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

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RESERVED ON: 28.02.2012
PRONOUNCED ON: 06.05.2013

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CRL.A. 877/2009

MOHD. IQBAL @ MUSTAQ @ FAISAL Appellant
Through : Prof. Bhim Singh, Sr. Advocate
with Mr. Gaurav Kumar Bansal, Advocate.
versus

STATE Respondent
Through : Ms. Richa Kapoor, APP.

CRL.A. 886/2009

MUSHTAQ AHAMAD KALLO @ AFZAL Appellant
Through: Ms. Kamini Jaiswal, Sh. Divyesh
Pratap Singh and Sh. Abhimanue Shrestha,
Advocates.
versus

THE STATE (NCT OF DELHI) Respondent
Through: Ms. Richa Kapoor, APP.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE S.P. GARG

MR. JUSTICE S.RAVINDRA BHAT

1. These two appeals challenge a common judgment and order of sentence, dated 27.08.2009 and 19.09.2009 respectively whereby the appellants (hereafter “accused”) were convicted for committing offences under Section 121, 121-A, 122 and 123, IPC read with

Section 120-B IPC, as well as Sections 17, 18 and 20 of the Unlawful Activities (Prevention) Act and further convicted under Sections 4 and 5 of the Explosives Substances Act. They were sentenced to undergo various imprisonment for various terms, the highest of which is life imprisonment; they were also directed to pay fine.

2. The prosecution alleged that in the first week of November 2006, secret information was received in Special Cell, Delhi Police regarding one Kashmiri boy (member of Jaish-e-Mohammad, JeM) who used to carry arms, ammunition, explosives and money from Delhi to Jammu and Kashmir. A team led by Insp. Mohan Chand Sharma was formed under the supervision of ACP Sanjeev Kumar Yadav (PW-15). At about 05:00 PM on 28.11.2006 secret information was received at PS Special Cell by SI Rahul Kumar (PW-14) regarding Faisal. The secret informer telephonically informed that Faisal, with another boy (accused) was coming to Delhi from Deoband by Kalka-Delhi train and that they would reach Old Delhi Railway station at about 07:45 PM. The informer further stated that he would deliver a consignment of explosives to one of their associates near Kaudia Pul. The secret information was reduced to writing and DD No. 12, (Ex.PW-15/H) was recorded.

3. It was alleged that on the basis of the information, a team consisting of Inspector Mohan Chand Sharma, Insp. Sanjay Dutt, Insp. Badrish Dutt, Insp. Subhash Vats, SI Dharmender (PW-1), SI Dalip Kumar (PW-5), SI Rakesh Malik, SI Kailash Bisht, SI Rahul Kumar

(PW-14) and others was formed. The team left PS Special Cell at about 06:00 PM; PW-14 met the secret informer and he too joined the team. At about 08:10 PM they saw two persons coming on foot towards *Kaudia Pul*; one person had slung a bag over his left shoulder and carried a brief case in his right hand. The other person was carrying a shoulder bag over his left shoulder. The informer identified the boy with the brief case in his right hand as Faisal. The two persons stopped in front of Hemant Telecom (a shop) and waited under the bridge, Kaudia Pul for about 10 minutes. When they started moving from there, the two persons were apprehended. Faisal @Mohd. Iqbal @ Mushtaq was apprehended by PW-1 and PW-14 whereas Mushtaq Ahmed Kallo @ Afzal was apprehended by PW-5 and PW-8. The bags of these two persons were searched and from Mohd.Iqbal's bag Rs. 5,00,000/-, a cheque book and some other documents were recovered. From accused Mushtaq Ahmed Kallo @ Afzal's granulated black coloured bag, explosives were recovered. Two samples of 10gms each were extracted from out of the recovered 2 kgs of explosives, and retained in two separate containers. The remaining explosives were sealed.

4. SI Rahul Kumar (PW-14) asked members of the public to join the investigation. Two witnesses Nand Kishore (PW-11) and Sikander Azam (PW-7) joined the police party. The recovered items were seized and sealed; the entire process was photographed. The accused were interrogated. During interrogation, they disclosed that they were members of JeM and had come to Delhi to deliver explosives which

were to be used to carry out terrorist activities. Mohd.Iqbal further revealed that the explosive items were collected from Sohaib in Deoband and he (accused) was supposed to deliver them to Raju, member of JeM at Kaudia Pul. He further disclosed that the Rs.5,00,000/- recovered from him were collected from a hawala operator in Delhi and that the money was to be used for the purpose of terrorism.

5. The *rukka* was prepared by PW-14 and sent to PS Special Cell through ASI Charan Singh for registration of case. Further investigation of the case was handed over to ACP Sanjeev Yadav (PW-15). The explosives and timers seized were sent for examination to CFSL. On completion of investigation charges were framed. Accused Mushtaq Ahmed was charged under Section 4 and 5 of Explosive Substance Act read with Section 23 of Unlawful Activities (Prevention) Act, Section 17, 18, 20 and 21 of Unlawful Activities (Prevention) Act and Sections 121, 121A, 122 and 123 of the IPC. Accused Mohd. Iqbal was charged with offences committed under Sections 17, 18, 20 and 21 of Unlawful Activities (Prevention) Act and section 121, 121A, 122 and 123 of IPC. The accused pleaded not guilty and claimed trial. In support of its case, the prosecution examined 16 witnesses.

6. The Trial Court held that the prosecution had proved its allegations and the charges. While arriving at its conclusions, the court upheld the basic prosecution version about the arrest of the petitioners, their having been unable to offer any explanation for the possession of

the cash and explosives. The accused had urged that they were picked up previously, and had come to Delhi from Srinagar earlier. It was their case that they were not arrested in the manner alleged by the prosecution and that the police version could not be believed. The accused relied on the circumstance that the independent witnesses, joined by the prosecution did not identify them and that the photographs allegedly clicked at the time of arrest and recovery of articles from them constituted best evidence, which was withheld from the trial court. The Court however, rejected these contentions and held that the accused's inability to account for what happened after 15th November, when they checked out of the hotel, and also their inability to prove by evidence the purpose of their visit, belied their defence. The Court held that the accused could not read too much into the fact that the public witnesses had turned hostile. On the basis of this reasoning, the accused were convicted and sentenced in the manner described previously.

Analysis of evidence

7. Before noticing the rival contentions, and discussing the relevant merits of the case, it would be essential to briefly discuss the evidence led by the prosecution during the trial.

8. PW-1 SI Dharmendra Kumar deposed to be posted in the Special Cell, Lodhi Colony in the first week of November and that secret information was received that one Faizal (a resident of Baramulla and an active member of Jaish-E-Mohd., a banned terrorist organization) under the direction of one Jhaneb @ Mika (a Pakistani

resident and a self-declared operational commander) would be reaching Delhi. He also stated that on this information, sources were deployed and the technical surveillance was mounted. The witness stated that on 27.11.2006 SI Rahul received information from a secret informer that the said Faizal with an associate would be reaching Delhi from Deoband, U.P. after travelling in Kalka Delhi Mail at 7:45 PM with a consignment of explosive substances. The informer also stated that the delivery would be made at *Kauria Pul*. The information was recorded in daily diary and a team was constituted comprising of Inspector Mohan Chand Sharma, Inspector Sanjay Dutt, Inspector Badrish Dutt, Inspector Subhash Vats, SI Rahul Kumar (PW-14), SI Dilip Kumar (PW-5), SI Kailash Bisht, SI Devender, SI Ramesh Lamba, SI Rakesh Malik, ASI Charan Singh, ASI Prahalad, HC Manoj, HC Gulbir, HC Krishna Ram and himself. At 6:00 PM, the team left the office in three private cars and two 2 wheelers and reached Delhi Public Library around 06:45PM. SI Rahul Kumar requested some passersby to join the raiding party but they refused. Inspector Mohan Chand Sharma and SI Rahul (PW-14) deployed the team near Kauria Pul around 10 PM. He saw two persons coming from railway station towards Kauria Pul; one Faizal had a grey shoulder bag slung over his left shoulder. He had a chocolate colored briefcase in his right hand. The other had a grey shoulder bag slung over his left shoulder. Faizal was identified by the informer, to SI Rahul Kumar. The two accused waited for ten minutes and then started walking. Thereafter the witness SI Rahul Kumar apprehended Faizal and other Mushtaq Ahmed was caught by SI Dilip Kumar and

ASI Charan Singh. The accused were enquired about the contents of the bag, but they could not reply satisfactorily. The bags were searched. Faizal's bag contained currency worth Rs.5 Lakhs; the search of Mushtaq Ahmed's bag yielded a cardboard box with Intex written on it. Inside was a blue coloured polythene. That in turn contained a black polythene bag, from which a black colour granulation substance was removed. It was weighed at 2 kilos by SI Rahul Kumar. Some persons who had gathered by then were asked to join; Nand Kishore and Sikander Azam volunteered to it. The samples were kept in separate plastic containers and sealed. The explosives were also seized and marked separately. The personal search of Faizal yielded two railway tickets from Deoband to Delhi which was seized by memo Ex.PW1/A signed by the witnesses. Both the accused were arrested and their personal search conducted. The witness signed on the personal search memos Ex.PW1/B and Ex.PW1/C and the arrest memos Ex.PW1/D and Ex.PW1/E. He also stated that site plan had been prepared. The witness identified the grey colour bag recovered from Faizal. The currency notes were exhibited as Ex.PW-2/1-10 and the bag recovered from Mushtaq Ahmed as Ex. P-3. He also identified the cardboard Ex.P-4, blue colour polythene and explosive substance Ex.P-7. The samples which had been sent and received back from FSL were also produced during the trial.

9. The witness during cross examination mentioned the vehicles and cars which had been hired and in which the police party travelled on the day of the incident. He deposed that the police party remained near Delhi Public Library for 15 minutes before parking the cars. He

also agreed that till the recoveries were made the vehicles remained parked and thereafter one Indica was brought to the spot. All these vehicles remained at the spot for about 8 hours. He could not recollect the different positions taken by members of the raiding party. He deposed that the articles of the accused were searched at the spot when they were apprehended and that the explosive substances were weighed on a scale in the vehicle of Sikander Azam after 20 minutes of the accused being nabbed. He conceded to not having personally receiving the secret information and that he knew about it being received by Inspector Mohan Chand Sharma. This was disclosed to him only on 27.11.2006. He mentioned that the information was revealed to him by Inspector Mohan Chand Sharma at about 05:30 PM but was not aware when it was reduced into writing. He deposed to not taking any private individual in the vehicle for witnessing the proceedings. He did not have any interaction with the secret informer. Further he stated that no document was recovered pointing to the identity of Mohd. Iqbal @ Faizal nor was anything recovered to show his link with any terrorist organization. He did not record the personal search memo and arrest memo of Mohd. Iqbal and did not search the bag recovered from him. He deposed to not having counted the currency note nor noting their numbers. He also deposed that some papers pertaining to "Jaan Gas Agency" were recovered from the briefcase and that he did not enquire about them from the accused. He further stated that at the place of arrest some photographs were taken by the members of the raiding party though he was not aware how many were taken. His statement was recorded in the Special Cell

office by the ACP on 28.11.2006. The witness stated that the police party thereafter returned to the Special Cell office around 4:00AM. ASI Charan Singh left the place with rukka around 11:15 PM. He admitted to not having written down statement of the accused under Section 161 nor to make any enquiries from them. Their disclosure statements were recorded in the Special Cell Office and they were later medically examined. He agreed to not having taken steps to satisfy himself that Mohd. Iqbal was also Faizal. The accused had also not been taken by him to Deoband and he agreed that no enquiry about their visit to Deoband was made. The witness denied the suggestion that Mohd. Iqbal was a gas dealer carrying on business under the name and style "Jaan Gas Agency" and was apprehended from Delhi on 16.11.2006 or that he came to Delhi by Jet Airways on 14.11.2006 in connection with his business since he had to pay Rs.1,50,000/- to M/s Delton Industries at Pitam Pura. He admitted to not informing the Chief Controller Explosives at the time about recovery of the explosives. He also admitted to not having informed Bomb Disposal Squad which had not visited the spot in his presence.

10. PW-5 SI Dilip Kumar corroborated PW-1 in certain material particulars about how the information was received at the Special Cell, the constitution of the raiding police party, its going to Old Delhi, SI Rahul Kumar finding the date and time of the arrival of the Kalka Delhi Mail, two accused walking and standing near STD booth, waiting there for ten minutes and then moving to Chandni Chowk and they being subsequently apprehended and later arrested. He also mentioned about the recovery of shoulder bag and briefcase from the

Faizal and a shoulder bag containing 2 Kgs of explosive from Mushtaq Ahmed. He stated that SI Rahul prepared a rukka and that in the meantime ACP Sanjeev Yadav reached the spot. The rukka was handed over to ASI Charan Singh and he went to the Police Station for registration of the FIR. The ACP was informed about these facts. Further investigation was done by the ACP Sanjeev Yadav; he prepared the site plan at the pointing out of the SI Rahul. The accused was interrogated by the ACP turn by turn and subsequently arrested. He also identified his signatures on the arrest memo and the personal searches. He also identified his signatures on the disclosure statements of the accused Ex.PW-1/F and Ex.PW-1/J. The articles seized and the currency taken into custody by the police were also identified by him.

11. In the cross examination, he stated that the raiding party was armed and also had ammunitions and bullet proof jackets. The witness had an official pistol but was not wearing any bullet-proof jacket. He stated that the accused were apprehended under Kauria Pul on the road upon SI Rahul Kumar signaling the party. He stated that the ACP and the IO Sanjeev Yadav did the writing work while sitting in his Qualis vehicle. He was not aware whether shops and hotels were situated near the spot and also whether there was police booth attached to PS Chandni Chowk in front of Kauria Pul. He confirmed that ASI Charan Singh went with the rukka to the Police Station but did not note which mode of transport he used. He denied the suggestion that the accused were picked up from a hotel i.e. "Rest Inn" at Urdu Bazar opposite Jama Masjid on 16.11.2006. He deposed that

two public witnesses joined the investigation and admitted that no names and addresses of other public individuals present at that time had been noted. He deposed that some cheque books and papers related to the gas agency were recovered from Faizal @ Mohd. Iqbal's bag and that he did not conduct any investigation in respect of the accounts etc. He also confirmed that photographs have been taken at the stage of the recovery but could not remember who did that. PW-6 Zamil Akhtar was Manager of the "Rest Inn" guest house at Urdu Bazar. He deposed that on 5.12.2006, the police officer with Mohd. Iqbal visited his guest house and checked the guest register maintained by the hotel. The register was brought to the Court. An entry of the names of Mohd. Iqbal Jaan and Mohd. Ahmed was made. This was seized as Ex.PW-6/A. He deposed that "on 16.11.2006, local police had checked the hotel and there is an entry in this regard at point 'B' of Ex.PW-6/A. It is wrong to suggest that on 16.11.2006, police from the Special Cell along with the local police had taken away the accused Mohd. Iqbal and Mohd. Ahmed from the hotel for enquiry. The police of Special Cell had not called him in their office on 15.11.2006 to 17.11.2006 and till date". The witness deposed about Mohd. Iqbal telling him that he was a Divisional Officer and that he had retained a photocopy of the LIC card of Mohd. Iqbal. He stated that having told the police that Mohd. Iqbal had informed him about LIC work and that he had retained the photocopy of the LIC card and the police did not record any statement.

12. PW-7 Sikander Azam who used to drive the public transport "fatfat sewa" deposed that when he had left his vehicle with the

mechanic and gone for a dinner at a nearby hotel, he was informed about the crowd. He was declared hostile since he did not support the prosecution story about his being a witness to the recovery etc. He denied his statement Ex.PW-7/A recorded under Section 161. He admitted that one Himmat Telecom, STD booth was situated near Kauria Pul and that he had seen the crowd of people near that shop. He denied hearing noise around 8:25 PM on 27.11.2006 and seeing the crowd of people making noise. He was confronted with his previous statement about the nabbing of the accused which he denied. He also denied witnessing the nabbing and recovery of articles or having seen the police asking members of the public to participate in the investigation or witnessing the recovery of the explosives and the currency notes from the accused. He, however, agreed that Ex.PW-7/A contained his signatures but explained that when he signed it was a blank paper. PW-8 SI Charan Singh also deposed on lines similar to PW-1 and 5 with regard to constitution of raiding party, their going and assembling near Old Delhi Railway Station, taking positions near Kauria Pul, seeing accused reaching the spot, waiting for ten minutes, bags that they were carrying and the circumstances under which they were nabbed. He also deposed that the search of the bags seized from the accused yielded currency notes and two polythene bags containing explosives which were weighted. He further mentioned the ACP and Inspector Mohan Chand Sharma were informed by Dharmender. He mentions having been handed over the *rukka* to the ACP at about 3 or 4 AM. He deposed to the seizure memo being prepared in his

presence. He, however, admitted that the site plan was not prepared in his presence.

13. PW-9 M.B. Bardan, Principal Scientific Officer of the CBI, CFSL, Government of India stated to having received a sealed parcel on 16.12.2006 in the present case. The sealed parcel contained black colored powder and after physio-chemical and instrumental analysis was confirmed to contain the explosives RDX and PETN, high explosive mixture and explosive substance under the Explosive Substance Act. His report dated 29.12.2006 was exhibited as Ex.PW-9/A. This witness was extensively cross examined and denied the suggestion that the contents of the polythene bags were not explosives substance. PW-10 ASI Anil Kumar who was positioned as ASI in the Special Cell, Lodhi Colony stated that at around 12:10 AM on 28.11.2006, he received a *rukka* which was recorded as FIR 92/2006 which was handed over to ASI Charan Singh to be submitted to ACP Sanjeev Kr. Yadav. The original FIR was exhibited as Ex.PW-10/A. During the cross examination, he was asked to read the *rukka*; he stated that since he was matriculate from government school and that since *rukka* was not in Hindi, he could not read it. He admitted to having recorded two DDs in regard to the registration of the FIR at around 10:00PM and 12:00AM, the time gap between them was two hours fifteen minutes.

14. PW-11 Nand Kishore, the second public witness deposed to be present near Kauria Pul in STD booth sometime in end of November at around 8-8:30PM. He said that when he left the booth, the booth owner called him back and asked him to meet the police. They asked

him that he had seen something in the booth to which he replied in the negative. The witness then deposed that police made him to sit in the Sikander (PW-7)'s vehicle, parked near Kauria Pul. Police officers were sitting and writing something which he was asked to sign. He said that police requested him to sign some documents and that they had told that they had apprehended two militants and they were not shown to him. He complied and signed the documents. The witness was declared hostile and several suggestions based on the previous statement said to have been recorded under Section 161 i.e. Ex.PW-11/A about movement of the accused, their being nabbed, the articles recovered from them in the form of currency notes, explosives, cheques and papers from the bag of Mushtaq Ahmed and other details, were all denied. He also denied that the explosives were weighed or that SI Rahul had requested the members of the public to join the proceedings and that PW-7 had so joined.

15. PW-12, Raghunath Singh, the Station Superintendent of Murad Nagar deposed to being posted as Station Superintendent at Deoband on 21.02.2007; he proved the letter received from Sh. Sanjeev Kumar Yadav, ACP Special Cell and exhibited it as Ex.PW-12/A. He confirmed that two tickets were sold by Deoband Railway Station on 27.11.2006 for Delhi Junction and also confirmed having sent the written reply, Ex.PW-12/B to the request by the Delhi Police.

16. PW-14, Rahul Kumar mentioned that in November 2006, he received secret information about one Jaish-e-Mohd. militant named Faizal, working under Sajjad @ Jhanjeb @ Mikall, a Pakistani

resident and Operational Commander of Jaish-e-Mohd. in Jammu and Kashmir. He deposed to forming a team of Inspector Mohan Chand Sharma under the supervision of ACP Sanjeev Kumar Yadav and mounting technical surveillance. He further deposed that on 27.11.2006, information was specifically received that the said Fayaz was coming to Delhi with his associates on the Delhi-Kalka Passenger Mail from Deoband to Old Delhi Railway Station and that they would have large number of explosives to be delivered to their associates near the Kaudia Pull. He deposed that information was lodged in the Daily Diary and a team was formed which left the Special Cell office at 06.00 PM and reached Delhi Public Library at Old Delhi Railway Station at about 06.50 PM. The secret informer met him and Inspector Mohan Chand Sharma at a pre-appointed place. They asked some passers-by to join investigation but they refused. The witness enquired the details from the Railway Station and found that the Delhi-Kalka Passenger Mail was to arrive at the scheduled time. He stated that under directions of Inspector Mohan Chand Sharma, he deputed all team members near and around Kaudia Pul. Like other police witnesses he stated that at 08.10 PM, two individuals emerged from the Old Delhi Railway Station; he also described the articles and package carried by each of them and that they had waited for 10 minutes after which upon their moving to Chandni Chowk, the police party confronted them and subsequently apprehended them. He further stated that the package yielded Rs.5 Lakhs in currency notes which was in possession of Mohd. Iqbal @ Mushtaq @ Fayaz; and that the bag carried by Mustaq Ahmed Kallo @ Afzad contained two

polythene baggages which had two kilos of explosives. These were taken into possession and seized.

17. In the cross-examination, the witness admitted that he joined Delhi Police in 1994 as SI and has not investigated any murder case till the date of deposition and that he was earlier posted at CSS, Special Branch at Chanakyapuri. He also admitted that the rukka (Ex.PW-10/A) did not mention any role played by Inspector Mohan Chand Sharma; he further added that the said police officer was supervising the team. The witness also admitted that neither the Personal Search Memos nor the Arrest Memos were written by him. He also admitted that he did not take personal search of the accused. The witness was not aware if the credentials about the accused were obtained from the J&K. He admitted that two accused – Imran Kimrani and Gulam Rasul were arrested by the Special Branch and were not aware of the point of time or when they were arrested. The witness deposed that the briefcase, Ex.P-9 recovered from Mohd. Iqbal was forced open but this fact was not recorded anywhere in the documents and that the briefcase contained documents, affidavits, bills etc. The details of these were not listed in the Seizure Memo. He also admitted not sending this document for verification anywhere as the police thought it was not necessary to keep details of the documents. He also admitted to not verifying the Delhi addresses mentioned in some of the documents.

18. PW-15, ACP Sanjeev Kumar Yadav deposed and corroborated the other witnesses about having received information about Jaish-e-

Mohd. Operatives, including one Faizal, visiting Delhi, about formation of a team led by Inspector Mohan Chand Sharma and specific information being received on 27.11.2006. He also corroborated the information regarding arrival of Faizal with other accomplices at Old Delhi Railway Station and the police party going there. He deposed that at 08.30 PM, SI Dharmender informed him over telephone that two accused were apprehended and some two kilos of RDX and Rs. 5 lakhs being recovered from them. He deposed that after receiving this information around 08.30 PM, he along with staff members went to Kaudia Pul. He found Inspector Mohan Chand Sharma, SI Rahul Kumar and SI Dilip were there. Inspector Mohan Chand Sharma produced both accused before the witness. SI Rahul Kumar prepared rukka, Ex.PW-10/DA and sent it to the police station; Special Cell, Lodhi Colony through ASI Charan Singh for FIR registration. He also claimed to have prepared a rough site plan, Ex.PW-15/A and interrogating the accused. He made enquiries about the registration of the FIR and being informed that FIR 92/2006 was registered on the basis of rukka. He stated that two public persons, i.e. PWs-7 and PW-17 were present and joined the proceeding and that he recorded their statements. The witness mentioned that the accused were arrested vide arrest memos Ex.PW-1/D and Ex.PW-1/E, and their personal searches were conducted; in the personal search of Mohd. Iqbal, two railway tickets from Deoband to Delhi were recovered and taken into possession separately by memo, Ex.PW-1/A. He deposed that at 03.30 AM on 28.11.2006, the accused was taken to Special Cell office at Lodhi Colony where ASI Charan Singh handed-

over copy of FIR and an original rukka. The witness deposited the case property with MHC(M). The witness also recorded statements of SI Dharmender, SI Rahul, SI Dalip and ASI Charan Singh and other witnesses. He deposed that on 29.11.2006, SI Shehrawat was directed to take the accused to Deoband for making enquiries and the said officer took them to that place. The witness, however, stayed in Delhi. On 30.11.2006, the accused and SI Shehrawat returned to Delhi - Special Cell office at Lodhi Colony. He also stated that SI Shehrawat mentioned that nothing could be recovered at the instance of accused at Deoband, and that at their disclosure, an attempt to trace another associate, Abdul Shahid was made but unsuccessfully. He also stated that pursuant to the disclosure statement, he visited Rest Inn Guest House and saw the Register Entry 1279 dated 14.11.2006. The accused had stayed in that Guest House. He proved that the photocopy of Guest House Register was Ex.PW-6/B. He further confirmed enquiring from the Station Superintendent at Deoband about the arrival of the Kalka Passenger train there and the time of its departure for Delhi and further receiving confirmation that the two railway tickets seized were sold from Deoband Railway Station. He claimed that he could identify the photocopies of the proceedings of recovery of explosive substances and currency notes. He stated that the photographs had been handed-over to him by Inspector Mohan Chand Sharma, Ex.PW-11/C – 11/E and PW-15/F-1 to F-5.

19. In the cross-examination, he stated that he did not record the statement of late Inspector Mohan Chand Sharma under whose

supervision investigation was carried-out. He also stated that Inspector Mohan Chand Sharma had not given him any documents or case property but that the same were given by SI Rahul. He denied the suggestion that Inspector Mohan Chand Sharma was involved in false encounters in the Special Cell. He confirmed that FIR No., the date and title of Ex.PW-15/A at two places were in different ink and explained that they were inserted after confirming FIR No. from police station. He also admitted that the site plan, Ex.PW-15/A did not contain signatures of any witness and that no witness who identified the place from where the accused were apprehended had been shown in the site-plan. He deposed that there was a typographical mistake in the charge and there were no timers recovered from the accused. The witness further stated that he did not call for antecedents of both the accused from J&K as he did not think it was necessary to do so. He also had not sent the briefcase since it had been sealed. He confirmed that the Seizure Memo, Ex.PW-7/A did not bear the signatures of witnesses and of IO on all pages except the last one and that the Seizure Memo, Ex.PW-7/A did not bear the date below the signature of the witnesses. He further admitted to some overwriting at Ex.PW-7/A.

20. PW-15 confirmed not writing any departure DD of the raiding party and not sending for requisition of arms and ammunitions for raiding nor even arranging for the vehicles. Even the DD entry for constitution of raiding party had not been made. He was not aware whether the accused had signed in the Visitor's Register and the

register in hotel. He had asked the Hotel Manager about the accused's activity. The witness also did not visit Deoband. The witness confirmed that papers relating to Jan Gas Agency and other documents were recovered from Mohd. Iqbal and that he also had in his possession files, Sales Tax documents and other papers.

Appellants' arguments

21. The appellants argued that they had been falsely implicated in this case. Counsel relied on the fact that both the accused in their statements under Section 313 Cr.PC maintained that they had been abducted from the Rest Inn guest house at Jama Masjid on 16.11.2006. Mohd. Iqbal in his statement stated that he was a business man and proprietor of *Jaan Gas Agency* in Bandipura, J&K and he had come to Delhi by a Jet Airways flight 9W605 on 14.11.2006 for business purposes. His case was that he was abducted by the police on 16.11.2006 and kept in illegal custody for 10 days; his arrest was shown on paper on 27.11.2006. He further stated that the police officials abducted him from the stair case of Rest Inn guest house. Accused Mustaq Ahmed in his Section 313 statement stated that he was a business man carrying on a business of Service Shoes Sopore in Baramullah, J&K. Even he stated that he was abducted by the police on 16.11.2006 and was kept in illegal custody for 10 days; his arrest was shown on paper on 27.11.2006.

22. Counsel for the accused submitted that the hotel entry register of the guest house, Ex.PW-6/A, showed that the accused (Mohd. Iqbal and Mustaq Ahmed) arrived at the hotel on 14.11.2006 and left the

hotel on 16.11.2006. The prosecution utterly failed to explain where they stayed between 16.11.2006 and 27.11.2006. The prosecution had alleged that the accused went to Deoband and returned to Delhi on 27.11.2006 however they (prosecution) have failed to explain the reason for their (accused's) visit to Deoband. The prosecution was unable to furnish any details regarding their stay at Deoband. Therefore, submitted Counsel for accused that the prosecution failed to prove beyond reasonable doubt, the date of arrest.

23. It was argued that the railway tickets from Deoband to Delhi have been planted on the accused to show that they were apprehended and arrested from Kaudia Pul on the night intervening 27/28.11.2006 and not on 16.11.2006 as claimed by the accused. The letter from PW-12 Raghunath Singh (Station Superintendent), Ex.PW-12/A, does not give any details regarding the passengers who travelled on those tickets but only states that those tickets were sold by the railway station Deoband on 27.11.2006 for Delhi. Further submitted the Counsel that it is unbelievable that accused (if the prosecution story is believed) would travel in the general compartment with explosives and Rs.5,00,000/- cash in their bag. Therefore all this goes to prove that the accused were framed in this case and were kept in illegal detention from 16.11.2006 to 27.11.2006. It was highlighted that the mere production of a railway ticket, bearing no reservation containing the name of either accused, allegedly recovered from their person, could not establish that they had in fact travelled to Deoband, and had returned by train, to Delhi or that they been arrested, in the manner

alleged by the prosecution. The prosecution story was that the accused left Delhi, went to Deoband, and procured the explosive substances, during that period. If such was the case, at least during investigation, it should have collected details of where the accused had stayed and if possible, also from where such dangerous articles were procured. The failure of the prosecution to make such investigation, or place any material on record falsified its story about the accused's arrest. This in fact established what the accused had stated all along, i.e. that they had been picked up on 16-11-2006 and kept in illegal confinement. The Trial Court's inability to attach any significance to these omissions on the one hand, and its conclusion that the recovery of the unreserved compartment ticket and production in an unsealed envelop, corroborated and proved that they had travelled to Deoband and back to Delhi was therefore, erroneous and contrary to record and probabilities.

24. The Learned Counsel for the accused further submitted that the secret information received at PS Special Cell, DD No.12 (Ex.PW-15/H) was regarding "*one Kashmiri youth having code name Faisal...*". The police have not produced any document establishing that Faisal mentioned in the secret information was the same as accused Mohd. Iqbal. All the documents – including those recovered from his possession, related to his true identity, Mohd. Iqbal. If indeed, he was Faisal, and there was a previous history about his activities, the prosecution could have easily established in some manner that Faisal was one of the aliases or assumed identities of

Mohd. Iqbal, or *vice-versa*. The Trial Court completely overlooked this aspect, and apparently was overwhelmed by the nature of charges leveled, and beguiled by the prosecution into assuming that the said accused and Faisal were one and the same.

25. Counsel for the accused argued that the inability of the police to trace Raju (the individual whom the accused were allegedly waiting to meet, at Kaudia Pul) or find any information pertaining to him made unreliable the prosecution story. It was the prosecution case that Raju was to take delivery of the consignment of explosives. It was submitted that neither the source – i.e. from where the explosives were purchased or acquired from in Deoband; nor where the accused stayed in between for 10 days, nor even the identity – assumed or tentative – of the receiver of explosives, was established. Having regard to these grave and fatal omissions, the Trial Court fell into error in accepting an incredible prosecution version that the accused had been arrested and were dangerous militants, intent on waging war with the country, and abetting in terrorist activities.

26. The accused counsel submitted that the consistent prosecution story was that at the time of arrest, a series of photographs were taken, evidencing the articles seized, the witnesses who were present as well as the location of the arrest. These were not produced. Even the photographer who clicked the pictures was not produced to testify during the trial. This too gave a lie to the prosecution allegations against the accused.

Insp. Mohan Chand Sharma was leading the raiding party along-with SI Rahul Kumar (PW-14); recoveries were made under his guidance. However the prosecution did not make him a witness and hence failed to examine him. The Ld. Counsel submitted that his non-inclusion in the witness list casts a doubt on the recoveries and arrest of the accused persons.

The Ld. Counsel for the accused pointed out that ASI Anil Kumar (PW-10) who allegedly registered the FIR in English is just matriculate pass and can hardly read English when asked to read the *Rukka* in English. PW-10 in his cross examination admitted that he was marticulate from a government school of Delhi and that there was no word in Hindi in the *rukka* Ex.PW-10/DA. He further admitted that he could not read the original *rukka*. Therefore the testimony of PW-10 casts suspicion as a person who admittedly cannot read the original *rukka* could not have recorded the FIR on the basis of such a document. Thus, submitted the Ld. Counsel that no FIR was registered on the said day, at the said time, in the said manner.

27. Learned counsel argued that the accused examined two defence witnesses to prove their innocence. DW-1 Imran Ahmad Kirmani testified to prove that the accused were in fact arrested on 16.11.2006 and not on 27.11.2006. DW-1 deposed that he was an accused in FIR No. 89/2006 and that on 15.11.2006 he was abducted from Mangalpuri, Dwarka by police officials of the Special Cell whereas his arrest was shown on 16.11.2006 from Dwarka Sector 6 market. He further deposed that he was an aeronautical engineer and working as

an aircraft technician with Star Aviation Academy, Palam Vihar, Gurgaon. He stated that he was taken to Special Cell Lodhi Colony on 15.11.2006; at that time there was a boy already lodged in the Cell by the name of Mustaq from Azam Garh. He further stated that on the night of 16.11.2006 when he was being taken to another room after interrogation, he saw two Kashmiris present there; he correctly identified the accused. He had not seen these two boys earlier but came to know their names on the night intervening 16/17.11.2006. He further stated that they stayed together at Lodhi Colony for about 5 days and even shared toiletries.

28. It was highlighted that Mohd. Iqbal himself deposed as DW-2 to establish that he had visited Delhi for the purpose of business and nothing else. DW-2 deposed that he was a distributor of Bharat Gas under the code number 140315 at Haajin/Bhandipura. He further stated that he had purchased gas stoves from Delton Industries as they were the authorized manufacturers of gas appliances and spares. He had purchased the appliances in July and October of 2006 and had come to Delhi with cash and cheque books to make the payment against the pending bills of Delton Industries. He further stated that he had been shortlisted for the dealership of Mahindra and Mahindra Automobile Sector and he had come to Delhi for finalizing the dealership. He deposed that his character certificate has been suppressed by the prosecution. He further deposed that he had withdrawn a sum of Rs. 4,76,250/- from J & K bank, Bandipura and the remaining Rs. 50,000/- was money he received by way of sales.

He further deposed that he refused to part with the money he was carrying to Delhi and therefore the police falsely implicated him in this case. In his cross examination he denied the suggestion that all the documents are false and fabricated. He stated that he had withdrawn cash amount from the bank. He admitted that in the entries of his bank account all the withdrawals are through demand drafts and not by cash; Ex.DW-2/E. The accused Mohd. Iqbal placed on record various letters, bills and other documents to prove that he was a business man of good character. Ex.DW-2/A is a letter from Delton Industries requesting for form C for the period of 01.04.2005 to 31.03.2006, Ex.DW-2/AI is a letter from Delton Industries requiring confirmation of statement of account for the year 2005-06, Ex.DW-2/B is a bill of purchase from Delton Industries, Ex.DW-2/C is a letter from Mahindra and Mahindra regarding accused Mohd. Iqbal's application for Mahindra dealership. The accused relied on the above mentioned documents to establish that he was a business man who had come to Delhi for business purpose. The accused further put on record a clearance certificate, Ex.DW-2/D, from the office of village guard (Numberdar) of district Bandipura. The Numberdar stated that Mohd. Iqbal,

“..is a well behaved young man who is a business man dealing with BP Gas Agency at Bandipura Kashmir.

He has no association with any political/anti social/ militant outfits. He possess good moral character and involved in baseless and false case.”

As regards the Rs.5,00,000/- recovered from the bag of Mohd. Iqbal, the Counsel submitted that the said amount was not collected from any hawala operator for the purpose of terrorist activities but was infact withdrawn from his bank account for the purpose of payment to Delton Industries. To prove that the money was not collected from a hawala operator, the accused put on record his bank statement from J&K bank, Ex.DW-2/E, wherein withdrawals amounting to Rs.4,76,250/- are shown. In his deposition as DW-2 he clarified that he had withdrawn a sum of Rs.4,76,250/- from J & K bank, Bandipura and the remaining Rs.50,000/- was money he received by way of sales. The prosecution has not led any evidence in support of its allegation that the amount of Rs.5,00,000/- was collected from an hawala operator; no connection between the money and any hawala operator has been established. Furthermore seizure memo Ex.PW-7/A prepared by Rahul Kumar (PW-14) states that from a chocolate coloured briefcase some documents, blank letterheads of Jaan Gas Agency Bandipur and 4 cheque books of J&K bank were seized. Therefore, the seizure memo corroborates the defence story. PW-14 and PW-15, both police witnesses, also admitted that some documents including Jaan Gas Agency papers were recovered from Mohd. Iqbal. PW-15 further admitted that Mohd. Iqbal was in possession of his sales tax form C and other relevant documents. It was submitted therefore, that the Trial Court, in failing to attach any weight to the defence evidence erred in law. It was submitted, by relying upon the decision in *Dudhnath Pandey v. State of U.P.* AIR 1981 SC 911 that the court has to give equal weightage to both prosecution and defence

evidence. The Trial Court, according to the accused's counsel, fell into error in equating the onus of proving reasonable doubt, with the same high threshold which the prosecution has to discharge, i.e proof beyond reasonable doubt. It was submitted that an overall consideration of the conspectus of circumstances would show that the accused in this case had shown elements which constituted reasonable proof, in the form of plausible explanation for their visit to Delhi, which the Trial Court should have accepted, and acquitted them of the charges leveled during the trial.

29. It was submitted that the Trial Court completely overlooked the fact that not only did the two independent witnesses completely belie the prosecution version, their depositions exposed fundamental and fatal flaws to the allegations against them. It was argued that the witnesses had not been confronted with arrest and personal search memos, even though the prosecution case was that they were at the spot when the accused were apprehended and articles recovered. In fact the materials in the form of arrest memos and personal search memos did not even contain their signatures. Having regard to the fact that according to the prosecution version, the appellants were arrested at 2:30 AM and 2:50 AM respectively, the question as to what transpired during the period 8 PM on 27th November, 2006 till the time of their arrest – more than 6 hours had not been explained. If one viewed this with the fact that the witness who wrote the *rukka* could not even read it the falsity and improbability of the prosecution story was exposed.

30. Appellants' counsel also highlighted some inconsistencies, termed glaring, submitting that ASI Charan Singh left the spot at 11-15 PM on 27-11-2006 with the *rukka*; it yet bore the FIR number. It was also submitted that the arrested persons' relatives signatures were allegedly secured at the time of the accused's arrest, at 2:30 AM. However, no witness – even prosecution witness deposed to it, or was able to shed any light as to how they had reached the special cell, or at the spot, at that odd hour. Counsel further emphasized the fact that indeed if the information was correct as alleged, there is no explanation whether, and if not - why, steps to tighten security in and around the Railway station were made. It was contended that the police witnesses admitted that railway authorities had not been told of the probable arrest, or the information received by the police. The reason for this casual and complacent attitude was not explained to the Court, nor did the Trial Court find the lack of such explanation strange.

31. The appellants' counsel also argued that the sheer improbability of the entire case emerges from the fact that though some DD entries mentioning about receipt of information was relied on during the trial and the witnesses had deposed to receiving intelligence reports in early November, 2006, no movement record diary or road register or departure entries were produced or proved in court. This too created considerable suspicion, and pointed to the defence version about the accused being picked up much earlier, kept in illegal confinement, and then foisted with false charges, being true.

Prosecution Arguments

32. The Learned APP submitted that the prosecution has proved its case beyond reasonable doubt and this Court should not interfere with the Trial Court's decision. The APP submitted that there are no material discrepancies and that all the witnesses have deposed in unison. SI Dharmender Kumar (PW-1), SI Dilip Kumar (PW-5), SI Charan Singh (PW-8), SI Rahul Kumar (PW-14) and ACP Sanjeev Yadav (PW-15) have all deposed regarding the arrest of both the accused persons on the intervening night of 27/28.11.2006; they have also proved the recoveries.

33. The APP submitted that the defence of the accused that they were arrested on 16.11.2006 and were kept in illegal custody till 28.11.2006 cannot be believed. The accused were produced before the Magistrate within 24 hours of their arrest but they did not complain about their alleged illegal detention since 16.11.2006. Further family members of the accused did not complain about the alleged detention to any authority; the complaint to National Human Rights Commission was dated 21.11.2007 (Ex.DW-2/H) and the complaint to J&K, State Human Rights Commission was dated 29.03.2008 (Ex.DW-2/J). Therefore, the defence taken by the accused was an afterthought and they cannot be permitted to take the alleged plea of illegal detention.

34. The Additional Public Prosecutor (APP) argued that PW-6, manager of the Rest Inn Guest house, did not support the defence story regarding arrest of the accused on 16.11.2006 from the guest

house. PW-6, the manager deposed that on 05.12.2006 some police officials of the Special Cell came along with accused Mohd.Iqbal to the guest house and checked the hotel entry register; he correctly identified the accused in the court. He further deposed that he gave a photocopy of page no. 86 of the hotel entry register (Ex.PW-6/A) to the police wherein at serial no.1279 (Point “B”) the name of the accuse Mohd. Iqbal and Mustaq Ahmed was mentioned. In his cross-examination, he admitted that it was a regular practice for the local police to inspect their hotel register. He stated that the Special Cell had not checked their hotel register on 16.11.2006. He again stated that on 16.11.2006 the local police had checked the hotel register but denied that on 16.11.2006 the local police along with the Special Cell had taken away the accused Mohd. Iqbal and Mustaq Ahmed from the hotel for inquiry. He stated that he had not been called to the police station. His statement was recorded on 05.12.2006. He admitted that entry at serial no. 1279 was in his handwriting. He further stated that accused Mohd. Iqbal had told him that he was a Divisional Officer and had come to Delhi for the official work of LIC; he retained the photocopy of the LIC card. He admitted that he read over what the police wrote. He had told the police that the accused had told him that he had come for some official LIC work to Delhi however they did not write this in his statement. All these facts belied the defence version of illegal detention.

35. The APP submitted that 2 kgs of explosive substance was recovered from accused Mustaq Ahmed and mere possession of it is

an offence. The defence taken by the accused that the explosive substance was planted cannot be believed as it is not a readily available substance. It is highly unlikely that police officials would be in possession of such highly explosive substance and that they would plant the same on an innocent person.

36. The APP urged that even though the two public witnesses had not fully supported the prosecution case, their deposition established that police officials were present at Kaudia Pul on 27.11.2006 when it was dark. They also admitted that the police officials were sitting in the Phat Phat Sewa of PW-7. PW-11 even stated that the police told him that they had arrested two militants.

37. The prosecution relied on the testimony of PW-12 Raghunath Singh (Station Superintendent at Deoband in the year 2007). He had deposed that he received a letter (Ex.PW-12/A) from ACP Sanjeev Yadav requesting verification of two tickets. He further deposed that he verified the official record and it was revealed that both the tickets (Ex.PX and PY) bearing ticket number 75898 and 75899 were sold by the railway station Deoband on 27.11.2006 for Delhi; his reply to the ACP's letter is Ex.PW-12/B. This material was sufficient to prove that the accused had travelled from Deoband. Counsel submitted that the Trial Court's finding in this regard is correct and based on a proper appreciation of facts.

38. It was submitted that two public witnesses (PW-7 and PW-11) turned hostile and did not support the prosecution case. PW-7 Sikandar Azam deposed that he did not remember the exact date,

month and year but about a year ago he was the driver of vehicle no. DL-1Q-0082, Phat Phat Sewa, and his vehicle stopped near Kaudia Pul; it was dark at that time. While a mechanic was repairing his vehicle, he went to a nearby hotel to have dinner. He further deposed that while he was having dinner the hotel owner told him that there was a crowd near his vehicle. After finishing his dinner i.e. about half an hour later he went to his vehicle and saw a crowd there and the police inquired from him whether the vehicle was his. He deposed that he told the police that the vehicle was his and they made him sit there; thereafter he left and nothing happened in his presence. The Learned APP submitted that this witness was cross-examined as he deviated from his statement under Section 161 Cr.PC. In cross-examination the witness stated that he did not remember whether the date of occurrence was 27.11.2006 and he further stated that he made no statement to the police. He admitted that his vehicle had stopped near Kaudia Pul. He admitted that he did not take a bill from the mechanic and further stated that he had purchased Clutch Plates from Kashmiri Gate; he did not have the bill for the Clutch Plates. He further admitted that there was a shop by the name of Himmat Telecom near Kaudia Pul and that he had seen a crowd near that shop. He denied having seen the police of Special Cell apprehending accused Mohd. Iqbal and Mustaq Ahmed. He further denied having stated to the police that the accused were having bag and briefcase; he was confronted with his statement Ex.PW-7/A. He further denied having stated to the police that from the bag of Mohd.Iqbal Rs.5,00,000/- were recovered from beneath the clothes in his bag; he was confronted

with his statement Ex.PW-7/A. He denied having stated to the police that from the bag of Mustaq Ahmed granulated explosive substance was recovered; he was again confronted with his statement Ex.PW-7/A. He further denied having stated that the explosive material weighed 2 kgs and that two 10gms samples were sealed separately. He further stated that it is wrong to suggest that PW-14 did all the writing and sealing work while sitting in his vehicle and that the persons apprehended revealed to the police that they were terrorists from the JeM outfit. He further stated that the police obtained his signature on a blank paper; the police threatened him to sign the paper. He denied the suggestion that all the proceedings of this case were done in his presence.

39. It was submitted that PW-11, Nand Kishore deposed that he did not remember the exact date but sometime in November 2006, between 8/8:30 PM he was present in a STD booth near Kaudia Pul and was making a telephone to his children to inform them that he will be late as his car had stopped. He further deposed that as soon as he left the STD booth, the owner of the booth told him that some police officers were calling him; the police made him sit in the vehicle of Sikandar (PW-7) which was parked near the Kaudia Pul. He further stated that the police officers were sitting in the vehicle and were doing some written work. He deposed that the police asked him to sign some documents and told him that they had apprehended 2 militants; the militants were not shown to him. He signed the papers prepared by the police and thereafter left. He further deposed that

nothing else had happened in his presence and he had not made any statement before the police.

40. The Learned APP cross-examined the witness as he was deviating from his statement u/s 161 Cr.PC. He denied having made a statement before the police; Ex.PW-11/A. he admitted that the date of that day was 27.11.2006. He denied the suggestion that on 27.11.2006 at about 8:20/8:25 two Kashmiri people holding briefcase and bags were apprehended. He denied having stated to the police that the apprehended persons revealed their names and addresses as Mohd.Iqbal and Mustaq Ahmed. He denied the suggestion that the police persons searched the bag and briefcase of the accused persons and recovered Rs.5,00,000/- from accused Mohd. Iqbal's bag; he had neither stated this before the police nor had he seen this happening. He further denied having stated to the police that from the bag of Mustaq Ahmed some documents and cheques were recovered alongwith granulated explosive substance. He further denied having stated that the explosive material weighed 2 kgs and that two 10gms samples were sealed separately. He denied the suggestion that a person named Sikandar (PW-7) joined the investigation. He denied the suggestion that the police handed over a seal of RKS to him. He admitted that the police had done the writing work while sitting in PW-7's vehicle. He admitted that seizure memo Ex.PW-7/A bears his signatures. He further stated that he had not seen the accused persons and therefore could not say if those persons are present in the Court.

41. The learned APP argued that even though the two public witnesses did not fully support the prosecution version, their resiling from the previous statements, had to be seen in the overall context of the facts of the case, where the other prosecution witnesses had established the arrest of the accused and recovery of the articles, including the explosives, from their person. It was argued that significantly both witnesses confirmed having signed on the two statements attributed to them; they did not offer any explanation why they signed on those, without witnessing anything. It was submitted that this important aspect cannot be lost sight of because most of the time members of the public are reluctant to associate in criminal investigations for fear of harassment and involvement. In this case, however, the two public witnesses were present and had even signed the statement. Therefore, to the extent, their testimonies in fact corroborated the prosecution version about how the appellants were nabbed, later arrested and charged for the offences they stood trial for.

42. It was submitted that minor discrepancies regarding time of recording of the FIR, or dates when some witnesses were examined, etc cannot be fatal as long as the basic prosecution story regarding involvement in the criminal activity has been established. In the present case, the argument that the appellants had not been identified at all, or that they had been held in illegal confinement for 10 days is entirely premised on baseless assumptions which cannot be given credence to by the court.

Findings and conclusions:

43. It can be seen from the above discussion that the prosecution case – accepted by the Trial Court as proved, was that Mohd. Iqbal was Faizal, who had links with the terrorist group – Jaish-e-Mohd and was controlled by a Pakistani self-styled Commander. It was further alleged that intelligence sources had informed about Faizal sometime in November which led to the formation of a team to track and develop sources in this respect sometime in November 2006. The prosecution case further was that on 27.11.2006, the team received information that Faisal, along with some accomplices would arrive at Old Delhi Railway Station sometime in the evening in a train from Deoband. A police party was formed which under the supervision of Inspector Mohan Chand Sharma and a number of other policemen went to Kaudia bridge (*Pull*) and saw two individuals stopping near a PCO booth for 10 minutes after walking-down the length of the bridge. It was further alleged that when these two individuals, i.e. accused started walking after waiting for ten minutes, they were nabbed by the police party which comprised of around 10 individuals, who had reached the spot in about 2-3 vehicles and also had two three-wheelers (auto rickshaw). ACP Sanjeev Kumar Yadav was not there but left for the spot around 08.30 PM and went there. Two members of the public – PW-7 and PW-11 joined the proceedings and recorded their statements. The police also alleged that currency notes for the value of Rs.5 lakhs was seized from Mohd. Iqbal who carried shoulder bag and a briefcase/suit case; the search of the other accused, Mustaq Ahmed's shoulder bag yielded bags containing two kilos of explosives, two samples weighing 10 grams each were separated and

sent for forensic examination later. The *rukka* and statements of witnesses was taken-up at the spot; all these proceedings took some time. ASI Charan Singh took the *rukka* to the police station where the FIR, being 92/2006 was recorded. Furthermore, the police case was that the accused were taken to the police station and formally arrested there at around 02.30 AM on 28.11.2006. Later, on the basis of their disclosure statement, a police party was sent to Deoband to collect information. However, neither the statements of any witnesses could be obtained nor was it possible to arrest or nab another suspect named by the accused. The police also relied upon the testimony of PW-6, the Manager of a Guest House where the accused had stayed between 14.11.2006 and 16.11.2006; the photocopy of the hotel register seized was identified by the witness and produced in Court. The police further relied upon the forensic expert, PW-9 who deposed that the samples seized and sent for analysis were indeed explosives.

44. The first argument of the accused was that the entire story of the prosecution that Mustaq Ahmed is Faizal and had links with the Jaish-e-Mohd. or was its self-styled Commander was never proved much less proved beyond reasonable doubt. A close reading of the evidence would reveal that all the police witnesses, i.e. PWs-1, 5, 14 and 15 mentioned about Faizal and that he was pointed-out by an informer to the late Inspector Mohan Chand Sharma, who led the raiding party, and who had headed the investigation prior to the arrest of the accused. In one sense, of course, whether Mustaq Ahmed is in fact Faizal or not, is itself a big question-mark. The prosecution has not

produced any documents recovered from the possession or any independent witness, who could identify Mohd. Iqbal, A-1 as Faizal. Furthermore, the documents relied upon by A-1, i.e. pertaining to Jaan Gas Agency, the cheque books recovered from his possession and the other letters led in evidence, make-out that in fact his identity was Mohd. Iqbal; he is a resident of Baramulla in J&K with an address. The evidence of PWs-14 and 15 also establishes that no steps were taken to verify the antecedents or identity of Mohd. Iqbal. The prosecution, however, yet alleged that the deposition of PW-6 and the photocopy of an LIC Agent's identity card, in the name of Mohd. Iqbal revealed that the said accused was deceiving the authorities in respect of his true identity. This line found favor with the Trial Court which was of the opinion that if Mohd. Iqbal in fact ran or was proprietor of a gas agency, there was no reason for him to hold an identity card stating that he was an LIC agent. This Court is of the opinion that the approach of the Trial Court in this regard was erroneous. The trial in this case was in respect of serious criminal charges; the burden of proving what was alleged by the prosecution always lay upon it. Having stated that Mohd. Iqbal was Faizal and that he had links with Jaish-e-Mohd, or was its operative or that he was acting in concert or under the supervision of its self-styled Commander, the allegations had to be proved beyond reasonable doubt. This could have been established by number of methods. The first obvious mode would have been to verify the antecedents from the address indicated by him. The other could have been to in fact identify him through some source – either written or ocular testimony as one

having links with Jaish-e-Mohd. or its Commander. The last would have been to verify whether in fact he held bank accounts and whether Jaan Gas Agency was his concern and whether he was or was not an LIC agent. None of these options were explored and the prosecution complacently though confidently argued before the Trial Court that Mohd. Iqbal did not establish by positive evidence in the form of testimony of any witness that he was a gas dealer or proprietor of a gas dealership and that he had come to Delhi on *bonafide* business activity. Whilst it is principally on that aspect, there was no oral evidence, and the predominant evidence relied upon by the defence as to the *bonafide* nature of the accused's visit to Delhi was based on documents such as air tickets, the Jaan Gas Agency papers and letters written by a Delhi concern, the fact still remains that Mohd. Iqbal's stay for two days in Rest Inn Guest House between 14.11.2006 and 16.11.2006, there is nothing to link him with the second accused - Mustaq Ahmed. The other incriminating evidence – which would be discussed later during the course of the judgment is that a ticket for two persons was recovered by the police from Mohd. Iqbal; it was issued in Deoband for a journey on 27.11.2006. This Court, therefore, hold that the prosecution did not prove beyond reasonable doubt that Mohd. Iqbal was Faizal and that he was a Jaish-e-Mohd. operative. No documentary evidence much less oral evidence to describe the identity or verify by him as a resident of J&K holding bank account was brought on the record of the Trial Court. Whilst all this, the Court also emphasized that the assumption by the Trial Court that the amount of Rs.5 lakhs was brought for dubious purpose, too has not been proved

beyond reasonable doubt. The evidence on record shows that the accused Mohd. Iqbal held certain bank accounts; the statement of those of the concerned bank was placed on the record along with covering letter of the concerned branch. Even though the letter was of a later date, if the police authorities had cared to verify whether the said account was genuine from where the large number of Rs.5 lakhs was withdrawn during the time in question or thereabout, the real truth would have emerged. The failure to do so is an important lapse which casts a reasonable doubt on the prosecution story enuring to the benefit of the accused.

45. The above discussion would not be dispositive of the entire prosecution story vis-à-vis Mohd. Iqbal. The fact still remains that he was concededly with Mustaq Ahmed, the other accused at Rest Inn for a while and was consequently arrested together with that accused. Therefore, the Court has to consider the entirety of evidence as against both these accused since the charge of Section 120-B was framed and the Trial Court in the impugned judgment has proceeded to analyse the evidence and materials on record on that basis.

46. The prosecution version with regard to the circumstances of accused being nabbed on 27.11.2006 has to be seen together with the accused's claims that they were illegally detained for more than 10 days after 16.11.2006. Both accused, under Section 313 Cr.PC statement as well as in their cross-examination made on behalf of the prosecution witnesses alleged that they were illegally detained and kept in illegal confinement on 16.11.2006 till the entire incident was

contrived and their alleged arrest and recoveries shown to have been made on 27.11.2006. The prosecution's allegation about the receipt of information with regard to the two accused reaching Delhi by train at the Old Delhi Railway Station at 07.45 PM on 27.11.2006 has been spoken about by PWs-1, 5, 8, 14 and 15. They have all consistently deposed that this information was being monitored by Inspector Mohan Chand Sharma under the supervision of ACP Sanjeev Kumar Yadav.

47. The very first documentary record is D.D. No.12 (Ex.PW-15/H). This was apparently taken up by SI Rahul Kumar, PW-14 upon receiving secret information telephonically at the Special Cell. The charge-sheet, Ex.PW-16/DA specifically refers to the fact that the charge-sheet which refers to SI Rahul, PW-14 as the complainant/informant, while referring to the FIR, states that,

“Today at about 05.00 PM, specific information was received by the undersigned from a secret informant telephonically in the office of the Special Cell, NDR, Lodhi Colony, New Delhi that the above said Faizal along with another associate is coming from Deoband by Kalka-Delhi Passenger and would arrive at Old Delhi Railway Station at about 07.45 PM and deliver a consignment of explosives to one of their associates near Kaudia Pull. If raid is conducted, they can be apprehended along with huge quantity of explosive material....”

48. This is identical and in fact emanates from Ex.PW-15/H. Yet SI Rahul Kumar in his testimony nowhere mentioned having recorded this and at least did not even mark it in the evidence. He did not even depose to having recorded DD-12 or to having been asked to record it, by ACP Sanjeev Yadav. ACP Sanjeev Yadav, in the testimony dated

19.02.2009, for the first time mentioned that Ex.PW-15/H, DD-12 was recorded at his insistence on receiving specific information about the accused persons. Even the attestations of Ex.PW-15/H by the ACP, PW-15, does not bear any date. These, in the opinion of the Court, throw a cloud of suspicion about the prosecution allegation regarding information having been received at 05.00 PM on 27.11.2006 pursuant to which a raiding party was formed, comprising of several policemen of whom only 4 deposed during the trial – PWs-1, 5, 8 and 14. This aspect has to be duly considered while weighing the impact of the overall evidence against the accused.

49. The next aspect is the nabbing, arrest of the accused, and recoveries made by the police. Here, the four police witnesses mention that the raiding party left the special cell around 6 PM, and after assembling at Delhi Public Library, took position, according to a plan – under the direction of late Inspector Mohan Chand Sharma. All the four police witnesses on one hand, deposed consistently how the two accused reached the *Kaudiya* bridge, waited near the PCO booth for ten minutes, and later set forth on foot and how they were nabbed and the bags seized from them. These witnesses also mention that the bag in the possession of A-2 had explosives. Certain interesting admissions were elicited from the police witnesses, on behalf of the accused, during the trial:

(1) The police party reached back the police station around 4 AM, next morning (28th November, 2006). The prosecution version during the trial, during the evidence of its witnesses, was that the accused

were arrested at the police station, *after* they were taken to the special cell, at around 2:30 AM the next day. This is sought to be corroborated by the arrest memos Ex. PW-1/E and PW-1/F. Yet, PW-15 Sanjeev Kumar Yadav mentioned categorically in the charge sheet Ex. PW-16/DA (dated 10-1-2007) that *“I arrested both the accused in the night at the spot in this case. I also examined witnesses and the exhibits of this case were deposited in PS Malkhana as per seizure report..”*

(2) The two public witnesses, PW-7 and PW-11 did not support the prosecution version at all. Both did not also identify the accused. Quite significantly, even though they supposedly witnessed nabbing of the accused, the arrest memos do not mention their presence; they were not made to sign as witnesses. Common sense would have dictated that the public witnesses who agreed to join the investigation would have been asked to sign as witnesses to the arrest memos and the search memos. Yet, those documents do not bear their signatures; no explanation is given in this regard, and the prosecution appears to suggest that the arrest was made about six hours later.

(3) There is no explanation why the police, who had definitive information about two terrorists and who, according to them, were nabbed with explosives almost immediately after they reached Delhi, were not personally searched in the presence at the spot, and arrested simultaneously, in the presence of the public witnesses. This omission also defies logic. It was not as if there was no probability of the accused keeping explosives or other dangerous substances or even

arms in with them. The police would have searched them, and recorded whatever was found during the search, at the time of their nabbing; the public witnesses' signatures on those memos would have corroborated and authenticated the prosecution version. This omission points at unnatural and extremely improbable behavior on the part of the police defying logic, prudence and reason.

(4) Ex. PW-7/A is a seizure memo, in respect of various articles, said to have been seized from the accused, at the spot, after they were nabbed –such as the briefcase, the shoulder bags, the papers pertaining to the gas agency, explosives, etc. The signatures of PW-7 and PW-11 were apparently obtained on this; the document was drawn by PW-14 Rahul Kumar Singh. This document makes fascinating reading. There is no description of the witnesses' addresses. PW-7 is shown as resident of Kaudiya bridge. PW-11 is shown to be resident of Geeta Colony- without any house number, ward or street number, etc. Furthermore, the seizure memo records (and PW-14 deposes in the evidence) that the seals were handed over to PW-11. This was also deposed to by PW-1. Yet, the prosecution does not seek corroboration of PW-11 on this, or in respect of the memo. The memo Ex. PW-7/A was not proved by the witness. He did not also state that the seal was given to him, after the articles were seized. He was not confronted with the previous statement recorded under Section 161 Cr. PC. This is at complete variance with the testimony of PW-14. The prosecutor did not even make any suggestion, with regard to the seal or the memo Ex.PW-7/A to the public witness PW-11. This blows a hole in the

prosecution story, and undermines its credibility with regard to narration of the facts which led to the arrest of the accused.

(5) Even if some of the above omissions are individually seen as oversights or lapses, the prosecution does not explain why the statement of Inspector Mohan Chand Sharma was not recorded. All the prosecution witnesses mentioned that he was in charge of the information, and aware of the latest development, including the likely visit of the accused. He formed the police raiding party; PW-15 joined the party after the accused were nabbed. In these circumstances, the said witness – who deposed not having recorded the statement of Inspector Sharma, does not explain the reason for that omission. It cannot be the prosecution case that there was foresight or premonition about his unavailability at the stage of trial.

(6) The prosecution witnesses deposed that PW-15 reached the spot at 10 PM (PW-14 stated so; even the statement of PW-5, recorded under Section 161 Cr. PC is to the same effect. PW-15 himself corroborates it by saying that he left for the spot at 8:30 PM, and that after reaching there, he recorded statement of some witnesses, continued the proceedings, and made seizures and arrests:

“I took over the further investigation of this case. On the pointing out of SI Rahul I had prepared rough site plan Ex. PW 1 5/A. I interrogated both the accused persons. In the meantime, I made telephone call to the duty officer of PS Special Cell and made inquiry about the registration of the FIR. On which he told me that FIR No. 92/2006 is being registered on the basis of the rukka by him. Two public persons namely Nand Kishore and

Sikandar Azam were present at the spot and had joined the investigation with the raiding party before (sic my) reaching me at the spot. I also made inquiry from them and they also confirmed the facts of the case and made their statement before me and I recorded their statements under Section 161 Cr. P.C. Both the accused present in court were arrested vide arrest memos PW-1/D and Ex. PW-1/E and their personal search were taken vide memo Ex. PW-1/B and Ex. PW-1/C. In their personal search of accused Mohd. Iqbal @ Mustaq @ Faizal present in the court, two railway tickets from Deoband to Delhi were recovered. The same were taken into possession separately vide seizure memo Ex. 1/A. At about 3-30 AM on 28-11-2006 the accused persons were taken to the office of special cell, Lodhi Colony, Delhi.”

It is clear from the sequence of events, deposed to by PW-15 that the accused were arrested at the spot, in the presence of the public witnesses. Yet, no attempt was made to explain why the public witnesses were not shown as witnesses to the arrest and recovery of the articles and money seized, or even the explosives recovered at that point in time. All these circumstances, in the opinion of this Court, render the prosecution version highly improbable.

50. The accused, Mohd. Iqbal, had relied on a number of documents, during the trial; these were placed in evidence and also mentioned in his statement under Section 313 Cr. PC. Two sets of documents, relating to his bank account, and cash credit facilities, as proprietor of Jaan Gas Agency, were issued by the Jammu and Kashmir Bank. Ex. DW-2/E is the copy of a statement of account, of the said concern, verified by the Branch Manager. The document contains a regular account number, and records that the sum of

Rs.4,76,255/- had been withdrawn by 13th November 2006. The document is prima facie admissible in evidence, in view of Section 4 of the Banker's Book Evidence Act, 1891, which states that:

“4. Mode of proof of entries in bankers' books.- Subject to the provisions of this Act, a certified copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.”

In any case, irrespective of applicability of the above provision, the fact remains that once the copy of the statement of account was produced, and there were some particulars on record that Jaan Gas Agency existed and was an account holder, the prosecution could easily have verified through appropriate correspondence, or process of verification by local police, about such account and whether the appellant had any connection with it. It could also have easily verified whether the specimen signatures with the said bank tallied with that of Mohd. Iqbal. Similarly, A-1 had relied on a letter by M/s Delton Industries dated 29-9-2006 requesting M/s Jaan Gas Agency to confirm its credit balance. That concern had its offices in Delhi, and the veracity of the appellant's plea that he had *bona fide* business concerns, could have been verified and revealed.

51. At this stage, it would be useful to recollect two decisions of the Supreme Court. In the first, *Harbhajan Singh v. State of Punjab*, AIR 1966 SC 97, it was observed that:

"Where the burden of an issue lies upon the accused he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt. That, no doubt, is the test prescribed while deciding whether the prosecution has discharged its onus to prove the guilt of the accused; but that is not a test which can be applied to an accused person who seeks to prove substantially his claim"

In *V.D. Jhingan v. State of U.P.*, AIR 1966 SC 1762 it was held that:

"It is sufficient if the accused person succeeds in proving a preponderance of probability in favour of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur a verdict of guilty. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability."

52. In the present case, whether the first accused was a *bona fide* resident and had a business, Jaan Gas Agency, and further had business relations with a concern in Delhi, were easily verifiable by the police authorities. PW-14 and PW15 mentioned that several documents were in the briefcase, relating to Jaan Gas Agency, etc. Yet no attempts were made to inquire into these aspects, or find out if indeed the said accused was involved in that business. Whether Delton Industries was a genuine concern and if anyone there knew or had transacted business with Mohd. Iqbal or his concern, Jaan Gas Agency, or had a trading account with him, was easily verifiable; Ex. DW-2/B bears an address in Pitampura, Delhi. To cap it all, PW-15 confirmed that the briefcase recovered from the said accused, contained papers concerning Jaan Gas Agency, as well as other documents; yet no effort was made to verify them, as the said official was of the opinion that they were not relevant. This omission, in the

opinion of the court, was unfair on the part of the prosecution which deliberately overlooked the possibility that the accused was a *bona fide* businessman from Jammu and Kashmir. The accused had given a reasonable explanation about his identity and nature of his business, which amounted to discharge of the onus which was cast on him. The prosecution was unable to show that these materials were undependable or false. Likewise, the second appellant, Mustaq had argued that he was a trader from Sopore, and submitted to his having given an identity card issued by the local trader's association. PW-15, who was in touch with the Jammu and Kashmir Police, and had corresponded with the police authorities at Baramulla, admitted during his cross examination that these materials were with him, but he did not get them verified – in respect of the identity of the second appellant, Mustaq.

53. As far as the recoveries go, the same discrepancies that have been noticed by the court, regarding the manner of recording the FIR and arrest of the accused, would apply in respect of these facts too. Furthermore, the Court notices that the police made no attempt to examine their personnel who had allegedly photographed the arrest of the accused, seizure of the explosives and other items. In fact the photographs were not even part of the charge sheet and the final report. They were sought to be brought on record belatedly at the stage of deposition of PW-15, in the form of Mark PW-11/C, PW-11/D, PW-11/E, PW-15/F-1, PW-15/F-2, PW-15/F-3, PW-15/F-4 and PW-15/F-5 respectively. The appellants' counsel objected to the bringing

on record of these photographs. Further, the Trial Court records reveal that PW-15 had, by a letter/ application dated 07-05-2008 stated that the digital data pertaining to the photographs, which were digital photographs, could not be retrieved in time due to technical snags and that the hard disc in the Special Cell was later retrieved. However, none of the witnesses claimed that the photographs were taken during the time; more crucially, the witnesses do not mention or identify any of the individuals in the photographs. The court also notices crucially that the public witnesses who allegedly saw the nabbing and preparation of documents were not confronted with the photographs. Contrary to the deposition of witnesses, the photographs nowhere show a *phat-phat* vehicle, in which the paper work pertaining to the seizure memos was done. The other improbability which throws a question mark about the explosives seized is that PW-5 and PW-14 depose that the explosives and other materials seized and taken into custody were sealed as “RK” and the seals were handed over to the public witness, PW-11 Nand Kishore. Yet, no such suggestion was put by the public witness. The other aspect is that two prosecution witnesses (PW-1 and PW-5) deposed that PW-14 Rahul had weighed the explosive substance, as he had carried a weighing scale with him. However, PW-14 did not mention carrying any weighing scale, or his weighing the article; he merely deposed that the explosive substance was weighed at the spot.

54. The prosecution story before the Trial Court was that the explosives had been procured by the appellants from Deoband and

was to be delivered to someone in Delhi, called Raju. However, the prosecution appears to have made no attempt to trace him or find out his whereabouts. If indeed he was the consignee or ultimate user of such dangerous explosives, the least expected of the police was to have pursued further leads, and ensured that he too was arrested, and charged with conspiracy, along with the present accused. Similarly, the prosecution case is that the police party's efforts to trace the supplier of the explosives, at Deoband were unsuccessful. Now, having arrested the accused, the easiest option to the police would have been to take them to Deoband, and returned with their accomplices or suppliers. Similarly, no attempt was made to show that the accused were in Deoband, and if so, the place where they stayed during their sojourn in that town. The prosecution's attempt at resting content with the arrest of the present appellants, and their prosecution for various offences, belies its assertion that the explosives recovered and seized from them was part of a deep rooted conspiracy.

55. A significant feature of this case is that the statement of almost all those who participated in the police raid was recorded; yet PW-15 conceded that the statement of Mohan Chand Sharma, the inspector who was following the leads, and who formed as well as led the police party, on that fateful day, was not recorded. There is no explanation; it cannot be that the police had a pre-monition that the said official would not be available during the trial (as a matter of fact, Inspector Sharma had died in the meanwhile). The testimonies of the police witnesses PW-1, PW-5 and PW-15 would also reveal that prior

intimation or tip off was not given to the railway authorities, despite information about the possibility of some passengers travelling in the train, armed with explosives. There is no explanation why such an omission took place. It defies common logic that no precautionary measures were taken in this regard; if indeed the explosives were taken by the accused, as suggested there was a real threat to several hundreds, if not several thousands of passengers travelling by the train, and later to thousands of passengers in the Delhi Railway station. PW-15 gave no explanation for this serious omission. This lends an air of unreality to the entire proceedings, further undermining and improbabilizing the prosecution case.

56. Besides the above features, some other glaring facts emerge from a reading of PW-15's evidence. He admitted that the FIR contained insertions, and overwritings, made in different ink. He also admitted that there was a reference to recovery of timers along with explosives, but that in fact no timers were recovered. Further, Ex. PW-7/A which contained the signatures of public witnesses (and was a seizure memo) did not contain any date; it also showed overwriting. He also admitted to not recording any DD entry regarding formation of a raiding party, on the day the appellants were arrested. He admitted to not going to Kashmir or having verified the antecedents of the accused. Further, there is no mention of any informant in the FIR recorded on 28th November, 2006.

57. The Court has no doubt that if all the facts alleged against the accused/Appellants are held to have been proved, their convictions by

the Trial Court would necessarily have to be affirmed. Starting with the gravest offence they are charged with, i.e. Section 121, to the other offences under the same chapter, containing overlapping ingredients (Sections 121-A, 122 and 123) the offences under the Unlawful Activities Prevention Act (Sections 18, 20, 21 and 23), and the offences under Sections 4 and 5 of the Explosive Substances Act, are serious. At one level or the other, they involve overt acts at overawing the sovereignty and integrity of the country and extend to covert acts which include abetment and conspiracy to achieve that end, with the use of explosives. The offence under Section 121 was described in *State (N.C.T. Of Delhi) vs Navjot Sandhu@ Afsan Guru* 2005 (11) SCC 600 in the following manner:

“the intention and purpose of the war-like operations directed against the Governmental machinery is an important criterion. If the object and purpose is to strike at the sovereign authority of the Ruler or the Government to achieve a public and general purpose in contra-distinction to a private and a particular purpose, that is an important indicia of waging war. Of course, the purpose must be intended to be achieved by use of force and arms and by defiance of Government troops or armed personnel deployed to maintain public tranquility. Though the modus operandi of preparing for the offensive against the Government may be quite akin to the preparation in a regular war, it is often said that the number of force, the manner in which they are arrayed, armed or equipped is immaterial. Even a limited number of persons who carry powerful explosives and missiles without regard to their own safety can cause more devastating damage than a large group of persons armed with ordinary weapons or fire arms. Then, the other settled proposition is that there need not be the pomp and pageantry usually associated with war such as the offenders forming themselves in battle-line and arraying in a war like manner. Even a stealthy operation to

overwhelm the armed or other personnel deployed by the Government and to attain a commanding position by which terms could be dictated to the Government might very well be an act of waging war.”

Yet, the Court is equally mindful that all that the prosecution has achieved in this case is to put out a case of picking up of the accused, based on a tip off, by a raiding party led by an inspector, whose statement was not even recorded. The several serious improbabilities which critically and fatally undermine the prosecution story are the complete lack of support by public witnesses; the dubiousness of the public witnesses themselves (their addresses are vague); the suspicious omissions in not investigating the alleged receivers of the explosive, or the omission to take the accused to Deoband, to arrest suppliers of the explosives; the complete lack of any explanation why the identity of Mohammed Iqbal, as Faisal, a terrorist, was not probed; no proof that he was part of any Pakistan based terrorist outfit; no identification in that regard and on the other hand, the police's glaring omission to verify the authenticity of documents produced by him, to say that he was a *bona fide* Kashmir based businessman, who held accounts, from which monies had been withdrawn, etc. The improbability of spot investigation taking over eight hours, during which no arrest was made, and the assertion of some of the prosecution witnesses, that the arrests were made around midnight, at the spot, and other not so significant discrepancies, which taken in isolation would be inconsequential, but which seen in the background of these contradictions and omissions, cumulatively undermine the prosecution case, inject grave doubts. The Trial Court's reasoning in proceeding to

ignore the deposition of public witnesses, and give complete credence to the deposition of official witnesses too, is unsustainable.

58. An important principle of law is that where an accused is charged with grave offences, that carry the most serious penalties, the Courts have to display a careful scrutiny of the evidence in ensuring that the standard of proof beyond reasonable doubt is adhered to scrupulously. In *Mousam Singha Roy and Ors v. State of West Bengal*, [2003] 12 SCC 377, it was held that:

"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."

59. In the present case the prosecution story, for the several reasons outlined above, does not inspire confidence in the Court that the accused/appellants' guilt has been proved beyond reasonable doubt by the State. As a result, the conviction and sentence imposed upon the accused/Appellants cannot be upheld. The same are hereby set aside. The accused are directed to be released forthwith, unless wanted in any other case. The appeals (Cr. A 877 of 2009 and 886 of 2009) are allowed in the above terms.

**S. RAVINDRA BHAT
(JUDGE)**

**S.P.GARG
(JUDGE)**

MAY 6, 2013