered; the memos did not also mention which accused had led to the recovery of the number plates. The Court also additionally rejected this circumstance holding that the recovery of number plate was from a general place accessible to the public and that there was no evidence showing that the particular spot was within the specific knowledge of the accused persons. The TIP of the number plates was not undertaken and most importantly, the prosecution did not establish that Ex.PWs-4 and 5 were the original number plates. The most damaging omission was that PW-8, the car owner was not shown the number plates and no suggestion was given to him that these number plates were part of the car at the time of theft.

118. The fourth circumstance which the Trial Court rejected as against A-3, A-5 and A-6 was the pointing-out of a place near the house – H. No.134, Zakir Nagar, Delhi (Circumstance No. 22 – para 277 of the impugned judgment). The prosecution case – spoken to by PW-31 and supported by PWs-39 and 101 - was that the police team reached Zakir Nagar after recovering the number plates from opposite Oberoi Hotel. It was alleged that the three accused pointed the place where they had parked the Maruti Car stolen from PW-8 from Nizamuddin. The Trial Court rejected the pointing-out memo, Ex.PW-33/S, holding that

> *"Again, the pointing out memo, Ex.PW-33/S is not incriminating piece of circumstance against the accused persons as this open place accessible to public was also known*

to the police prior to 18.06.1996. Moreover, no independent public witness was joined at the time of preparation of the pointing out memo Ex.PW-33/S. The place is stated to be near the residence of tenant Mirza Maqbool Hussain. However, he was not joined in the investigation. No person from the neighbourhood was examined by the prosecution to show if the car in which the cylinder bomb was planted for causing bomb blast at Central Market, Lajpat Nagar, New Delhi had remained parked in front of house No.134, Gali No.21, Jakir Nagar, Delhi and if so for how many days.There is no mention in the memo Ex.PW33/S as to who had parked the said maruti car at that place and on what particular date."

119. The fifth circumstance alleged against A-3, A-4 and A-7 was the arrest of A-7 from Gorakhpur and the recovery of two rupee currency note from him (Circumstance No. 11 – para 194 of the impugned judgment), allegedly at the pointing and behest of A-3 and A-4. The relevant witnesses here were PW-16 - Inspector Rajender Gautam; PW-24 - SI Hari Singh and PW-36 - Inspector Rajeshwar Kumar. The Trial Court in paras 194 to 204 of the judgment discussed the evidence and the circumstances rather elaborately, and observed that there were serious contradictions in the versions of the official witnesses. The Court felt that

"No independent public witness was joined at Gorakhpur at the time of apprehension of A-7. Again no independent public witness was joined or requested to join at the time of conducting personal search of A-7 and recovery of two rupee currency note Ex.PX from his possession."

120. PW-16, Inspector of the Delhi Police was in fact declared hostile by the prosecution since he was silent as to whether he had gone to Gorakhpur along with the police party. In cross-examination, he agreed with the suggestion that A-7 was arrested on 16.06.1996 and a two rupee currency

note was recovered from his possession, (Ex.PW-16/F). On the prodding of the prosecution, PW-16 agreed that A-7 had disclosed that on the basis of two rupee currency note, one lakh could be collected from Mangal Chand at Shalimar Bagh. In cross-examination, PW-16 admitted that he could not remember who was arrested from Gorakhpur and did not even know the name of the locality from where accused were arrested. He could not remember the hotel or restaurant or the name of its Manager. The Trial Court rejected PW-16's testimony altogether. The Court noticed that PW-16 and PW-24 contradicted each other. PW-24 merely stated that he and PW-16 went to Gorakhpur and arrested A-7 from a hotel and that his disclosure statement EX.PW-16/H was recorded. This witness also was unaware as to which police station exercised jurisdiction over Budha Hotel. The witness admitted that no transit remand was obtained and that local police was not involved. Curiously, the testimony of PW-24 varied with PW-36 as regards the arrest of A-7. He stated that information was received that A-5 and A-7 would be coming to Budha Hotel and that at the pointing-out of A-3 and A-4, A-6 and A-7 were arrested.

121. The discussion of the entire circumstance regarding the arrest of A-7 at the instance of A-3 and A-4, and the recovery of the two rupee currency note, is in Paras 201 to 204 of the impugned judgment. The Court underlined the unreliability of the statements of material witnesses which contradicted each other and held that no incriminating article was recovered from the accused and further the prosecution was unable to show how A-7 reached Budha Hotel. The Trial Court pertinently observed,

"*recovery of two rupee currency note no. 66M571634 Ex.PX in*

the personal search of A-7 to be used by A-4 again inspires no confidence. This currency note Ex.PX was having no distinct identification. A-7 was also having other currency notes recovered in his personal search. There was no fun for A-7 to come at Gorakhpur along with A-6 from Kathmandu, Nepal just to hand-over currency note Ex.PX to A-3 and A-4. There is no worthwhile evidence on this aspect except the disclosure statement of the accused.

203. Nothing has come on record to show if A-7 had remained in constant touch with co-accused persons at any time prior to the incident at Delhi or after the occurrence…….

204. Apprehension of A-7 and alleged recovery of two rupee currency note, Ex.PX, in my view is not an incriminating piece of circumstance to connect A-7 with the commission of the offence."

122. Nevertheless, the Court proceeded to hold that since A-7 failed to prove evidence to show if he was apprehended in Nepal,

"the possibility of his apprehension at the instance of A-3 and A-4 can't be ruled-out. Only the time and manner of arrest of A-7 has not been established beyond doubt. Since A-7 has not challenged his arrest, it makes no much difference as to in which manner and time, A-7 was arrested in this case."

123. It is evident from the above that the arrest and circumstances of the arrest leading to the arrest of A-7, the alleged pointing-out by A-3 and A-4 and the recovery of two rupee currency note were all disbelieved by the Trial Court in the impugned judgment.

124. The sixth circumstance alleged against A-3 (as well as A-5 and A-6) was the recovery of a stepney from the house of A-8 (Circumstance No. 15 – para 224 of the impugned judgment). This was sought to be proved by the testimonies of PWs-8, 17, 31 and 101. The exhibit was stepney, i.e. Ex.P1

and the document in support of the seizure was seizure memo, Ex.PW-8/B. The most important witness in this regard was the owner of the Maruti Car, PW-8 – Atul Nath. He crucially omitted deposing before the Court that the three accused had led to the recovery of the stepney, Ex.P,1 from the house of their co-accused, A-8. PW-8 did not mention about his presence at the time of recovery, in the premises of A-8 (of stepney) and was in fact declared hostile. He had departed from the statement recorded under Section 161 Cr.PC. In cross-examination by the prosecution, PW-8 positively denied the suggestion that Ex.P1, the stepney was recovered at the instance of A-3, A-5, and A-6 from the house of acquitted accused A-8 (Sayyed Maqbool Shah). He also denied that on 17.06.1996, the said three accused persons, A-3, A-5 and A-6 led the police party to A-8's house along with him or that he identified the car stepney, as the one which belonged to him at the place of the recovery.

125. In contradistinction with the testimony of PW-8, the owner of the car and also of the stepney (agreeing to the prosecution version), PW-17 SI Sanjay Kumar stated that the accused took the police party to House No. 4/11 or 4/111 on the second floor of the concerned building belonging to A-8 and disclosed that the car stepney could be recovered. The stepney was recoved by the said witness. PW-101 supported that version.

126. The Trial Court rejected this circumstance as against the concerned accused, i.e. A-3, A-5 and A-6. The detailed discussion on this circumstance is between paras 224 and 230 in the impugned judgment; it is listed as the fifteenth circumstance. The conclusions are as follows:

"229. Contradictory versions given by the witnesses regarding

the presence of PW8 Atul Nath at the residence of A-8 from where the stepney of the car is stated to have been recovered makes the story of recovery of stepney doubtful. No other independent public witness from the locality where the house of A-8 was situated was joined at the time of recovery. There was no purpose for these three accused persons to conceal the stepney Ex.P1 at the residence of A-8 after the commission of the incident. The stepney was not of substantive value to be retained for such a long period after the commission of the incident at the residence of A-8. No evidence has come on record to show as to how and under what circumstances stepney Ex.P1 happened to be kept at the residence of A-8 or that who had kept it or when it was kept or by which mode of transport, it was kept. After the apprehension of these accused persons who were allegedly known to A-8, A-8 was not imagined to keep the stepney Ex.P1 at his residence to be got recovered by these accused persons. Seizure memo Ex.PW8/B describes condition of stepney Ex.P1 as old and used one. Why such a useless object of insignificant value will be kept by A-8 at his residence and what purpose it was to serve.

230. Testimonies of PW 17 SI Sanjay Kumar, PW31 Inspector Sureinder Kumar and PW101 Inspector Paras Nath, however, establish that these accused persons had led the police team to the residence of A-8 on that day, i.e. 17.06.1996. Prior to that Delhi Police was not aware about the address and residence of A-8. Police came to know about the factum of his residence at house no.4/11, 2nd Floor, Bhogal, only in pursuance of the disclosure statements made by the accused persons and when they led the police team to his residence. The prosecution has, however, failed to establish beyond doubt that the stepney, Ex.P1 was recovered from the house of A-8 in the manner described by them. Hence recovery of stepney/tyre Ex.P1 to connect A-8 has not been proved beyond doubt.

XXXXXX XXXXXXXX XXXXXXX"

127. The next circumstance alleged against A-3 (as well as A-5) was that they pointed-out M/s. Deluxe Store from where an Araldite tube was

purchased (Circumstance No. 19 – para 257 of the impugned judgment). PWs-101 and 31 stated that on 18.06.1996, A-3 and A-5 pointed out M/s. Deluxe Store, Matia Mahal, Jama Masjid and revealed that on 13.05.1996, they had purchased Araldite tube from Mohd. Alam. It was alleged that Mohd. Alam was present at the shop at the time of preparation of pointing-out Memo Ex.PW-31/Q. PW-31 corroborated this version. The prosecution had relied on PW-52. In his deposition before the Trial Court, he admitted to being owner of M/s. Deluxe Store, 230, Matia Mahal, Jama Masjid, Delhi but did not, however, say if any of the accused had purchased the Araldite tube from his shop; he merely stated that some 8-9 years before the trial, few persons in civil dress went to his shop and enquired whether someone had purchased Araldite tube from him, to which he replied he could not remember. He also stated that the police prepared some documents and he signed the same at their asking. The witness was declared hostile. He denied the contents of the statements of PW-52/A and also denied that on 18.06.1996, A-3 and A-5 went to his shop with police and disclosed that he had purchased Araldite tube. The Trial Court rejected this circumstance, holding as follows:

> *"260. No other independent public witness was joined by the police at the time of preparation of pointing-out-memo, Ex.PW31/Q. Again no documentary proof was collected regarding purchase of any araldite tube from shop of PW52 Mohd. Alam. TIP of the accused persons were not got conducted from PW52. Prior to their identification on 18.6.96. Araldite tubes recovered from the residence of A-3 in pursuance of his disclosure statement was not shown to PW52 if it was the same araldite tube which was purchased from his shop.*

261. The evidence led by the prosecution on this aspect is highly scanty to prove this circumstance. After 8-9 years of incident, it is highly improbable for a shop-keeper to remember by face of his customer who had purchased article of ordinary use of insignificant value."

128. The next circumstance alleged against A-3 and A-5 were the pointing-out of a shop, M/s. Vakil Cable Store, New Meena Bazar (Circumstance No.20– para 262 of the impugned judgment) from where they (according to the prosecution) purchased a 2 meter yellow coloured wire on 13.05.1996. This circumstance was sought to be corroborated by the testimonies of PW-31, Inspector Surender Kumar and the IO, PW-101. Both stated that A-3 and A-5 led the police team on 18.06.1996 to M/s. Vakil Cable Store where Mohd. Naseem was present. They also stated that the accused identified Mohd. Naseem and told the police that they purchased the wire after which pointing-out memo, Ex.PW-31/O was prepared. The star witness for the alleged circumstance (of wire purchase), PW-32, admitted owning No.40, Uni-Star Cables. He mentioned that a policeman had visited his shop and showed another person sitting in a vehicle and asking whether he had purchased a wire, which the witness had denied at that time. The witness was, therefore, declared hostile and cross-examined. He denied the contents of the statements recorded under Section 161. This circumstance, i.e. the pointing-out of the place from which the wire was allegedly purchased by A-3 and A-5 was rejected and held not proved by the Trial Court, in the following finding:

"269 From the testimony of these prosecution witness again, the prosecution has failed to prove purchase of two meter yellow wire from the shop of PW32 Mohd. Naseem. No oral or documentary evidence has come on record about purchase of

two meter wire from the shop of PW32 Mohd. Naseem on 13.5.96 by any of the accused persons. Testimony of this prosecution witness PW 32 Mohd Naseem reveals that on some day police had taken one person sitting in the vehicle and it made inquiries from him if the said person had got purchased wire from him. The prosecution was not aware about the existence of the address of PW32 Mohd. Naseem. Police reached there only in pursuance of disclosure statements made by the accused persons. This circumstance has not been proved beyond reasonable doubt.

XXXXXXX XXXXXX XXXXXX"

129. Circumstance No.21 (para 270 of the impugned judgment), alleged against A-3 was that he led the police to the place (M/s. Uni Star Fans Refrigerators, Shop No.K-126, Meena Bazar, Jama Masjid, Delhi) from where a drilling Machine was borrowed on 14.05.1996. The prosecution had also alleged that he was seen drilling a hole in a gas cylinder, on 14.05.1996. The prosecution had alleged that A-3 had identified one Mohd. Aslam and stated that he borrowed the drilling Machine (to drill a hole in the cylinder); which was recorded in the pointing-out memo, Ex.PW-31/B. It was stated that Mohd. Aslam produced the Drilling Machine, Ex.P-6, which was seized under Memo, Ex.PW-31/C. This circumstance was sought to be proved by the testimonies of PW-31, Surender Kumar and PW-101 Paras Nath. PW-33 Mohd. Aslam did not support the prosecution and stated that A-3 never met him. He could not identify A-3. In cross-examination, he denied that A-3 was brought to his shop on 18.06.1996. He denied he ever had drilling machine or A-3 had taken the drilling machine from him to be returned later. He denied the seizure memo, Ex.PW-31/C as well as Ex.P-6.

130. The prosecution had alleged that PW-11, Nafees had in fact observed

or seen A-3 drilling the hole in a 5 kg gas cylinder, on 14.05.1996. PW-11 did not support the prosecution but admitted that 10-12 days after the said alleged date, A-3 was brought by the police near his shop. The Trial Court (in para 273 of the impugned judgment) held that:

> *"273 Recovery of the drill machine Ex. P6 from the possession of PW33 Mohd. Aslam at the instance of A3 has not been proved beyond reasonable doubt. Since A3 was residing in the neighborhood of PW33 Mohd. Aslam, his acquaintance with him was quite natural. In the cross-examination, no specific date was mentioned as to when A3 had taken the drill machine Ex. P6 from PW33 Mohd. Aslam. Moreover, prosecution failed to show that drill machine Ex. P6 was ever used by A3 for making any hole in the cylinder. There is no evidence on record to this effect. Mere recovery of drill machine Ex. P6 without any specific mark of identification from the shop of PW33 Mohd. Aslam, is not an incriminating piece of circumstance to connect A3 with the commission of offence."*

131. However, the Court held that PW-33 admitted his signatures on the police memo and did not complain about same to be adverse. The Court deduced that PW-33's premises were not known to the police and that

> *"The police officials were not expected suddenly to visit his shop without any specific purpose and to get his signatures on blank papers."*
>
> (paras 274 to 276):
>
> *"274 Memo Ex. PW33/C and Ex. PW31/P contain the signatures of PW33 Mohd. Aslam. These memos were prepared on 18.6.96. These memos also bear the signatures of A3. PW33 Mohd. Aslam did not lodge any complaint against the police officials for getting his signatures on blank papers. The police officials were having no knowledge about the presence of PW33 Mohd. Aslam running the shop in the name and style of M/s Uni Star Fans Refrigerators at Meena Bazar, Jama Masjid, Delhi.*

The police officials were not expected suddenly to visit his shop without any specific purpose and to get his signatures on blank papers. PW33 Mohd. Aslam was also not expected to put his signatures blindly on the blank papers just at the asking of the police officials particularly when A3 was known to him being working in his neighborhood. Since A3 was already known to PW33 Mohd. Aslam, it seems that he has opted not to support the prosecution regarding use of drill machine Ex. P6 belonging to him by A3. The fact, however, remains that A3 had led the police party at the shop of PW33 Mohd. Aslam on 18.6.96 and police was not aware about the existence of this shop prior to that.

275 PW11 Nafiz examined by the prosecution also did not support if A3 was seen by him making hole in a gas cylinder of 5 Kg., on 14.5.96, or that he had made inquiries from A3 about the purpose of drilling in the cylinder.

276 This witness, however, admitted in crossexamination of Ld. Addl. PP for the State that after 10/12 days, after his arrest, A3 was brought by the police near his shop."

132. In the opinion of the Court, the approach of the Trial Court, after holding that the circumstance regarding pointing-out of the premises of PW-33 had not been proved and yet adversely commenting on PW-33's conduct, leading to a contrary conclusion that in fact A-3 was brought to his place 10-12 days later, discloses a flawed reasoning. As may be noticed from the rejection of previous circumstances, such as pointing-out of the place where the car had been allegedly parked, pointing-out of the place where the shop where the wire was purchased, pointing out of the place from where the Araldite tube was bought and other alleged incriminating circumstances, the Court uniformly ruled that the independent witnesses' failure to support the prosecution witness was fatal. Here again, there was no difference in the nature or quality of evidence. PW-33 denied that A-3 had

visited the shop and brought the drilling machine. PW-11 denied that he observed A-3 drilling a hole in the gas cylinder. In these circumstances, the mere fact that PW-33 supported the prosecution to the extent that he admitted about the visit of A-3 after his arrest with the police 10-12 days later would not make any material difference. Giving weightage only to that aspect alone, without a discussion of the other evidence by the said witness, who did not support the prosecution, amounts to not applying a fundamental rule of law, which is that the testimony of a witness has to be read as a whole. On the other hand, if one were to closely scrutinize this aspect, it might even lend credence to A-3's allegation that he was not arrested on 14.06.1996 but in fact on 28.05.1996. This is in view of the fact that 10-12 days after 14.05.1996- would be 26-27.05.1996. The Court, therefore, is of the opinion that the Trial Court's approach in first deciding that the circumstance with regard to pointing-out of PW-33's shop was not being proved, was correct; however, its later observations with regard to PW-33 not being entirely truthful in view of the possibility of his having prior acquaintance with A-3 is rather unwarranted. It tended to prejudice the reasoning in the latter part of the impugned judgment, as would be apparent from the ensuing discussion. It is, therefore, held that having rejected the alleged pointing-out of PW-33's premises, the later observations ought not to have been made; in any event they could not have been used against the accused A-3, to arrive at conclusions adverse to him.

Circumstances held proved as against A-3

133. The most important circumstance i.e. No.23 (para 279 of the impugned judgment) alleged against A-3, A-5 & A-6 was that they pointed

out the shop *"Dulhan Dupatta"* near which the stolen Maruti car containing explosives was parked prior to the date of the incident, i.e. 19-05-1996. This circumstance was sought to be proved through the testimonies of PW-31, PW-39 and PW-61. The prosecution had alleged that after arrest of the accused, disclosure statements were made by them. The disclosure statement of A-3, Naushad is PW-31/B. PW-31 who had deposed to joining the investigation and witnessing the recovery of incriminating articles from the premises of A-3 Naushad on 15.06.1996 stated that a disclosure statement had been made by him - PW-31/B. The prosecution alleged that on 18.6.1996 after visiting Zakir Nagar, A-3, A-5 and A-6 led the police party to Lajpat Nagar where they identified the shop *"Dulhan Rangrej"* where they had parked the car loaded with RDX i.e. cylinder bomb a day prior to the bombing. PW-31 deposed that the statement of the *"Rangrej"* shop owner was recorded by the IO after which they were taken to Pushpa Market, Lajpat Nagar where they pointed out the place in front of the fountain park where they had parked the car for the purpose of blast on the day of incident. This witness stated that owner of the *"Dulhan Rangrej"* identified the accused as the individuals who had parked the car at 06:15 PM on 19-05-1996 and that the witness also further stated that the blast had not taken place. These were also the purport of the disclosure statement Ex.PW-31/B made by Naushad. PW-39 who deposed after PW-31 stated that all three accused *"pointed out a place opposite shop No.D-II/35, Central Market, Lajpat Nagar, New Delhi vide pointing out memo Ex.PW-31/R which bears my signatures at point "B"*. The witness stated in cross examination that only at Lajpat Nagar a public witness was associated in the proceedings and that no site plan regarding pointing out of the spot

was prepared by the IO. In this background, the testimony of independent witness PW-61 on whom the prosecution relied heavily to identify the accused A-3, A-5 and A-6, becomes material.

134. PW-61 Sumit Kumar stated that he had a shop in Central Market, Lajpat Nagar *"Dulhan Dupatta"* situated at D-II/35, Lajpat Nagar and that on Sunday at around 2-2:30 PM, when he was in his shop, 3-4 persons parked a white Maruti-800 in front of his shop despite his objections; ultimately they removed it from there and parked it four shops away. He stated that as far as he could remember registration number of the car was 1895 and that two days later he came to know that a bomb blast had taken place in a Maruti car and that later the police had visited his shop and that *"about a month later police had visited my shop when I was away and my younger brother Sanjeev was only available at the shop. My brother told me that three police officials who came to my shop were accompanied by 3-4 persons. I don't know anything else about this case or about the bomb blast in Lajpat Nagar."*

135. The witness was then declared hostile and cross examined by the prosecution. Crucially, he denied the suggestion that on 18.6.1996, A-3, A-5 and A-6 led the police to his shop in his premises in his presence and also denied the suggestion that in his presence all the said accused pointed out the place in front of his shop. That on 19.5.1996 at about 6:30 PM they had marked a stolen Maruti and that a cylinder bomb was fitted in the car. He denied all suggestions as to when the accused persons had told him in his presence about a timer fitted with a bomb etc. He also denied that the police had prepared the pointing out memo Ex.PW-31/R. He stated that the

memo was already prepared by the police. He later stated that he had identified the two accused persons on 18.6.1996 when they pointed out a place in front of his shop, and that he had told the police that they were the same persons who had parked the car on 19.5.1996 and that they had quarrelled with him. He agreed with the suggestion that on 20.5.1996 when he opened the shop the car was not parked there and that he deposed wrongly on account of the confusion. He then stated that he could identify three accused persons if shown to him. The Court then recorded *"thereafter this witness has rightly identified the accused Mohd. Naushad with certainty and has identified the accused Mirza Nisar Hussain @ Naza with some degree of doubt in the same and that this witness had not identified the third accused at all."* In cross examination, he stated that he had signed on the pointing out memo Ex.PW-31/R in the Police Station where he went receiving a message to reach PS Lodhi Colony, through his brother. He admitted that no site plan was drawn at the place where the accused had parked the car. He denied that he had any interaction with the accused a few days prior to occurrence of the bomb blast.

136. The relevant discussion pertaining to this "pointing out" memo, sought to be established by the prosecution is in paras-239-284 and 530-532 of the impugned judgment which are as follows: -

> *" **(23) Pointing out Dulhan Dupatta shop by A3, A5 and A6**:*
>
> *279. Case of the prosecution is that on 18/6/2008 A3, A5 and A6 led the police party to the shop of Sumit Kumar at 2D35, Lajpat Nagar where on 19/5/1996 at around 6 pm they had parked the stolen Maruti 800 car, the genuine number of which is DL 2CF5854 and a fake number plate fixed on the said car was DL 4AC 1895. The ld. defence counsel has controverted*

this plea of the prosecution.

280. PW31 Insp. Surinder Kumar in his statement before the court deposed that on 18/6/1996, A3, A5 and A6 had taken the police party at Lajpat Nagar where they identified the shop of 'Dulhan Rangrej' where they had parked the car loaded with RDX i.e., cylinder bomb in 1996 but it could not explode due to weak battery. The said car was parked by them at about 6.15 pm in the area. When the blast did not take place they again removed the car and took it to Zakir Nagar. The statement of shop owner of Dulhan Dupatta was recorded. In the cross examination, nothing was suggested to this witness if all these accused persons had not taken the police team at the shop of PW61 Sumit Kumar or that he had not met them at that time. No suggestion was put to this witness in the cross examination that these accused persons had not parked any such car on 19/5/1996 in front of the shop of Dulhan Dupatta. The testimony of this witness on this aspect has entirely remained unchallenged.

281. PW39 Insp. Hari Ram Malik also supported the prosecution on this aspect and deposed that on 18/6/1996 these accused persons while in police custody pointed out the place opposite shop no. DII/35 Central Market Lajpat Nagar and the pointing out memo Ex. PW 31/R was prepared. Again this witness was not cross examined on this aspect. The witness admitted that the local police was not joined in the investigation and no site plan was prepared. No suggestion was put to this witness also that these accused persons had not taken the police team to the place in question and no pointing out memo Ex. PW 31/R was prepared.

282. Material testimony on this aspect is that of PW 61 Sumit Kumar owner of the shop 'Dulhan Dupatta'. In his deposition before the court PW61 Sumit Kumar, stated that he was running a shop in Central Market, Lajpat Nagar with the name and style of 'Dulhan Dupatta' situated in the premises of DII/35 Lajpat Nagar. One day, on Saturday and at about 2 /2.30 pm he was present at his shop. At that time 3/4 persons parked a Maruti 800 of white colour in front of his shop despite his

objecting to the same. Ultimately, they removed the car from there and again they parked the said vehicle four shops away on right side in front of a Doctor's shop. So far he remembered, the registration number of the said car was 1895. Two days later on Tuesday, he came to know that a bomb blast had taken place at Lajpat Nagar in a maruti car. After about a month later, police visited his shop when he was away and his younger brother Sanjiv was available at his shop. His brother told him that 34 police officials had come at his shop along with 3/4 other persons. He did not know anything else about that case.

283. This witness was got declared hostile by the ld. Addl. PP and was cross examined. In the cross examination, the witness admitted that the police had prepared the pointing out memo Ex.PW 31/R and the same contained his signatures at point 'C'. The witness volunteered to add that the same was not prepared in his presence as it was already prepared by the police and he did not go through it minutely. In his subsequent cross examination the witness categorically admitted that he had identified the above named three accused persons on 18/6/1996 when they pointed out the place in front of his shop and he (PW61 Sumit) told the police that they were the same persons who had parked the above mentioned Maruti 800 in front of his shop on 19/5/1996 and when he raised objection, the said persons had quarreled with him. The witness further admitted in the cross examination that on 19/5/1996 when he closed his shop at about 8.30 pm the above mentioned car was seen parked near his shop and no other person was present near the said car. The witness further admitted that when on 20/5/1996 he opened his shop, the above mentioned car was not parked there. The witness clarified that initially he could not clarify some of the things which he disclosed lateron in testifying before the court but the same had taken place on account of confusion. The witness further claimed that he could identify the said three accused persons if shown to him. Thereafter the witness was permitted to look at the accused persons present in custody before the court and to identify the said accused persons. The witness rightly identified A3 with certainty. The

witness further identified A5 with some degree of doubtful in the same. The witness however could not identify the third accused at all.

284. This witness was cross examined by the ld defence counsel for the accused persons. He denied the suggestion that the IO of the case Insp. Paras Nath had pointed out towards the accused persons to him. He further admitted in the cross examination that he had put his signatures on the pointing out memo Ex. PW 31/R in the PS. He had gone to the PS on the said occasion on receipt of message from his brother. The witness denied the suggestion that these three accused persons were seen by him for the first time at PS Lodi Colony. No site plan was drawn at the place where the accused had parked the car first in his presence.

XXXX XXXX XXXX

530. In his disclosure statement Ex. PW 31/B, A3 gave graphic detail regarding his association with the co-accused persons and his active participation in the commission of the incident. He disclosed that on 19/5/1996 on Sunday as per their plan, he along with A5 and A6 parked the Maruti car at about 7.00 pm at Central Market, Lajpat Nagar in front of one shop of 'Dupatta Rangai' on which there was a board of 'Dulhan Dupatta'. There were some shops of vegetables and fruits there. The shop keeper of 'Dulhan Dupatta' told them not to park the vehicle there. Thereafter he parked the same at some distance.

531. In pursuance of this disclosure statement A3 along with A5 and A6 led the police team at the said place where on 19/5/1996 they had parked the vehicle in front of the shop of 'Dulhan Dupatta'. They identified the shop of Dulhan Rangrej. PW 61 Sumit Kumar met the police team there. PW61 Sumit Kumar supported the prosecution and in his deposition before the court, he categorically claimed that three persons had parked the Maruti car having registration no 1895 on 19/5/1996 in front of his shop. When he raised objection, the said persons had quarreled with him. The witness further testified that on 18/6/1996 the police brought the said three

persons at the shop and pointing out memo Ex. PW 31/R was prepared which contained his signature at point C. This witness further claimed to identify the said persons. Witness pointed at the accused persons present before the court and he rightly identified A3 with 'certainty'. This witness also identified A5 with some degree of doubtful. This testimony of this witness was discussed in detail above and was found convincing and trust worthy. A3 failed to explain his visit along with his associates near the shop of PW61 Sumit Kumar where he along with his associates had parked the Maruti car on 19/5/1996, used in the explosion. A3 failed to explain his nexus with Maruti car having registration number 1895. The testimony of PW61 Sumit Kumar identifying A3 with certainty inspires confidence as he had objected to A3 and his associates for parking the vehicle in front of his shop and on his objection a quarrel had taken place which forced A3 and his associates to remove the vehicle from that place and to park it at some other place. PW61 Sumit Kumar had sufficient opportunity to see faces of A3 and his associates at that time as quarrel had taken place with them. This circumstance fully establishes involvement of A3 in the incident. Its corroborative value is unassailable.

532. Again police was not aware of all these facts disclosed by A3 in his disclosure statement Ex. PW 31/B and came to locate the place in front of shop of PW61 Sumit Kumar only when A3 along with his associates took them to his shop. A3 did not deny that A5 and A6 had not accompanied him at that time or that there were two other different persons with him. Signatures of A3 and his associates A5 and A6 in the pointing out memo Ex.PW 31/R categorically prove that it was only A3, A5 and A6 who had led the police team to the shop of PW61 Sumit Kumar."

137. As is evident, the prosecution endeavour was to prove that two days before the incident, the stolen Maruti car was initially parked in front of PW-61's shop; due to his protests, the accused parked that car elsewhere. The episode, according to the prosecution came to light after the arrest of

A-3 and the other accused. Reliance is placed on the disclosure statement PW-31/B. The witness, PW-61 did not support the prosecution at all. After the witness was declared hostile, he denied several suggestions. Due to repeated prodding by the prosecution, in cross-examination, he identified A-3, and was in doubt about the identity of A-5. He did not identify A-6 at all. The Trial Court relied on the testimony of this witness, to the extent he deposed in cross-examination by the prosecution, and altogether discarded the other parts of his testimony.

138. The following features emerge from an overall analysis of the evidence, presented by the prosecution in respect of this circumstance:

(1) Soon after arrest of A-3, his disclosure statement was recorded (Ex.PW-31/B) on 16.6.1996. In this, the accused made a statement about the incident of his having, with his co-accused, parked the stolen Maruti car in front of "*Dulhan Dupatta"* a day before the bombing and due to objection of PW-61, moving elsewhere, and finally parking the car in Zakir Nagar. All this was before the incident.

(2) On 18.6.1996, <u>after</u> recording the disclosure statement, the accused led the police party to the spot, and PW-61 allegedly identified them. The prosecution relied on the memo Ex.PW-31/R.

(3) The two police witnesses did not mention about the name of the shop. One of them repeatedly called it "Dulhan Rangrej" and "Rangrej" (PW-31) whereas the other witness did not remember the name (PW-39).

(4) PW-61 denied - in his examination- in-chief, that the accused had visited near the place, or that he was there when they led the police party. Even in the cross examination by the prosecution, the witness denied:

(a) Pointing out of his shop by accused on 18.6.1996;

(b) Statement by them about the parking incident on 19.5.1996 and the altercation with them;

(c) Statement by them that the car was taken to Zakir Nagar.

139. PW-61 admitted his signature on PW-31/R the memo and admitted (in cross examination) contrary to what he said earlier, that he signed it in PS Lodi Colony, where he went after receiving word from the police to go there. After making these statements – most of which were unsupportive of the prosecution – PW-61 identified A-3 as one of the people who had gone to his shop on 18.6.1996. He was in doubt about A-5; and could not identify A-6.

140. The omissions and lapses were sought to be explained by PW-61, saying that he was confused during the course of his testimony. Two very crucial circumstances which have to be kept in mind is that the prosecution story is about the parking incident having occurred two days before the actual bombing and that crucially the place i.e. *"Dulhan Dupatta"* was mentioned on 16.6.1996 in the disclosure statement of A-3 (Ex.31/B). While first circumstance i.e. the abortive attempt can arguably be connected – if all circumstances are proved – as an act preparatory to commit crime albeit unsuccessfully, the most important aspect which the Trial Court lost

sight of was that *"Dulhan Dupatta"* itself is a shop. This place was known to the police on 16.6.1996 after the disclosure statement was recorded, according to the prosecution. This circumstance is extremely important, because any finding would directly implicate the accused and have the effect of shifting the onus of explaining what they were doing in a Maruti car, just two days before the bomb blast. It would be necessary for the court to first unravel what the prosecution sought to prove by this "pointing out" circumstance. It is not the prosecution's case that any article was recovered pursuant to this pointing out, recorded through memo Ex. PW-31/R, dated 18-6-1996. What it seeks to achieve is to establish a fact, hitherto unknown to it, i.e an abortive attempt to explode a cylinder bomb had taken place on 19-5-1996; the stolen Maruti car had been used for the purpose of transporting the three accused A-3, A-5 and A-6. During the process, the accused tried to park the car in front of PW-61's shop; he objected. The car was parked elsewhere, and later taken away the next day, on 20th May, 1996.

141. The prosecution's case is that A-3 was arrested on 15-6-1996, and his disclosure statement was recorded on 16-6-1996 (Ex. PW-31/B). The Trial Court disbelieved the circumstances regarding the arrest of A-5 and A-6. The disclosure statement of A-5 is alleged to have been recorded on 30th June, 1996. The prosecution had argued –in this court's opinion correctly- that there is in law no bar to joint disclosure statements, and if two accused disclose facts, or mention about an article contemporaneously, or simultaneously, their statement is admissible, if the basic ingredients of Section 27 of the Evidence Act are fulfilled. This would mean that the prosecution should be able to show that the pointing out memo led to

discovery of a fact not known to it earlier, or lead to recovery of an article uniquely hidden or concealed.

142. The accused having stated about the Maruti car being parked in front of the shop, the ensuing quarrel and their going somewhere else were also mentioned by them in the disclosure statement of Naushad. Such being the case, the issue which should have caught the attention of the Court was whether *"Dulhan Dupatta"* itself was in an inconspicuous place or hidden in some corner as to be generally unseen- only if that were the case, would the finding that the shop was discovered, and its owner's statement recorded, have been relevant. The witnesses i.e. PW-31, PW-39 and PW-61 did not mention about any site map having been drawn. On the other hand, what is evident is that the prosecution itself alleges that the stolen car was sought to be parked in front of the shop. There can be no two opinions of the fact that the shop is in Lajpat Nagar, Central Market, and, therefore, in open public view. It is the prosecution's case that it is a shop, and that there was enough place to park in front of it. Having regard to these circumstances, if the police were aware of the identity of the shop as well as the incident, (which no doubt was relatively fresh, in the witnesses' mind as it was little over three weeks after the bombing incident) no effort was made on their part to locate the place and record the statement of the shop keeper, PW-61. Had this been done and a resultant TIP conducted, those circumstances would have gone a long way in lending assurance and even credibility to the prosecution version. Instead, not only did the police not visit the place despite having knowledge of this fact but it also failed to hold TIP. Having regard to these, the alleged "pointing out" is an extremely week and tenuous

circumstance and cannot be held to have been proved beyond reasonable doubt. In any event, the prior knowledge of the police ruled out the fact that the police *discovered* "Dulhan Dupatta" only on 18.6.1996 at the pointing out of the accused. Having regard to these, the pointing out of PW-61's premises by the accused is neither incriminating nor can it be even said to have been proved.

143. So far as the weight attached to the testimony of PW-61 regarding the identity of A-3 goes, this Court is of the opinion that the Trial Court clearly fell into error in concluding that there was positive identification. The entire analysis of evidence on this circumstance – extracted above – and found between paragraph Nos.530-532 would reveal that the Trial Court completely ignored this witness' testimony in the examination-in-chief. Absolutely no reasons were given and there was a ready acceptance in the impugned judgment about the explanation given by the witness that earlier part of his testimony was the result of confusion. This explanation itself ignored the internal contradictions which clearly emerged from the testimony, in cross examination by the prosecution itself. In the first part of the cross examination (by the prosecution), the witness had denied the pointing out of his shop by the accused on 18.6.1996 and even denied that they made statements with regard to the parking of the car on 19.5.1996 or that they had made further statement with regard to defusing the bomb and later on removing the car to Zakir Nagar. If the Trial Court had taken these facts also into consideration (concededly these were deposed during the cross examination by the prosecution), the apparent conflict in the testimony of this witness in the cross examination by the prosecution after he was

declared hostile would have constrained it to adopt more circumspect approach. However, Trial Court focused almost entirely on that part of the testimony in which the witness' admission as his identification of the accused was elicited.

144. The correct legal position, no doubt, is that dock identification is substantive evidence, which the court is entitled to rely on. However, the circumstances under which such identification takes place, the exact manner of identification during trial, the delay between the incident (when the witness observed the accused, and the day of the trial) are all material factors, which ultimately weigh with the court in appraising the evidence, and deciding its worth. In *Simon & Ors. v. State of Karnataka,* 2004 (2) SCC 694 the Supreme Court observed that:

> *"14…mere identification of an accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification is to test and strengthen the trustworthiness of that evidence. Courts generally look for corroboration of the sole testimony of the witnesses in court so as to fix the identity of the accused who are strangers to them in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. It has also to be borne in mind that the aspect of identification parade belongs to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. Mere failure to hold a test identification parade would not make inadmissible the evidence of identification in court. What weight is to be attached to such identification is a matter for the courts of fact to examine. In*

appropriate cases, it may accept the evidence of identification even without insisting on corroboration……."

145. Earlier, in *Dana Yadav alias Dahu & Ors. v. State of Bihar* -2002 (7) SCC 295 the Supreme Court had reviewed the previous decisions and held that:

> *"the evidence of identification is a relevant piece of evidence under Section 9 of the Evidence Act where the evidence consists of identification of the accused at his trial. The identification of an accused by a witness in court is substantive evidence whereas evidence of identification in test identification parade is though primary evidence but not substantive one and the same can be used only to corroborate identification of the accused by a witness in court. This Court has dealt with this question on several occasions. In the case of Vaikuntam Chandrappa and others v. State of Andhra Pradesh AIR 1960 SC 1340 which is a three Judge Bench decision of this Court, Wanchoo, J., with whom A.K.Sarkar and K.Subba Rao, JJ. agreed, speaking for the Court, observed that the substantive evidence of a witness is his statement in court but the purpose of test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are stranger to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding or any other evidence. The law laid down in the aforesaid decision has been reiterated in the cases of Budhsen and another v. State of U.P. 1970(2) SCC 128, Sheikh Hasib alias Tabarak v. The State of Bihar (1972) 4 SCC 773, Bollavaram Pedda Narsi Reddy and others v. State of Andhra Pradesh (1991) 3 SCC 434, Ronny alias Ronald James Alwaris and others v. State of Maharashtra (1998) 3 SCC 625 andRajesh Govind Jagesha v. State of Maharashtra (1999) 8 SCC 428. It is well settled that identification parades are held ordinarily at the instance of the investigating officer for the purpose of enabling the witnesses to identify either the properties which are the subject matter of alleged offence or the persons who are alleged to have been*

involved in the offence. Such tests or parades, in ordinary course, belong to the investigation stage and they serve to provide the investigating authorities with material to assure themselves if the investigation is proceeding on right lines. In other words, it is through these identificationparades that the investigating agency is required to ascertain whether the persons whom they suspect to have committed the offence were the real culprits. Reference in this connection may be made to the decisions of this court in the cases of Budhsen, (supra), Sheikh Hasib (supra), Rameshwar Singh v. State of Jammu & Kashmir (1972) 1 SCR 627 and Ravindra alias Ravi Bansi Gohar v. State of Maharashtra and others (1998) 6 SCC 609.

It is also well settled that failure to hold test identification parade, which should be held with reasonable despatch, does not make the evidence of identification in court inadmissible rather the same is very much admissible in law. Question is what is its probative value? Ordinarily identification of an accused for the first time in court by a witness should not be relied upon, the same being from its very nature, inherently of a weak character, unless it is corroborated by his previous identification in the test identification parade or any other evidence. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what a witness has seen earlier, strength or trustworthiness of the evidence of identification of an accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. If a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence. We are fortified in our view by catena of decisions of this Court in the cases of Kanta Prashad v. Delhi Administration AIR 1958 SC 350, Vaikuntam Chandrappa (supra), Budhsen (supra), Kanan and others v. State of Kerala (1979) 3 SCC 319, Mohanlal Gangaram Gehani v. State of Maharashtra (1982) 1 SCC 700, Bollavaram Pedda Narsi Reddy (supra), State of Maharashtra v. Sukhdev Singh andanother (1992) 3 SCC 700, Jaspal Singh

alias Pali v. State of Punjab (1997) 1 SCC 510, Raju alias Rajendra v. State of Maharashtra (1998) 1 SCC 169, Ronny alias Ronald James Alwaris (supra), George and others v. State of Kerala and another (1998) 4 SCC 605, Rajesh Govind Jagesha (supra), State of H.P. v. Lekh Raj and another (2000) 1 SCC 247 and Ramanbhai Naranbhai Patel and others v. State of Gujarat (2000) 1 SCC 358.

Apart from the ordinary rule laid down in the aforesaid decisions, certain exceptions to the same have been carved out where identification of an accused for the first time in court without there being any corroboration whatsoever can form the sole basis for his conviction. In the case of Budhsen (supra) it was observed:-

"There may, however, be exceptions to this general rule, when for example, the court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration."

In the case of State of Maharashtra (supra), it was laid down that if a witness had any particular reason to remember about the identity of an accused, in that event, the case can be brought under the exception and upon solitary evidence of identification of an accused in court for the first time, conviction can be based. In the case of Ronny alias Ronald James Alwaris and others (supra), it has been laid down that where the witness had a chance to interact with the accused or that in a case where the witness had an opportunity to notice the distinctive features of the accused which lends assurance to his testimony in court, the evidence of identification in court for the first time by such a witness cannot be thrown away merely because no test identification parade was held. In that case, the concerned accused had a talk with the identifying witnesses for about 7/8 minutes. In these circumstances, the conviction of the accused, on the basis of sworn testimony of witnesses identifying for the first time in court without the same being corroborated either by previous identification in the testidentification parade or any other evidence, was upheld by this Court. In the case of Rajesh Govind Jagesha (supra), it was laid down that the absence of test identification parade may not

be fatal if the accused is sufficiently described in the complaint leaving no doubt in the mind of the court regarding his involvement or is arrested on the spot immediately after the occurrence and in either eventuality, the evidence of witnesses identifying the accused for the first time in court can form the basis for conviction without the same being corroborated by any other evidence and, accordingly, conviction of the accused was upheld by this Court.

146. Again, in *Bollavaram Pedda Narsi Reddy And v State of Andhra Pradesh* AIR 1991 SC 1468 the Court observed the need for clear and categorical identification, as a forthright piece of evidence:

> *"The evidence given by the witnesses before the court is the substantive evidence. In a case where the witness is a stranger to the accused and he identifies the accused person before the court for the first time, the court will not ordinarily accept that identification as conclusive. It is to lend assurance to the testimony of the witnesses that evidence in the form of an earlier identification is tendered. If the accused persons are got identified by the witness soon after their arrest and such identification does not suffer from any infirmity that circumstance lends corroboration to the evidence given by the witness before the court. But in a case where the evidence before the court is itself shaky, the identification before the magistrate would be of no assistance to the prosecution In the present case, the appellants are admittedly persons with whom the two witnesses had no previous acquaintance. The occurrence happened on a dark night."*

In the UK, the law relating to identification appears to be more stringent. This can be gathered from the following discussion by the (erstwhile) House of Lords, in *Goldson and Devon McGlashan v. The Queen* [2000] UKPC 9 (PC):

> *"There is no dispute that if an identifying witness has not made a previous identification of the accused, a dock identification is*

unsatisfactory and ought not to be allowed. Unless the witness had provided the police with a complete identification by name or description, so as to enable the police to take the accused into custody, the previous identification should take the form of an identification parade. On the other hand, Mr. Thornton accepts that if the accused is well known to the witness, an identification parade is unnecessary and could, for the reasons already given, be positively misleading. In the present case, however, the question of whether the identification fell into the one class or the other was itself a question in dispute. Mr. Thornton says, rightly, that an identification parade would have helped to resolve this dispute. It does not however follow that the absence of a parade has resulted in a serious failure of justice so as to require the intervention of the Privy Council.

14. The normal function of an identification parade is to test the accuracy of the witness's recollection of the person whom he says he saw commit the offence. Although, as experience has shown, it is not by any means a complete safeguard against error, it is at least less likely to be mistaken than a dock identification. But an identification parade in the present case would have been for an altogether different purpose. It would have been to test the honesty of Claudette Bernard's assertion that she knew the accused. It is of course true that even if her evidence about knowing them had been truthful, she might still have been mistaken in identifying them as the gunmen. But, as Lord Devlin remarked in his Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (26th April 1976) (at page 99 para. 4.96), that is "not a claim that could be tested by a parade".

15. In England, the obligations of the police to hold identification parades are contained in a Code of Practice issued by the Home Secretary pursuant to section 66 of the Criminal Evidence Act 1984. The language of the Code is not for present purposes material, because there is no similar code in Jamaica, but its effect was summed up by Hobhouse L.J. in Reg. v. Popat [1998] 2 Cr.App.R. 208, 215 by saying "There

ought to be an identification parade where it would serve a useful purpose".

16. Their Lordships will give two English examples of this principle being applied in cases in which there was, as here, a dispute over whether the accused was in fact a person known, or sufficiently known, to the witness. The first is Reg. v. Conway (1990) 91 Cr.App.R. 143. The accused was charged with stabbing a man outside the flat where the victim lived with his woman friend and her 15 year old son. Seeing the accused from behind immediately before the incident, the woman had said to the victim that she did not know him. Afterwards, she said that she knew him, had seen him in a public house and had entertained him to dinner but had not wanted the victim to know about their acquaintance. Her son also said that he knew him in the same way. They did not know his name, where he lived or, as the Court of Appeal later said, anything of importance about him. Before the preliminary hearing in the magistrates' court, the accused's solicitors wrote to the Crown Prosecution Service saying that their client denied that either witness knew him and requested an identification parade. They added "Obviously, if there is not an identification parade, we will be objecting to any form of dock ID". No parade was held despite a specific provision in the then Code of Practice for the Identification of Persons by Police Officers which said "In a case which involves disputed identification evidence a parade must be held if the suspect asks for one and it is practicable to hold one". The witnesses made dock identifications at the committal proceedings and at the trial. The Court of Appeal held that the judge should have stopped the case because the identification evidence was too tenuous and because there had been a breach of the Code. Even if he had allowed the case to go to the jury, he should have pointed out the provisions of the Code and the consequent prejudice to the accused.

17. The other case is Reg. v. Fergus [1992] Crim.L.R. 363 in which there had been no identification parade although the witness claimed only to have seen the accused once and heard his name from someone else. The Court said that "The case where the complainant had seen the assailant only once or on a

few occasions before might well be treated as that of identification rather than recognition". An identification parade should have been held and the dock identification made the verdict of guilty unsafe and unsatisfactory.

18. Their Lordships consider that the principle stated by Hobhouse L.J. in Reg. v. Popat [1998] 2 Cr.App.R. 208, 215, that in cases of disputed identification "there ought to be an identification parade where it would serve a useful purpose", is one which ought to be followed. It follows that, at any rate in a capital case such as this, it would have been good practice for the police to have held an identification parade unless it was clear that there was no point in doing so. This would have been the case if it was accepted, or incapable of serious dispute, that the accused were known to the identification witness. At least in the case of McGlashan, that does not appear to have been the position here."

147. For all the above reasons, it is held that the identification by PW-61 and the circumstance that A-3 had, along with the other accused, tried to park the stolen Maruti car a day before the explosion, and that he had led the police party to the place on 18-6-1996 and pointed out the place, in front of that witness, cannot be held to have been proved beyond reasonable doubt.

Arrest of A-3 Naushad and A-4 (*Circumstance No. 9 – para 169 of the impugned judgment)*

148. The prosecution case regarding arrest of these two accused was sought to be established by PW16 Insp. Rajender Gautam who deposed that on 14/6/1996 he along with Insp. Paras Nath, (PW-101) Insp. Suresh Chander, SI Surender Verma etc. joined the investigation of the case. At about 6:20 PM PW-101 got secret information that A3 along with his companion, a Kashmiri youth would be going to Gorakpur in Vaishali express. He organized a team and they all reached New Delhi Railway station. ACP PP

Singh also joined the police party at New Delhi Railway Station. They all reached Platform no. 4 of New Delhi Railway Station and held a *'nakabandi'*. At about 7.30 PM at the pointing out of the informer, A3 and A 4 were apprehended; both were interrogated by Insp. Paras Nath and were arrested. Their personal search memos Ex. PW16/A and 16/B were prepared. The witness was declared hostile, because he did not testify about many particulars. In the cross examination by the prosecution, he said that he had witnessed the arrest of A-6 and A-7 and witnessed the personal search memos (in relation to them) Ex. PW-16/D and PW-16-E; he also claimed – in cross examination by prosecution – to have witnessed the recovery of a Re. 2/- note (seized by Memo Ex. PW-16/F). Similarly, he agreed to the prosecution's suggestion about having witnessed the disclosure statements of A-5 Latif (Ex. PW-16/H) and A-6 Killey (Ex. PW-16/I). He stated further that A-9 Javed and A-6 were arrested in his presence. He agreed with the suggestion that Latif and Killey were arrested in his presence, given by the prosecution. However, he also stated that due to passage of time, he could not identify Killey and Latif. He admitted in prosecution's cross examination that Mirza Hussain had made disclosure statement Ex. PW-16/J, and pointed out Shop No. 3/32 at Bhogal, through memo Ex. PW-16/K, and Killey pointed out to Shop No. C-1/59, Lajpat Nagar (Ex PW-16/B). The witness was cross examined about where the police party was present before moving to New Delhi Railway station, whether other passengers and members of the public were present on the railway platform, whether the entire paperwork was done on the railway station; if so how long it took to complete, etc. The witness was unaware if anyone was arrested from Gorakhpur, nor knew the name of the police station at Gorakhpur from whose jurisdiction any such

arrest took place, or even the locality from where any such arrest took place; he said it was near the Gorakhpur railway station. He said that the Manager of the hotel was joined by the IO and that an entry existed in the register. He was not aware if any departure or arrival entries existed in respect of movement, in the DD register of the local Gorakhpur police station. According to him, the Delhi police had gone to Gorakhpur in a private citizen; however no evidence was shown; it was not produced.

149. PW-39 corroborated PW-16 and deposed that he joined in the investigation on 14.6.1996 along with PW-16, other police personnel and PW-101 and went to Jama Masjid near Urdu bazaar where at about 06:20 PM, information was received that Naushad with one other boy would go to Gorakh Pur from New Delhi Railway Station by Vaishali Express and that from there they would proceed to Nepal. PW-101 organized a raiding party and informed ACP P.P. Singh on the phone. All of them reached the Railway Station; P.P. Singh also reached there. On enquiring from PW-101 they were told that Vaishali Express would leave the station at 07:45 PM from platform no.4. At 07:20 a trap was laid at platform no.4. On the pointing out of informer at about 07:35 PM, Naushad and Saba were apprehended. They were arrested and a personal search was conducted (Ex.PW-16/A and Ex.PW-16/B). Disclosure statement of A-4 was recorded (Ex.PW-16/C) in the Operation Cell. The witness signed it. The witness joined the investigation again on 18.6.1996 with PW-1.

150. The Appellant A-3 questioned his arrest, as claimed by the police and submitted that the prosecution did not prove this circumstance. In this regard it is submitted that the confessional statement A-9 as well as the statement

made during initial stages of the prosecution exhibit PW- 99 /B1 does not name or refer to A-3. Having regard to this , and the fact that PW- 13 (who is supposed to have been met and been entrusted with explosives, and who in turn disclosed about A-3 to A-9), never supported the prosecution case, the first link in the chain about A-3's involvement in itself is not proved. A-3 therefore argued that his involvement in and further role not having been proved, the prosecution was unable to establish the primary facts as to how he was one of the perpetrators of the crime. Counsel emphasized the fact that this link in the chain of circumstances alleged against A-3 was vital; having snapped it, the prosecution had been dealt with a severe blow at the initial threshold and the Trial Court fell into error in proceeding to hold as it did that he was involved in the bomb blast. It was next argued that one of the reasons for the acquittal of A-4 was based on the ground that the circumstances of his arrest were not proved. Counsel emphasized that since A-4's involvement was no different from A-3's and the circumstances of his arrest involved the same facts, the same reasoning and logic had to be applied to the latter accused i.e. A-3. In not having done so and having glossed over the fatal infirmities alleged against A-4, which were material and relevant for A-3, the Trial Court fell into error.

151. As noticed previously the circumstances of A-3's arrest were sought to be proved by the testimonies of three police witnesses i.e. PW- 16 PW- 39 and PW-101. Although PW-105 deposed about his presence in the railway station, the fact remains that none of the other three witnesses i.e. PW- 16, PW- 39 and PW- 101 mentioned about his appearance during the proceedings at all. The prosecution had alleged that soon after the bomb

blast, A-3 went missing. It was alleged that the residence of that the accused was visited pursuant to the disclosure statement and the statement recorded by PW- 13, somewhere on the 3rd- 4th June 1996. However, A-3 was not traceable. In the circumstances, the police kept vigil near his house. This is the effect and substance of the depositions of PW- 39 and PW-101. There is some other evidence by way of oral testimony of other witnesses to this effect. The circumstances of arrest of A-3 were sought to be also proved by the testimony of PW- 92 who was according to the prosecution associated during the process as well as the recovery proceedings pursuant to the disclosure statement of A-3. However, PW- 92 did not support the prosecution. A-3 on the other hand relied upon the testimony of PW- 92 that in fact on 28th of May 1996, he witnessed him (A-3) being taken away by the police. On the basis of this as well as a telegram said to have been sent by a A-3's father, to the National Human rights Commission, it was argued that the arrest in fact never took place on 14-06-996 and was a completely stage-managed affair. Counsel had underlined that being a busy public area it is inconceivable that no independent witnesses were available at the Railway station.

152. The previous discussion of the evidence, particularly with regard to the testimonies of PW- 16, PW- 39 and PW- 101 would reveal that all of them were substantially consistent with each other as regards the arrest of A-3. No doubt there are no independent witnesses in support of this circumstance. Yet, the Court cannot completely overlook the fact that in these kinds of crimes or for that matter many incidents involving serious offences often members of the public are reluctant to associate with police

proceedings either for fear of persecution or for the sheer harassment of having to attend numerous and interminable court hearings. Whatever be the circumstances, Courts have on several occasions lamented this phenomenon and at the same time stated that unavailability of public witnesses should not *ipso facto* lead the Court to discard prosecution, or police witnesses' testimonies. The fact remains that this is a widespread and commonly occurring circumstance which would not invalidate the testimonies of the police witnesses as far as the aspect is concerned. A word here about the testimony of PW-105. The prosecution had almost closed its evidence when an application under Section 311 Cr. PC was moved almost 12 years after the incident, and the testimony of this witness was permitted to be recorded. He asserted that he was associated with the proceedings that led to the arrest of A-3. However, PW-16 did not mention about PW-105's presence. In these circumstances, there is some doubt as to whether PW-105 was present during the arrest and the immediate aftermath.

153. The argument on behalf of A-3 that A-9's confession did not mention him, though attractive, is not relevant, and is inconsequential. A-9's role appears to have been to reach Delhi via Gujarat and hand over the explosives. This seems to be the substance and tenor of his statement made to the Gujarat police immediately after his arrest and in the disclosure statement. Therefore, it was not necessary for him to mention A-3 or his role. The necessary link which prosecution sought to prove between A-9 and A-3 was not knowledge about the latter, but what A-9 gave to PW- 13 who knew A-3. For inexplicable reasons, PW- 13 (who was supposed to have been given the explosives, and in turn facilitated the handing over or actually handed them over to the other accused involved in scheming and

implementing the ghastly crime) was not named as accused. PW- 13 did not support the prosecution story at all during the trial. The court therefore had to deal with this situation. It is in this context that A-3 argues that the initial link between him and the crime was to the testimony of PW- 13; since he did not support the prosecution case, the role attributed to A-3 leading to his arrest, was unbelievable. As stated earlier, attractive though this may seem, the Court cannot accept the submission. Often the prosecution acquires leads or clues that will lead to the offender. The State's inability to prove the clues or sources or even the witness's reluctance to support those factors during the trial or the prosecution's omission to cite any witness would not by itself mean that the entire circumstance has to be disbelieved. It is a fact that in the statement of A-9 made to the Gujarat police as well as in his confessional statement, there is a clear mention of Wajid (PW-13), a resident of Turkman Gate. The prosecution had recorded a statement from Wajid during the course of the investigation which mentioned A-3. PW-13 did not support this and he turned hostile during the trial. That would, in this Court's opinion, itself not give a lie to the entire circumstance leading to the possible role of A-9 which may otherwise be independently proved as also the circumstances of his arrest. In this context, it would be noteworthy to mention that Wajid is in fact a resident of Turkman Gate, and A-3 also lived in the neighborhood. Therefore, the link in the investigative chain is a matter of inference. In this connection, the Supreme Court had pertinently stated, in *Pawan Kumar v. State of Haryana* [2001 (3) SCC 628] that:

> *"Incidentally, success of the prosecution on the basis of circumstantial evidence will however depend on the availability of a complete chain of events so as not to leave any doubt for the conclusion that the act must have been done by the accused*

person. While, however, it is true that there should be no missing links, in the chain of events so far as the prosecution is concerned, but it is not that every one of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts."

154. Coming further to the arguments made on the behalf of A-3 that he was actually nabbed on 29.5.1996 and not on 14-06-1996, no doubt he relies upon the testimony of a defence witness i.e. an official summoned from the National human rights commission, who in turn deposed that a telegram was received stating that he had been nabbed and kept in illegal confinement on 28-05-1996. It is A-3's positive case that his father, in fact, had sent the telegram; he also alleged that on 29 May 1996 when the police swooped down to his premises, his wife was maltreated. During the course of the proceedings, neither the wife nor A-3's father stepped forward and supported his case. There was no testimony in this regard. The Court therefore was left with only the testimony of DW-2 who stated that a telegram was received, mentioning about the illegal arrest and detention of A-3. Now this witness brought the record and sought to prove that such a telegram in fact was on the file of the NHRC. While this objective fact cannot be ignored, at the same time, it only suggests that a telegram was sent to the National Human Rights Commission on 28.05.1996. The further fact as to who sent the telegram and whether it was in fact A-3's father has not been established. As far as the argument regarding acquittal of A-4 is concerned, the Court notices that those findings did not pertain to the arrest of the two accused from the New Delhi Railway station; on the other hand, the other incriminating circumstances alleged against A-4 could not be established by the prosecution. A Court can differentiate those accused who

are acquitted from others if the evidence and circumstances so warrant such a finding. (*Ref Gurcharan Singh and Anr. V. State of Punjab* (AIR 1956 SC 460). A-4 was consequently acquitted. Therefore, on an overall analysis of the evidence, the findings of the Trial Court regarding the arrest of A-3 are sound and are hereby affirmed.

Recoveries made at the behest of A-3 Naushad from his residence (Circumstance No. 10 – para 181 of the impugned judgment)

155. The Trial Court held that A-3's statement after arrest, i.e. Ex. PW 31/B pursuant to which he led the police team to his residence at P7, First Floor, DDA Flats, Turkman Gate, Delhi from where, he led to the recovery of two RDX bricks (Ex. PW18/64 and 65) in a green polythene bag (Ex. P17); a timer watch (Ex. P8), the iron solder (Ex. P9), a wire Ex.P10, screw driver Ex.P11, pliers Ex. P12, wire cutter Ex. P13, two araldite tubes Ex. P14, electric wire Ex. P15 and one gas cylinder had all been proved. This circumstance was discussed as circumstance number 10.

156. The witnesses who spoke about this circumstance were PW-31, PW-41 and PW-101, who were members of the raiding party. The two RDX slabs were seized pursuant to A-3 leading the police to a room on top of the premises, and pulling it; they were lying under a steel box. Other articles recovered were a timer-watch (Ex. P8), an iron solder (Ex. P9), a wire Ex.P10, screw driver Ex.P11, pliers Ex. P12, wire cutter Ex. P13, two araldite tubes Ex. P14, electric wire Ex. P15 and one gas cylinder. The witnesses mentioned that the raid took place during early hours of 15/6/1996, after A-3's disclosure statement was recorded pursuant to his arrest the previous evening. The prosecution had relied on the testimony of

PW-92, Abdul Samad, who resiled from the statement recorded during investigation. He did mention, however, that A-3 Naushad was picked up from his house on 29-05-1996. He also admitted his signatures on the recovery memo. The Trial Court held that the fact that this witness turned hostile did not in any manner dent the prosecution case, because he did admit that the police had raided A-3's premises. He, however, mentioned that the arrest took place much earlier; and denied that he was a witness to the recovery of the RDX and other articles.

157. The prosecution version about the circumstances surrounding the recovery of the RDX, in the opinion of the Court, was adequately established. The disclosure statement of A-3 mentioned that those explosives were hidden in his house; he led the police to the place, resulting in the recovery. As far as the testimony of PW-92 goes, undoubtedly he did not support the prosecution. However, he did not deny his signatures on the recovery memo; he also mentioned that A-3 was arrested by the police, but much earlier. Now, even if his testimony were unsupportive of the prosecution, yet two things were not denied by him. These, in the opinion of the Court, lend corroboration to the prosecution witnesses' deposition about the recovery of RDX slabs from A-3's premises.

***Nau**shad's stay at Gorakhpur* (Circumstance No. 13 – para 208 of the impugned judgment)

158. The prosecution had sought to prove that A-3 Naushad fled Delhi after the bombing incident, and went to Gorakhpur, where he stayed in Gupta Guest house. To prove this circumstance, reliance was placed on the reservation chart, Ex. PW-40/C and the entries in the hotel register, which

were sought to be proved by PW-82 and PW-83.

159. PW-40, a police constable deposed to having gone to Gorakhpur on 18.6.1996 with ASI Inder Pal where he obtained a photocopy of the Railway Reservation Chart for 27.5.1996 on Shaheed Express, (Ex. PW-40/A) which was seized by recovery memo Ex. PW-40/B. This showed that Mohd. Naushad had a reservation from Gorakhpur to New Delhi at waiting list RAC-12. The witness recorded the statement of the person from whom he had got the photocopy (Mr Chakarborty). He then went to Gupta Hotel from where he obtained a photocopy of the visitors book (Ex. Pw-40/C which was seized by memo (Ex. PW-40/D) which had the details of Mohd. Naushad. He went back to Gorakhpur on 29.6 1996 with Constable Surinder and seized one original visitor's book (Ex. PW-40/1, through recovery memo Ex PW-40/E) from Hotel Gupta (where A3 had stayed) and an original visitor's book from Hotel Buddha (where A5 and A6 had allegedly stayed). He recorded the statements of witnesses from where the visitors' registers had been seized. He conceded to not having any record of investigations being handed over to him and he could not member if the fact Naushad's train reservation was recorded in any document. He said that his statement regarding his investigation in Gorakhpur had not been recorded. He stated that he had obtained only the photocopy of the reservation chart and the witness statement to this effect only stated that that witness had handed over the photocopy to him. He stated that he had not obtained the reservation requisition slip. He said that he had not recorded any reason for not obtaining the original visitor's book from the hotel at the first instance. He says that he did not try to verify the handwriting of the accused at

Gorakhpur; He could not recall the DD of his arrival in Delhi following his trip to Gorakhpur. PW-66 Constable Surinder joined PW-40 on 29.6.1996 in the investigation in Gorakhpur, when they seized the original register which contained Mohd. Naushad's name at SI. No. 1283, which contained his name and address, vide seizure memo Ex. PW-66/A. In his cross-examination he admitted that the Serial nos. were not printed, but handwritten. He stated that he could not identify the writing on the register as belonging to Naushad since he was not personally acquainted with the man.

160. The testimonies of PW-82 and PW-83 were also sought to be relied on. PW-82 was the owner of Gupta Hotel and Lodge. His statement pertains to the police having seized the visitor's register in which there was an entry with Naushad's name in it. PW-83 - Vijay Kumar Gupta the hotel manager of Gupta Hotel, stated that on 27.5.1996 Mohd. Naushad had stayed in the hotel and had made an entry in the Register (SI No. 1285) in his own handwriting. He said that the Police seized the register on 29.6.1996, and that his signature was on the relevant recovery memo (Ex. PW-66/A). The Trial Court held that there was no meaningful cross examination of these last two witnesses, and that they had established that Naushad had in fact stayed in the hotel, on 28th May, 1996. The Trial Court, however, did not attach much credence to the alleged handwriting of Naushad on the hotel register, holding that the sample handwritings were not obtained in accordance with established procedure.

161. The interesting feature of this circumstance is that the prosecution did not offer much less prove any departure and arrival memos for investigating

officers. Despite the fact that over the course of the investigation, the police claimed to have travelled to different parts of the country frequently, in no instance, have records of these been produced as evidence to establish the veracity of their claims. Even in the present circumstance, PW-40 SI Baljit Singh had visited Gorakhpur twice, and PW-66 Const. Surinder traveled there once, they were unable to 'recall' the relevant DD entries recording their movements.

162. The Trial Court has noted that there were irregularities in obtaining the handwriting samples from A3. Neither was permission sought from the concerned Metropolitan Magistrate to obtain the sample, nor was the sample obtained in the presence of a magistrate, or any public witness. Even if there had been no such irregularities, the expert witness PW-94 was unable to fix the authorship on the basis of comparison between the questioned and test handwritings. This can be gathered from a reading of the opinion, which reads as follows:

> *"...11. The red enclosed writings marked Q18 and Q18/1 when compared with the blue enclosed writings marked S17 to S31 & S17/A to S31/1 similarities are found in formation of letter 'D' 'O' 'N', & 'A' etc. But all the significant features as occurring in the questioned hand writings could not be accounted for from the specimen writings supplied for the purpose of comparison and are highly formal & conscious in their execution. As such it has not been possible to fix the authorship of the red enclosed writings stamped & marked Q18 and Q18/1 in comparison with the blue enclosed writings similarly stamped and marked S17 to S31 & S17/A to S31/1 in the absence of the standard material asked for."*

There is, therefore, no acceptable, much less conclusive, evidence that links the handwriting in the Hotel Register with that of A3.

163. As far as the railway Reservation Chart (Ex. PW40/A) is concerned, the Trial Court held as follows:

> *"216. A 3 has not disputed his name appearing at Serial No.7 in Reservation chart Ex. PW 40/A. No suggestion was put to PW40 SI Baljeet Singh that A3 had not travelled by Shaheed Express on 27/5/1996 from Gorakhpur to Delhi. Genuiness of the chart Ex. PW 40/A was not challenged."*

164. This Court notices that the chart was not proved by any public witness. The railway official from whom the Railway Reservation Chart was taken, (Shri Chakravarthy) was not produced as a witness; even the original chart, or its authenticated or certified copy was not produced; what was placed on record is a photocopy. It would be unsafe to assume that A-3 had in fact undertaken the journey, as alleged by the prosecution. So the railway reservation chart cannot be relied on, since this person has not proved it.

165. In order to reach the conclusion that the accused had in fact stayed in Gorakhpur, the Trial Court relied on the statements of public witnesses PW-82 and 83. PW-82's statement has been believed despite the fact that this witness's statement pertains only to him having been a witness to the seizure of a photocopy of the visitor's book of his hotel, and his statement, as well as the statement of police witnesses PW-40 and 66 seem to have been accepted at face value. The reason for this conclusion is that the only substantial physical evidence recovered from Gorakhpur is the visitor's book, with A3's name and address on it. The handwriting analysis of the sample from A-3 failed to establish Naushad as the author, and therefore, the physical evidence does not support the guilt of that accused. PW-83 Vijay Kumar Gupta, a manager at the hotel says that on 27.5.1996 Mohd. Naushad

had stayed in the hotel and had made an entry in the Register (SI No. 1285) in his own handwriting. However, before this witness can be considered an eyewitness to the stay of A3 in Gorakhpur, it must be kept in mind that despite him having said that he had seen A3 in the hotel on 27.5.1996, he was not, at any point, shown the accused in order to verify his identity, during the trial. He did not identify A-3.

166. The Trial Court however, took the same line here as in the case of PW-40 and PW-66:

> *"Again nothing was suggested to this witness in the cross examination, that A3 had not stayed at Gupta Hotel. A3 did not deny that the writing in the register was not in his hand."*

On the basis of the accused's silence at the time of cross examination, the Trial Court seems to have inferred his guilt. This is a flawed approach, because the question of accused's silence gaining significance would only arise if the witness who saw them in the hotel, or saw them travel on the train, or some other unimpeachable material, apart from the unverified photocopy of a railway reservation chart, had been produced. It also ignores the failure of the prosecution to match the handwriting of A-3 with the handwriting on the hotel register.

167. Likewise, the Court notices a flawed approach in the presumption of guilt, on account of the assumed presence of the accused at Gorakhpur.

> "*Again stay of A3 at Gupta Hotel far away from Delhi on 27/5/1996 without any apparent reason substantiates the version of the prosecution case."*

168. This is clearly in violation of the principle that the burden of proof is

on the prosecution and that it is not for the accused to prove his innocence but for the prosecution to prove his guilt. This Court recollects the caution sounded by the Supreme Court in *Tanviben Pankajkumar Divetia v State of Gujarat* 1997(7) SCC 156 that:

> *"The principle for basing a conviction on the basis of circumstantial evidences has been indicated in a number of decisions of this Court and the law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. This Court was clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held that the Court has to be watchful and avoid the danger of allowing the suspicion to make the place of legal proof for some times, unconsciously it may happen to be a short step between moral certainty and legal proof. It has been indicated by this Court that there is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions. (Jaharlal Das Vs. State of Orissa 1991 (3) SCC 27).*
>
> *52. We may indicate here that more the suspicious circumstances, more care and caution are required to be taken otherwise the suspicious circumstances may unwittingly enter the adjudicating thought process of the Court even though the*

suspicious circumstances had not been clearly established by clinching and reliable evidences."

169. Only when the relevant incriminating facts or circumstances have been proved, does the accused owe any explanation, under Section 313, to the Court. Till then, he has the right to remain silent; his omission to cross-examine, when the prosecution is unable to prove a fact, can under no circumstance, be an adverse factor, leading the court to infer proof of facts, as has happened in this case. As a result of the above discussion, it is held that the prosecution was unable to establish that A-3 Naushad had gone to Gorakhpur, and stayed in Gupta hotel, on 28th May, 1996.

Purchase of gas cylinder by A-3 and A-5- Circumstance No. 30 (para 330 of the impugned judgment)

170. The prosecution had alleged that on 19-06-1996, A-3 and A-5 led the police party to a shop M/s. Unique Agencies at 2610, Churiwalan, Delhi from where they had purchased a gas cylinder. This was sought to be proved by PW-31 and PW-36, who both deposed that they went with the accused, who took them to that shop, where the shopkeeper identified them, and a pointing out memo Ex. PW 31/M was prepared, which contained his signatures. The Trial Court first held that the accused did not challenge the two police witnesses' testimony, which was an adverse circumstance against them. It thereafter discussed the evidence of the shopkeeper, PW-54, and concluded that the circumstance had been proved.

"334 Prosecution has further examined PW54 Mehmood Kamal as a prosecution witness. This witness was also joined in the investigation on 19/6/1996. In his deposition before the court, the witness admitted that he was running gas agency

under the name of M/s. Unique Agencies at 2610, Churiwalan, Delhi. He used to sell gas cylinders, other home appliances and burners etc., in 1996. The witness further supported the prosecution and deposed that in May, 1996 two persons had come at his shop for purchasing a gas cylinder. The gas cylinder was not available with him on that day. He asked the said two persons to deposit the price of the gas cylinder and to come on the next day to collect the same. Those two persons deposited with him Rs.290/and left on that day. Next date again they came at his shop and he delivered them one empty gas cylinder.

335. This witness further substantiated the police version that on 19/6/1996 some police personnel came at his office and took him at their office at Lodhi Colony. The witness however failed to support the prosecution regarding identification of two persons who had come at his shop and who had purchased the gas cylinders. The witness was got declared hostile by ld. Addl PP for the State and was cross examined.

336. In the cross examination, the witness admitted that his statement was recorded by the police. He further admitted that his signatures appeared on the pointing out memo Ex. PW 31/M at point 'B'. The witness however added that this memo was an already written document. The witness admitted that he had told the names of the said two persons to the police as Mohd. Naushad (A3) and Mirza Nissar Hussain @ Naza (A5). He further disclosed in his deposition that on that day (date of his examination before the court) he remembered only the name of Mohd. Naushad (A3).

337. This witness was not cross examined by the ld. defence counsel. So the facts on which the case of the prosecution was supported by this witness have remained unrebutted. The presence of this witness running his shop under the name and style of M/s. Unique Agencies was not denied. No suggestion was put to this witness in the cross examination that both these accused persons had not led the police party to his shop. Names of both these accused persons finds mention in the pointing out memo / identification memo Ex. PW31/M which contains the

signature of this witness. This witness did not allege if he had put his signature under any pressure by the police on the memo Ex.PW 31/M. Names of both these accused persons were disclosed by the police to this witness on 19/6/1996. Had these accused persons not taken the police to the shop of PW54 Mehmood Kamal, the police must not have come to know about the names of these two persons as mentioned in the memo Ex. PW 31/M. The name and address of this witness was not known to the police prior to the disclosure statements of these accused persons. The police discovered the factum of this witness running gas agency in the name of M/s. Unique Agencies at 2610, Churiwalan only in pursuance of the disclosure statements made by these accused persons. It is true that this witness opted not to support the prosecution on material circumstance to have purchased two cylinders from his shop by A3 and A5 in May, 1996. It, however, stands established that both A3 and A5 in pursuance of their disclosure statements led the police team at the shop of PW 54 Mehmood Kamal.

338. This circumstance also points an accusing finger against A3 and A5 for purchasing gas cylinders from his shop in the absence of any specific purpose. A3 & A5 did not offer any explanation for visiting the shop of PW Mehmood Kamal for purchasing gas cylinder. They did not justify purchase of any such cylinder for any particular purpose. They did not claim their presence on any other place on the day of visit to PW54 Mehmood Kamal."

The Trial Court later concluded that:

"537. The discovery of shop of PW54 Mehmood Kamal, the place from where A3 and A5 had purchased gas cylinder is relevant u/s 27 Indian Evidence Act. PW54 Mehmood Kamal did not support the prosecution regarding identity of A3 and A5. However, this fact was established by PW31 Insp. Surinder and PW39 Insp. Hari Ram Malik and PW36 Insp. Rajeshwar that it were both A3 and A5 who had taken them to the shop of PW 54 Mehmood Kamal. PW54 Mehmood Kamal in the cross

examination by the ld. Addl PP for the State however admitted that police had recorded his statement and pointing out memo Ex. PW 31/M contained his signature. He further admitted that he had told the names of the said two persons to the police as A3 and A5. On the day of deposition, he further testified that he remembered only the name of A5. This portion of the disclosure statement of A3 corroborates the version given by the police witnesses regarding identification of his shop by A3 and A5. In statement u/s 313 Cr.P.C A3 and A5 did not explain this incriminating circumstance against them as to why and for what purpose they had purchased gas cylinders from PW54 Mehmood Kamal."

171. A plain analysis of the above discussion of evidence would show that PW-54 was unable to identify the accused; he was cross examined by the prosecution. In the cross examination, this witness denied the facts put to him:

"It is wrong to suggest that the said two persons had led the police team to my shop on 19/6/1996 and had pointed out my shop as being the place wherefrom they had purchased two gas cylinders. I also did not make any such statement to the police. Confronted with point B to B of Ex. PW-54/A….It is correct that my signatures appear on pointing out memo Ex. PW-31/M at Point B-however this was already written document and was not read over to me when I signed it. <u>It is correct that I had been told the names of the two persons by the police as being Mohd. Naushad and Mirza Nissar Hussain @ Naza….It is incorrect to say that accused Naushad (ld APP points towards accused Naushad) and accused Mirza Nissar Hussain @ Naza (shown to the witness by ld. APP) are the said two persons who had come to my shop on 13-05-1996 and were delivered gas cylinders on 14/5/1996.."</u>

172. It can be seen from the above extract of PW-54's testimony that the

witness not only failed to identify the accused, he refused that they had gone to his shop. This was his consistent story, both in examination in chief, as well as cross examination by the prosecution. In these circumstances, the Trial Court's inferring that the accused had, in fact, gone to his shop, along with the police on 19-6-1996, and even on 13-5-1996 for purchasing the gas cylinders is unsupportable. Like in the case of the stay of A-3 at Gorakhpur, the Trial Court imposed a reverse burden of proof, and drew adverse inference against the accused, for omission to cross examine PW-31, who merely stated that they had led the police party to the shop of PW-54, from where they had purchased gas cylinders. This is evident from the following excerpt of the Trial Court's judgment:

> *"Pointing out memo cum identification memo was prepared in that regard. This statement of the witness was not challenged in the cross examination. No suggestion was put to this witness in the cross examination that both these accused persons had not led the police party at the shop of M/s. Unique Agencies."*

173. An interesting fact is that PW-54 was not shown the gas cylinder which was recovered from A-3 Naushad's premises, pursuant to his disclosure statement. Though a fairly commonplace article, the prosecution was in a position to put this article for identification during trial; it deliberately omitted to do so; not even a TIP was held in this regard. Taking into consideration all the facts and circumstances, it is held that the Trial Court fell into error in holding that the pointing out of M/s Unique Agencies, from where two gas cylinders were supposedly bought by A-3 and A-5, were proved. The Court also fell into error in completely ignoring the contradictory statement of PW-54, who did not, during the trial, at any stage, identify the accused. The evidence here was akin to those circumstances

which the Trial Court consciously rejected, whenever the prosecution based its case, solely on the testimony of police witnesses. For these reasons, it is held that Circumstance No. 30 alleged against A-3 and A-5 was not proved.

Pointing out of Shop from where soldering was made (Circumstance No. 28 para 309 of the impugned judgment)

174. PW-31 deposed that Naushad and Killey pointed out to Vijay Electronics on 19.06.1996 as the place from where they got the wires soldered to the battery. With respect to Imperial Gramaphone Company he said that the accused pointed out to this shop as the place from where the Jayco wall clock was purchased. PW-39 Inspector Hari Ram Malik corroborated PW-31 to say that they pointed out to Imperial Gramaphone Company, where they had purchased the soldering iron and that a pointing out memo was prepared and the shop owner signed on the same. PW-58 Jitender Pal Singh, the owner of the electronics store Imperial Sound and Service deposed that on 19.6.1996, the police went to his shop along with two people and told him that one soldering iron and solder had been purchased by the two people who had come with them. He said that he could remember these two people who had purchased the same from him and had made a statement to this effect to the police. He said the items were sold for Rs. 35/-. He even stated that he could identify the two persons if shown to him, but when they were shown to him, in a group of ten accused persons, he said that due to the passage of time he was unable to identify them. In his cross examination by the APP, he admitted that the police had brought two persons with muffled faces and on un-muffling their faces, he had admitted to the police that they had purchased a solder iron and wire from

his shop. He said that one of these persons may have been Naushad (this after Naushad was pointed out to him by APP); he was not certain of the identity of the other person being Naza. He said that the pointing out memo had been prepared and he had signed on it at point B (Ex. PW-31/K). This memo is dated 19.06.1996, and stated that Naushad and Naza, under police custody, voluntarily with muffled faces pointed out to Imperial Sound and Service and identified Jitender Singh and stated that on 13.05.1996 they had purchased a soldering iron and wire from that shop and that they had used the solder for making the bomb.

175. The Trial Court held that this circumstance was proved, in Paras 343-349. The omission to cross examine PW-31 and 39 was adversely commented in the findings. Regarding testimony of PW-58, it was held that:

> *"346... Regarding identification, the witness stated that since it was matter of 8/9 years back, he was not in a position to say whether those two persons brought by the police at his shop were amongst the accused persons present before the court.*
>
> *347. This witness was cross examined by the ld. Addl PP for State after declaring him hostile. In his cross examination by the ld.Addl PP, the witness admitted that the police had recorded his statement. He further admitted that in his statement, he had stated that the two persons whose names were disclosed before him by the police as A3 and A5 had accompanied the police and had pointed out his shop as the place from where they had purchased the soldering iron and solder on 13/5/1996. The witness further admitted that the said two persons had come with muffled faces and they were seen by him when their faces were unmuffled in his presence by the police. He further admitted that he had told the police that the said two persons had come at his shop and purchased a soldering iron and solder wire from his shop. The witness further stated that A3 present before the court today might be*

one of the two persons. However he could not say anything about the other accused A5 as having come to the shop for the above said purchase. The witness further admitted that the pointing out memo Ex. PW 31/K was prepared on which he signed at point 'B'. The witness stated that he could identify the soldering iron purchased from his shop if shown to him. The witness identified the soldering iron Ex. Z1after it was shown to him before the court.

********** **********

349. Scanning the over all testimony of this witness reveals that soldering iron Ex. Z1 recovered by the police in this case from the residence of A3 was identified by this witness to be the same which was purchased from his shop for a sum of Rs. 35/- There is no denial that this independent public witness was not running his electronics spare parts shop at stall no. 8A in the name and style of Imperial Sound and Service. This witness categorically asserted that on 19/6/1996 the police had brought two persons in muffled faces at his shop and their names were asserted / disclosed to him as A3 and A5. Both these accused persons admitted about the purchase of soldering iron and solder from his shop on 13/5/1996. Statement of the witness is also categorical that both these accused persons were brought by the police in muffled faces at his shop in a police vehicle. Their faces were unmuffled and the accused persons were shown to the witness. He had informed the police that the said two persons brought at his shop on19/6/1996 had purchased the soldering iron and solder from his shop. The names of these two accused persons find mention in the pointing out / identification memo Ex. PW 31/K. This witness has categorically identified his signatures on Ex. PW 31/K which has not been challenged by the accused persons. No suggestion was put to this witness in the cross examination that both these accused persons had not come at his shop on 13/5/1996 and had not purchased any soldering iron and solder from his shop for Rs. 35/.No motive was imputed to this witness to falsely plead that both these accused persons whose names were disclosed as A3 and A5 had accompanied the police at his shop.

> *350. Accused persons did not explain how and for what purpose they happened to purchase soldering iron and solder from the shop of this witness. There is no denial by the accused persons that soldering iron Ex. Z1 was not recovered from their possession or that it was never purchased from PW 58 Jitender Pal Singh.*
>
> *351. Police was not aware about the shop of the witness prior to the two accused persons leading the police party at his shop. Only after both these accused persons led the police party to the shop of this witness, the police came to know that they had purchased the soldering iron and solder from his shop. The existence of the shop at that specific place has not been controverted by the accused persons. Again purchase of soldering iron and solder wire on 13/5/1996 from the shop of PW58 Jitender Pal Singh is another incriminating piece of circumstance to point an accusing finger against A3 and A5.*

176. The Trial Court's findings depended largely on the failure to cross examine the witness, and what was elicited from him during the cross examination by the prosecution. The Court did not focus on the inability of the witness to identify either accused. There is also no material on record to suggest that the soldering iron was of a distinctive nature or make, as to be dubbed an uncommon or out of the ordinary article, which the witness could have identified, especially since he dealt with and sold such articles in a routine manner. Therefore, the findings of the Trial Court in this regard, that the circumstance was proved by the prosecution, cannot be sustained; the evidence in any case does not measure up to the requirement of standard of proof, beyond reasonable doubt. This circumstance therefore, was not proved against the accused, and the Trial Court's reasoning and findings are, therefore, erroneous on this aspect.

Recovery of key

177. The recovery of a key was discussed as Circumstance No. 26 in paras 291-295 of the impugned judgment. The prosecution had alleged that on 18.06.1996, A-3, A-5 and A-6 led the police party to a place behind the Nizamuddin ITI Bus Stand from where at Arab-ki-Sarai, a key was recovered. The prosecution alleged that the key had been prepared at Jama Masjid and was seized under Memo, Ex.31/F. The key was alleged to be a duplicate one in respect of the stolen Maruti Car, placed on record as Ex.P7. The prosecution had entirely relied on the police testimonies of PWs-31,39 and 101 for this purpose.

178. The Trial Court had rejected this circumstance, i.e. Recovery of duplicate key, stating as follows:

> *"293. On screening the testimony of prosecution witnesses on this aspect, again, I am of the view that the prosecution has failed to prove if duplicate key, Ex.P-7 was got recovered by the accused persons in pursuance of their disclosure statement or that it was the key which was used at the time of commission of theft of Maruti Car belonging to PW-8 – Atul Nath…….*
>
> *294. Moreover, as per prosecution, this duplicate key was got prepared from PW-64, Mohd. Rizwan at Jama Masjid. PW-64, Mohd. Rizwan appeared in the witness box. He turned hostile regarding preparation of duplicate key. The key (Ex.P7) was not shown to PW-64 to prove that it was the same key which was got prepared by the accused persons from him."*

179. In the light of the above reasoning, the Trial Court rejected this circumstance and also added that the absence of any public witness to support the recovery did not lent credence to the prosecution version in this regard. However, while summing-up, in para 643, the Trial Court held that,

> *"643. On analysis of circumstances discussed at S. No. 9,*

> *10, 23, 26, 30, 31, 32 and 46(C), and in the absence of evidence to the contrary, the prosecution has proved beyond reasonable doubt that A-3 along with his associates not only hatched criminal conspiracy to cause bomb blast at Lajpat Nagar Market, Delhi but also actively participated in procuring various articles to execute the plan."*

180. This Court is of the opinion that *ex-facie,* the approach of the Trial Court pertaining to Circumstance No. 26 in holding in one part of the judgment that the prosecution had not proved its allegation, and concluding to the contrary while summing-up the incriminating evidence against the accused, is unsupportable. This discloses a glaring error on the face of the record. The Trial Court's reasoning, therefore, in para 643, to the extent that it took into consideration a circumstance which the impugned judgment itself held not to have been proved and accordingly held to be erroneous.

***Recovery of Rs.1 lac - Mangal Chand (Circumstance No. 17 – para 243 of the impugned judgment)*:**

181. This circumstance was sought to be proved through the testimony of PW-35. The prosecution's version here was that after the arrest of A-3 and A-4, on 16.06.1996, A-7 was arrested from Gorakhpur, together with A-6. A two-rupee note was recovered from the possession of A-7. It was alleged that on 17.06.1996, A-4 led the police party to the house of Mangal Chand at BJ-24, Shalimar Bagh and on the production of a two rupee currency note, cash of Rs.1 lac was obtained from him. The cash was seized. The two rupee currency note had been seized earlier. The recovery of Rupees one lac in cash from Mangal Chand, which according to the prosecution, was obtained after showing a two rupee currency note to Mangal Chand, was part of the sequence which started with the arrest of A-4, who pointed-out A-7; two

rupee currency note was seized from A-7 and A-4 led the police party to Shalimar Bagh where the currency was recovered. The Trial Court concluded in para 542 that this circumstance had to be held against A-3 for the following reasons:

> *"542. Prosecution has proved recovery of Rs. one lakh by A4 from Mangal Dass. This money was meant for A3.Only A3 was beneficiary as A4 had accompanied him on 14/6/1996 to go to Gorakhpur where both were apprehended. A3 did not explain presence of A4 with him. He did not assert if money collected by A4 was not meant for him. This circumstance also is at par with the contents of disclosure statement made by him."*

182. Earlier, the Trial Court noticed the prosecution case in this regard as follows:

> *"243. Case of the prosecution is that A4 led the police party at BJ24, Shalimar Bagh and from there obtained Rs. 1 lac on the strength of two rupee currency note from Mangal Chand."*

183. In para 243, the Trial Court discussed the sequence of events; the police party had arranged to go to Shalimar Bagh; at that stage, PW-35 was joined in the proceedings. According to his deposition, SI Sanjay Kumar, A-4 as well as another police officer reached the premises at Shalimar Bagh. He, A-4 and SI Sanjay Kumar went inside the home. A-4 gave two rupee currency note to Mangal Chand, who verified it and gave Rupees one lac currency note in another bag.

184. At that stage, other police staff reached the premises and seized the two rupee currency note and the one lac rupee currency which was kept under seal "RPG". The seizure memos were Ex.PW-17A and 17C. The currency notes were produced before the Court. The entire discussion of the

evidence in paras 245 to 250 mentions only about the currency note being recovered at the instance of A-4. The prosecution nowhere mentioned that A-3 was taken with the police party and either identified by Mangal Chand or PW-35 did not produce any identification in the form of an Employment or Voter Identification Card. In the cross-examination, what emerged was that summons was sent by the Court to his Sonepat, Haryana address. The appellant had urged that there were no details of that address in the list of witnesses filed together with the charge-sheet. The witness, in the course of his statement submitted that he never mentioned he had office at Shalimar Bagh nor resided there. His testimony, in this regard, can only be seen by the Court as regards the alleged handing-over of the seal to him. PW-17, SI Sanjay supported the recovery. Furthermore, and most importantly, the prosecution made no attempt to produce Mangal Chand from whom the amount – alleged to be payable and in fact held to be payable to A-3, was recovered. If so, Mangal Chand's role was, at least, as one of a facilitator; and at no stage did the prosecution attempt to explain why he was not interrogated or taken into custody. His absence during the proceedings or even the recording of this statement is a vital omission. All these have to be viewed in the backdrop of the somewhat startling conclusion drawn by the Trial Court in para 251 that the recovery of Rupees one lac was an incriminating circumstance against A-3, Naushad *"despite the fact that it was at the instance of A-4 and on the showing of two rupee currency note allegedly recovered from A-7."*

185. The following conclusion was drawn by the Trial Court on the basis of such material:

> *"251. From the testimonies of the prosecution witnesses referred above it stands established that A4 in pursuance of his disclosure statement obtained Rs. 1 lac from Mangal Chand residing at BJ24, Shalimar Bagh on the strength of two rupee currency note shown to him. The police was not aware about all these facts prior to A4 leading the police team at that specific place. A4 has failed to explain as to how and under what circumstances, he was to get Rs. 1 lac from Mangal Chand. He also failed to explain as to for what purpose, he had collected the heavy amount from Mangal Chand. Memo Ex. PW 17/C contains signature of Mangal Chand which shows that Mangal Chand was residing at the given address. Obtaining of Rs. 1 lac by A4 from Mangal Chand substantiates the story presented by the prosecution that Rs. 1 lac collected from Mangal Chand were meant to be received by A3 for his role in the incident."*

186. The conclusion of the Trial Court in the above regard is not only on the basis of any evidence but it appears to be entirely on hearsay. This can be clearly seen from the discussion with regard to the role of A-7, appearing at paras 596-602 of the impugned judgment. In para 597 it was in fact stated that:

> *"...A6 and A7 were arrested from Gorakhpur when allegedly they both had come from Nepal to deliver two rupee currency note Ex. PX to A4 to enable him to obtain Rs. 1 lakh from Mangal Dass to be given to A3. This occurrence took place on 16/6/1996 when conspiracy to cause bomb blast had already came to an end. Prior to 21/5/1996 no active participation of A7 in the incident has been brought on record. There was no occasion for both A6 and A7 to travel to Gorakhpur from Nepal only for handing over a two rupee currency note to A4. It could have been given even by one person. This version of the prosecution has not been believed in the circumstances referred above. Even if it is assumed that A7 had delivered two rupee currency note to A4 on 16/6/1996, it does not establish him to be a member of conspiracy to cause bomb blast on 21/5/1996 at*

Delhi which was no more in existence. It is not the case of the prosecution that A7 was beneficiary in whatsoever manner in collection of Rs. 1 lakh by A4 from Mangal Dass at Shalimar Bagh."

187. The testimony of PW-35 nowhere reveals that at any stage was Mangal Chand questioned as to whom the money was meant to be given to. Even if he were to have implicated A-3, without the primary evidence of Mangal Chand, PW-35 could not have proved that fact. All that could have been concluded was that at the instance of A-4, two rupee currency note was shown to Mangal Chand, who handed-over Rupees one lac. This two rupee currency note, according to the prosecution, was recovered from A-7. This fact was disbelieved by the Trial Court, in paras 596 to 602 of the impugned judgment. The Trial Court also held that the post-event recovery of something not connected with A-7 could not be attributed to A-7 or held to be incriminating as against him. Similarly, it also concluded in respect of A-4 that the conclusion of the amount could not be held as incriminating against that accused (A-4), in the following manner:

"551. Since Mangal Dass was not directly known to A4, collection of Rs. 1 lakh by him only on the strength of two rupee currency note is not a factor to prove his involvement in the incident. Anybody having a currency note of Re. two could have got the cash from PW Mangal Dass. In the absence of any material, there was no basis for the police to arrest A4 in this incident. Mere apprehension of A4 with A3 to whom he knew earlier is not enough to prove his complicity in the incident. It is on record that A4 is the brother of A5. On that account no fault can be found with A4. For the role played by A5,A4 can't be roped in this case. There is nothing on record to show if A4 had remained in touch with his brother A5. Nothing has come on record to show if A4 was having any nexus / connection with JKIF or had participated in any of its activities. It is also not

alleged if A4 was involved in such incident earlier or he was arrested or apprehended in any such other similar cases."

188. There is absolutely no discussion as to how the recovery, at the instance of A-4, of Rupees one lac, from one Mangal Chand, after showing a two rupee currency note (recovered from A-7), especially when A-4 and A-7 were acquitted by the Trial Court could have been held as an incriminating circumstance proved beyond reasonable doubt against A-3. In this regard, with respect we hold that the Trial Court completely overlooked the material evidence and based its findings entirely on conjectures.

(b) Circumstances held to have been proved against A-5

189. The prosecution had alleged 17 circumstances – 15 against A-5 Naza.

These were:

(1) Arrest of the accused (Circumstance No.14 – para 217 of the impugned judgment)

(2) Pointing-out of Shop from where Araldite Tube was purchased (Circumstance No. 19 – para 257 of the impugned judgment).

(3) Pointing-out of Shop from where two-metre wire was purchased (Circumstance No.20– para 262 of the impugned judgment)

(4) Pointing-out of place in Zakir Nagar where Maruti car was parked (Circumstance No. 22 – para 277 of the impugned judgment)

(5) Pointing-out of the shop – Dulhan Dupatta (Circumstance No. 23– para 279 of the impugned judgment)

(6) Recovery of rear and front number plates of the stolen car (Circumstance No. 25– para 286 of the impugned judgment)

(7) Pointing-out of the place from where the number plates were made (Circumstance No.18 – para 252 of the impugned judgment)

(8) Pointing-out of the place of incident (Circumstance No. 26 para 296 of the impugned judgment)

(9) Pointing-out of Shop from where 9 volt battery was purchased (Circumstance No. 27 – para 299 of the impugned judgment)

(10) Pointing-out of Shop from where soldering of battery was done (Circumstance No.28 – para 309 of the impugned judgment)

(11) Pointing-out of Shop from where clock was purchased (Circumstance No. 29 – para 317 of the impugned judgment)

(12) Pointing-out of place from where gas cylinder was purchased (Circumstance No. 30 – para 330 of the impugned judgment)

(13) Pointing-out of place from where duplicate key was prepared (Circumstance No. 31– para 339 of the impugned judgment)

(14) Pointing-out of Shop from where soldering iron was purchased (Circumstance No. 32 – para 343 of the impugned judgment)

(15) Travel from Kathmandu to Delhi (Circumstance No. 36 – para 379 of the impugned judgment)

(16) Recovery from the house at Srinagar (Circumstance No. 5 – para 114 of the impugned judgment)

(17) Phone call by the appellant to A-7 (Circumstance No. 44– para 456 of the impugned judgment)

190. The Trial Court held the following circumstance not to have been proved:

(1) A-5's arrest (Circumstance No.14 – para 217 of the impugned judgment)

(2) Pointing-out of Shop from where Araldite Tube was purchased (Circumstance No. 19 – para 257 of the impugned judgment).

(3) Pointing-out of Shop from where two-metre wire was purchased (Circumstance No.20– para 262 of the impugned judgment)

(4) Pointing-out of place in Zakir Nagar where Maruti car was parked (Circumstance No. 22 – para 277 of the impugned judgment)

(5) Recovery of rear and front number plates of the stolen car (Circumstance No. 25 – para 286 of the impugned judgment)

(6) Pointing-out of the place of incident (Circumstance No. 26 – para 296 of the impugned judgment)

(7) Recovery from the house at Srinagar (Circumstance No. 5 – para 114 of the impugned judgment)

(8) telephone call by the appellant to A-7 (Circumstance No. 44– para 456 of the impugned judgment).

191. As a consequence of this discussion, it was held by the Trial Court that the circumstances pertaining to pointing-out of *Dulhan Dupatta*

(Circumstance No. 23– para 279 of the impugned judgment); pointing-out of shop from where 9 volt battery was purchased (Circumstance No. 27 – para 299 of the impugned judgment); pointing-out of the place from where soldering of battery was done (Circumstance No.28 – para 309 of the impugned judgment); shop from where clock was purchased (Circumstance No. 29 – para 317 of the impugned judgment) ; pointing-out of shop from where gas cylinder was purchased (Circumstance No. 30 – para 330 of the impugned judgment); pointing-out of shop from where duplicate key was prepared (Circumstance No. 31– para 339 of the impugned judgment) ; pointing-out of shop from where soldering iron was purchased (Circumstance No. 32 – para 343 of the impugned judgment), and travel from Kathmandu (Circumstance No. 36 – para 379 of the impugned judgment) were proved.

192. In the earlier portion of the judgment, while dealing with the circumstances and with regard to the detailed discussion in respect of A-3 Naushad, several common circumstances, i.e. pointing out of Dulhan Dupatta (Circumstance No. 23); pointing out and recovery of front and rear number plates of the stolen Maruti car (No. 24); Recovery of key (Circumstance No.25); Pointing out of place from where gas cylinder was purchased (No. 30); Pointing out of place from where duplicate key was purchased (No. 31); Pointing out of place from where solder iron was purchased (No. 32) were held to have been not proved. The same logic and reasoning would apply in the case of this accused also. The circumstances which survive consideration in the case of A-5 are pointing out of the place from where battery was purchased (Circumstance No. 27 – para 299 of the

impugned judgment); pointing-out of the place from where soldering of battery was done (Circumstance No.28 – para 309 of the impugned judgment); shop from where clock was purchased (Circumstance No. 29 – para 317 of the impugned judgment) and A-5's travel from Nepal to Delhi.

(i) Pointing out of the place from where the 9 volt battery was purchased (Circumstance No. 27)

193. This circumstance was alleged as incriminating against A-5 and A-6; the prosecution version was that these accused led the police party to PW-60. To prove this circumstance the prosecution relied upon PW-60 Rajesh Kumar. That witness stated during his examination in chief that

> *"……after pointing out towards accused Mirza Nisar Hussain submitted that he might be one of the two persons who had been brought to my shop by police and who had told the police that he had purchased the battery from my shop. I do not have even a faint idea with respect to other accused persons who had been brought by the police in my shop…"*

During his cross examination by ld. APP (after leave was granted by the Court) this witness stated that

> *"…….voluntarily; the two accused persons had been brought near my shop in a Maruti Van and the accused persons kept sitting in the same with muffled faces. From my shop I was called and made to sit in the van itself and thereafter the faces of the two accused persons were un-muffled and I was asked whether the said two accused persons had purchased battery from my shop and I had replied that when they were saying that they had purchased battery from my shop they may be correct but it was not possible for me to remember by face each and every customer. I however, told the police that one of those two accused persons namely Mirza Nisar Hussain @ Nasa who is present in the court might have purchased from me. It is*

wrong to suggest that I categorically identified accused Mohd. Ali Bhat @ Mohd. Killey as the only person who came at my shop with accused Mira Hussain @ Naza for purchasing battery on 21.5.1996 when police removed the muffled from his face…"

194. In the cross examination PW-60 Rajesh Kumar further stated that; *"….. after picking up from my shop the van was driven to Central Road to Masjid road, where from a man from Vijay Electrical shop was picked up and from there in the same van I was taken to one police station situated in Lodhi road area…."*

He also stated that:

"….. I have no personal knowledge if the battery purchased from me by the accused persons as used in bomb blast at any place….."

195. The police witnesses, however, sought to depose that PW-60 had identified A-5 and A-6 as those who had approached him and purchased a battery. Now, their testimonies are in direct conflict with that of PW-60; that witness could not identify any accused as the purchaser; he said in the cross examination after being declared hostile that he was not sure whether the two accused had visited his shop. The Trial Court, however, held that since the witness admitted that when the two accused persons pointed out his shop and identified him, police prepared memo Ex. PW 31/L and he signed the same at point 'B'. It was also held that:

"Overall testimony of this witness reveals that no material discrepancies have been elicited in the cross examination of this witness to discard his version given before the court. Nothing has come on record to show that this independent public witness did not run his shop under the name and style of

Ganesh Electronics at shop no. 21 Jangpura. This witness categorically testified that on 21/5/1996 two persons had purchased 9 volt battery from him for a sum of Rs. 95/-. No enmity has been imputed to this witness for falsely claiming sale of 9 volt battery from him for Rs. 95/. Again this witness is categorical that on 19/6/1996 police had brought two persons at his shop and one of them had identified his shop from where 9 volt battery was purchased. This witness pointed out towards A5 to be one of the said accused persons and did not identify the other accused who had accompanied him. This witness has no ulterior motive to falsely identify A5 to be the person who had purchased 9 volt battery from him. This witness elaborated his version and voluntarily stated that the two persons were brought in the maruti van at his shop and the said persons were in muffled faces. When the said two persons were unmuffled, he was asked whether they had purchased the battery from his shop and he replied that when the said persons were saying that they had purchased the battery from his shop, they might be correct. He further admitted that out of those two persons, A5 might had purchased the battery from him. This witness had some doubt about the exact identity of A5. However, in the subsequent cross examination, the witness cleared the doubt and asserted that he had told the police that the above named two accused persons pointed out his shop and identified him. The police prepared the memo Ex. PW 31/L and he had signed the same at point 'B' and the above named two accused persons had also signed the said memo. No suggestion has been put in the cross examination that memo Ex. PW 31/L was not prepared at his shop or that the accused persons did not sign the same. Accused persons have failed to state as to how and under what circumstances, their signatures appeared on the pointing out memo Ex. PW 31/L. These signatures of both these accused persons on the pointing out memo Ex. PW 31/L in the presence of PW60 Rajesh Kumar categorically establishes that both of them had led the police team to the shop of PW 60 Rajesh Kumar and had pointed out the shop from where they had purchased 9 volt battery. Again this fact was not in the knowledge of the police prior to the accused persons taking the

police party to the shop of PW60 Rajesh Kumar in pursuance of their disclosure statements. No explanation was offered by the accused persons as to why and for what purpose they had purchased the 9 volt battery from teh shop of PW60 Rahesh Kumar on 21/5/1996. Case of the prosecution is that this battery was used in the bomb blast. Hence this circumstance is an incriminating piece of circumstance against A5 and A6."

196. The Trial Court also relied on the testimony of the police witness, PW-39. This Court is of the opinion that the witnesses' doubt regarding A-5 and inability to identify the other accused, and his *volte face,* renders his testimony that they had led the police to his shop, shaky. Though in the examination in chief, the witness mentioned about purchase of battery from his shop by two individuals, his inability to identify either clearly, during the trial undermines the prosecution story. He had also stated that one of the buyers had a *"massa"* on his face (i.e. a scar or birthmark). The prosecution did not attempt to connect this aspect with either accused; the Trial Court also overlooked this fact. Like in the case of other circumstances, such as purchase of gas cylinder, purchase of araldite, pointing out by the shop keeper of "*Dulhan Dupatta*" etc, the primary fact is the identification of the accused concerned, as the individuals who went to the shop to buy the article, on some day prior to the incident. This was to establish a link in the chain of circumstances, which tied up to the various act preparatory to the offence itself. The absence of positive identification nevertheless led the court to hold as proved – in our view erroneously, that the accused had led them to a place which was hitherto unknown to the police, and from where the shopkeeper made some kind of identification, which was not refuted during cross examination, which in turn resulted in their involvement in the crime. The law is not concerned with proof of possibility of involvement,

which is all that the prosecution achieved through such evidence, but proof beyond reasonable doubt, i.e. such proof as would rule out all controversy or doubt that these accused did what was alleged against them, in respect of such circumstance. Reliance on the accused's signatures, on the pointing out memo, in the absence of their clear identification, in the court's opinion, could not have been resorted to, to implicate them. As a result, it is held that this circumstance was not proved, against A-5 and A-6.

(ii) Pointing-out of the place from where soldering of battery was done (Circumstance No.28)

197. The prosecution had alleged that sometime in 1996, A-5 and A-6 had visited the shop of PW-38, Vijay Kapoor, and asked that two wires be soldered to a battery. He identified A-5 positively, but was unsure about A-6. He stated that the soldering was done for Rs. 5/-. He also stated that a month later, the accused had gone to his shop, and identified it, a fact which was recorded in Ex. PW13/N. In cross examination, this witness stated that his signatures were taken on blank paper, and that the memo was written in the Lodhi Office of the police. He also admitted not remembering how many customers had visited his shop that day, and further that his employee did the soldering requested for.

198. Unlike in the case of other circumstances, the witness in this case was able to identify one of the accused (A-5) positively during examination in chief. However, his admission that the pointing out memo was prepared somewhere else, and that he signed on blank papers, was not contradicted. His further admission that he could not remember how many customers visited him the same day further weakens proof of this circumstance. The

absence of any date approximate period, further injects some vagueness into the evidence. The identification of A-5 has to be viewed in the backdrop of all these facts, which point to his unreliability, and having been tutored by the police. Here, a TIP would have been crucial, in lending assurance to the fact alleged, since the prosecution case is that this circumstance was to prove an act preparatory to the crime, and intrinsically connected with its execution. On an overall conspectus of the materials on the record, it is held that this circumstance was not proved beyond reasonable doubt, by the prosecution.

(iii) Pointing out of the shop from where a clock was purchased (Circumstance No 29).

199. The prosecution had alleged against A-5 and A-6 that they had purchased a wall clock, which was to be used for the explosion, from the shop of PW-50. To prove this, reliance was placed on the testimonies of PW-50 and PW-48. PW-48 Parmod Kumar during his examination stated that one person aged 19-20 years had visited his shop and had purchased a wall clock; he identified A-7 Latif. He was declared hostile by the prosecution; at its behest, during cross examination by the prosecutor, the witness deposed:

> *"...it is wrong to say that the said two persons were in muffled faces, when they came to the shop with the police and that their faces got unmuffled after their arrival to the shop for getting them identified from me and that I had identified the said two persons on being the same who had come to the shop on 14.5.1996 for purchasing the wall clock. I did not make any statement to \the police. It is wrong to say that I had made a statement mark PW-48/A to the police. The witness is read over mark PW-48/A which he denied having made to the police.*

"... It is wrong to say that the said three persons had come to the shop for the purchase of the wall clock."

".... It is wrong to say that the accused Mirza Nisar Hussain and Mohd. Ali Bhatt @ Mohd. Killey (accused shown to the witness by Ld. APP) were the person who led the police team to the shop. It is wrong to say that I am deliberately not identifying the accused persons out of fear or having been worn over by them and deposing falsely....."

The prosecution also relied upon PW-50 Yogesh Kumar Gupta to prove the said circumstance. PW-50 Yogesh Kumar Gupta deposed during his examination in chief that:

"... I cannot identify now whether those two boys are present in court or not as it is a matter of many; years. I only know that they were two kashmiri looking well built and well dressed boys...."

200. During the cross examination of PW-50 Yogesh Kumar Gupta by Ld. APP, it was stated by the witness that:

"... I cannot admit or deny whether accused Mirza Nisar Hussain @ Nasa and Mohd. Ali Bhatt @ Mohd. Killey (witness is shown and pointed out these two accused by Ld. APP) were the same two boys who had led police team to my shop on 19.6.1996....."

The Trial Court, after noticing that the shop owner could not identify A-5 or A-6 as the two individuals who went to his shop to purchase a wall clock, for which a receipt was issued by PW-48 (recovery Memo PW-31/G) nevertheless held that they had taken the police to his shop, where they had stated that the purchase was made:

"325. This witness has nevertheless proved that on 19/6/1996 the police had brought two persons at his shop and theyhad told

about the purchase of wall clock from his shop. This witness also proved his signatures on the recovery memo Ex PW-31/G. He has admitted his signatures on the pointing out memo ExPW 31/H. This witness further admitted that the names of those two boys who had come at his shop on 19/6/1996 were mentioned in the memo and he had signed that memo after reading the same."

Similarly, the Trial Court did not feel it strange to return a similar finding, with regard to appreciation of PW-48's evidence:

> *"329. From the above testimony of PW48 Pramod, it stands established that wall clock make Jayco was purchased from his shop on 14/5/1996. It further stands established that on 19/6/1996 two persons whose names were disclosed as A5 and A6 had led the police team to the shop of the witness and had pointed out that it was the same shop from where they had purchased the wall clock. The statement of the witness was corroborated from the documentary evidence whereby sale receipt Ex. PW 48/A was issued out of the receipt book Ex. G1 which was seized vide seizure memo Ex. PW 31/G. This testimony of this witness substantiates the version of the prosecution that on 19/6/1996 both A5 and A6 had led the police team to the shop of PW48 Pramod Kumar from where they had purchased the Jayco wall clock. The police was not aware about the factum of purchase of wall clock by these accused persons from the shop of PW48. No suggestion was put to this witness in the cross examination that these two accused persons had not led the police team to the shop of the witness or that they had not purchased any Jayco wall clock from him. The prosecution had thus established that the Jayco wall clock was purchased from the shop of PW48 Pramod Kumar and PW50 Yogesh Kumar Gupta on 14/5/1996…."*

201. In the opinion of this Court, when both these independent witnesses, in the first instance, failed to identify the accused concerned, i.e. A-5 and A-6, who had allegedly visited the shop to purchase the clock, and one of

these witnesses, i.e. PW-48, identified someone else, the Court ought not to have drawn the inference based solely on the signatures in the "Pointing-out Memo", that the fact stood established. The shop owner, i.e. PW-50 was consistent in his omission or failure to identify the accused; PW-48 not only did not identify them but even went one step further and positively identified A-7 as the only individual who had gone to the shop and purchased the clock. The conclusion based on the fact that the witnesses had signed Ex.PW-31/G and Ex.PW-31/H, goes beyond the permissible limits of what can be considered by a Court under Section 27 of the Act read with proviso to Section 162 of the Cr.PC. The fact alleged was that A-5 and A-6 had visited PW-50's shop to purchase a clock, on 13.06.1996. Neither PW-50 nor his shop assistant, PW-48, corroborated this. Their failure to identify the accused was constituted as fatal blow to the prosecution allegations in this regard. In such circumstances, to seize the clutch at the pointing-out memo, in order to say that the said accused had led the police party to the shop and that in turn established the incriminating circumstance, was impermissible. Once the preliminary fact, i.e. purchase of the object or article from the shop by the accused could not be established, the secondary aspect that such accused had led the police party to the shop became irrelevant, under no circumstances did that secondary fact link the accused to the offence. For these reasons, it is held that the Trial Court's findings with regard to proof all this circumstance cannot stand; it is accordingly set-aside.

(iv) Regarding A-5's travel from Kathmandu to Delhi (Circumstance No. 36).

202. The prosecution had alleged that A-5 had travelled from Kathmandu

to Delhi before the bomb blast at Lajpat Nagar. It sought to rely upon a passenger list dated 10.05.1996, issued by the Royal Nepal Airlines; a copy of that list was marked as Ex.67/A. PW-67, an employee in Royal Nepal Airlines, during his deposition in Court confirmed that on 09.07.1996, the IO of the case had contacted him and that he handed-over the passenger list dated 10.05.1996. He also identified the list as Ex.67/A. That list contained A-5's name. The IO of the case, PW-101 also deposed to this and further, seizure of A-5's Boarding Card which was marked and produced as Ex.PW-101/3.

203. The Trial Court in its findings (in paras 379-381) upheld the prosecution allegations. This Court is of the opinion that no fault can be found with the soundness of the reasoning of the Trial Court in this regard. This fact also finds independent corroboration in the confession by Javed (A-9), made on 17.07.1996 to the following effect:

> *"In the evening of 8th May itself Javed Senior had asked me to accompany (him) to Delhi along with the bag containing gun powder (barood) and two detonators. Thereafter on 10th May, Javed Senior had sent Naza to Delhi, who had to make a setting for blast in Delhi."*

204. This Court is of the opinion that the finding in respect of the above circumstance was correctly held to have been proved against A-5.

(c) Circumstances alleged against A-6

205. The Trial Court had analysed the evidence which included depositions of police witnesses as well as independent witnesses and took into consideration materials such as seizure memos, articles etc. and in the impugned judgment held that several circumstances alleged against A-6

were not proved. In an earlier part of this judgment, at the outset, in the section dealing with analysis, this Court has listed-out a detailed chart of all the circumstances concerning the appellants (i.e. Circumstance Nos. 9 to 44). For the sake of convenience, a list showing what circumstances were alleged against A-6 and what were the corresponding findings of the Trial Court in that regard is reproduced as under:-

S. No.	**Circumstance No.**	**Particulars**	**Accused involved**	**Remarks**	**Judgment of the Trial Court (para nos.)**
1.	12	Arrest of A-6	A-6	Held **proved but not incriminating against him**	205-207
2.	18	Pointing-out of shop from where duplicate number plates were prepared	A-3 and A-6	Held **not proved**	252-256
3.	22	Pointing-out of place where car was parked, i.e. No.134, Gali No. 21, Zakir Nagar, Delhi	A-3, A-5 and A-6	**Not proved**	277-278
4.	23	Pointing-out of the shop "Dulhan Dupatta"	A-3, A-5 and A-6	Held **Proved**	279-285
5.	25	Recovery of front and rear number plates	A-3, A-5 and A-6	Held **Not proved**	286-290
6.	26	Recovery of a key	A-3, A-5 and	Held **Not proved; even**	291-295

			A-6	**otherwise not incriminating as it did not connect the accused with the crime.**	
7.	26 (repeat numbering)	Pointing-out of place of incident	A-5 and A-6	Held **Not proved. Not incriminating**	296-298
8.	27	Pointing-out of shop from where 9-Volt battery was purchased	A-5 and A-6	Held **proved**	299-308
9.	28	Soldering of the battery to the two wires	A-5 and A-6	Held **proved**	309-316
10.	29	Pointing-out of shop from where clock was purchased	A-5 and A-6	Held **proved**	317-329
11.	39	Use of car	Against all accused	Held **proved**	407-414
12.	42	Sanction		Held **Proved**	434-435
13.	43	Recoveries at the instance of A-5, A-6 and A-7 at Srinagar	A-5, A-6 and A-7	Held **Not proved**	436-455

206. It may be seen from the above that in respect of all the circumstances – save Circumstance No.12, A-6's role overlaps with that of A-3 or A-5 and

in some cases with both of them. In the case of Circumstance Nos.22, 23, 25, 26 and 39, A-6's role is identical with A-3 and A-5. This Court has rendered findings while discussing A-3 (Naushad's) role and held that the circumstances, i.e. Circumstance Nos. 18, 22, 25, 26 and 43 are not proved. To avoid repetition, the same findings would apply in the case of A-6. Likewise, in the case of Circumstance Nos. 26 to 29, 39 and 43, which are alleged against both A-5 and A-6, there is a detailed discussion in the section dealing with the role of A-5. All the said circumstances, i.e. Circumstance Nos. 26 and 43 have been held as not proved by the Court as agaistA-5. Applying the same logic and reasoning, it is held that the circumstance does not stand established as against A-6 also because of the common nature of the evidence.

207. The only surviving circumstance which has to be considered by this Court is the factum of A-6's arrest. In regard to this circumstance, the Trial Court relied on the discussion made by it *vis-à-vis* the arrest of A-7 who was alleged to have been along with A-6 at Gorakhpur; the Trial Court held that:

> *"206. Arrest of A-7 on 16/17-6-1996 in the manner claimed by the prosecution has not been believed by the Court as discussed above. Similarly apprehension of A-6 along with A-7 in the said circumstances can't be believed. Again the statements of the prosecution witnesses regarding apprehension of A-6 at a specific place are full of discrepancies. No independent public witness was joined at the time of apprehension of A-6 along with A-7. No incriminating article was also recovered from the possession of A-6. Meagre cash of Rs.498/- with some letters/visiting cards etc., were recovered in the personal search of A-6 which have not been connected with the incident. Statements of all the prosecution witnesses apprehending A-6 have already been discussed in detail at the time of discussing*

arrest of A-7. So no detail discussion is being made to prove the arrest o fA-6 in this para.

207. A-6 has failed to prove his apprehension on 17/6/1996 by Delhi Police from Nepal. The fact remains that A-6 was also arrested along with A-7 in this case and also remained in custody since then. It makes no serious effect if he was not arrested in the manner claimed by the prosecution or that prosecution failed to prove the exact time and specific place at Gorakhpur from where A-6 was apprehended. DD No.28A made by IO at PS at Gorakhpur shows visit of Delhi police to Gorakhpur and apprehension of A-6 along with A-7 from there can't be ruled out. Since nothing incriminating was recovered at the time of apprehension of A-6, his arrest on 16/17-6-1996 from Gorakhpur is not an incriminating piece of circumstance against him."

208. In view of the above evidence, this Court finds that the arrest of A-6 can hardly be deemed as incriminating; it is at best a neutral circumstance, since the impugned judgment itself does not contribute anything incriminating in regard to the circumstances pointed and surrounding A-6's arrest.

(d) Circumstances alleged against A-9 Javed

209. As far as A-9 is concerned, the Trial Court discussed the evidence in respect of Circumstances No. 34 (Confessional statement); his stay at Satyam Hotel (No. 35) and his arrest (Circumstance No. 40) and held that all those circumstances were proved.

(i) Arrest of A-9: Circumstance No. 40

210. The prosecution breakthrough in respect of the conspiracy alleged, and ultimately held to have been proved, in the impugned judgment of the

Trial Court, was on account of the arrest of Javed, and the subsequent developments. Therefore, it would be appropriate to analyze the facts and findings in respect of Javed.

211. The prosecution had alleged that the Gujarat Police received information, sometime in May, 1996 about two individuals, i.e Asadullah and Rashid crossing the border at Nepal and entering India, and ultimately going to Ahmedabad to carry out a bomb explosion there. The State police, on receipt of information, started searching the city. Eventually, after some search, PW-99, Inspector Rajwanshi, arrested four persons, i.e Asadullah, Rashid Khan, Javed Khan (A-9 in this case) and Maqbool Butt, on 1-6-1996. This witness deposed that SI Wagela and his team went to Jamalpur Chakla area and checked a guest house, i.e Anukul Guest House, and found an entry in the guest register, on 25-5-1996 about four persons from Kathmandu having reached the city, from Mumbai on 24-5-2006 and checking into the guest house, which they left on 25-5-2006. He deposed that the police conducted a search, and eventually arrested Javed (A-9) and Asadullah (A-10) on 1-6-1996, along with the other two, near Rupali Cinema. The Trial Court discussed the circumstances surrounding the arrest of Javed (A-9) and Asadullah (A-10); it believed that the two accused persons were arrested from Ahmedabad on 01.06.1996 along with Rashid and Juber Bhatt @Maqbool Bhatt from near *Rupali Cinema*. The Court relied on the testimonies of PW-98, PW-99, and the Judgment of Ld. ASJ Ahemdabad in SC No. 220/1998 and 89/2008. The Court observed that the stay of the four, including A-9 and A-10 at Anukul Guest house in Ahmedabad on 24.05.1996 was proved by entry made in the hotel register at Serial number

4310 dated 25.05.1996; it was in the name of Rashid. To prove the entry, the prosecution examined PW-99. The Ahmedabad Court had acquitted the accused persons in SC No. 220/1998 and 89/2008. However their stay at Anukul Hotel and arrest dated 01.06.1996 was believed. The accused were acquitted since the Ahmedabad Court held that mere assembly of the accused at one place was not sufficient to constitute offences under Sections 121, 121A, 122, 123 IPC. The object of the gathering was not proved and the articles recovered from their possession were not able to connect the accused with the crime.

212. The Trial Court held that A-9 was not able to show the purpose of his visit to Ahmedabad and why he alongwith his associates had stayed at Anukul Guest House on 24.05.996; it was also held that the presence of A-9 in a suspicious circumstance in Ahmedabad from 24.05.1996 to 01.06.1996 and his failure to explain the purpose of his visit was an incriminating circumstance against him. As far as A-10 was concerned, the Trial Court held that his mere apprehension on 01.06.1996 and his stay at Anukul Hotel on 24.05.1996 without any further incriminating evidence was not enough to connect him with the commission of offence.

213. The Counsel for the Appellants urged that there was no evidence on record to show where the accused persons were from 25.05.1996 to 01.06.1996 (i.e. after they checked out from Anukul Hotel and till they were arrested). Javed (A-9) in his statement under Section 313 Cr. P.C in reply to question 136 stated that he was arrested on 24.05.1996 from Ahmedabad and was produced before the Magistrate on 03.06.1996. Even in his confessional statement (Ex.PW-100/A; pg.220 Vol.7), Javed, in reply to Question 1 stated

that he was arrested from a hotel in Ahmedabad on 24.05.1996 at about 03:00 PM. It would therefore be necessary to analyze the evidence of the two Gujarat Policemen, PW-98 and PW-99 in this regard.

214. PW-98, B.R. Patil, deposed that in May 1996, while he was posted as DSP, ATS Ahmedabad, a TP was received giving information that Asadullah and Rashid would be crossing over the Indo Nepal border and that they would be reaching Gujarat to carry out explosions in Ahmedabad. Insp. Rajvanshi's (PW-99's) team started searching for these persons in Ahmedabad. He further deposed that on 01.06.1996, PW-99 found 4 persons who disclosed their names as Asadullah (A-10), Rashid Ahmed, Juber Bhatt (Zulfikar) and Javed Khan (A-9). They were interrogated by PW-99 and an FIR 12/1996 was lodged against them u/s 120B, 121, 122 IPC. He further deposed that on 02.06.1996 further investigation of the case was handed over to him; PW-99 had prepared the personal search memos and seizure memos of the accused. A digital diary was seized from Asadullah (A-10) and a panchnama regarding the same was prepared on 01.06.1996. PW-98 identified accused Javed (A-9) and pointed to another accused and identifies him as Asadullah (A-10). However the accused said that his name was Abdul Gunny Goni to which the witness stated that Asadullah was one of the *aliases* of Abdul Gunny Goni. PW-98 further deposed that during the investigation Javed (A-9) made a disclosure statement regarding the bomb blast at Lajpat Nagar, New Delhi before Insp. Rajvanshi (PW-99). In his cross-examination he denied the suggestion that they were arrested on 24.05.1996.

215. PW-99, B.M. Rajvanshi, of Gujarat Police deposed that on 24.08.1995

he was posted in the Anti-Terrorist Squad, Ahmedabad, Gujarat and that on 23.05.1996 he was ordered by the Deputy Inspector General of Police, ATS to look into intelligence received regarding two terrorists Asadullah and Rashid entering India from Nepal. The tele-printer message and fax received by the Director General of Gujarat Police stated that these two terrorists would be reaching Ahmedabad *via* Mumbai from Kathmandu and that they would be renting a house in Ahmedabad and would plan explosions in big markets in Ahmedabad. To look into this intelligence two teams were formed; SI Wagela led the first team and the second team was led by PW-99. He further deposed that on 25.06.1996 SI Wagela's team checked Anukul Guest House and there in the hotel register they found an entry about four persons who had come into the city, from Kathmandu via Mumbai on 24.06.1996 and they had left the hotel on 25.06.1996. PW-99 further deposed that SI Wagela informed him about these facts and thereafter he went to the hotel and saw Rashid's name in the hotel register. He deposed to searching the four persons and that at around noon they found four suspicious persons near *Rupali Cinema* and his bringing them to the ATS office. He further deposed that after interrogation it was discovered that the said four persons had come from Kathmandu with the intention to sabotage the city. Suspicious materials like a digital diary and suspicious literature was seized from them; he made the *panchnama* on 01.06.1996 from 17:30 to 19:15. He further deposed that the 4 persons arrested were Asadullah (A-10), Rashid, Javed Khan (A-9) and Maqbool Butt. An FIR bearing no 12/1996 was lodged against them u/s 120B, 121, 122 IPC. PW-99 further deposed that Asadullah made a disclosure statement in which he gave details about how the conspiracy to cause sabotage in India was hatched in Pakistan.

Asadullah also stated that he had sent Javed (A-9) to Delhi with 8 to 9 kgs explosives and that Javed (A-9) gave them to Wajid Kasai's (PW-13's) sister and then Naza (A-5) committed a blast in Lajpat Nagar market on 21.05.1996. He further deposed that the fact that Asadullah and Javed were involved in the Lajpat Nagar blast was disclosed by both the accused. He further deposed that he prepared both the disclosure statements (Ex.PW-99/A and Ex. PW-99/B). He identified Javed Khan (A-9) and pointed to another accused and identified him as Asadullah (A-10), however the accused says his name was Abdul Gunny Goni to which the witness stated that Asadullah was one of the *aliases* of Abdul Gunny Goni.

216. The Appellants' counsel had argued that A-9's arrest did not take place on 1-6-1996 and that, in reality, he was taken into custody much earlier, on 24-5-1996, and kept in illegal detention. A-9 no doubt says this, in the statement recorded under Section 313, Cr. PC. However, the testimonies of PW-98 and PW-99 are consistent on this aspect. The appellant's allegation of having been arrested on 24-5-1996 was not put to PW-99, who deposed about the arrest. Furthermore, it is a matter of record that PW-98 had deposed as PW-26 in the judgment of the Ahmedabad Court in SC 220/98. Even though the Ahmedabad Court acquitted A-9 and A-10, but its judgment nowhere suggests that it disbelieved that the arrest of the accused was on 1-6-1996. In these circumstances, the allegation that A-9 was taken into custody much earlier, and kept in illegal confinement has no force.

(ii) Confessional Statement of A-9 (Circumstance No. 34) and his stay at Satyam Hotel in Delhi (Circumstance No. 35)

217. After the Ahmedabad police arrested Javed (A-9), Asadullah (A-10), Maqbool Butt and Rashid on 01.06.1996 from near Rupali Cinema, Ahmedabad, A-9 and A-10 made disclosure statements before PW-99 B.M. Rajvanshi (Ex.PW-99/A and Ex. PW-99/B). Javed (A-9) in his disclosure statement mentioned about his involvement in the Lajpat Nagar blast and mentioned the name of all the accused persons except for Naushad (A-3). He stated visiting the house of Wajid Kasai (PW-13) on 14.05.1996 and leaving a bag containing explosives with his (PW-13's) sister for Naza (A-5). On the basis of Javed's (A-9's) disclosure statement ATS Ahmedabad sent a wireless message Ex.PW-91/A and Ex.PW-91/B on 02.06.1996 to Delhi Police informing them about the possible involvement of A-10, A-9 and Maqbool Butt in the Lajpat Nagar blast. In the wireless message, ATS Ahmedabad also mentioned about delivery of explosives at Wajid Kasai's house in Delhi. On receipt of the wireless message from Ahmedabad, on 02.06.1996 itself Insp. Paras Nath (PW-101) went to Wajid Kasai's (PW-13's) house at Turkman Gate, Delhi and made enquiries from PW-13 and his sister Pappe (PW-14). Insp. Paras Nath (PW-101) recorded their statements under Section 161 Cr.P.C. Naushad's (A-3's) name was mentioned for the first time in PW-13's statement. The disclosure statement is not admissible, to the extent that PW-13 and PW-14 did not support the statements attributed to them under Section 161 Cr PC, during trial. However, the interesting aspect is that Javed's disclosure statement is relevant to the extent that it mentioned the fact that he visited PW-13's house, on 14-5-1996. This court would advert to the relevance and significance of this aspect a little later.

218. The prosecution had alleged, and the Trial Court found, that Javed made a confessional statement before the Additional Chief Metropolitan Magistrate (PW-100) Jaipur on 19-7-1996. It was alleged that A-9 was taken from Ahmedabad to Jaipur, where he was kept in connection with a bomb blast at Dausa, Rajasthan. The confessional statement made by A-9 was proved by PW-100, the Magistrate. The argument on behalf of A-9 was that there is no proof that a confession, as understood in law, was made. It was argued that even though A-9 was said to have been arrested on 1-6-1996, there is no explanation why the confession was made nearly seven weeks after that event. Counsel also highlighted that the Delhi Police did not take any action even after the confession, and chose to arrest him only on 27-71996. It was lastly urged that the confession by itself cannot form the basis of conviction, since it is a weak piece of evidence and that the Court has to be satisfied on the basis of other, strong corroborative evidence, proved beyond reasonable doubt.

219. Javed (A-9) in his confession stated that he, Javed Senior (Javed Kirwa A-15) and Latif (A-7) were engaged in the business of carpet in Kathmandu. They used to live in Naya Bazar, Kathmandu. In April 1996, prior to Eid he had seen a bag and an *attaché* (case) in the room they used to reside in. The bag contained gun powder (*Barud)* and the *attaché* contained a wireless set, detonator, time pencil and remote control. He further stated that Javed Senior's (Javed Kirwa's A-15) boss Bilal Beg (A-11), whom he (A-9) had never seen, used to reside in Pakistan. On 29.04.1996, the day of Eid, Julfikar alias Ayub came from Pakistan to Kathmandu and both A-9 and Latif (A-7) went to receive him at the airport (Bilal Beg had told Latif that

Julfikar had worn a black pant and a yellow colour shirt). A-9 further stated that he asked Zulfikar whether he lives in Pakistan to which Julfikar replied that he is not a citizen of Pakistan and was a resident of Kashmir; he had gone to Pakistan for training. A-9 further stated that he showed Zulfikar the *attaché* and bag and asked him what type of articles were kept in it; Zulfikar replied that they were Time Pencil, Detonator and Remote Control. A-9 knew about the wireless set from before. On 06.05.1996 two more persons came from Pakistan and stayed with them at Kathmandu. Both these persons told Latif (A-7) that nobody should visit their room; A-9 did not know their names. On 08.05.1996 Javed Kirwa (A-15), Mahmood Killey (A-6), Naza (A-5) and Riyaz Moula (A-13) came to Kathmandu (A-9, Latif A-7 and Javed Kirwa A-15) used to work together. In the evening of 08.05.1996 Javed Kirwa (A-15) asked A-9 to accompany him to Delhi alongwith a bag containing gun-powder (*barud*) and two detonators. On 10.05.1996 Javed Kirwa @ Javed Senior (A-15) had sent Naza (A-5) to Delhi to make arrangements for the blast in Delhi. On the evening of 11.05.1996 A-9, with Javed Kirwa @ Javed Senior (A-15), Mohd. Killey (A-6), Riyaz Maula (A-13) and Javed Soparewala left for Delhi from Kathmandu. In the morning of 12.05.1996 they reached the border. A-9 remained at the border and the rest moved ahead. On 13.05.1996 A-9 left for Delhi from the border and reached Delhi in the morning of 14.05.1996. Javed Kirwa @ Javed Senior (A-15) and Naza (A-5) had asked him (i.e A-9) to leave the bag at Naza's friend's house i.e. at Wajid Kasai's house (PW-13). A-9 further stated that when he reached Wajid's house, Wajid and Naza (A-5) were not there and only women and children were present there. A-9 asked them to give the bag to Naza (A-5) and told them that it contained

Naza's clothes. A-9 further stated that he stayed in Delhi on 14.05.1996 and on 15.05.1996 he left for Kathmandu and reached there on 17.05.1996. Javed Kirwa @ Javed Senior (A-15), Mohd. Killey (A-6) and Riyaz (A-13) had reached Kathmandu before him. A-9 further stated that on his asking about the task in Delhi, they replied *"that Naza (A-5) had been given after making the same and Riyaz Maula (A-13) was the mechanic because only he was the trained person."* On 19.05.1996, Mohd. Killey (A-6) and Riyaz (A-13) went back to Delhi and Javed Kirwa @ Javed Senior (A-15) informed A-9 that the work in Delhi had not been done due to some defect. A-9 further stated that earlier on 06.05.1996 two persons had come from Pakistan and their names were Asadullah (A-10) and Rashid (he came to know of their names later). Zulfikar had come to Kathmandu on 29.04.1996. On 20.05.1996 Julfikar, Asadullah (A-10) Rashid and A-9 left for Patna and on 21.05.1996 Asadullah (A-10) who got his name written as Nuruddin, Rashid who got his name written as Jalaluddin on the ticket, Julfikar and A-9 left from Patna for Mumbai and reached Mumbai on 23.05.1996. A-9 further stated that on reaching Mumbai, Asadullah (A-10) told them that they were to go to Ahmedabad and in the evening at 8:30 PM the four of them left for Ahmedabad and reached it on 24.05.1996 at 12:00 PM. A-9 further stated that on reaching Ahmedabad they went to a hotel, had a bath and then had their meal. Asadullah (A-10) and Rashid both left for *Namaz* whereas A-9 and Julfikar stayed back; 15 minutes later CBI officials and the manager of the hotel came to the room and conducted a search. At about 4/5:00 PM Asadullah (A-10) and Rashid came to the hotel from where the CBI officials took all of them and interrogated them. A-9 further stated that he told them that he had gone upto Patna only and he did not know anything

and did not have any knowledge regarding other things. He further stated that he only brought the bag to Delhi and there Javed Kirwa @ Javed Senior (A-15) informed him about the blast; Javed Kirwa @ Javed Senior (A-15) had himself done all the work regarding the blast on the basis of planning of Bilal Beg. A-9 further stated that he did not know anything about any other blast.

220. It was argued by counsel for the appellants that the absence of Naushad's name in the confessional statement of A-9 made the entire case dubious. Similarly, the appellants had argued that if Javed's confession were to be relied on, the prosecution case about his arrest, on 1-6-1996 would be falsified.

221. There is no doubt that Javed's confession was made considerably after his arrest. In the absence of any binding authority or bar in law, that cannot vitiate the confession; it is, on the other hand, circumstances surrounding the confession or the prosecution's inability to prove that it was made voluntarily, or that there are facts on record which undermine the truthfulness (and therefore cast a doubt on its voluntariness) which would, if such facts emerge from the record, render it incapable of acceptance. This aspect was emphasized by the Supreme Court in *Subramania Goundan Vs. State of Madras* [(1958) SCR 428]:

> *"The next question is whether there is corroboration of the confession since it has been retracted. A confession of a crime by a person, who has perpetrated it, is usually the outcome of penitence and remorse and in normal circumstances is the best evidence against the maker. The question has very often arisen whether a retracted confession may form the basis of conviction if believed to be true and voluntarily made. For the purpose of*

arriving at this conclusion the court has to take into consideration not only the reasons given for making the confession or retracting it but the attending facts and circumstances surrounding the same. It may be remarked that there can be no absolute rule that a retracted confession cannot be acted upon unless the same is corroborated materially. It was laid down in certain cases one such being In re Kesava Pillai [ILR 53 Mad 160 : (AIR 1929 Mad 837)] (B) that if the reasons given by an accused person for retracting a confession are on the face of them false, the confession may be acted upon as it stands and without any corroboration. But the view taken by this Court on more occasions than one is that as a matter of prudence and caution which has sanctified itself into a rule of law, a retracted confession cannot be made solely the basis of conviction unless the same is corroborated one of the latest cases being Balbir Singh Vs. State of Punjab (S) AIR 1957 SC 216 (C), but it does not necessarily mean that each and every circumstance mentioned in the confession regarding the complicity of the accused must be separately and independently corroborated nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made. It would be sufficient, in our opinion, that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession."

222. In *Hari Chand* (supra), cited by the Appellant, the Supreme Court held that the criminal court should not approach the case by taking into consideration the confession, but first marshal the evidence which otherwise exists, and then, look into the confession:

"in dealing with a case against an accused person, the Court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which

the judicial mind is about to reach on the said other evidence."

223. There is no doubt that the Court cannot take into consideration the self inculpatory parts of a statement recorded by an accused to the police during the investigation. However, those which directly pertain to recovery of an article, or discovery of a fact, are admissible (Ref *Pulukuri Kotayya v. Emperor*, AIR 1947 PC 67). Here, two pieces of information corroborated the statement made by A-9 on 1-6-1996 (Ex. 99/B). The first is that as on that day, A-9, while describing his visit to Delhi in May 1996, he mentioned about his stay in Satyam Hotel, at Paharganj. This fact was proved by the prosecution during the trial; PW-46 Rajan Arora, the guest house proprietor identified A-9 and stated that he stayed in his establishment for a day, on 14-5-1996. The witness was examined in 2004. The witness was not sure whether the guest house register had been taken into possession by the police, and he admitted that though he had a record of receipts, he had not brought it to Court that day. The second fact which was mentioned by A-9 Javed was about Wajid (PW-13) and his sister (PW-14). Now, even though these witnesses turned hostile and did not support the prosecution, the place where PW-13 lived (Raji House, Turkman Gate) was established as a fact. PW-13 deposed to being a resident of Turkman Gate. These two facts were not known to the Delhi Police at the time when Javed made his confessional statement to the Gujarat Police (Ex PW-99/B). They clearly amounted to *"fact discovered"* subsequently. At that stage, the other accused, apart from A-1 and A-2 had not been arrested. In the judicial confession, the fact that A-9 went to Delhi, and stayed there and that he met Wajid, are mentioned; however no further details were stated.

224. Another aspect which lends assurance by way of corroboration of A-9's confessional statement is that in Ex. PW-99/B (recorded on 1-6-1996), A-9 had stated that Naza (A-5) came to Delhi on 10-5-1996 by air. Now, this aspect was subsequently sought to be established, through the evidence of PW-67, Keshar Singh of Royal Nepal Airlines, who proved Ex PW-67/A the copy of a passenger list of the airline, dated 10-5-1996, containing the name *"Hussain M.N"*.

225. Now, these three circumstances do not by themselves add up as incriminating, individually. However, the requirement of the law is not that a confession, if otherwise shown to have been validly made, should be corroborated in all particulars. Confession ordinarily is admissible in evidence as a relevant fact. It can be the basis for conviction. For that purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; (iii) corroboration. In this regard, observations in the following extract of the decision in *Shankaria v. State of Rajasthan* [(1978) 3 SCC 435] are apt:

> *"22… It is well settled that a confession, if voluntarily and truthfully made, is an efficacious proof of guilt. Therefore, when in a capital case the prosecution demands a conviction of the accused, primarily on the basis of his confession recorded Under Section 164 Cr. P.C, the Court must apply a double test:*
>
> *(1) Whether the confession was perfectly voluntary? (2) If so, whether it is true and trustworthy ? Satisfaction of the first test is a sine quo non for its admissibility in evidence. If the confession appears to the Court to have been caused by any inducement, threat or promise such as is mentioned in Section 24, Evidence Act, it must be excluded and rejected brevi manu. In such a case, the question of proceeding further to apply the second test does not arise. If the first test is satisfied, the Court*

must before acting upon the confession reach the finding that what is stated therein is true and reliable. For judging the reliability of such a confession, or for that matter of any substantive piece of evidence there is no rigid canon of universal application. Even so, one broad method which may be useful in most cases for evaluating a confession, may be indicated. The Court should carefully examine the confession and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If on such examination and comparison, the confession appears to be a probable catalogue of events and naturally fits in with the rest of the evidence and the surrounding circumstances, it may be taken to have satisfied the second test."

226. Thus, the confession in this case is not the only evidence which incriminates A-9. His statement made to the Gujarat Police about where he stayed during his visit to Delhi on 14-5-1996, his statement where he mentions about Wajid, leading to discovery of where that witness lived (which helped the further investigation), his statement about how Naza (A-5) had visited Delhi on 10-5-1996, and his description about the place where he stayed in Delhi on 14-5-1996, all stand corroborated. In this conspectus of facts, A-9 should have been able to say why he visited Delhi on 14-5-1996. No doubt, as a citizen of a democracy, he has the freedom to move throughout the territory of India. Yet, when he was put queries about what he was doing in the city before the bomb blast, at least he could have proved the purpose of his visit, and produced those with whom he transacted or carried out business on that occasion. His silence is another pointer to the fact that he had nothing to say about these circumstances.

227. Now, the next limb of the facts pertaining to A-9's confessional statement. In *Shivappa vs. State of Karnataka* (1995) 2 SCC 76, while

underlining the settled principles, the Court outlined the duties of the magistrate recording the confession, in the following terms:-

> *"6. From the plain language of Section 164 CrPC and the rules and guidelines framed by the High Court regarding the recording of confessional statements of an accused under Section 164 CrPC, it is manifest that the said provisions emphasise an inquiry by the Magistrate to ascertain the voluntary nature of the confession. This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused under Section 164 CrPC. The failure of the Magistrate to put such questions from which he could ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the same. Full and adequate compliance not merely in form but in essence with the provisions of Section 164 CrPC and the rules framed by the High Court is imperative and its non- compliance goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence. Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the mind of an accused. In case the Magistrate discovers on such enquiry that there is ground for such supposition he should give the accused sufficient time for reflection before he is asked to make his statement and should assure himself that during the time of reflection, he is completely out of police influence. An accused should particularly be asked the reason why he wants to make a statement which would surely go against his self-interest in course of the trial, even if he contrives subsequently to retract the confession. Besides administering the caution, warning specifically provided for in the first part of sub-section (2) of Section 164 namely, that the accused is not bound to make a*

statement and that if he makes one it may be used against him as evidence in relation to his complicity in the offence at the trial, that is to follow, he should also, in plain language, be assured of protection from any sort of apprehended torture or pressure from such extraneous agents as the police or the like in case he declines to make a statement and be given the assurance that even if he declined to make the confession, he shall not be remanded to police custody.

7. The Magistrate who is entrusted with the duty of recording confession of an accused coming from police custody or jail custody must appreciate his function in that behalf as one of a judicial officer and he must apply his judicial mind to ascertain and satisfy his conscience that the statement the accused makes is not on account of any extraneous influence on him. That indeed is the essence of a `voluntary' statement within the meaning of the provisions of Section 164 CrPC and the rules framed by the High Court for the guidance of the subordinate courts. Moreover, the Magistrate must not only be satisfied as to the voluntary character of the statement, he should also make and leave such material on the record in proof of the compliance with the imperative requirements of the statutory provisions, as would satisfy the court that sits in judgment in the case, that the confessional statement was made by the accused voluntarily and the statutory provisions were strictly complied with.

228. In this case, the Magistrate, PW-100, recorded the statement on 19.7.1996. A-9 was produced before him on 17.7.1996. The proceeding sheet of 17.7.1996, when the said accused was taken to the Court, was adduced in evidence as PW-100/A. It contains a series of questions put to Javed, and his answers. The proceedings also indicate that PW-100 questioned the accused about the date of arrest, and when he was brought to Jaipur, etc. He also specifically explained that it was not necessary for the accused to make a confession to which he stated that he was making it of his

own sweet will. Another question put to the accused was whether he had been mentally or physically tortured or threatened to confess; the accused replied in the negative. The accused was also informed that if he confessed, that statement could be used against him in evidence. After that, the accused was given time to think over, and reflect; the next hearing was scheduled on 19th July, 1996. On the latter day, again, when the accused was produced in court, several questions were put to him by PW-100 to satisfy himself that the confession was made voluntarily. The accused again stated that he had not been threatened, into making any confession, and that it was of his own accord, after understanding that it could be used against him.

229. PW-100 deposed to all the facts; he was subjected to cross examination in which he was asked whether he was overseeing the case in which the accused made the confession, and who had identified him. The accused's cross examination did not yield any admission. Significantly, the accused A-9 did not retract from the confession at any stage during the trial. Furthermore, Javed's confession mentioned in detail the role played by various accused – A-11 to A-17, particularly A-11 and A-15 who appeared to have been masterminds. Having regard to all these facts, this Court is of opinion that the Trial Court's findings about reliability of A-9's confession (PW-110/A) and further its having been proved, do not call for interference.

230. The Counsel for Appellant had argued that the recording of a confessional statement by PW-100 was in respect of a case over which he was not exercising any jurisdiction. Counsel had sought to rely on the text of Section 164, Cr. PC and also underlined the fact that A-9 Javed was subsequently discharged in respect of the crime he was charged with by the

Rajasthan Police.

231. The relevant extract of Section 164, Cr. PC, which empowers a Magistrate to record confessions reads as follows:

> ***"164. Recording of confessions and statements.***
>
> *(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:*
>
> *Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.*
>
> *(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.*
>
> *(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorize the detention of such person in police custody."*

232. Facially, there appears to be no restriction of the nature urged by counsel on behalf of A-9. The provision does not limit the authority of the Magistrate. It authorizes the recording of a statement or confession *"whether or not he has jurisdiction in the case."* To read the provision in the manner suggested by the Appellant would be reading into it a restriction which is unwarranted. One has to keep in mind that the Magistrate also exercises

jurisdiction under this provision to record statements. The section therefore, has to be uniformly construed. In this connection, it would be useful to recollect the decision of the Lahore High Court in *Karam Ilahi v. Emperor* AIR 1947 Lahore 92, where it was held that:

> *"It is important to note that the word used in section 157 is 'offender' and the word 'accused' is used for the first time in the Chapter in section 167. At the time section 157 comes into operation, there is only a report and a suspicion that a cognizable offence has been committed while section 167 comes into play after the police officer entrusted with the investigation has taken necessary steps to arrest the person who is alleged or suspected to have committed the offence. This makes me think that according to the provisions of the Criminal Procedure Code a person becomes an accused person immediately after he has been arrested by the police for an offence which forms the subject-matter of investigation by them."*

233. The matter was put in perspective, by the Sikkim High Court, in the following manner, in *Arjun Rai vs State Of Sikkim* 2004 Cr. LJ 4747 in the following words:

> *"Sub-section (1) of Section 164, Cr. P.C. empowers a Metropolitan Magistrate or a Judicial Magistrate, whether or not he has jurisdiction in the case, to record any confession or statement made to him in the course of an investigation or at any time afterwards before the commencement of any inquiry or trial. Sub-section (2) requires that before recording any confessional statement the Magistrate to explain to the person making confession that he is not bound to make any confession and that, if he does so, it may be used against him."*

234. For these reasons, the Court holds as insubstantial the argument that the Magistrate, (PW-100) who in fact recorded the confession (PW-100/A) could not have done so; the submission is rejected. As a result of the

discussion in regard to circumstances alleged against A-9, both the circumstances, i.e. the Confessional statement of A-9, and his stay at Satyam Hotel, stood proved; the Trial Court's findings in this regard are sound, and do not call for interference.

X The Trial Court's approach in regard to appreciation of evidence and the law on the subject

235. The Trial Court, in its impugned judgment, has highlighted – indeed gone into some details – about the prosecution's deficiencies, in examining witnesses, failure to follow leads, and present evidence sufficient to prove its case beyond reasonable doubt against all those brought to trial (A-1 to A-10). On an analysis of the evidence, the Trial Court concluded that the materials proved before it were inadequate, as far as four accused were concerned (A-4, A-7, A-8 and A-10). This resulted in their acquittal. So far as A-1 and A-2 were concerned, the Court held that apart from recovery of explosives, there was no material to prove their role as conspirators in the bomb blast; the Court also held that there was no evidence to show that A-1 and A-2 had facilitated, or participated in, movement of materials, resources or in the planning of the crime. Ultimately, the Court convicted A-3, A-5, A-6 and A-9. The first three were awarded death sentence; A-9 was awarded life imprisonment.

236. It would be relevant at this stage to extract the relevant parts of the Trial Court's judgment:

> *"**g. Remissness of I.O. – Effect:***
>
> *484. On scanning the file, it transpires that the investigation conducted by the police in this case is highly defective. At no*

stage the police opted to put any of the accused persons for TIP from the prosecution witnesses. The prosecution has miserably failed to justify as to why no TIP of the case property recovered in this case or that of the accused persons arrested in the case conducted from the prosecution witnesses. The case of the prosecution is that the accused persons led the police team at various places during investigation and pointed out various places from where they had arranged articles for preparation of cylinder bomb planted in the maruti car in question. However, at no stage police bothered to get any of the accused persons arrested in this case to be identified in judicial TIP proceedings from the prosecution witnesses.

485. The police did not deem it fit during investigation to get record statement of any material witnesses u/s 164 Cr.PC. Perusal of the file reveals that number of prosecution witnesses examined by the police during investigation and whose statements were recorded under Section 161 Cr.PC have turned hostile and did not support the prosecution.

486. The police during investigation did not seize relevant record pertaining to the visits/stay of the accused persons in the hotels/guest houses prior to their arrest. Statements of the concerned employees/Managers of the hotels were not recorded.

487. The police did not join the local police at any stage during investigation and did not make any entries of their visits out side Delhi. No DD entries regarding any such visits was proved on record during trial. The police failed to show by documentary evidence their visits to specific places. The accused arrested from outside Delhi were never produced before the concerned Court and no transit remand of any of the accused was obtained creating doubt of the date, place and the manner in which the accused persons were apprehended and arrested in this case.

488. Number of witnesses cited in the list of witnesses were not examined by the prosecution during trial. Insp./ACP P.P. Singh is stated to be the overall incharge of the investigation.

However, at the first instance, he did not bother to appear as witness before the Court. Only when application u/s 311 Cr.PC was moved by the prosecution during final arguments were allowed, he opted to appear as witness PW-105. No memos contain signatures of PW-105 ACP PP Singh.

489. Ld. Spl. P.P. for the State during trial and specifically during final arguments always complained about non-cooperation from the IO of the case. He expressed his inability to address arguments in detail due to non-cooperation from the IO. No efforts were made during the last about more than 14 years to apprehend the co-accused persons against whom challan was presented as Proclaimed Offenders.

490. Antecedent of none of the accused was collected by the police during investigation. In the disclosure statement of the accused persons, the police had come to know about the details of the antecedents of the accused persons and also regarding their various activities. However, no independent evidence was collected by the prosecution to substantiate the information recorded in the disclosure statements of the accused persons. No worthwhile evidence was collected by the police to show the activities of these accused persons prior to the incident and to find out as to in how many similar cases they were involved or any of them was ever convicted at any time."

237. The Trial Court, as noticed from the extracts of its judgment, faulted the investigation with defective presentation of evidence, and omissions in regard to proof of allegations. A close reading of the impugned judgment itself would reveal that obvious inferences about lack of credibility of witnesses, in regard to circumstances, or general unreliability of prosecution in that regard, on specific aspects such as identification were glossed over, and superficially explained. These, in the opinion of this Court, point to a flawed understanding of "proof beyond reasonable doubt" in a criminal trial. The deficiencies are highlighted below, in respect of lack of identification of

accused by independent witnesses and use of signatures on memos (pointing out memos) as proof that the accused had led the police to a certain place, despite the failure of independent witnesses to identify the concerned accused.

(1) *Identification:*

(a) PW-82 and PW-83 were examined to prove the stay of A-3 in Gupta Hotel, at Gorakhpur. The prosecution relied on the hotel register extracts, and copies thereof; yet the two witnesses, i.e. PW-82 and PW-83 were not even asked to identify A-3. Furthermore, the passenger list of the train was not produced; only a photocopy was produced. Even the concerned witness, Shri Chakravarthy, did not depose during the trial. The Court did not believe the handwriting report; it does not anywhere corroborate that the sample writings of A-3 matched with that in the hotel register. All these omissions were overlooked and the Trial Court held that the prosecution proved the circumstance alleged.

(b) The prosecution failed to examine Mangal Chand, who had given A-4 Rs. One lakh, on the latter's showing the Rs. 2 currency note; this was to prove the incriminating circumstance against A-3 and the allegation that he was to receive such money for illegal purposes. The prosecution neither arrested Mangal Chand, who was *prima facie* an accessory to the crime; according to its showing; no explanation was offered in this regard. It did not even choose to examine him, or record his statement. This crucial omission was not given any weightage, and the Trial Court uncritically accepted the prosecution version that the money recovered was meant for A-3; no witness – neither independent witness, PW-35, nor even any other

witness – spoke about it.

(c) A-3 was sought to be identified by PW-61, shop owner of *"Dulhan Dupatta"*. The witness did not identify A-3; even after he was declared hostile, he denied the incident of A-3's visit during investigation. On further questioning, he identified A-3, as one of the people who had gone to his shop, during investigation, with a police party, and told them that the Maruti car was parked a day prior to the incident, and about the altercation with PW-61. The witness however did not identify others – A-5 and A-6 even during the prosecution's cross examination. In spite of these obvious infirmities, and question mark about the credibility of the witness, as regards identification, the Trial Court whole heartedly accepted the police version.

(d) PW-60, a shop owner, did not identify A-5 and A-6 in examination in chief, as the two individuals who had purchased a battery from him. He stated – in cross examination by prosecution that A-5 *"might be"* one of the two, purchasing a battery from him. Yet, this was accepted as proof of identification of the accused.

(e) Similarly, the statement by PW-38 that A-6 *"might have"* been one – (along with A-5, whom he identified) as the individual who got soldering of wires done.

(f) The statement of PW-48 regarding purchase of clock by A-7 (and not A-5 or A-6). He did not identify these two; yet his testimony was used against them.

(2) Using signatures on pointing-out/recovery memos as incriminating circumstance.

238. The previous discussion in this judgment would reveal that a large number of independent prosecution witnesses did not support the official version; they resiled from the statements made during investigation, and were declared hostile, and cross examined by the prosecution (these were PW-33, 48, 50, 58, 60, 61 and 92). The Trial Court noticed these facts, but went on to hold that the signatures of such witnesses in "Recovery Memos" or "Pointing out" memos were not denied, and consequently the statement recorded in Section 161 – about secondary facts that one or the other accused had visited the premises of such witness, *during the investigation,* had not been denied; consequently, the fact was proved, and that, in turn, was an incriminating circumstance. These instances are detailed below.

(a) The signatures of PW-33 (whose evidence regarding recovery of drill machine was held unreliable) on PW-33/C and PW-31/P was held to be incriminating against A-3.

(b) The statement of PW-50 – who could not identify A-5 or A-6 (alleged to have purchased a wall clock from him) *"nevertheless"* was used as establishing purchase of a wall clock *"by two boys"* (Ref. Para 324, impugned judgment) and that PW-50 had *"no enmity to make false deposition against the accused in this regard."* Proof of his signatures on Memos PW-31/G and PW-31/H were held corroborative and incriminating as to the fact that police had taken PW-5 and PW-6 to his shop during investigation.

(c) PW-48's failure to identify A-5 or A-6 – who purchased a wall clock, and his identification of A-7 was nevertheless interpreted as incriminating A-5 and A-6 because of seizure memo, Ex.31/G.

(d) Proof of shop from where gas cylinder was purchased alleged against A-3 and A-4 depended on their identification by shop owner PW-54. The Court noticed (para 335) that the witness *"failed to support the prosecution regarding identification."* Yet, the Court inferred, on the basis of the Memo, Ex. PW-31/M, signed by PW-54 on the basis of its observation that *"no suggestion was put to this witness in the cross-examination that both the accused persons had not led the police party to his shop"*, (para 337) and that though the witness *"opted not to support the prosecution on material circumstance",* yet, *"it stands established"* that A-3 and A-5 *"led the police team to the shop of PW-54"* (para 337).

(e) Similarly, the failure of PW-64 to identify A-3 and A-5 as those who got a duplicate key made, was ignored and the circumstance that the said accused had led the police to the witness's shop, during investigation, when he allegedly identified them, was based on his signatures on PW-31/J.

(f) PW-58 – from whom the prosecution alleged that A-3 and A-5 had purchased a solder iron – did not identify the accused in Court. However, the Trial Court relied on the pointing out memo PW-31/K which contained the witnesses' signatures, as proving its contents, that the said accused said before him that they had purchased a solder iron, and that he identified them in 1996.

239. In this context, it would be useful to recollect the mandate of Section 162, Criminal Procedure, which reads as follows:

> ***"162. Statements to police not to be signed: Use of statements in evidence.***

(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re- examination of such witness, but for the purpose only of explaining any matter referred to in his cross- examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act. Explanation.- An omission to state a fact or circumstance in the statement referred to in sub- section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

240. In one of the earliest decisions, i.e. *Tahsildar Singh v State of UP* AIR 1959 SC 1012, a Constitution Bench of the Supreme Court delineated the scope of Section 162 Cr. PC and held that:

"This leads us to the main question in the case, i.e., the interpretation of s. 162 of the Code of Criminal Procedure. The cardinal rule of construction of the, provisions of a section with a proviso is succinctly stated in Maxwell's Interpretation of Statutes, 10th Edn., at p. 162 thus:

> *" The proper course is to apply the broad general rule of construction, which is that a section or enactment must be construed as a whole, each portion throwing light if need be on the rest. The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together is to prevail."*

Unless the words are clear, the Court should not so construe the proviso as to attribute an intention to the legislature to give with one hand and take away with another. To put it in other words, a sincere attempt should be made to reconcile the enacting clause and the proviso and to avoid repugnancy between the two.

As the words in the section declare the intention of the legislature, we shall now proceed to construe the section giving the words used therein their natural and ordinary sense.

The object of the main section as the history of its legislation shows and the decided cases indicate is to impose a general bar against the use of statement made before the police and the enacting clause in clear terms says that no statement made by any person to a police officer or any record thereof, or any part of such statement or record, be used for any purpose. The words are clear and unambiguous. The proviso engrafts an exception on the general prohibition and that is, the said statement in writing may be used to contradict a witness in the manner provided by s. 145 of the Evidence Act. We have already noticed from the history of the section that the enacting clause was mainly intended to protect the interests of accused. At the stage of investigation, statements of witnesses are taken in a haphazard manner. The police- officer in the course of his investigation finds himself more often in the midst of an excited crowd and label of voices raised all round. In such an atmosphere, unlike that in a Court of Law, he is expected to hear the statements of witnesses and record separately the statement of each one of them. Generally he records only a summary of the statements which appear to him to be relevant. These statements are, therefore, only a summary of what a

witness says and very often perfunctory. Indeed, in view of the aforesaid facts, there is a statutory prohibition against police officers taking the signature of the person making the statement, indicating thereby that the statement is not intended to be binding on the witness or an assurance by him that it is a correct statement.

At the same time, it being the earliest record of the statement of a witness soon after the incident, any contradiction found therein would be of immense help to an accused to discredit the testimony of a witness making the statement. The section was, therefore, conceived in an attempt to find a happy via media, namely, while it enacts an absolute bar against the statement made before a police- officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by s. 145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence witness or even a Court witness. Nor can it be used for contradicting a defence or a Court witness. Shortly stated, there is a general bar against its use subject to a limited exception in the interest of the accused, and the exception cannot obviously be used to cross the bar."

241. In *Muthu Naicker & Ors. vs State Of Tamil Nadu* AIR 1978 SC 1647, the Supreme Court emphasized the importance of Section 161, and held that the prosecution's obligation to prove the facts mentioned by witness was not discharged merely by pointing to their omission to depose parts of those statements, by contradicting such omitted, or material portions. In other words, if a witness does not support the prosecution case, it is not enough that contradictions are pointed out by the prosecution in its cross examination (of its witness, by permission of court); other evidence to prove those facts - other than the statement, has to be led. The Court observed, in this context that:

> *"One curious practice not known to law adopted by him was that whenever a witness was asked about an omission with reference to the statement of the witness recorded by the investigating officer under Section 161, Cr.P.C., the learned Public Prosecutor would make a statement whether the statement referred to in evidence was to be found or was not to be found in the statement under Section 161, Cr.P.C. and no attempt was made to prove the omission. Such concession for proof of contradiction or omission lacks support of law and is likely to be unfair to the witness in that when the investigating officer is questioned with regard to the contradiction or omission, a further opportunity will be available to him to explain the contradiction or omission. "*

242. Similarly, in regard to the limits to which Section 161 statements can be relied on when the witness deposes contrary to such statements during investigation, the Supreme Court had this to say, in *Ram Swaroop and Ors. v. State of Rajasthan* 2004 Cri. L.J. 5043:

> *"We have also noticed that the High Court has attached undue importance to the statements made in the course of investigation and recorded under Section 161 of the Code of Criminal Procedure. It is well settled that a statement recorded under Section 161 of the Code of Criminal Procedure cannot be treated as evidence in the criminal trial but may be used for the limited purpose of impeaching the credibility of a witness. We find that in paragraph 6 of the judgment, the High Court while dealing with the evidence of PW-7 has clearly treated the statement of PW-7, recorded in the course of investigation, as substantive evidence in this case….*
>
> *In our view the High Court ought to have considered his deposition rather than his statement recorded under Section 161 of the Code of Criminal Procedure."*

243. The moot question which survives consideration is whether, the *"pointing out"* of public places like shops, irrespective of whether or not the shopkeepers concerned supported the prosecution about the allegation of the

accused having purchased articles or goods from them, is *ipso facto* a "fact discovered". Some guidance can, for this purpose, be had from the celebrated ruling in *Pulukuri Kotayya v. Emperor* (AIR 1947 PC 67), where the Privy Council considered the provision of Section 27 of Evidence Act and observed that:

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

244. It was thus held, *Salim Akhtar @ Mota vs State Of Uttar Pradesh* AIR 2003 SC 4076 that past use of a weapon, found at some place at the pointing out of the accused, cannot be considered; nor can how it came into the accused's hands, i.e. through a terrorist organization:

> *"So far as the disclosure statement of the appellant is concerned, the same was admittedly made to police personnel and only that part of the statement would be admissible which is permissible under Section 27 of the Evidence Act. The scope of this provisions was explained by the Privy Council in the well known case of Pulukuri Kottaya and Ors. v. Emperor, AIR*

1947 PC 67, wherein it was held that it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced. The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given, must relate distinctly to this fact. Information as to the past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Therefore, what is admissible is the place from where the polythene bag containing pistol and other articles was allegedly recovered. The fact that some terrorist organisation had given the pistol and other articles to the appellant or its use would not be admissible."

245. In *Mohammed Inayatullah v State of Maharastra* AIR 1976 SC 483, the Supreme Court explained the scope of Section 27, and the steps to apply it, as follows:

"The first step in the process was to pinpoint the fact discovered in consequence of this statement. Obviously, in the present case, the threefold fact discovered was: (a) the chemical drums in question, (b) the place i.e. the Musafirkhana, Crawford Market, wherein they lay deposited and (c) the accused's knowledge of such deposit. The next step would be to split up the statement into its components and to separate the admissible from the inadmissible portion or portions. Only those components or portions which were the immediate cause of the discovery would be legal evidence and not the rest which must be excised and rejected.. Thus processed. in the instant case, only the first part of the statement, viz., "I will tell the place of deposit of the three Chemical drums" was the immediate and direct cause of the fact discovered. Therefore, this portion only was admissible under Sec. 27. The rest of the statement, namely, "which I took out from the Haji Bunder on first August", constituted only the past history of the drums or their theft by the accused: it was not the distinct and Proximate cause of the discovery and had to be ruled out of evidence altogether.

After culling out and rejecting the inadmissible portion, it was to be considered further whether the admissible portion of the information taken in conjunction with the facts discovered was sufficient to draw

the presumption that the accused was the thief or receiver of stolen property knowing it to be stolen. The answer to this questions in the circumstances of the case, had to be in the negative. The drums in question were found in the compound or yard of a Musafirkhana which was a place of rest and waiting for Musafirs (travellers). It was not alleged by the prosecution-much less proved-that the drums were lying concealed, or that the compound was under the lock and key of the accused. There is not even an oblique hint that the place of the deposit of the drums was in any way under the control or occupation of the accused. The place being a Musafirkhana, was from its very nature accessible to all and sundry.

It must be remembered that an inference under s. 114, Illustration (a) should never be reached unless it is a necessary inference from the circumstances of the given case, which cannot be explained on any other hypothesis save that of the guilt of the accused. Such is not the case here."

246. In view of the above discussion, the approach of the Trial Court, in noticing that witnesses who did not support the prosecution, but admitted that statements were recorded during investigation, <u>without any further proof of the contents of such statements (which did not lead to discovery of a fact- as it was revealed earlier to the police in disclosure statements of accused, or recovery of any article),</u> was in clear error of law.

247. This Court further notices that the recording of depositions of all witnesses- including those of defence witnesses continued for 12 years, and concluded in May 2007; arguments on behalf of the defence, began on 12-5-2007. Arguments had substantially concluded- only the submissions on behalf of three out of 10 accused, remained, on 11-9-2008. At that stage, by virtue of a general order of the High Court, directing all matters which were pending for seven or more years, the case was transferred to a "Fast Track" Court, through notification dated 5-9-2008. The accused approached this

Court, in an attempt to ensure that the case continued with the same judge, since substantial arguments were heard. The accused's petition was rejected, by an order of the Court, dated 17-9-2008. Consequently, arguments had to be addressed afresh; even as on 6-11-2008, no Prosecutor had been assigned for the case before the new Court. Eventually, arguments began, and all defence arguments concluded on 6-4-2009. At that stage, after conclusion of arguments, the prosecution sought recall of several of its witnesses, and also sought leave to examine PW-105, who had not even deposed till then (i.e. 14 years after the incident, and after conclusion of arguments). The Trial Court, by its order dated 6-5-2009, allowed the prosecution's application for recording of new witnesses' testimony, and recall for fresh examination in chief of four witnesses, including the IO PW-101. Such evidence was recorded, in late August, 2009, and thereafter final arguments were heard afresh, after another exercise of putting questions to the accused, under Section 313 Cr. PC. This time consuming procedure, mostly on account of unpardonable lapses of the prosecution, was entirely avoidable. A TIP of the accused and the articles seized must have been conducted, since there was sufficient time between the recording of disclosure statements after arrest of the appellants, and their being taken to the spots concerned (for "pointing out", since recoveries of articles were made before the pointing out, except in the case of neutral or non-incriminating circumstances, found by the Trial Court such as recovery of duplicate key, etc). This lapse was inexcusable, and in the absence of such an exercise, the Trial Court felt compelled to pile up the half proved or not proved secondary facts, such as the pointing out circumstances, about which independent witnesses equivocated, and held that guilt of the present appellants had been proved beyond reasonable

doubt.

Findings on the prosecution arguments regarding error in the conclusions in respect of A-1 and A-2

248. In the present case, the Trial Court had convicted all the four accused of the charge of conspiracy. As noticed in the substantive discussion of the evidence, most of the circumstances alleged against A-3, A-5 and A-6 have been held not proved. The circumstances relating to A-9, which were held proved, have been affirmed. The circumstances proof of which has been affirmed against A-3 are his arrest, and recovery of explosives from his house. As against that, the circumstance proved against A-5 is his travel from Kathmandu to Delhi, in the Royal Nepal Airways, which was spoken to by A-9. None of the incriminating circumstances against A-6 are held proved by this Court. In this conspectus of circumstances, the question is whether a conspiracy within the meaning of Section 120-B IPC can be said to have been proved against any or all of the Appellants.

249. A reading of the Trial Court's judgment would indicate that it disbelieved the charge of conspiracy, leveled against A-1 and A-2, even while upholding the charges, on the basis of the materials and allegations proved, in respect of the offence under the Explosive Substances Act. This was because the link between the recovery and the bomb blast incident alleged against the said accused, i.e. A-1 and A-2 was held not proved. The prosecution could not establish that the phone calls made to the media channels, in the immediate aftermath of the bomb blast, were by the said two accused. These aspects were discussed in detail in Paras 158-166 of the impugned judgment, where the Trial Court held – on analysis of the

documentary evidence (Ex. PW-105/P1-P5) and oral testimonies of the relevant witnesses (PW-78, PW-105 and PW-107) that though some suspicious facts emerged, those were insufficient to prove that A-1 and A-2 had any link with the conspiracy. The learned standing counsel appearing for the State had urged that the recovery of explosives at the behest of A-1 and A-2 and the fact that the phone calls had emanated from their houses, were sufficient to criminally implicate them for conspiracy and that those recoveries could also be linked with the kind of explosives used in the bomb blast, and recovered from A-3. Furthermore, the disclosure statements of those accused (Ex. PW-18/D and 18/E) clearly linked them with the key conspirators such as Bilal Beg about whose role A-9 had admitted, in his confessional statement. It was submitted that even though the State had not appealed against the judgment, so far as it acquitted A-1 and A-2 of the charge of conspiracy, the findings are suspect, and ought to be reversed, and used in so far as they implicate the appellants before this Court.

250. There is no doubt about the amplitude of the Court's power, in appeal, to re-apprecaite the entire evidence and render its own findings. Yet, this has to be seen in the context of each case. The State has chosen not to prefer any appeal against the findings of the Trial Court, in so far as the allegations of conspiracy it sought to level against A-1 and A-2 are concerned. In the absence of any appeal, the State has to point out what jurisdiction the Court possesses to render adverse findings against those appellants. Furthermore, this Court's power to re-appreciate findings where acquittal in respect of a charge are concerned, are few; it is only in regard to those cases, where substantial errors of law, or substantial errors in appreciation of evidence are

discernible, that such appellate power can be exercised. There is no such substantial error or infirmity in the impugned judgment, which calls for reversal of findings leading to acquittal of A-1 or A-2 in regard to charges of conspiracy. In this connection, it would be useful to recollect the decision of the Supreme Court, in *State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru* 2005 (11) SCC 600, as follows:

> *"We do not think that the theory of agency can be extended thus far, that is to say, to find all the conspirators guilty of the actual offences committed in execution of the common design even if such offences were ultimately committed by some of them, without the participation of others. We are of the view that those who committed the offences pursuant to the conspiracy by indulging in various overt acts will be individually liable for those offences in addition to being liable for criminal conspiracy; but, the non-participant conspirators cannot be found guilty of the offence or offences committed by the other conspirators. There is hardly any scope for the application of the principle of agency in order to find the conspirators guilty of a substantive offence not committed by them, Criminal offences and punishments therefore are governed by statute. The offender will be liable only if he comes within the plain terms of the penal statute. Criminal liability for an offence cannot be fastened by way of analogy or by extension of a common law principle."*

251. There is insufficient material linking the other accused, particularly the Appellants with the said two accused, i.e. A-1 and A-2; beyond the mention of Bilal Beg, in the confessional statement of A-9, there is no material linking A-1 and A-2 to the other Appellants with them. Consequently, the charge of conspiracy, which the Trial Court held not to have been proved, does not call for interference.

Summary of discussion regarding proof of circumstances and findings of

the Court in the present judgment

252. The analysis of evidence by this Court in the preceding discussion would reveal that the circumstance, findings in respect of proof of which were upheld, are as follows:

S. No.	**Circumstance No.**	**Particulars**	**Accused involved**	**Remarks**
1.	9	Arrest of A-3 and A-4	A-3 & A-4	**Proved**
2.	10	Recovery of explosives etc. from residence of A-3 Naushad	A-3	**Proved**
3.	23	Pointing-out of the shop *"Dulhan Dupatta"*	A-3, A-5 and A-6	**NOT Proved**
4.	27	Pointing-out of shop from where 9-Volt battery was purchased	A-5 and A-6	**NOT proved**
5.	28	Soldering of the battery to the two wires	A-5 and A-6	**NOT proved**
6.	29	Pointing-out of shop from where clock was purchased	A-5 and A-6	**NOT proved**
7.	30	Pointing-out of M/s. Unique Agencies	A-3 and A-5	**NOT proved**

8.	31	Pointing-out of shop from where duplicate key was prepared	A-3 and A-5	**NOT proved**
9.	32	Pointing-out of shop from where solder was purchased	A-3 and A-5	**NOT proved**
10.	36	A-5's travel from Kathmandu to Delhi	A-5	**Proved**

253. Therefore, out of the ten circumstances alleged against A-3, A-5 and A-6, which were held to have been proved by the Trial Court, only three have been upheld. As against A-3 the circumstance held to have been proved are his arrest from the New Delhi Railway station (No. 9) and recovery of explosives from his house (No. 10). As against A-5, the only circumstance held to have been proved was his travel from Kathmandu to Delhi, in a Royal Nepal Airlines flight, on 10-5-1996 (No. 36). None of the circumstances alleged against A-6 have been held to be proved against him.

254. As far as A-9 is concerned, the section dealing with his role has discussed the evidence in respect of Circumstances No. 34 (Confessional statement); his stay at Satyam Hotel (No. 35) and his arrest (Circumstance No. 40) and this Court has found that all those circumstances were proved.

255. Proof of the above circumstances, as against A-5 and A-6, in the opinion of this Court is wholly inadequate for returning a finding of guilt. No doubt, the proof of A-5's travel from Kathmandu to Delhi on 10-5-1996

is an adverse factor. However, neither A-9's knowledge, nor the proof of other circumstances, as against the latter, including his confession, are sufficient to convict him for any offence he was charged with, including conspiracy under Section 120-B. As regards A-6, the previous discussion would reveal that save his arrest – a neutral circumstance *ipso facto* – no other circumstance linking with the crime has been proved. The said two accused (A-5 and A-6) therefore, have to be acquitted.

256. As far as A-3 is concerned, the circumstances established are his arrest, and recovery of lethal explosives, from his house. The articles recovered were proved to be explosives, according to the testimony of the expert (PW-44) and the report (Ex. PW-100/G). These circumstances, in the opinion of the Court, are sufficient to uphold the conviction under Section 5 of the Explosive Substances Act.

257. Now, as far as A-9 is concerned, the Court has upheld the findings of the Trial Court, regarding the voluntary nature of the confession and other facts proved against him.

258. The surviving issue is whether the prosecution proved that A-9 and A-3 were guilty of conspiracy, under Section 120-B IPC.

259. Like most crimes, conspiracy requires an act (*actus reus*) and *mens rea*. The agreement constitutes the act, and the intention to achieve the unlawful objective of that agreement constitutes the required mental state. Section 120-B criminalizes an agreement to commit a crime. All conspirators are liable for crimes committed in furtherance of the conspiracy by any member of the group, regardless of whether liability would be

established by the law of complicity. The law punishes conduct which threatens to produce the harm, independent to conduct that has actually produced it. Unlike an attempt to commit a crime which merges with the completed offense, conspirators can be tried and punished for the conspiracy and the completed crime. Conspiracy is provided by the act of agreement.

260. Criminal conspiracy is a clandestine activity; people generally do not form illegal covenants openly. In the interests of security, a person may carry out his part of a conspiracy without even being aware of the identity of his co-conspirators. Since an agreement of this kind can rarely be shown by direct proof, it must be inferred from circumstantial evidence of co-operation between the accused. What people do is, of course, evidence of what lies in their minds. To convict a person of conspiracy, the prosecution must show that he agreed with others that together they would accomplish the unlawful object of the conspiracy. A major hurdle in such cases is the need to prove agreement; as it defines the potential liability of each accused.

261. Speaking about nature of conspiracies and the different models, the Supreme Court noted, in *Firozuddin Basheeruddin vs. State of Kerala* [2001 (7) SCC 596] that:

> *"The law has developed several different models with which to approach the question of scope. One such model is that of a chain, where each party performs a role that aids succeeding parties in accomplishing the criminal objectives of the conspiracy. No matter how diverse the goals of a large criminal organisation, there is but one objective: to promote the furtherance of the enterprise. So far as the mental state is concerned, two elements required by conspiracy are the intent to agree and the intent to promote the unlawful objective of the conspiracy. It is the intention to promote a crime that lends*

conspiracy its criminal cast.

Conspiracy is not only a substantive crime. It also serves as a basis for holding one person liable for the crimes of others in cases where application of the usual doctrines of complicity would not render that person liable. Thus, one who enters into a conspiratorial relationship is liable for every reasonably foreseeable crime committed by every other member of the conspiracy in furtherance of its objectives, whether or not he knew of the crimes or aided in their commission. The rationale is that criminal acts done in furtherance of a conspiracy may be sufficiently dependent upon the encouragement and support of the group as a whole to warrant treating each member as a causal agent to each act. Under this view, which of the conspirators committed the substantive offence would be less significant in determining the defendants liability than the fact that the crime was performed as a part of a larger division of labor to which the accused had also contributed his efforts."

262. The above approach was approved in *Navjot Sandhu (supra).* Similar observations are to be found in *Esher Singh V. State Of A.P.* (2004 (11) SCC 585). It is also now settled law that where number of accused are involved, it is not mandatory that all the conspirators must know each and every detail of the conspiracy, as long as they are co-conspirators in the main object of the conspiracy [Ref *Yash Pal Mittal V. State Of Punjab* (1977 (4) SCC 540) and the only relevant factor is that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or overshooting by some of the conspirators. Thus saying that there was no actual link between the accused or there was no connection between the acts said to have been performed by each accused, one cannot so easily escape, if the conspiracy is proved on the basis of the agreement and the determination to commit the offence. Even in the absence of agreement as to the means by which the purpose is to be

accomplished, once the illegal act is completed on the basis of the criminal conspiracy, that is sufficient and the agreement as to the means need not always proved by clinching evidence.

263. The following are the ingredients of the offence of conspiracy, under Section 120-B of the Indian Penal Code:

(1) There should be an agreement between the persons who are alleged to conspire; and

(2) That the agreement should be:

(i) for doing of an illegal act, or

(ii) for doing by illegal means an act which may not itself be illegal.

264. In *Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra*, (1964) 2 SCR 378, the offence was described by the Supreme Court the following manner:

> *"Before dealing with the individual cases, as some argument was made in regard to the nature of the evidence that should be adduced to sustain the case of conspiracy, it will be convenient to make at this stage some observations thereon. Section 120-A of the Indian Penal Code defines the offence of criminal conspiracy thus:*
>
> > *"When two or more persons agree to do, or cause to be done an illegal act, or an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy."*
>
> *The essence of conspiracy is, therefore, that there should be an agreement between persons to do one or other of the acts described in the section. The said agreement may be proved by direct evidence or may be inferred from acts and conduct of the parties. There is no difference between the mode of proof of the offence of conspiracy and that of any other offence: it can be established by direct evidence or by circumstantial evidence. But Section 10 of the Evidence Act introduces the doctrine of agency and if the conditions laid down therein are satisfied, the act done by one is admissible against the co-conspirators. The said section*

reads:

> *"Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."*

This section, as the opening words indicate, will come into play only when the Court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there should be a prima facie evidence that a person was a party to the conspiracy before his acts can be used against his co-conspirators. Once such a reasonable ground exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was entertained, is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it. The evidentiary value of the said acts is limited by two circumstances, namely, that the acts shall be in reference to their common intention and in respect of a period after such intention was entertained by any one of them."

265. A peculiarity of the offence (of conspiracy) is that privacy and secrecy is its hallmark and typical characteristics. (*Darshan Singh v. State* AIR 1983 SC 554). The gist of the offence of conspiracy is an agreement to break the law. A formal agreement of the parties concerned is not essential to the formation of a criminal conspiracy. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. *(Barsay E.G.* AIR 1961 SC 1762; *Bhagwan Swarup* AIR 1965 SC 682; *Bimbadhar Pradhan* AIR 1956 SC 469). A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. Mere evidence of association is not sufficient to lead to the inference of

conspiracy. *(Kehar Singh v State* AIR 1988 SC 1883; *Mohd. Hussain Umar Kochra v. Dalipsinghji K.S.* AIR 1970 SC 45, 51). Merely because certain persons hold beliefs identical to the offenders, or the bare fact that they were present with persons who were parties to the conspiracy, cannot constitute a valid foundation for a conviction on a charge of conspiracy.

266. As far as A-9's role in the conspiracy is concerned, the section dealing with his role has discussed at length, how the police was able to secure information which ultimately led to the arrest of A-3 and recovery of explosives. Although he did not mention A-3 in his disclosure or confessional statement the fact remains that the police was able to reach PW-13. That witness no doubt did not ultimately support the prosecution during the trial. Yet, the Court has relied on *Pawan Kumar* and held that the confession has been corroborated in material particulars. The charge of conspiracy has been established, in his case. As far as A-3 is concerned, the findings of the Trial Court regarding his arrest, and recovery of explosives have been upheld. The circumstances which led the police to him, to the extent they were proved by the confession of A-9, and pointed to him, had to be explained, at least in the context of the substantive charge of conspiracy. The prosecution was able to establish that A-3 was not apprehended in the immediate aftermath of its becoming aware about his role – on 3rd June, 1996. He was arrested on 14th June. The recovery of lethal explosives, similar to the kind which resulted in the explosion at Lajpat Nagar, was not explained by him. Although other conspirators, such as Javed Kirawa and Bilal Beg were not tried, and there is no direct evidence forthcoming about A-3's role in the blast, the circumstances proved are sufficient to establish

that he was a conspirator, who intended to aid such crimes. Therefore, the charge of criminal conspiracy under Section 120-B IPC stands established. The conviction under Section 120-B read with Section 436, IPC is also upheld. However, the conviction under Sections 302, 307 and 411 IPC cannot be upheld; they are consequently set aside.

Findings and conclusions

267. It has been repeatedly cautioned by the Supreme Court that while dealing with a case of grave nature - like the present one, there is always a danger that conjectures and suspicion may take the place of legal truth. In *Mousam Singha Roy and Ors v. State of West Bengal*, [2003] 12 SCC 377, it was held :

> *"It is also a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof, since a higher degree of assurance is required to convict the accused."*

In *Sharad Birdhichand Sarda v. State of Maharashtra,* [1984] 4 SCC 116, it was held :

> *"We can fully understand that though the case superficially viewed bears an ugly look so as to prima facie shock the conscience of any court yet suspicion, however great it may be, cannot take the place of legal proof. A moral conviction however strong or genuine cannot amount to a legal conviction supportable in law.*
>
> *It must be recalled that the well established rule of criminal justice is that "fouler the crime higher the proof". In the instant case, the life and liberty of a subject was at stake. As the accused was given a capital sentence, a very careful, cautious and meticulous approach was necessary to be made."*

In *Kashmira Singh v. State of M.P.*, AIR (1952) SC 159, it was observed:

> *"The murder was a particularly cruel and revolting one and for that reason it will be necessary to examine the evidence with more than ordinary care lest the shocking nature of the crime induce an instinctive reaction against a dispassionate judicial scrutiny of the facts and law."*

268. The nature of grave prosecution lapses, in regard to various issues, such as lack of proof connecting some of the accused with the bomb incident, failure to hold TIP of articles and the accused, despite disclosure by the accused, about the places or shops from where articles were obtained, or in regard to publicly accessible shops, not recording the statements of vital witnesses such as Mangal Chand (whose role, even according to the prosecution was shady, and no explanation was forthcoming why he was not arrested or booked for any charges of aiding or abetting the conspiracy at the initial stage) and no explanation why PW-13 (who according to the prosecution was the conduit for the passage of arms and explosives, and whose house was a safe haven for other conspirators) was not arrested or charged, underline not only its lapses and inefficiencies, but also throw up question marks as to the nature and truthfulness of the evidence produced. Other aspects, such as complete absence of any Daily diary entries to corroborate the movement of the police, grave lapses, such as inability to collect the authenticated copies of reservation chart, record statement of witnesses in its support, and omission to collect details to prove telephone calls, all betray a slipshod approach. In grave and serious crimes, which undermine the safety of the citizens and pose a threat to the well-being of society at large, where the prosecution alleges some individuals to be accused, it has (as noticed earlier) a solemn duty to discharge, by ensuring that minimum standards or proof required of in a criminal trial, are satisfied.

In this case, unfortunately, the police has shown casualness. More often than not, it is such weaknesses and lapses which are the occasion for the State, in several cases, to complain that the Courts insist on an impossible standard of proof, and that the law has to be interpreted "realistically" or "pragmatically". It needs to be emphasized that the flaw is not in the law, or the standard of proof, which has, and will remain proof "beyond reasonable doubt"; but in its understanding and implementation by the police force. In matters of liberty, the weakness of the State surely cannot be an excuse for lowering time tested standards, especially in serious crimes, where the accused stand to forfeit their life, or at best, the most part of it.

269. The prosecution's role in conducting the appeals and references in a lackadaisical manner, - initially assigning the references to an Additional Public Prosecutor, and only, upon the Court's insistence, having regard to the gravity and public importance of the matter, instructing the Standing Counsel to appear and argue these cases, deserves to be highlighted. This Court recollects that in death references where the State seeks confirmation of the sentence it is the duty of the Standing Counsel to open the case. Having regard to the gravity and public importance of these matters, these cases too deserved no less. The casual approach in the conduct of these appeals and references, at the initial stages of hearing, therefore, has to be underlined.

270. In the light of the summary of conclusions recorded above, the conviction and sentence of A-5 and A-6 are hereby set aside; they are acquitted of the charges. Their appeals (Crl.Appeal Nos.950/2010 and 951/2010 filed by Mirza Nissar Hussain @ Naza and Mohammed Ali Bhatt

@ Kille) are allowed.

271. The conviction and sentences as against A-9 are sustained. His appeal i.e. Crl.A.948/2010 is accordingly dismissed. The substantive sentences awarded to A-9 by the Trial Court shall run concurrently as directed by the Trial Court.

272. Conviction of A-3 for the offence punishable under Section 411 IPC is set aside. His conviction for other offences is maintained. As far as sentence of death imposed under Section 120B read with Section 302 IPC is concerned, the Trial court found it to be rarest of the rare cases as he (A-3) was proved to have participated in the actual bombing in a busy market resulting in loss of life of thirteen and dangerous injuries to 38 persons. As observed in the earlier part of the judgment, the prosecution has failed to establish that A-3 himself planted or participated in the actual explosion of the bomb but he is proved as a conspirator to have aided in the conspiracy to cause bomb explosion which resulted in immense loss of life and property. In the circumstances, in our view the case would not fall in the category of rarest of rate cases and the award of extreme penalty of sentence to death cannot be confirmed. A-3 is thus sentenced to undergo imprisonment for life for the offence punishable under Section 120B read with Section 302 IPC. Sentences under other offences (except under Section 411 for which he has been acquitted) are upheld. The sentence with regard to fine for the convictions which have been upheld shall remain undisturbed. All the substantive sentences shall run concurrently. Thus, the Appeal of A-3 (Mohammed Naushad) i.e. Crl.Appeal No.949/2010 partly succeeds in the manner described above.

273. The death sentences imposed on three accused A-3, A-5 and A-6 are consequently not confirmed; the Reference is answered in these terms.

S. RAVINDRA BHAT, J.

G. P. MITTAL, J.

NOVEMBER 22, 2012