

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

***CRIMINAL APPELLATE JURISDICTION***

**CRIMINAL APPEAL NO.110 OF 2010**

|                                              |                  |
|----------------------------------------------|------------------|
| Arshad Hussain Gulam Ahmed Badru Hussain. ]  |                  |
| Age - 26 years, Occu. : Business, ]          |                  |
| Residing at Upper Ashbir, Sopore, ]          |                  |
| District Baramulla, Jammu & Kashmir. ]       |                  |
| (At present at Nashik Road Central Prison, ] |                  |
| Nashik) ]                                    | ... Appellant    |
|                                              | Orig. Accd. No.3 |

Versus

|                                             |                |
|---------------------------------------------|----------------|
| The State of Maharashtra. ]                 |                |
| (at the instance of Anti-Terrorist Squad, ] |                |
| Mumbai vide L.A.C. No.1 of 2006) ]          | ... Respondent |

**ALONG WITH**

**CRIMINAL APPEAL NO.179 OF 2010**

|                                              |                  |
|----------------------------------------------|------------------|
| Khurshid Ahmed Abdul Gani Lone @ Lala. ]     |                  |
| Age - 29 years, Occu. : Business, ]          |                  |
| Residing at Takiya Ahmed Shah, Post Eran, ]  |                  |
| Tal. Bandipura, District Baramulla, ]        |                  |
| Jammu & Kashmir. ]                           |                  |
| (At present at Nashik Road Central Prison, ] |                  |
| Nashik) ]                                    | ... Appellant    |
|                                              | Orig. Accd. No.2 |

Versus

|                                             |                |
|---------------------------------------------|----------------|
| The State of Maharashtra. ]                 |                |
| (at the instance of Anti-Terrorist Squad, ] |                |
| vide L.A.C. No.1 of 2006) ]                 | ... Respondent |

**ALONG WITH**  
**CRIMINAL APPEAL NO.917 OF 2010**

|                                           |   |                   |
|-------------------------------------------|---|-------------------|
| The State of Maharashtra.                 | ] |                   |
| (At the instance of Anti-Terrorism Squad, | ] |                   |
| Mumbai, vide L.A.C. No.1 of 2006)         | ] |                   |
| C.C.No.48/PW/2006).                       | ] | ... Appellant     |
|                                           |   | Orig. Complainant |
| Versus                                    |   |                   |
| 1. Mohd. Ramzan Haji Abdul Wahab Haji.    | ] |                   |
| Age - 58 years, Occu. : Faming & Fruit    | ] |                   |
| Business,                                 | ] |                   |
| R/o - Village Naupara, Taluka Bandipura,  | ] |                   |
| District Baramulla, Jammu & Kashmir.      | ] | ... Abated        |
| 2. Khurshid Ahmed Abdul Gani Lone @ Lala. | ] |                   |
| Age - 29 years, Occu. : Business,         | ] |                   |
| R/o Takiya Ahmed Shah, Post Airen,        | ] |                   |
| Tal. Bandipura, District Baramulla,       | ] |                   |
| Jammu & Kashmir.                          | ] |                   |
| 3. Arshad Hussain Gulam Ahmed Badru       | ] |                   |
| Hussain.                                  | ] |                   |
| Age - 27 years, Occu. : Grocery Business, | ] |                   |
| R/o Takiya Ahmed Shaha, Post Airen,       | ] |                   |
| Taluka Bandipura, District Baramulla,     | ] | ... Respondents / |
| Jammu & Kashmir.                          | ] | Orig. Accd. Nos.  |
|                                           |   | 1 to 3            |

**ALONG WITH**  
**CRIMINAL APPEAL NO.122 OF 2011**

|                                                        |   |                   |
|--------------------------------------------------------|---|-------------------|
| The State of Maharashtra.                              | ] |                   |
| (At the instance of Anti-Terrorism Squad,              | ] |                   |
| Mumbai, vide L.A.C. No.1 of 2006)                      | ] |                   |
| C.C.No.48/PW/2006).                                    | ] | ... Appellant     |
|                                                        |   | Orig. Complainant |
| Versus                                                 |   |                   |
| 1. Mohd. Ramzan Haji Abdul Wahab Haji.                 | ] |                   |
| Age - 58 years, Occu. : Faming & Fruit                 | ] |                   |
| Business,                                              | ] |                   |
| R/o - Village Naupara, Taluka Bandipura,               | ] |                   |
| District Baramulla, Jammu & Kashmir.                   | ] | ... Abated        |
| 2. Khurshid Ahmed Abdul Gani Lone @ Lala.              | ] |                   |
| Age - 29 years, Occu. : Business,                      | ] |                   |
| R/o Takiya Ahmed Shah, Post Airen,                     | ] |                   |
| Tal. Bandipura, District Baramulla,                    | ] |                   |
| Jammu & Kashmir.                                       | ] |                   |
| 3. Arshad Hussain Gulam Ahmed Badru                    | ] |                   |
| Hussain.                                               | ] |                   |
| Age - 27 years, Occu. : Grocery Business,              | ] |                   |
| R/o Takiya Ahmed Shaha, Post Airen,                    | ] |                   |
| Taluka Bandipura, District Baramulla,                  | ] |                   |
| Jammu & Kashmir.                                       | ] |                   |
| 4. Maullana Gulam Ilahi Baksh Yahya.                   | ] |                   |
| Age - 44 years, Occu. : Imam of Haj                    | ] |                   |
| Committee,                                             | ] |                   |
| R/o 195, Sharif Devji Street, Off. Mohd.               | ] |                   |
| Ali Road, Lokhandwala Building, 1 <sup>st</sup> floor, | ] |                   |
| Room No.4, Near Chakala Street,                        | ] | ... Respondents / |
| Mumbai - 3.                                            | ] | Orig. Accd. Nos.  |
|                                                        |   | 1 to 4            |

Mr. Sandeep Kumar Singh for Appellant in Criminal Appeal No.110 of 2010 and for Respondent No.3 in Criminal Appeal Nos.917 of 2010 and 122 of 2011.

Mr. Pramod G. Kathane for Appellant in Criminal Appeal No.179 of 2010 and for Respondent No.2 in Criminal Appeal Nos.917 of 2010 and 122 of 2011.

Mrs. M. M. Deshmukh, APP for State - Appellant in Criminal Appeal Nos.917 of 2010 and 122 of 2011 and for Respondent in Criminal Appeal Nos.110 of 2010 and 179 of 2010.

Mr. Mateen Shaikh a/w Mr. Sajid Qureshi, Mr. Shahid Nadeem, R. Shaikh, Mr. Arshad Shukla, Mr. Srinivas Kshirsagar, Mr. Jamil Shaikh and Mr. Ansar Tamboli for Respondent No.4 in Criminal Appeal No.122 of 2011.

**CORAM :- B. R. GAVAI &**  
**SARANG V. KOTWAL, JJ.**  
**DATE :- 12 JUNE, 2018**

**JUDGMENT (PER SARANG V. KOTWAL, J.) :-**

1. All these Appeals arise out of the same set of facts challenging the same impugned Judgment and Order dated 16/01/2010 passed by the learned Additional Sessions Judge, Sewree, Mumbai, in Sessions Case No.719 of 2006. Therefore, all these Appeals are decided and disposed of by this common Judgment. In the said Sessions Case, there were four accused viz. 1) Mohd. Ramzan Haji Abdul Wahab Haji, 2) Khurshid Ahmed Abdul Gani Lone @ Lala

3) Arshad Hussain Gulam Ahmed Badru Hussain and 4) Maullana Gulam Ilahi Baksh Yahya. For the sake of convenience, all the original accused are referred hereinafter as per their status as accused in Sessions Case No.719 of 2006 before the trial Court.

2. By the impugned Judgment, the accused nos.1 to 3 were convicted for the offence punishable under Section 18 of the Unlawful Activities (Prevention) Act, 1967 as amended by Amendment Act, 2004 (hereinafter referred to as 'UAPA') read with Section 120B of the IPC. Each of them was sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs.1,000/- and in default to suffer rigorous imprisonment for one year.

The accused nos.1 to 3 were further convicted for the offence punishable under Section 5 of the Explosive Substances Act, 1908 and each of them was sentenced to suffer rigorous imprisonment for four years and to pay a fine of Rs.500/- and in default to suffer rigorous imprisonment for fifteen days.

The accused nos.1 to 3 were also convicted for the offence punishable under Section 9B(1)(b) of the Explosives Act, 1884 and each of them was sentenced to suffer rigorous imprisonment for one

year and to pay a fine of Rs.500 and in default to suffer rigorous imprisonment for fifteen days.

The accused no.2 alone was convicted for the offence punishable under Section 25(1B)(a) of the Arms Act and was sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.500/- and in default to suffer rigorous imprisonment for fifteen days.

All the substantive sentences were directed to run concurrently and the convicted accused were given set off from 06/01/2006 till 16/01/2010 under Section 428 of the Code of Criminal Procedure, 1973 (for short, Cr.P.C.).

By the same impugned Judgment and Order, the accused nos.1 to 4 were acquitted from the charges of commission of the offences punishable under Sections 17, 19, 20 and 23 of the Unlawful Activities (Prevention) Act.

The accused no.4 was charged with commission of offence punishable under Section 18 of the UAPA read with Section 120B of the IPC and he was acquitted from the said charge.

2. The accused no.2 Khurshid challenged his conviction by preferring Criminal Appeal No.179 of 2010 before this Court. The accused no.3 Arshad Hussain challenged his conviction before this Court vide Criminal Appeal No.110 of 2010. The State of Maharashtra preferred Criminal Appeal No.917 of 2010 against the accused nos.1, 2 and 3 for enhancement of sentence awarded to them. The State of Maharashtra also preferred Criminal Appeal No.122 of 2011 before this Court against the accused nos.1 to 4 challenging their acquittal.

3. During pendency of these Appeals, the accused no.1 expired and therefore, the Criminal Appeal No.917 of 2010 and Criminal Appeal No.122 of 2010 stood abated against him. The Appeals were pending final disposal before this Court for quite some time and the convicted accused had undergone their entire sentence. In this background, we are deciding all these Appeals.

4. We have heard Mr. Sandeep Kumar Singh, learned Counsel for Appellant in Criminal Appeal No.110 of 2010 and for Respondent No.3 in Criminal Appeal Nos.917 of 2010 and 122 of

2011, Mr. Pramod G. Kathane, learned Counsel for Appellant in Criminal Appeal No.179 of 2010 and for Respondent No.2 in Criminal Appeal Nos.917 of 2010 and 122 of 2011. We have also heard Mrs. M. M. Deshmukh, learned APP for State - Appellant in Criminal Appeal Nos.917 of 2010 and 122 of 2011 and for Respondent in Criminal Appeal Nos.110 of 2010 and 179 of 2010. We have also heard Mr. Mateen Shaikh, learned Counsel for Respondent No.4 in Criminal Appeal No.122 of 2011. With their assistance, we have read the entire evidence and have gone through the record and proceedings of the case.

5. Section 44 of the UAPA provides for protection of witnesses. Sub-Clause (b) of Sub-Section (3) of Section 44 of UAPA provides that Court may take measures in that behalf by avoiding to mention the names and addresses of the witnesses in its Orders or Judgments or in any records of the case accessible to public. In view thereof, we refrain ourselves from mentioning names of the witnesses. All the prosecution witnesses and the defence witnesses are hereinafter referred to by their serial numbers.

6. The prosecution case, in brief, is as follows :

Sometime before 06/01/2006, the Anti-Terrorism Squad, Mumbai ('ATS'), received a secret information that some terrorists had entered Mumbai for commission of terrorist activities. The officers of the ATS kept watch on the activities of the suspects and they came to know that they had come from the State of Jammu & Kashmir. On 06/01/2006, the ATS received an information that some members of a terrorist organization Lashkar-e-Toyba had come to the area of Bombay Central. Three teams of ATS kept surveillance in the area. At about 12.00 p.m., activities of 3 suspects looked suspicious. Therefore, the ATS concentrated on them. At about 12.30 p.m., they were accosted and apprehended in front of Cafe Sagar. These suspects were the accused nos.1, 2 and 3. Two panchas were called for the purpose of their search. Some suspicious articles were found on their person. The search of the accused no.1 showed that he was having one rectangular box and a round shaped article wrapped in paper in the pant pocket of his bandi. The accused no.2 Khurshid was found to possess one pistol in his pant pocket. After opening of the pistol, it was found that it contained six live cartridges in the magazine. He also had in his possession one rectangular box in his

pant pocket. On search of accused no.3 Arshad, it was found that he was possessing one rectangular box and one mobile phone. Since it was suspected that those articles could be explosives, Bomb Detection Squad and sniffer dogs were called. They confirmed the presence of explosives. At that time, crowd started gathering at the spot and therefore, the suspects and the articles were taken to the office of ATS at Kalachowki.

The rectangular box found with the accused no.1 contained 5 electronic switches and one timer. The round shaped packet found with the accused no.1 contained 20 electronic detonators.

The rectangular box found with the accused no.2 was containing 2 electronic timers.

The rectangular box found with the accused no.3 was containing 2 electronic timers.

Besides these articles, their personal search yielded some railway tickets and other personal articles. The articles were seized and sealed in different packets. The statements of one of the raiding party members was recorded and was treated as the FIR. On the basis of the said statement, an offence was registered vide L.A.C. No.1 of 2006.

7. The interrogation of the arrested accused showed that they were residing at Zamzam Hotel. The statement of the manager of Zamzam hotel was recorded and the hotel register was seized. On 13/01/2006, the accused no.4 was arrested and it was alleged that he was having a Nokia mobile handset with sim card bearing no. 9867827806. The articles were sent for scientific examination. In the months of December 2005 and January 2006, some suspicious phone numbers were kept under surveillance and their conversation was intercepted after following due process. Such intercepted conversations were recorded on audio CDs. These audio CDs were handed over to the Investigation Officer of this case. On 19/01/2006, voice samples of the accused were obtained. The intercepted conversations recorded on the CDs were sent for comparison with the voice samples to the laboratory at Chandigarh. The detonators, switches and timers were sent to the Director, National Bomb Data Centre, NSG, Manesar, Haryana for examination. The examination reports were collected by the investigating agency. Various sanctions for prosecution under the Arms Act, the Explosives Act, the UAPA, were obtained and the charge-sheet was filed. The case was

exclusively triable by the Court of Sessions. The trial was conducted before the Court of Sessions for Greater Mumbai at Sewree.

8. During trial, the prosecution examined 23 witnesses. The defence of the accused is that of total denial. The accused nos.1 to 3 took a defence that they were taken in custody on 31/12/2005 and since then they were under control of the investigating agency. These accused claimed that they were forced to make conversations on phone and all the investigation was false. The accused no.4 took a defence that he had nothing to do with the other accused and he was not involved in the offence. The accused no.2 examined himself and an officer of the mobile telephone network as his defence witnesses. After recording the evidence and the statements of the accused, the learned trial Judge passed the impugned Judgment and Order as mentioned earlier.

9. We shall first decide whether the conviction of the accused in this case is proper. The learned trial Judge has convicted the accused nos.1 to 3 for commission of offence punishable under Section 18 of the UAPA read with Section 120B of the IPC. They

were also convicted for the offence punishable under Section 5 of the Explosive Substances Act, 1908 and under Section 9B(1)(b) of the Explosives Act, 1884. The accused no.2 was additionally convicted under Section 25(1B)(a) of the Arms Act. For reaching the conclusion of guilt in respect of these offences, the learned Judge has mainly relied on the evidence of the witnesses who were present when these three accused were apprehended near Cafe Sagar at Kalachowki. The prosecution has examined PW 1, PW 12, PW 13 and PW 23 in that behalf. PW 1 was serving as a PI in ATS on 06/01/2006. PW 12 was a Police Officer working with the ATS and was a member of the raiding party. PW 12 was in-charge of Kalachowki unit of ATS. All of them have deposed that on 06/01/2006, these 3 accused were apprehended near Cafe Sagar. The incriminating articles were recovered from them. The Bomb Detection Squad and sniffer dogs were called on the spot. On their confirmation of presence of explosives, the articles were taken to the office of ATS at Kalachowki. The articles, as mentioned earlier, were found in the boxes. This evidence of the raiding party members is supported by the independent witness PW 6 who was a pancha who was called by the officers of the ATS for conducting the search. He has corroborated in

all material particulars, the evidence given by the members of the raiding party. Apart from these witnesses, Even the PW 23 who was the Assistant Commissioner of Police and was the Investigating Officer, was present on the spot when these accused were apprehended and thus had supervised the investigation right from the beginning.

10. PW 23 was in-charge of the Bomb Detection Squad, Mumbai, from February 2003. He has deposed that on 06/01/2006, he had received a telephonic call at about 12.45 hours from one Inspector of the ATS. The Bomb Squad proceeded towards the junction near Cafe Sagar at Nagpada. When the officers of the Bomb Squad reached the spot, they saw 15 to 20 officers of the ATS had taken 3 suspects in their custody and were conducting their search. This witness has thereafter deposed that all those incriminating articles containing explosives were recovered from the accused nos.1 to 3. He has identified all the articles shown to him. He has deposed that the articles contained electric detonators which could be used to initiate a blast. There were timers operated on 9 volts battery, there were components of IED (Improvised Explosive Device), moisture

absorbents and a revolver. In short, he has corroborated the evidence of seizure given by the aforementioned witnesses. From the nature of evidence on record, there is absolutely no doubt about the truthfulness of the evidence in respect of the raid conducted by the officers of the ATS on 06/01/2006 when the accused nos.1 to 3 were arrested. The cross-examination of this witness has not shaken his evidence in any manner and the learned trial Judge has rightly held that the prosecution has proved the evidence in respect of the raid. Sealed articles were sent for forensic analysis and the reports at Exh.161 and Exh.163 also corroborate that these sealed articles were prescribed articles under the various Acts. The learned trial Judge has recorded his finding in paragraph 66 based on the discussion in earlier paragraphs of his Judgment.

11. The prosecution has examined PW 17 who was working as a Deputy Commissioner of Police, Brihan Mumbai, and was performing the duties of the District Magistrate during the relevant period. He had granted sanction under Section 39 of the Arms Act for prosecuting the accused no.2 under the Indian Arms Act. The Sanction Order dated 31/03/2006 is produced on record at Exh.141.

PW 18 who was the Collector of Mumbai from May 2005 to July 2006, had given sanction to prosecute the accused under the Explosive Substances Act, 1908. The Sanction Order dated 18/03/2008 is produced on record at Exh.144. PW 19 was serving as a Joint Secretary with the Government of Maharashtra in Home Department (Spl.) at the relevant time and had accorded sanction on 25/09/2006 for prosecuting the accused under the UAPA. The said Sanction Order is produced on record at Exh.146. There is no serious challenge to these Sanction Orders and hence the prosecution was properly launched against all these accused. Thus, we find that the prosecution has led sufficient and reliable evidence to prove the guilt of the convicted accused and therefore, the Criminal Appeal No.110 of 2010 preferred by the accused no.3 and Criminal Appeal No.179 of 2010 preferred by the accused no.2 must fail and hence are accordingly dismissed.

12. This leaves us to consider the Appeals filed by the State of Maharashtra against acquittal of all the accused from the charges of commission of different offences under different Sections. First, we shall consider the case of the prosecution against the accused no.4.

The prosecution case is that the accused no.4 had entered into conspiracy with the other accused and one Salauddin for commission of the offences alleged against him. It is the allegation of the prosecution that the accused no.4 had made arrangements for giving shelter to the other accused at Zamzam Hotel and at the Haj House. The accused no.4 was working in the Haj House. There are allegations that the accused no.4 helped the other accused in exchanging their currency notes of smaller denominations for notes of higher denominations. The prosecution has alleged that the accused no.4 had procured a sim card for the phone number 9867827806 from another person and it was used for communicating with the other accused. The accused no.4 was arrested on 13/01/2006.

13. PW 15 acted as a pancha when the accused no.4 was arrested. According to him, the accused no.4 was arrested at about 9.30 a.m. and on his personal search, apart from other articles, one mobile phone was found. He has not further deposed that the number of such mobile phone was verified by the officers of the ATS. This aspect is important because the prosecution is seeking to connect this accused with the phone no.9867827806. Though PW 23, the

Investigating Officer, has deposed in paragraph 18 of his deposition that at the time of arrest, the accused no.4 was found with one Nokia mobile phone bearing no.9867827806; his evidence in respect of that phone number has remained uncorroborated by the pancha PW 15.

14. PW 20 was the person who had procured a sim card of Airtel company for the accused no.4. This witness had procured a sim card in the name of his brother. However, he has not given the phone number of the sim card. Therefore, there is no cogent evidence to show that the mobile phone no.9867827806 was connected with the accused no.4. Though Exh.155 which was an application form for a sim card mentions the said phone number. However, that application was not in the name of the accused no.4. At the most, it could be said that this witness PW 20 had given one sim card to the accused no.4. However, this fact, by itself, does not prove any incriminating circumstance against the accused no.4.

15. There is another allegation against the accused no.4 and that is the exchange of money by the accused nos.1 with his help. The prosecution has examined PW 2 who had taken part in this

transaction. According to him, the accused no.4 had approached him with one person who wanted his lower denomination notes to be exchanged. This witness, with the help of one Girishbhai, had exchanged the notes. This witness has deposed that the person who had accompanied the accused no.4, looked like the accused no.1. He has further deposed that he had identified the person who looked like the accused no.1. Thus, there is no positive identification by this witness of the person who had accompanied the accused no.4 when the money was exchanged and for whom the money was exchanged. The person referred as Girishbhai by this witness is not examined by the prosecution. Therefore, this evidence does not help the prosecution in establishing the link between the accused no.4 and the accused no.1. The learned trial Judge has dealt with these aspects from paragraphs 15 to paragraphs 22 and we find that the reasoning given by the learned trial Judge in that behalf is proper.

16. The prosecution has examined another witness PW 4 who had helped in exchanging the amount of Rs.12 Lakhs in smaller denominations for higher denominations for some commission. According to him, in September 2005, the accused no.4 had brought

one person with him who was in need of such exchange. This witness has further deposed that he had exchanged the the money with the help of one Marwadi. Though this witness has identified the accused no.1 at the identification parade and in the Court as the person who had accompanied the accused no.4 at the time of exchange of money and who was in need of such exchange, however, this witness has stated that he was to get the money exchanged, from a person from Zaveri Bazar. This person from Zaveri Bazar or the person referred to as 'Marwadi', were not examined or brought forth by the prosecution. This witness himself was not in the business of exchanging currency notes. He has not stated in his evidence as to from where he brought the notes of higher denominations of such large quantity. Thus, his evidence was rightly not found to be reliable and was discarded by the learned trial Judge in his discussion in paragraph 26. Thus, the circumstance of helping the accused in exchanging the money in higher denominations has rightly been discarded by the learned trial Judge.

17. The prosecution has further alleged that the accused no.4 had made arrangements for booking a room at Haj House for the

other accused. In that behalf, the prosecution has examined PW 11 who was in-charge of booking the rooms for pilgrims in the Haj House. He has deposed that the accused no.4 had booked a room for his acquaintances in September, November and December 2005. he has also produced the receipts. The receipts dated 01/09/2005, 26/11/2005 and 10/12/2005 were in the name of Mohd. Aashique and the receipt dated 18/07/2005 was in the name of Aashique Hussein. Though this witness has produced the receipts, no further evidence was led to show that these bookings corresponding to these receipts were done at the request of the accused no.4. This witness has referred to one driver working in the Haj House office by name Mohd. Gulam. According to him, this person had booked a room in the name of Ramzan Haji. This Mohd. Gulam is a different person than the accused no.4. Receipt at Exh.119 mentioned name of Mohd. Gulam as the person through whom the room was booked. The other receipts do not mention the name of the person through whom the rooms were booked. The learned trial Judge has dealt with this aspect from paragraphs 47 to paragraphs 50 and has rejected this piece of evidence against the accused no.4.

18. Similarly, PW 7 is examined to show that the accused nos.1 to 3 were staying in the said Zamzam Hotel from 22/12/2005 to 31/12/2005. There is no evidence that the accused no.4 had made such booking or that he had met these accused at the hotel. Therefore, there is nothing to show that the accused no.4 had given shelter or was responsible for harbouring the accused nos.1 to 3.

19. The next important question about the involvement of the accused no.4 and conspiracy of all the accused is in respect of the alleged telephonic conversation. According to the prosecution case, the 3 phone numbers were suspected for being involved in some suspicious activities. Phone no.9867827806 was attributed to the accused no.4. As we have already discussed, the prosecution has failed to prove the connection of the accused no.4 with this phone number. Phone no.9867994135 was allegedly used by the accused no.2 and the phone no.9906869790 was allegedly used by one Salauddin. According to the prosecution case, this Salauddin was working with a terrorist organization by name Lashkar-e-Toyba and he was the mastermind behind the present offence. The identity of this person is not properly established by the prosecution. No

evidence is led to show that this particular phone number was used by the said person by name Salauddin.

20. The prosecution has examined PW 8 who was attached with the ATS from November 2005 to April 2007. In the month of December 2005, they had received information about these 3 suspected mobile phone numbers and therefore, a report was made to Deputy Commissioner of Police which was approved by the Joint Commissioner of Police. Final approval was taken from the Additional Chief Secretary, Home Department and the aforementioned 3 phone numbers were kept under surveillance and their conversation was intercepted. The phone number attributed to the accused no.2 was intercepted from 29/12/2005. The phone number attributed to the said Salauddin was intercepted from 01/01/2006 and the phone attributed to the accused no.4 was intercepted from 03/01/2006. The interception was discontinued after 16/01/2016. After the conversations were intercepted, they were recorded on 3 CDs. The CD no.1 was pertaining to the phone number attributed to Salauddin. The CD no.2 was in respect of the phone number attributed to the accused no.2 and the third CD was in respect of the intercepted

conversations in respect of the phone number of the accused no.4. This witness heard the conversations and dictated the transcripts on 17/01/2006. After the transcripts were prepared, the CDs were kept in a separate cover. Significantly, this witness, in the cross-examination, has admitted that he did not remember the date on which these CDs were prepared. He further admitted that the expert technician recorded the conversations in the computer and the communication was directly recorded on the hard disc. The prosecution has not brought any evidence to show as to how the conversations from the hard disc were transferred on CDs and what precautions were taken at that time. This link is an important factor and therefore, the prosecution has failed to prove that the CDs were the exact copies of the conversations, intercepted by these officers. In this view of the matter, the further evidence in respect of the voice samples, voice analysis, voice matching, etc. becomes doubtful and therefore, it cannot be said that the prosecution has proved that these conversations could be attributed to any of the accused. Moreover, the evidence of PW 8, and PW 10 who was the pancha when the transcripts were made, does not show that the CDs were kept in sealed condition. Therefore, the possibility of tampering with these

voice recordings cannot be ruled out, as is rightly held by the learned trial Judge in paragraph 103.

21. The investigating agency had recorded voice samples from all the accused for comparison with the voices in respect of the intercepted conversations. PW 9 was a pancha in whose presence the voice samples of all the accused were recorded on cassettes. These cassettes and the CDs of recorded conversations were sent for voice identification to a laboratory in Haryana.

22. PW 21 was working in Central Forensic Science Laboratory at Chandigarh who has conducted the test for matching of the voice. According to his report, the intercepted conversations matched with the voice of the accused. His report dated 28/12/2006 is produced at Exh.152. The learned trial Judge has discussed the matching of the voice and the intercepted conversations from paragraph 77 to paragraph 105 and ultimately has discarded this piece of evidence. Since he has rightly observed that there was no evidence on record to show how the conversations were transferred on the CDs and in the absence of any evidence to show that they were

kept in safe custody and that there was no possibility of any tampering; this evidence could not be held as having been proved by the prosecution against any of the accused. Thus, once this link of *inter se* communication between the accused is snapped, there is no material to show that the accused no.4 was in conspiracy with the other accused. In this view of the matter, we are of the opinion that the learned trial Judge has rightly acquitted the accused no.4.

23. The last circumstance which the learned trial Judge has discussed is in respect of the conspiracy amongst the accused nos.1 to 3 with the aforementioned Salauddin. The prosecution has examined PW 3 who was a chance witness. He was present in a hotel at Hyderabad and he had heard the incriminating conversation between the accused nos.1 and 3 on 17/11/2005. His entire conduct is unnatural. On the next day, he came to Aurangabad and much belatedly he informed the PW 14 who was attached to Vaijapur Police Station as PI. PW 3 informed PW 14 about the said conversation on 19/12/2005. There is no satisfactory explanation as to why this witness had not disclosed this fact for more than a month. PW 14 simply forwarded this information to the ATS, Mumbai, on

26/12/2005. There is no explanation as to why this information was not immediately passed on to the ATS on 19/12/2005 itself. Because of these factors, the learned trial Judge has rightly disbelieved this piece of evidence against the accused

24. The prosecution has also examined PW 16, the Special Executive Officer, who had conducted the identification parade. At the parade, PW 3 had identified the accused nos.1 and 3. However, the evidence PW 3 itself being unreliable, the evidence of identification parade in that behalf does not help the prosecution. Another witness from Zamzam Hotel had identified the accused nos.2 and 3. However, we have already discussed this evidence and since they were caught together, this circumstance does not make any difference to the case. PW 22 had given a sim card to the accused no.2 and had identified him in the said parade. However, the evidence in respect of the intercepted conversations of the mobile phone of accused no.2, as already discussed earlier, was not reliable. The accused no.1 was identified by the PW 4 who had exchanged the money but as discussed earlier, the evidence of that witness PW 4 itself being unreliable, is liable to be rejected.

25. Apart from the prosecution witnesses, the accused no.2 had examined himself on oath and had examined a Nodal Officer of Bharti Airtel. The accused no.2 has deposed that he had come to Mumbai with the accused no.3 as tourists on 22/12/2005 and had stayed at Zamzam Hotel. According to him, they were picked up on 31/12/2005 by the officers of the ATS. They were taken in illegal custody and were pressurized into talking on mobile phone. The recoveries were foisted on them. The accused no.2 also examined defence witness no.2 in an attempt to show that the phone calls which the accused were forced to make, when they were illegally detained, were false. However, this Nodal Officer did not have any Call Details Record (CDR) and therefore, his evidence did not help the accused no.2 in any manner. The evidence given by the defence witnesses on behalf of the accused no.2 does not inspire confidence and there is no reason to disbelieve the evidence in respect of the raid and the arrest of the accused nos.1 to 3 on 06/01/2006 as mentioned earlier. Therefore, the evidence led by the accused no.2 has not made any dent in the prosecution case.

26. While deciding the Appeal against acquittal, we have kept the settled principle of law in deciding such Appeals in our mind. It is well-settled that unless the view taken by the Court acquitting the accused is perverse, the Appellate Court should not interfere with the finding of acquittal. It is also well-settled that if the view taken by the trial Court is a possible view, even in that case, the Appellate Court should not interfere with such finding. The Hon'ble Supreme Court has reiterated these principles in the case of ***Brahm Swaroop and Another Vs. State of Uttar Pradesh***<sup>1</sup>. In paragraph 38, it is held thus :

*“38. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference with the decision of the trial court in a routine manner, where the other view is possible should be avoided, unless there are good reasons for such interference.”*

27. In the instant case, we do not find that the Judgment of the learned trial Judge acquitting the accused nos.1 to 3 under

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<sup>1</sup> (2011) 6 Supreme Court Cases 288

different heads and acquitting the accused no.4 in respect of the charges against him, is, in any manner, perverse. The view taken by the trial Court is a possible view and therefore, does not call for any interference.

28. Hence, the Criminal Appeal No.122 of 2011 filed by the State against the acquittal is liable to be dismissed.

29. The last question that falls for our consideration is in respect of Criminal Appeal No.917 of 2010 filed by the State seeking enhancement of the sentence of the accused. As in the case of Appeals against acquittal, even in the case of Appeals for enhancement of sentence, it is well-settled that a question of sentence is primarily a question of discretion of the trial Judge and unless that discretion has been capriciously exercised and the sentence awarded is manifestly inadequate, the Appellate Court would not be justified in enhancing it. In this context, we can advantageously refer to the observations made by a Division Bench of this Court in the case of *Kayyumkhan @ Shankar S/o Yusuf Khan Vs. The State of Maharashtra*<sup>2</sup>.

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<sup>2</sup> 1997 ALL MR (Cri) 1004

30. As mentioned earlier, the accused no.1 has expired. The learned APP submitted that looking at the dangerous explosives found with the accused and considering their possible intent, the accused did not deserve any leniency and maximum sentence should be awarded to them. The learned trial Judge has observed that considering the fact that the accused were not previously convicted and they were the first time offenders, they deserved some concession in the matter of quantum of punishment. He has further observed that it was a serious crime and therefore, he was not inclined to take a very lenient view and considering the facts and circumstances of the case, the learned trial Judge has imposed the sentence as mentioned earlier. The major punishment awarded to the accused is under Section 18 of the UAPA. The said Section provides that the sentence shall not be less than 5 years but which may extend to the imprisonment for life and the convict would also be liable to pay fine. The learned trial Judge, in his wisdom and discretion, has awarded two years more than the minimum sentence of 5 years and was pleased to award the sentence of 7 years. In our opinion, the learned trial Judge has exercised his discretion properly. Moreover, the offence has taken place in January 2006. The accused were in custody since 06/01/2006. The sessions

case was decided on 16/01/2010 and thereafter the Appeals were filed, which were pending till date. In the meantime, the accused no.1 has expired and the accused nos.2 and 3 have served out their entire sentence. Even thereafter, more than five years have passed. Therefore, in this view of the matter also, we are not inclined to enhance the sentence awarded to them.

31. Hence, the following order :

**ORDER**

The Appeals are dismissed.

The fees of Mr. Pramod G. Kathane, learned counsel appearing for Appellant in Appeal No.179 of 2010 and for Respondent No.2 in Appeal Nos.122 of 2011 and Appeal No.917 of 2010 is quantified at Rs.5000/- to be paid by Legal Services Committee Fund.

**(SARANG V. KOTWAL, J.)**

**(B. R. GAVAI, J.)**