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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CONFIRMATION CASE NO. 4 OF 2013

The State of Maharashtra

.. Appellant
(Org. Complainant)

Vs.

Mirza Himayat Baig @ Ahmed Baig Inayat
Mirza @ Hasan

.. Respondent
(Org. Accused)

**WITH
CRIMINAL APPEAL NO. 755 OF 2013**

Mirza Himayat Baig @ Ahmed Baig Inayat
Mirza @ Hasan
Aged 32 years,
R/o Kamwada Galli,
Junna Bazar, Tal. Beed,
District Beed, Maharashtra

.. Appellant
(Org. Accused)

Vs.

The State of Maharashtra

.. Respondent

Mr. Raja Thakare, Spl. P. P. a/w Smt. V. R. Bhonsale, APP, a/w Mr.
Sagar Kumbhar a/w Mr. Bharat Manghani for State.

Ms. Mansi Mahida for ATS.

Mr. Mehmood Pracha a/w Mr. T. W. Pathan a/w Mr. I. A. Khan a/w
Mr. V. A. Shaikh i/by Legal Axis for accused.

**CORAM: NARESH H. PATIL &
S. B. SHUKRE, JJ.**

RESERVED ON : DECEMBER 21, 2015.

PRONOUNCED ON : MARCH 17, 2016

JUDGMENT [Per Naresh H. Patil, J.] :

1. The Confirmation Case No. 4 of 2013 arises out of the Reference made by the learned Additional Sessions Judge, Pune in Sessions Case No. 771 of 2010 for confirmation of the death sentence awarded to accused Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan. By judgment and order dated 15th and 18th April, 2013 in Sessions Case No. 771 of 2010, the learned Additional Sessions Judge, Pune convicted and sentenced accused – Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan as under:-

Convicted under Section	Sentenced to
U/s 16(1)(a) of the Unlawful Activities (Prevention) Act, 1967.	Death and to pay fine of Rs.500/-, in default to pay fine, to undergo imprisonment for one month. The accused be hanged by the neck till he is dead.

U/s. 10(b) of the Unlawful Activities (Prevention) Act, 1967.	Death and to pay fine of Rs.500, in default to pay fine, to undergo imprisonment for one month. The Accused be hanged by the neck till he is dead.
U/s. 10(a) of the Unlawful Activities (Prevention) Act, 1967	Suffer Imprisonment for two years and to pay fine of Rs.500/-, in default to pay fine, to undergo imprisonment for one month.
U/s.18 of the Unlawful Activities (Prevention) Act, 1967.	Suffer Imprisonment for life and to pay fine of Rs.500/-, in default to pay fine, to undergo imprisonment for one month.
U/s. 20 of the Unlawful Activities (Prevention) Act, 1967.	Suffer imprisonment for life and to pay fine of Rs.500/-, in default to pay fine, to undergo imprisonment for one month.
U/s. 13(1)(b) of the Unlawful Activities (Prevention) Act, 1967.	Suffer imprisonment for seven years and to pay fine of Rs.500/-, in default to pay fine, to undergo imprisonment for one month.
U/s. 13(2) of the Unlawful Activities (Prevention) Act, 1967.	Suffer imprisonment for five years.
U/s. 120B of the Indian Penal Code.	Death and to pay fine of Rs.500/-, in default to pay fine, to undergo imprisonment for one month. The accused be hanged by the neck till he is dead.
U/s. 302 read with 120B of Indian Penal Code..	Death and to pay fine of Rs.500/-, in default to pay fine, to undergo imprisonment for one month. The accused be hanged by the neck till he is dead.
U/s.307 read with 120B of Indian Penal Code.	Suffer imprisonment for life and to pay fine of Rs.500/-, in default to pay fine, to undergo imprisonment for one month.
U/s. 435 read with 120B of Indian Penal Code.	Suffer imprisonment for seven years and to pay fine of Rs.500/-, in default to pay fine, to undergo imprisonment for one month.

U/s.153A of Indian Penal Code.	Suffer imprisonment for three years.
U/s. 474 of Indian Penal Code.	Suffer imprisonment for seven years and to pay fine of Rs.500/-, in default to pay fine, to undergo imprisonment for one month.
U/s. 3(b) of Explosive Substances Act, 1908 read with Section 120B of Indian Penal Code.	Death and to pay fine of Rs.500/-, in default to pay fine, to undergo imprisonment for one month. The Accused be hanged by the neck till he is dead.
U/s. 4(a) & (b) of Explosive Substances Act, 1908.	Suffer rigorous imprisonment for life and to pay fine of Rs.500/-, in default to pay fine, to undergo imprisonment for one month.
U/s. 5 of Explosive Substances Act, 1908.	Suffer rigorous imprisonment for life and to pay fine of Rs.500/-, in default to pay fine, to undergo imprisonment for one month.

However, the accused is acquitted for offence punishable under Sections 465, 467 and 468 of the Indian Penal Code. The accused being aggrieved by the very same judgment and order, preferred Criminal Appeal No. 755 of 2013. As both, the Confirmation Case and Appeal, are directed against the same judgment and order, both these appeals were heard together and are being decided by this common judgment.

2. Prosecution case is that, on 13/2/2010 bomb blast had taken place at German Bakery, Koregaon Park, Pune. PW 103 – Vinod Damodar Satav is the Investigating Officer, who was working as an Assistant

Commissioner of Police, Anti Terrorist Squad, Pune Unit at the relevant time. While he was in office, he received information at 19.20 hrs. (7.20 p.m.) about the bomb blast. He proceeded to the spot of incident with the police staff. Police Inspector of Bandgarden Police Station Shri Nadgauda was present on the spot along with staff. The German Bakery is situated on the North Main Road at Koregaon Park, Pune. When the Investigating Officer reached the spot, he saw several articles in the Bakery lying scattered. The glass panels and the counter of the Bakery were destroyed. Many persons, who were in and around the German Bakery, were seen lying in pool of blood. They had received serious injuries. The Investigating Officer informed Police Inspector of Bandgarden Police Station Shri Nadgauda to cordon off the spot. He found gas cylinders, used in the German Bakery, in intact condition. The eastern side wall of the German Bakery was collapsed and one big crater was noticed. While describing the location of the German Bakery, it was mentioned that near the Bakery, there is a place for persons belonging to Jew community to offer prayer, which is called as "Chabad House". The Osho Ashram is at a near distance from the German Bakery. Due to peculiar location of the German Bakery, number of foreigners used to visit the Bakery. The Investigating Officer's initial impression was, that it was a bomb blast

caused involving terrorist activity. The Investigating Officer informed Additional Director General and Director General of Police, Anti Terrorist Squad of the said incident.

3. It is the prosecution case that the injured were taken and admitted to the different hospitals like Jahangir Hospital, Ruby Hall, Sassoon Hospital, Budhrani Hospital and Surya Hospital. The several teams of police officers were formed for the purposes of investigation of crime. The teams were assigned specific job of investigation, spot assessment, viewing of CCTV footage, analyzing technical data etc.

4. Police Inspector Shri Pravin Pant gave report, based on which Police Inspector Shri Nadgauda registered C.R. No. 83 of 2010 in the Bandgarden Police Station (Complaint Exh. 309). The Director General of Police issued order to the effect that the investigation shall be conducted by the Anti Terrorist Squad. Said order dated 13/2/2010 is at Exh. 408. The Investigating Officer PW 103 – Shri Satav took over the investigation. An offence came to be registered in the office of Anti Terrorist Squad, Kala Chowki, Mumbai. A copy of the same was sent to the Special Court of Anti Terrorist Squad (Report dated 15/2/2010 is marked as Exhibit 409).

Thereafter, Investigating Officer drew panchanama of spot of incident on the same day from 8 a.m. to 3.30 p.m. A team of experts from Delhi reached the spot, which included the experts from Forensic Science Laboratory and CBI. The experts had visited the spot and had collected certain samples from the spot of incident. It is the prosecution case that around 20 samples were collected. The experts from the CBI, Forensic Science Laboratory, Pune and Delhi had collected the samples. All the samples collected from the spot were packed in different packets and were sealed with the signatures of panchas. The prosecution case is that videography of the spot of incident was done, certain photographs were taken by the police photographers, namely, Shri Pardeshi and Shri Mhetre.

5. Thereafter the investigating agency sent 7 samples, out of 20, to Pune's Forensic Science Laboratory. 7 samples collected by experts from Forensic Science Laboratory, Delhi were sent to Laboratory at Delhi (Spot Panchanama Exh. 166). The report from the Forensic Science Laboratory, Pune was received. Exh. 343 is a forwarding letter addressed to Laboratory, Pune and the report is at Exh. 22. As per the report of Laboratory at Pune, traces of Cyclonites (RDX), Ammonium Nitrate and Nitrate Ions along with petroleum Hydrocarbon oil were found in the

samples, thereby indicating that RDX was used in causing the bomb blast.

6. The CCTV footages of Hotel “O”, which is next to the Gernman Bakery, was seized by Police Inspector Shri Joshi. Two hard-disks under a panchanama were seized, copies of which were prepared and system generated data of CCTV footage from Hotel “O” was also collected (Exh. 163 is a spot panchanama of seizure of CCTV footage and Exh. 164 is the system generated data). From the German Bakery, one V.C.R., one V.C.D. and one remote control were seized under panchanama. A C.D. was prepared for operational purposes (Exh. 242 is the said panchanama). The inquest panchanamas were drawn (Exhs. 69 to 85). There were 42 injured persons, who submitted their affidavits in lieu of examination-in-chief (Exhs. 113 to 153). Their medical certificates were brought in evidence (Exhs. 200 to 205A and Exhs. 206 to 234). According to the police, 17 persons succumbed to the injuries and were declared dead. The clothes of the deceased persons were sent to laboratory along with sample of hair, skin and blood. The clothes were seized under a panchanama (Exh. 86). The splinters collected by the doctor from dead bodies and the injured persons were sent to laboratory (Exhs. 314 to 320 are the panchanamas).

7. It is the prosecution case that on 18/2/2010, Colonel Mann from the National Security Guards and one Shri Gopinath from Hyderabad Forensic Science Laboratory had visited the spot of incident. Police Inspector Shri Nadgauda was instructed to show them the spot of incident and the articles seized. Colonel Mann and Shri Gopinath opined that the incident was caused due to bomb blast by using mobile phone as triggering device. They also opined that 9 volt battery was used. The articles, which were collected by Colonel Mann and Shri Gopinath, were also sent to Chemical Laboratory. The forwarding letter dated 24/2/2010 is marked as Exh. 410. Two experts, namely, Suresh Padwalkar and Ashish Shinde, who were said to have knowledge in respect of mobile phones, were contacted and then taken to Forensic Science Laboratory to show the articles, which were collected by Colonel Mann and Shri Gopinath. The letter in this respect was written on 26/2/2010 (Exh. 411). The experts' opined that back side part of Nokia mobile model 1100 was seen in the said articles, lying with the laboratory. The statements of these persons were also recorded. During the course of investigation, Police Inspector Shri Joshi was instructed to collect the record of CCTV footages of the date of incident from the German Bakery and prepare copies for operational purposes. 7 video cassettes were made (Exh. 269) (Article 33). This work

was done in the system installed on the second floor of German Bakery. The police suspected that the bomb blast could have been triggered by banned organizations Lashkar-E-Taiba and Indian Mujahiddin. It was noticed that in the month of May, 2006, the Anti Terrorist Squad had seized 16 AK 47 riffles, 3200 live cartilages, 43 Kg. RDX, 50 hand-grenades etc. in the city of Aurangabad, State of Maharashtra. The Investigating Officer Shri Satav – PW 103 had done part of investigation of the said case. A person named Samad Khan was accused in that case. It is stated that he had made confessional statement under the Maharashtra Control of Organised Crime Act, 1999 (for short “MCOC Act). In the said statement, he had referred to the name of present accused – Mirza Himayat Baig, which probably gave clue to the investigating team to investigate the case regarding the role of the present accused – Mirza Himayat Baig. The certified copy of the said confessional statement is at Exh. 412.

8. It is the prosecution case that the present accused – Mirza Himayat Baig was wanted accused in one case, which was registered by Anti Terrorist Squad. The said offence was registered under the provisions of the Unlawful Activities (Prevention) Act, 1967 (C.R. No. 17/2008).

9. During the course of screening of the CCTV footages, it was noticed that one person had entered the German Bakery with two bags and he left German Bakery only with one bag. That person was wearing a cap. The investigating agency had viewed the footage of CCTV installed in the German Bakery and Hotel "O". The relevant clipping of the C.D. is Article 61. This was done by Police Inspector Shri Hasabnis. The CCTV footages were shared with all the investigating agencies and during the course of investigation, it was revealed that in the clipping a person wearing a cap was noticed as Ahemad Siddi Bappa @ Yasin Bhatkal. Police Inspector Dinesh Kadam, who was working in the Anti Terrorist Squad, had also worked in Crime Branch, Mumbai and played a major role in apprehending accused involved in Ahemdabad and Surat bomb blasts. He had certain photographs with him. He was shown CCTV footages.

10. On 27/5/2010, an auto-rickshaw driver came to the office of Anti Terrorist Squad, Pune. The Investigating officer was informed by the auto-rickshaw driver that he had dropped a person from Pune Railway Station to Central Mall, Pune, whose look was identical as was appearing in the photograph published in the newspaper on 25/5/2010. The Investigating Officer recorded the statement of the said auto-rickshaw driver, who

deposed before the court as PW 93.

11. It is the prosecution case that on 7/9/2010, when the Investigating Officer was present in his office, information was received from D.I.G. that accused Mirza Himayat Baig was coming at the Pool Gate Bus Stop at Pune. The Investigating Officer reached the spot by laying a trap. Mirza Himayat Baig was seen at platform No.3 at 14.00 hrs. He was apprehended and brought to Anti Terrorist Squad office. Preliminary inquiry was made with him. After holding preliminary inquiry, the investigating team was convinced that he was involved in the present case. Two panchas were called for taking his personal search (Exh. 252). They found two mobile phones, one of silver gray and one of black colour, a piece of ATM card, election card, a piece of newspaper and pocket diary written in Urdu language and his photographs (Articles 13 to 22). Exh. 252 is the panchanama of personal search. The Investigating Officer arrested present accused – Mirza Himayat Baig. His arrest was informed to his brother and accordingly Bandgarden Police Station was intimated of his arrest by forwarding the report dated 7/9/2010 (Exh. 413).

12. It is the prosecution case that during the interrogation of

accused Mirza Himayat Baig, it was revealed that he himself, alongwith other accused persons Mohsin Choudhari and Yasin Bhatkal, had assembled the bomb in the Global Internet Cafe at Udgir and the remaining explosives and other material were kept at his residence at Udgir. Two panchas were called and in whose presence the statement of accused Mirza Himayat Baig was recorded between 16.45 p.m. to 17.00 p.m. Immediately thereafter the Investigating Officer along with panchas, accused and the staff left for Udgir in Government vehicle and two private vehicles. The team reached Udgir via Solapur road at 1.30 a.m. in the early hours of 8/9/2010. Thereafter, it is the prosecution case that accused Mirza Himayat Baig asked the vehicle to be taken to Jalkot Road. On the say of the accused, the vehicles were stopped. The team contacted the BDDS and called them on the spot. The accused came out of the vehicle. The Bomb Disposal Squad reached. The team proceeded towards the directions given by accused Himayat Baig.

13. It is the prosecution case that accused Mirza Himayat Baig accompanied them to a bungalow, which was having compound wall on all sides. The gate of the compound wall was locked. Accused Himayat Baig called one Abdul. One boy came outside, who disclosed his name as Abdul

Rahim Sayyad. Accused Mirza Himayat Baig showed his face to the boy and gave our introduction to the said boy. Thereafter the boy opened the lock of the gate. It is the prosecution case that the investigating team asked the said boy to take their search but he refused to take such search. Thereafter, investigating team along with the accused entered the bungalow.

14. It is the prosecution case that there was a hall in the said bungalow, which was having one staircase on the right side of the hall. The accused took them from the said staircase to the first floor of the house. One wooden double bed was lying there. Accused Mirza Himayat Baig opened the panel of storage box of the said bed. He removed one nylon bag. It is the prosecution case that accused Mirza Himayat Baig told that the explosives were kept in the said bag, covered in a plastic bag. The BDDS officers were asked to verify the explosives with the help of sniffer dog. Sniffer dog named "Janjeer" was made to sniff the explosives. Said sniffer dog barked and wagged its tail and gave indication that it was explosive. The BDDS officers informed that the bag was containing explosives. Thereafter the said bag was opened. There were five pieces of some substance, all black in colour, one soldering gun, soldering wire and one wire cutter in the said bag. The five pieces of black coloured substance

were weighed on the weighing machine, which weighed 1200 grams in total. From that, samples of 50-50 grams were made. The seized articles were kept in separate bags and were sealed with the lakh seal and thereafter panchanamas were drawn, labels were put with the signatures of the panchas. A detailed panchanama was prepared (Exhs. 341 and 341A). The articles seized were numbered as 54 to 60, which were seized under panchanama (Exh. 341A).

15. It is the prosecution case that a station diary entry was made before leaving the office. The said entry is at Exh. 414. During the course of inquiry, it was informed that one person, namely, Gaus had taken two bags of accused Mirza Himayat Baig. The Investigating Officer directed to inquire into the same. The investigating team thereafter returned to Pune. After coming back to Pune, an entry was accordingly taken in the station diary on 8/9/2010. Said entry is at Exh. 415. The prosecution placed reliance on the log-book entry of the Government vehicle, which was used at the time of aforesaid panchanamas at Exhs.341 and 341A.

16. Accused Mirza Himayat Baig was produced before Pune court on 8/9/2010. He was remanded to custody till 20/9/2010. He was taken to

Anti Terrorist Squad office at Pune so that he could be kept safe and investigation could be carried out properly. Police Inspector Dinesh Kadam was asked to interrogate accused Mirza Himayat Baig and in the meanwhile PI Gaikwad conducted investigation in respect of two bags belonging to accused Mirza Himayat Baig, which were made available to police by Gaus. One of the bags contained clothes of accused Himayat Baig and another contained documents and reports. The report was submitted regarding seizure of two bags (Exh. 417). The panchanama of the seizure of two bags is at Exh. 264. There were 59 documents in one bag. They were kept in different envelopes. They contained election card, certificate pertaining to disability, educational certificates and one passport. In panchanama at Exh. 264, there was a reference to an endorsement in the passport that accused Mirza Himayat Baig had visited Colombo via Chennai on 7/3/2008 and had returned on 24/3/2008.

17. It is the prosecution case that the explosive substance, which was seized at the instance of accused, was sent to Forensic Science Laboratory. The C. A. report is at Exh. 24 which says that “explosive substance was RDX, petroleum Hydro Carbon oil and Charcoal”. Sample of the said material was also referred to Forensic Science Laboratory at

Pune and Delhi. Exhs. 22 and 23 are reports received from Pune and Delhi Forensic Science Laboratories. Prosecution case further suggests that accused Mirza Himayat Baig was in contact with other accused persons, who were involved in the case of Arms Haul of Aurangabad, State of Maharashtra, in the year 2006. It was further revealed that accused Mirza Himayat Baig was in contact with the absconding accused in the said Arms Haul case, namely, Jabiuddin Ansari and Fayyaz Kagzi. Accused Mirza Himayat Baig had given his identity in the name of “Hasan” and “Yusuf”. He projected that he was running the Internet Cafe at Udgir. He was also in contact with absconding accused by name Riyaj Bhatkal, Iqbal Bhatkal, Yasin Bhatkal and Mohsin Choudhari. Accused Mirza Himayat Baig was acting as per the directions of the absconding accused and was inciting the minds of young persons in propagating Jihad by inciting them to cause incidents like bomb blasts and create disharmony between the Hindu and Muslim religion. Accused Mirza Himayat Baig had gone to Colombo and met absconding accused Jabiuddin Ansari and Fayyaz Kagzi and had undergone training of assembling the explosives. He had received fundings for the said cause. The said financial assistance was received in Euro Currency. Passport of accused Mirza Himayat Baig is Article 30.

18. It is the case of the prosecution that accused Mirza Himayat Baig was using ATM card of one Rehan, who is examined as PW 94. From the diary maintained by accused Himayat Baig, it was revealed that he was in contact with absconding accused. The banking transactions were done from the account of Rehan. The handwriting of accused Mirza Himayat Baig was seen on the pay-in-slips of the bank. The investigating agency had taken specimen handwriting and signature of accused Mirza Himayat Baig. Specimen signature of Rehan was also taken by drawing a panchanama. (Exhs.247 and 250). The record containing CCTV footage at the ATM centre was also relied upon by the prosecution. A C.D. prepared for the operational purposes, by drawing a panchanama at Exh.253, was relied upon. In this connection, two CDs were prepared by the prosecution (Articles 23A and 23B).

19. It was further revealed that on 7/2/2010 accused Mirza Himayat Baig had travelled from Udgir to Mumbai by bus of Priyanka Travels. The police seized register maintained by Priyanka Travel by drawing a panchanama (Exh. 283). Accused Mirza Himayat Baig reached Mumbai on 8/2/2010 and resided in Al-Noor Lodge. The register, containing the entries, maintained by the Al-Noor Lodge was seized by the

police (Article 35). The signature of accused Mirza Himayat Baig is at Exh. 281 in Article 35.

20. The prosecution case is that Police Inspector Reddy had conducted investigation in connection with the use of different identity cards by accused person. It was revealed that accused person had collected certificate of handicapped person, caste certificate, ration card, certificate of residence and driving license. Said documents were sent for verification to the concerned agency. The authorities confirmed that the certificate of handicapped person was a forged document. Concerned Tahsildar informed that the caste certificate and ration card were forged documents (Exhs. 285 and 286). The certificate of residence was also found to be forged by Chief Officer, which is at Exh. 290.

21. Further investigation conducted by PI Dinesh Kadam revealed that accused Mirza Himayat Baig had come to Mumbai on 8/2/2010 and had purchased one sack bag and one Nokia mobile phone of 1100 model. The police went to person, namely, Mohammad Ilias Mansoori from whom the accused had purchased the sack bag. Accused Mirza Himayat Baig had come to Pune on 31/1/2010. He came again there on 13/2/2010.

22. During investigation, it was revealed that accused Mirza Himayat Baig was using two mobile phones having Sim card of Tata Docomo and Vodafone. When accused Mirza Himayat Baig was apprehended, mobile phone having Sim card of Tata Docomo was found in his possession. During his visit to Mumbai on 8/2/2010, accused Mirza Himayat Baig had kept the cell phones with one Zakiuddin and had left Mumbai for Udgir and the same was done by the accused to camouflage his presence. Accused had instructed Zakiuddin to keep the mobile phones in switched on mode and answer the phone calls.

23. On 11/2/2010 accused Mirza Himayat Baig had gone to Aurangabad from Mumbai by bus. He had kept his mobile phones with a person by name Shakil Ahemad and had instructed him to keep the mobile phones on switched on mode. It was revealed that both the mobile phones were taken back by the accused from said Shakil Ahemad in the night of 13/2/2010.

24. It revealed that absconding accused Yasin Bhatkal and Mohsin Choudhari had visited Udgir in the third week of January 2010 and hatched

conspiracy with accused Mirza Himayat Baig and accused Mirza Himyat Baig had come to Pune on 31/1/2010 for surveying the German Bakery. On 6/2/2010, absconding accused Yasin Bhatkal and Mohsin Choudhari had again visited Udgir and carried the explosives and articles used for causing bomb blast with them. Accused Mirza Himayat Baig had arranged for their stay and made place of Global Internet Cafe available for assembling the bomb. The mobile phone, which was purchased by accused Mirza Himayat Baig in Mumbai, was used to trigger the bomb.

25. The investigating officer Shri Satav deposed that necessary sanction was secured from the concerned Collector for prosecuting the accused under the Explosive Substances Act and after seeking sanction from Additional Chief Secretary (Home), State of Maharashtra, under the Unlawful Activities (Prevention) Act, further steps were taken. After obtaining necessary permissions and sanctions and after recording statements of various witnesses, the Investigating Officer filed charge-sheet on 4/12/2010 against the present accused Mirza Himayat Baig and absconding accused for the offences punishable under Sections 120(B), 302, 307, 326, 325, 324, 427, 153A, 467, 468, 471, 474, 109, 34 of Indian Penal Code, under Sections 10, 13, 16, 18, 20 and 21 of Unlawful

Activities (Prevention) Act, 1967 and under Sections 3, 4 and 5 of Explosive Substances Act, 1908. Since some of the said offences were triable by Court of Sessions, the Judicial Magistrate, First Class (A.C. Court, Pune) committed the case to the Sessions Court by an order dated 6/12/2010.

26. According to the prosecution, at the scene of offence, 9 persons died and 8 person died in the hospital (total number of persons died is 17). Amongst the deceased, few were foreigners. 58 persons suffered injuries. On behalf of the prosecution 103 witnesses were examined. The charge-sheet was filed against seven persons, six of them were shown as absconding. The charge-sheet was filed in the Court of J.M.F.C. (A.C. Court), Pune. The learned Magistrate issued proclamation against the absconding accused under Section 82 of Cr. P. C. and issued warrants against them, based on an affidavit filed by the Investigating Officer and by written application filed by Investigating Officer on 15/10/2011. The learned Magistrate observed that the evidence recorded in the matter would be under Section 299 of Cr. P.C. against the absconding accused persons.

27. The charge was framed against the accused on 16/7/2011 (Exh.

17). The charge was read over and explained to the accused, to which he pleaded not guilty and claimed to be tried.

28. The prosecution examined 103 witnesses, out of which evidence of the prosecution witnesses nos.1 to 41 was tendered by submitting affidavits pursuant to the provisions of Section 296 of Cr. P.C., they being formal witnesses. The defence was given opportunity to cross-examine the prosecution witnesses. From the list of formal witnesses, the defence chose to cross-examine 11 witnesses.

29. After framing charge, prosecution submitted an application (Exh.20) praying for exhibiting 43 reports from the Government Scientific Expert as per the provisions of Section 293 of Cr. P. C. The learned defence advocate submitted say (Exh. 21) to the effect that the reports from Forensic Science Laboratory mentioned in the application from Sr. Nos.4 to 43 may be exhibited under Section 293 of Cr. P.C. The defence did not admit the reports of Forensic Science Laboratory mentioned at Sr. Nos.1, 2 and 3. The trial court admitted in evidence the Forensic Science Laboratory reports (Exhs.22 to 65) with liberty to defence to make appropriate application under sub-section (2) of Section 293 of Cr. P. C., if they so

desired, for examining any such witness, by passing an order on 30/7/2010.

30. The prosecution submitted application (Exh. 66) under Section 294 of Cr. P. C. calling upon the defence to either admit or deny certain documents such as spot panchanama, photographs and videography of the scene of offence, panchanamas in respect of seizure of hard disk of the computer of Hotel "O" and the video cassettes from the German Bakery, sketch of the spot prepared by the survey officer, inquest and papers regarding cause of death of victims, panchanama about seizure of clothes of deceased, panchanamas in respect of seizure of splinters from the bodies of injured, certificates of injured persons and the forwarding letters sent to the forensic science laboratory filed by them in support of the case. The say of defence was called. The say was submitted vide Exh. 67 stating therein that the inquests mentioned at Sr. Nos.9 to 25 and forwarding letters addressed to the forensic science laboratory mentioned at Sr.Nos.89, 90, 96 to 129 and mentioned in the said application are not denied and they may be exhibited. The inquest panchanamas and the papers regarding cause of death of the victims came to be admitted in evidence and marked as Exhs. 69 to 85. The defence counsel admitted certificates of injured persons, which are mentioned at Sr. Nos.34 to 85 in the application at Exh. 66. They

are marked as Exhs.200 to 234 in evidence. The documents which were admitted by the defence concerning the injury certificates were exhibited. The defence advocate admitted panchanamas pertaining to seizure of splinters removed from the body of the injured persons and seizure of clothes of deceased. On 20/3/2012, the prosecution submitted another application under Section 294 of Cr. P.C. concerning admission and denial of genuineness of injury certificates of six injured persons. The defence admitted the same (Exhs.235 to 240). Prosecution filed application for tendering evidence by way of affidavit of formal witnesses, which was allowed by an order dated 3/9/2011. Application was filed by the prosecution for recording the evidence against the absconding accused under Section 299 of Cr. P.C. The defence opposed the said application. Said application was allowed by an order dated 15/10/2011 by observing that the evidence recorded in the matter would be under Section 299 of Cr. P.C. as against the absconding accused.

31. Prosecution submitted an application under Section 294 of Cr. P.C. (Exh. 385) calling upon the defence to admit or deny sanction orders secured by the prosecution for prosecuting the accused. The defence had no objection to exhibit the said three sanction orders. Three sanction

orders, therefore, came to be admitted in evidence and marked as Exhs. 391, 392 and 393. Map/sketch of the spot of incident was also submitted, on which the defence had given endorsement that the same may be exhibited and therefore, the same was admitted in evidence at Exh. 260.

32. The prosecution, after recording evidence, filed closure pursis at Exh. 427. The statement of accused was recorded under Section 313 of Cr. P. C. Defence did not examine any witness.

33. This is a case based on circumstantial evidence. The prosecution has placed reliance on various circumstances, which includes the long standing association of accused Mirza Himayat Baig with absconding accused Fayyaz Kagzi, Jubiuddin Ansari, Mohsin Choudhari and others, active part shown by the accused in the activities of “Jehad” and tendency of the accused for taking revenge against the “atrocities” committed on Muslim community. The prosecution states that accused camouflaged identity by using pseudo names such as Hasan, Yusuf, Ahmed. He created fake documents of identity. The prosecution case suggests that the accused entered into criminal conspiracy with the absconding accused to cause bomb-blast at German Bakery, Pune and as it's part, committed

several unlawful activities, including hiding his own identity for indulging into financial dealings without involving his name for using ATM card of PW 94. As a part of criminal conspiracy, accused Mirza Himayat Baig did reiki at Pune and visited Colombo, Sri Lanka for committing unlawful activities.

The prosecution case is that accused Mirza Himayat Baig is a member of banned terrorist organization Lashkar-E-Taiba i.e. L-e-T.

In pursuance of conspiracy hatched with the absconding accused, accused Mirza Himayat Baig visited Mumbai for purchasing mobile hand-set i.e. Nokia 1100, which was used as a triggering device and a haversack bag. The accused, as a part of criminal conspiracy, created false alibi by keeping his mobile phones with his friends to show that on the date of blast, the accused was at Aurangabad. The accused was found in possession of documents of identity of other persons. The accused had been last seen with another absconding accused i.e. Yasin Bhatkal, wearing a cap and carrying two bags on 13/2/2010 at Pune, on which day the blast was carried out at German Bakery.

34. The prosecution case is that on the date of the blast, the other

absconding accused wearing a cap and carrying two bags entered German Bakery and left the Bakery having one bag with him. The said person was identified as Yasin Bhatkal, who was planter of the bomb. He was shown as absconding accused.

35. The prosecution placed reliance on seizure of CCTV footages of German Bakery and Hotel “O”, recovery of RDX, Forensic Science Laboratories reports and sanction orders obtained under the Unlawful Activities (Prevention) Act, 1967 and Explosive Substances Act, 1908.

36. Broadly speaking the main plank of the prosecution case rests on circumstances like, background of the accused and his various unlawful activities, purchase of mobile hand-set of Nokia 1100 from Manish Market, Mumbai, seizure of RDX from a room in white building at Udgir at the behest of the accused, making of bomb in Global Internet Cafe run by the accused, reiki done by accused of German Bakery at Pune, his presence in Pune along with the planter of bomb, identification by auto-rickshaw driver and mobile phone being used as a triggering device for exploding the bomb and use of RDX (Cyclonite) in the bomb that exploded at German Bakery.

37. On the issue of association of accused Mirza Himayat Baig with absconding accused Fayyaz Kagzi, Jabiudding Ansari, Mohsin Choudhari and other, the prosecution examined PW 73, PW 87, PW 94, PW 97 and PW 103.

PW 73 – Abdulsamad Mohammad Hanif Shaikh stated in his examination-in-chief before the court that he was having the cloth shop by name “Indore Cotton Shop” at Udgir. He purchased clothes from Mumbai and sold them in his shop. He met with one person by name Yusuf sir with his friend Khurshid Alam. His friend Khurshid Alam told him that Yusuf sir was having an Internet Centre by name Global Internet Cafe in the Nagar Parishad market. Khurshid told him that Yusuf sir would give him money but Yusuf sir (present accused), who stated that he was not knowing this witness and, therefore, he would give money to Khurshid Alam. Accordingly Khurshid Alam gave Rs.40,000/- in cash to witness – Abdulsamad. After two days, Khurshid Alam came to his shop and gave Rs.60,000/- in cash to the witness. During the intervening period of three months, an amount of Rs.1,20,000/- was paid by the witness to the accused by visiting his Internet Cafe. He became more friendly with the accused.

He identified the accused in the court and stated that he was “Yusuf sir”. On 6/2/2010, the witness had gone to Mumbai for purchasing. It was his practice to book tickets from Priyanka Travels, Latur, on phone. He had booked ticket for 6/2/2010. Priyanka Travels belonged to his friend Ezaz Maniyar. Whenever the witness visited Mumbai, he was staying in Al-Noor Lodge situated at Mohamad Ali Road, Crawford Market. He reached Mumbai in the morning of 7/2/2010 and stayed at the Al-Noor Lodge. There was a practice to obtain name and signature of the customer at Al-Noor Lodge. The witness had written his name, mobile number in the register maintained there and thereafter he was allotted bed. He rested there for some time and had breakfast at the hotel situated next to Al-Noor Lodge. The witness stated that in between 11 a.m. to 12.00 noon, he received phone call from Yusuf sir. He told him to book one ticket for Mumbai. Accordingly, the witness telephoned his friend Ezaz Maniyar and booked one ticket in the name of accused. Mobile number of Yusuf sir was given to Ezaz Maniyar. Accordingly, accused travelled to Mumbai on the said ticket in the morning of 8/2/2010. The witness had gone to receive Yusuf sir and he accompanied him to Al-Noor Lodge. There the accused (Yusuf sir) wrote his name in the register. The witness identified the register maintained by Al-Noor Lodge (Article 35) and the entry at Sr. No.

1124 dated 7/2/2010 in the register was the in the name of accused. There was signature of accused in Column No.16. Entry and signature was marked at Exh. 322. The signature at Exh. 281 in the register was identified by the witness that of accused Yusuf sir.

38. The witness stated that once he had gone to Internet Cafe to meet the accused. There he was introduced to a person from Pune. The witness heard of the bomb blast in German Bakery through television and it was reported that Yusuf sir who was the owner of Global Internet Cafe was involved in the bomb blast. In the television news, his name was mentioned as Himayat Baig. In the television news, photographs of German Bakery and Global Internet Cafe and one person were shown, who was referred as Mohsin Choudhari. That person was the same person to whom the accused had introduced the witness in Global Internet Cafe as his friend.

39. In the cross-examination, the witness admitted that he did not personally see Yusuf sir handing over money to Khurshid Alam. The witness stated that thereafter police recorded his statement and it was not read over to him. The witness did not make entry in the register

maintained by Al-Noor Lodge in his hand-writing. He had only put up his signature.

40. The next witness is PW 94 – Shaikh Abdul Rehan Shaikh Ahemad. He was residing at Aurangabad since last three years with his family. He had many friends in Beed and accused Mirza Himayat Baig is one of them. He identified the accused in the open court. He got acquainted with the accused in the year 2006. Mudatsir, Jabiuddin Ansari and Dr. Sohail are the friends of accused Mirza Himayat Baig. The person by name Abdul Jindal arrested by Delhi Police was said to be same person by name Jabiuddin Ansari. He stated that he had seen accused Mirza Himayat Baig together with the said person named above. The witness stated that in the year 2006, the arms and ammunitions were found in Aurangabad. Thereafter, his cousin brother Izaz Abdul Rahim Shaikh and Jabiuddin Ansari had absconded. Jabiuddin Ansari was arrested in connection with the said stock of arms and ammunitions found in Aurangabad. The witness used to attend Dars (religious discourse). The accused was also attending such Dars delivered by Dr. Sohail. In the said Dars, the witness, accused Himayat Baig, Zaki, Burhan and others were present. After 3-4 months of Dars, the witness met accused Mirza Himayat

Baig at village Kej in District Beed in Marathwada region of Maharashtra in one Dawat. The said Dawat was organized by accused Himayat Baig. After having lunch, they offered Namaz about 5 p.m. and after some time they had read Kurhan. Thereafter there was discussion about atrocities on Muslims and incident of Babri Masjid, Gujarat riots. They discussed that all should come together and fight against atrocities and do Jihad. These instructions were given by accused Mirza Himayat Baig and others who were present there.

In the year 2008, the witness was working in Pune in a consultancy by name Job One India. He was having bank account in the branch of Bank of Hyderabad, situated at Mondha in Beed city. He was having ATM card of the said bank account. His bank account and ATM card was used by accused Mirza Himayat Baig who had asked for his ATM card. All the transactions in the said account was done by accused Mirza Himayat Baig.

The witness further stated that in the year 2008 when he met accused Himayat Baig, he was residing in Masjid. Thereafter the witness also started residing in Masjid. The accused had taken on rent one shop in

the Nagarparishad complex at Udgir. There he started Internet Cafe. The Internet Cafe started functioning in the month of February, 2009 by name “Global Internet Cafe”. The witness started working in the said Global Internet Cafe. He was getting Rs.1500/- per month. Thereafter the accused took one room on rent in Masjid situated at Chandrakant Square and the accused and the witness started residing there. During their stay, the witness and the accused were talking about atrocities on Muslims, the incident of Babri Masjid, Gujarat riots and disturbance in Philippines. The accused reiterated that they should take revenge and to do Jihad. In Udgir, accused Himayat Baig was known as “Yusuf sir”.

In the month of December, 2009, accused Mirza Himayat Baig told the witness that the Internet Cafe was not functioning properly and he had searched a job for the witness in Hotel New Bharat at Hyderabad. The witness went to Hyderabad in December, 2009. The accused had accompanied him. In March, 2010, the witness and the accused came to Udgir from Hyderabad. Accused Himayat Baig showed him one video clip from his mobile phone, which was relating to training given to persons at Afghanistan. Accused stated that they should also take such training.

The witness deposed in cross-examination that father of accused Mirza Himayat Baig was doing the work of preparing Jilebis and Bhajia. Some time he used to go to the house of accused. Their friendship became strong in the year 2008. The ATM card of the witness was given to accused on asking, which was used by the accused. The witness clearly stated that he was not depositing any amount in the said account. The witness agreed that atrocities were committed on Muslims in Gujarat and riots had taken place. He was aware of incident of demolition of Babri Masjid. According to the witness, Jihad means to control oneself and Jihad also means to fight back against the atrocities committed in the name of religion. Witness stated that whenever accused Mirza Himayat Baig went out of station, he used to look after the work of Internet Cafe.

41. The next witness is PW 97 – Mohammad Zakiuddin Ansari. The witness is native of Beed. In May, 2006 some boys were taken in custody in connection with RDX and firearms, which were found in Aurangabad. He stated that at that time accused Mirza Himayat Baig and others were absconding from Beed. Witness stated that whenever he went to Beed, accused Himayat Baig used to meet him and talk about Godhra incident of Gujarat, demolition of Babri Masjid, atrocities on Muslims and

about Jihad. As per Islam, Jihad means to make efforts but Mirza Himayat Baig used to say that Jihad means to take revenge. Sometimes the accused used to keep his mobile phones with the witness by saying that people were troubling him.

42. On provoking to take revenge against atrocities on Muslims under the garb of Jihad, prosecution placed reliance on PW 95 – Shakil Ahmed Laik Ahmed and PW 97 – Mohammad Zakiuddin Ansari.

PW 95 is Shakil Ahemad Laik Ahemad. He is educated upto B.Sc. Computer Science. He was residing at Aurangabad since his birth. He was called by the ATS police in their office at Kala Chowki, Mumbai in September, 2010. When he visited the office of ATS police, accused was shown to him. He identified accused Mirza Himayat Baig as Yusuf. The witness identified the accused in open court by saying that he is Yusuf, by pointing out towards him. This witness attended Dars in Parbhani. He met Kashif, who introduced him with the accused. After Dars, he returned back. In the year 2008, Kashif had taken him to one hotel situated in the area of Usmanpura in the city of Aurangabad. Yusuf was present there. Yusuf told him that atrocities were being committed on Muslims and they

should do Jihad by taking revenge. It was the accused who stated that students should be gathered and it was his responsibility to give them training of arms and ammunitions, which he can arrange for. The witness and the accused were in contact telephonically.

In the year 2009, Yusuf had called the witness to Udgir at Global Internet Cafe. When the witness went there, the accused introduced the witness to Sabir Patel, Rehan, Alif and Khurshid Alam. The witness identified Rehan – PW 94 in the open court. Witness stated in examination-in-chief that as Yusuf started talking about Jihad, he started avoiding the accused. On 12/2/2010 accused Himayat Baig had come to Aurangabad. He met the witness. He again came to the witness at 10 p.m. He kept two mobile phones with the witness. He looked tired. When asked, the accused informed that he had come on the bike from a long distance. The accused disclosed him the name of the organization and when the witness asked him about the said organization, to which he replied that it was L-e-T.

43. The next circumstance is relating to camouflaging identity by pseudo names as Hasan, Yusuf, Ahmed. The evidence led by prosecution relating to this circumstance is of PW 73, PW 92 and PW 95.

PW 92 is Shaikh Gaur Khurshid Ahemad. He is a resident of Udgir since birth. He was educated upto B.Com. He was running Alsaba Classes for 5th to 7th standards' students at Udgir. He was running the classes in a building known as White Building, Azad Nagar, Jalcot Road, Udgir. The said building was owned by one Tanwir Kadri, which was rented out to the witness. There were other persons, namely, Shaikh Ayyaz, Abdul Rahim, Jalkote Madam, Kadri Madam and the accused referred as "Hasan Sir" as teachers. He explained that Hasan sir means Himayat Baig, who was teaching computer to students. Witness identified the accused in open court. The accused told the witness that he had taken education upto D.Ed and he wanted a place to stay, on which the witness told him that he may stay in one of the rooms in the building and teach the students. In the month of March, 2010, the accused had kept two bags in the room. The accused used to teach computers in the evening between 8 p.m. to 9 p.m. The accused had not paid the rent of the room. It was informed that he was not even attending the classes and he used to come late in the room. The witness, therefore, told the accused to leave the room as he was neither taking classes nor paying rent of the room. The accused promised that he will leave the room after Ramzan. Thereafter, it is stated that the accused did not turn up. Therefore, the witness carried his two bags

from the room to the house of the witness. One bag was of Khaki colour and one was of black colour.

On 8/9/2010 some officers had come to the house of the witness. They enquired with him about Hasan sir. The witness stated that for many days he had not come to attend the classes. The officers enquired about bags of Hasan sir. The witness told them that they were in his house. The officers thereafter asked the witness to hand over both the bags and accordingly the bags were handed over by the witness to the police. Two panchas were called in the police station. Both the bags were opened. In one bag there were clothes and in another bag, there were certain documents relating to educational field. The police kept the articles in six different packets. Panchanama was accordingly drawn. Articles 24 and 26 were shown to the witness. The witness identified the same. Exh. 264 is the panchanama dated 8/9/2010.

In cross-examination, the witness stated that he did not had the license to conduct the classes as, according to him, there was no need to possess such license to run the classes for 5th to 7th standards. There was no agreement between the landlord and the witness for using the said

premises. There were in all five rooms in the said building and around 40 students were attending the classes. The witness had maintained the register of the students' names. The witness was staying at a distance of half kilometer from the white building.

44. Another circumstance is relating to criminal conspiracy for hiding identity and doing financial dealings without involving his name. PW 76 is Dilip Pralhad Ahiwale, who is a graduate in Science and Law. He was appointed as the Asst. Examiner of Documents at C.I.D., Maharashtra State, Pune in the year 1980. After appointment, he was placed under training for one and half year for the subject of Science of Handwriting. After completion of his training, he started his independent work of examination of documents. He was working as Honorary Lecturer on the subject of Science of Handwriting and examination of documents in various institutes and training centres. Certain documents were sent to this officer for opinion by the Deputy Inspector General of Police, Anti Terrorist Squad, Pune under communication dated 23/10/2010. Said letter is marked at Exh. 333. The witness received following documents:-

- (a) Seven Bank Pay-in-slips as questioned documents.
- (b) One Guest house register as questioned documents.

- (c) 102 Specimen writing sheets.
- (d) One pocket diary containing admitted writings.
- (e) One letter dated 11/7/2008 containing admitted writings.

All these documents were shown to the witness before the court. The witness gave opinion in respect of each of the documents.

In the cross-examination, this witness deposed that he was on the pay-role of State C.I.D. He further stated that he had not produced the photographs of these documents. The witness was re-examined by the prosecution, during which he stated that he had not come across any significant difference in the specimen handwriting and the questioned handwriting. Dis-similarities and natural variations are two different things which can be distinguished by an experienced person.

45. Another circumstance relates to part of criminal conspiracy during which the accused had reiki done in Pune city.

PW 96 is Shaikh Atik Nazeer. He is resident of Udgir. He studied upto 10th standard in Udgir and completed his 12th standard examination at Shirur, Taluka Ahemadpur, Dist. Latur. He studied upto

B.Sc. from Badanapur, District Aurangabad. In the month of October, 2009, he got acquainted with a boy while travelling in the train. He referred his name as Hasan. Thereafter, after two and half months when he had gone to his brother-in-law near the Global Internet Cafe, he noticed the accused sitting there. Thereafter in the month of January, 2010, he received a phone call from Hasan. At that time he told the witness that there was inauguration for launch of Popular Front of India party and for the purpose of getting the reservations for Muslims, on 31/1/2010 at Pune. He further told the witness that expenses towards travelling and meals for the said inauguration will be borne by the said party. The witness and his friend had attended the inauguration. Before that, on 30/1/2010 at about 2.00 to 2.30 p.m. the accused had phoned him and informed that he was waiting at the railway station. The accused promised him a ticket of the said party in the next election and the expenses of the election would be borne by the party. Thereafter in between 12.00 noon to 12.30 p.m. accused took them to Ambedkar ground where the function was to be held. Thereafter the accused went somewhere out and came in the evening. There was some discussion between the witness and the accused on the point, how to offer Namaz. The witness identified the accused in the open court. The question was put to the witness by the prosecution to the effect

that as to whether at that time the accused said that as atrocities were being committed on the Muslims by the non Muslims, revenge should be taken by way of Jihad, to which the witness replied in the negative.

Thereafter, in cross-examination, the witness admitted that the Popular Front of India is the political party. On 13/2/2010 the witness had come to Aurangabad for appearing in examination. The examination was of Lab Technician to be held on 14/2/2010. At that time accused met him on 13/2/2010 between 8.30 p.m. to 9.00 p.m. The accused informed him on telephone in between 5.00 p.m. to 6.00 p.m. that he was busy in reception.

46. To establish circumstance of purchase of mobile hand-set Nokia 1100, the prosecution examined witness PW 63 - Mohammadali Abdulla Gotekar. This witness was working at Al-Noor Guest House, Crawford Market, Mumbai since the year 2007. In the year 2010, he was working as Manager in the said Guest House. On the ground floor of said Al-Noor Guest House, there was a dormitory wherein there were 30 beds and from the first floor upto 4th floor there were in all 24 rooms. His duty hours were from 9.00 p.m. to 9.00 a.m. The witness used to sit on the ground floor. The main Manager of the Guest House was Mr. Aiyyaz

Quadir Khot. As the witness was staying in the Guest House, he was available in the Guest House round the clock. The witness deposed that whenever the customer came, he wrote down his name and information in the register and obtained signature of the customer.

On 13/9/2010 in between 4.30 p.m. to 6.00 p.m. the police from ATS office, Pune, had come to the said Al-Noor Guest House. They were in search of one customer and, therefore, they had come there. The customer had come on 8/2/2010 and an entry was at Sr. No. 1129 in his own handwriting. The entry refers to name of Mohammed Yusuf Mohammad Issac, who had come from Udgir. His mobile number was mentioned. The said entry is at Exh. 281.

The police seized that register. The witness identified the accused in the open court. The person who had given reference of the accused was also from Latur, whose name was Abdul Samad Indori.

47. PW 88 is Mohammad Ilias Abdul Kareem Mansoori. He runs a shop under the name and style "Goodluck", bearing Shop No.35 situated in Maneesh Market, M.R.A. Marg, Mumbai 400 001 and deals in mobile business. The shop timings are from 12.00 noon to 9.00 p.m. The police

had come to his shop in connection with inquiry of purchase of mobile phone from his shop in the month of February, 2010. At that time, he was not in the shop, but his younger brother was present. He learnt from his brother that the police had come and, therefore, he had gone to ATS office at Kala Chowki. Police made inquiry with him and asked as to whether he had sold a mobile of Nokia company in February 2010, to which the witness replied in affirmative. His statement was recorded by the police on computer. It was read over to him. The police then inquired about the person who had purchased the mobile from his shop in the month of February 2010. The witness stated that one person had come to his shop in the afternoon at about 2.00 p.m. He asked for old Nokia phone of 1100 model. Since the said model was available in his shop, witness had shown the same to him. The said person had sorted out 3-4 mobile phones in which the battery was of more power. He had checked the alarms of the said mobile phones and thereafter purchased one mobile phone by paying Rs.750/- and left the shop. The police inquired with him about the description of the said person. The witness gave the description to the police.

The witness was called by police after 15 days. The police

told him that he shall accompany him to Yerwada Jail, Pune on 3/10/2010. Accordingly, on the said date the witness had gone to Yerwada Jail, Pune. The Test Identification Parade was held in the Yerwada Jail at Pune. In the said Test Identification Parade, 9 persons were standing and the witness was asked to identify the person, who had purchased mobile from him. After watching them carefully, the witness had identified the person, who had purchased the mobile phone. Thereafter, the Tahsildar was asked the name of the said person and he had given his name as “Baig”. The witness identified accused, who was sitting in court as the same person.

During the course of cross-examination, the witness stated that he does not possess any license for running the business. Number of persons visit everyday to his shop from different age groups. The witness stated that he kept documents pertaining to new phones, but the documents of old mobile phones are not kept. Nokia 1100 is a old mobile. He does not have any record as to from whom he purchased the said model of phone. No documents are prepared in respect of selling the said old model. The exact date of selling of mobile is not mentioned in the statement of the witness, but he stated in court that it was 8/2/2010. The witness did not issue any receipt against the payment of Rs.750/-. He had no documentary

evidence to show that he sold the mobile for Rs.750/- as no receipt was given for selling old mobile phone. In the Test Identification Parade, accused Mirza Himayat Baig was standing approximately on the 5th or 6th position in the row, according to the witness.

48. The next circumstance relates to conspiracy in concealing of identity of the accused, who was found in possession of documents belonging to others. On this issue, prosecution examined following witnesses:

PW 83 is Ramrao Hanmantrao Nautakke. He was working as Agricultural Supervisor in Government service. On 26/9/2010 the police from ATS had come to him for inquiry. At that time they showed him xerox copy of his Identity Card. Witness recognized it and stated that it belonged to him. He had given the xerox copy of the card in the shop and except that, he had not given the xerox copy of his election identity card to any person.

49. PW 86 is Ajmat Khan. He runs a shop in the name and style as "Mobile Campus" situated near Udgir Nagar Parishad Office. On

10/9/2010, the police had come to him for inquiry in respect of a Sim card. The police had come with the xerox copy of application form meant for getting Sim card. Said application form was of Tata Docomo company. The said form was having a stamp of his shop. The form was of a person by name Mukund Kulkarni. The witness stated that at the time of Christmas festival in the year 2009, there was offer for getting the Sim card of Tata Docomo company. At that time, a person by name Sabir Mamu and one another person had come to his shop. Sabir Mamu is the social worker. He used to come to his shop. At that time Sabir Mamu told the witness that the person, who was accompanying him, was his friend and told him to give him the Sim card. Accordingly, he had given him a Sim card. A photograph was pasted on the form and all the information was filled in. Since the photograph was not that of the said friend of Sabir Mamu, witness told them that it was not his photograph. By keeping faith on Sabir Mamu, witness accepted the form. The witness identified the said friend of Sabir Mamu in the court and that was accused Mirza Himayat Baig. The police again inquired with the witness on 10/9/2010 in respect of another Sim card of Idea Company, which was in the name of one Balaji. The police had shown him the photo and xerox copy of one election card. The witness told the police that the said photograph and the copy was submitted in his

shop by one person named Balaji, who was accompanying with one woman. The witness was doing the business of Sim cards since last 4-5 years. He had obtained the license in the year 1999. The defence suggested that the witness did not have any authority letter to deal in the Sim cards of the Tata Docomo Company. The witness had seen the accused in the Global Internet Cafe.

50. PW 82 is Vanmala Balaji Awarale. The witness stated that in the year 2010, she was residing at Udgir. She wanted to purchase a mobile phone for her father, who was at the relevant time residing at Morewadi which was 28 kms. away from Udgir. She had gone to the shop “Mobile Campus” situated near the office of Nagar Parishad, Udgir. The father also accompanied her at that time. They had taken election identity card and photos of her father. The Sim card, which was provided to her, did not work. Therefore, she had been to the said shop again. At that time she was told that it would start working after 2-3 days. The witness again approached the said shop and then she was told that there was a theft in the shop and, therefore, the election card and the photos were not returned to the witness by the said shopkeeper. On 26/9/2010, the ATS police had come to her for inquiry. They showed the witness xerox copy of the election

identity card of her father. The witness identified the same to be copy of the election identity card of her father. She was not aware as to how the said xerox copy had come to the police. The witness identified the said xerox copy of the election identity card (Article 31). The witness identified Ajmat Khan in the open court.

During cross-examination, the witness stated that she had not lodged any complaint against the said shopkeeper, nor she had informed the police that there was a theft in the said shop.

51. PW 89 is Vilas Sangram Garibe, who was called by Anti Terrorist Squad police Nanded on 13/11/2010. They inquired with him regarding Sim card of mobile and the application form for obtaining Sim card and his election card. The mobile phone number in respect of the said Sim card was not of the witness, but he found his photograph pasted on the form which was submitted for obtaining Sim card. The form was filled in the name of the witness. The witness stated that the contents of the form and signature thereon were not in his handwriting. The witness stated that he had gone to Global Internet Cafe on 4/2/2010 for getting the xerox copy. The witness identified the accused person sitting in open court as the person who was available on that day in the Global Internet Cafe.

52. PW 84 is Sanjay Devrao Biradar, who resides in Ghonshi in Taluka Jalkot, District – Latur. He did not have Pan Card so he decided to apply for Pan Card. For that he approached Global Internet Cafe situated in Nagar Parishad, Udgir. It was advertised that service of issuance of Pan Card was available there. He had paid Rs.200/-, xerox copy of Election I-Card and one photo. Thereafter he again went to Global Internet Cafe and inquired. The witness stated that the person to whom he had given the amount and paper was hefty in physic. His name was Najeeb. The witness stated that there was another associate of him in the said Internet Cafe. The witness identified accused Mirza Himayat Baig who was sitting in the Cafe on that day. On 26/9/2010 the ATS police again had come for making inquiry with him. They had brought xerox copy of election identity card. Copy of election identity card is at Article 31. The witness identified the xerox copy of I-card. The witness stated that he did not fill up the form. Signature on the form was not of his. According to the witness, the photographs and the xerox copy of his election card was misused by someone.

53. The next vital circumstance is of recovery of RDX by drawing

memorandum panchanama at the instance of accused Mirza Himayat Baig. This is one of the vital piece of evidence relied upon by the prosecution.

PW 77 is Shrikant Shridhar Shetti. He was called by ATS police on 7/9/2010. On that day, he had gone to take appointment of Dr. Sarangpani at his clinic situated near the Modern College, Pune. That time policeman asked him that in connection with German Bakery bomb blast, the accused has been arrested and panchanama in respect of his statement and recovery/discovery was to be made. The policeman asked him as to whether he would act as a panch. The witness replied in the affirmative. That policeman took him to ATS office, which was situated at a distance of 100 to 125 mtrs. Investigating Officer Shri Satav was present there. There were several policemen in the office and one more person was introduced to him as a panch. His name was Koshe. Thereafter one person, whose face was covered, was produced before the witness. The veil placed over his face was removed at the instance of Shri Satav, who asked the person his name. Said person told his name as Mirza Himayat Baig. Shri Satav asked him as to whether there was any pressure over him, to which he replied in the negative. The said person stated that the material used in preparing the bomb and the material which was left out was kept at

the place of his present residence and he will show the same. His complete statement was written down by the police on paper. It was read over to him. He was asked, whether statement was correctly recorded, to which he answered in affirmative. The statement was given to the witness for reading. The panchas were satisfied after reading the said statement. The accused thereafter signed on the said statement. Thereafter the witness put his signature on the said statement and then the other panch had signed the said statement. The witness identified his signature as a panch witness and signature below his signature is that of another panch. The panchanama bears signature of accused and of Shri Satav. The contents are true and correct.

The witness further deposed before the court that after the memorandum statement, he came to know that they were required to go to Udgir. He phoned his younger brother and told him that he was going out of station for work and would be back by tomorrow afternoon. The police staff was called. The panchas were asked to take their personal search. Accordingly panchas took search. The accused also took the search of panchas. The Government vehicle was also searched. There was weighing machine in the said vehicle and other stationery material. The face of the

accused was covered. At the instance of the accused, the vehicle was taken to Latur via Hadapsar. On the way they had meals. They reached Udgir around 1.30 a.m. The accused asked the vehicle to be taken in the left side from the Shivaji Square and accordingly the vehicle was taken. At the instance of the accused, the vehicle was stopped. Accused stated that his house was nearby. They all alighted from the vehicle. Shri Satav made one phone call and called the backup required by him. The panchas and other followed the accused. The accused showed them one house. There was a compound wall to the said house, having one iron gate. The accused knocked the gate and gave call by saying "Abdul, Abdul". At that time the staff of the Bomb Squad and the sniffer dog, which was called by Shri Satav, was with them. After the accused gave said call, the lights of the house were switched on and one person came outside the house. The accused lifted his veil and told the said person that it was him. Shri Satav asked the name of that person. The said person told his name as Abdul Sayyed. He opened the gate. Shri Satav disclosed his identity to Abdul Sayyed and asked him to take personal search of all of them. Abdul Sayyed declined to take personal search. Thereafter they entered the house. They followed the accused, who had taken them on the first floor from the staircase, which was on the right side of the hall. There was one room on

the first floor. The accused opened the latch of the door of the said room. There was one wooden Dewan / double bed. The accused lifted the ply of the said Dewan. Inside therein was a carton of pressure cooker. There was one nylon bag in the box. There was one plastic bag of white colour, which was removed by the accused.

The witness stated before the court that inside the said white colour plastic bag, there was one more carry bag of yellow colour. The accused stated that, that was the same material which was used in connection with the German Bakery blast. The accused referred the material as "Barood". Shri Satav called the main person from the Bomb Squad, who came along with the dog. Shri Satav told him to check the material. The material was sniffed by the dog and the dog wagged its tail and barked. The members of the Bomb Squad said that the material was explosive. Shri Satav asked the staff of Bomb Squad to give in writing. Accordingly, they gave in writing. Shri Satav asked to remove all the material from the bag. That material was having following items:-

- (i) One solder gun
- (ii) One solder wire
- (iii) One solder wire cutter.

In the same material, there were five pieces of a substance in black colour. Those five pieces were in the yellow colour bag. The said five pieces together weighed 1200 grams. Shri Satav removed about 100 grams material from the said pieces. Said 100 grams material was divided into two. All the said articles were packed separately in the plastic and thereafter brown paper was wrapped. There were seven packets. Brown paper means envelopes. The envelopes were tied with the stag. The labels were put on each envelope and the information of the contents were written on it. The opening of each envelope was sealed by lakh seal. Thereafter Shri Satav asked the police staff and panchas to check the house. Thereafter a detailed panchanama was prepared. The panchanama was accordingly signed. The witness was able to identify the panchanama and the signature. The contents recorded in the panchanama were true and correct (Exh.341A). The prosecution produced seven sealed packets. The labels of each packet bears signatures of the panchas. The second packet was opened. It contained black colour hard material in small quantity (Article 55). Thereafter small packet having no label and signature was opened. The panchas signed on the labels. The said envelope was opened (Article 56). The third packet was thereafter opened, which contained a

solder gun (Article 57) and accordingly all the envelopes/packets were opened and given article numbers.

The prosecution heavily placed reliance on the memorandum statement, panchanama, extract of relevant station diary entry, extract of log-book of police vehicle, station diary entry of Udgir City Police Station, report of dog squad.

54. PW 80 is Laxman Dharmaji Kumare. At the relevant time he was working in the Bomb Detection and Bomb Disposal Squad at Latur from the year 2006 onwards. The nature of his work consists of detecting the suspicious material like explosive by naked eyes and with the help of sniffer dog and equipment. The signal given by the sniffer dog is understood by the handler of the dog. The police of ATS had sought the help of their squad on 7/9/2010. Oral information was given by the Superintendent of police, Latur to their Squad at 9.00 p.m. that the ATS team from Pune had come and they should report to the Udgir Police Station. Accordingly, eight persons from the team along with one sniffer dog and equipment reached Udgir at 11.00 p.m. The said sniffer dog is named as "Janjir", who is still in the team. The head of the team received

phone call from the ATS team at about 2.00 a.m. They were asked to come at Jalkot road and they had gone there and stopped. The ATS team was there. They followed the ATS team. Initially the ATS team had gone on the first floor of one house and they had stopped at the ground floor. There was black sticky substance in the yellow colour carry bag, which was in the nylon bag. The sniffer dog had given positive signal. Thereafter at the instance of ATS team, the head of their team had given the written report in that regard. The report was written down in his presence. It was signed by Shri Attar. The witness identified the said report and the signature. The contents of the report were said to be true and correct (Exh. 351).

In the cross-examination, witness stated that the team left Latur at 9.00 p.m. At that time the said sniffer dog was 2 ½ years old. It was the Labrador specie of dog. The suggestions given to the witness were denied.

55. Another circumstance relied upon by the prosecution is that accused was last seen with absconding accused, who was a planter of the bomb, namely, Yasin Bhatkal. Both of them were seen in Pune on 13/2/2010.

PW 93 is Shivaji Gulab Gavare. He was plying auto-rickshaw

in Pune city at the relevant time. He owns auto-rickshaw. In the year 2010, he was plying auto-rickshaw of one Mr. Kawade.. Normally he used to ply auto-rickshaw in Koregaon Park, Pune Station, Camp and Yerwada of Pune City. On 13/2/2010, the witness was sitting in the auto-rickshaw opposite Hotel Sagar situated near the Pune Railway Station. At that time two boys came near him and asked as to whether the auto-rickshaw was available. They told the witness that they wanted to go to Rajnish Ashram situated in Koregaon Park area. The witness took them to Koregaon Park through the Jahangir Hospital. On a turn, the boys told him to take auto-rickshaw in straight direction. The straight road was going in the direction of Bandgarden. They asked him to stop the auto-rickshaw near the Central Mall. The witness told them that Koregaon Park is ahead, but they told him that they wanted to get down at the said place. After they got down from the auto-rickshaw, they paid fare to the witness and they stopped at some distance. The witness was waiting for another customer. While describing the appearance of the boys, witness stated that one was tall with fair complexion and wearing cap. He was having a bag hanging in front of him and another bag hanging on his back. Another boy was of average height, having normal complexion. Both the boys were in the range of 28 to 30 years of age.

The witness stated that on 27/5/2010 he had gone to police. The reasons for going to the police was that in the Sakal Daily newspaper published on 25/5/2010, a photograph of one suspect in the German Bakery blast case wearing a cap was published. He stated that after seeing the said photograph, he remembered that the said boy, wearing cap, was the same, who was carried by the witness in his auto-rickshaw along with another boy on 13/2/2010 from Pune Station. Since the police had made appeal to the public to give information in connection with the German Bakery blast case, the witness approached the police. It is the version of the witness that earlier he could not gather courage to go to the police immediately after seeing the photograph on 25/5/2010. But, he later on approached the police on 27/5/2010. The witness gave information to the police. The police recorded the statement of the witness. The police asked him whether he is in a position to identify those two boys. The witness answered in affirmative.

The witness thereafter received a summons from the police informing him to come to Yerwada Central Prison on 3/10/2010 for Test Identification Parade. The summons letter is at Exh. 379. Accordingly, on

3/10/2010 he had gone to Yerwada Central Prison. After reaching there, he showed the summons letter to the guard. He was taken inside. Tahsildar Shri Yogesh Kharmate reached there. He directed the witness and others to sit in the room and not to meet anybody. Tahsildar again asked the witness whether he would be in a position to identify the said persons, to which witness answered in affirmative. Tahsildar asked the witness whether the police had shown him the suspects or any photograph. The witness answered in the negative. Thereafter he was taken to the adjacent hall where 9 persons were standing in line. In that hall Shri Kharmate and two panchas were present. 9 persons were standing in one line were of similar appearance and height. Shri Kharmate informed the witness to identify the person who was carried by the witness in his auto-rickshaw. The witness identified the said person by touching him. The witness stated that the person who was identified by him was the same amongst two whom he had dropped in his auto-rickshaw and who was not having any bag with him. After the witness identified that person by touching, Shri Kharmate asked his name. He gave his name as "Himayat Baig". The witness identified the accused, who was sitting in the court.

The prosecution brought a laptop and played a CD which was

seen by the witness, defence advocate and the learned Spl. Public Prosecutor. The witness saw it and informed the court that the person who was wearing a cap and having bags on his person was the same to whom he had dropped in his auto-rickshaw along with accused Mirza Himayat Baig who was present in court. The CD which was played showing relevant clipping is marked as Article 61.

During cross-examination of this witness, he stated that it was not possible for him to say as to how many passengers travelled in his auto-rickshaw prior to one month. He had not seen sketches of the suspects of the blast printed in the newspaper prior to 25/5/2010. He admitted that there was no auto-rickshaw stand in front of Hotel Sagar which was in front of Pune Railway Station. He admitted that he did not know as to where the said two persons had gone after they left his auto-rickshaw. He also admitted that various passengers within the age group of 28 to 30 years sit in his auto-rickshaw or carried by him in his auto-rickshaw. He stated that it was true that persons having different complexions and features travelled in the auto-rickshaws.

The witness stated that on 27/5/2010 he had gone to office of

Anti Terrorist Squad along with the said newspaper. His statement was recorded on the same day. But the CD clipping seen by him in the court for the first time. He identified photograph printed in the newspaper and the person to whom he had seen in the clipping was the same. The Photostat copy of the news item in Sakal Daily dated 25/5/2010 was brought by the defence Advocate and the same was shown to the witness. The prosecution did not object to the Photostat copy being marked as Article 62. Below the photograph published in the newspaper, name of Abdul Samad was mentioned. The witness stated that he was not aware that the person who was shown in the photograph was arrested by the police and later on released. The witness denied the suggestion that he had never dropped the person in the auto-rickshaw to whom he had identified in the clipping of the CD along with accused Mirza Himayat Baig.

56. The other circumstance relates to identification of the absconding accused Yasin Bhatkal. On this circumstance, the prosecution examined PW 90 - Ranjit Govindrao More.

PW 90 is Ranjit Govindrao More. On 13/3/2010 between 5 p.m. to 5.30 p.m. he was present in the German Bakery along with his girl

friend Ruchika Bachru. He entered the German Bakery from the gate which was adjacent to the main road. Inside, there was one Bakda (bench) on which he kept his plastic carry bag. Both of them had been to counter for placing order. Other people were also there to place their orders and were carrying eatables. After taking delivery, both of them came to the Bakda. There was one boy standing behind him near the counter and he was carrying two bags. After the incident of bomb blast, the witness had gone to office of Crime Branch as the messages were being received on the mobile phones in that connection. At that time police had shown him the CCTV footages of German Bakery. In the said CCTV footages, he along with his girl friend were seen and the said person having two bags on his person, who was standing behind the witness, was also seen. The said person was wearing a cap. This witness was asked following question:

“Q. - How could you keep the said person in your mind?

Ans. - Before going to the counter for placing my order I had kept my bag on the Bakda and I was wondering as to how that person had come to place the order along with two bags.”

There was a system of self service in the German Bakery, but the waiters were also available to serve the food. At the time of viewing

the said CCTV footages, the witness saw that the said person left German Bakery and that time he was carrying only one bag. A laptop was brought by the prosecution. The CD was played on the said laptop and clippings were shown to the witness. The same was also viewed by the learned Spl. P.P. and the defence advocate. The witness identified himself and the boy wearing the cap, who left the Bakery with one bag. Police recorded his statement.

In his cross-examination, the witness stated that he was present in the German Bakery for 30 to 35 minutes. Bomb blast occurred after he left the German Bakery. He identified the colour of the cap of the boy as light green or something like tamarind colour. The sack bag, which was hanging behind his back, was also of the same colour. The second bag, which was hanging across his shoulders, was of black colour. The other customers were also having bags. The witness did not see the said boy at the time of leaving the premises of German Bakery.

57. PW 101 is Prasad Narayan Hasabnis. He was working as Sr. PI, Kondhawa Police Station. He deposed that on 13/2/2010 when incident of bomb blast took place in the German Bakery, he was working as the PI

(Administration) in the Control Room at Pune. He was one of the members of the investigating team for the said incident. Along with him, there were two Police Inspectors by name Shri Joshi and Shri Barge for conducting investigation. They were given work of verifying CCTV footages in respect of the incident available from Hotel "O" and the German Bakery to identify the suspects and the witnesses. They were provided with copy of original footages. They had viewed the CCTV footages and established link of persons who were seen present at the counters of Hotel "O" and the German Bakery. They had synchronized the timings mentioned in the footages and the persons seen in the footages. On 5/3/2010 when they were viewing the CCTV footages, they noticed one suspicious person, standing at the counter of German Bakery. The said person was wearing a cap on his head. He was having two sack bags on his person, out of which one was on his back and other was at the front side. When they viewed the CCTV footages of Hotel "O", they noticed that the said person, who was wearing a cap and having two bags on his person, was seen crossing the road and coming towards the German Bakery. In the CCTV footages of Hotel "O", it was noticed that the said person was leaving the German Bakery after some time and at that time, he was having only one sack bag on his person. Information was given to Sr. Officers in

respect of the same. He had informed Shri Peter Lobo and Shri Dinesh Kadam who were police officers at the relevant time. This witness had recorded statements of Shri Ranjit More (PW 90) and girl friend of Ranjit More by name Ruchika Bachu and a foreigner by name Merkita. The witness identified the person wearing cap from CCTV footages (Article 61 - CD which was played and showed to the witness).

The witness deposed that his statement was recorded on 2/12/2010. Omission is recorded in the evidence to the effect that in his statement before police, he did not state that the person wearing cap was carrying two bags, out of which one bag was on his backside and the other was on front side.

58. The prosecution pointed out that the contradiction in respect of position of the bags, was not disputed by the defence. Another omission was to the effect that he did not state before the police that the person wearing cap was noticed while going out with one bag. The distance between German Bakery and Hotel "O" is about 100 fts.

59. PW 102 is Dinesh Parashuram Kadam. He deposed before the

court that he was working as Police Inspector in the Anti Terrorist Squad (ATS), Mumbai. Prior to that he had worked for the ATS in between 2004 to 2006. From 2007 till 2010, he had worked for Crime Branch, Mumbai. While working in the Crime Branch, the nature of his duty was to investigate the information received from Central Intelligence Agencies and to investigate in respect of terrorist and the important accused persons.

In the month of May 2006, large quantity of AK 47 rifles, RDX, handgranades, live cartilages were seized at Aurangabad and in that regard C.R. No. 3/2006 was registered with the ATS police station. The witness had helped in the said investigation. The main accused persons by name Fayyaz Kagzi and Jabiuddin Ansari were the wanted accused. The witness stated that recently said Jabiuddin Ansari @ Abu Jindal was arrested. Both the said persons are residents of Beed, who were searched in Beed by police. He further deposed that in July 2008, the blast had taken place in Ahmedabad and live bombs were found in Surat. In connection with said incident, the Terrorist Organization by name Indian Mujahiddin had sent the e-mails to various government offices and media. Similar e-mail was sent in August 2008. The said crime was investigated by Crime Branch, Detection Mumbai. The said crime was registered on 15/2/2008.

In the said crime, 21 accused persons were arrested, who were connected with the Indian Mujahiddin Organization, who were said to be involved in various incidents of bomb blast, which had occurred across the country. Arms and ammunitions, detonators, timers etc. were seized at the instance of said accused persons. Their statements were recorded under the provisions of Section 18(2) of the M.C.O.C. Act and the charge-sheet was filed against them and the absconding accused persons in the MCOC Court. During the course of investigation, it was revealed that the members of the said Indian Mujahiddin Organization by name Rijaz Bhatkal, Iqbal Bhatkal and Yasin Bhatkal were involved in the said crime. During investigation, police obtained photographs of the absconding accused. This witness had visited the place known as Bhatkal in the State of Karnataka in search of those accused.

60. The witness further deposed that when he joined ATS in May, 2010, that time ATS was investigating German Bakery bomb blast case. Considering his experience, he was directed to assist in the investigation. When this witness was observing the CCTV footages, while assisting in the investigation of German Bakery case, he noticed that a person, carrying two bags while entering German Bakery and carrying one bag while

leaving the same, was Yasin Bhatkal, based on photographs which were collected by him in the earlier investigation of different cases. The witness identified the said person in the CCTV footages. The investigating agency preserve the photographs of terrorists absconders in Album. This witness was confident that Yasin Bhatkal was seen in the footages entering German Bakery. He was confident that he would be able to identify Yasin Bhatkal in the CCTV footages of the German Bakery. A CD which was played is at Article 61. He identified the person as Yasin Bhatkal who was wearing the cap and having two sack bags and standing at the counter of German Bakery. The timing shown in the footages was 16.46.11 to 16.51.

In the Unit of ATS, Mumbai, the witness was attached, CR No. 9/2009 was registered and the wanted accused Abdul Samad was arrested on 24/5/2010 from Mangalor in connection with the said crime. Abdul Samad is younger brother of Yasin Bhatkal. In the Album maintained in the office, photograph of the wanted accused was there. Photograph of Ahmed was also in the Album. Information of Abdul Samad was collected in C.R. No. 9 of 2009. The witness produced information written on one document having one photograph and the Photostat copy (Exh. 398). Another Article 62 is xerox copy of newspaper shown to the witness.

Abdul Samad was never arrested in German Bakery bomb blast case.

61. The witness deposed that on 16/9/2010 the guard, who was with accused Mirza Himayat Baig, informed him that accused wanted to tell something. He called panchas through police constable Faruquee. He made enquiry with the panchas and gave information about the German Bakery Bomb Blast case. The memorandum statement of the accused was recorded before the panchas and it was read over to panchas. Thereafter, at the instance of the accused, the witness, the panchas and the police staff went to the Manish Market, Mumbai. The vehicle was stopped near the hotel by name Gulshan-E-Iran, which was situated near by the said Manish Market. The accused took them to one shop and told that he had purchased the mobile Nokia 1100 from that shop. The investigators introduced themselves to the person who was present in the shop. The said person told that he was not knowing anything as during the relevant period his brother was present in the shop. Panchanama was prepared accordingly which is at Exh.400.

62. After they came out of Manish Market, accused Mirza Himayat Baig took them to nearby lane on the left side, which was known as Sabu

Siddiki lane and pointed at one shop which was on the footpath and told that he had purchased the haversack bag from the said shop. A person by name Ahmed Salim was present in the said shop. The said person told that he did not remember as to whether accused had purchased the bag from him. The accused thereafter took them to a nearby area. At that time, face of the accused was covered with a cloth. After they returned to the office, entry was taken in the station diary as well as in the log-book of the vehicle. The true copy of the station diary entry is at Exh. 401 and the true copy of entry in the log book is at Exh. 402. On 16/9/2010 the witness recorded the statement of Ilias Mansuri, who was present in the shop of Manish market on 8/2/2010 and also recorded the statement of bag seller by name Mohammad Salim Altaf Alam. Thereafter the witness submitted aforesaid panchanamas and the statements of witnesses to IO Shri Satav. The report is at Exh. 403.

During cross-examination, the witness stated that it is not true to say that there is absolutely no connection with the incident happened in Ahmedabad with the German Bakery case. According to the witness Yasin Bhatkal, who is accused in that case, is also wanted accused in this case. Yasin Bhatkal was absconding since the year 2008, as per the knowledge

of the witness. He stated that the organization by name Indian Mujahiddin was not banned in the year 2004. According to him, the organization was banned after the year 2008. The witness stated that in all the cases, Indian Mujahiddin was involved. The witness brought a photo album before the court. He denied suggestions that he was deposing falsely that after viewing CCTV footages Abdul Samad had stated that the person seen in the same was Yasin Bhatkal. No statement of Abdul Samad was recorded under Section 164 of Cr. P.C. in respect of the said CCTV footages.

The witness further deposed that it was true to say that no document was available in the said mobile shop to show that the accused had purchased the mobile phone from that shop.

63. Another circumstance relates to use of mobile hand-set Nokia 1100 as triggering device for causing bomb blast in German Bakery.

PW 98 is Gopal Ranganath Atkare, who was dealing in cloth business at the relevant time. The witness deposed that he was called by police at German Bakery, Koregaon Park, Pune, where the bomb blast had taken place at 11.15 a.m. along with his friend Prakash Baliram Bulunge.

Police told them that a panchanama of the articles from the said place was to be made and asked them to act as a panch. The witness agreed. Shri Nadguada, Col. Mann, persons from Hyderabad Forensic Laboratory Shri T. Suresh and D. G. Gopinathan were present at the spot. The panchas were introduced to them. (Col. Mann was from National Security Guard (NSG) had collected some articles). The articles included pieces of mobile Sim card, the broken pieces of mobile, some 14 pieces of Aluminum etc. Around 10 to 11 articles were put in the plastic bags. Panchanama is at Exh. 388. One big carton in sealed condition was brought by the prosecution. It was opened in court and 20 articles wrapped in brown colour paper, having labels were removed. All the packets were having the labels upon which there were signatures of the witness and another panch Prakash Bulunge. The packets were opened one by one. The first packet upon which it was mentioned MP 98/10/1 was opened. It was having one small plastic pouch, in which there was broken piece of Airtel company Sim card. The second packet upon which it was mentioned MP 98/10/2 was opened. It was having one small Sim metal cover. The third packet was having one camera view cover. The fourth packet was having one mother board clip. The fifth packet was having one mother board clip ring. The tenth packet was having the piece of back side of cell phone. The 11th

packet was having piece of bag chain and the 12th packet was having the part of mother board of cell phone. The 15th packet was having pieces of bag. The 16th packet was having 9-V battery piece. The 17th packet was having 9-V battery head pin. These articles were collectively marked as Article 63 and seized under panchanama. During cross-examination, the witness stated that the said articles were seized from the open space of the premises of German Bakery.

64. PW 99 is Suhas Madhukar Nadgauda. On 13/2/2010 he was attached to the Bandgarden Police Station, Pune as Sr. PI. The witness was doing patrolling duty at the relevant time. At about 7.00 p.m. while he was on patrolling duty, he received information that a big blast had taken place at German Bakery, Koregaon Park, Pune. He immediately reached the spot of incident with staff. When he was present there, the cashier of German Bakery came to him and started telling the details. He asked the said person to go immediately to Bandgarden Police Station for making a complaint. Thereafter he followed him to Bandgarden Police Station. He recorded the said complaint of the cashier of German Bakery by name Pravin Pant on the computer. The recorded statement was made available to

the said person, who had gone through the same and after going through the contents, signed the said statement. Said complaint was treated as FIR, based on which an offence came to be registered at C.R. No.83 of 2010 under various sections in Bandgarden Police Station. FIR is marked as Exh. 390 (collectively). On 14/2/2010 the investigation of this case was transferred to the Anti Terrorist Squad. Even thereafter the witness was part of the team of investigation. On 18/2/2010 when he was present at the spot, officers of FSL, Hyderabad and the team of NSG had come on the spot of incident. They started inspecting the spot of incident. The team of NSG included Col. Mann and in the team of FSL, Hyderabad there were officers by name T. Suresh and G. Gopinath, who were collecting articles from the spot, which were relevant for the purpose of investigation. The witness called two persons to act as panchas. The panchanama is at Exh. 388 and the articles collected are marked collectively as Article 63. The team of NSG and FSL had collected articles from the premises of the German Bakery.

Forensic Evidence :

65. The forensic laboratory reports regarding presence of RDX at the scene of the blast and the FSL report regarding presence of RDX as

explosive recovered from the accused Mirza Himayat Baig was also relied upon as strong circumstances. Evidence of PW 75 - N. B. Bardhan, PW 78 – Ravindra Kulkarni, Assistant Chemical Analyzer, Pune was relied upon by the prosecution. PW 75 - N. B. Bardhan identified the C.A. report (Exh. 23) which was prepared by him in respect of the articles which were collected from the spot of incident. He deposed that Physico-Chemical and Instrumental Examination confirmed the presence of RDX.

PW 75 is N. B. Bardhan, the Principal Scientific Officer, C.F.S.L., C.B.I., New Delhi, who deposed before the court. The witness was promoted as the Principal Scientific Officer in the year 2007. He was posted in the C.F.S.L (Central Forensic Scientific Laboratory), Ballistic Department. His duty was to examine the crime exhibits received in explosion and fire arm cases and after scientific examination of the same, he would submit a report to the forwarding authority of the case through official channel. He had undertaken training from various scientific institutions in India and had got around 19 years of experience in the forensic ballistics. He had examined 400 fire arm and explosion cases consisting of over 10,000 exhibits. As he was working in the CFSL, he had appeared in various courts across the country. The witness stated that

seven exhibits were forwarded to laboratory under the forwarding letter by ATS, Pune. The letter is at Exh. 330. Parcels containing partly burnt pieces of cloth, broken accessories of mobile phones, damaged metallic pieces, six damaged mobile phones, damaged wrist watch pieces, two currency notes of Rs.100/- denomination, totaling Rs.200/- and some Indian and Foreign currency coins, one DVD player and one spectacle with cover, burnt and torn pieces of black coloured cloth having multiple small holes on it, damaged iron piece and pieces of clothes.

During the course of his examination, following laboratory processes were carried out on the above referred exhibits :

- (a) Physical Examination.
- (b) Chemical Analysis
- (c) Thin Layer Chromotography Analysis
- (d) Instrumental Analysis by High Pressure Liquid Chromotography system.

Physico-Chemical and Instrumental Examination confirmed the presence of RDX, Ammonium Nitrate and Oil in the contents of parcle Nos.A-1 to A-7.

The witness deposed that RDX is high explosive material. If RDX is used as a Explosive material in a bomb and if it is exploded, it may cause a severe destruction to the surrounding objects. The expert could detect a high explosive like RDX residue from the object even if it is present in Nano Gram Level. Nano gram level means very very minimum quantity. In the event of the explosions by use of high explosives like RDX, after the explosion, the high explosive contents turns into gaseous form emanating a large volume of gas and produce a high level of temperature and gets defused to the surroundings in the form of smoke. The smoke which emanates due to the blast, gets stuck to the surrounding object in the form of smoke residue and from the analysis of that residue the nature of explosive used can be determined. The addition of Ammonium Nitrate and Oil to the explosive substance, increases its effectiveness of destruction through blast effect and inflammable effect. (Exh. 22 is the report from Regional Forensic Science Laboratory, Pune shown to the witness).

During cross-examination, the witness admitted that the opinion given by him about RDX is not mentioned in the report. The full form of RDX is Research and Development Explosive. He stated that its

chemical name is Cyclo Trimethelene Trinitraamin. RDX is not the technical term. The military is one of the users of RDX. As to whether RDX was not available in the open market, the witness stated that he cannot offer his comment. RDX is the separate compound and Ammonium Nitrate is the separate compound. It is not necessarily to have RDX with Ammonium Nitrate always because RDX is by itself is a high explosive. Cyclonite is also another name of explosive called RDX. To a question, the witness answered in the following manner:

Q. How a Bomb can be exploded?

Ans. A bomb can be exploded only when it is stimulated by an external energy like electrical energy, flame, heat or friction.

It is not necessary to have electrical instrument always for explosion. It depends basically on the type of Bomb supposed to be initiated. RDX in pure form is White Crystalline Substance. The witness stated that he had come across that in most of the explosion cases, timer device has been used for the purpose of explosion of Improvised Explosive Device. But, in number of cases, Remote Control Device is also used for initiation of Improvised Explosive Device.

66. PW 78 is Ravindra Rajaram Kulkarni, Assistant Chemical Analyzer in Forensic Science Laboratory, Pune. The witness was qualified as M.Sc. Organic Chemistry. He had examined thousands of samples received in the cases and had deposed before the court as Chemical Analyzer on many occasions. His Chemical Laboratory had received several samples in connection with the Bomb Blast occurred at the German Bakery, Pune. The Forensic Laboratory, Pune, where he was working, was equipped with latest and sophisticated equipments. There are several devices which can detect the explosives, such as RDX at different concentrations. The GCION scan Chromatogram can detect RDX upto the level of Picogram. In simple language, Picogram quantity means very very small quantity. The Picogram quantity is not visible by naked eye. On 14/2/2010, seven parcels were received in the Forensic Science Laboratory from the Bundgarden Police Station. Original forwarding letter is at Exh. 343. Exh. 22 is C.A. report shown to the witness. The witness identified his signature from the said report. The witness stated that traces of Cyclonic (RDX), Ammonium Nitrate and Nitrate and Nitrite Ions along with Petroleum Hydrocarbon Oil was detected in the collective extracts of the Exhibit numbers, which are mentioned in the report. The witness stated that the RDX is the high explosive. Ammonium Nitrate can also be used as

an explosive. If RDX is mixed with Ammonium Nitrate, Charcoal, Petroleum Hydrocarbon Oil, the effectiveness of the explosion is enhanced. The reports placed on record were exhibited by the court. The C.A. reports are at Exhs. 22 and 24, which were shown to the witness.

During cross-examination, the witness stated that there are various names of RDX. The common name is Research Development Explosive (RDX). He stated that it is not necessary to have Petroleum Hydrocarbon Oil in RDX. The contents of RDX are not available in the open market. Military is provided with RDX. The Bomb can be exploded with Timer, according to the witness.

67. PW 100 – Suraj Chandrashekhar Padwalkar. The witness deposed that he completed computer repairing course and mobile repairing course after completing 12th standard. His shop is situated near Sagar Archade, Goodluck Square, Deccan, Pune. He claims to have knowledge of different components of mobile phones. He provides services of repairing the mobile phones to the general public as well as to the Government officers. The witness was aware that a bomb blast had taken place in German Bakery on 13/2/2010. The police approached him on

26/2/2010. The ATS officer asked him for his assistance. The witness was called in the office of ATS. Accordingly, he reached the ATS office between 12.00 p.m. to 12.05 p.m. One more person namely Ashish Shinde from Nokia Care Company was also present there. Thereafter the witness, Ashish Shinde, Vinod Satav, IO and driver went to the Forensic Laboratory at Pune. At that time, Shri Satav told him that mobile parts, which were found from the spot of bomb blast, were kept in the Forensic Laboratory and they should assist the investigating team in identifying the company of the mobile phones etc. When they reached the Laboratory, they found that mobile spares were kept on a table. The witness and Shri Shinde examined the mobile parts. They were half burnt. Some batteries were there in the said spare parts, which were also half burnt. The witness noticed one back cover of the mobile phone made of plastic. The cover was blackened. Both, witness and Shri Shinde examined the said articles with the help of magnifying glass. It was noticed that the said back cover was of Nokia 1100 model. The witness identified the said cover (Article 63-A).

During cross-examination, the witness deposed that there are many pieces of Nokia 1100 model which were manufactured. The model number of mobile phone is written in the inner part of the mobile phone.

As the Article 63-A – mobile cover got blackened due to burn, the model number i.e. Nokia 1100 could not be seen. The witness admitted that there was no mark on the said article to show that it belonged to Nokia company, but on the basis of notches on the said article, the witness stated that it was of Nokia 1100 model. The witness admitted that there were several pieces of Nokia 1100 model available in the open market. It was got explained from the witness that the notches mean the inside projected portion of the back cover.

68. There were in all 103 witnesses examined by the prosecution, out of which 41 witnesses have filed their affidavits under Section 296 of Cr. P. C. Out of said 41 witnesses, on the request of defence, 11 witnesses were cross-examined and 30 affidavits were admitted. Section 296 of Cr. P. C. reads as under :-

“296. Evidence of formal character on affidavit.- (1) The evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit.

69. The names of the witness, whose affidavits were proposed to be filed under Section 296 of Cr. P. C. were furnished by an application by the State on 3/9/2011 incorporating the names of 41 witnesses + 18 other witnesses. Said application is at Exh. 111.

70. By application dated 15/10/2011, the defence expressed its desire to cross-examine 11 witnesses (page 125 of Additional Paper Book). The State filed an application on 8/11/2011 under Section 294 of Cr. P. C. for reading the 28 documents in evidence (Exh. 156). By an application dated 9/11/2011, the defence did not admit the medical certificates listed at Sr. Nos. 1 to 28 as mentioned in the application dated 8/11/2011. An application was filed by the complainant / State on 29/7/2011 under Section 294 of Cr. P. C. calling upon the defence to admit or deny the genuineness of the documents which could be exhibited in the proceedings without any further proof (Exh. 66), which included spot panchanamas, inquest panchanamas, panchanamas about clothes of deceased and splinters removed from the bodies of injured persons, certificates about injured persons etc. By further application dated 20/3/2012, six documents were submitted by calling upon the defence for its admission or denial under

Section 294 of Cr. P. C. They included particulars of Jahangir Hospital in respect of the injured persons (Exh. 66A). The defence submitted its say dated 6/8/2011 (Exh. 67) on spot panchanama, inquest panchanama, panchanamas about seizure of clothes of deceased and splinters and about certificates of injured and about forwarding letter. In the end, the defence stated that the documents mentioned in the say were not admitted by the defence and it was prayed that the prosecution be directed to strictly prove the said documents. In the said say, the defence stated that documents which have been admitted may be exhibited under Section 294 of Cr. P. C. The defence did not admit the genuineness of spot panchanama, photographs of scene of offence, videography of scene of crime, hard-disk of Hotel "O", CC Camera, seizure of video player and cassettes of German Camera, seizure of cassettes of German Bakery CC Camera, sketch prepared by City Survey Officer were not admitted by the defence. The defence admitted inquest panchanamas as listed at Sr. Nos. 9 to 25. The defence denied the genuineness of the splinters recovered from the bodies and the panchanamas drawn listed at Sr. Nos. 27 to 33 and the certificates issued in favour of injured persons listed at Sr. Nos. 34 to 85. The trial court had passed orders accordingly on the applications filed by the State after obtaining say of the defence.

71. PW 1 is Smita Dnyaneshwar Kharose, who had sworn affidavit in the present case under Section 296 of Cr. P. C. Said affidavit is treated as examination-in-chief. She admitted that she and her husband were looking after the German Bakery. Her husband had looked after the Bakery for last about 25 years and she has been looking after the Bakery since 1999 after her husband died. The bakery consists of two rooms and the front open space is having a tin shed. The bakery is situated on the main road of the Koregaon Park, Pune. She admitted that there was CCTV camera installed at the counter of the bakery since beginning. The hard-disk of the CCTV camera was kept in the said room. She denied the suggestion that the person entering the Bakery from the main gate was not captured in the CCTV camera. According to her, the CCTV camera was installed at “O” Hotel. She was not shown CCTV footages. The bakery used to function in two shifts from 8.00 a.m. to 3.00 p.m. and from 3.00 p.m. to 11.00 p.m.

72. Another witness is PW 2 – Dr. Mansi Yogesh Jadhav, who has a Dental Clinic on the first floor of the German Bakery. She too filed affidavit under Section 296 of Cr. P. C. She was cross-examined by the

defence. She deposed that she had not seen fire brigade extinguishing the fire. She was present on the spot for about half an hour after the blast.

73. PW 3 is Shankar Narayan Kharose. He was residing at Swapnalok Society, Flat No.1, Koregaon Park, Pune. His office is in the same building in which German Bakery was situated. In his affidavit he stated that initially they all suspected that the blast in the Bakery had been caused due to an LPG Gas cylinder blast, however, on inspection they realized that all the LPG cylinders were intact.

74. PW 22 is Vikas Shivgan who was present in German Bakery at 6.45 p.m. He deposed that as he was to take coffee cups, all of a sudden there was a big noise and blast. He noticed 2-3 persons near the counter falling down. His statement was recorded by Pune Police on 14/2/2010.

75. PW 23 is Ramesh Gitaprasad Panta, native of Kathmandu, Nepal and is working presently in Goa. He was working in German Bakery for about three years as watchman. On 13/2/2010 at about 7.15 p.m. he was getting ready for reporting to his duty when he heard a loud explosion and felt as if the building had collapsed. He came out of the

building and saw what had happened. During his cross-examination, he deposed that at the time of the blast he was on the third floor of the building. Due to the blast, the shed was completely damaged. After the blast he came down. The police had come first and thereafter the fire brigade. The fire brigade had sprinkled some water. His statement was recorded on the next day in the same building by the police.

76. PW 24 is Shrikrishna Vishnubahadur Thapa. At the relevant time, the witness was working in German Bakery since last four years as cashier. On 13/2/2010 his duty hours were from 6 a.m. to 3 p.m. He stated that at about 10 a.m. he went to gas agency at Yerwada, Pune, collected cooking gas cylinder for his house. He worked till 4 p.m. He left German Bakery at 4 p.m. and went to Camp for buying vegetables for his house. At 6.50 p.m. he came back to German Bakery and spoke to Pravin Pant, Manager of Bakery and he gave him account of the day. While he was leaving for his house and walking through the passage where customer were sitting in German Bakery, all of a sudden there was a big blast and flames were seen at German Bakery. In his cross-examination, witness stated that the cashier counter was inside the bakery. His job was to collect cash from the customers at the counter. He admitted that there was a

CCTV camera at the counter. He also admitted that the persons who used to come to the counter, were captured in the CCTV camera. The supervision of the bakery was done by the Manager. Statement of this witness was recorded on the next day of the incident. His affidavit was typed by the police and was sworn by him on 16/9/2011.

77. PW 25 is Ram Gopal Karki, who was working as Manager in German Bakery since the year 1998. The bakery used to open from 6 a.m. to 11 p.m. The bakery used to operate in two shifts and there were 30 employees in the bakery. On 13/2/2010 the first shift commenced at 6 a.m. and got over at 3 p.m. and the second shift had started. At 5.30 p.m. he along with his wife had gone to Zercon Society, Viman Nagar, where he received a phone call from his son who informed him that a very loud explosion had occurred near the German Bakery and due to the impact of the explosion the whole building had shaken. He stated in the affidavit that he reached the spot within 20-25 minutes. He saw blood and human flesh lying on the floor. Human limbs and other body parts were also lying scattered in the Bakery. Gas Cylinders were found intact. There was a huge cavity created in the floor. The witness went to the morgue in Sassoon Hospital in order to search for Gokul, who is one of the employees

of the Bakery. However, he could not find Gokul. Thereafter he went to Jehangir Hospital and Ruby Hall Hospital to search Gokul. However, he could not locate him. But when he returned to Budhrani Hospital, he identified one dead body which was of Gokul Bardeva, one of the employees of German Bakery. Gokul Bardeva's dead body was handed over to Nepal Embassy.

During his cross-examination, the witness denied the suggestion that the watchmen at the German Bakery used to check the belongings of the customers. In the bakery about 300 to 400 customers used to visit every day. He admitted that the persons entering from the gates were not captured by the CCTV camera installed in the bakery. But he changed the version in the next breath and deposed that the persons entering from the gates were captured by the CCTV camera installed in the bakery.

78. PW 28 is Kedar Shivbhakti Gibhire. He was servant in the Bakery. He is native of Nepal. He was working in Bakery for about one and half years.

79. PW 30 is Hanumant Sitaram Kute. He was driving auto-rickshaw in Koregaon Park area. After the blast, he stated that he started running from the spot. There was lot of loss and damage to the property.

80. PW 33 is Umesh Aabaji Pongadwale. He was working as a salesman in a shop namely Quality General Stores, Koregaon Park, Pune. The said shop is next to German Bakery. In his affidavit, he stated that after the blast, he came out of the shop and saw that the tin-shed outside the German Bakery was completely damaged. The customers and employees of Bakery were lying seriously injured. There was a pool of blood in the bakery. During cross-examination, he deposed that the shop was owned by Smita Kharose. The blast had taken place in the open space of the bakery.

81. PW 42 is Kishorsinha Ransinha Pardeshi. He was working in the police department in the Crime Branch as a photographer since the year 2002. He had taken the photographs of the accused persons, the unknown dead bodies and the spot of crime. He was in-charge of photography department at Pune Crime Branch. He has two constables to assist him. The cameras and other equipments for the photography are provided by the police commissionerate. He further deposed before the court in

examination-in-chief that the cameras having digital memory cards are used. The witness had taken the photographs and the video shooting. The said CDs are Article 1 and Article 1A. The said articles were marked after playing CDs in the laptop which was brought by the witness on the defence giving no objection to the same.

82. PW 43 is Sayyad Khwaja Hamza. He was working at the relevant time as I. T. Manager in Hotel "O" which is situated outside the German Bakery in the Koregaon Park. According to the witness the cameras which were installed outside can capture the whole area covering German Bakery. That the data gets automatically stored for 9 days. The system operates automatically, according to the witness. The police had asked for CCTV footages and accordingly they were shown to the police. The report was generated through the system. The police had taken the copy of the particular footage. The CD/DVD of the particular footages was handed over to the police. The witness made one clone of the hard-disk. The hard disk and clone were handed over by the witness to the police along with CD/DVD. The police had seized and sealed the said articles. The panchanama drawn on 14/2/2010 is marked as Exh. 163. The hard-disk is Article 3 and the other hard disk is Article 3A. The CD is Article 4.

The labels along with the wrapper are marked as Article 5 collectively. During cross-examination of this witness, he deposed that if one stands at the main entrance of Hotel "O", one cannot see the inside view of the German Bakery. At the main entrance of Hotel "O", there were two CCTV cameras installed. Whoever enters the Hotel "O", the CCTV cameras record the same. The witness stated that the CCTV cameras which are installed at Hotel "O" are having the capacity to capture the things/image situated at the distance of 100 fts. as they are the zooming cameras. It is stated that no CCTV cameras were seized from Hotel "O".

Panch Witnesses:

83. PW 44 is Jagdish Harishchandra Nimbalkar. The witness was aware of the blast which had taken place on 13/2/2010. He was called by the police to the spot of incident on 14/2/2010. According to the witness, there was one CCTV camera above the counter near the shutter. The wire of the CCTV camera was hanging. This witness had given account of the situation in the German Bakery. There is one open space on the eastern side of German Bakery ad-measuring approximately 40 fts. X 14 fts. The witness had seen one big pit adjacent to the hole of eastern wall of the

German Bakery. He had seen some trees which were partially burnt. There were some gas cylinders kept in one iron enclosure. Persons from CBI, Forensic Science Laboratory had collected half burnt clothes, pieces of mobile phones, broken watches, pieces of tins, coins and various articles from the spot. They were sealed by putting seal. Video shooting and the photographs of the spot of the incident was done. The spot panchanama is marked as Exh. 166. Two CDs were played in the laptop which was brought by the prosecution, one by one, and shown to the witness. He identified the same. The CDs were again sealed.

During cross-examination, the witness stated that he was in the government service since last 9 years. The witness had recorded dying declaration once only. He stated that he had not conducted any panchanama. The witness denied suggestion that the entire premises of German Bakery was washed with water. The pit spot was 11 inch deep and 26 inch wide. There was some water seen in the said pit. Other suggestions given by the defence were denied by the witness.

84. PW 51 is Gokul Sudam Shelar. On 20/9/2010 he was called at the Head Quarter of Police at Shivajinagar, Pune at about 11.00 a.m. by the ATS, Pune for panchanama in respect of handwriting. Shri Satav pointed

out towards one person and told that his name as Mirza Himayat Baig. Shri Satav told the said person to write numbers from 0 to 9. Accordingly said person wrote the numbers from 0 to 9 on 6 papers. The said person had written down the numbers from 0 to 9 on each page for 6 times. Thereafter, the witness, other panch by name Gaikwad, Shri Satav and the said person who had written down the numbers from 0 to 9 had singed on each paper. The said papers are marked collectively at Exh. 246.

85. PW 58 is Soorajsingh Bisht. His evidence is at Exh. 268. On 23/2/2010 at about 11 a.m. he was called by the police from the Crime Branch at the German Bakery. At that time he was standing in the parking area of German Bakery. The manager of German Bakery was present there . It was informed by the staff that there was CCTV camera installed on the counter of the German Bakery and the recording was being done at the residence of Gopal Garki. His residence was on third floor of the German Bakery. His Flat Number was B-5. Therefore they all went to his flat. The witness saw one LCD TV of Sony company and below that there was one VCR. Shri Garki removed 7 video cassettes from the cupboard which were kept there. Thereafter police had called Shri Dongre to prepare the copies of the said video cassettes. The police had taken charge of 7 video

cassettes and VCR. Said articles were wrapped in the brown colour paper and the seal was put and also the labels along with signatures were obtained. In the court, sealed box was opened which contained 7 video cassettes which was marked as Article 33, the VCR is article 34. The panchanama is at Exh. 269.

During cross-examination, the witness deposed before the court that he had not seen German Bakery from inside, though his office was in the same premises where the German Bakery was situated. The video cassettes were not blank, according to the witness.

86. PW 53 is Tushar Shivaji Pandit. He was called in the office of ATS. The police officer Shri Satav was present there. One accused was also present there. Witness stated that said accused is present in the court and pointed out to accused Mirza Himayat Baig. In the presence of this witness personal search of accused was done. During the search, one chocolate colour packet / pouch, one identity card of Election Commission of India having the photograph of the accused, cash of Rs.3,020/-, one spectacle, 3 passport size colour photographs of accused, one piece of newspaper, one pocket book in which matter was written in English and

Urdu language, one piece of ATM card of the bank of Hyderabad, two mobile phones, out of which one was having Sim card of Tata Docomo company were seized from the accused. Cash amount consisted two notes of Rs.1000/- denomination, two notes of Rs.500/- denomination and two notes of Rs.10/- denomination. The clothes of the accused were removed. He was examined but no injury was found on his person. The said articles are marked and placed on record. During cross-examination, the witnesses stated that the clothes of the accused were not seized. Rest of the suggestions were denied by the witness.

87. PW 56 is Umakant Dnyaneshwar Chatnale. He is resident of Udgir, District – Latur. He deposed before the court that when he was passing through the police station on 8/9/2010, he was called by the police. He went inside Udgir Police Station. Shri Gaikwad from the ATS was present there. The other police officers were also present there. One person by name Gaus having two bags was present there. Shri Gaikwad told this witness that some articles in connection with the German Bakery bomb blast were to be seized under panchanama. The said articles were taken from Shri Gaus. One was having black colour breif case and one Khaki colour shoulder bag of cloth. The Khaki cover bag was opened and it

contained two shirts, two pants, two handkerchiefs and some other articles of clothes. The black colour brief case was opened, many documents were seen inside the same. In those documents there was one identity card, one document having the stamp of Chennai Airport on the passport, one blue colour Mobile Phone of Nokia company and other documents. They were sealed in separate packets. Panchanama was accordingly drawn. Khaki cover bag is marked as Article 24 and all other articles collectively marked as Article 25. The black colour brief case is marked as Article 29. The documents and envelopes are also marked as Exh. 27. The passport along with two small envelopes are marked as Article 30 collectively. The witness stated that there were three Sim cards and one small light green colour envelope having labels, which were seized in his presence. The said panchanama is at Exh. 264. During cross-examination, the witness stated that he does not know reading and writing Urdu language. When he reached the police station, the person by name Gaus was also present there. Both these bags were opened before him after the said panchanama. Most of the written articles which were seized are in Urdu language.

88. PW 59 is Mobin Rashid Shaikh. He is resident of Khairewadi Ganeshkhind road, Pune. He was called on 6/12/2010 at about 1 p.m. by ATS police in their office at Shivajinagar, Pune. The documents in

connection with the German Bakery bomb blast case were in one closed packet. The said packet was of light green colour. Said packet was cut by scissor. There were many papers in the said packet. It contained the college I Cards, the receipts towards payments of fees, the certificates in respect of educational eligibility, driving license etc. In all there were 37 documents. All these documents were collectively marked as Article 28.

89. PW 60 is Amit Mansukhlal Veera, who deposed that he was called on 13/9/2010 by ATS police in front of one shop in Crawford Market, Mumbai. At that time he was going from that place. He was told that his help was required as the panch witness in the Al-Noor Guest House. Accordingly, he went to the said guest house. The police told the Manager of the guest house that they wanted to seize the register of the guest house. The police had seized the register after verifying the same. The panchanama is at Exh. 274. The witness stated that Al-Noor Guest House is situated in the crowded area.

90. PW 64 is Gopal Chamkure. He was called to act as a panch by the ATS Police Nanded at the Ashok Hotel, Priyanka Travels at Latur. The agent, namely, Ijiyaz Maniyar was present in the Priyanka Travel. The said

officers who had come there and asked the agent that they wanted to check entry of 6th and 7th February, 2010 from the booking register. The said agent produced one register. It was green in colour and the name Jagruti was written over it. There was entry in the name of Samad Indori against entry dated 6th and 7th February, 2010. The said officers took charge of the said register and prepared panchanama, upon which the witness, other panch and the agent Ijiyaz Maniyar and Shri Reddi had signed. The panchanama is at Exh. 283.

91. PW 61 is Renukadas Narayanrao Dhanorkar, who was working as Superintendent, Social Welfare, Zilla Parishad, Nanded. He was shown identity card issued to a physically handicapped person (Article 36). The blue colour identity card which is at Article 31/1 was not issued from his office. The stamps and the signatures on the same do not match with the record of his office.

92. PW 62 is Mahesh Deshmukh. He was working as a Motor Vehicle Inspector in the office of Deputy R.T.O., Ambejogai. He was shown blank forms having stamp of Deputy Regional Transport Officer, Ambejogai. He stated that stamps on these forms and the stamps of his

office are not the same. During cross-examination, witness stated that the blank forms are of no use. At the time of giving licence the documents are verified. He admitted that the police had not seized rubber stamps from the office.

93. PW 65 is Prabhodaya Govind Mulay, who was working as Tahsildar, Beed. He was inquired in respect of the ration card. He stated that ration cards are available in the office of Tahsildar. He deposed that he had verified genuineness of the caste certificate issued in favour of accused from the documents available in Tahsildar's office. It was revealed that the said caste certificate was forged. The signature and the stamp on the said certificate do not tally with the official record. The witness verified the copy of ration card received along with the letter at Article 41 from the office record. No entry regarding issuance of the said ration card was found. During cross-examination, the witness deposed that the signature was verified by him from the pay role. The witness described the procedure for issuing ration card. It is stated that the said ration card was in the name of Mirza Inayat Baig Mehboob Baig. It included the names of family members. On the ration card the name of Mirza Himayat Baig was mentioned which is at Sr. No.3. The article 28/2 is marked as Exh. 287. The

witness stated that no complaint was received by their office in respect of said ration card. The witness was unable to tell as to who was the Nayab Tahsildar in the year 2003. They had not seized the stamps which were compared with the stamp appearing on the said ration card.

94. PW 66 is Vyankati Baliram Nilawad. At the relevant time he was working as Chief Officer in Beed Municipal Council. He was examined in respect of Domicile Certificate. The witness stated that the stamp appearing on the Domicile Certificate and the stamp of their office do not tally. There was no outward number on the said certificate.

95. PW 71 is Martand Vinayakrao Patil, who was working as the Branch Manager at the State Bank of Hyderabad, Monda Branch, Beed at the relevant time. He was examined on the issue of signatures appearing on the withdrawal slips. He deposed that there was no saving account in the name of Mirza Himayat Inayat Baig in the Mondha Branch. According to him, any person can deposit the amount in the bank account. He admitted that on the pay-in-slip, which was part of Exh. 309 collectively, there was no signature of the person, who had deposited the amount. All the transactions mentioned in the statement of account are done by using ATM

card. The witness stated that no complaint was received by the Branch Manager that the subject account was misused by any person.

96. PW 81 is Baby John, who was working as Nodal Officer with Tata Tele Services, Mumbai since 2005. His duty was to provide subscriber's details to the Law enforcing agencies as per Licensing agreement of Government of India. He stated that every mobile hand-set is having IMEI number. This number will also be reflected in call details. Police had asked some call details of one Sim card by way of written requisition. The said information was provided under signature of the authorized person. The printed call details are also placed on record. During cross-examination, the witness described the procedure to be adopted by the person who applies for a Sim card. The witness provided information from 1/1/2010 to 6/9/2010. Following question was asked to this witness :

Q. Is it true that calling number discloses the location of the person from where he is calling?

Ans. Yes. I say that there were two things. One is switch and the other is the Cell I.D. The Cell I.D. gives the exact location of that person from where he is calling.

The witness further admitted that the location of the person to whom the call is made is not disclosed in the aforesaid call details.

Medical Evidence:

97. Five medical officers were examined on the evidence relating injured persons. They are, PW 45 - Dr. Sudhir Lohkare, PW 46 – Dr. Sumit Saxena, PW 47 – Dr. Jaising Shinde, PW 48 – Dr. Balkrishna Agrawal, PW 49 – Dr. Chetan Puram and PW 50 – Dr. Pravin Survase.

PW 45 is Dr. Sudhir Lohkare, who was attached to Inlac and Budharani Hopsital, Koregaon Park, Pune at the relevant time as Consultant General Surgeon. The witness is conversant with the handwriting and signatures of the other doctors who were working with him. The witness deposed that on 13/2/2010 near about 13 to 14 injured patients were brought to the Inlac Budharani Hospital, which is very near to the place of occurrence. The distance is about 1 km. The witness had brought along with him the original papers of the hospital record. He referred to the case papers of Vikas Shigwan, who was brought in injured condition to the hospital. The Casualty Medical Officer Mr. Santosh examined him and the injuries on his person were noted by the resident in Surgery Dr. Pankaj

Nemade. Said injuries were possible by any projectile coming out of the bomb blast. The injuries were simple in nature. According to the doctor, the injuries were caused due to bomb blast endangering life. According to the witness abrasion is scratch type of injury. There is no procedure to know that the particular injury was caused only by bomb blast. The injury of the patient was not dangerous to his life. The injury certificate is at Exh. 169.

98. PW 46 is Dr. Sumit Saxena. He was at the relevant time attached to the Inlac Budhrani Hospital, Koregaon Park, Pune. Six patients were brought in injured condition. Their names are mentioned by Dr. Rahul Chaudhary, who had seen them first. The witness had brought relevant papers to the court. Specialist in their field treated the patients. Some of the patients had burns over face, neck and right hand and also multiple abrasions on abdomen below the umbilicus. The percentage of burns were 9%. The injury certificate was marked as Exhibit 171. Some of the injured persons had suffered abrasions and lacerations. They were treated in operation theater. Persons who suffered injury to their ear, according to the Medical Officer, would suffer permanent impairment of hearing. One patient, namely, Sumit Singh was brought to the Casualty Department of Inlac Budhrani Hospital was shifted to Intensive Care Unit

(I.C.U.) as he was found critical. X-rays were taken. He had suffered compound fracture to left fibula and had fracture of clavicle. He had multiple foreign bodies. Dr. Karnalkar, ENT Specialist had also seen him and diagnosed right ear traumatic perforation. His injury certificate is at Exh. 173. Doctor opined that in these types of cases there can be hundreds of foreign bodies. It is not possible to remove all the foreign bodies. The bigger foreign bodies and the foreign bodies in the vital area were removed. There is risk of the vital nerves getting affected while removing the foreign bodies and, therefore, certain foreign bodies could not be removed. Doctor opined that had the patient not treated immediately, he could have died. All the injuries were serious in nature and were possible due to bomb blast. While referring to case of Ms. Amrapali Chauvan, the doctor stated that she was brought in a critical condition and shifted to I.C.U. Dr. Panse had diagnosed the case as fracture of left femur. The patient had suffered multiple small wounds on right leg. Her condition had deteriorated in between and had to be kept on ventilator support for few days. The injuries were serious and could occur due to bomb blast. Injury certificate is at Exh. 174. Likewise, Ms. Vineeta Pathak and Mrs. Waltrawo K. were also treated as injured patients. Their injuries, according to the Medical Officer, were possible by bomb blast.

In the cross-examination, the witness stated that the history was given by the patient. Abrasions are superficial injuries. These injuries could cause dis-figuration. The injuries found on the person of Santosh R. Chandwani were simple in nature. Doctor stated that in all the certificates, history was given by the patient. In no certificate it was mentioned that the injuries were dangerous to human life. In the injury certificate it was not stated that the injuries were possible by bomb blast. The said injuries could be cured very fast by giving treatment.

99. PW 47 is Dr. Jaising Shinde. The witness is the Founder Director of the Surya Hospital. The said hospital was formed in the year 1985. The witness is a Surgeon by profession. The patient Uplaxya Tiwari was brought in the Surya Hospital on 13/2/2010 at about 9 p.m. He was transferred from Ruby Hall to Surya Hospital. He had 14 to 15% superficial to deep burns. He had burns on face, neck, both hands and both legs. The history of incident was given by the friends who accompanied the patient. He had contusion on right lower leg. He had perforation of the right ear drum. Injury certificate is at Exh. 181. Likewise, Medical Officers treated Mr. Saqr Fadl Saleh Albidani. He was brought in the Surya Hospital on

13/2/2010 at 8.30 p.m. He had suffered contused lacerated wounds. He was accordingly treated by the doctor. Injury Certificate is at Exh. 181.

In the cross-examination, he deposed that in a human being there are 3 layers of skin. The first one is Epidermis, the second one is Dermis and the third one is Hypodermics. The danger of the said injury to the human being depends upon the area upon which the burn occurs. Doctor deposed that in the injury certificate it was not stated that they were classical injuries due to bomb blast.

100. PW 48 is Dr. Balkrishna Agrawal. He is a Surgeon by profession. He was attached to Amit Hospital situated at Yerwada, Pune since 1986 as a practicing surgeon. Ms. Hiteshi Kamboj and Mr. Kiran Prakash Jadhav were brought to the hospital in injured condition. They had suffered injuries on their person. The certificate is at Exh. 183 and 183A collectively. They had sustained grievous injuries.

101. PW 49 is Dr. Chetan Puram, who is Orthopedic Surgeon, attached to Sancheti Hospital Pune, since the year 2002. He treated patient by name Mr. Mushtaq Ahemad, who was brought to the hospital and had

suffered CLW and multiple abrasions. Injury certificate is at Exh. 186. Second patient was Mr. Kanaji Sherkhane, who suffered a compound fracture of the left tibia fibula. He was admitted in the hospital and had undergone surgery.

During cross-examination, Medical Officer deposed that in the injury certificates it was not mentioned as to who had brought the patient. The age of the injury was also not mentioned. How many pieces of metallic foreign bodies were found in the body of the patient was also not mentioned.

102. PW 50 is Dr. Pravin Survase, who is Surgery Resident at Sassoon General Hospital, Pune. He deposed that he looks after the emergency surgical cases. He refers to the case of patient – Bharat Agrawal, who was brought to the hospital on 13/2/2010 at 8.53 p.m. He had suffered five injuries, including multiple tiny abrasions, CLWs. The patient was operated for local exploration and foreign body removal. Total 9 metallic foreign bodies were removed from right heap, right back, right buttock and right foot. The patient was discharged on 22/2/2010. The injuries suffered by the patient were grievous in nature. Another patient –

Kantilal Zhala had also suffered CLWs and multiple abrasions. He was also treated as he had suffered serious injuries. Patient was operated for local exploration and foreign body removal. Two metallic foreign bodies were removed from left leg and left ankle. Likewise, Paras Rimal, Rushab Agarwal, Sunanda Naik, Uday Karemvasi, Nagrajan Reddi, Asherig Ejrali, Chek Wang and Faraz Zalanani were also treated as injured patients. The Medical Officer submitted that all the above patients were brought to the Sassoon Hospital at approximately same time. They had given common history of explosion. The injuries were indicative of bomb blast injuries.

During cross-examination, the Medical Officer denied the suggestion that CLW is not a bleeding injury. Doctor admitted that in the injury certificate age and nature of injury was not mentioned.

103. Prosecution had submitted inquests, postmortem reports and connected papers in respect of persons who died in the said incident. The defence had admitted the genuineness of the said documents and, therefore, they were admitted in evidence and exhibited. 17 persons died in the said incident. Their names and cause of death in the tabular form is mentioned as under :-

Sr.No.	Name of the deceased	Cause of death	Exhs.
1	Anikt Kamlendudhar	Hemorrhage & Shock due to explosion injury	69
2	Kum.Shilpa Goyanka	Explosion injury	70
3	Kum.Vinita Gadani	Explosion injury	71
4	Kum. Sinduli Piduri	Hemorrhage and Shock due to explosion injury	72
5	Kum.Anandi Dhar	Hemorrhage and Shock due to explosion injury	73
6	Shankar Pansare	Hemorrhage and Shock due to punctured injury over chest	74
7	Vikas Tulsiyani	Complication following explosion injuries	75
8	Anas Suliman (Foreigner)	Septicemia due to explosion injuries	76
9	Kum. Aditi Jindal	Complications following explosion injuries	77
10	Atul Anap	Complications following explosion injuries	78
11	Amjad Elgo Ahemd (Foreigner)	Multiple burn injuries due to explosion	79
12	Aditya Mehta	Complications following explosion injuries	80
13	Abhishek Saxena	Complications following explosion injuries	81
14	Gokul Nepali	Explosion injuries	82
15	Ms. Nadia Macerini	Explosion injuries	83
16	Sayeed Abdol Khani (Foreigner)	Hemorrhage and Shock due to explosion injury	84
17	Raju Agarwal	Complications following explosion injuries	85

104. PW 91 is Balasaheb Barguje, the Police Naik attached to ATS. The witness carried seven sealed packets to Delhi for handing it over to Forensic Science Laboratory. On 7/4/2010 he had again gone to Delhi to

collect report from the Forensic Science Laboratory and submitted his compliance report at Exh. 329.

105. PW 103 – Shri Satav, the Investigating Officer, was cross-examined in detail on behalf of the defence, during which he deposed that he reached the site of blast after 20 to 25 minutes after receiving the information. The witness admitted that he did not record statements of experts from the Forensic Science Laboratory. He admitted that statements of Col. Mann and Goinath were not recorded by him. He could not say that the RDX is possessed by Army only, but stated that the RDX was not available in the open market. According to him Lashkar-E-Toeba Organization is Pakistan based one. The members of the said Organization also operate in India. He was not in a position to state the names of the President or Secretary of the said Organization in India. The confessional statement of Samad Khan was recorded in M.C.O.C. case. The witness stated that it is not true to say that the Karnataka Police had arrested Abdul Samad in the present case and was released later on. Some of the accused of Aurangabad Arms Haul Case are still absconding from the year 2006 onwards. No information was received as to from which place accused Mirza Himayat Baig was coming at Pool Gate Bus Stand at Pune. The

witness admitted that prior to 7/9/2010 he had not seen accused Mirza Himayat Baig. He admitted that photograph of accused Himayat Baig which was used for apprehending him, was not produced. Since accused Mirza Himayat Baig was one of the suspects in the present case, he was taken to the office of ATS. The witness further deposed in his cross-examination that there was no evidence that accused Himayat Baig along with Mohsin Chaudhari and Yasin Bhatkal had assembled the bomb at Cyber Cafe at Udgir. Witness did not make any inquiry as to whom the Cyber Cafe at Udgir belonged to. The witness denied suggestion that accused Mirza Himayat Baig did not assemble bomb in the Cyber Cafe at Udgir. He denied suggestion that signature of Mirza Himayat Baig was taken on blank paper. The witness admitted that Abdul Rahim Sayyed was not examined as witness. The witness admitted that in Exh. 414, which is a station diary entry, names of panch witnesses were not mentioned. There was no reference of sniffer dog and opening the gate by Abdul Sayyed. But everything in detail was mentioned in the panchanama. The witness admitted that there was no evidence to show that accused Mirza Himayat Baig met with Jabiuddin Ansari and Fayaz Kagzi in Colombo. Recently Jabiuddin Ansari was arrested, according to the witness. The witness did not personally visit Global Internet Cafe at Udgir. It is stated that accused

Himayat Baig posed himself as Hasan and Yusuf by using forged documents. He was using ATM card of Rehan to conceal his transactions. CCTV footage about the accused Himayat Baig withdrawing money from ATM has already on record. The bank's pay-in-slip at Exh. 300 is dated 20/1/2010 and the bank pay-in-slip at Exh. 309 collectively dated 20/12/2008 and 30/06/2008 are also on record, which are prior to the incident. The witness denied suggestion that no prior permission of search was obtained under Section 188 of Cr. P.C. for filing charge-sheet against accused Mirza Himayat Baig. He denied that there was no proper sanction obtained from the Central Government under the Unlawful Prevention of Activities Act. Accused Mirza Himayat Baig was the absconding accused in C.R. No. 17/2008 registered under the provisions of Unlawful Prevention of Activities Act. He denied suggestion that accused Himayat Baig was taken in custody at Latur on 19/08/2010 by ATS Aurangabad and he was given in custody of ATS, Pune on 20/8/2010. He denied suggestion that accused Mirza Himayat Baig was falsely implicated in this case and accused had not come to Pune on 13/2/2010 along with another person wearing cap and having two bags. The witness denied the suggestion that accused Mirza Himayat Baig had not come to Pool Gate bus stand on 7/9/2010.

The witness was re-examined by the prosecution, during which he stated that in respect of Col. Mann, the report was received from him in respect of visit to the spot of incident, which is at Exh. 425. The copy of court's order and the copy of the panchanama in respect of destruction of the said RDX seized in Aurangabad Arms Haul case is placed on record, which is Article 24. The witness had tendered report from the Fire Brigade Department, that no fire had taken place on the spot of incident (Exh. 424).

106. The prosecution filed an application under Section 294 of Cr. P.C. 1973 to admit or deny genuineness of the documents enlisted therein for exhibiting the same in the proceeding without any further proof. By an endorsement made on 20/3/2012, it was noted on behalf of the defence that “all the medical certificates of injured persons are hereby admitted by the defence at Sr. Nos.34 to 85 and they may please be exhibited”. Accordingly, those documents came to be admitted and exhibited. Said application is at Exh. 66. The prosecution filed similar application at Exh. 66A under Section 294 of Cr. P.C. for exhibiting six documents. On the say of the defence, those documents were also exhibited, which referred to

particulars of hospitals Jahangir, Pune and Kokilaben, Mumbai. The prosecution filed application under Section 294 of Cr. P. C. (Exh. 66) in respect of spot panchanamas etc. The defence admitted panchanamas at page Nos.117 & 118 i.e. seizure of clothes of deceased (Exh. 67). The prosecution thereafter filed an application under Section 296 of Cr. P. C. for filing affidavit in evidence of witnesses (Exh. 68). The said application is dated 6/8/2011. Said application was allowed on 3/9/2011. The affidavits relied upon were to the extent of injuries caused to the witnesses in the blast. The prosecution further filed an application seeking permission to record evidence in absence of the accused, who were absconding, under Section 299 of Cr. P. C. on 20/8/2011 (Exh. 106). On 3/9/2011 the prosecution submitted names of witnesses whose affidavits were proposed to be filed under Section 296 of Cr. P. C. (Exh. 111). The accused desired to cross-examine 11 witnesses by filing say on 15/10/2011 (Exh. 154). The defence had not disputed the affidavit filed in evidence of 28 witnesses (Exh. 156). On behalf of the accused it was submitted that the defence does not admit medical certificate at Sr. Nos.1 to 28 as mentioned in the application dated 8/11/2011 (Exh. 156). The prosecution further submitted documents for admission under Section 294 of Cr. P. C. by filing an application dated 20/10/2012 at Exh. 385.

107. After framing charge, the prosecution submitted application at Exh. 20 praying for exhibiting 43 reports from the Government Scientific Experts as per provisions of Section 293 of Cr. P. C. The defence submitted say at Exh. 21 and stated that the Forensic Science Laboratory reports mentioned in the application from Sr. Nos.4 to 43 may be exhibited under Section 293 of Cr. P. C. However, the defence did not admit the reports of Forensic Science Laboratory mentioned at Sr. Nos.1, 2 and 3. The reports admitted were given Exhibit Nos.22 to 65 with liberty to the defence to make appropriate application under sub-section 2 of Section 293 of Cr. P. C. for examining any witness. The trial court passed said order on 30/7/2010. The prosecution itself had examined Forensic Experts as PW 75 and PW 78. Inquest mentioned at Sr. Nos. 9 to 25 and forwarding letters addressed to Forensic Science Laboratory were also not denied by the defence as against an application filed at Exh. 66 under Section 294 of Cr. P. C.

108. The inquest panchanamas and papers regarding cause of death of the victims came to be admitted in evidence and marked as Exhs.69 to 85 and the forwarding letters addressed to Forensic Science Laboratory

were marked as Exhs. 87 to 104. The certificates of injured persons mentioned in application at Exh. 66 were admitted in evidence and marked as Exhs.200 to 234.

109. Learned defence advocate admitted panchanamas pertaining to seizure of splinters removed from the bodies of injured persons mentioned from Sr. Nos.28 to 33 in the application at Exh. 66 and marked as Exhs. 315 to 320. The defence admitted panchanama in respect of seizure of clothes of the deceased at Sr. No.66 in the application at Exh. 66 and so it was admitted in evidence and marked as Exh. 86.

110. On an application filed by the prosecution at Exh. 106 seeking permission to record evidence in absence of absconding accused, trial court noted that it is the matter of record that the learned Magistrate before whom the charge-sheet was submitted, had issued proclamation against the absconding accused persons under Section 82 of Cr. P.C. and issued the warrants against them.

111. The application was allowed by order dated 15/10/2011 by observing that the evidence recorded in the matter would be recorded under Section 299 of Cr. P. C. as against the absconding accused persons.

112. The prosecution examined 103 witnesses, out of which evidence of prosecution witnesses 1 to 41 was tendered by submitting affidavits pursuant to the provisions of Section 296 of Cr. P. C., being formal witnesses. The defence was given opportunity to cross-examine the witnesses. The defence chose to cross-examine 11 witnesses. The prosecution closed its evidence by filing closure pursis at Exh. 427. The statement of accused was recorded under Section 313 of Cr. P.C. The defence did not examine any witness.

Submissions of Shri Raja Thakare, Spl. P. P.

113. The learned Spl. P. P. Shri Raja Thakare has referred to the entire evidence recorded by the trial court, the relevant documents, orders passed from time to time and notings. We had looked into the original record during the course of hearing of the Confirmation Case as well as appeal with the assistance of the learned counsel appearing for the prosecution and the defence.

114. Learned Spl. P.P. Shri Raja Thakare submitted that the

prosecution had brought on record the background of the accused relating to his association with persons, his occupation, peculiar habits. The prosecution has also focused on the ideology nurtured by the accused, his approach towards life. The prosecution as far as possible had tried to minutely examine the mindset of the accused person who, according to the prosecution, had extended not only his helping hand but had played a major proactive participatory role, which ultimately resulted into a dastardly act of bomb explosion in the German Bakery on 13/2/2010.

115. It was submitted by the learned Spl. P. P. that long standing association of accused – Mirza Himayat Baig with absconding accused Faiyaz Kagzi, Jabiuddin Ansari and Mohsin Choudhary and others is a relevant fact. The association of accused with the absconding accused is also highlighted by the learned Spl. P. P. The accused – Mirza Himayat Baig was advocating and was pro-actively working in taking revenge against atrocities committed on Muslims under the garb of Jihad. He was camouflaging his identity by pseudo names such as “Hasan”, “Yusuf” and “Ahmed”. The accused was involved in creating and possessing fake documents of identity, like documents issued by RTO department, caste certificates, ration card, domicile certificate etc.

116. Learned Spl. P.P. submitted that in furtherance of his activity, the accused entered into a criminal conspiracy to continue with unlawful activities and for hiding his own identity and for doing financial dealings without involving his name, accused used ATM cards of others.

117. Learned Spl. P. P. submitted that as a part of criminal conspiracy, the accused had visited Colombo, Sri Lanka and did reiki at Pune.

118. According to the prosecution, accused Mirza Himayat Baig is member of banned terrorists organization known as “Lashkar-E-Taiba (L-e-T). In pursuance of the conspiracy hatched with the absconding accused, accused – Mirza Himayat Baig visited Mumbai for purchasing mobile hand-set i.e. Nokia 1100 which was used as triggering device and haversack bag. The accused, as a part of criminal conspiracy, created false alibi by keeping his mobile phones with his friends i.e. PWs 95 and 97 to show that on 13/2/2010 the accused was at Aurangabad. It is the prosecution case that as a part of conspiracy and in furtherance of concealing his identity the accused was found in possession of documents of identity of other persons.

119. Learned Spl. P. P. submitted that accused, who is a resident of Beed, had taken shelter at Udgir by pseudo name “Hasan” “Yusuf” and was said to be running “Global Internet Cafe”.

120. Learned Spl. P. P. submitted that the prosecution recovered RDX from the room used by the accused. The accused had made bomb in his Global Internet Cafe at Udgir and in pursuance of larger conspiracy had gone to Pune along with absconding accused Yasin Bhatkal on 13/2/2010. The other absconding accused Yasin Bhatkal was wearing a cap and carrying two bags was identified from the images of CCTV installed in the German Bakery and in front of Hotel “O”. It was identified that the said person was Yasin Bhatkal who had kept one bag in the German Bakery and left the Bakery soon before the blast with one bag. According to the prosecution Yasin Bhatkal is a planter of bomb. The learned Spl. P. P. submitted that the prosecution had seized CCTV footages at German Bakery and Hotel “O” and recovered RDX through memorandum of panchanama at the instance of accused – Mirza Himayat Baig. The prosecution placed reliance on Forensic Science Laboratory reports which confirmed that the blast was triggered due to RDX and it was with the help

of a mobile Nokia 1100 hand-set which was used as a triggering device. The prosecution placed reliance on the reports to submit that the contents of the explosive recovered under the memorandum of panchanama at the instance of accused Mirza Himayat Baig and the one found at the scene of the blast are identical.

121. The prosecution obtained appropriate sanctions under the Unlawful Activities (Prevention) Act, 1967 and Explosive Substances Act, 1908. These sanctions/orders were admitted by defence under Section 294 of Cr. P. C. (Exhs. 391, 392 and 393).

Submissions of Shri Pracha, learned counsel for accused:

122. Shri Pracha, learned counsel appearing for the accused raised preliminary issue concerning sanctions. Learned counsel submitted that unless the investigation was undertaken under the provisions of the National Investigation Agency Act, 2008 (for short NIA Act 2008), the Unlawful Activities (Prevention) Act, 1967 (for short Act of 1967) had no application. It was submitted that no formal order of sanction was passed by the competent authority. The learned counsel referred to various

provisions of the NIA Act 2008, Act of 1967 and the Criminal Procedure Code. It was the submission of the learned counsel that the State did not submit any report on receipt of information and recording of the same under Section 154 of the Cr. P. C. to the Central Government. It was submitted that the learned Magistrate was not entitled to take cognizance of the charge-sheet which was filed in the court. The cognizance ought to have been taken by the Competent Court designated under the NIA Act, 2008. It was the submission of the learned counsel that the entire proceeding initiated against the accused and the investigation undertaken deserves to be set aside for want of valid sanction and for taking cognizance by a court which had no jurisdiction.

The learned counsel Shri Pracha submitted that accused has been falsely involved in the case. There is absolutely no evidence against him in the shape of circumstantial evidence or otherwise. The circumstances gathered against the accused are not incriminating. The circumstances are not independently established. In itself, the circumstances brought on record are not sufficient to hold beyond doubt that the offence must have been committed by the accused. It was the submission of the learned counsel that based on documentary material

allegedly recovered from the accused and his association with the other persons, he cannot be branded as a person who was involved in terrorists activities. The prosecution has failed to establish that the accused was active member of Indian Mujahiddin, alleged terrorist organization. The circumstances brought on record in the nature of back cover of Nokia 1100, visit of the accused to Mumbai, his staying in the lodge, his visit to Aurangabad are not sufficient to establish the involvement of the accused in the crime.

123. Learned counsel submitted that recovery of so called explosive material, known as RDX, from the white building room is not reliable, nor there is any evidence to establish that the accused had manufactured the bomb in his Global Internet Cafe at Udgir.

124. Learned counsel further submitted that there is no evidence to show that the accused was frequently in touch with the other absconding accused and the so called planter of the bomb soon before the incident, nor there is any evidence that the accused had carried the bomb to Pune.

125. The evidence concerning alleged bogus documents to

camouflage the identity, use of ATM card in itself does not establish criminal liability of the accused.

126. The counsel submitted that the evidence in respect of CCTV footages from German Bakery or “O” Hotel is not reliable. The evidence is not established strictly in accordance with the provisions of Section 65-B of the Indian Evidence Act. On CCTV footages, the learned counsel submitted that the original CD is not placed on record in stead VCD, CD for operational purposes was said to have been prepared, which is also not placed on record. Photographs of Yasin Bhatkal is also not placed on record. The counsel disputed the finding reached by the trial court. According to him, call details records are not reliable and are doctored to suit present case. It was the submission of the learned counsel that the report submitted by Col. Mann does not refer to the CCTV of German Bakery, nor does it say conclusively that mobile phone was used as triggering device. The cassettes placed on record are secondary evidence which ought not to have been exhibited by the trial court. In respect of the hard-disks, which were placed on record, the counsel submitted that the trial court did not see those hard-disks and no certificates in respect of the CD were placed on record **(Exh. 164)**.

127. The learned counsel further submitted that the explosive substance (RDX) was not established by the prosecution. The prosecution failed to establish percentage of explosive/RDX allegedly used in the blast. The forensic reports from Delhi and Chandigarh were not placed on record deliberately. It was submitted by the learned counsel for the accused that the blast site was crowded by people, investigators and many others and, therefore, the sealing of the sample from site cannot be relied upon. The counsel disputed the time of explosion by referring to the time mentioned in the CD covering blast in the German Bakery and the CD maintained by the “O” Hotel management. The death caused in the incident was not homicidal as no act of blast/terror act was established by the prosecution. The counsel disputed the entry maintained in the register of Al-Noor Lodge at Mumbai. Questions were raised in respect of the station diary entries.

128. In respect of the seizure of explosive, learned counsel submitted that evidence relating to dog squad taken on record was not reliable. The prosecution failed to establish nature of substance recovered from the white house and allegedly used in the blast. The counsel submitted that the premises from where the prosecution claims to have

recovered RDX was not used by the accused. The counsel questions application of provisions of Section 43E of the Act of 1967 to the facts of the present case. The counsel further submitted that none of the forensic reports stated that the recovered substance is RDX. None of the reports mentioned the percentage of RDX. The learned counsel further submitted that house owner of the white building was not examined, nor Abdul who was present on the date when the police claimed to have entered the premises. Adverse inference is required to be drawn for non examination of the material witnesses. According to the learned counsel, there is no evidence in respect of visit of accused to Colombo for the purpose of funding or for any criminal activity. In spite of letter written to Interpol by CBI, no reply was received from the Interpol or was placed on record, nor any further efforts were made by the investigating agency to secure reply. Therefore, adverse inference is required to be drawn against the prosecution. The learned counsel seriously questioned that Nokia 1100 phone could be used as a triggering device. The theory is based on imagination of prosecution.

129. The counsel submitted that last seen evidence is not reliable. After gap of few months it was not at all possible for auto-rickshaw driver

to identify the accused person along with so called planter of the bomb, Yasin Bhatkal. The learned counsel submitted that the police has deliberately not investigated the offence properly and has booked innocent person. The learned counsel submitted that the real culprits are left behind by the police intentionally. The counsel submitted that matter has to be looked into seriously and action is required to be taken against the police officers for not investigating the offence properly as the issue relates to the security of the Nation and safety of its people.

Appreciation :

130. We would first deal with the issue of sanction. The Act of 1967 was enacted by the Parliament in the year 1967 and it was amended from time to time. The NIA Act 2008 (34 of 2008) received the assent of President on 31/12/2008. Section 6 of the NIA Act 2008 refers to investigation of scheduled offences. The schedule of offences refers to eight enactments. At Sr. No.2 the Unlawful Activities (Prevention) Act, 1967 is mentioned. Section 7 refers to power to transfer investigation to State Government. Section 10 refers to power of State Government to investigate scheduled offences. Chapter III constitutes Sections 6 to 10.

Chapter IV of the Act refers to Special Courts. Sections 6 and 10 reads as under :-

“6. Investigation of Scheduled Offences.- (1) On receipt of information and recording thereof under Section 154 of the Code relating to any Scheduled Offence the officer-in-charge of the police station shall forward the report to the State Government forthwith.

(2) On receipt of the report under sub-section (1), the State Government shall forward the report to the Central Government as expeditiously as possible.

(3) On receipt of report from the State Government, the Central Government shall determine on the basis of information made available by the State Government or received from other sources, within fifteen days from the date of receipt of the report, whether the offence is a Scheduled Offence or not and also whether, having regard to the gravity of the offence and other relevant factors, it is a fit case to be investigated by the Agency.

(4) Where the Central Government is of the opinion that the offence is a Scheduled Offence and it is a fit case to be investigated by the Agency, it shall direct the Agency to investigate the said offence.

(5) Notwithstanding anything contained in this section, if the Central Government is of the opinion that a Scheduled Offence has been committed which is required to be investigated under this Act, it may, suo motu, direct the Agency to investigate the said offence.

(6) Where any direction has been given under sub-section (4) or sub-section (5), the State Government and any police officer of the State Government investigating the offence shall not proceed with the investigation and shall forthwith transmit the relevant documents and records to the Agency.

(7) For the removal of doubts, it is hereby declared that till the Agency takes up the investigation of the case, it shall be the duty of the officer-in-charge of the police station to continue the investigation.

10. Power of State Government to investigate Scheduled Offences.- Save as otherwise provided in this Act, nothing contained in this Act shall affect the powers of the State Government to investigate and prosecute any Scheduled Offence or other offences under any law for the time being in force.”

131. Under Section 11, the Central Government is authorized to constitute Special Courts. Section 13 refers to jurisdiction of Special

Courts. Section 22 refers to power of State Government to constitute Special Courts.

In the present case it is seen that after the offence was registered under Section 154 of the Code, which means “Criminal Procedure Code 1973”, the State did receive the report, but there is no evidence to show that the same was forwarded to the Central Government. On receipt of report, the Central Government to determine as to whether the offence is a scheduled offence and whether it is a fit case to be investigated by the agency i.e. NIA. The NIA is entitled to take up the investigation on the direction of the Central Government. The Central Government is entitled to suo motu direct the agency to investigate the offence.

132. In view of provisions of Section 10, the powers of the State Government are saved as nothing shall affect the powers of the State Government to investigate and prosecute any scheduled offence or other offences under any law for the time being in force. The reading of both these enactments would show that unless the Central Government directs the NIA to take over the investigation, there is no power entrusted with the

NIA to take over the investigation on its own. Therefore, the application of NIA Act would come into operation only in case the Central Government takes up the decision and issued any of the directions as mentioned under Section 6 of the NIA Act 2008. There is no embargo under the NIA Act, 2008 and the Act of 1967 for the State Agencies to investigate till a decision is taken by the Central Government. The investigation undertaken by the State Government cannot be faulted on that ground. In other words, if the investigation is entrusted to NIA, the power of the State to investigate and prosecute the scheduled offences ceases. The NIA independently is not given freedom to investigate any case of its choice. It is only when the Central Government entrusts such case to it, the NIA can investigate the said case, even if the case involved is a scheduled offence referable to the Acts mentioned in the schedule. The NIA has to wait till the case is entrusted to it by the Central Government.

133. Code is defined under NIA Act, 2008 as Code of Criminal Procedure 1973. The trial of cases in accordance with the procedure prescribed under the Code of Criminal Procedure is the rule. After considering the provisions of both the enactments and the Code of Criminal Procedure, we are of the view that as long as investigation of a case is not

entrusted to NIA, the powers of the State Government and its investigating agencies are intact and, therefore, the said agencies could proceed in accordance with the Cr. P. C. and take further steps of completing the investigation and filing the report under Section 173 of Cr. P. C. in a competent court. In view of the fact that the Central Government did not direct NIA to take over the investigation, the State agency filed the charge-sheet in the Magistrate Court. The court took cognizance and thereafter committed the case to Court in the Sessions Division of Pune.

134. We are, therefore, of the view that the State agency was competent to investigate the offence and file report before the court in accordance with the provisions of Cr. P. C. We do not find any illegality in taking cognizance of offence by the concerned Magistrate and consequential committal of this case to the Sessions Court. We do not notice any jurisdictional error committed by either of the courts below.

Sanction Order :

135. The sanction order (Exh. 391) of the Home Department (Special), Mantralaya, Mumbai is dated 2/12/2010, which was signed by Medha Gadgil, Additional Chief Secretary (Home) and Secretary In-Charge

of Home Department, Government of Maharashtra. The said order was issued in the name of Governor of Maharashtra.

136. Section 45 (1) of the Act of 1967 refers to cognizance of offences which reads as under :-

45. Cognizance of offences. _ (1) No Court shall take cognizance of any offence -

(i) under Chapter III without the previous sanction of the Central Government or any officer authorised by the Central Government in this behalf.

(ii) under Chapters IV and VI without the previous sanction of the Central Government or, as the case may be, the State Government, and where such offence is committed against the Government of a foreign country without the previous sanction of the Central Government.

(2) Sanction for prosecution under sub-section (1) shall be given within such time as maybe prescribed only after considering the report of such authority appointed by the Central Government or, as the case may be, the State Government which shall make an independent review of the

evidence gathered in the course of investigation and make a recommendation within such time as may be prescribed to the Central Government or, as the case may be, the State Government.

137. In law, previous sanction of the Central Government was necessary under Section 45(1) of the Act of 1967 as amended in 2008 to prosecute the accused for the offences committed by him under Sections 10 and 13 of the Act of 1967 and Amendment 2008.

138. The sanction order refers that the Central Government vide its order dated 8/8/2007 (Notification No. S.O.1004(E) dated 21/6/2007) had authorized the Secretary of the State Governments in-charge of Home Department, Government of Maharashtra to exercise powers to accord sanction for taking cognizance of the said offence by the court. In accordance with the provisions of Section 45(1), it was necessary for the State Government to accord sanction for prosecution of the accused. Under Section 196 of Cr. P. C., sanction of the State was required to prosecute the accused for offence punishable under Section 153A of IPC. Paras 7, 8 and 9 of the sanction order read as under :-

7. And whereas, after having fully examined the material placed before me and considering all facts, I am satisfied that there is prima facie case made out against the accused person and that it is necessary in the interest of justice that the accused person should be prosecuted in the Court of competent jurisdiction for the offences under sections 10 and 13 of the Unlawful Activities (Prevention) Act, 1967 Amendment 2008.

8. And whereas, the State Government is satisfied that there is a prima facie case made out against the accused person and it is necessary that accused person should be prosecuted in the court of competent jurisdiction for offences under section 16, 18, 20, 21 of Unlawful Activities (Prevention) Act 1967 Amendment 2008 and under section 153A of Indian Penal Code (IPC)

9. Now therefore, in exercise of the powers conferred by the clause (i) and (ii) of sub-section (1) of Section 45 of the Unlawful Activities (Prevention) Act 1967 Amendment 2008 and section 196 of Cr. P. C. sanction is hereby accorded for the prosecution against the arrested accused person Mirza Himayat Inayat Baig @ Mohammed Mirza Inayat Baig @ Yusuf @ Hasan, for taking cognizance of the said offence by the Court of Competent jurisdiction.

139. Learned Spl. P.P. Shri Raja Thakare submitted that the Director of Prosecutions, Maharashtra State was appointed as an authority to make an independent review of the evidence gathered in the course of investigation and to make recommendation to State. The Director was appointed by the State in exercise of power under Section 45(2) of the Act of 1967.

140. Learned counsel appearing for the defence submitted that prosecution has not placed on record the authorization made by the State Government under Section 45(2) in favour of Director of Prosecutions and the material placed before the Director for making an independent review of the evidence gathered in the course of investigation for making recommendation. The sanction was not accorded within the time frame as envisaged by Rule 4 of the Unlawful Activities (Prevention) (Recommendation and Sanction of Prosecution) Rules 2008.

141. Learned Spl. P. P. submitted that the sanction order has not been disputed by the defence and was admitted by the defence, which is at Exh. 391. The reading of the sanction order itself demonstrates that the authority had applied mind to the entire record and thereafter accorded

sanction. The sanction order was admitted under Section 294 of Cr. P.C. and, therefore, there was no occasion to lead any evidence on that part. Learned Spl. P. P. refers to Section 465 of Cr. P. C. and placed reliance on Apex Court judgment in the case of Kailash Vs. Nankhu and ors. **[AIR 2005 SC 2441]**. Paragraph 34 of the said judgment reads as under :-

“34. Two decisions, having a direct bearing on the issue arising for decision before us, have been brought to our notice, one each by the learned counsel for either party. The learned senior counsel for the appellant submitted that in *Topline Shoes Ltd. vs. Corporation Bank* (2002) 6 SCC 33, *pari materia* provision contained in Section 13 of the Consumer Protection Act, 1986 came up for the consideration of the Court. The provision requires the opposite party to a complaint to give his version of the case within a period of 30 days or such extended period not exceeding 15 days as may be granted by the District Forum. The Court took into consideration the Statement of Objects and Reasons and the legislative intent behind providing a time frame to file reply and held : (1) that the provision as framed was not mandatory in nature as no penal consequences are prescribed if the extended time exceeds 15 days and; (ii) that the provision was directory in nature and could not be interpreted to mean that in no event whatsoever the reply of the respondent could be taken on record beyond the period of 45 days.”

142. Learned Spl. P. P. submitted that amendment to the Unlawful Activities (Prevention) Act, 1967 i.e. Act of 35 of 2008 came into force on the same day after Act 34 of 2008 i.e. National Investigation Agency Act 2008 came into force. In the alternative, learned Spl. P. P. submitted that act of JMFC of taking cognizance on the police report could be at the most an irregularity which is saved as per the provisions of Section 460 of Cr. P. C. as the trial itself was conducted by the Sessions Court, Pune i.e. before the Sessions Judge of the division in whose territorial jurisdiction the offence was committed. There was no prejudice caused to the accused in the whole process. We find substance in the submissions of the learned Spl. P. P.

143. Learned Spl. P. P. submitted that neither the Act nor any authority prescribes how a sanction order is to be worded and, therefore, merely because it is not mentioned in the sanction order to the effect that the sanctioning authority had taken into consideration the opinion expressed upon the independent review of the evidence made by the Director of Prosecution, sanction order does not get vitiated. To grant sanction or not would be a matter of subjective satisfaction of the sanctioning authority.

144. Considering the scheme of the NIA Act, 2008 and the Act of 1967, in case the State fails to submit a report to the Central Government in connection with the incident of terrorists act, the State agencies are not prevented from investigating the case and also the fact that the order of sanction is self explanatory, which is not disputed by the accused, it would not be permissible to say that the State agencies would get no jurisdiction to investigate the scheduled offence as mentioned in the NIA Act, 2008 and that the sanction accorded was improper and invalid.

145. The Collector and District Magistrate Latur passed order on 20/11/2010 in exercise of power conferred under Section 7 of the Explosive Substances Act, 1908 in according consent to prosecution of the arrested accused Mirza Himayat Baig and for taking cognizance by the court of competent jurisdiction for offence punishable under Sections 3, 4 and 5 of the said Act (Exh. 392).

146. By an order dated 2/12/2010, the Collector and District Magistrate, Pune, granted sanction under Section 7 of the Explosive Substances Act, 1908 to prosecute the accused – Mirza Himayat Baig for offences punishable under Sections 3, 4 and 5 of the said Act (Exh. 393).

Law on circumstantial evidence and criminal conspiracy :

147. According to the prosecution, in pursuance of the conspiracy hatched with the absconding accused, present accused – Mirza Himayat Baig visited Mumbai for purchasing mobile i.e. Nokia 1100 model, which according to the prosecution was used as triggering device and to purchase haversack bag.

148. PW 73 – Abdulsamad Mohammad Hanif Shaikh @ Indori deposed that he was having a cloth shop named as “Indore Cotton Shop” at Undgir. He used to purchase clothes from Mumbai and sell it in his shop. For running the business, he was advanced money by the accused through Khurshid Alam. He had paid an amount of Rs.1,20,000/- in the intervals of three months to accused by going to his Internet Cafe. Thereafter he became friendly with the accused. He identified the accused, who was sitting in the court. On 6/2/2010 the witness had gone to Mumbai. For going to Mumbai, he used to go to Latur by S.T. Bus and thereafter he used to book a ticket through Priyanka Travels, Latur, to go to Mumbai. The witness booked ticket on phone on 6/2/2010 through Priyanka Travels. It seems he was more comfortable with Priyanka Travels for booking tickets

as his friend Ezaz Maniyar was running the same. Whenever the witness was in Mumbai, he was staying in Al-Noor Lodge situated at Mohamad Ali Road, Crawford Market. He reached Mumbai in the morning of 7/2/2010. Between 11 a.m. to 12 noon, he received a phone call from the accused, who told him to book a ticket for Mumbai. Accordingly, the witness telephoned his friend Ezaz Maniyar and booked one ticket. Accused reached Mumbai in the morning of 8/2/2010. The witness had gone to receive the accused and brought him to Al-Noor Lodge. The accused wrote his name as "Yusuf" in the register maintained by Al-Noor Lodge. The witness had identified the signature of accused in the register maintained in the Al-Noor Lodge (Exh. 35). The signature is at Entry Sr. No.1124 dated 7/2/2010 and was in the name of the witness, he had signed against the Column No.16 (Exh. 322) and the signature at Exh. 281 in the register was identified by the witness to be of "Yusuf" sir. The witness further stated that accused had introduced to him with one person saying that he was his friend from Pune. He came to know through news channel that Yusuf sir was the owner of Global Internet Cafe and it was Yusuf sir, who was involved in the bomb blast in German Bakery. Name of accused – Himayat Baig was also referred in the news. One photograph of the person was shown to be of Mohsin Choudhari, who was the same person to whom

Yusuf sir had introduced him in the Global Internet Cafe as his friend from Pune. We had examined the register maintained by the Al-Noor Lodge.

PW 76 is Dilip Ahiwale, retired Chief Examiner of Documents, C.I.D., State of Maharashtra. By communication, the investigators had sent five documents to him for examination which are,

- (1) Seven Bank Pay-in-slips as Questioned documents.
- (2) One Guest house register as questioned documents
- (3) 102 Specimen writing sheets
- (4) One pocket diary containing admitted writings
- (5) One letter dated 11/07/2008 containing admitted writings.

The witness deposed that he had carried necessary examination of these documents along with specimen signatures and it was found that the signatures appearing on these documents are identical with the specimen signatures, meaning thereby that these signatures were of the accused person. In the cross-examination, the witness accepted that he was on the pay role of State C.I.D. The said department works under the control of Additional D.G.P., C.I.D., Crimes, State of Maharashtra. According to

the witness, he did not come across any significant difference in the specimen handwriting and questioned handwriting.

We have verified the register seized by the prosecution from the office of Priyanka Travels, Latur. Entries recorded on 6/2/2010 and 7/2/2010 are material for the present case. PW 67 – Maniyar Jahami is the owner of the Priyanka Travels. His office is situated at Ashoka Hotel, Main Road, Latur. He deposed the ATS Officer from Nanded Shri Reddy had come for inquiry along with panchas. They took the register and the entries on 6th and 7th February 2010 and thereafter it was seized. The witness identified Article 39 and the entries recorded on 6th and 7th February, 2010 at Article Nos.39/1 and 39/2 respectively. According to the entry, Samad Indori had travelled from Latur to Mumbai on 6/2/2010 and on 7/2/2010 in the name of Samad Indori, another person had travelled. This he was saying because after going to Mumbai from Latur on 6/2/2010, it was not possible for the same person to come to Latur and again go to Mumbai on 7/2/2010. He deposed that there are corrections made in the entry in article 39. This correction, according to the witness, was made on the instruction of Samad Indori. Earlier the entry was in the name of another person and later on it was taken in the name of Samad Indori. In the cross-examination, the

witness was unable to say in whose name the entry of 7/2/2010 was made. The examination of original register of Priyanaka Travels shows that whitener was applied against the entry recorded in the register on 7/2/2010. Indori is rewritten on the white ink and further the cell number and the other endorsements are also corrected by applying whitener (Article 39/2). It is difficult to place implicit reliance on this entry to establish that the accused had travelled by Priyanka Travels to Mumbai in the night of 7/2/2010 on the ticket registered in the name of Samad Indori. This entry is the only entry on the relevant page of the register, wherein the whitener was applied. The witness is not explaining the method of correction carried out in the register. The carbon copy of the ticket issued to the passenger was not seized by the police, according to the witness. Neither the witness had shown the carbon copy to the police. All these circumstances show that the evidence of this witness and entry made in the register on 7/2/2010 do not inspire confidence in the prosecution case.

149. It is curious to note that the bus tickets for Latur to Mumbai on 6/2/2010 and 7/2/2010 were booked in the name of this witness, but for booking ticket for the journey on 7/2/2010, mobile number of the accused was given. The witness admitted in the cross-examination that he had not

made entry in the Register of Al-Noor Lodge but he had put merely his signature.

150. PW 63 - Mohammadali Abdulla Gotekar was working at Al-Noor Guest House, Crawford Market, Mumbai since the year 2007. He was residing in the same Guest House. The Chief Manager of the Guest House was Mr. Ayyaz Quadir Khot. Article 35 is the register maintained by the Al-Noor Guest House which was shown to the witness. He stated that entry dated 8/2/2010 at Sr. No. 1129 was written in his hand writing. The said entry was in respect of the person by name Mohammed Yusuf Mohammad Issac who had come from Udgir. This information was given by the customer and his mobile number was also mentioned against the said entry. The said customer signed in the last column in the presence of this witness (Entry is marked at Exh. 281). The witness has identified the customer to be the accused. He had also referred to a person who had given reference in respect of the present customer by name Abdul Samad Indori.

151. PW 88 – Mohammad Ilias Abdul Kareem Mansoori is the owner of the mobile shop from where accused purchased the mobile phone. This witness deposed that he does business in mobile phones in his shop

under the name and style “Goodluck”. His shop number is 35 and situated in Manish Market, M.R.A. Marg, Mumbai -01. His shop timings are 12 noon to 9 p.m. He was called by ATS Police at A.T.S. Office at Kala Chowky. Police made inquiry with him. He deposed before the court that he had sold a Nokia phone in February 2010. The person, who had purchased the phone had come to his shop in the afternoon at about 2.00 p.m., who asked for a old Nokia mobile phone of 1100 model. The said model was available in his shop, which was shown to the customer. The customer searched out 3-4 mobile phones to check battery having more power. The customer had also checked the alarm of the said old phone. The customer/accused had purchased mobile phone from his shop for an amount of Rs.750/- and thereafter he left. This witness identified the accused in court. The police had called this witness to Yerwada Jail at Pune. The Test Identification Parade was arranged in Yerwada Jail. The police had asked him to identify the accused from amongst 9 persons who were standing. The witness identified the accused. In the cross-examination, the witness deposed that he does not have a license to run his shop. He also admitted that number of people visit his shop everyday belonging to different age group and there was no reason for him to keep in mind the description of each and every customer. According to him, if customer is of typical type

or behaviour, it is possible to remember him. The witness does not have any dealership of mobile phone. He usually deals in old phones, but he maintains documents in respect of new phones while dealing, but there are no documents maintained in respect of dealings made in respect of old mobile. Nokia 1100 mobile is a old mobile and, therefore, there was no record maintained by this witness. The said mobile was of cheaper price. The witness deposed that he does not have any documentary evidence to show that he had sold the mobile phone to the accused person.

This is a vital circumstance for the prosecution as it is the prosecution case that the blast was triggered by use of Nokia 1100 mobile phone. The question is as to whether the witness - mobile shop owner, would be in a position to identify the accused person after near about seven months after the alleged incident of blast which took place in German Bakery. The evidence of this witness does not show that the accused could be identified due to his distinct appearance, features, physic, nature, dressing etc. It is informed, during the course of hearing, that Manish Market is a crowded area in Crawford Market of Mumbai where probably thousands of people would be visiting daily in thick crowded lanes for selling and purchasing various consumer items. What was the

distinctiveness in the personality of the accused person, that a shop owner who had sold him a old Nokia 1100 mobile, would remember him so clearly in his mind so as to identify him in the Test Identification Parade is a question. The prosecution has not established such distinctiveness in the appearance of the accused person which would have prompted the witness to remember him. Neither we find in the evidence that the shop owner was possessing such photogenic memory to remember thousands of customers visiting his shop and recollect the same. The witness does not describe that Nokia phone had any identification mark or identification number except the mobile phone of 1100 model. The prosecution is not in a position even to claim that the Nokia 1100 model which was purchased by the accused was one of the rare model phone available in the market. There could be many such old phones of Nokia 1100 model available with customers or in the market.

152. PW 102 - Dinesh Parashuram Kadam, who was working as Police Inspector in the Anti-Terrorist Squad (ATS), Mumbai at the relevant time. Prior to the incident, he had worked for ATS during the period from 2004 to 2006. He deposed that on the statement made by the accused, panchas and the police staff went to Manish Market, Mumbai. The vehicle

stopped near the hotel by name Gulshan-E-Iran and they followed the accused person to Manish Market, who took them to same shop from where he had purchased Nokia 1100. According to the prosecution the incident of bomb blast took place in Ahmedabad was investigated by concerned police of Ahmedabad. Some inquiry was made in respect of one e-mail in connection with the same blast by Maharashtra Police. According to the witness Yasin Bhatkal, one of the accused in this case, was also a wanted accused in Ahmedabad case. The witness deposed that according to the witness Indian Mujahiddin Organization is involved and person by name Rijaz Bhatkal, Iqbal Bhatkal and Yasin Bhatkal were absconding since the year 2008. The witness admitted that there was no document available in the mobile shop to show that the accused had purchased the mobile phone from that shop.

Recovery of RDX at the instance of accused :

153. This is a very important circumstance in the prosecution case and it is an incriminating circumstance. The prosecution has placed reliance on the evidence of panch witness to memorandum and seizure panchanama – PW 77 Shrikant Shridhar Shetti, dog handler PW 80 - Laxman Dharmaji Kumare, extract of relevant station diary entry (Exh.

414), log-book of police vehicle (Exh.416), station diary entry of Udgir City Police Station (Exh. 419), the report of dog squad (Exh. 351), articles 54 to 60 seized under memorandum panchanama, evidence of PW 75 – N. B. Bardhan, Principal Scientific Officer and Assistant Chemical Analyzer PW 78 – Ravindra Kulkarni, Forensic Science Laboratory, Pune.

PW 77 – Shrikant Shetty was called by ATS Police on 7/9/2010. He was asked as to whether he would act as a panch. Witness replied in the affirmative. The policeman took him to ATS office which was situated nearby. The Investigating Officer Shri Satav was present there. There were other policemen in the office. Another panch by name Koshe was there. The Investigating Officer Shri Satav informed this witness that on the statement made by the accused, discovery was to be made in the presence of panchas. Accused was brought, whose face was covered and produced before the panchas. The veil was removed from his face. The said person was asked his name. He disclosed his name as Mirza Himayat Baig. The officer thereafter asked Mirza Himayat Baig as to whether there was any pressure on him, to which he said “no”. The witness deposed before the court that accused informed that the material used in preparing bomb and material which was left, was kept in the place of his present

residence and he would show the same. His complete statement was recorded and read over to him. The accused accepted the statement to be correct and answered in the affirmative. Thereafter the panchas were made to read the statement and thereafter the accused signed on the said statement along with panchas and Shri Satav had also put his signature. The witness deposed that he would identify the accused, if produced. The witness identified his signature and signature of another panch. The witness phoned his younger brother and told him that he was going out of station for work and would be back next day afternoon. The witness was informed that he was to go to Udgir by the police officer. The police party was called. They were searched in presence of panchas. Accused – Mirza Himayat Baig was also asked to take search of panchas. Accordingly accused took search of panchas. The government vehicle, in which they had gone to Udgir, was also searched in the presence of panchas. Another two private vehicles were called. In the government vehicle, total seven persons were sitting, including the accused, Shri Satav, panchas and other policemen. The face of the accused was covered. The cloth put over the face was having two holes near the eyes, nose and mouth of the accused. At the instance of the accused, the vehicle was taken to Latur via Hadapsar. On the way, they had meals.

154. The witness deposed further that they reached Udgir in the night around 1.30 a.m. The accused asked to take the vehicle on the left side from the Shivaji Square and accordingly the vehicle was taken and thereafter at the instance of the accused, the vehicle was taken to Jalkot road and thereafter the vehicle was stopped at the instance of the accused. It is deposed that the accused told that his house was nearby. All the persons alighted from the vehicle. Shri Satav made one phone call and called the backup required by him. All followed the accused. The accused pointed out at one house, which has a compound wall and iron gate. The accused knocked on the gate. Accused called by saying “Abdul Abdul”. At that time the staff of the Bomb Squad and the sniffer dog which was called by Shri Satav was with them. After the accused gave the call, lights of the house were switched on and a person came outside the house. The accused lifted his veil and told the said person that it was him. Shri Satav asked the name of the person, who disclosed his name as “Abdul Sayyed”. Said Abdul Sayyed opened the gate. Shri Satav gave his identity and asked him to take personal search of all of them. Accordingly, Abdul took personal search. Thereafter they entered the house. Accused took them on the first floor from the staircase, which was on the right side of the house. There

was one room on the first floor. The accused opened the latch of the door of the said room.

There was one wooden Dewan. The accused lifted the ply of the said Dewan. Inside the said Dewan, there was one carton of pressure cooker. There was one plastic bag of white colour. It was removed by the accused. Inside the said white colour plastic bag, there was one more carry bag of yellow colour. The accused said that this was the same left out material which was used in connection with the German Bakery Blast. The accused referred it as “Barood”.

155. Shri Satav called the main person from the Bomb Squad. The Bomb Squad came along with a dog. Shri Satav told them to check the said material. The material was sniffed by the dog. Dog wagged its tail and barked. The members of the Bomb Squad said that the material was explosive. Shri Satav asked the staff of Bomb Squad to give in writing. Accordingly, they gave in writing. Shri Satav asked to remove all the material from the bag. That material was having following things:-

- (a) One solder gun.
- (b) One solder wire.
- (c) One solder wire cutter.

In the said material, there were five pieces of a substance in black colour. Those five pieces were kept in the yellow colour bag.

156. Shri Satav removed about 100 grams material from the said pieces. The said 100 gram piece was divided into two. All the said articles were packed separately in plastic and thereafter brown paper was wrapped over it. There were total seven packets. The envelopes were tied with a stag. The labels were put on each envelope and the information about the contents were written on it. Opening of each envelope was sealed by lac. The entire process was completed by 5 a.m. The witness identified his signature on the panchanama dated 7/9/2010 (Exh. 341A). 7 packets were produced by prosecution. They were shown to the witness. He identified his signature on each packet and signature of another panch. All the packets were opened one by one. The yellow bag contained hard pieces which were black in colour. All the articles were collectively marked as Article 54. Likewise, other packets were marked as Exhs. 55, 56, 57, 58, 59 and 60.

The prosecution submitted that the evidence of the panch

witness is not shaken. The Investigating Officer had called for independent panchas and after completing all the necessary procedure had proceeded in government vehicle to Udgir at the instance of the accused. The statement of the accused and the memorandum panchanama has been exhibited. The explosive material was recovered, which was hidden in the Dewan, from the place which was used by the accused as his residence. It was exclusive possession known to accused only. The accused himself had taken the police party to the said place and pointed out the material. As against this, the learned counsel appearing for the defence Shri Pracha submitted that the material, which was recovered from the white building at Udgir and said to be explosive, was planted material by the police. The defence submitted that two important witnesses i.e. Abdul, who opened the gate of the white building and owner of white building were not examined. Adverse inference is required to be drawn against the prosecution on this count. Learned defence counsel questioned that the seized material was explosive one or RDX, which was used in the blast. The defence placed reliance on the forensic report in support of the submission. It is also submitted that initially the prosecution evidence suggested that one government vehicle and two other vehicles had proceeded to the spot, but later on it was noticed that one government vehicle had reached the spot.

The local police station was kept in dark. The station diary entries were doubted by the defence. The submission of the defence is that the evidence of dog handler cannot be relied upon as PW 80 Laxman Dharmaji Kumare deposed that he did not sign any paper on that day. The defence had also referred to the distance between Latur and Udgir and the time consumed by the police party to reach Udgir. The defence had tried to show deficiencies in respect of the recovery of the explosive material at the instance of the accused.

157. From the evidence brought on record, station diary entries, log book entries of police vehicle and dog handler's evidence, we find that the prosecution evidence on this aspect cannot be discarded. Theory of plantation of material propounded by the defence is not convincing. It can be noticed in the evidence that accused had led police party and had himself shown the way on the first floor. He had lifted the plank of Dewan. Thereafter the Bomb Detection Squad was called and then they had completed the rest of the necessary formalities. We do not find any reason to discard the evidence of dog handler. Because of non-examination of Abdul and the owner of the white building, the discovery of the incriminating explosive cannot be discarded. There is nothing in the

evidence of this witness or any other witness to suggest that knowledge of the accused about keeping of black substance in the Dewan box was not exclusive and that other persons or said Abdul possibly had also knowledge about it.

158. PW 78 - Ravindra Kulkarni, Assistant Chemical Analyzer in Forensic Science Laboratory, Pune, deposed before the court that on 14/2/2010, 7 parcels were received by Forensic Science Laboratory from the Bandgarden Police Station. Said parcels were in connection with the German Bakery bomb blast case. The forwarding letter is at Exh. 343. The said report was given by the witness. He identified the signature. The witness had deposed in para 5 of his examination-in-chief as under :-

“5. (Exh.22 which is the CA report is shown to the witness.) This report was given by me. It bears my signature. From this report, I say that the traces of Cyclonite (RDX), Ammonium Nitrate and Nitrite Ions along with Petroleum Hydrocarbon oil was detected in the collective extracts of the Exhibit numbers, which are mentioned in the report. The RDX is the high explosive. Ammonium Nitrate can also be used as an explosive. If RDX is mixed with Ammonium Nitrate, Charcoal, Petroleum Hydrocarbon Oil, the effectiveness of the explosion is enhanced.”

The report at Exh. 24 is dated 16/9/2010. The report was addressed to the Assistant Commissioner of Police, Anti-Terrorism Squad, Crime Branch, Pune. The laboratory examined substance in one parcel sent in connection with the crime i.e. Exh. 1. The report mentions description of parcel as under:-

“One sealed parcel, seals intact and as per copy sent”.

Description of articles contained in parcel

“Exh.No.1. Blackish mass in plastic bag wrapped in paper labelled -A-1”.

Result of Analysis

“--Cyclonite (RDX), petroleum hydrocarbon oil and charcoal are detected in exhibit no.(1) -

--RDX is used as high explosive.--”

The witness deposed in court that there are various names of RDX and it was not necessary to have Petroleum Hydrocarbon oil in RDX.

159. The prosecution submitted that on the basis of the material collected and Chemical Analyzer's report, the prosecution established that

the blackish mass recovered at the instance of the accused was RDX which was explosive substance.

160. From the evidence brought on record, we are convinced to hold that prohibited substance – explosive was discovered at the instance of the accused. The prosecution has established discovery of the explosive material by leading oral evidence, documentary evidence, technical reports, which cannot be discarded.

Circumstance of last seen together with the planter of the bomb :

161. The prosecution has placed heavy reliance on the testimony of PW 93 – Shivaji Gulab Gavare, auto-rickshaw driver. The witness deposed before the court that since last 19 years he was plying auto-rickshaw in Pune City. On the day of the incident, he was plying auto-rickshaw owned by him. Normally he used to ply auto-rickshaw in areas of Koregaon Park, Pune Station, Camp and Yerwada. He stated that he was aware that on 13/2/2010 bomb blast had taken place in German Bakery. He was plying his auto-rickshaw on that day at about 4 p.m. He was waiting opposite hotel Sagar situated near the Pune Railway Station. At that time, two boys

came near his auto-rickshaw and asked as to whether the rickshaw was available. They told him that they wanted to go to Rajnish Ashram in the area of Koregaon Park. He carried those boys to Koregaon Park through the Jahangir Hospital. When he was about to take turn for going to Koregaon Park, the boys told him to take auto-rickshaw in straight direction. The said road was proceeding towards the direction of Bandgarden area. The passengers asked him to stop the rickshaw near Central Mall. The witness told them that the Koregaon Park is ahead, but they said they wanted to get down there only. After they got down from the rickshaw, they paid fare and thereafter the witness stopped at some distance, waiting for another customer. The witness described the appearance of the boys. According to him amongst the said two boys, one was tall with fair complexion and wearing a cap. He was having one bag hanging in front of him and another bag hanging on his back. The another boy was of average height having normal complexion and they were within the range of 29 to 30 years of age.

162. The witness stated that on 25/5/2010 in the Sakal Daily Newspaper he saw photograph of one suspect in the German Bakery blast case, wearing a cap. On 27/5/2005, he approached the police. He informed

the police that after seeing the photograph, he remembered the boys. The police recorded his statement and asked him whether he would be in a position to identify the boys. The witness answered in the affirmative. Thereafter, he received summons from the police informing him to come to the Yerwada Central Prison on 3/10/2010 for Test Identification Parade. Accordingly, the witness had gone to Yerwada Central Prison on 3/10/2010. Tahsildar Shri Yogesh Kharmate was present there. Tahsildar inquired with the witness as to whether the police had shown him the photograph, to which he replied in the negative. Thereafter he was taken to the adjacent hall, where 9 persons were standing in one line. Two panchas were also present there. The witness claims to have identified the accused. He was one of the passengers carried by the witness in his auto-rickshaw. The witness identified the accused by touching him. That person disclosed his name as Himayat Baig. This witness identified the accused in court also. The prosecution had brought a laptop and played a CD. The said CD was played, showing the relevant clippings was marked as Exh. 61.

163. The evidence of this witness is very crucial for the prosecution case. The paper cutting, wherein photograph was published of the planter of the bomb was shown to us in the court in the course of hearing. The

witness has not given any special reason for remembering and identifying the accused person. The only clue which the witness got was after seeing the photograph of person in the newspaper on 25/5/2010, but, admittedly the said photograph was not of the accused, but was of the planter of the bomb and according to the prosecution it was of Yasin Bhatkal, who carried two bags on his person. But in case of the present accused person, the prosecution could not place on record any material to show that he could remember even the accused person who was accompanying the planter of the bomb. A xerox copy of the said news item and the copy of receipt issued by publication house are at Exh. 62 Collectively. Careful scrutiny of the said news item shows that below the photograph, name mentioned was "Abdul Samad". The witness stated before the court that he was not aware whether said person was arrested by the police and later on released.

164. First of all, in the facts of the case, we are not inclined to place implicit reliance on the evidence of PW 93, auto-rickshaw driver, who after three months approached the police with a newspaper which had published a photograph of the planter of the bomb and even identified the person who was accompanying the planter. Nothing has been brought on record to

suggest that auto-rickshaw driver had a photogenic memory. The auto-rickshaw driver was involved in plying auto-rickshaw since 19 years. It was his regular duty. In the facts, we feel that it would be difficult for the witness to remember the accused as passenger and even identify him in Test Identification Parade and in open court. Based on such circumstance of last seen and considering the quality of evidence led by the prosecution on other circumstances, we are not convinced to conclusively hold that the evidence of the auto-rickshaw driver i.e. PW 93 is a reliable evidence and a circumstance which was clearly established by the prosecution. There are inherent deficiencies in the evidence of circumstance of last seen. This circumstance does not inspire confidence in the prosecution case.

165. Prosecution submitted that Test Identification Parade panchanama in respect of identification of accused by PW 93 was admitted by the defence under Section 291A of Cr. P. C. The Test Identification Memorandum is at Exh. 369. Even if the defence admitted the said panchanama, the court, while examining the evidence and appreciating the prosecution case, will have to deal with this circumstance independently and weigh the quality of evidence on its own merits.

166. The prosecution has also placed reliance on CD (Article 61), which was played in the court. The CD had footage clippings of German Bakery bomb blast site. PW 93, auto-rickshaw driver, identified the absconding accused, the planter of the bomb, wearing a cap and carrying two bags as the one accompanying present accused in his auto-rickshaw on 13/2/2010. The planter of the bomb or absconding accused i.e. Yasin Bhatkal, according to the prosecution, was having distinct appearance i.e. wearing a cap and carrying two bags loaded on his front and back side of his person. The present accused does not seem to have any such distinctive nature of appearance for him to be remembered by the auto-rickshaw driver inspite of gap of more than three months. We are, therefore, not inclined to accept this circumstance as incriminating one.

167. No doubt we are not appreciating the evidence against the co-accused – Yasin Bhatkal, absconding at the relevant time and who is said to be planter of the bomb, but some discussion in respect of as to who the person was, has become necessary for the purposes of this case. The prosecution had examined PW 102 - Dinesh Kadam, Police Inspector and placed reliance on CD (Article 61) containing relevant clipping. Evidence of PW 101 – Prasad Hasabnis, Sr. P.I., PW 90 - Ranjit More and the

seizure of CCTV footage of German Bakery and Hotel “O”.

168. PW 102 – Dinesh Kadam, Police Inspector was attached to ATS, Kala Chowky, Mumbai. Since May 2010 he was working as Police Inspector in the Anti-Terrorist Squad, Mumbai. He deposed before the court that in May 2006 large quantity of AK 47 rifles, RDX, Handgranades, live cartridges were seized at Aurangabad and in that regard C.R. No. 3 of 2006 was registered with the ATS Police Station. The witness had helped in the said investigation. According to the witness, the main accused persons by name Fayyaz Kagzi and Jabiuddin Ansari were the wanted accused. Jabiuddin Ansari @ Abu Jindal, according to the witness, has been arrested. Both the persons are residents of Beed District in Marathwada region of the State.

169. The witness stated that in July 2008, the blast had taken place in Ahmedabad and live bombs were found in Surat. At that time, Indian Mujahiddin, terrorist organization, had sent e-mail to the various government offices and the media. Similar e-mail was sent in August 2004. The said crime was investigated by Crime Branch, Detection Mumbai. During the course of investigation, it was revealed that members

of said Indian Mujahiddin by name Rijaz Bhatkal, Iqbal Bhatkal and Yasin Bhatkal were involved in the said crime. The witness had personally gone to the place by name Bhatkal in the State of Karnataka in search of the accused persons. From the investigation done and photographs obtained, the witness claims to have identified the CCTV footages and was of the view that the person seen in German Bakery was Yasin Bhatkal on the basis of said photographs collected by him in connection with the investigation of other cases. Again prosecution played CD (Article 61) on the laptop in the court. The witness identified Yasin Bhatkal, wearing a cap and having two sack bags, one on the front side and another on the back side. He was present at the counter of German Bakery. The CCTV footages of German Bakery which showed the planter at the counter records time 16.46.11 to 16.51. The clippings further show that Yasin Bhatkal left German Bakery at 17.29.30 with one sack bag.

170. The defence raised issue as to whether the person who was carried by auto-rickshaw driver (PW 93) on 13/2/2010 along with present accused person was Yasin Bhatkal or not. The learned counsel for the defence submitted that the photograph published in Daily Sakal newspaper mentioned the name below the said photograph as “Abdul Samad” and not

Yasin Bhatkal. This witness deposed before the court that C.R.No. 9 of 2009 was registered and the wanted accused Abdul Samad was arrested on 24/5/2010 from Mangalor in connection with the said C.R. According to the witness, Abdul Samad is younger brother of Yasin Bhatkal. According to the witness the name of Abdul Samad, who was accused in C.R. No. 9 of 2009 was Abdul Samad Mohammad Jarar Siddi Bappa. The witness admitted in his deposition that Abdul Samad was never arrested in the German Bakery bomb blast case. The news item published in the newspaper that Abdul Samad was arrested in German Bakery case, according to this witness, was not correct. According to the witness on 7/9/2010, ATS, Pune had arrested accused Himayat Baig in German Bakery bomb blast case.

171. PW 101 – Prasad Hasabnis, Sr. PI is from Kondhawa Police Station. At the relevant time, he was working as PI (Administration) in the Control Room at Pune. He was one of the members of the investigating team of German Bakery blast case. He was assigned job to view CCTV footages of German Bakery and Hotel “O”. On 5/3/2010 when the witness was viewing the CCTV footages, he noticed one suspected person, standing at the counter of German Bakery. The said person was wearing a cap on his

head and carrying two bags. This witness had also given the same evidence i.e. description of the planter of bomb, entering the German Bakery and leaving the German Bakery. He was also shown Article 61, CD. He identified the planter of the bomb.

172. PW 90 is Ranjit More. This witness deposed that he was present in the German Bakery along with his girl friend Ruchika Bachru. He entered the bakery from the gate which was adjacent to the Main road. He deposed that he remembered that there was one boy standing behind him near the counter and was carrying two bags. He had gone to the police station and at that time police had shown him CCTV footages. In the CCTV footages, he and his girl friend were seen and the person having two bags was also seen. The said person was wearing a cap. CD on the laptop was played and CCTV footages were shown to the witness. The witness had identified himself and the person standing behind him with two bags wearing cap. The witness was fortunate enough to leave the German Bakery after being there for 30 to 35 minutes. The blast took place after the witness left. According to the witness, the sack bag which was hanging on the back of the person was of light green or something like tamarind colour. The cap was also of the same colour. Second bag, which was hanging

across the shoulders of the person was of black colour. The witness admitted that other customers were also having bags. This witness could not see person having two bags, leaving German Bakery.

173. PW 58 is Soorajsingh Bisht, a panch witness to the seizure of seven video cassettes from the cupboard of German Bakery, which was said to be recordings made at the residence of Mr. Garki on the third floor, above the German Bakery in Flat No. B-5. They are numbered as Article 33 Colly. The VCR seized from the German Bakery is Article 34 and the panchanama dated 23/2/2009 is at Exh. 269. His evidence was relied upon by the prosecution in support of the submission that there was a CCTV camera in German Bakery and the police had collected seven video cassettes of the recordings under the said panchanama.

174. The prosecution placed reliance on evidence of PW 43 – Sayyad Khwaja Hamza, who was working as I.T. Manager in Hotel “O”, which is situated besides the German Bakery. He has given description of the situation of the CCTV camera placed outside the Hotel “O”. According to him the cameras which were installed outside, capture the whole area upto the German Bakery. There was storing capacity of the data for nine

days. The system operates automatically. The police had interrogated this witness and had seen CCTV footages of Hotel “O”. The report was generated by the witness and was handed over to the police. One clone of hard-disk was prepared. CD/DVD of particular footages were also prepared. Hard-disk and clone were handed over to police along with CD/DVD. The police seized and sealed these articles. The panchanama was drawn on 14/2/2010 which is at Exh. 163. The hard-disk which is in plastic packet (Article 3) is original one and the other hard-disk is clone one, (Article 3A). The CD is Article 4. The defence did not raise any objection for playing CD which is marked as Article 4. The witness was cross-examined in detail on distance between German Bakery and the Hotel “O”, situation of placement of CCTV camera in and around Hotel “O”. The witness admitted that if one stands at the main entrance of Hotel “O”, one cannot see inside view of the German Bakery. It was stated that no CCTV cameras were seized by the police from Hotel “O”.

175. The defence has raised issues regarding admissibility of the seven video cassettes seized by the prosecution from German Bakery premises, clone CD, the CD made of collected clippings of German Bakery footages and Hotel “O” footages. According to the learned defence counsel

Shri Pracha this evidence has not been established in accordance with Section 65-B of the Indian Telegraph Act. The learned defence counsel submitted that the trial court ought to have seen seven original video cassettes of German Bakery and in view of the facts that seven video cassettes were not played in the open court, neither were seen by the learned trial court, the evidence of the created sample of the footages/clippings played in the open court on a laptop cannot be admissible evidence in law. The learned defence counsel submitted that such evidence is full of infirmity and it would be hazardous and risky to place implicit reliance on such evidence. The prosecution has not discharged its responsibility.

176. During the course of hearing and with the consent of the learned counsel appearing for the parties, we have asked the Registry to play the seven video cassettes. With the best efforts, the seven video cassettes could not be played due to technical defects and non-availability of the required record player. We share the concern of the learned counsel appearing for the defence that these seven video cassettes ought to have been played during the trial. At the same time, it had come on record that the defence did not dispute the CD which was played in the open court

during examination of the material witnesses. The learned Spl. P. P. Shri Raja Thakare, therefore, submitted that as no doubt was expressed, nor the defence objected to the playing of the CD in open court, the concern shown by the defence and objection raised on that count need not be taken into consideration.

177. During the course of hearing, with the consent of the learned counsel appearing for the parties, the said CD was also played on T.V. Screen fitted in the court room. We had ourselves seen the clippings repeatedly for 3 to 4 times. CD clipping of Hotel "O" was also shown on the screen and the laptop which was brought in the court with the consent of the parties. We had seen a boy with a cap on his head standing behind the counter, having two bags on his person, one in front and one on the back. Thereafter the clipping shows that one boy leaving the German Bakery premises with one bag on his person and soon thereafter the blast takes place. Considering the evidence placed on record, it would be difficult to conclusively hold that the person who was seen at the counter with two bags on his person was Yasin Bhatkal, the boy who was planter of the bomb. It is informed by the prosecution, during the course of hearing of this appeal that the absconding accused Yasin Bhatkal has been arrested.

We need not say anything more on the arrest of the absconding accused, though the learned counsel appearing for the defence submitted that the prosecution has failed to establish beyond reasonable doubt that the person, planter of the bomb, was Yasin Bhatkal, absconding accused.

178. PW 103 – Investigating Officer Shri Satav deposed before the court that on 13/2/2010 he was working as Assistant Commissioner of Police in the Anti Terrorist Squad, Pune. He was in his office when he received information at 19.20 hrs. (7.20 p.m.) about bomb blast at German Bakery. He reached the site. At that time, he saw that articles were lying scattered. The outer shed had fallen down. Blood was noticed at various places. According to the witness, inside and outside part of the bakery got blackened due to the blast. The gas cylinders at the German Bakery were found to be intact. Eastern wall of German Bakery had collapsed and big crater (big hole) was noticed.

Learned counsel appearing for the defence submitted that after the blast, the place was visited by Investigating Officer, panchas, police personnel, many watchers, relatives of injured as well as dead persons, fire-brigade personnel and others. The defence pointed out that in fact the

investigating agencies ought to have cordoned off the bakery premises and sealed it so that third party interference/presence in the bakery premises was prohibited and ruled out. But this has not happened in the present case. The evidence on record suggests that no such care was taken by the investigators. In such cases it is possible that the real evidence disappears or something could be planted to divert the attention of the investigating agencies. Learned counsel appearing for the defence took serious objection to the manner in which the investigating agencies dealt with the spot of incident.

179. PW 44 – Jagdish Nimbalkar is panch of the spot panchanama. He deposed that the inside area of German Bakery was of 18 ft. x 14 ft. He too stated that there was a big pit (khadda) adjacent to the hole of eastern wall of the German Bakery. The trees in the compound of the bakery were partially burnt. Some gas cylinders were seen in one iron enclosure.

180. The prosecution case is that the piece of black cover of Nokia 1100 model was seen in the crater during investigation which itself would show the power generated by the blast and impact of the blast. It is curious to note that there were many customers as usual in the German Bakery. Around 17 persons died and many persons suffered injuries. By and large

every customers visiting German Bakery must be having their own cell phones. Many cell phones were seen scattered in the bakery. It is also on record that it is not the case of the prosecution that Nokia 1100 model piece was not generally available in the market. Many such pieces were sold and it is possible that many customers who had purchased phones, may be using it or phone must be lying idle with them and it is also possible that they might have sold said model phone to some other persons. But, over all assessment of the evidence led in respect of the spot of incident shows that the blast had strong impact inside and outside the German Bakery. The defence case is that there was no CCTV camera fitted in the German Bakery, which is, however, negatived by the prosecution evidence, particularly of PW 78 – Shrikrishna Thapa, the cashier of German Bakery, who has admitted that there was a CCTV camera at the counter.

181. Learned counsel appearing for the defence Shri Pracha submitted that the prosecution has failed to establish that a blast took place in German Bakery and that was due to explosive substance – RDX. Learned counsel submitted that though the samples were sent to Delhi and Chandigarh Laboratories, the reports from said laboratories were not placed on record deliberately as the said reports were not favourable to the

prosecution. Learned counsel submitted that the sample sealing procedure was not adopted properly. The time of explosion was also disputed. Therefore, the defence counsel submitted that the deaths were not homicidal one as it was not a terrorist act nor the deaths were caused due to blast due to explosive substance.

182. The report submitted by Shri H. S. Mann, Lt. Col., OC, Bomb Disposal Unit (NSG) is at Exh. 425. Clauses 12, 13 and 14 of the said report read as under :-

“Technical Assessment:

12. Looking at the condition of the site, effect of blast and condition of the dead bodies (ref pics no 22 to 25 at appx `f' attached) and having carried out the detailed analysis in the unit location having returned back and having watched the CCTV footage, the following is the technical assessment of the team:

(a) Type of explosive used. -As per the Pune forensic science laboratory who took the first sample from the blast site, it is a mixture of RDX, ammonium nitrate and fuel oil. The same will be confirmed after receiving the report from CFSL Chandigarh of the samples forwarded by the BIO team. However the sample of debris recovered by the NSG team was

done approx 85 hrs after the blast and there was water accumulated in the crater. Hence the forensic analysis of the Pune FSL is being taken as the confirmed result for the interim period.

(b) Oty of explosive - The quantity of the explosive used can be anything between 3.5 Kgs. to 5.0 Kgs. Depending upon the percentage of RDX added to the mixture of ammonium nitrate and fuel oil.

(c) Detonator - Likely Electric detonator. The same has been confirmed by comparing the recoveries with the remnants of a trial detonation of an electric detonator in the unit location during detailed analysis.

(d) Power source - Likely 9V battery. The metal parts collected were compared with the sheet of a 9 V battery in the unit location and detailed analysis carried out and were found to match.

(e) Container - Likely Aluminium container of sufficient capacity to hold the explosive contents placed in a tote bag.

(f) Mechanism - Likely Remote controlled (likely a mobile phone) as only parts of mobile phone have been recovered and no parts of any other initiating mechanism has been recovered. Also recovery of these parts from the crater clearly indicate that these parts belong to the circuit of

initiating mechanism which on detonation has pushed these parts deep into the crater. Parts of the mobile phone belonging to the guests can not be pushed into the crater. Hence the investigation leads to the possibility of use of mobile phone as initiating mechanism.

(g) Shrapnel - No external shrapnel like ball bearing and nails were added. The melted aluminium of the container acted as shrapnel.

13. The team left Pune on 19 Feb 2010 and reached the unit location on 20 Feb 2010.

14. Problem Areas - The blast took place on 13 Feb 2010. However the orders for mobilising the Blast Investigation Operation (BIO) team was received on 16 Feb and the investigation could start only on 17 Feb after a gap of approx 82 hrs after the blast. The team could not analyze the actual condition of the site but had to rely on photographic record held with police and FSL scientists. Also vital clues and recoveries were tampered due to the movement of number of teams which had frequented on the site and may have been displaced from original location.”

The conclusion of the report itself shows that vital clues and recoveries were tampered due to the movement of number of teams which frequented

on site. The report has also noted that there is possibility of use of mobile phone as initiating mechanism.

The report further mentions that the detonator is an electric detonator and power source was likely 9 V battery. According to the report, on extensive search, mobile parts marked as 1, 2 & 3 on the pic no 18 i.e. mother board chip, the metal clipping that are parts of the mobile phone were recovered from the debris of the crater approximately at the depth of 19" (6" further to the existing depth). The report mentioned that the team visited Regional Forensic Laboratory, Pune on 18/2/2010 and met the forensic scientists. The debris collected by the team was also analyzed for any clue. The size of crater was 4' x 4' dia and 11 inch depth at the seat of explosion. But the actual size of the crater was more which got increased due to retrieval of large amount of debris by various agencies. As regard the report, learned defence counsel Shri Pracha submitted that Col. Mann was not examined, whose report was relied upon by the prosecution. The learned Spl. P. P. appearing for the prosecution submitted that Col. Mann was a high ranking officer and it was not required to examine him when the report was placed on record. In our view, in the facts of the case, we find that it would have been appropriate if prosecution had examined Col. Mann

or any other team member headed by Col. Mann. It is noticeable that the blast took place on 13/2/2010, but the NSG team visited the spot on 17/2/2010 i.e. after a gap of 83 hrs. after the blast. Crucial time of 28 hrs. was lost for the reasons best known to the investigating agencies. The NSG reached Pune from Delhi on 16/2/2010, but preferred to visit the spot on 17/2/2010. The orders were received from the HQ NSG at 1305 on 16/2/2010 to move a BIO team to investigate the blast. The investigating team left Delhi by Indian Airlines flight IC-849 for Pune at 1600 hrs. and reached Pune at 1805 hrs. The team visited the site of blast between 1830 hrs. to 1900 hrs. It is observed in the report that as it was getting dark, it was decided to start investigation on the next day morning.

183. The defence stated that annexures of report of Col. Mann were not placed on record which should go adverse to the prosecution case. The team headed by Col. Mann did not recover back side of part of the phone. It was said to have been recovered by the investigating team later on. The defence, therefore, suggested that such parts could be planted at any time at any place in such situation. The investigating officer had forwarded the Chemical Forensic Lab the back side part of the phone for examining as to whether there were traces of explosives on the said part. The defence took

serious objections that when the parts were sent under the communication dated 24/2/2010 to the Lab at Pune, then the investigating officer along with some other witnesses ought not to have visited the land and interfered with the sample and allowed the other witnesses, may be experts according to the prosecution, to handle those parts. It has caused serious prejudice to the defence. The defence submitted that in response to the said communication, as stated above, no report given by the CFL, Pune was placed on record.

184. The three reports were submitted by the Assistant Chemical Analyzer to Government Regional Forensic Science Laboratory i.e. Exhs. 22, 23 and 24. Exh. 22 – report was forwarded in respect of samples collected from the spot of incident, which refers to blackish stained cotton swab of the black stains which were appearing near the hole which occurred due to the blast. The piece of floor tile and one metallic piece, sample of clothes were lying on the floor. By communication dated 15/2/2010, the Forensic Science Laboratory, Pune submitted the following result of analysis:

“---- Traces of Cyclonite (RDX), Ammonium, Nitrate and Nitrite ions along –

----- with petroleum hydrocarbon oil are detected in the collective ---

---Extracts of Exhibit Nos.1, 2, 3, 4, 5, 6 and 7. ----

--- RDX is used as high explosive.--”

Another report is at Exh. 23, which refers to explosive examination report. It was submitted by the Ballistics Division, Central Forensic Science Laboratory (CBI) Block – IV, C.G.O. Complex, Lodhi Road, New Delhi – 110003. The samples collected from the spot of incident were seen in seven parcels which contained partly burnt shattered red and black coloured cloth pieces, broken accessories of Mobile phones, damaged metallic pieces, cotton swabs, six damaged mobile phones with their accessories, currency notes, DVD player and other articles. In the report submitted by Shri N. B. Bardhan, Principal Scientific Officer (Ballistics) CFSL, CBI, New Delhi, the result of examination was mentioned as under :-

“On the basis of examinations carried out in the laboratory with scientific aids, following are the results of examination:-

(i) The Physico-Chemical and Instrumental examination confirmed the presence of “RDX”, “Ammonium Nitrate” and “Oil” in the contents of parcels No. `A-1' to `A-7'.

185. The report, concerning the sample recovered from the white building at the behest of the accused person i.e. of blackish mass in plastic, was submitted by Shri R. R. Kulkarni, Assistant Chemical Analyzer to Government, Regional Forensic Science Laboratory, Pune. The results of analysis mentioned in the said report read as under :-

“---Cyclonite (RDX), petroleum hydrocarbon oil and charcoal are detected in exhibit no.(1) -
– RDX is used as high explosive.--”

Based on this, it was submitted that RDX was used as explosive substance for triggering the blast. There are other reports of analysis submitted by the Laboratory at Pune which are at Exhs. 25 to 65 regarding various samples of clothes, hair tissues and various articles collected from the spot etc., where the FSL did not find any explosive substance.

We are not convinced to uphold the contention of the learned counsel appearing for the defence that the prosecution failed to establish that explosive substance (RDX) was not used in the blast occurred in the

German Bakery. According to the learned counsel Shri Pracha, the prosecution failed to establish the percentage of RDX as independent component in the explosive substance. Considering the report, we are not inclined to uphold the said contention that the percentage of RDX was required to be mentioned. The prosecution case on that count cannot be said to be unreliable. No doubt, the samples which were taken by the NSG and were sent to Chandigarh for submitting report were not placed on record but that would not discredit the FSL reports of Pune. The non-submission of report by FSL, Hyderabad even would not adversely affect the prosecution case.

186. Section 65-B of the Indian Evidence Act 1872 contained in Chapter V of the said Act refers to documentary evidence. The learned counsel appearing for the defence submitted that the evidence brought on record in respect of use of ATM card machine by the accused and the seizure of CCTV camera from the German Bakery and Hotel "O". VCDR report of mobiles (Tata Docomo and Vodafone) did not stand test of scrutiny under the provisions of Section 65-B of the Indian Evidence Act. The learned Spl. P. P. Shri Raja Thakare fairly submitted that the original record in respect of the ATM has not been placed on record and, therefore,

the provisions of Section 65-B would be made applicable for admissibility of electronic record. As regards CCTV cameras in German Bakery and Hotel “O”, the learned counsel for the prosecution referred to panchanama, which was admitted by the defence. The learned counsel referred to Exh. 269, which is a panchanama of seizer of seven video cassettes from the German Bakery premises dated 23/2/2010. The prosecution submitted that the witnesses have been examined to prove the seizure of hard-disks, CD of Hotel “O”, which was attached, in respect of CDR.

187. A certificate (Exh. 349 Colly.) for and on behalf of the Vodafone Cellular Limited of Nodal Officer was placed on record. The learned Spl. P. P. submitted that the said certificate satisfies the requirement of Section 65-B of the Indian Evidence Act.

188. Authorized signatory of Tata Teleservices (Maharashtra) Limited has also issued the details of the mobile no. 8149308626 addressed to the Addl. Commissioner of Police, which is at Exh. 355. Learned defence counsel Shri Pracha raised issues, while referring to CDR record, that they do not disclose correct picture as described by the prosecution. Therefore, the theory of the prosecution that the accused was

in the habit of keeping the mobile at one place for operational method and leave that place and go to other destination for the sole purpose to mislead the investigating agency is not convincing. We find that the prosecution has reasonably explained the system which is being operated by the cell companies. The CDR evidence, on the objection raised by the learned counsel appearing for the defence, need not be discarded. The learned defence counsel Shri Pracha submitted that the Charcoal was not found in the forensic report of samples recovered from the spot of incident. Charcoal was found in the sample allegedly recovered at the behest of the accused person from the white building. The defence submitted that substantive components of the explosive as described by the FSL Pune in respect of the explosive detected from the samples seized from the white building and the blast site are entirely different and not similar. The learned defence counsel submitted that even byproduct of such substantive component was not found in the bakery. Therefore, it was submitted that five black pieces which were recovered at the behest of the accused from the Dewan of his room at Udgir could not be explosive substance (RDX). According to the learned counsel RDX is of white colour and not black. This itself would discard the theory of the prosecution on that count. The defence counsel alternatively submitted that whatever material said to have

been recovered at the behest of the accused was not explosive substance and prosecution theory that the bakery blast was due to explosive was also not established beyond reasonable doubt. In the light of the prosecution case and the evidence brought on the record, we are not inclined to accept this version of the defence.

189. It has come on record that earlier to incident, the accused person had gone to do reiki in Pune. PW 96 – Shaikh Atik Nazeer was examined, who stated that in connection of demanding reservation for Muslims, a function for launch of Popular Front of India party on 31/1/2010 at Pune was organized. Accordingly, the witness reached Pune. The programme started between 5.30 to 6.00 p.m. But, in the afternoon the accused left the witness and others saying that he would come after some time. Witness referred the accused as “Hasan”, who came back in the evening. The witness was not knowing as to where the accused had gone. To a question put by the learned Spl. P.P, with the permission of the court, the witness answered as under:

Q. Whether at that time the Accused said that as the atrocities were being committed on the Muslims by the non Muslims, the revenge should be taken by way of Jihad?

Ans. No.”

The witness further deposed that examination of Lab Technician was held on 14/2/2010 and at that time accused met him on 13/2/2010 between 8.30 p.m. to 9.00 p.m. On that day he phoned accused between 5.00 pm. To 6.00 pm. At that time, the accused told him that he was in reception which was arranged in Aurangabad. The witness did not attend the said reception.

190. PW 95 is Shakil Ahemad. He is residing at Aurangabad since his birth. He deposed that on 12/2/2010 Yusuf, the accused, had come to Aurangabad. Accused used to come to Aurangabad and stay in his house. He used to talk about Jihad. Therefore, the witness stated that he started avoiding him. Accused wanted to keep his two mobile phones with the witness. Accused instructed the witness to keep the mobile phones in a functioning mode and further instructed that if anyone calls on the mobile phones, he should tell them that he had gone out and if any missed call was there, he should call back on the said number and tell that accused had gone out. Thereafter Yusuf/accused left on 12/2/2010. He again came to the witness and took both his mobile phones. At that time he was appearing tired. When the witness asked him, he told that he had come travelling on bike from a long distance.

191. From the evidence of PWs 95 and 96 prosecution wants to say that the accused had come to Aurangabad on 12/2/2010 and had kept his two mobile phones with PW 95 and on 13/2/2010 the accused had left Pune for Aurangabad and reached Aurangabad in the evening at about 10.00 p.m. and met PW 95. Both the witnesses i.e. PW 95 and PW 96, claim that the accused met them at Aurangabad.

We are of the view that their evidence does not inspire confidence. The evidence on record shows that accused had gone to Pune on bike and returned within four hours on bike to Aurangabad on the same day. There is no evidence to establish that a reception had taken place at Aurangabad, which was attended by the accused in the evening of 13/2/2010. The evidence of these these witnesses i.e. PW 95 and PW 96 has inherent deficiencies and lacks reliability. The evidence is not credible. The prosecution wants to rely on this evidence in support of the circumstance of the accused last seen with the planter of the bomb in Pune on 13/2/2010.

192. According to the prosecution there are two theories of arrest of accused, whether the accused was arrested on 7/9/2010 or 19/8/2010.

According to the defence, the accused was arrested on 19/8/2010, whereas according to the State, the accused was arrested on 7/9/2010 at Pool Gate Bus Stand, Pune. The defence submitted that, in fact, the accused was arrested on 20/8/2010 at Latur. Two mobile phones were used by accused bearing Nos.9637597877 and 8149308626.

Comments on the judgment of the trial court :

193. The trial court has recorded reasons in the judgment after framing points for determination. On the issue of evidence in the form of electronic record and its admissibility, the trial court observed that record seized under panchanama pertaining to Hotel "O" is admissible in evidence. Seizure of VCR, video cassettes and remote control from German Bakery was also considered. It was observed that as the said articles were not disputed by the defence, no formal proof was produced by the prosecution to establish its authenticity. There was some more electronic material seized from German Bakery in the form of seven video cassettes and VCR. On the evidence of PW 79, Nodal Officer of Vodafone Company, the trial court observed that the authority of this witness and the authenticity of the information supplied by him was not challenged. The

phone call details and mobile numbers were duly proved by the prosecution. According to the trial court, nothing was brought by the defence to show that the system was not working properly or there was some tampering with the system or record. On the evidence of PW 81, the Nodal Officer with the Tata Tele Services, Mumbai, the trial court observed that authenticity of the phone call details were not challenged and the phone calls details of Phone No. 8149308626 were duly proved by the prosecution.

194. On the issue of ATM card, it was observed that the authenticity of electronic record supplied by the witness is in respect of ATM centers is proved and thus the said electronic record is admissible in evidence. Para 25 of the judgment of the trial court reads as under :-

“25. From the evidence discussed in respect of the electronic record, the prosecution have proved the authenticity of the CCTV footage seized from the hotel “O” and the German Bakery, of the phone call details and of the CCTV footage seized from the concerned Banks in respect of ATM Centers, as per the provisions of Law and thus, the said evidence in the form of electronic record is admissible in evidence”.

195. On the issue of admissibility of news item published in newspaper (Article 31 published on 25/5/2010), reference was made to Apex Court judgment reported in AIR 1988 SC 1274 – Laxmiraj Shetty and another V/s. State of Tamilnadu. The trial court opined that none of the parties examined the Editor of the newspaper, wherein the said news item was published. The contents of the news item are not proved. In the light of the judgment cited above, newspaper is a hearsay evidence and, therefore, not admissible and thus the said news item at Article 62/Exh. 399 was kept out of consideration.

196. The C.A. reports at Exhs. 25 to 65 are in respect of blood, skin, hair sample of the victims etc. These reports were not disputed by the defence since they do not show residue of explosive. This is recorded by the learned trial judge in para 61 of the judgment. In para 65 of the judgment, the learned trial judge concluded that it was established by the prosecution that explosion occurred at German Bakery in the evening due to explosive substance i.e. RDX. From the record placed before us and the submissions advanced, we would not discard the case of the prosecution that blast took place in German Bakery due to which several persons lost their lives and several got injured. There is sufficient material on record in

the shape of FSL report that the material used in the blast was RDX. Defence wanted further details of components of RDX or the explosive material detected in the samples. In our view, the prosecution has reasonably established its case on the aspect of material used in the explosion in the blast which occurred in German Bakery.

197. The charge was framed by the trial court on 16/7/2011 (Exh. 17), wherein it was mentioned that between March 2008 to 13/2/2010, the accused along with wanted accused and others hatched a criminal conspiracy and were members of criminal conspiracy and the object of which was to commit terrorist activity in Pune. Though the trial court has referred to conspiracy being hatched in Colombo and other places, there is absolutely no evidence placed on record in support of the said charge that some conspiracy was hatched in Colombo. Prosecution has placed on record certain documents, including passport to show that accused had visited Colombo and some correspondence was made with Interpol, but thereafter the prosecution did not take any pains to establish its case to show that any investigation was carried out on these lines. Therefore, the circumstance of accused visiting Colombo is not a relevant circumstance for the consideration of this case. The trial court had discussed this issue in

para 83 of the judgment. Reference is made to provisions of Section 188 of Cr. P. C. The trial court concluded by observing that admittedly the act of causing explosion pursuant to the conspiracy was executed in India at Pune.

198. The prosecution placed reliance on evidence of PW 103 – Investigating Officer, who deposed that he had verified cases in connection with the activities of terrorists. In Aurangabad case one of the accused persons by name Samad Khan was involved wherein he had given confessional statement in M.C.O.C. Act in which there was reference of the present accused – Himayat Baig. Certified copy of the said confessional statement was brought on record (Exh. 412). The defence submitted that confessional statement is a weak piece of evidence and, therefore, the same may not be relied upon. The trial court, therefore, observed that it is well settled under law that confessional statement is a weak piece of evidence and can be used for the purpose of corroboration. It cannot be taken into consideration to establish the involvement of the accused in the present case.

199. The defence disputed the claim of prosecution that the accused

was arrested by Anti-Terrorist Squad on 7/9/2010. In the statement recorded under Section 313 of Cr. P. C., the accused stated that he was arrested on 19/8/2010 or prior to that when he had gone to Latur for making inquiry about CET Examination. After making inquiry in the evening he was going towards Latur bus Stop for returning to Beed, at that time he was caught hold of from the backside on the gun point and he was made to sit in one Sumo Jeep and was brought to Pune. It was his case that he was kept for two days and tortured and thereafter on 21/08/2010 he was taken to Mumbai at Kala Chowky and tortured in different ways, including giving currents on the private part and after two days he was again brought to Pune by Shri Kadam (PW 102), Shri Sabnis and Shri Patkar who were from the Anti-Terrorist Squad and he was taken to German Bakery and told that this was a spot of incident. The accused further stated that he was again taken to Mumbai and tortured in different ways and he was made to sign on different blank papers at the bottom of page. He stated that he did not sign on any written paper. According to the trial court there were three remand reports on record dated 8/9/2010, 20/9/2010 and 28/9/2010 which showed that he was produced before the learned Magistrate, who passed orders on those remand reports. The remand reports did not show that any ill-treatment was given to the

accused. Neither any grievance was made by the Advocate appearing for the accused before the learned Magistrate. It is further stated that in case the accused was arrested on 19/8/2010, the family members of the accused person would have raised the issue and approached police for taking some steps to search him. However, nothing has been done. The conclusion reached by the trial court on this aspect of the matter seems to be reasonable and in consonance with the evidence on record.

200. The trial court discussed the evidence concerning the accused using false names while residing in Udgir, seizure of two bags which he had kept in the class room of white building, black colour brief-case having several documents, passport (Exh. 422), which was found in black colour brief-case which was accepted by the accused as that of his. PW 92 deposed that since the accused had not come for so many days, he took his bags to his house. Panchanama Exh. 264 mentions in details articles which were seized from the said bag. The trial court rightly reached conclusion in para 107 of the judgment as under :-

“107. From the evidence of the above referred witnesses it is abundantly established by the prosecution that the accused resided at Udgir for some time in the Masjid and for some time

in the white building by the assumed names Yusuf and Hasan. Though the said witnesses were cross-examined by the defence, their testimony remained unshaken. The seizure of two bags in which one of the document is the Passport of the Accused Himayat, gives further assurance that the said bags and the articles belonged to the Accused and they were kept in the white building, where he was teaching and residing. In his statement u/s 313 of Cr. P. C. it is stated by the Accused that the said two bags were seized from Beed, which is his native place. However, there is nothing to support the said contention.”

From the discussion made on this issue, the trial court has rightly concluded that the explosive substance and other articles like solder wire, solder gun and solder wire cutter were recovered at the instance of the accused person. The evidence of the dog handler was also relied upon, the entries taken in the log-book and other entries made in the police stations, Pune and Udgir were considered by the trial court for arriving at a conclusion that the investigating team did reach white building, Abdul Samad opened the main door, investigating team entered the house and thereafter the bomb detection squad entered the house. The accused had shown the Dewan in a room which was occupied by him and at his instance the wooden plank was lifted and objectionable material was recovered. The

defence submitted that the room was not locked, which means that it was accessible to anybody. It was also submitted that adverse inference need to be drawn as Abdul was not examined. Considered in their entirety, the prosecution case, documentary evidence placed on the record and the findings reached by the trial court, we conclude this issue by saying that the prosecution has established that the prohibited substance/explosive material along with other articles were kept in a sealed position by the accused in Dewan and at his behest the recovery was made. The exclusive possession of the prohibited material / explosive substance is established by the prosecution and we do not find any good reason to deviate from the findings recorded by the trial court on this issue. The counsel appearing for the defence submitted that the RDX must have been planted in the Dewan by somebody. No such inference could be drawn in the light of the circumstances brought on record. The evidence of discovery, made at the instance of the accused, is required to be believed. The articles kept were not open, but were hidden inside the Dewan. For the reasons stated above, we can hold that the accused was in conscious possession of the explosive material. It is important to note that in the statement recorded under Section 313 of Cr. P. C. except denial, the accused did not give any explanation in that regard. The trial court concluded the findings on this

aspect in para 129 of the judgment.

201. The learned trial court, while observing on the visit of accused to Colombo, had dealt with the evidence of Investigating Officer PW 103 Shri Satav, which refers to the documents recovered from two bags of the accused which were seized by the police under a panchanama Exh. 264. In 313 statement, the accused stated in respect of his visit to Colombo. According to his explanation, he stated that he had gone for doing job, but due to language problem he could not get the job (Question No. 264). While reply to last question i.e. Question No. 526 in the 313 statement, accused stated that he had gone to Colombo for selling clothes and perfumes, which he had purchased from Mumbai and to do job in the Mall or in a big shop.

202. In para 143, the trial court considered travel of the accused from Latur to Mumbai by a Bus of Priyanka Travels. The travel agency was owned by PW 67 - Ezaz Maniyar and PW 73 Abdulsamad Mohammad Hanif Shaikh who was doing cloth business at Udgir had booked ticket for the accused. The prosecution relied upon the evidence of these witnesses and the registers maintained by the Priyanka Travels and An-Noor Lodge.

We have already discussed above that whitener was applied on the entry made in the register on 7/2/2010. The said entry does not inspire confidence for placing reliance. Even if it is assumed that the accused had travelled from Latur to Mumbai, the prosecution will have to make out a case that he had travelled for the purposes of entering in a conspiracy or for giving the final shape to a terrorist act or in furtherance of his terrorists activities. The entries written in the register maintained by Priyanaka Travel and the entries made in the Al-Noor Guest House in the name of accused as “Yusuf” could at the most be considered as a circumstance brought on record by the prosecution, but the said circumstance must be of relevant character and nature for the purposes of establishing the guilt of the accused. In other words, the circumstance must be of a relevant fact and the said circumstance is not of that character.

203. One of the important circumstances is in respect of purchasing of mobile hand-set. The trial court has discussed this issue in para 149 of the judgment. The trial court has placed reliance on the Test Identification Parade wherein owner of the mobile shop i.e. PW 88 identified the accused in Yerawada Jail on 3/10/2010. The test identification parade memorandum has been admitted in evidence pursuant to provisions of

Section 291A of Cr. P. C. and defence had also given no objection for exhibiting the same. It has come on record that the shop is in a crowded area of Crawford Market. The market is known as Manish Market wherein PW 88 - Mohammad Mansoori was selling mobile cell phones. We are not convinced to accept the prosecution theory that accused, who was said to have purchased the mobile Nokia 1100 model on 8/2/2010 could be identified after near about 7 to 8 months in Yerawada Jail by PW 88 - Mohammad Mansoori. We are not satisfied from the evidence of PW 88 and other witnesses to infer that the witnesses were impressed by a distinct features in the personality of the accused person to remember him for such a long time. First of all the mobile phone was old mobile phone, no papers were maintained for sale and purchase of the said mobile phone. Secondly, said Nokia 1100 model is not the only piece available in the market. Obviously there must be hundreds of such pieces. There was no distinctiveness about mobile 1100 Nokia phone which the accused alleged to have purchased. At the same time, we are not satisfied to hold that the very phone which was said to have been purchased by the accused from PW 88 was used as a triggering device in the bomb blast. What was found at the site is back cover of the phone and from the notches of the back cover, the experts stated that it must be of Nokia 1100 model. From that

angle, the evidence of PW 88, PW 102 and the evidence of Test Identification Parade is required to be considered by this court. The trial court observed that if the customer is of typical type or behaviour, it is possible to remember him. We are not convinced to hold that any distinctiveness in the appearance of the accused and his behaviour had such a everlasting impact on the mind of the witnesses that he was remembered and identified even after a gap of eight months. In the entirety of the facts and circumstances, this circumstance too is required to be appreciated. We find this is a weak piece of evidence and circumstance brought on record by the prosecution. Assuming that the circumstance of accused purchasing mobile from PW 88 is established, the said circumstance, along with other circumstances, does not establish the guilt of the accused person regarding bomb blast in the Bakery.

204. As regards the report of Col. Mann, the learned trial court in para 156 recoded that said report is at Exh. 425 and it is the official communication. There was no slightest doubt about its authenticity and it was not challenged by the defence. None of the team members, who visited the spot of incident along with Col. Mann, was examined by the prosecution. In fact, if somebody was examined, such a move by the

prosecution could have thrown more light on the several questions involved in this case. In fact, non-examination of any of the members from the team headed by Col. Mann adversely affects the prosecution case. Several questions remained unanswered due to that.

205. Learned trial Judge in para 158 of the judgment reached following conclusions :-

“158. From the above evidence and material on record, it becomes crystal clear that the explosion at German Bakery is caused by using the mobile phone as a triggering device. In this fact situation or circumstance, the purchase of mobile phone of Nokia 1100 by the accused from Mumbai by unaccounted transaction assumes importance and become relevant.”

In view of the evidence brought on record and as discussed above, there are serious doubts as to whether the blast which occurred in German Bakery was triggered by Nokia mobile phone 1100 purchased by the accused from Manish market, Mumbai. In the facts and in totality of circumstances, it would be unreasonable to draw such conclusion. These circumstances have not been established by the prosecution beyond reasonable doubt.

206. On the issue of accused last seen with the planter of the bomb, the trial court has referred to the evidence of PW 93 – auto-rickshaw driver. The said evidence is considered in para 163 of the judgment. The trial court has placed heavy reliance on the identification parade conducted, where the auto-rickshaw driver identified the accused in Yerawada Central Prison on 3/10/2010. We have already discussed above the nature of evidence on this point. Again the issue relates to distinctive features in the personality of the accused, his behaviour, trends and his appearance on the said day. We can understand that the planter of the bomb, who was said to be with the accused, had distinctive appearance on that day as it was stated that he was carrying two bags, one in front and one on his back. He was also wearing a cap. But as regards the accused, there was no such distinctiveness for auto-rickshaw driver to identify him after 7 to 8 months gap. This circumstance does not inspire confidence in the prosecution case. The plea of the prosecution that the accused was last seen with the planter of the bomb does not get credence. There are inherent infirmities and the said circumstance does not connect the other circumstances for completing the chain of events. There is force in the submissions of the defence that PW 93 was a got up witness who claims to have seen the photograph of the

planter of the bomb in the newspaper and claims to have identified present accused in the Test Identification Parade. Merely because the Test Identification Memorandum was not challenged by the defence, that would not establish the circumstance beyond reasonable doubt.

207. It is crucial to notice that the trial court has disbelieved PW 96 - Shaikh Nazir. In concluding para 166 of the judgment, the trial court observed as under :-

“166.Absence of such entry in the phone call details, falsifies the evidence of this witness. In such circumstances the entire evidence of this witness should be discarded and is discarded.”

As regards identification of the planter, who is said to be accused Yasin Bhatkal, the trial court observed in para 167 as under :

“167. From the evidence of PW 102, it has already been established by the prosecution that the person wearing cap seen entering the German Bakery with two bags, seen at the counter of German Bakery and leaving German Bakery with only one bag in the CCTV footage is none other but, absconding

Accused Yasn Bhatkal. Through the evidence of PW 90 and PW 101 it is established by the prosecution that the said relevant CCTV footage in which Accused Yasin Bhatkal is seen, is that of 13-02-2010 and just prior to the explosion. Through the evidence of PW 93 the prosecution have further established that the accused was seen with absconding accused Yasin Bhatkal in Pune shortly before the explosion.

Thus, this circumstance is proved by the prosecution beyond reasonable doubt.”

In the facts and circumstances of the case and considering the quality of evidence, we are of the view that some more and better evidence was required on the part of the prosecution to establish the identity of Yasin Bhatkal. The prosecution may have an opportunity to establish its case against Yasin Bhatkal as and when the case proceeds against him.

208. The trial court discussed the phone call details of all the phones used by the accused and his movements on 12/2/2010 and 13/2/2010. The evidence on the point that accused had gone to Pune and returned on the same day evening is not inspiring confidence. Placing reliance on the evidence of PW 95, it would not be appropriate to hold that the accused had gone to Pune and returned on the same day i.e. on 13/2/2010. The

prosecution evidence on this point lacks clarity, the evidence is vague and full of deficiencies and doubts. The finding recorded by the trial court that this circumstance was established beyond reasonable doubt does not appeal to us. The said finding is discarded.

209. The trial court has placed reliance on accused using mobile phones of others of Tata Docomo Company and Vodafone Company. Accused used pan cards of friends, certificates, photographs, ration card and other documents. Even if this circumstance is said to have been established by the prosecution, it does not connect the accused with the commission of terrorist activities. The circumstances like accused involving in activities of arranging meetings in the name of Jihad, reading certain objectionable material and raising voice against the injustice done to the Muslim community, at the most, would demonstrate mental set up of the accused, his anxiety and frustration and his perception about the social structure and the events taking shape in the society. Some concrete, substantial, convincing, cogent and reliable evidence was required by the prosecution to connect the accused with the commission of crime. In the facts of the case, we find that the prosecution has failed to discharge its responsibility to lead evidence in support of the charge framed

against the accused person on major counts.

210. It was observed by the trial court in para 185 of the judgment that except denial there is no explanation from the accused as to how he came into possession of false documents. Even if it is assumed that accused was in possession of such documents and the same could be a circumstance in itself, but such circumstance would become incriminating only when the prosecution discharges its duty and brings relevant factors for connecting all these circumstances to the activities of crime. We do not find various circumstances, completing a chain, for upholding the prosecution case and for upholding the conclusions drawn by the trial court.

211. The issue of conspiracy was dealt with by the trial court in para 187 of the judgment. The charge was framed under Section 120-B of the IPC. Before the trial court, the learned Spl. Public Prosecutor fairly submitted that there was no evidence to show that the accused himself had forged the documents and used them. Indeed, he is right. There is no evidence available on record showing that the accused himself had forged the documents and used them or attempted to use them with any dishonest

intention. But, at the same time, the evidence does show that the accused was found to be in possession of forged documents, which he knew to be forged. The accused has not given any explanation as to how he came into possession of these forged documents, which were a handicapped certificate, caste certificate, ration card and domicile certificate, all falling in the category of valuable security as defined under Section 30 of the Indian Penal Code, or for what purpose he had possessed those documents. The inference would be that he possessed them with some dishonest intention. It is obvious that ingredients of Section 474 of the Indian Penal Code have been fulfilled in this case and, therefore, we are of the view that the trial court rightly found the accused as guilty of the offence punishable under Section 474 of the Indian Penal Code. For these reasons, we are also of the view that the finding of innocence of the accused as regards offences punishable under Sections 465, 467 and 468 of the Indian Penal Code recorded by the trial court is correct and needs no interference.

Case Laws on circumstantial evidence:

212. In the case of M. G. Agarwal vs. State of Maharashtra [AIR 1963 SC 200], Supreme Court, in para 18, observed as under:

“18.The main charge of conspiracy under section 120-B is sought to be established by the alleged conduct of the conspirators and so far as accused No.1 is concerned, that rests on circumstantial evidence alone. It is a well-established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused persons' conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt.....”

In the case of Kali Ram vs. State of Himachal Pradesh [(1973) 2 SCC 808], Supreme Court, in paras 26 and 27 observed thus:-

“26. It needs all the same to be re-emphasised that if a reasonable doubt arises regarding the guilt of the accused, the benefit of that cannot be withheld from the accused. The Courts would not be justified in withholding that benefit because the acquittal might have an impact upon the law and order situation or create adverse reaction in society or amongst those members of the society who believe the accused to be guilty. The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record. Indeed, the Courts have hardly any other yardstick or material to adjudge the guilt of

the person arraigned as accused. Reference is sometimes made to the clash of public interest and that of the individual accused. The conflict in this respect, in our opinion, is more apparent than real. As observed on page 3 of the book entitled “The Accused” by J. A. Coutts 1966 Edition, “When once it is realised, however, that the public interest is limited to the conviction, not of the guilty, but of those proved guilty, so that the function of the prosecutor is limited to securing the conviction only of those who can legitimately be proved guilty, the clash of interest is seen to operate only within a very narrow limit, namely, where the evidence is such that the guilt of the accused should be established. In the case of an accused who is innocent, or whose guilt cannot be proved, the public interest and the interest of the accused alike require an acquittal”.

27. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and

undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiation. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimized but not ruled out altogether. It may in this connection be apposite to refer to the following observations of Sir Carleton Allen quoted on page 157 of *“The Proof of Guilt”* by Glanville Williams, Second Edition:”

“I dare say some sentimentalists would assent to the proposition that it is better that a thousand or even a million guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos.”

In the case of Sharad Birdhichand Sarda vs. State of

Maharashtra [(1984) 4 SCC 116], Supreme Court, in para 153, observed as under:-

“153. 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 Sahabrao Bobade v. State of Maharashtra where the following observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047]

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 to 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.”

In the case of Vijay Kumar Arora vs. State (Government of NCT of Delhi) [(2010) 2 SCC 353], Supreme Court in paras 16, 16.1 and 16.2, which read as under:-

“16. Essential ingredients to prove the guilt of an accused by circumstantial evidence are.

16.1. The law relating to circumstantial evidence is well settled. In dealing with circumstantial evidence, there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion, however, strong, cannot be allowed to take place of proof and therefore, the court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof. However, it is no derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturisation of actual incident, but the circumstances can not fail. Therefore, many a times it is aptly said that “men may tell lies, but circumstances do not”.

16.2. In cases where 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. Each fact sought to be relied upon must be proved individually. However, in applying this principle, a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them, on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies.”

Case law on Conspiracy :

213. Supreme Court, in the case of State (NCT of Delhi) vs. Navjot Sandhu Alias Afsan Guru [(2005) 11 SCC 600], in paras 85, 87, 89 and 100 observed as under:-

“85. As conspiracy is the primary charge against the accused, we shall now advert to the law of conspiracy, its definition, essential features and proof. Section 120-A IPC defines criminal conspiracy. It says :

“120-A. When two or more persons agree to do, or cause to be done, -

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy.”

Section 120-B prescribes the punishment to be imposed on a party to a criminal conspiracy. As pointed out by Subba Rao, J. in *Major E.G. Barsay v. State of Bombay* : (SCR p. 228)

“ The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts.”

87. In America, the concept of criminal conspiracy is no different. In *American Jurisprudence*, 2nd Edn., Vol. 16, p. 129, the following definition of conspiracy is given:

“A conspiracy is said to be an agreement between two or more persons to accomplish together a criminal or unlawful act or to achieve by criminal or unlawful means an act not in itself criminal or unlawful The unlawful agreement and not its accomplishment is the gist or essence of the crime of conspiracy.

89. In the Statement of Objects and Reasons to the Amendment Bill, it was explicitly stated that the new provisions (120-A and 120-B) were “designed to assimilate the provisions of the Penal Code to those of the English Law....”. Thus, Sections 120-A and 120-B made conspiracy a substantive offence and rendered the mere agreement to commit an offence punishable. Even if an overt act does not take place pursuant to the illegal agreement, the offence of conspiracy would still be attracted. The passages from Russell on Crimes, the House of Lords decision in *Quinn v. Leatham* and the address of Willes, J. to the Jury in *Mulcahy v. R.* are often quoted in the decisions of this Court. The passage in Russell on Crimes referred to by Jagannatha Shetty, J. in *Kehar Singh* case (SCC t p. 731, para 271) is quite apposite:

“The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties. Agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se, enough.”

This passage brings out the legal position succinctly.

100. Lord Bridge in *R. v. Anderson* aptly said that the evidence from which a jury may infer a criminal conspiracy is almost invariably to be found in the conduct of the parties. In *Daniel Youth v. R.* the Privy Council warned that in a joint trial care must be taken to separate the admissible evidence against each accused and the judicial mind should not be allowed to be influenced by evidence admissible only against others, “A co-defendant in a conspiracy trial”, observed Jackson, J. (US p. 454), “occupies an uneasy seat” and

“it is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together”.

(Vide *Alvin Krulewitch v. United States of America*)

In *Nalini case* Wadhwa, J. pointed out, at p.517 of SCC, the need to guard against prejudice being caused to the accused on account of joint trial with other conspirators. The learned Judge observed that : (SCC p. 517, para 583)

“There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy.”

The pertinent observation of Judge Hand in U.S. v. Falcone was referred to: (SCC p. 511, para 572)

“The distinction is especially important today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders.”

At para 518, Wadhwa,J., pointed out that the criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. The learned Judge then set out the legal position regarding the criminal liability of the persons accused of the conspiracy as follows : (SCC p. 518, para 583)

“One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime.”

214. In the present case, considering the evidence on record, we are

of the view that the prosecution has failed to establish that the bomb was manufactured/ prepared/assembled by the accused in the Global Internet Café at Udgir. It is possible that the prosecution would urge that reasonable inference is required to be drawn on this issue in the light of the other circumstances brought on record. But, except for the evidence that the accused had asked his other attendants in the Global Internet Café to leave the said Cafe, there is no evidence to enable the court to draw even an inference that on that day accused must have prepared the bomb in the Global Internet Café. We are not convinced to draw such inference. The question, therefore, remains unanswered as to where the bomb was prepared and how the bomb was handed over to the planter of the bomb.

215. From the evidence brought on record, we are of the view that the facts established by the prosecution are not consistent with the hypothesis of the guilt of the accused as regards the main charge relating to unlawful activities and terrorist acts. They are not of conclusive nature and tendency. The chain of evidence does not get completed. The circumstances, which are established by the prosecution, are not consistent with the guilt of the accused. It is not possible to hold that in all human probability, the acts must have been done by the accused. There was a vast

gap between “may” and “must” and prosecution has failed to bridge this gap. One has to travel a long distance from “may” to reach upto “must”. The prosecution has failed to do so.

216. The major circumstances, on which the prosecution is relying upon, are the nature of the accused, his mental aptitude, his approach towards life, his utterances, his jihadi tendencies, his conduct of moving with two cell phones, some forged documents etc., are in themselves do not establish the evidence against the accused of his involvement into the charged offences. The major circumstance, according to the prosecution, is accused travelling from Latur to Mumbai in the night of 7/2/2010, which is based on the entry made in register maintained by Al-Noor Guest House on 8/2/2010 and visit to Manish Market, Mumbai for purchasing the said mobile phone Nokia 1100, which according to the prosecution was used as a triggering device. In our view, the evidence on this aspect of accused purchasing the mobile phone from Manish market itself is a very weak piece of evidence. The same does not inspire confidence.

217. In our view the prosecution has established that at the instance of the accused the prohibited explosive substance /RDX was

recovered. The question is whether mere recovery of RDX from the accused person would connect him with the further activities of preparing bomb and handing over the same to the other accused – Yasin Bhatkal. There is absolutely no evidence. In cases of circumstantial evidence, it would be unfair to expect evidence on each and every circumstance which the prosecution wants to utilize. In a given fact situation, the courts will have to draw inferences and base its findings on probability, but merely on inferences and probabilities a guilt cannot be established. The guilt has to be established according to settled principles of law which cannot be compromised at any point. Graver the crime, greater should be the standard of proof.

218. As said earlier, there is no evidence connecting the accused with the activities of preparing of the bomb and helping the other accused to use it for achieving the object of creation of terror in the section of people of India. Therefore, it would not be possible to hold that mere recovery of RDX from the accused itself is sufficient to presumptively infer with the aid of Section 43-E(a) of the UAP Act that the accused has committed an offence of indulging in terrorist act as defined under Section 15 and punishable under Section 16 of the UAP Act, 1967. The

presumption under Section 43-E can be drawn only when there is reason to believe that the arms or explosives or other banned substances used in the commission of the offence of indulging in terrorist act were of similar nature to those recovered from the possession of the accused. The words "similar nature" and the expression "there is reason to believe" employed in Section 43-E(a) are of great significance. They imply that there must be some connection between the arms or explosives etc. recovered from the possession of the accused and the arms or explosives etc. used in the commission of offence of terrorist act and this connection must be established by some relevant circumstances being brought on record by the prosecution so as to provide a reason for the Court to believe in the existence of such a connection. This evidence is lacking in this case and, therefore, there is no reason to believe that the explosives recovered from the accused must have been used in the commission of the offence of terrorist act as defined under Section 15 of the UPA. If such an interpretation is not assigned to Section 43-E(a), the resultant inference would be omnibus in nature and a person found to be in possession of explosive substance unauthorizedly would be facing the risk of being involved in every blast triggered by means of similar explosive at different places in the country. That being not the intention of the legislature, a care

has been taken to prescribe a condition that there must be "reason to believe" that the arms or explosives etc. of similar nature were used in the commission of the offence relating to terrorist act before the presumption is drawn, which is of course rebuttable at the behest of the accused.

219. The next circumstance is of accused being identified by auto-rickshaw driver PW 93. His evidence does not inspire confidence. After 7 to 8 months of the incident, the auto-rickshaw driver claims to have seen a photograph in the newspaper and approached the police with his version. No doubt, prosecution claims to have conducted Test Identification Parade in which the auto-rickshaw driver has identified the accused person. But the entire exercise of the auto-rickshaw driver remembering the accused person and identifying him in Yerawada Jail must inspire full confidence. The said circumstance and evidence ought to have been established beyond reasonable doubt. The defence had raised several issues concerning identity of planter as Yasin Bhatkal. The defence pointed out that at one stage the prosecution had referred the name of the planter as Abdul Samad. We have noticed that the identity of the planter as Yasin Bhatkal is tried to be established on the basis of the edited version of the CCTV coverage which was part of the CD played in the trial court and

before us. The Investigating Officer Dinesh Kadam – PW 102 who had earlier investigated certain cases had certain photographs of Yasin Bhatkal based on which he claims to have identified that the person who was seen on the screen was Yasin Bhatkal. The defence had raised several questions of evidentiary value and authenticity of the clippings of CCTV coverage which was played in the trial court. Seven video cassettes were not played in the trial court, neither with the best efforts of the technical wing of the Registry of this court those VCDs could be played. Based on the clippings shown on the screen and the version of one of the investigators i.e. PW 102 – Dinesh Kadam, it would be difficult to conclusively hold that the said person seen on the screen was Yasin Bhatkal, though he may be resembling the person named Yasin Bhatkal, according to the prosecution and other witnesses. These circumstances assume significance, as according to the prosecution the accused was last seen with the planter – Yasin Bhatkal and was identified by the auto-rickshaw driver.

220. The prosecution case in its entirety has to be understood, viewed and minutely analyzed and scanned. Collectively the prosecution case must inspire confidence to uphold its charge to say that it must be the accused, involved in the terrorist activities, who was responsible for

causing death of several persons and causing injuries to several others. Upon consideration of the evidence and the circumstances available on record in their entirety, we find that this is a case in which the circumstances forming links in so far as offences relating to commission of terrorist acts by entering into conspiracy with other accused persons and connected offences are concerned, have not been conclusively established in as much as there are missing links in between. In a case, like the present case, based upon circumstantial evidence, it is necessary for the prosecution to prove all the relevant circumstances conclusively and in such a manner that when these circumstances are taken together, they must point towards nothing but guilt of the accused. As discussed earlier, that is not the case here as regards the offences relating to commission of the terrorist acts and other connected offences. It is seen that the trial court missed out these important aspects emerging from the evidence available on record. The accused, therefore, deserves to be acquitted of the offences punishable under Sections 16(1)(a), 10(b), 10(a), 18, 20, 13(1)(b) and 13(2) of the Unlawful Activities (Prevention) Act, 1967, Section 120-B, Section 302 read with 120-B, Section 307 read with Section 120-B, Section 435 read with 120-B, Section 153A, Section 3(b) of Explosive Substances Act, 1908 read with Section 120-B of the Indian Penal Code

and Section 4(a)(b) of Explosive Substances Act, 1908 and to that extent the impugned judgment and order deserves to be quashed and set aside. However, the finding recorded and sentence awarded for an offence punishable under Section 474 of the Indian Penal Code, for the reasons stated earlier, deserves to be confirmed.

It has been argued by the learned counsel for the accused that even the offence punishable under Section 5 of the Explosive Substances Act, 1908 is not made out for the reason that there is no clinching evidence brought on record by the prosecution that the accused was found to be knowingly in possession of the explosive substance in as much as the explosive substance itself has not been found to be of special category. He also submits that the trial court has committed perversity in recording a finding of conviction and awarding the sentence for an offence punishable under Section 5 of the Explosive Substances Act, 1908 and that too without specifying as to under which of the two clauses thereof, whether Clause (a) or Clause (b), the sentence was awarded. He submits that such a vague finding deserves to be quashed and set aside.

We are not inclined to accept the argument of the learned

counsel for the accused for the reason that the recovery of blackish substance from the possession of the accused has been already found by us to be of reliable nature and the accused has not given any explanation as to how and under what authority he was having the possession of the blackish substance, which has been conclusively found to be an explosive substance called "RDX". Under Section 2(b) of the Explosive Substances Act, 1908, RDX or the Research Development Explosive has been defined to be included in "special category explosive substance". This explosive substance cannot be possessed by anybody without authorization under the law. The accused has not explained anything regarding the possession or the purpose for which he had the possession of the explosive material, the RDX. Therefore, the offence punishable under Section 5(b) of the Explosive Substances Act, 1908 has been constituted in this case and accordingly, we find that it has been committed by the accused. No doubt, while awarding sentence for commission of the said offence, the trial court has generally referred to Section 5 of the said Act without being specific about which of the two clauses i.e. Clause (a) or Clause (b) of Section 5 was applicable to the facts of the case. But, that appears to be only a mistake as the sentence of Rigorous Imprisonment for life has been prescribed only under Clause (b) of Section 5 of the Explosive Substances

Act, 1908. Besides, it has caused no prejudice to the accused. Therefore, the sentence awarded by the trial court under Section 5 of the said Act would have to be treated as awarded under Section 5(b) of the said Act and we do so accordingly.

221. For the reasons recorded above, we pass following order:

ORDER

(I) Reference made by the Additional Sessions Judge, Pune, is rejected.

(II) Criminal Appeal No. 755 of 2013 filed by appellant/accused – Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan is partly allowed.

(a) The order of conviction and sentence awarded against the appellant/accused – Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan for offence punishable under Section 16(1)(a) of the Unlawful Activities (Prevention) Act, 1967 is quashed and set aside and accused is acquitted of the said offence.

(b) The order of conviction and sentence awarded against the appellant/accused – Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan for offence punishable under Section 10(b) of the Unlawful Activities (Prevention) Act, 1967 is quashed and set aside and accused is acquitted of the said offence.

(c) The order of conviction and sentence awarded against the appellant/accused – Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan for offence punishable under Section 10(a) of the Unlawful Activities (Prevention) Act, 1967 is quashed and set aside and accused is acquitted of the said offence.

(d) The order of conviction and sentence awarded against the appellant/accused – Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan for offence punishable under Section 18 of the Unlawful Activities (Prevention) Act, 1967 is quashed and set aside and accused is acquitted of the said offence.

(e) The order of conviction and sentence awarded against the appellant/accused – Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan for offence punishable under Section 20 of the Unlawful Activities (Prevention) Act, 1967 is quashed and set aside and accused is acquitted of the said offence.

(f) The order of conviction and sentence awarded against the appellant/accused – Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan for offence punishable under Section 13(1)(b) of the Unlawful Activities (Prevention) Act, 1967 is quashed and set aside and accused is acquitted of the said offence.

(g) The order of conviction and sentence awarded against the

appellant/accused – Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan for offence punishable under Section 13(2) of the Unlawful Activities (Prevention) Act, 1967 is quashed and set aside and accused is acquitted of the said offence.

(h) The order of conviction and sentence awarded against the appellant/accused – Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan for offence punishable under Section 120-B of the Indian Penal Code is quashed and set aside and accused is acquitted of the said offence.

(i) The order of conviction and sentence awarded against the appellant/accused – Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan for offence punishable under Section 302 read with Section 120-B of the Indian Penal Code is quashed and set aside and accused is acquitted of the said offence.

(j) The order of conviction and sentence awarded against the appellant/accused – Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan for offence punishable under Section 307 read with Section 120-B of the Indian Penal Code is quashed and set aside and accused is acquitted of the said offence.

(k) The order of conviction and sentence awarded against the appellant/accused – Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan for offence punishable under Section 435 read with Section 120-B of the Indian Penal Code is quashed and set aside and accused is acquitted

of the said offence.

(l) The order of conviction and sentence awarded against the appellant/accused – Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan for offence punishable under Section 153A of the Indian Penal Code is quashed and set aside and accused is acquitted of the said offence.

(m) The order of conviction and sentence awarded against the appellant/accused – Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan for offence punishable under Section 3(b) of the Explosive Substances Act, 1908 read with Section 120-B of the Indian Penal Code is quashed and set aside and accused is acquitted of the said offence.

(n) The order of conviction and sentence awarded against the appellant/accused – Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan for offence punishable under Section 4(a) and (b) of the Explosive Substances Act, 1908 is quashed and set aside and accused is acquitted of the said offence.

(o) The fine amount, if deposited, in the above stated offences, shall be refunded to the accused.

(p) The acquittal of appellant/accused - Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan for offence punishable under Sections 465, 467 and 468 of the Indian Penal Code is confirmed.

(q) The conviction and sentence of the appellant/accused - Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan awarded for offence punishable under Section 474 of the Indian Penal Code is confirmed.

(r) The conviction and sentence of the appellant/accused - Mirza Himayat Baig @ Ahmed Baig Inayat Mirza @ Hasan of life imprisonment for an offence punishable under Section 5 (b) of the Explosive Substances Act, 1908 is confirmed.

The sentences awarded as above against the accused shall run concurrently.

Appellant/accused be given benefit of set off for the period of detention already undergone by him in terms of Section 428 of the Code of Criminal Procedure.

The muddemal property received by the Registry of this Court, be sent to the trial court.

Office to furnish copy of this Judgment and Order to the accused, who is in jail, through the concerned Prison Authorities.

(S. B. SHUKRE, J.)

(NARESH H. PATIL, J.)