Supreme Court of India
Adambhai Sulemanbhai Ajmeri & Ors vs State Of Gujarat on 16 May, 1947
Author: .....J.
Bench: A.K. Patnaik, V. Gopala Gowda

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 2295-2296 OF 2010

Adambhai Sulemanbhai Ajmeri & Ors. …Appellants

Versus

State of Gujarat ...Respondent

WITH

CRIMINAL APPEAL NO. 45 OF 2011

J U D G M E N T

V.GOPALA GOWDA, J.

These appeals are filed by the convicted accused- appellants as they are aggrieved by the conviction and sentences awarded to them by the Special Court (POTA), and confirmed by the High Court of Gujarat for the offences punishable under the provisions of the Indian Penal Code, 1860 (hereinafter 'IPC'), the Arms Act, 1959, the Explosive Substances Act, 1908 and the Prevention of Terrorism Act, 2002 (hereinafter 'POTA') as per list in para 2 below, for the attack on the Akshardham temple in Gandhinagar between the afternoon of 24.09.2002 and early morning of 25.09.2002, wherein 33 people were killed and more than 85 people were injured.

2. The following list outlines the charges against each of the accused and the conviction and sentences meted out to them by the Special Court (POTA), Ahmedabad, and upheld by the High Court of Gujarat. Accused no.1 is not in appeal before us. The appellant nos. 1-5 before us will hereinafter be referred to as per their position as accused i.e A-2 to A-6. Appellant no.4, Abdullamiya Yasinmiya Kadri (A-5) has already undergone 7 years out of the 10 years of sentence awarded by the learned Judge, Special Court (POTA) and by order dated 03.12.2010, this Court directed him "to be released to the satisfaction of the trial court." The following list outlines the charges, conviction and sentences awarded to each of the accused-appellants.

All the accused persons had been charged with offences under the following sections by the learned Judge, Special Court (POTA):

1. Section 120B of the IPC.

2. Section 120B of the IPC read with Sections 121, 123, 124A, 153A, 302 and 307 of the IPC.

3. Section 120B of the IPC read with Sections 25(1AA) 27 and 29 of the Arms Act.

4. Section 120B of the IPC read with Sections 3, 4 and 6 of the Explosive Substances Act.

5. Section 120B of the IPC read with Sections 3(1)(a) and (b), 3(3), 4, 20 and 21(2) (b) of the POTA.

6. Additionally, A-2 had been charged with offence under Section 452 of the IPC (for entering Akshardham illegally).

7. Additionally, A-6 had been charged under Section 135(1) of the Bombay Police Act, 1951 (for illegally possessing arms and explosives despite notification, in force, issued by Gandhinagar District Police Official).

The Special Court (POTA) framed the aforesaid charges and convicted and sentenced the accused persons as per nature of offences detailed hereunder: Altaf Malek (hereinafter 'A-1') • Gathered the Indian Muslims who had gone to Saudi Arabia.

• Associated with banned organizations like Lashkar-e-Toiba.

• Collected funds from Jaish-e-Mohammed. Convicted and sentenced under:

¾ Section 22 (1) of POTA. Rigorous Imprisonment for 5 years with a fine of Rs.5,000/- and in default of payment of fine, simple imprisonment for 6 months. He was acquitted of rest of the charges. Adambhai Ajmeri (hereinafter 'A-2') • Talked to locals to get idea about city, and to get idea about lodging etc. They took him to A-4 and A-5.

• Received money through Havala.

• Meeting on 24.06.2002 with witness at G Royal Hotel, Hyderabad. Absconding accused gave him Rs 3,500 • Picked up the two assailants (hereinafter referred to as the 'fidayeens') from the railway station and gave them shelter.

• Moved around in an auto rickshaw and showed the fidayeens places around the city, where strikes could be done and also arranged for their night stay at his brother's place.

• Was present at Akshardham at the time of the incident and exited when the firing started. Convicted and sentenced under:

¾ Section 3 (3) of POTA- Life imprisonment and a fine of Rs.10,000/- and in case of default, simple imprisonment for 2 years.

¾ Section 3 (3) read with Section 5 of POTA- Rigorous imprisonment for 10 years and a fine of Rs.5,000/- and in case of default, simple imprisonment for 1 year.

¾ Section 22 (2) (a) and (b) of POTA - Rigorous imprisonment for 10 years and fine of Rs.20,000/- and in case of default, simple imprisonment for 1 year.

¾ Section 120B IPC read with Section 4 of Explosive Substances Act - Rigorous imprisonment for 10 years and fine of Rs.10,000/- and in case of default, simple imprisonment for 2 years. ¾ Section 120B IPC read with Sections 3 and 6 of Explosive Substances Act - life imprisonment and fine of Rs.20,000/-.

¾ Section 120B IPC read with Section 302 IPC – Death penalty (hanging by neck till death) and fine of Rs.25,000/-.

¾ Section 120B IPC read with Section 307 IPC – life imprisonment and fine of Rs.20,000/- and in case of default, simple imprisonment for 1 year. ¾ Section 120B IPC read with Section 27 of Arms Act- Rigorous imprisonment for 7 years and fine of Rs.10,000/- and in case of default of fine, simple imprisonment for 1 year.

¾ The accused was acquitted of the rest of the charges.

Mohammed Salim Hanif Sheikh (hereinafter 'A-3') • Gathered Indian Muslims working in Saudi Arabia at his home and showed them instigating videos. • Is a member of Jaish-e-Mohammed and Lashkar-e- Toiba.

• Made instigating speeches with the intention of endangering the unity and integrity of India. • Became a member of Jaish-e-Mohammed and took funding from them.

Convicted and sentenced under:

¾ Section 3 (3) of POTA- Life imprisonment and a fine of Rs.10,000/- and in case of default, simple imprisonment for 2 years.

¾ Section 3(3) read with section 5 of POTA, Rigorous imprisonment for 10 years and a fine of Rs.5,000/- and in case of default, simple imprisonment for 1 year.

¾ Section 20 of POTA - Rigorous imprisonment for 5 years and fine of Rs.20,000/- and in case of default, rigorous imprisonment for 1 year. ¾ Section 21 (2) (b) of POTA - Rigorous imprisonment for 10 years and a fine of Rs.10,000/- and in case of default, simple imprisonment for 1 year.

¾ Section 22 (1) (a) of POTA - Rigorous imprisonment for 10 years and a fine of Rs.20,000/- and in case of default, simple imprisonment for 2 years.

¾ Section 120B IPC read with Section 4 of Explosive Substances Act - Rigorous imprisonment for 10 years and a fine of Rs.10,000/- and in case of default, simple imprisonment for 2 years. ¾ Section 120B IPC read with Sections 3 and 6 of Explosive Substances Act - life imprisonment and fine of Rs.20,000/-.

¾ Section 120B IPC read with Section 302 IPC – life imprisonment till his natural life (till he is alive) and a fine of Rs.25,000/-.

¾ Section 120B IPC read with Section 307 IPC – life imprisonment and fine of Rs.20,000/- and in case of default, simple imprisonment for 1 year. ¾ Section 120B IPC read with Section 121A IPC Rigorous imprisonment for 10 years and a fine of Rs.5,000/- and in case of default, simple imprisonment for 1 year.

¾ Section 120B IPC read with Section 153A IPC Rigorous imprisonment for 3 years and a fine of Rs.5,000/- and in case of default, simple imprisonment for 6 months.

¾ Section 120B IPC read with Section 27 of Arms Act, Rigorous imprisonment for 7 years and a fine of Rs.10,000/-, and in case of default, simple imprisonment for 1 year.

¾ The accused was acquitted of the rest of the charges.

Abdul Qaiyum Muftisaab Mohmed Bhai (hereinafter 'A-4') • Gave shelter to the fidayeens.

• Wrote the two Urdu letters recovered from the fidayeens, which spoke of instigating violence and atrocities and communal riots.

Convicted and sentenced under:

¾ Section 3 (3) of POTA- Life imprisonment and a fine of Rs.10,000/- and in default of payment, simple imprisonment for 2 years.

¾ Section 3 (3) read with section 5 of POTA - Rigorous imprisonment for 10 years and a fine of Rs.5,000/- in default of payment of fine, simple imprisonment for 1 year.

¾ Section 120B IPC read with Section 4 of Explosive Substances Act - Rigorous imprisonment for 10 years and a fine of Rs.10,000/- in default of payment of fine, simple imprisonment for 2 years. ¾ Section 120B IPC read with Sections 3 an 6 of Explosive Substances Act - life imprisonment and a fine of Rs.20,000/-, in default of payment of fine to recover the amount in accordance with law.

¾ Section 120B IPC read with Section 302 IPC – Death penalty (hanging by neck till death) and a fine of Rs.25,000/- in default of payment of fine to recover the amount in accordance with law. ¾

Section 120B IPC read with Section 307 IPC – life imprisonment and fine of Rs.20,000/- in default of payment of fine, a simple imprisonment for 1 year.

¾ Section 120B IPC read with Section 153A IPC Rigorous imprisonment for 3 years and a fine of Rs.5,000/- in default of payment of fine, a simple imprisonment for 6 months.

¾ Section 120B IPC read with Section 27 IPC of Arms Act, Rigorous imprisonment for 7 years and a fine of Rs.10,000/-, in default of fine a simple imprisonment for 1 year.

¾ Section 120B IPC read with Section 121A IPC Rigorous imprisonment for 10 years and a fine of Rs.5,000/- in default of payment of fine, a simple imprisonment for 1 year.

¾ The accused was acquitted of the rest of the charges.

Accused-5 Abdullamiya Yasinmiya (hereinafter 'A-5') • Member of Jaish-e-Mohammed and Lashkar-e-Toiba. • Gave shelter to the fidayeens.

• Dropped them near Kalur Railway Station, had also put them in an ambassdor car to take them to the temple.

Convicted and sentenced ¾ Section 3 (3) of POTA- Rigorous imprisonment for 10 years and a fine of Rs.10,000/- and in default of payment, simple imprisonment for 2 years. ¾ The accused was acquitted of the rest of the charges.

Accused-6 Chand Khan (hereinafter 'A-6') • Met the dead terrorists, also bought an ambassador car worth Rs 40,000 and made secret compartment for storing weapons and explosives. • Came from Ahmedabad to Bareilly with explosives, moved the fidayeens in an auto, and helped to transfer the weapons.

• Received Rs 30,000/- from Zuber (a dead terrorist, killed in a separate encounter) Convicted and sentenced under:

¾ Section 3 (3) of POTA- Life imprisonment and a fine of Rs.10,000/- in default of payment of fine, simple imprisonment for 2 years. ¾ Section 3 (1) of POTA, life imprisonment and a fine of Rs.25,000/- in default of payment of fine, the same shall be recovered in accordance with law.

¾ Section 3 (3) read with Section 5 of POTA, Rigorous imprisonment for 10 years and fine of Rs.5,000/- in default of payment, simple imprisonment for 1 year.

¾ Section 120B IPC read with Sections 3 an 6 of Explosive Substances Act - life imprisonment and a fine of Rs.20,000/-, in default of payment of fine to recover the amount in accordance with law.

¾ Section 120B IPC read with Section 4 of Explosive Substances Act - Rigorous imprisonment for 10 years and a fine of Rs.10,000/- in default of payment of fine, simple imprisonment for 2 years. ¾

Section 120B IPC read with Section 302 IPC – Death penalty (hanging by neck till death) and a fine of Rs.25,000/- in default of payment of fine to recover the amount in accordance with law. ¾ Section 120B IPC read with Section 307 IPC – life imprisonment and fine of Rs.20,000/- in default of payment of fine, simple imprisonment for 1 year.

¾ Section 120B IPC read with Section 25 (1AA) of Arms Act - rigorous imprisonment for 7 years and a fine of Rs.10,000/-, in default of fine a simple imprisonment for 2 years.

¾ The accused was acquitted of the rest of the charges.

3. The aforesaid sentences imposed upon each accused person were ordered to run concurrently. The accused persons were allowed to set off the sentences for the time spent in custody, wherever applicable.

Various sentences of rigorous imprisonment, life imprisonment and death sentence as detailed in the list above were passed against the accused persons by the Special Court (POTA) in POTA case No. 16 of 2003 by the judgment dated 01.07.2006, which was affirmed by the High Court of Gujarat at Ahmedabad by the impugned judgment and order dated 01.06.2010 in Criminal Confirmation Case No. 2 of 2006 along with Criminal Appeal Nos. 1675 of 2006 and 1328 of 2006.

4. Aggrieved by the said impugned judgment and order of the High Court of Gujarat, all the accused persons except A-1 have appealed before this Court challenging the correctness of their conviction and sentences imposed upon them, urging various legal and factual grounds in support of the questions of law raised by them.

5. Certain relevant facts are stated herein below for the purpose of examining the correctness of the findings and reasons recorded by the High Court in the impugned judgment and order while affirming the findings and reasons recorded in the judgment and order passed by the Special Court (POTA). The facts of the incident leading up to the case, the arrest of the accused persons and their trial and conviction are detailed below:

On 24.09.2002 at about 4.30 p.m., two persons armed with AK-56 rifles, hand grenades etc. entered the precincts of the Swaminarayan Akshardham temple situated at Gandhinagar, Gujarat from gate No.3. They fired indiscriminately towards the children, games and rides and started throwing hand grenades. While continuing the attack, they reached gate No. 2 of the temple and fired at the worshippers, devotees, volunteers and visitors and then proceeded towards the main building. Since the main door of the temple was locked, they moved towards the Sachchidanand Exhibition Hall, killing and injuring women, children and others. Thereafter, immediately CRPF personnel, Deputy Inspector General (DIG), Gujarat State and other senior police officers along with SRP commandos rushed to the place of offence to return the fire. Ambulances were called and other police forces were also urgently called at the place. The team led by Mr. V.B. Rabari - Inspector General of Police, Mr. R.B. Brahambhatt - Deputy Superintendent of Police, Gandhinagar and four other special reserve police commandos climbed on the roof. By that time, the terrorists (fidayeens) once again started firing. A fierce gun battle ensued, and there was also a bomb blast.

6. In the meantime, a team of National Security Guard (NSG) commandos was summoned from New Delhi. They arrived by a chartered flight and took control at about 12.00 at midnight. After understanding the topography of the area, they began the counter attack against the fidayeens. Exchange of firing continued and lasted for nearly 5 hours which went on into the wee hours of 25.9.2002. Eventually both of them were killed in the early morning hours as they succumbed to the injuries received in the said operation. It is the further case of the prosecution that a large quantity of fire arms and explosive substances were carried by the two fidayeens. Some of the explosives were seized along with other articles from the premises. The attack resulted in the killing of 33 persons, including NSG commandos, personnel from the State Commando Force and three other persons from SRP group. Nearly 86 persons, including 23 police officers and jawans were grievously injured. Those who were injured or killed during the attack were removed to Sola Civil Hospital and to Civil Hospital, Ahmedabad.

7. A complaint was lodged by the then ACP Mr. G.L. Singhal, (Prosecution Witness (hereinafter 'PW')-126) on 24.09.2002 at the Gandhinagar Sector 21 police station. After the possession of the temple premises was handed over from NSG Commandos to the state police, an FIR was registered being Ist CR No. 314 of 2002 on 25.09.2002 for the offences punishable under Sections 120-B, 302, 307, 153-A, 451 of the IPC by PW-

126. A Report under Section 157 of the Code of Criminal Procedure (hereinafter 'CrPC') was also prepared. The same was lodged against the unknown persons aged between 20 to 25 years and the investigation was handed over to Police Inspector Mr. V.R. Toliya (PW-119) of the local Crime Branch, Gandhinagar.

It is the case of the prosecution that some articles were received from Brigadier Raj Sitapati, Head of the NSG, which were collected from the clothes of the dead bodies of the fidayeens, and according to them, these articles included two letters written in Urdu language, allegedly found in the pocket of each one of the fidayeens.

8. The investigation of the crime continued for sometime under the said Police Inspector and thereafter, the Anti Terrorist Squad (ATS) was directed by the Director General of police, State of Gujarat to take over the investigation of the case. The investigation continued but nothing fruitful came out of the attempt of the investigating officer to trace the accused persons who were involved in the conspiracy and other offences committed by two fidayeens. The investigation of the case was transferred to ACP Singhal (PW-126) of the Crime Branch who was the complainant in the case, on 28.08.2003 at the direction of the DGP from Mr. K.K. Patel of ATS with 14 files, each with index.

9. On 29.08.2003 at 2 p.m., A-1 to A-5 were arrested by PW- 126 and the matter was investigated further. The prosecution alleged that the criminal conspiracy was hatched at Saudi Arabia, Hyderabad, Ahmedabad and Jammu and Kashmir by some clerics, along with a few others, as they had become spiteful after the incidents of riots which had taken place in the state of Gujarat after the Godhra train burning incident in 2002.

Subsequently, A-6 was also taken into custody and arrested by the Gujarat police on 12.09.2003 from the State of Jammu and Kashmir. It is also the case of the prosecution that after investigation, the matter was concluded and the charge sheet was filed against all the six accused persons by the Crime Branch, after obtaining necessary sanction from the State Government for the purpose of taking cognizance of the offence in compliance with Section 50 of POTA. In the said charge sheet, 26 persons were shown as absconding accused.

The five accused persons, who were arrested on 29.08.2003, remained in the police custody, which had been sought from the Judicial Magistrate, Gandhinagar on 29.08.2003. Provisions of POTA were invoked by the police on 30.08.2003. The chargesheet was filed before the designated Court constituted under Section 23 of POTA, on 25.11.2003. It is further the case of the prosecution that the chargesheet was filed by the Investigating Officer after obtaining necessary sanction order as required under Section 50 of POTA from the government of the state of Gujarat vide sanction order dated 21.11.2003 [Exhibit (hereinafter 'Ex.')498].

10. It is the case of the prosecution that the confessional statements of the accused persons were recorded by the Superintendent of Police, Sanjaykumar Gadhvi (PW-78), as provided under Section 32 of the POTA by following the mandatory procedure.

11. There were 376 witnesses shown in the chargesheet. Out of those, 126 witnesses were examined by the prosecution to prove the charges against the accused persons. The prosecution witnesses were examined on various dates and through them, various Exs. namely, 117 to 679 were marked. The details of the names of the prosecution witnesses and the dates of examination and the marking of exhibits to them are described in the judgment passed by the Special Court (POTA) and the same need not be adverted to in this judgment as it is unnecessary.

12. The Special Court (POTA) had formulated 8 points for its consideration and answered the same in the judgment by accepting the case of the prosecution and passed an order of conviction against all the accused persons and sentenced A-2, A-4 and A-6 to death, A-3 to life imprisonment, A-1 to rigorous imprisonment for 5 years and A-5 to rigorous imprisonment for 10 years.

13. A reference was made to the High Court of Gujarat under Section 366 of the CrPC for confirmation of the death sentence imposed upon A-2, A-4 and A-6. All the accused persons appealed before the High Court against their conviction and sentences imposed on them.

14. The Division Bench of the High Court, after adverting to the charges framed against each one of accused persons under the provisions of POTA, Explosive Substances Act, Arms Act and IPC, and the punishment imposed for each one of the offences under the aforesaid provisions of the Acts and Code, confirmed the order passed by the Special Court (POTA).

Briefly stated, the High Court held that the attack was an act of retaliation against the incidents of communal riots which took place in the State of Gujarat in the months of March and April, 2002 during which several Muslim persons had lost their lives and properties. The High Court stated:

> "Therefore, the terrorist attack was conceived by some unknown persons of foreign origin presumably of Pakistan and Saudi Arabia. The Indian Muslims residing in Saudi Arabia were instigated to retaliate for the incidents which happened during the months of March and April, 2002 and were enticed to fund the terrorist attack. The Fidayeens were recruited by the said masterminds who traveled to Ahmedabad by train from Kashmir via Bareily and they were provided with rifles, hand grenades, gun-powder and other weapons. The said accused persons joined them in providing necessary hide-outs in the city of Ahmedabad and also provided them transport to go in and around the city of Ahmedabad and helped them in selecting the place and time for carrying out the attack. The accused persons also helped in giving them last rites of namaaz for their well being (Hifazat)."

15. The High Court further held that a criminal conspiracy was hatched to strike terror amongst the Hindus in the State of Gujarat. The accused persons and the absconding accused, were in connivance, had gathered the Indian Muslims working in the towns of Jiddah, Shiffa and Riyadh of Saudi Arabia at the residence of A-3. A-1, A-3 and A-5 and the absconding accused Nos. 3 to 5 and 12 to 22, who at the instance of the ISI of Pakistan became members of the terrorist outfit "Jaish-e-Mohammad", and collected funds for it to spread terror in the State of Gujarat. They showed the cassettes of the loss caused to the Muslims in the State of Gujarat and the gruesome photos and the videos of the dead bodies of Muslim men, women and children, at the residence of A-3; distributed the cassettes and made enticing statements to damage the unity and integrity of India and to cause loss to the person and property of Hindu people. It was also observed by the High Court that to carry out the criminal conspiracy, the absconding accused No. 16 visited the relief camps run at Ahmedabad during the communal riots.

16. The statements of the injured witnesses were examined, which is also adverted to in the impugned judgment and the High Court stated that the casualties are also proved by the postmortem notes Exs. 170 and 171 and by examining various doctors and prosecution witnesses.

17. The High Court in the impugned judgment also noted that there is a reference made to the injuries sustained by the individuals which is proved by the medical certificates and the same have been proved by the doctors. The High Court also referred to handing over of the list (Ex.524), recovered from the bodies of fidayeens, including notes in Urdu, by Maj. Jaydeep Lamba (PW-91) to PW-126 under Panchnama (Ex. 440) and the same is proved by the Panch-Vinodkumar Valjibhai Udhecha (PW-74.) Reference of recovery of white coloured AD Gel pen from the scene of offence under Panchnama (Ex.650) is proved by the Panch-Hareshbhai Chimanlal Shah (PW-11 : Ex.649). The said pen was sent to the Forensic Science Laboratory (in short 'FSL') under Panchnama (Ex.621). The FSL report (Ex.668) confirmed that the Urdu writings (Ex. 658) were in the same ink as that of the muddamal pen. There was also reference made of recovery of muddamal articles in the afternoon of 25.9.2002 (84 in number) from the temple precincts under Panchnama (Ex.396) which is proved by panch-Prakashinh Ratansinh Waghela (PW-71 : Ex.395). There was further reference of recovery of empty bullet of Rifle-303, Rifle Butt No. 553, disposal of left out hand grenades, recovery of empties from the fire arms of the SRP Jawans, the empties produced by I.G. Shri V.V. Rabari, production and sealing of Dongri of the police constable, recovery of bullets from the injured

witnesses, production of clothes of injured PSI-Digvijaysinh Chudasama and injured witness, the splinters of hand grenades and bullets recovered from the injured and these are proved by the panchnama Exs. 553, 106, 121, 107, 596, 108 597, 109, 110, 111 and 160. Also, the reference of recovery of the disputed signature of witness-Abdul Wahid (PW-56) in the entry register of Hotel G. Royal Lodge, Naampalli, Hyderabad and the collection of his specimen signature collected under Panchnama (Ex.583) is proved by Panch-Manubhai Chhaganlal Thakker (PW- 101:Ex.581) and collection of the natural signature of the witness Abdul Wahid (PW-56) under Panchnama (Ex.684) is proved by the investigating officer ACP Singhal (PW-126 : Ex.679). Reference was made to the Panchnama (Ex.682) proved by Panch-Dipakshinh Ghanshyamsinh Chudasama (PW-62: Ex.344) regarding seizure of Auto-rickshaw No. GRW-3861 wherein the fidayeens visited various places and the route they had taken in Auto-rickshaw on 22.09.2002 and the route to Akshardham Temple on 24.09.2002, was traced by A-2. Reference was also made of the house of Abbas (the brother of A-2) in which fidayeens and Ayub (absconding accused No. 23) were provided lodging, was identified by A-2 under Panchnama (Ex.580) proved by the Panch-Jignesh Arvindbhai Shrimali (PW-100 :Ex.579). There is also reference of seizure of Panchnama (Ex.336) of the Passport and a piece of paper containing telephone numbers, a telephone diary and electricity bill of February, 2003 of A-2 proved by the Panch-Santosh Kumar R. Pathak (PW-59 :Ex.335). The panchnama (Ex.446) of collection of the natural signature of A-2 is proved by the Panch-Mukeshbhai Natwarlal Marwadi (PW-75:Ex.445) and recovery of specimen handwriting of A-2 under Panchnama (Ex.448) is proved by Panch-Dineshbhai Chunaji Parmar (PW- 76:Ex.447). There is also panchnama of seizure of recovery of Railway ticket(Ex.589) from Ahmedabad to Mumbai dated 22.04.2002, communication regarding cancellation of ticket dated 22.04.2002, telephone charge slips and the expense account for mattresses, fan, petrol, food and hotel from the residence of A-2 has been proved by the Panch-Navinchandra Bechardas Kahaar (PW-103 : Ex.585). There is also seizure of the Accounts Diary from Mehboob-ellahi Abubakar Karim (PW-

82) to prove receipt of Rs.10,000/- and Rs.20,000/- sent from Riyadh and paid to the A-2 under the Code "JIHAD" under Panchnama (Ex.481), which is proved by the Panch-Bharatbhai Babulal Parmar (PW-102 : Ex.584). There is recovery of natural handwriting (Ex.613) of A-4 from a diary identified by him, which was recovered under Panchnama (Ex.309) and proved by the Panch-Ashok Manaji Marwadi (PW-49 :Ex.308). Collection of the specimen writing (Ex.698) of A-4 under Panchnama (Ex.334) is proved by the Panch-Arvindbhai Jehabhai Chavda (PW-58 : Ex.333).

The High Court stated that the handwriting expert Jagdishbhai Jethabhai Patel (PW-89 : Ex.507) has proved that the disputed writings marked A/5/A and A/5/B (Urdu writings Ex.658) were the same as the natural handwriting and the specimen writing of A-4. The report (Ex.511), which is the opinion of the handwriting expert, is also confirmed by the expert report (Mark-T) of R.K. Jain, Directorate of Forensic Sciences, Hyderabad and in the presence of the Panch - Bhikhaji Bachuji Thakore (PW-6: Ex.343). Under Panchnama (Ex.681), A-4 and A-5 identified the place where the last namaaz was performed for the fidayeens and the place where the weapons were packed. The witness identified A-4 and A-5 in the court. Reference was made to the recovery of muddamal-ambassador Car No. KMT-413 from the compound of SOG Camp, Srinagar, J&K. The existence/disclosure of concealed cavity under the rear seat of the car in Panchnama (Ex.671), is proved by the Police Inspector-Shabirahmed (PW-123 : Ex.670) and the Assistant Sub-Inspector

Gulammohamad Dar (PW-124 : Ex.673). Reference was made of the disputed handwriting of Yusufbhai Valibhai Gandhi (PW-

57) from entry No.81 dated 23.09.2002 and his natural handwriting from entry Nos. 224, 225 and 226 of 24.05.2003 and 26.05.2003 from the passenger register of Gulshan Guest House in Panchnama (Exs.317 and 319) which have been proved by the Panch-Poonambhai Narshibhai Parmar (PW-54: Ex.318) and Panch-Ashok Sahadevbhai Kahaar (PW-53: Ex.316) respectively. The Panch-Poonambhai Narshibhai has also proved recovery of the disputed signature of A-6, from column No.13 of the aforesaid entry No.81. The collection of specimen handwriting of Yusuf Gandhi (PW-57) in Panchnama (Ex.321) is proved by Panch-Sajubha Adarji Thakore (PW-55:Ex.320). The High Court has made further reference that A-6 identified STD booths used by him during his stay in Ahmedabad on 23.09.2002 and 24.09.2002 under Panchnama (Ex.342) proved by Panch-Prahlad Bagadaji Marwadi (PW-60 : Ex.341). Further, there is reference to A-6, who identified the places visited by him, and the way to Gulshan Guest House from Railway Station under Panchnama (Ex.591) proved by Panch-Natwarbhai Fakirchand Kahar (PW-104 : Ex.590). Reference is also made by the High Court of the Taxi Driver, Rajnikant (Rajuji) Thakore, who identified the dead bodies of the fidayeens under Panchnama (Ex.130) which is proved by Panch-Bhupatsinh Chandaji Waghela (PW-5 : Ex.129). The route of the fidayeens from Kalupur Railway Station to Akshardham gate no.3 is identified by Taxi driver Rajnikant Thakore (PW-68) under Panchnama (Ex.131) proved by Panch-Bhupatsinh Andaji Waghela (PW-5: Ex.129).

18. From paragraph 75 onwards in the impugned judgment, the Division Bench of the High Court has referred to the judgments of this Court. Reliance was placed on the cases of S.N. Dube v. N.B. Bhoir & Ors.1 and Lal Singh etc.etc. v. State of Gujarat & Anr.2 which made reference to the confessional statement recorded under Section 15 of Terrorist and Disruptive Activities (Prevention) Act,1987 (hereinafter 'TADA'), wherein this Court rejected the contention urged on behalf of the accused persons that the confessional statements were inadmissible in evidence because (a) the statements were recorded by the investigating officer or the officers supervising the investigation

(b) the accused persons were not produced before the judicial Magistrate immediately after recording the (2000) 2 SCC 254 (2001) 3 SCC 221 confessional statements and (c) guidelines laid down in the case of Kartar Singh v. State of Punjab3 were not followed. Reliance was also placed by the High Court on the case of State of Maharashtra v. Bharat Chaganlal Raghani & Ors.4, wherein this Court held the confessional statements of the accused persons to be admissible in evidence. The Court further held that confessional statements having been proved to be voluntarily made and legally recorded, can be used against all or some of the accused persons in the light of other evidence produced in the case.

19. The High Court referring to the broad principles covering the law of conspiracy as laid down in the case of State of Tamil Nadu v. Nalini & Ors.5, and also referring to Section 120-A of IPC which constitutes the offence of criminal conspiracy, held (1994) 3 SCC 569 (2001) 9 SCC 1 (1999) 5 SCC 253 that the acts subsequent to achieving an object of criminal conspiracy may tend to prove that a particular accused person was a party to the conspiracy. Conspiracy is hatched in private or in secrecy and it is rarely possible to establish a conspiracy by direct evidence. Usually, both the

existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused persons.

Further, reference was also made to the judgment in the case of State of W.B. v. Mir Mohammad Omar & Ors.6, wherein it was held that the courts should bear in mind the time constraints on the police officers in the present system, the ill equipped machinery they have to cope with and the traditional apathy of respectable persons towards them.

(2000) 8 SCC 382 The High Court also relied upon the case of Rotash v. State of Rajasthan7, wherein this Court held that the investigation was not foolproof but that defective investigation would not lead to total rejection of the prosecution case. Further, reference of State of M.P. v. Mansingh8 in the case of Rotash (supra) in support of the aforesaid proposition of law.

20. The Division Bench of the High Court also referred to the evidence of Asfaq Abdulla Bhavnagari (PW-50: Ex.312) who had worked at Riyadh in Saudi Arabia and whose statement was recorded by the police, which according to the prosecution, led to the revelation of the entire conspiracy.

21. The High Court further placed reliance upon the statement of Mohammed Munaf Hajimiya Shaikh (PW-52 : Ex.315) who gave evidence against A-2, A-4 and A-5 (2006) 12 SCC 64 (2003) 10 SCC 414 regarding running of relief camp in the State of Gujarat and against his brother Abdul Rashid Sulemanbhai Ajmeri (absconding accused No. 4). According to the witness, A-5 and A-4 advised A-2 to go ahead with the plan and gave telephone number of one Nasir Doman to A-2. He identified A-2, A-4 and A-5 in the court.

22. The High Court also placed reliance on the statement of Abdul Wahid (PW-56 : Ex.325), who admitted that on 24.04.2002 he had gone to Hyderabad with A-2 and that they had met Khalid (absconding accused No. 16) there. According to this witness, the said Abdul Raheman @ Abu Talah @ Khalid had made arrangement for their lodging at Hotel G-Royal. He also admitted to having met Ayub (absconding accused No.23) at Hyderabad. He further admitted the disputed signature in the hotel register (muddamal article no.

129) and the specimen signature (muddamal article no.

131) as that of his own. He also identified A-2 in the court.

23. The High Court also placed reliance on the statement of Mehboob-e-llahi Abubakar Karimi (PW-82) who has admitted to transfer of money through him. He also admitted the payment made to A-2 and identified the muddamal Diary (article no. 106) and the entries (Ex.477) and (Ex.478) made in respect of the aforesaid transfer of money. The High Court further placed reliance on the statement of Sevakram Bulaki (PW-97 : Ex.563), owner of Hotel G. Royal Lodge, Hyderabad, who supported the prosecution version and admitted to having allotted Room No. 322 to two persons namely Abdul Shaikh and A.S. Shaikh who came from Ghatkopar, Bombay on 26.04.2002. He further admitted entry (Ex.326) made in the entry register.

24. The High Court further referred to the statement of A-1 (Ex.456) recorded before the Deputy Commissioner of Police Zone-IV, Ahmedabad under Section 32 of POTA, who admitted that he and other Muslims from Gujarat, working at Riyadh used to meet at the residence of A-3 and also admitted that one Karim Annan Moulvi (absconding accused No. 20), who was a native of Pakistan, also used to attend the meetings. He also stated that he used to collect funds in the name of Islam and was connected with Pakistani Jihadi group "Sippa-e-Saheba" and had also become a member of "Jaish-e-Mohammed". The High Court also stated that the confessional statement made by him is supported by the evidence of Abdul Raheman Panara (PW- 51:Ex.314)

25. In paragraph 19 of the impugned judgment, the Division Bench of the High Court examined the admissibility of the confessional statements made by A-1, A-2, A-3, A-4 and A-6 and their probative value and held that the confessional statements were made by the accused persons under Section 32 of POTA before Sanjay Gadhvi, Deputy Commissioner of Police (Zone-IV) (PW-78: Ex.452), Ahmedabad, who had been examined by the prosecution. He had deposed before the Special Court (POTA) about the manner in which the confessional statements of the accused persons were recorded. He also identified and proved their confessional statements (marked as Exs. 454, 456, 458, 460 and 462). He stated before the court that the provisions of POTA were explained to the accused persons before their statements were recorded, and further stated that he had warned them that their statements may be used against them and that they were not bound to make such statements before him.

26. The contention of the counsel for the accused that the aforesaid statements have been recorded mechanically by PW-78, without following the mandatory procedural safeguards provided under Section 32 of POTA, was rejected by the Division Bench of the High Court, which held that the same have been recorded after following the mandatory procedural safeguards provided under Section 32 of POTA, after careful examination of the above provisions of Section 32. The High Court opined that sub-sections (4) and (5) of Section 32 do not make it mandatory for the Police (Recording Officer) to send the accused to judicial custody after recording his confessional statement under Section 32 of POTA.

27. The High Court came to the conclusion that the Chief Judicial Magistrate is obliged to send the accused to judicial custody only in case the accused persons complain of ill-treatment or torture by the police. All the accused persons who made confessional statements appeared before the CJM (PW-99), and they made no complaint against the police and they had also admitted the statement made by them. The Division Bench of the High Court held that the aforesaid facts tend to prove that none of the accused persons making the confessional statement had been ill treated by the police or had been oppressed or lured to do so.

28. Therefore, the High Court has concluded at paragraph 131 of the impugned judgment that the prosecution had proved that the confessional statements of all the six accused persons were properly recorded and procedural requirements under the statute were complied with.

The Division Bench of the High Court further recorded the concurrent finding at para 132 of the impugned judgment that if the statutory safeguards are properly followed by the police officer and

the CJM, and other facts and evidence on record indicate free will of the accused persons in making the confessional statement, such statement is admissible in evidence and can be relied upon as a truthful account of facts of the crime.

29. The High Court further examined the evidence of Suresh Kumar Padhya CJM (PW-99 : Ex.568) who had recorded the statement of A-1 and A-3 on the request of PW-78, DCP on 18.09.2003, i.e a day after their confessional statements were recorded. A-2 and A-4 made their confessional statements before PW-78 on 24.09.2003 and were sent to PW-99 on 25.09.2003. A-6 made his confessional statement on 05.10.2003 and was sent to PW-99 on 06.10.2003. PW-99 had stated before the Special Court (POTA) that accused persons had stated before him that they were not ill treated by the police. Their statements were read over to them. With regard to cross examination of PW-99, he admitted that he had not inquired from the accused persons as to how long they were in the police custody nor did he send them to judicial custody after recording their statements. He deposed that he did not think it necessary to send the accused persons to the judicial custody. He has also admitted that he had not recorded a specific statement that the accused persons had made confessional statement of their own volition.

30. The High Court considered the evidence of PW-99 and came to the conclusion that the procedural safeguards provided under Section 32 of POTA have been followed by PW-78 to record the statements of the accused persons as per the guidelines issued by the Apex Court in various judgments particularly State of Tamil Nadu v. Nalini & Ors.(supra) and Jayawant Dattatraya Suryarao v. State of Maharashtra9. The High Court came to the conclusion that this Court in the case of Devender Pal Singh v. State of NCT of Delhi10 held that the initial burden is on the prosecution to prove that all the requirements under Section 15 of TADA and Rule 15 of TADA Rules were complied with. Once that is done and the prosecution discharges its burden, then it is for the accused to satisfy the (2001) 10 SCC 109 (2002) 5 SCC 234 court that the confessional statement was not made voluntarily. The High Court opined that in present case, each accused making confessional statement was granted time of around 15 minutes to reflect over his decision to make confessional statement, and the High Court stated that there is no evidence on record to suggest that 15 minutes time was inadequate so as to render the confessional statements inadmissible in evidence or unreliable as none of the five accused persons while making the confessional statement had asked for further time. None of them had made a complaint of inadequacy of time before PW-99 and on the other hand, admitted the confessions made by them.

31. The High Court further stated that the contention made by the learned counsel for the accused persons that they were kept in police custody for around 45 days before the official date of arrest, is absolutely unbelievable. Further, sending the accused persons to judicial custody after recording the confessional statement is a matter of prudence and not a statutory requirement. PW-99 had made a specific note on the writings (Exs. 453, 455, 457, 459 and 461), that each of the accused person was asked whether he had suffered ill-treatment at the hands of the police and that none of them had complained of ill-treatment by the police. The Division Bench held the confessional statements of the accused persons to be admissible in evidence in order to prove their guilt, relying on various decisions of this Court.

32. After recording such findings, the defence evidence was also examined. Defence witness (hereinafter 'DW') Nos. 1 to 7 have given evidence and the same have been adduced by the defence to support their claim that the accused persons were arrested long before the official date recorded and that they were tortured by the police to make the confessional statements. The aforesaid evidence of DW-3 referred to A-2 and A-3. The High Court referred to all the defence witnesses, except DW-3 to hold that none of the aforesaid evidence remotely supports the defence version that A-2 and A-3 were arrested long before 29.08.2003, i.e the dates of arrest as mentioned in their arrest memos. The High Court held that the evidence of the doctors also does not prove the police atrocities allegedly committed upon the accused persons during the period they were in the police custody. All the six accused persons, in their retraction statements, complained of having been beaten up by ACP Singhal (PW-126), V.D. Vanar and R.I. Patel, because of which they could not stand up on their feet. On denying their complicity in the Akshardham attack, they were threatened of being encountered. Each accused persons said that every day they were called either by Singhal, V.D. Vanar or by R.I. Patel and were forced to admit their complicity in the Akshardham attack. On 05.11.2003, the accused persons were produced before the Special Court (POTA) from the judicial custody. Each one of them was given audience before the judge of the Special Court (POTA) wherein, they all made an oral complaint of police atrocities during the police custody and also complained of having been in police custody for long time. According to each accused person, he was made to sign the confessional statement prepared by the police under coercion and duress and had not made the same of his own free will.

At paragraph 144 of the impugned judgment, the Division Bench of the High Court had recorded its finding that the aforesaid retractions are ex facie unbelievable, without giving any reason.

33. At para 145 of the impugned judgment, the High Court examined the evidence in respect of the letters written in Urdu (Ex.658), which is a vital incriminating evidence against A-4. According to the defence, these letters were planted by the police at a later stage, and they placed reliance on the evidence of PW-42 (Ex.266), the inquest Panchnama(Ex.267) of the bodies of the deceased fidayeens, the post mortem notes(Ex.492 and Ex.493) and the muddamal clothes of the fidayeens and submitted that since both of them died of bullet wounds sustained during the counter attack by the NSG commandos, the bodies were wounded and soiled in blood, and their clothes were tattered by the bullet holes and the splinters. There were holes in the clothes of the fidayeens particularly on the pockets of their trousers. In the aforesaid circumstances, it is not possible that the letters recovered allegedly from the pockets of the trousers of the fidayeens were unsoiled and in perfect condition, and therefore, the expert opinion (Ex.511) is not very accurate and is not reliable. The High Court stated that it is true that the Urdu letters recovered from the bodies of the deceased fidayeens were in perfect condition in spite of the multiple injuries received by the fidayeens and assigned the reason in paragraph 189 of the impugned judgment as "But then the truth is stranger than fiction" and that it is not possible to disbelieve that two Urdu letters (Exh.658) were recovered from the bodies of the fidayeens. It was stated by the High Court that both the letters were signed by Brig. Raj Sitapati of NSG. The recovery of these letters is recorded in the muddamal articles as per list (Ex.524) which were received by ACP G.L Singhal (PW-126) in the premises of Akshardham temple itself under Panchnama (Ex.440), signed by the Police Officer Shri Prakashchandra Mehra (PW-105 : Exh.592). The evidence and the opinion (Exh.511) of the handwriting expert J.J.Patel

(PW-89: Exh.507) was relied upon to prove that the said letters were written by A-4.

34. The argument advanced by the learned counsel for the accused persons regarding the subsequent planting of letters was rejected by the High Court, stating that if this argument was to be accepted, then the aforesaid evidence adduced by the prosecution has to be disbelieved and it has to be held that the police had such presence of mind that in the:

> "milieu of the aftermath of the terrorist attack, the police thought of creating the evidence, found out a person who knew Urdu, got them to write the write-ups in handwriting that would match the handwriting of accused no.4, Abdul Kayyum, made Lt.Col Lamba and Brig. Raj Sitapathi their accomplices and that the two officers of the NSG readily agreed to be the accomplices. SO did the panch witness, Vinod Kumar(PW-74) and Dilip Sinh (PW-1). This possibility is too far-fetched to believe." The High Court therefore held that the accused persons had committed offences for which they had been charged and confirmed the conviction and sentence, i.e. death sentence awarded to A-2, A-4 and A-6, life-

imprisonment to A-3, five years Rigorous Imprisonment to A-1 and ten years Rigorous Imprisonment to A-5 and the appeals of the accused persons were dismissed. The correctness of the impugned judgment and orders passed by the High Court is under challenge in these appeals by the accused – appellants, in support of which they urged various facts and legal contentions before this Court.

35. The rival legal contentions urged on behalf of the accused persons and the prosecution will be dealt with as hereunder:

Contentions on behalf of the prosecution We will first examine the contentions urged on behalf of the prosecution represented by Mr. Ranjit Kumar, the learned senior counsel appearing on behalf of the State of Gujarat who has advanced the following arguments to establish the guilt of the accused persons:

The procedure under Section 50 of POTA was followed by the State Government while granting sanction:

36. It was contended by the learned senior counsel that on completion of the investigation, PW-126 forwarded a complete set of papers and his report through official channel recommending prosecution against all six accused persons under the provisions of POTA. The sanction granted by the Home Department was given under the signature of the Deputy Secretary of the said department, Mr. J.R Rajput by sanction no. SB.V/POTA/10/2003/152 (Ex.498). All the papers were received by the sanctioning authority on 12.11.2003 and the section officer put up the file to the Under Secretary on 13.11.2003 and after proper application of mind, the sanction was approved by Kuldeep Chand Kapur, Principal Secretary, Home Department (PW-88) on 15.11.2003 and it was sent back to the Minister for State (Home) who approved it on 18.11.2003 and received back these papers from the Minister on 19.11.2003 and thereafter sanction order was issued on 21.11.2003. It

was further submitted that the procedure for granting sanction by the Home Department was followed as per the Gujarat Government Rules of Business, 1990. It was submitted that the sanction order was passed by the State Government after proper application of mind by the competent authority. The learned senior counsel also submitted that the learned counsel for A-6, Ms. Kamini Jaiswal placed reliance on the case of Ramanath Gadhvi v. State of Gujarat11 qua the sanction under Section 20-A (2) of TADA, which has been declared per incuriam by a 5 Judge Bench in the case of Prakash Bhutto v. State of Gujarat12 and therefore the judgment has no relevance. Confessions of A-1, A-2, A-3, A-4 and A-6 are valid:

37. The learned senior counsel contended that the procedure for recording of the confessions as under (1997)7 SCC 744 (2005)2 SCC 409 Section 32 of POTA was scrupulously followed. The accused persons did not make any complaints of beatings or ill treatment by the police when produced before the CJM for remand on different dates. When the complaints were made later, a medical examination was carried out in which none of the complaints were found to be true. The learned senior counsel also submitted that the confessional statements of A-2 and A-4 were recorded on 24-09-2003, that of A-3 on 17-09-2003 and that of A-6 on 05-10-2003. A-5 did not make any confession at all. The retraction to these confessional statements came around five weeks later. He contended that it is clear that these retractions are mechanical as even A-5, who had not made any confessional statement, sent his retraction. The Urdu letters were collected from the dead bodies of the two fidayeens:

38. The inquest panchnama was drawn of the dead bodies of the two fidayeens by Police Officer Shri Prakashchandra Mehra (PW-105: Exh.592), who in his statement has confirmed the collection of the two Urdu letters. PW-91, Maj. Jaydeep Lamba, who was the commander of the task force, also stated that two Urdu letters were found from the dead bodies of the fidayeens by him and Brig. Raj Sitapati, and that they contain the signature of Brig. Raj Sitapati at the bottom and that a list was prepared of the articles recovered (Ex.524) which` was signed by him. Reliance was also placed by the learned senior counsel on the evidence of PW-89 who had opined that the letters (Ex.658) had been written by A-4. The learned senior counsel also submitted that PW-91 deposed before the court, and that in his cross examination, he was not questioned regarding the 'condition' of the letters written in Urdu, as recovered from the two fidayeens. Similarly, even PW- 126 was not cross examined by the counsel for the accused persons on the condition of the letters. On being questioned by us as to why the letters did not have any blood stains on them, the learned senior counsel submitted that the panchnama stated that the trousers were stained with blood and not soaked with it. Their trousers became wet due to the oozing of blood which has gone to the back of the trousers because of gravity as the bodies were lying on their back after shooting.

The link of accused persons to Akshardham attack has been established.

39. The learned senior counsel had relied upon the confessional statements of the accused persons to draw the link between them and the attack on the Akshardham temple. He had submitted that the confessional statements would clearly go to show how each one of the accused persons had a different and compartmentalized role from the procurement of arms and ammunitions to providing the logistics to the fidayeens for carrying out the operation and the motivation provided for the

attack. The role of A-6 has also been proved.

40. The learned senior counsel submitted that A-6 played a crucial role in bringing the weapons from Kashmir to Bareilly- in his ambassador car bearing registration no. KMT 413, in a secret cavity made underneath the back seat, and thereafter he carried the weapons, concealed in the bedding in the train and accompanied the fidayeens to Ahmedabad. The Navgam Police Station at Jammu & Kashmir had arrested A-6 in offence registered in FIR: CR no. 130 of 2003, and it was during the interrogation in the above said offence that he had disclosed his involvement in the Akshardham attack. A fax message was received by the Gujarat ATS from the IGP Kashmir regarding the same on 31.08.2003. The investigation was conducted by PW-126 who was the then ACP and was authorized to do so as per section 51 of POTA. A team was formed under the proper authorization for collecting materials from different places during investigation. I.K Chauhan (PW- 125) was asked to go for inquiry to Jammu & Kashmir.

It was submitted that there were many other evidences, other than his confessional statement, including the testimony of Yusuf Gandhi, owner of Gulshan Guest House, (PW-57) who had stated before the Special Court (POTA) that A-6 stayed there, and also the panchnama of the ambassador car KMT 413 (Ex.671). Delay in cracking the case.

41. The learned senior counsel submitted that initially the investigation was conducted by V.R Tolia (PW-113) of the Local Crime Branch, Gandhinagar, and thereafter by K.K Patel of the ATS. The investigation was then handed over to G.L Singhal, ACP Crime Branch (PW- 126) on 28.08.2003. It was on 28.08.2003, that Ashfaq Bhavnagri (PW-50) was interrogated, who revealed the entire conspiracy as well as the role of A-1 and A-3 in committing the dastardly offences. The Conspiracy.

42. It was further submitted that it has been proved that the accused persons, along with the absconding accused hatched a conspiracy to create terror and take revenge on the Hindus on account of the Godhra riots. For this purpose, secret meetings were held at Jiddah, Riyadh, Hyderabad and Kashmir. A-2 was contacted by his brother who ensured supply of finance, weapons and trained terrorists. A-4 and A-5, who were running relief camps and were also religious leaders, accepted to garner local support and thus money was sent through havala. A-2 and the two fidayeens visited various places in Ahmedabad and finally chose Akshardham temple in Gandhinagar as the site for the attack on 24.09.2002. A-4, at the instance of A-5, wrote the two Urdu letters and gave them to the fidayeens. A-5 took the fidayeens to the railway station, from where they took a taxi to the Akshardham temple. The arms and ammunitions were brought from Kashmir by A-6.

Concurrent findings of the courts below

43. It was further submitted by the learned senior counsel for the prosecution that the Special Court (POTA) as well as the Division Bench of the High Court, after proper appreciation and analysis of evidence, gave concurrent findings of fact and thus the conviction and the sentences ordered by the courts below ought to be upheld.

44. The learned senior counsel for the prosecution thus submits that it has proved beyond reasonable doubt that the accused persons were involved in the conspiracy for the attack on the Akshardham temple and the sentences meted out to them by the Special Court (POTA) and confirmed by the High Court must be upheld by this Court as the concurrent findings of fact recorded on the charges framed against the accused persons does not warrant any interference by this Court.

Contentions on behalf of A-2 & A-4 and A-3 & A-5.

45. We will now examine the contentions urged on behalf of A-2 and A-4 who are represented by learned senior counsel, Mr. K.T.S Tulsi and thereafter A-3 and A-5, who are represented by learned senior counsel, Mr. Amarendra Sharan. Subsequently, the contentions urged on behalf of A-6 who is represented by learned counsel, Ms. Kamini Jaiswal will be dealt with. The contentions will be dealt with topic wise. That the Sanction required under Section 50 of POTA was not obtained in a proper manner.

46. Section 50 of POTA provides that "no court shall take cognizance of any offence under the Act without the previous sanction of the Central Government or as the case may be by the State Government." The prosecution has relied on the testimony of Kuldeep Chand Kapoor (PW-88) to prove that the sanction was granted in accordance with the law.

It was contended by the learned counsel for A-6 that the perusal of the statement of PW-88 would show that all the documents pertaining to the investigation were not placed before the sanctioning authority and it was only on the approval of the Minister that the sanction was granted. The sanction was granted without due application of mind. Thus the said sanction is not a proper previous sanction, on the basis of which the court could have taken cognizance of the offences. Evidentiary value of confessions:

47. All the three learned counsel have similar submissions with respect to the reliance placed by the courts below on the confessional statements made by the accused persons to hold that the accused persons are guilty of the offences they are charged with. They submitted that the concurrent findings of fact upholding the conviction of the accused persons on the basis of their confessional statements is erroneous, keeping in mind that there is no admissible or reliable evidence on record which connect them with the offences.

It is contended by both the learned senior counsel Mr. K.T.S. Tulsi and Mr. A. Sharan on behalf of A-2 and A- 4 and A-3 and A-5 respectively, that the prosecution had not complied with the statutory provisions under Section 32(5) of POTA, though they produced the accused persons before the learned CJM PW-99, within 48 hours as provided under Section 32(4) of POTA. It is contended that after recording their statements, CJM (PW-99) failed to discharge the vital obligation of sending them to judicial custody and thus, committed a grave error in remanding them back to police custody which was a clear violation of Section 32(5) of POTA and Article 20(3) of the Constitution. It was submitted that the Division Bench of the High Court had erroneously made an observation in the impugned judgment in this regard with reference to Section 32(5) of POTA, stating that the

Chief Judicial Magistrate has the power to send a person to a judicial custody only when he complains of ill treatment and torture by the police. The aforesaid finding is contrary to the law laid down by this Court in NCT v. Navjot Sandhu.13 (2005) 11 SCC 600

48. Further, the learned senior counsel placed reliance on the deposition of PW-99 to contend that it leaves no manner of doubt that he was neither mindful of his obligations under Section 32 of POTA nor did he make any enquiry regarding fear or torture likely to have been faced by the accused persons while making their confessional statements. On the contrary, he mechanically sent the accused persons back to police custody after recording their statements. It was further submitted that the CJM had failed to perform the most important duty of informing himself about the surrounding circumstances for making the confessional statements by the accused. Remanding the accused persons to judicial custody has been considered as the most significant safeguard and protection against torture by police, which was thrown to the wind by the CJM, thereby he had violated the fundamental rights guaranteed to the accused persons under Articles 20(3) and 21 of the Constitution. It was further contended by the learned senior counsel that there was a failure on the part of the courts below in not considering the evidence of doctors who work in Government Hospitals and who deposed in the case on behalf of the accused persons that A-2 to A-6 had complained of having received severe beating by the police prior to recording the confessional statements. The said evidence is clear from the depositions of DW- 2(Ex.731), DW-4(Ex.736), DW-5(Ex.737) and DW- 7(Ex.744). From the evidence of DW-2, it is revealed that the X-ray plates and case papers of A-4 were found missing and from the aforesaid evidence, the only conclusion that can be drawn is that once the accused persons had complained of having received severe beatings by the police prior to their making of their confessional statements, the credibility of such confessions became doubtful as the same had not been made voluntarily before PW-78 by them. Therefore, it had been urged that neither the Special Court (POTA) nor the Division Bench of the High Court should have placed reliance upon the said confessional statements to record the finding of guilt against the accused persons. The courts below should have considered that there was a statutory obligation upon the prosecution not to suppress any evidence or document on record which indicates the innocence of the accused persons. Thus, in the light of evidence of DW-2, the conduct of the prosecution in the facts and circumstances of the case becomes unjustified. The learned senior counsel in support of the said contention placed reliance upon the decision of this Court in the case of Sidhartha Vashisht v. State (NCT of Delhi)14.

49. Further, the learned senior counsel on behalf of the accused persons contended that there were serious infirmities with regard to the manner in which the alleged confessional statements of the accused persons (2010) 6 SCC 1 were recorded without sufficient time being given for reflection, which was in violation of the principle laid down by this court in the cases of Ranjit Singh @ Jita & Ors. v. State of Punjab15, Navjot Sandhu case (supra) and State of Rajasthan v. Ajit Singh & Ors.16. It was further urged that the courts below had failed to take into consideration the element of fear of further torture by the police, in the minds of the accused persons which was bound to be present, especially when their confessional statements were recorded by PW-78 in his office without them being assured of being sent to judicial custody immediately after making their statements. These above important facts had certainly vitiated the confessional statements made by the accused persons, making them highly unreliable and unnatural. Therefore, the courts below should not have

placed reliance on the same to (2002) 8 SCC 73 (2008) 1 SCC 601 record the finding of guilt against the accused persons. The remaining evidence on record placed on behalf of the prosecution, does not establish even remotely that they were party to any of the material ingredients of the conspiracy of the attack on Akshardham temple. In support of the said contention, the learned senior counsel invited our attention to concurrent findings of fact of the courts below contending that the same are liable to be set aside as they have relied solely upon the confessional statements made by the accused persons while upholding their conviction. The courts below had gravely erred in not considering the very important legal aspect of the matter, that a trial court cannot begin by examining the confessional statements of the accused persons to convict them. It was contended that it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of other evidence, only then, the court must turn to the confessions in order to be assured as to the conclusion of guilt, which the judicial mind is about to reach, based on the said other evidence. In support of the aforesaid legal submissions he had placed reliance upon the judgment of this Court in the case of Haricharan Kurmi v. State of Bihar17 and the Navjot Sandhu case(supra).

50. Further elaborating their submissions, the learned senior counsel urged that the confession of an accused person has been regarded by this Court as fragile and feeble evidence which can only be used to support other evidence. In support of this contention he relied upon the judgment of this Court in the Prakash Kumar v. State of Gujarat18. The approach of the courts below to record the finding of guilt against the accused persons, should be to first marshall evidence against the accused persons excluding their (1964)6 SCR 623 (2007) 4 SCC 266 confessions and see whether conviction can safely be based upon it.

Retracted confessions.

51. The learned senior counsel Mr. A. Sharan appearing for A-3 and A-5 had further contended that the courts below had failed to take into consideration that the confessional statements made by the accused persons had been retracted at the earliest possible opportunity available to them. The evidence of the doctors that the sustained fracture being found on the bodies of the accused persons by the examining doctor and subsequent disappearance of the X-ray plates from the records, raised a series of doubts regarding the manner in which the confessional statements were recorded. In support of this contention the learned senior counsel placed reliance upon the decision of this Court in the case of Chandrakant Chimanlal Desai v. State of Gujarat19 . The learned senior counsel further contended that in the present set of facts, there was sufficient proof that the confessional statements were not made voluntarily and in the light of the above, the courts below were duty bound to corroborate the confessional statements with other independent evidence to test their veracity. Learned senior counsel Mr. K.T.S Tulsi representing A- 2 and A-4 and learned counsel, Ms. Kamini Jaiswal representing A-6 have reiterated the same and submitted that there had to be independent evidence corroborating the confessional statements of the accused persons if they had been retracted. Evidence of accomplices.

52. The learned senior counsel Mr. K.T.S Tulsi submitted that the learned senior counsel for the (1992) 1 SCC 473 prosecution had placed reliance on the evidence of PW- 50 as substantial evidence

against the accused persons. He contended that a careful reading of the evidence of PW-50 showed that the said witness had clearly admitted that he was an accomplice in as much as he admitted to having contributed money, even when A-3 informed them that the money was to be used for taking revenge. It was further contended that a court should not rely on the evidence of an accomplice to record finding of guilt against the accused persons and to buttress the said submission, he placed reliance upon the judgment of this Court in the case of Mrinal Das v. State of Tripura20. In support of the said submission, he had further placed reliance upon the judgment of this Court in the case of Bhiva Doulu Patil v. State of Maharashtra21 (2011) 9 SCC 479 AIR 1963 SC 599 Further elaborating his submission in this regard, he placed reliance upon another judgment of this Court in the case of Mohd. Husain Umar Kochra v. K.S. Dalipsinghji22, wherein this Court had further stated with regard to the combined effect of Sections 133 and 114, Illustration (b) of the Indian Evidence Act, 1872 and held that corroboration must connect the accused persons with the crime.

53. The learned senior counsel relied upon the case of Sarwan Singh v. State of Pubjab23, wherein this Court has laid down the legal principle that the courts are naturally reluctant to act on such tainted evidence unless it is corroborated and that independent corroboration should support the main story disclosed by the approver apart from a finding that the approver is a reliable witness. The accomplice evidence should satisfy a double test, i.e. he is a reliable witness (1969) 3 SCC 429 AIR 1957 SC 637 and that there is sufficient corroboration by other evidence to his statement. This test is special to the case of weak or tainted evidence like that of the approver.

In support of the said principle, he further placed reliance on the cases of Ravinder Singh v. State of Haryana24, Abdul Sattar v. U.T. Chandigarh25, Narayan Chetanram Chaudhary v. State of Maharashtra26, Sheshanna Bhumanna Yadav v. State of Maharashtra27 and Bhuboni Sahu v. R.28.

54. The learned senior counsel specifically referred to the case of K. Hashim v. State of Tamil Nadu29 wherein this Court, after adverting to Sections 133 and 114, Illustration (b) of the Evidence Act has held that the said provisions strike a note of warning (1975) 3 SCC 742 (1985) Suppl (1) SCC 599 (2000) 8 SCC 457 (1970) 2 SCC 122 (1948-49) 76 IA 147 (2005) 1 SCC 237 cautioning the court that an accomplice does not generally deserve to be believed.

55. He then drew our attention to an unreported judgment of this Court delivered by one of us, A.K. Patnaik, J. in the case of State of Rajasthan v. Balveer (Crl. Appeal No. 942 of 2006 decided on 31.10.2013) wherein this Court observed, while referring to illustration (b) of Section 114 of the Evidence Act, and observed that the Court will presume that an accomplice is unworthy of credit unless he is corroborated by material particulars.

56. It was further urged that the learned senior counsel on behalf of the prosecution had strongly relied on the statement of PW-51, whereas the aforesaid deposition was virtually rendered useless during cross examination before the Special Court (POTA). The version given by the said witness in his cross examination was more credible, natural and casts a serious doubt about the manner in which the evidence was sought to be fabricated by police officer, D.G Vanzara whose entrusting of the case to the Crime Branch on 28.08.2003 suddenly resulted in feverish activity, whereupon the accused persons were arrested and their confessional statements were recorded. The learned senior

counsel for the prosecution had relied upon the deposition of PW-52 who had stated in his evidence about sending money through A-3, as well as the weapons for the carnage and had also identified A-2, A-4 and A-5 before the Court. The learned senior counsel, Mr. K.T.S Tulsi submitted that the said statement of this witness was exculpatory as he had stated that no work was assigned to him. Therefore, such statement can neither be considered to be reliable nor worthy of acceptance without corroboration in material particulars from independent sources. In view of the test laid down by this court in a catena of judgments referred to supra, upon which strong reliance had been placed by the learned counsel based on the presumption contained in illustration (b) of Section 114 read with section 133 of the Indian Evidence Act, it was submitted that provisions of the Evidence Act are of no avail to the prosecution case. Letters purportedly recovered from the pockets of the fidayeens cannot be relied upon:

57. Both the learned senior counsel, Mr. K.T.S Tulsi and Mr. A. Sharan contended that it was not possible to believe that the letters were recovered from the pockets of the two fidayeens, mainly on the evidence from the post mortem of the dead bodies of the fidayeens which showed that the bodies had 46 and 60 external injuries, respectively, due to multiple bullet shots and the panchnama of the clothes of the assailants clearly demonstrated that their clothes were full of blood and mud and therefore, it was highly improbable and difficult to believe that the alleged letters were recovered in a perfect condition from the clothes of the fidayeens. The High Court had failed to reconcile the fact of absence of bullet holes on the letters with the presence of multiple bullet holes on the pockets of the trousers, from which the letters were purported to have been recovered. With regard to the letters being in a perfect condition, the High Court merely observed that “Truth is stranger than fiction” and it was submitted that the courts below ought not to have relied upon such a document to record their findings of guilt against the accused persons on the basis of the same.

58. The learned senior counsel also referred to various discrepancies in the statements of the two important witnesses in relation to the letters, i.e of PW-91, Lt. Col. Jayadeep Lamba, who, according to the prosecution, had recovered them from the pockets of the trousers of the fidayeens, but whose statement was not recorded under Section 161 CrPC and that of PW- 121, the translator of the letters. It was claimed by the prosecution that PW-91 was not examined by the investigation officer under Section 161 CrPC since the NSG had refused to grant permission to its personnel to disclose any information regarding their operation with respect to the attack. The prosecution had placed reliance upon a letter dated 11.02.2002 by the Ministry of Home Affairs to prove the same. The learned senior counsel contended that the prosecution had however, relied upon the statement made by this witness, PW-91 before the Special Court (POTA), who was a chargesheet witness although his statement under Section 161 CrPC was never recorded and thus, the accused persons had been naturally deprived of an opportunity to effectively cross-examine the witness and thereby they were very much prejudiced.

59. The learned senior counsel also contended that the claim of the prosecution that the letters were found in a pouch which was present in the pocket of the trousers of the fidayeens cannot be believed as there is no evidence to support the same and on the contrary, the receipt voucher of the articles collected from the fidayeens only listed two ‘handwritten letters in Urdu’ and there was no mention of the pouch whatsoever.

Delay in recording statements of accomplices and confessional statements of the accused persons.

60. The learned senior counsel, Mr. A. Sharan had submitted that the preliminary investigation of the case was initially carried out by the police from 27.09.2002 and thereafter, the investigation was handed over to the ATS on 03.10.2002. After the matter was investigated for a year, it was transferred to the Crime Branch on 28.08.2003 and surprisingly, on the very next day i.e, 29.08.2003, all the accused persons, except A-6 were arrested and on 30.08.2003, the provisions of POTA were invoked by the Crime Branch against them.

61. It was further contended by him that this made the prosecution story highly improbable and the fact that the accused persons were apprehended a year after the incident made the conduct of the prosecution highly doubtful and totally unreliable.

It was further contended by him that it is a well settled principle of law that there should not be an inordinate delay in the recording of the statements of the accomplices by the police. PW-50, PW-51, PW-52 and PW-56 had stated in their depositions that their statements were recorded around the 7th or 8th month of 2003. Thus, this inordinate delay leads one to draw an adverse inference and also leads one to believe that the police had sufficient time to fabricate the story and rope in the accused persons falsely in this case. Reliance was placed by the learned senior counsel on the case of State of Andhra Pradesh v. S.Swarnalatha & Ors.30, wherein even 26 days delay in recording statements of prosecution witnesses was not allowed by this Court. The learned senior counsel also referred to the case of Jagjit Singh @ Jagga v. State of Punjab31 in support of the above position of law. It was contended that the delay in recording the statements of the accused and witnesses by police and reliance placed upon the same by the courts below vitiated the finding recorded that the accused persons are guilty, and the same is liable to be set aside. There was delay in recording the statement of PW-52 and PW-56 which is evident from the record that PW-52 had stated that his statement was recorded on 07.09.2003, while PW-56 stated that his statement was recorded in the 7th or 8th month of 2003. Thus, there (2009) 8 SCC 383 (2005) 3 SCC 689 was a delay of almost of a year in recording the statement of the aforesaid witness by the Police. Failure of prosecution to establish a nexus between the accused persons and the crime as well as link between the fidayeens and the accused persons.

62. The learned senior counsel Mr. A. Sharan contended that for the prosecution to invoke common intention under Section 34 IPC or common object under Section 149 IPC, it is required to establish beyond reasonable doubt the connection between the accused persons and the common intention/object of the crime with which they are charged. In this regard, it was submitted that all the main prosecution witnesses, i.e PW-50, PW-51, PW-52 and PW-56 upon which strong reliance had been placed by the learned senior counsel on behalf of the prosecution, had failed to show and establish the nexus either with common intention or object, or the cumulative effect of the proved circumstances, to establish any connection between the accused persons and the conspiracy of the attack on Akshardham. Further, it was contended that the courts below had grossly erred in placing strong reliance upon the evidence of above prosecution witnesses to hold that there was a link or connection between the fidayeens and the accused persons, and that it was on the failure of the prosecution to establish such connection, that they had been subsequently roped in.

63. Further, it was contended that even from the confessional statement of A-6, wherein he had narrated as to how the two fidayeens were brought from Jammu & Kashmir to Gujarat, there was no mention of A-1 to A-

5. Therefore, the prosecution had failed to establish the connection between A-6 and A-2, A-4, A-3 and A-5 and this important aspect of the matter had not been considered at all by the courts below while recording the finding of guilt against the accused persons and the same cannot be allowed to sustain. Defence Witnesses to be given same weightage as prosecution witnesses.

64. The learned senior counsel also contended that the courts below should have given same weightage to the evidence of the defence witnesses as that of the prosecution witnesses and in support of this contention, he placed reliance upon the cases of Munshi Prasad v. State of Bihar32, I.C.D.S. Ltd. v. Beena Shabeer & Anr.33 and State of Uttar Pradesh v. Babu Ram34 Suppression of material witness draws an adverse inference against the prosecution.

65. It was contended by the learned senior counsel that PW-126 stated that his senior officer D.G Vanzara, had orally told him that PW-50 was aware of (2002) 1 SCC 351 (2002) 2 SCC 426 (2000) 4 SCC 515 the details of the conspiracy, but D.G. Vanzara was never produced as a prosecution witness. The case is the same with Brig. Raj Sitapati, who was also a witness to the recovery of the two Urdu letters, and this material witness had also been conveniently brushed aside both by the police and the prosecution. Reliance was placed by the learned senior counsel in this regard on Tulsiram Kanu v. The State35, Ram Prasad & Ors. v. State of U.P.36 and State of U.P. v. Punni & Ors.37 Alternative stories put forth by the prosecution.

66. Further, it was contended by the learned senior counsel Mr. A Sharan that alternative stories had been put forth by the prosecution. It was borne out from the confessional statement of A-4 that the two fidayeens, i.e. Doctor 1 (Murtuza/ Hafiz Yasir) & AIR 1954 SC 1 (1974) 3 SCC 388 (2008) 11 SCC 153 Doctor 2 (Ashraf/Mohd. Faruk) belonged to Lahore and Rawalpindi respectively. As per the confessional statement of A-6, the names of the two fidayeens were Sakil and Abdullah, who belonged to Jammu and Kashmir and had travelled along with A-6 to Gujarat. It was observed from the deposition of Maj. Jaydeep Lamba (PW-91) that it was written in the two Urdu letters that the two fidayeens were from 'Atok' region of Pakistan. It was submitted that the prosecution had come forth with three different versions insofar as the origin of the two fidayeens was concerned. Even the prosecution was not certain as to which of the three versions was true. It was submitted that therefore, in the presence of these major discrepancies in the prosecution story, and the non-reliability of the confessional statements of the accused persons, they were entitled to acquittal. Contentions on behalf of A-6.

67. The contentions urged by learned counsel Ms.Kamini Jaiswal on behalf of A-6 will now be adverted to as he was arrested later and his situation is different from that of the other accused persons.

Arrest of A-6 in an offence investigated by Jammu and Kashmir police.

68. It is contented that as per the case of the prosecution, A-6 was under arrest at the Navgam police station Kashmir, in relation to offence in FIR no. 130 of 2003 under Sections 120-B and 153-A of Ranbir Penal Code(RPC) and Sections 7 and 27 of the Arms Act. It was also the case of the prosecution that a fax message was sent by the IGP Kashmir to ATS, Gujarat on 31.08.2003, and that pursuant to the receipt of the fax, the Transfer Warrant was sought from the Special Designated Court (POTA), Ahmedabad and on that basis, the Application for Remand was made to the Chief Judicial Magistrate, Badgaum. A-6 was brought to Ahmedabad on 12.09.2003 and was arrested by the Gujarat police in CR No. 314 of 2002 at 9:30 P.M. Confessional statement of A-6 is not admissible against him.

69. It was further submitted that the entire case of the prosecution rested solely on the alleged confession of A-6 which was recorded on 05.10.2003 (Exs.461-462), while he was in police custody. It had been submitted that there were several violations of the mandatory requirements of Section 32 of POTA while recording his confessional statement. Learned senior counsel Mr. K.T.S Tulsi, appearing on behalf of A-2 and A-4 and Mr. A. Sharan learned senior counsel appearing on behalf of A-3 and A-5 had also advanced arguments in detail as to how the confessional statements of the accused persons were not recorded in accordance with the mandatory procedural safeguards under Section 32 of POTA and the learned counsel for A-6, Ms.Kamini Jaiswal had alluded to them with respect to A-6 also. Hence, we will not reiterate the same in this portion of the judgment. That the other evidence produced by the prosecution also does not point to the guilt of A-6.

70. The learned counsel submitted that during the remand of A-6, the investigation was carried on by V.D Vanar (PW-112), at Bareilly and Ahmedabad. He had drawn panchnama of a PCO from where the accused had allegedly made telephone calls, but though he stated that a panchnama was drawn at Bareilly, no such panchnama had been brought on record. He was also said to have recorded the statement of PW-69, Minhaas Ashfaq Ahmed who had stated that A-6 got the ambassador car repaired at Das Motors and also the statement of one Dr. Sudhanshu Arya (PW-93) who had stated that the accused came to him for treatment of his child. However, it is contented that none of these incidents in any way connected the accused to the attack on the Akshardham temple.

Some other evidence which the prosecution sought to rely on to establish the guilt of A-6 were the deposition of the owner of Gulshan Guest House, Yusuf Gandhi, (PW-57: Ex.328), Panchnama of specimen signature of A-6 in the register of the guest house (Ex. 683), recovery of the ambassador car from the custody of the J & K Police (Ex.672) and the report of the RTO regarding the ownership of the said ambassador car. (Ex.672).

It was submitted that the register of the Guest House, which was seized around 27.08.2002 and 28.08.2002, was never sealed, and that the pointing out of the signature by A-6 while being in custody of the police was not admissible in evidence.

It was further submitted that with regard to the ownership of the ambassador car, the report of the RTO (Ex.672), showed that it was registered in the name of Abdul Majid Rathor. The prosecution had also not been able to bring anything on record to connect A-6 with the said owner or with the car, or of the case with the attack at Akshardham temple.

That there had also been a violation of Section 51 of POTA.

71. It was contended by the learned counsel that Section 51 of POTA, which starts with the non-obstante clause, makes it mandatory that the investigation under POTA be carried out only by the officer of the rank of Deputy Superintendent of Police or a police officer of an equivalent rank. It was argued that the investigation in the present case was mostly carried out by the officer of the rank of a Police Inspector. The POTA, unlike CrPC does not contain any provision where the powers of the I.O could be delegated to any other person. Thus, it was contented that any investigation, if carried out by any officer below the rank of ACP is illegal and evidence, if any, collected during such investigation could not be looked at. Findings of this Court:

72. We have heard the rival factual and legal contentions raised at length for a number of days and perused in detail the written submissions on record produced by the learned counsel representing both the parties. We have also perused the material objects and evidence on record available with this Court in connection with this case. The following points that would arise in these appeals for the purpose of adjudication of the appeals by this Court are:

1. Whether sanction given by the Gujarat State Government dated 21.11.2003 in this case is in compliance with Section 50 of POTA?

2. Whether the confessional statements of the accused persons were recorded as per the procedure laid down in Section 32 of POTA, CrPC and the principles laid down by this Court?

3. Whether the statements of the accomplices disclosing evidence of the offences, and the connection of the accused persons to the offence, can be relied upon to corroborate their confessional statements?

4. Whether the two letters in Urdu presented as Ex.658 which have been translated in English vide Ex.775, were found from the pockets of the trousers of the fidayeens who were killed in the attack?

5. Whether the letters allegedly found from the pockets of the trousers of the fidayeens were written by A-4?

6. Whether there is any evidence apart from the retracted confessional statement of A-6 which connects him to the offence?

7. Whether there is any independent evidence on record apart from the confessional statements recorded by the police, of the accused persons and the accomplices, to hold them guilty of the crime?

8. Whether A-2 to A-6 in this case are guilty of criminal conspiracy under Section 120-B IPC?

9. Whether the concurrent findings of the courts below on the guilt of the accused persons can be interfered with by this court in exercise of its appellate jurisdiction under Article 136 of the Constitution?

10. What Order?

We will now proceed to answer each point in detail.

73. Justice Vivian Bose while dealing with the incipient constitution in the case of State of West Bengal v. Anwar Ali Sarkar38, made an observation which is very pertinent to be quoted herein, which reads thus:

> "90. I find it impossible to read these portions of the Constitution without regard to the background out of which they arose. I cannot blot out their history and omit from consideration the brooding spirit of the times. They are not just dull, lifeless words static and hide-bound as in some mummi-fied manuscript, but, living flames intended to give life to a great nation and order its being, tongues of dynamic fire, potent to mould the future as well as guide the present. The Constitution must, in my judgment, be left elastic enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs. I feel therefore that in each case judges must look straight into the heart of things and regard the facts of each case concretely much as a jury would do; and yet, not quite as a jury, for we are considering here a matter of law and not just AIR 1952 SC 75 one of fact: Do these "laws" which have been called in question offend a still greater law before which even they must bow? " (emphasis laid by this Court) POTA was repealed in 2004. Yet, the trials, its implementation has entailed, are continuing till date.

POTA was repealed for the gross violation of human rights it caused to the accused persons due to abuse of power by the police. This is an important aspect to be kept in mind while deciding this case and hence, it was pertinent to mention this in the beginning to say that we are wary of the abuse the provisions of this Act might bring. And we are conscious of it. Answer to point no.1

74. It was contended by Ms. Kamini Jaiswal, the learned counsel for A-6 that a perusal of the statement of PW-88 would show that not all documents pertaining to the investigation were placed before the sanctioning authority and that it was only on the approval of the Home Minister of the State of Gujarat to prosecute the accused, that sanction as required under Section 50 of POTA was granted in this case. PW-88 Kuldeep Chand Kapoor IAS, Principal Secretary, Home Department, had stated in his statement (Ex.497) recorded before the Special Court (POTA) as under:

> "I agree that the last paragraph of the letter of ACP (Ex. 502) contains the details of papers submitted to the Home Department and these are the only papers that had been received by me.
>
> I am producing Patrak- A and B details of arrests of all the six accused. Patrak- A, Patrak – B and details of the accused arrested are being given respectively Ex. 503, Ex. 505 and Ex. 506.

It is true that while granting the sanctions against all the six accused to be prosecuted, I had perused Patrak- A and B other two Patraks.

(q). Did you notice while granting sanction against the accused that no explosives substance has been seized from any of the accused?

(a). Explosive substances and firearms were found at the site.

I agree that from these six accused, no explosive substance had been recovered. I do not know that A- summary had been filed earlier.

(q). Whether there were any papers of investigation by Crime Branch, Ahmedabad conducted at Jammu and Kashmir?

(a). As far as I know, there was no investigation by Crime Branch, Ahmedabad at Jammu and Kashmir Police. Therefore, I cannot say whether there were no papers to my knowledge to that effect and it was the police of Jammu and Kashmir who had intimated the Gujarat Police about the whereabouts of Chand Khan from Jammu and Kashmir Police by following due process of law.

I was not supplied the papers of investigation carried out by Jammu and Kashmir police. Therefore, I cannot say whether there were any such papers or not. Witness volunteers that in my opinion those papers were not relevant for me to come to the conclusion for permitting the prosecution to prosecute against the accused. I have no idea whether the accused Adam Ajmeri and Adbul Qayum a Mufti had been taken to Jammu and Kashmir for investigation by Crime Branch, Ahmedabad. Witness volunteers that as Crime Branch would not need to take my permission for taking accused for Investigation of State of Jammu and Kashmir, I am not aware.

I had verified the case papers and satisfied that section 52 of POTA had been complied with completely.

There were no papers suggesting compliance of section 52 of POTA in the bunch of papers sent to me. According to me, those papers were not relevant for my purpose as compliance was to be observed by the I.O. and I was not investigating the case. I do not agree that the entire Investigation had not been done by the competent officer of the level of ACP.

I do not agree to the suggestion that neither Minister nor I applied mind while granting sanction nor officer below also applied mind for such a grant." (emphasis laid by this Court) (translation extracted from the Additional documents submitted on behalf of State of Gujarat) PW-88, in his deposition had stated that PW-126 had forwarded to him the relevant documents as aforementioned for the purpose of deciding whether it was a fit case for granting sanction under Section 50 of POTA. He had reiterated in his deposition that he had perused all these documents, especially Patrak-A,

which contained the details of the two Urdu letters and the opinion of the handwriting expert from the FSL and Patrak B, the contents of which were not mentioned in his statement, and also the details of the arrest of the accused persons. But glaringly, PW-88 had stated in his deposition that he had not enquired about whether there were any investigation papers regarding the involvement of A-6 in the crime by the Crime Branch, Ahmedabad, at Jammu and Kashmir. This aspect is important as he had stated that he had no knowledge of whether the custody of A-6 was taken in accordance with due process of law. He further stated that he had verified the case papers and had satisfied himself that Section 52 of POTA had been complied with completely but in the very next sentence, he stated:

> "There were no papers suggesting compliance of Section 52 of POTA in the bunch of papers sent to me. According to me, those papers were not relevant for my purpose as compliance was to be observed by the I.O and I was not investigating the case." (translation extracted from the Additional documents submitted on behalf of State of Gujarat) Thus, it is clear from the statement of PW-88 that he was an important part of the process of granting sanction under POTA and could throw light on the aspects taken into consideration while granting sanction. He was the only prosecution witness who was examined by the court in this regard and it is apparent that he had not applied his mind for the same, which is clearly visible from the inherent contradictions in his statement as shown above.

75. It has been held by this Court that all the relevant documents required for granting sanction shall be presented before the sanctioning authority so that the sanction can be granted on the basis of relevant material information and documents collected during the course of investigation with respect to the crime. In the case of Rambhai Nathabhai Gadhvi & Ors. v. State of Gujarat39, this Court, while examining a similar sanction Order as provided under Section 15 of TADA (repealed), has held as under:

> "8. Taking cognizance is the act which the Designated Court has to perform and granting sanction is an act which the sanctioning authority has to perform. Latter is a condition precedent for the former. Sanction contemplated in the sub-section is the permission to prosecute a particular person for the offence or offences under TADA. We must bear in mind that sanction is not granted to the Designated Court to take cognizance of the offence, but it is granted to the prosecuting agency to approach the court concerned for enabling it to take cognizance of the offence and to proceed to trial against the persons arraigned in the report. Thus a valid sanction is sine qua non for enabling the prosecuting agency to approach the court in order to enable the court to take cognizance of the offence under TADA as disclosed in the report. The corollary is that, if there was no valid sanction the Designated Court gets no jurisdiction to try a case against any person mentioned in the report as the court is forbidden from taking cognizance of the offence without such sanction. If the Designated Court has taken cognizance of the offence without a valid sanction, such action is without jurisdiction and any proceedings (1997) 7 SCC 744 adopted thereunder will also be without jurisdiction.

9. In this case the prosecution relies on Ext. 63, an order issued by the Director General of Police, Ahmedabad, on 3-9-1993, as the sanction under Section 20-A(2) of TADA. We are reproducing Ext. 63 below:

"Sr. No. J-1/1909/1/Khambalia 55/93 Director General of Police, Dated 3-9-1993 Gujarat State, Ahmedabad.

Perused: (1) FIR in respect of offence Registered No. 55/93 at Khambalia Police Station 25(1)(b)(a)(b) of Arms Act and Sections 3, 4 and 5 of the TADA.

(2) Application sent by DSP Jamnagar vide his letter No. RB/D/122/1993/1820 dated 9-8- 1993.

Having considered the FIR in respect of offence Registered No. 55/93 at Khambalia Police Station District Jamnagar under Section 25(1)(b)(a)(b) of Arms Act and Sections 3, 4 and 5 of TADA and letter No. RB/D/122/1993/1820 of DSP dated 9-8-1993 seeking permission to apply the provisions of TADA carefully, I A.K. Tandon, Director General of Police, Gujarat State, Ahmedabad under the powers conferred under the amended provisions of TADA (1993) Section 20-A(2) give permission to add Sections 3, 4 and 5 of TADA.

A.K. Tandon Director General of Police Ahmedabad Gujarat"

10. Apparently Ext. 63 makes reference only to two documents which alone were available for the Director General of Police to consider whether sanction should be accorded or not. One is the FIR in this case and the other is the letter sent by the Superintendent seeking permission or sanction. No doubt in that letter to the Director General of Police the Superintendent of Police had narrated the facts of the case. But we may observe that he did not send any other document relating to the investigation or copy thereof along with the application. Nor did the Director General of Police call for any document for his perusal. All that the DGP had before him to consider the question of granting sanction to prosecute were the copy of the FIR and the application containing some skeleton facts. There is nothing on record to show that the Director General of Police called the Superintendent of Police at least for a discussion with him." (emphasis laid by this Court) It was further held by this Court in the case of Anirudhsinhji Karansinhji Jadeja and Anr. v. State of Gujarat40, as under:

> " 15. The aforesaid is however not all. Even if it be accepted that as an additional safeguard against arbitrary exercise of the drastic provisions, the State Government had provided by administrative instructions an additional (1995) 5 SCC 302 safeguard whereunder the DSP was required to obtain the sanction/consent of the State Government, we are of the view that in the present case the same was given by the State Government without proper application of mind.
>
> We have taken this view because the sanction/consent was given by the Government merely on the basis of the fax message dated 17-3-1995 of the DSP. The reason for our saying so is that though there is no record a fax message of Deputy Director General

> of Police also, which is dated 18-3-1995, the sanction/consent order has mentioned above the fax message of the DSP only. Now, no doubt the message of the DSP is quite exhaustive, as would appear from that message which has been quoted above in full, we are inclined to think that before agreeing to the use of harsh provisions of TADA against the appellants, the Government ought to have taken some steps to satisfy itself whether what had been stated by the DSP was borne out by the records, which apparently had not been called for in the present case, as the sanction/consent was given post-haste on 18-3-1995, i.e., the very next day of the message of the DSP. It seems the DSP emphasised the political angle in the first two paragraphs of his message. The dispute or motive stated was that the Darbars were annoyed because they were refused loan and not because of any political rivalry. In the third paragraph there is reference to statements of accused after arrest which would ordinarily be inadmissible in evidence. Reference to avoid incident of the past does not provide any nexus. The State Government gave the sanction without even discussing the matter with the investigating officer and without assessing the situation independently. All these show lack of proper and due application of mind by the State Government while giving sanction/consent." (emphasis laid by this Court) It was the Deputy Secretary, Law and Order, Mr. J.R Rajput who had signed the document of sanction issued in the name of the Governor (Ex.498). However, he was not examined by the Court. On the other hand, PW-88, the Principal Secretary was examined. Therefore, we intend to examine the statement of PW-88, since he formed the only link in the Home Ministry of State of Gujarat and could enlighten us with the facts and information which were taken into consideration by him while granting sanction.

While deposing before the Special Court (POTA), PW-88 stated that he had not discussed anything with the Home Minister regarding the grant of sanction and the Minister had simply signed the proposed note as a mark of approval. PW-88 further stated that he had not discussed anything with the I.O about granting sanction in the present case. However, the Special Court (POTA) erroneously justified the granting of sanction on the ground that the learned counsel for A- 2 and A-4 before the Special Court (POTA), Mr. R.K. Shah, did not insist on examination of the internal note and at no stage was such a request made in writing.

76. In the case of Mansukhlal Vithaldas Chauhan v. State of Gujarat41, it has been held by this Court as under:

> "19. Since the validity of "sanction" depends on the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation, it necessarily follows that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any quarter nor should any external force be acting (1997) 7 SCC 622 upon it to take a decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous

> consideration. If it is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be bad for the reason that the discretion of the authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution." (emphasis laid by this Court)

77. However, the present case does not show that the sanctioning authority had applied its mind to the satisfaction as to whether the present case required granting of sanction. The prosecution had failed to prove that the sanction was granted by the government either on the basis of an informed decision or on the basis of an independent analysis of fact on consultation with the Investigating Officer. This would go to show clear non-application of mind by the Home Minister in granting sanction. Therefore, the sanction is void on the ground of non- application of mind and is not a legal and valid sanction under Section 50 of POTA.

Answer to Point no. 2

78. To begin with, the provisions for recording confessional statements can be found in CrPC under Section 164 which reads as:

> "164. Recording of confessions and statements. (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:
>
> Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:
>
> Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.
>
> (2)The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him ; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily. (3)If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.
>
> (4)Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person

making the confession ; and the Magistrate shall make a memorandum at the foot of such record to the following effect: -

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him. (Signed) A. B.

Magistrate".

(5) Any statement (other than a confession) made under sub- section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case ; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried." However, caution against the use of confession statements made by accused persons before the police, is specifically provided in Section 162 of the CrPC, which reads as:

"162. Statements to police not to be signed: Use of statements in evidence. (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

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

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act.

Explanation.-An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact." The caution against the use of confessional statements of an accused given to police as incriminating evidence stems from Article 20(3) of the Constitution which provides that no person shall be compelled to be a witness against himself. However, POTA makes a departure from the above principle through Section 32 which reads as under:

> "32. Certain confessions made to police officers to be taken into consideration.- (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical or electronic device like cassettes, tapes or sound tracks from out of which sound or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or the rules made thereunder. (2) A police officer shall, before recording any confession made by a person under sub- section (1), explain to such person in writing that he is not bound to make a confession and that if he does so, it may be used against him: Provided that where such person prefers to remain silent, the police officer shall not compel or induce him to make any confession. (3) The confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes it.
>
> (4) The person from whom a confession has been recorded under sub-section (1), shall be produced before the Court of a Chief Metropolitan Magistrate or the Court of a Chief Judicial Magistrate along with the original statement of confession, written or recorded on mechanical or electronic device within forty- eight hours.

(5) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate, shall, record the statement, if any, made by the person so produced and get his signature or thumb impression and if there is any complaint of torture, such person shall be directed to be produced for medical examination before a Medical Officer not lower in rank than an Assistant Civil Surgeon and thereafter, he shall be sent to judicial custody." Since this Act makes a departure from the established criminal jurisprudence as well as the provisions of the Constitution, the constitutionality of the Act came to be challenged before this Court in the case of Peoples Union of Civil Liberties v. Union of India42. The Court upheld the constitutionality of the Act after taking into account all the provisions which seemingly violate the fundamental rights guaranteed under the Constitution. For the purpose of this case, we intend to record the finding of this court with respect to the provisions of Section 32. The relevant paragraphs of the case read as under: (2004) 9 SCC 580 "63. Concerning the validity and procedural difficulties that could arise during the process of recording confessions, the Petitioners submitted that there is no need to empower the police to record confession since the accused has to be produced before the Magistrate within forty-eight hours, in that case the magistrate himself could record the confession; that there is no justification for extended the time limit of forty eight hours

for producing the person before the Magistrate; that it is not clear in the Section whether the confession recorded by the police officer will have validity after Magistrate has recorded the fact of torture and has sent the accused for medical examination; that it is not clear as to whether both the confession before the police officer as well as confessional statement before the Magistrate shall be used in evidence; that the Magistrates cannot be used for mechanically putting seal of approval on the confessional statements by the police; that, therefore, the Section has to be nullified. Validity of this Section was defended by the learned Attorney General by forwarding the arguments that the provisions relating to the admissibility of confessional statements, which is similar to that of Section 32 in POTA was upheld in Kartar Singh case ; that the provisions of POTA are an improvement over TADA by virtue of enactment of Sections 32(3) to 32(5); that the general principles of law regarding the admissibility of a confessional statement is applicable under POTA; that the provision which entails the Magistrate to test and examine the voluntariness of a confession and complaint of torture is an additional safeguard and does not in any manner inject any constitutional infirmity; that there cannot be perennial distrust of the police; that Parliament has taken into account all the relevant factors in its totality and same is not unjust or unreasonable.

64. At the outset it has to be noted that Section 15 of TADA that was similar to this Section was upheld in Kartar Singh case (pp. 664-83 of SCC). While enacting this Section Parliament has taken into account all the guidelines, which were suggested by this Court in Kartar Singh case. Main allegation of the Petitioners is that there is no need to empower the police to record confession since the accused has to be produced before the Magistrate within forty-eight hours in which case the Magistrate himself could record the statement or confession. In the context of terrorism the need for making such a provision so as to enable Police officers to record the confession was explained and upheld by this Court in Kartar Singh case (p. 680 para 253 of SCC). We need not go into that question at this stage. If the recording of confession by police is found to be necessary by Parliament and if it is in tune with the scheme of law, then an additional safeguard under Sections 32(4) and (5) is a fortiori legal. In our considered opinion the provision that requires producing such a person before the Magistrate is an additional safeguard. It gives that person an opportunity to rethink over his confession. Moreover, the Magistrate's responsibility to record the statement and the enquiry about the torture and provision for subsequent medical treatment makes the provision safer. It will deter the police officers from obtaining a confession from an accused by subjecting him to torture. It is also worthwhile to note that an officer who is below the rank of a Superintendent of Police cannot record the confessional statement. It is a settled position that if a confession was forcibly extracted, it is a nullity in law. Non- inclusion of this obvious and settled principle does not make the Section invalid. (See: Kartar Singh case, p. 678, para 248 –49 of SCC). Ultimately, it is for the Court concerned to decide the admissibility of the confession statement. (See: Kartar Singh case p. 683, para 264 of SCC). Judicial wisdom will surely prevail over irregularity, if any, in the process of recording confessional statement. Therefore we are satisfied that the safeguards provided by the Act and under the law are adequate in the given circumstances and we don't think it is necessary to look more into this matter. Consequently we uphold the validity of Section 32." (emphasis laid by this Court)

79. The provisions of a Special Act prevail over the provisions of General Act. Since the constitutionality of the POTA was declared as valid by this Court, its provisions would prevail over

CrPC. However, considering the stringency of the provisions of POTA and the grave consequences that misuse of the Act might carry i.e, violation of right to life and personal liberty, we need to ensure that the guidelines laid down in the Act are rigorously observed while recording the confessional statements of the accused persons. We will examine herein the various mandatory provisions to be followed while recording the confessional statements and whether the same have been followed in the instant case.

80. The learned senior counsel appearing on behalf of A-2, A-3 and A-4 submitted that the mandatory provisions laid down in Section 32 were not followed by PW-78 Mr. Sanjaykumar Gadhvi while recording their confessional statements. It was argued by the learned senior counsel that Section 32(2) had not been complied with since the accused persons were not statutorily informed in writing that they were not bound to make confessional statements and their statements, if made, shall be used against them. The learned senior counsel on behalf of the prosecution, on the other hand contended that the statutory mandates had been complied with by the police.

We have perused the evidence on record in this aspect. We have found stark discrepancies in the manner in which the statements of the accomplices and those of the accused persons were recorded. While the statements of the accomplices in the present case, namely- PW-50, PW-51 and PW-52 were preceded by written records of cautions in the same document, the confessional statements of the accused persons do not show such caution. On the other hand, the intimation by the DCP Sanjaykumar Gadhvi (PW-78) appeared on a separate documents marked as separate Exhibits from the confessions. The same are as follows:

> For A-2- Adambhai Sulaimanbhai Ajmeri Intimation letter given by DCP prior to confession- Ex.457 Confessional Statement- Ex. 458 For A-3-Mohammad Salim Mohammad Hanif Sheikh Intimation letter given by DCP prior to confession- Ex.453 Confessional Statement- Ex. 454 For A-4- Abdul Kayum Intimation letter given by DCP prior to confession- Ex. 459 Confessional Statement- Ex. 460 For A- 6- Shanmiya@ Chandkhan Sajjadkhan Pathan Intimation letter given by DCP prior to confession- Ex. 461 Confessional Statement- Ex. 462 On this aspect of the matter, the CJM, PW-99 made the following statement during cross examination by the learned counsel for the accused persons vide Ex.568:
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> "....It is true that the explanation given to the accused and statement made by him, the said both were separate papers. I agree to the fact that generally the explanation and the statement should be in same paper. As both of this were in same papers, I did not suspect that the said explanation which was given, has been brought later on" (translation extracted from the Additional documents submitted on behalf of the Appellants) It is also pertinent to extract one of the intimation letters given by the DCP prior to the confession of one of the accused persons. The intimation letter given by DCP to A-2 reads thus:
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> "..... your statement under section 32 of the POTA before the Superintendent of Police is to be taken. But you are not bound to make this statement or confession and

the confession that you will make could be used against you as evidence. So it is informed to you that you give this statement willingly and free from any kind of pressure or threat or allurement." (translation extracted from the Additional documents submitted on behalf of the Appellants)

81. It was held by this Court in the case of Hardeep Singh Sohal & Ors. v. State of Punjab through CBI43 that the police officer recording the confessional (2004)11 SCC 612 statement under TADA is required to give in writing at the end of the statement, that the accused was informed that the confessional statement he has voluntarily decided to make, can be used against him as evidence and also the fact that the accused after fully knowing the consequences has decided to make the confessional statement. The relevant paragraphs of the judgment can be read as under:

"16. The constitutional validity of Section 15 of the TADA Act was challenged. A Constitution Bench of this Court in Kartar Singh v. State of Punjab upheld the constitutional validity of the said provision. The contention urged in Kartar Singh case was that the procedure in the TADA Act is the antithesis of a just, fair and reasonable procedure and this power could be abused to extort confession by unlawful means by using third-degree methods. This plea was rejected on the ground that sufficient safeguards have been made in the Rules as to the manner in which the confession is to be recorded. Rule 15 extracted above would show that confession shall be in writing and signed by the person who makes the confession. The police officer shall also certify under his own hand that such confession was taken in his presence and recorded by him and that the record contains a full and true account of the confession made by the person and such police officer shall make a memorandum at the end of the confession and the pro forma of such certificate also is appended to Rule 15.

17. Ext. PAA does not contain such a certificate having been given by PW 34. It is true that PW 34 had put certain questions to the accused as to whether he was aware that the statement which he wants to make could be used against him and on the basis of the same he will be sentenced. The officer also asked him whether there is any pressure, fear on him and he answered in the negative. However, PW 34 did not give the certificate at the end of the confession. The certificate should have specifically stated that he had explained to the person making the confession that he was not bound to make the confession and, if he does so, the confession he may make may be used against him and that he believed that this confession was voluntarily made and it was taken in his presence and recorded by him and was read over to the person making it and admitted by him to be correct, and it contained a full and true account of the statement made by him.

18. This Court has in a series of decisions deprecated the practice of non-observance of this provision and held that such violation would be inadmissible. In Bharatbhai v. State of Gujarat this Court held that Rule 15(3)(b) of the TADA Rules was not

> complied with and no memorandum as required was made. There was also no contemporaneous record to show the satisfaction of the recording officer after writing of confession that the confession was voluntarily made or read over to the accused. Thus, the confessional statement was inadmissible and cannot be made the basis for upholding the conviction.
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> 19. In S.N. Dube v. N.B. Bhoir this Court held that writing the certificate and making the memorandum under Rule 15(3)(b) to prove that the accused was explained that he was not bound to make a confession and that if he made it, it could be used against him as evidence; that the confession was voluntary and that it was taken down by the police officer fully and correctly are all matters not left to be proved by oral evidence." Though the case mentioned supra dealt with TADA, the Rules of which cannot be imported into POTA, the main objective behind mentioning this case was that the underlying safeguards which were required to be taken while making confessional statement to the police cannot be compromised with.

82. The intimation letters of caution written by PW-78 fail to prove that the process of intimation preceded the recording of confessional statements as a continuous process. On the other hand, the letters of intimation and the confessional statements exist as disjunctive evidence, failing to prove the required chain of procedure, i.e, that the letters of caution precede the confessional statements and not vice versa.

Further, in the instant case, the CJM (PW-99 : Ex.568) during cross examination before the Special Court (POTA) by the learned counsel for the accused persons, on being asked about sending the accused to judicial custody after confession, stated:

> "I had not sent him in judicial custody. I did not feel that I should send him in judicial custody……I had not asked the accused about how many days of his remand are left. I had not told him that he will not be sent to police custody again".

In the case of Mohammad Ajmal Mohammad Amir Kasab Alias Abu Mujahid v. State of Maharashtra44, the accused was willing to make confessional statement (2012) 9 SCC 1 while he was in police custody. Yet, his confession was deferred on the ground that he shall be sent to judicial custody after the confession was made before the CJM and this would hinder the investigation procedure. However, in the present case, presenting the accused persons before the CJM for half an hour was a mere formality to show compliance with the provisions of Sections 32(4) and 32(5) of POTA since they were sent back to police custody immediately after being presented before the CJM.

83. In the present case, the CJM (PW-99 : Ex.568), during cross examination went on to record that:

> "….. I did not make inquiry with any police officers with regard to the said confessions. I had not asked the two accused produced before me as to whether they

need any lawyer or not. I had not taken the said accused persons in my custody. It is true that I did not issue any warrant for them to be sent to judicial custody. It is true that I did not inquire with the accused about where and at what time and who recorded their statements. It is true that I have not kept any rojkam or record in my court about the accused persons produced before me on date 25th. There is entry in the postal book with regards to the covers along with the statements having been sent by me to the POTA court." (translation extracted from the Additional documents submitted on behalf of the appellants) The statements made by the CJM show how casually the mandates under Sections 32(4) and 32(5) were followed, rendering the said requirement a hollow and empty exercise.

84. Now, we proceed to examine the statement of PW-78, DCP Mr. Sanjaykumar Gadhvi(Ex.452), who recorded the confessional statements of the accused persons. On being cross examined by the learned counsel for A-1, A-3 and A-5, he stated as under:

"..I have not asked the accused about since how many days they were in custody. I had asked to the officer who had brought the accused about since how many days the accused was in police custody. I had asked him but I don't remember presently what reply was given by him. Before taking the statement of the accused persons, I did not examine their physical condition by removing their clothes. I knew that the fact that the accused persons were brought from the custody of Crime Branch. I had not asked to the accused persons before recording confessional statement that since how many days they were in custody prior to the recording of the confessional statement. I had not informed the accused persons that if they do not give confessional statement they will not be sent back to the Crime Branch custody. I have not made any note with regards to the fact that I had sent back the Crime Branch Officer along with vehicle. It is true that I had also not written the fact at any place with regards to the instruction given by me to return after around three hours and only when called by me. I had also not made any note with regards to the fact that I had got the accused persons seated in my P.A.s room. The fact that I had informed accused persons in writing that they are not bound to make statement and if they make then the same can be used against them, with regard to the said fact, I have not kept any copy with me. On asking me about how I had reached to the conclusion as stated by me with regards to the language of Mohammad Salim, I state that that he was speaking fearlessly and whatever facts were stated by him, its point were clear. There was no sign of fear in his expression and he was not crying. I have not made any note at any place with regards to the fact stated by me to the accused persons that their case is with Crime Branch and I am not associated with Crime Branch in any way. I have also not made note about having stated to the accused that I am Deputy Superintendent of different area. It is true that I have not noted the fact separately regarding which I have stated in my deposition that for the purpose that he can re-think about giving statement voluntarily, I had called my office boy and had got him seated in adjacent office of my PA and had asked to have water and think over with peaceful mind for 10-15 minutes and then come back to my office.

> It is true that I have not made any note with regards to the fact that "After 15 minutes, he had again come to my office and had stated that he had thought with peaceful mind about his good and bad, thereby on the basis of feeling regret felt by him, and that he in fact desires to make his statement". It is true that there is no note regarding the fact that I had read over the statement to the accused. I have also not made note about the fact that I had stated to the accused that "this statement is still with me and since it is in the form of confession, he is free to give or not give statements, and he can also deny the same".

(translation extracted from the Additional documents submitted on behalf of the State of Gujarat) Further, during cross examination by the learned counsel for A-2 and A-4, he stated that:

> "It is true that with regards to the fact stated by me during cross examination regarding non- presence of written notes, the said written notes are not present in case of every accused. ...It is true that the two documents which have been shown to me today in court, except for the said documents, there are no other written records with regards to confessional statement. It is true that there is no note with regards to time at any place in the statement under s. 32 or in the document of understanding. It is true that there is no mention of any specific place of Ahmedabad city in the column for place therein. " (translation extracted from the Additional documents submitted on behalf of the State of Gujarat) On being asked about what kind of understanding was given by him to the accused persons before the recording of the confessional statement, he stated:
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> "I had given understanding to the accused during oral understanding that the type of his statement is confessional statement." (translation extracted from the Additional documents submitted on behalf of the State of Gujarat) Reverting to the requirement of Section 32, the police officer recording the confessional statements is required to explain in writing to the accused that he is not bound to make confessional statement and once such statement is made, the same can be used against him. Further, it is imperative that the accused is assured that if he does not make the confessional statement, it will not jeopardize his well-being while in police custody and also to ensure that such statements are made before a competent police officer in a threat-free environment. The deposition of the police officer PW-78 who had recorded the confessional statements of the accused persons however, reflects otherwise. He admitted to the fact that he did not assure the accused persons that not making the confessional statement will not put them in adverse position.
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> 85. Further, there is nothing available on record to show that reasonable reflection time was given to the accused persons before making the confessional statements, though the prosecution claimed to have given them 15 minutes as reflection period. We will examine this aspect of the matter herein.

It is pertinent to mention here that the two exhibits referred to supra, namely, the letter of intimation and the statements of confession, in the case of each of the accused persons, are of the same day. It has been contended by the learned senior counsel of the accused persons that not enough time was given to them to reflect on the incident before making confessional statements. They were given a token amount of time i.e., 15 minutes to think and reflect and thereafter the recording of confessional statements began, which fact is on record as per the statement of PW-78, who recorded their confessional statements. While it has been laid down by this Court that the amount of time to be given for reflection before confession depends on the facts and circumstances of the case, it is imperative to bear in mind that in the present case, the accused persons were making confessions after a period almost 11 months after the incident. Hence, a mere period of 15 minutes does not appear to be reasonable time for reflection on the incident of the attack and their involvement in the same. In this regard, we wish to mention the observation made by this Court on this issue. In the case of State of Rajasthan v. Ajit Singh & Ors.45, this Court observed as follows:

> "12. We have perused the confession of the seven accused and the prefatory proceedings relating thereto. We first examine the confession made by Noordeen. From Ext. P-18, the note recorded by Shri Ranjit Basot as a prelude to the recording of the confession, it transpires that he had been produced before him at 12.30 p.m. on 21-9-1991 and after the completion of the formalities the recording of the confession had started at 12.45 p.m. Likewise Ajit Singh alias Guru Lal Singh had been produced before the officer at 10.50 a.m. and the recording of the confession had started half an hour later. We have seen the record of confessions of the other accused as well and it shows that 15 to 30 minutes' time was given to the accused for reflection before the actual (2008) 1 SCC 601 confessions were recorded. We accordingly find that sufficient cooling-off time had not been given to the accused, in the background that they had been in police custody over a long period of time. It has been held in Ranjit Singh case: (SCC pp. 76-77, paras 10-12) "10. According to the deposition of PW 3 in cross-examination, the accused were in police custody 18-20 days prior to recording of their confessional statements. PW 3 has deposed that he gave the requisite warning to the accused that they were not bound to make the confessional statement and if they make it will be used as evidence against them, but despite the warning they were prepared and willing to make the statement. After recording the introductory statement in this behalf in question-answer form he still considered it proper to give them some time for rethinking and for this purpose they were allowed to sit in a separate room for some time and were brought to him after about half an hour and expressed their desire to make statement and thereafter the confessional statements were recorded.
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> 11. Before adverting to the facts said to have been narrated by the accused as recorded in the two confessional statements, it deserves to be noticed that in case the recording officer of the confessional statement on administering the statutory warning to the accused forms a belief that the accused should be granted some time to think over the matter, it becomes obligatory on him to grant reasonable time for the purpose to the accused. In other words, the cooling time that is granted has to be reasonable. What

> time should be granted would of course depend upon the facts and circumstances of each case. At the same time, however, when the time to think over is granted that cannot be a mere farce for the sake of granting time. In a given case, depending on facts, the recording officer without granting any time may straight away proceed to record the confessional statement but if he thinks it appropriate to grant time, it cannot be a mechanical exercise for completing a formality.
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> 12. In Sarwan Singh Rattan Singh v. State of Punjab where a Magistrate granted about half an hour to the accused to think over and soon thereafter recorded the confessional statement, this Court reiterated that when an accused is produced before the Magistrate by the investigating officer, it is of utmost importance that the mind of the accused person should be completely freed from any possible influence of the police and the effective way of securing such freedom from fear to the accused person is to send him to jail custody and give him adequate time to consider whether he should make a confession at all. It would naturally be difficult to lay down any hard-and-fast rule as to the time which should be allowed to an accused person in any given case."
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> 13. Applying the aforesaid principles to the facts of the present case, we are of the opinion that adequate time had not been given to any of the accused as they had been in police custody for almost 45 days in each case. We also observe that there is no evidence on record to suggest that the special report envisaged under sub-rule (5) of Rule 15 had been submitted to the Magistrate. The confessions cannot, therefore, be taken into account for any purpose.

(emphasis laid by this Court) Further, in the case of Ranjit Singh v. State of Punjab46,which case is relied upon in the case of Ajit Singh(supra) this Court observed as under:

> "11. Before adverting to the facts to have been narrated by the accused as recorded in the two confessional statements, it deserves to be noticed that in case the recording officer of the confessional statement on administering the statutory warning to the accused forms a belief that the accused should be granted some time to think over the matter, it becomes obligatory on him to grant reasonable time for the purpose to the accused. In other words, the cooling time (2002) 8 SCC 73 that is granted has to be reasonable. What time should be granted would of course depend upon the facts and circumstances of each case. At the same time, however, when the time to think over is granted that cannot be a mere farce for the sake of granting time. In a given case, depending on facts, the recording officer without granting any time may straightaway proceed to record the confessional statement but if he thinks it appropriate to grant time, it cannot be a mechanical exercise for completing a formality.

13. This Court further held:- "However, speaking generally, it would, we think, be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not he should make a confession. Where there may be reason to suspect that the accused has been persuaded or coerced to

make a confession, even longer period may have to be given to him before his statement is recorded. In our opinion, in the circumstances of this case it is impossible to accept the view that enough time was given to the accused to think over the matter."

20. In the facts and circumstances of the present case the grant of half an hour to the accused to think over before recording their confessional statement cannot be held to be a reasonable period. We do not think that is safe to base conviction on such confessional statements. Further, on the facts of the present case, conviction cannot be maintained on the sole testimony of two police officials. It may also be noticed that although PW6 Chander Bhan, Armourer, was examined by the prosecution to prove that the weapons were in working conditions, no effort was made to prove that the ammunition or the empties matched the weapons." (emphasis laid by this Court) Therefore, in the given facts and circumstances on record and based on the legal principles laid down by this Court, we are of the opinion that enough time was not given to the accused persons to record their confessional statements, particularly in the present case since they were making confessions after 11 months of the incident.

86. It is also pertinent to take note of the callous manner in which PW-99 had discharged his duty in the present case. Since A-2 and A-4 made confessional statements on the same day, they were produced before the CJM PW-99 the very next day. It is pertinent therefore, to note the observation made by him with respect to A-2 and A-4. The statement of PW-99 with respect to A-2 is recorded as under:

> "The accused has signed in this above statement in my presence at 16-30 hrs, today on 25.9.2013. And therefore, his statement by read over and conveying him noted and he has signed by admitting.
>
> Sd/-

Chief Judicial Magistrate Rural" (emphasis laid by this Court) (translation extracted from the Additional documents submitted on behalf of the appellants) The statement of CJM with respect to the A-4 is as under:

> "The accused has made his signature in the above statement made by him today on dated 25.9.2003 at 5 p.m. before me. The statement is read over and explained to accused and as he admits the same, he has made his signature in his confession.

Sd/- illegible Chief Judicial Magistrate Ahmedabad (Rural) Old High Court, Ahmedabad" (emphasis laid by this Court) (translation extracted from the Additional documents submitted on behalf of the appellants) From the above statements of the CJM PW-99, it can be inferred that he was able to record the statement of the accused persons, read it over to them and enquire about any coercion and torture, all in a period of half an hour. It is highly improbable that a confessional statement running to more than 15 pages could be read back to them within half an hour. The statement of PW-99 on examination in chief and also on cross examination has been mentioned above and it is clear that he did not enquire about the basic compliances he was required to make himself aware of,

to ensure fair investigation against the accused persons. His conduct in recording of statement under Section 32(5) of POTA merely resembles that of a passive reluctant officer involved in some procedural formality.

87. It is pertinent to note here that while POTA makes a departure from CrPC in that it makes confessional statements made before a police officer admissible, the procedural safeguards therein are not a mechanical formality. On the other hand, it should be able to inspire confidence to show that the procedure has been scrupulously followed while recording confessional statements particularly because of the grave consequences which follow such statements, which might result in deprivation of life and personal liberty of the person, which is a fundamental right guaranteed by the Constitution that can be taken away only by following the procedure established by law. Therefore, it is incumbent upon the CJM to strictly and scrupulously follow all the statutory procedural safeguards provided for under Section 32 of POTA.

88. Further, the other statutory mandate under Section 32 of POTA is that the person making the confessional statement shall be produced for medical examination and thereafter, be sent to judicial custody after the CJM records the statement of the accused person. The question which then arises for our consideration is whether this mandate is operative only if the accused makes a complaint of torture before the CJM or whether the CJM is duty bound to send the accused persons to judicial custody as a statutory requirement after recording the statement. It had been contended by the learned senior counsel on behalf of the accused persons that they were subjected to physical torture by the police before the confessional statements were recorded and that they were also kept in police custody in the intervening night between being produced before the CJM and being sent to Judicial Custody. Therefore, though they were subjected to torture, they could not make a complaint before the CJM due to fear and apprehension, since they were taken back to police custody after their statements were recorded. The learned senior counsel for the accused persons, argued that Section 32(5) unambiguously declares that the accused shall be sent to judicial custody after the recording of the confessional statements, whereas the learned senior counsel for the prosecution contended that the accused must be sent for medical examination only if there is a complaint of torture and only in that case, must he be sent to judicial custody. We are unable to agree with the argument of the learned senior counsel for the prosecution.

Firstly, the use of the phrase, 'shall be sent to judicial custody' after confession is a mandatory requirement in comparison to the use of an alternative term 'may' which gives discretionary power to the CJM. Further, this court in the case of State (NCT of Delhi) v. Navjot Sandhu47, has unambiguously observed as under:

> "177. Now we look to the confession from other angles, especially from the point of view of in-built procedural safeguards in Section 32 and the other safeguards contained in Section 52. It is contended by the learned (2005) 11 SCC 600 senior counsel Mr. Gopal Subramanium that the DCP before recording the confession, gave the statutory warning and then recorded the confession at a place away from the police station, gave a few minutes time for reflection and only on being satisfied that the accused Afzal volunteered to make confession in an atmosphere free from threat

or inducement that he proceeded to record the confession to the dictation of Afzal.

Therefore, it is submitted that there was perfect compliance with sub-Sections (2)&(3). The next important step required by sub- Section (4) was also complied with inasmuch as Afzal was produced before the Additional Chief Metropolitan Magistrate-PW63 on the very next day i.e. 22.12.2001 along with the confessional statements kept in a sealed cover. The learned Magistrate opened the cover, perused the confessional statements, called the maker of confession into his chamber, on being identified by PW80-ACP and made it known to the maker that he was not legally bound to make the confession and on getting a positive response from him that he voluntarily made the confession without any threat or violence, the ACMM recorded the statement to that effect and drew up necessary proceedings vide Exts.PW63/5 and PW63/6. It is pointed out that the accused, having had the opportunity to protest or complain against the behavior of police in extracting the confession, did not say a single word denying the factum of making the confession or any other relevant circumstances impinging on the correctness of the confession. It is further pointed out that Afzal and the other accused were also got medically examined by the police and the Doctor found no traces of physical violence. It is therefore submitted that the steps required to be taken under sub-Sections (4)&(5) were taken. However, the learned counsel for the State could not dispute the fact that the accused Afzal was not sent to judicial custody thereafter, but, on the request of the I.O PW80, the ACMM sent back Afzal to police custody. Such remand was ordered by the ACMM pursuant to an application made by PW80 that the presence of Afzal in police custody was required for the purpose of further investigation. Thus, the last and latter part of sub-Section (5) of Section 32 was undoubtedly breached. To get over this difficulty, the learned counsel for the State made two alternative submissions, both of which, in our view, cannot be sustained.

178. Firstly, it was contended that on a proper construction of the entirety of sub- Section (5) of Section 32, the question of sending to judicial custody would arise only if there was any complaint of torture and the medical examination prima facie supporting such allegation. In other words, according to the learned counsel, the expression 'thereafter' shall be read only in conjunction with the latter part of sub- Section (5) beginning with 'and if there is any complaint' and not applicable to the earlier part. In our view, such a restrictive interpretation of sub-Section (5) is not at all warranted either on a plain or literal reading or by any other canon of construction including purposive construction. The other argument raised by the learned counsel is that the provision regarding judicial custody, cannot be read to be a mandatory requirement so as to apply to all situations. If the Magistrate is satisfied that the confession appears to have been made voluntarily and the person concerned was not subjected to any torture or intimidation, he need not direct judicial custody. Having regard to the circumstances of this case, there was nothing wrong in sending back Afzal to police custody. This contention cannot be sustained on deeper scrutiny.

179. The clear words of the provision do not admit of an interpretation that the judicial custody should be ordered by the Chief Judicial Magistrate only when there is a complaint from the 'confession maker' and there appears to be unfair treatment of such person in custody. As already stated, the obligation to send the person whose alleged confession was recorded to judicial custody is a rule and the deviation could at best be in exceptional circumstances. In the present case, it does not appear that the ACMM (PW63) had in mind the requirement of Section 32(5) as to judicial

custody. At any rate, the order passed by him on 22.12.2001 on the application filed by PW80 does not reflect his awareness of such requirement or application of mind to the propriety of police remand in the face of Section 32(5) of POTA. Compelling circumstances to bypass the requirement of judicial custody are not apparent from the record."

89. Apart from Section 32 of POTA, Section 52 also lays down certain guidelines which are to be strictly adhered to while recording the confessional statements of an accused person under Section 32. On this issue, it was held in Navjot Sandhu case (supra) as under:

> "158. These provisions of Section 32, which are conceived in the interest of the accused, will go a long way to screen and exclude confessions, which appear to be involuntary. The requirements and safeguards laid down in sub-sections (2) to (5) are an integral part of the scheme providing for admissibility of confession made to the police officer. The breach of any one of these requirements would have a vital bearing on the admissibility and evidentiary value of the confession recorded under Section 32(1) and may even inflict a fatal blow on such confession. We have another set of procedural safeguards laid down in Section 52 of POTA which are modelled on the guidelines envisaged by D.K. Basu8 Section 52 runs as under:
>
> "52. (1) Where a police officer arrests a person, he shall prepare a custody memo of the person arrested.
>
> (2) The person arrested shall be informed of his right to consult a legal practitioner as soon as he is brought to the police station.
>
> (3) Whenever any person is arrested, information of his arrest shall be immediately communicated by the police officer to a family member or in his absence to a relative of such person by telegram, telephone or by any other means and this fact shall be recorded by the police officer under the signature of the person arrested.
>
> (4) The person arrested shall be permitted to meet the legal practitioner representing him during the course of interrogation of the accused person: Provided that nothing in this sub-
>
> section shall entitle the legal practitioner to remain present throughout the period of interrogation." Sub-sections (2) and (4) as well as sub-section (3) stem from the guarantees enshrined in Articles 21 and 22(1) of the Constitution. Article 22(1) enjoins that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. They are also meant to effectuate the commandment of Article 20(3) that no person accused of any offence shall be compelled to be a witness against himself.

> 159. The breadth and depth of the principle against self-incrimination embedded in Article 20(3) was unravelled by a three-Judge Bench speaking through Krishna Iyer, J. in Nandini Satpathy v. P.L. Dani. It was pointed out by the learned Judge that the area covered by Article 20(3) and Section 161(2) CrPC is substantially the same. "Section 161(2) of the Criminal Procedure Code is a parliamentary gloss on the constitutional clause" — it was observed (SCC p. 434, para 21). This Court rejected the contention advanced on behalf of the State that the two provisions, namely, Article 20(3) and Section 161, did not operate at the anterior stages before the case came to Court and the incriminating utterance of the accused, previously recorded, was attempted to be introduced. Noting that the landmark decision in Miranda v. Arizona did extend the embargo to police investigation also, the Court observed that there was no warrant to truncate the constitutional protection underlying Article 20(3). It was held that even the investigation at the police level is embraced by Article 20(3) and this is what precisely Section 161(2) means. The interpretation so placed on Article 20(3) and Section 161, in the words of the learned Judge, "brings us nearer to the Miranda mantle of exclusion which extends the right against self-incrimination, to police examination and custodial interrogation and takes in suspects as much as regular accused persons" (SCC p. 435, para 22).
>
> The observations in M.P. Sharma v. Satish Chandra (SCR p. 1088) to the effect that: "the protection afforded to an accused insofar as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him" were cited with approval in Nandini Satpathy case (SCC p. 448, para 43)."

90. Therefore, we are of the opinion that neither the police officer recording the confessional statements nor the CJM followed the statutory mandates laid down in POTA under Sections 32 and 52 while recording the confessional statements of the accused persons, and we hold that the confessional statements made by A-2, A- 3, A-4 and A-6 under Section 32 of POTA are not admissible in law in the present case. Therefore, we answer this point in favour of the appellants. We have to observe next therefore, whether the statements of the accomplices can be relied upon to determine the involvement of the accused persons in this case. Answer to point no.3:

91. Section 133 of the Indian Evidence Act 1872 states that:

> "an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." Both the courts below have placed extensive reliance upon the evidence of accomplices, PW-50, PW-51 and PW-

52 to establish the culpability of the accused. However, one needs to understand the extent of admissibility of such evidence. But prior to that, we also need to emphasize upon the reliability of the evidence given by an accomplice. It has been held by this court in the case of Haroom Haji Abdulla v. State of Maharashtra48 as under:

> "8. ..... The Evidence Act in Section 133 provides that an accomplice is a competent witness against an accused person and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The effect of this provision is that the court trying an accused may legally convict him on the single evidence, of an accomplice. To this there is a rider in AIR 1968 SC 832 Illustration (b) to Section 114 of the Act which provides that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. This cautionary provision incorporates a rule of prudence because an accomplice, who betrays his associates, is not a fair witness and it is possible that he may, to please the prosecution, weave false details into those which are true and his whole story appearing true, there may be no means at hand to sever the false from that which is true. It is for this reason that courts, before they act on accomplice evidence, insist on corroboration in material respects as to the offence itself and also implicating in some satisfactory way, however small, each accused named by the accomplice. In this way the commission of the offence is confirmed by some competent evidence other than the single or unconfirmed testimony of the accomplice and the inclusion by the accomplice of an innocent person is defeated.

This rule of caution or prudence has become so ingrained in the consideration of accomplice evidence as to have almost the standing of a rule of law.

9. The argument here is that the cautionary rule applies, whether there be one accomplice or more and that the confessing co-accused cannot be placed higher than an accomplice. Therefore, unless there is some evidence besides these implicating the accused in some material respect, conviction cannot stand. Reliance is placed in this connection upon the observations of the Judicial Committee in Bhuboni Sahu v. Emperor a case in which a conviction was founded upon the evidence of an accomplice supported only by the confession of a co-accused. The Judicial Committee acquitting the accused observed:

> "..... Their Lordships whilst not doubting that such a conviction is justified in law under s. 133, Evidence Act, and whilst appreciating that the coincidence of a number of confessions of co-accused all implicating the particular accused given independently, and without an opportunity of previous concert, might be entitled to great weight, would nevertheless observe that Courts should be slow to depart from the rule of prudence, based on long experience, which requires some independent evidence implicating the particular accused. The danger of acting upon accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates, and how has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue....."

> (emphasis laid by this Court) However, in the present case, the Courts below have placed strong reliance upon the statements of accomplices PW-50 Ashfaq Bhavnagri, PW-51 Abdul Rehman Gulamhussain Panara and PW-52 Mohammad Munaf Sheikh to establish the culpability of the accused persons.

Though the confessional statement of PW-51 was followed by a retraction, the same as per the courts below, did not vitiate the admissibility of the evidence against the accused persons.

92. We will therefore, examine the relevant excerpts from the statements of the three accomplices namely, PW-50, PW- 51 and PW-52 to ascertain what each of them had to say about the incident of the attack, on the premise that Section 133 of the Evidence Act states that an accomplice is a competent witness. PW-50 in his deposition (Ex.312) before the Special Court (POTA) stated as under:

> ".....We used to arrange cassette at Salimbhai's place on Thursday night, it was done by Salimbhai, and we had seen the cassette over there, in which Muslim children were burnt alive. There was mass killing of Muslims. Huge mobs of Hindus had come and they used to attack on Muslims, and there were mass burial ceremonies. We had also seen interviews of relief camps. Thereafter, there were two maulanas (priests) at Salimbhai's place, among them one was named as Faradullah Ghauri alais Abu Sufiyan and Saukatullah Ghauri who was brother of Abu Sufiyan. They had said their speech before us that this much has happened in your Gujarat, despite this you do not awake from your sleep and you are engaged in playing carom. We are from Hyderabad and have come to help you. .....
>
> There were also talks over there that Lashkar-e-Toiba is having huge fund but is not having network and Jaish-e-Mohammed does not have fund but is having manpower as well as it is having network, and hence, both these groups will work together, therefore you just give donation. On that night many persons gave donation, donation of about 12 to 13 thousand Riyals was given. We were taken to the program by Rashidbhai Ajmeri and Salimbhai because we did not know those people. Those people were new for us. Similar program was also organized after riots in Gujarat. At that time at least 400 people had gathered and all were from Gujarat. Good amount of donation was gathered in it also. ...And thus by doing such small meetings, they used to gather money. After some time, people got fed up and used to say that you are not doing anything and are just utilizing the money. We used to give money to Salimbhai Sheikh who was with us, and he used to give this money to Faradullah Ghauri, and he used to send this money to India through charge responsibility (Hawala). He used to send this money through Majid Vora Patel and Iqbal Vora Patel who are basically from Bharuch. Thereafter, during about three months of riots post-Godhra in 2002, Faradullah Ghauri and Shaukatullah Maulana came to India, these people had visited the relief camps in Ahmedabad, and they had met with a person named Jahid in camp, and they had gathered persons whose family members were killed or who had suffered great losses.

.....

When Abu Talah and Faridullah Ghauri had come to India, they had called Adam Ajmeri brother of Rashid Ajmeri to Hyderabad for meeting.

Thereafter we came to know about Akshardham tragedy on Saudi TV. Initially nobody spoke about it, an thereafter one meeting was organized after 8 days, and had said that this is work of Jaish-e-Mohammed. And Abu Talah had said to them, we came to know about this from Salimbhai and Rashidbhai. These people had also said that the persons who had gone to Akshardham, their intention was to spread terror and not to kill, their fight was with the police, and had also said that they gave fight for about 10 to 12 hours and got martyred." (translation extracted from the Additional documents submitted on behalf of the appellants) He further stated during cross examination by learned counsel Mr. H. N. Jhala for A-1, A-3 and A-5:

"Question: Was Salimbhai your leader? Answer: Salimbhai had more responsibilities. He had more worries about Islam. When I met with Salimbhai on first Thursday after Godhra carnage, he had no cassette at that time. I had not kept any note for Salimbhai coming and going to India. At the time of Godhra carnage, Salimbhai was present at Saudi Arabia, and I met him on Thursday thereafter.

Question: Incidence of Godhra happened on date 27/02/2002, what do you want to say about Salimbhai was in India from January- 2002, and not in Saudi Arabia?

Answer: It is true that he was not present in Saudi at the time of Godhra carnage. Witness voluntarily states that he was present at Saudi at the time of Akshardham.

We had watched the cassette in the following month of Godhra carnage. It is true that the cassette in the following month of Godhra carnage. It is true that the cassette (C.D.) which was watched regarding the incidences of Post Godhra carnage, the said were watched at the house of Salimbhai. There is television and VCD player at the house of Salimbhai." ....

Question: The money which was collected in Saudi Arabia, the said money was utilized for running relief camps?

Answer: We used to give money to Salimbhai and we had not asked him about what he did with money nor did he say to us about what he did with the money.

I had given maximum of 500 Riyal to Salimbhai, it is Rs. 5000/-. Besides me, there were my other friends who also used to meet at Salimbhai's place on every Thursday. Except me, all other used to ask Salimbhai about what he did with the money. Salimbhai used to say that this money has been collected for taking revenge. Since he didn't say anything everybody had stopped giving money. I don't know if this money was utilized for running relief camps.

.....The meetings which held during nights, the said meetings held in big halls and party plots of Riyadh. Salimbhai used to take us in these meetings, and therefore, we used to go, he had said you will have to come and therefore we had attended two or three meetings. It was not like that I have to go wherever Salimbhai asked to, because he was doing his business and I was doing job." (translation extracted from the Additional documents submitted on behalf of the appellants) Further, on cross examination by learned counsel of A-2 and A-4 before the Special Court (POTA), PW-50 deposed as under:

> "I know Rashid Ajmeri since two years of incidence. Rashid Ajmeri was at Saudi Arabia in year 2002. Name of the brother of Rashid Ajmeri is Adam. It is Adam Ajmeri. The fact that Adam Ajmeri was called at Hyderabad was stated to me by Salimbhai and Rashidbhai. I don't know about why he was called at Hyderabad. It is not true that I know that the fact I have stated about Adam Ajmeri having gone to Hyderabad is false.

It is not true that the fact I am stating about I having been called to Hyderabad by Salimbhai and Adambhai is also stated false by me." (translation extracted from the Additional documents submitted on behalf of the appellants) PW-51, in his deposition (Ex.314), particularly indicated the active involvement of A-2 and also about the involvement of A-4 and A-5. The relevant excerpt from the deposition reads as under:

> "Nashir Doman, (the cable operator) in our area had brought one person to me during afternoon time at Bawahir Hall. Nasir had introduced him to me as his friend Adambhai from Shahpur. Nashir had said that Adambhai has come with regards to taking revenge about what has been suffered by Muslims during riots. During talks, another of our friend named Munaf Radiator had also arrived. And I had asked Adam to inform about the matter.
>
> Adam had said to us that his brother Rashid resides at Riyadh Saudi Arabia. And Salim of Dariapur, Kankodi Pol is with him. And under leadership of Altaf Sheikh of Shahpur Adda, there is big group of Muslim youths from Gujarat especially from Ahmedabad. And they have support of Jaish-E-Mohammad organization. Those people will send weapons to us, will send men, and are also ready to send funds. We will have to remain helpful in doing survey work of Hindu areas. On listening to such serious talk, I had said that I will have to talk to my leaders.....
>
> At that time, I had met with Mufti Qaiyum and Maulvi Abdullah near the hall. I had said to them about what Adam had said, and in a way as if they already knew about it. Thereby, they replied that we know it and had assigned me the responsibility of arranging house for the guests who would come for the work of this carnage, and I had agreed.....
>
> As Adam informed about the talk having taken place at Saudi Arabia, and he having informed that phone call will come at Doman Nasir's place, Mufti Ayub and Maulvi

had asked to four of us to go and discuss at Nasir's home. But phone did not come. Thereafter, we and Adambhai had departed after deciding to talk to Saudi from opposite of Kalupur Railway. .... After two to three days, I and Adam had gone to Kalupur Darwaja on my scooter, and Nasir Doman had also come along on his scooter. From STD/ ISD booth named Kohinoor Telecom, Adam had dialed number at Saudi Arabia and firstly he had done all the talk in Arabic language, and thereafter to give us assurance, he had talked in Hindi language and asked to exchange greetings with the people involved with me in work. By saying this, Adam handed over the receiver to me..... I was asked from the other side in Gujarati, 'brother, what you need,'. Prior to this, Adam had asked me to demand for Rs. 20 Lac for the work. Therefore, on my say that it would take Rs. 20 lac for the work, I was asked from the other side to give the phone to Adambhai. And Adam had done some talk in Arabic language. We could not understand the said language. ... In the last week of May 2002, Nashir had called me to his house by sending message through someone. And when I went, Nashir, Adam and Adam's brother Ahmed was present. Adam had given me Rs. 5000/- and had said to me that guests are going to come and you have to arrange for their lodging. And he had also given Rs.5000/- to Nashir and he said to buy two mobile phones from it and give it to Rehman, and had said that the numbers for the same will be given to the guests and had said that thereby they will remain in contact. At that time, I had said to Adam that another Rs. 15,000/- will be required for deposit of house and for mattresses. So Adam said that it will also be arranged, and when it was informed to Mufti Qaiyum and Maulvi Abdullah at Bawahir Hall about all this, at that time Mufti Qaiyum had said to me that arrangement for lodging of guests should be done, money is arranged or not. At that time, Maulvi Abdullah had said that if there is much problem then he should be informed. After, one week, Nashir had given two mobile phones to me..... After taking the said phone, I had given it to Mehmood Wadhwani, and I had said to him that you should only switch it on when you want to use it, or keep it continuously switched off. This Mehmood Wadhwani is from Madhno Mohallo, Charwat, Dariapur, and is my friend. .....

One day at 9 or 10 o' clock in the night, Adam had called me on my mobile phone ..... We had cold drinks over there and he had given me Rs. 5000/-. At that time, I had asked for another Rs. 10,000/- for house and arrangement as the earlier Rs. 5000/- had got spent in rickshaw fare and SIM card. Therefore, Adam had agreed for arranging another Rs. 10,000/- and thereby we had departed. Thereafter, Nashir Doman had come to call me at Hall and had said to me that Adam is presently sitting at his brother, Ahmed's house and is calling you. Thereafter, I and Nashir both went to Ahmed's house by walking and Adam had given me Rs. 10,000/- and had informed me that guests will come from Hyderabad to do carnage in Gujarat, and had asked me to do arrangement for house and other arrangements speedily, and therefore, I had agreed and thereby we had departed. .....And Adam had informed that the guests will arrive from Hyderabad in one or two weeks. But nobody had arrived. During June 2002, Adam had said to me that your mobile phone for contact is switched off. Therefore, the guests arriving from Hyderabad while arriving at

Ahmedabad had contacted from Kheda, but since mobile phone was switched off, contact could not be made and thus, it seems that they have returned. .... I had informed him that if the phone is switched off, I will get it switched on. ..

I felt that Adam must have assured about the other phone given to me if it is switched off or switched on. And since the phone was continuously switched off, he has made story about the guests having returned from Kheda, just to reprimand me. But I did not come to know if the guests may have come up to Kheda or not. After about a week or 10 days, Adam met me at Dariapur and had said to me that the carnage persons have returned back after coming to Bareja- Narole as contact could not be made. Therefore, there is no meaning keeping the mobile phone with you. By having said this, he has asked us to return both the mobile phones, and therefore I had replied that there is my card inserted in the mobile phone with me and I will return it to you after I get another instrument for me, and I will return the other one by getting it back from my friend, so Adam had said to give both the mobile phones to Nashir and thereby he had left..... During this time, Liyakat of Juhapura who had gone outstation for marriage ceremony had returned, and he met me at the corner of Madhno Mohallo at Dariapur. He had said to me that now the guests are not going to come. Possession of the said house is to be handed back to Sohrabkhan after returning mattresses, barrels and table fans. The rent for it is to be paid by me. After informing this, three or four days later, Liyakat had said to me at Madhno Mohallo that everything has been returned and Sohrab had said about Rs. 500/- with regard to the rent. Therefore, I had given Rs. 500/- to Liyakat. ... Adam used to come every week for collecting the money because he had given me Rs. 20,000/- and two mobile phones for making arrangements for the person to coming from Hyderabad to do carnage, and from among them, one mobile phone was taken back through Nashir and one was with me and therefore, he used to ask for it. I used to give him Rs. 300/- to Rs. 500/-. At last, during end of September, once Adam had come to my shop during noon time and had said that the guest who were to come from Hyderabad for doing carnage have arrived. He said, “I have to take them around the city and therefore, I am in need of more money”. At that time, Adam had asked for Rs. 2000/- from me, but since the said was not with me, I was asked to meet at night, because I had to pay the due amount. Adam had come in the night and since I had arrangement for Rs. 900/-, I had given Rs.

900/- to him. At that time Adam had also said to me that I had received the guests coming from Hyderabad at Railway station, who have come to do carnage and have taken them around the city and thereafter have dropped them at the railway station. During those days, while I was passing from opposite of Dariapur Bawahir Hall, at that time Mufti Abdul Qaiyum and Maulvi Abdullah had met and exchanged greetings. He had asked for well being and at that time Mufti Abdul Qaiyum had informed me that “the persons who were to come for carnage, those guests have arrived, and God willing, victory will be ours in short time”. Some days earlier I had dispute with Maulvi Abdullah and Mufti regarding dissimilarity of dowry in the marriage of refugee girls in camp and since there was no arrangement for distribution of sewing machines. Therefore, I had not given interest in their say.

Thereafter, some days later, while I was sitting at my traders place at Gomaji complex, Pankornaka, Tran Darwaja, I got the news that terrorists have attacked Akshardham Temple. Therefore, I got the doubt that this work may have been done by the persons who have come from Hyderabad to do carnage. Because, these people have said to me the persons for carnage have arrived." (emphasis laid by this Court) (translation extracted from the Additional documents submitted on behalf of the appellants) Finally, we are extracting the relevant excerpt from the statement made by PW-52 (Ex.315). The excerpt from his statement reads as under:

> "When the relief camp for Muslims had started at Dariapur Bawahir Hall, at that time Muslim youths of our area used to gather over there. All used to sit and talk. Abdul Rehman Panara was the organizer of the camp. Since he had business by name of Panara Garments, I knew him. The main administrators of the camp were Mufti Abdul Qaiyum and Maulvi Abdullah. Nasirbhai Doman who used to visit camp is cable operator of our area, and I know him. I know Adambhai since last election of Municipality because he used to take interest in politics by Congress Party. I knew brother of Adambhai named Ahmedbhai of Dariapur, and therefore, I started knowing Adambhai.
>
> In the beginning of April 2002, once Adam had called me on my mobile phone during noon time. I had gone to Chaarwad Bawahir Hall and Nasir, Adam and Abdul Rehman were present over there. At that time, Adam Bhai had said that Muslims have been oppressed here. And therefore, carnage for taking its revenge is to be done. He said that "my brother Rashid is in Saudi. And Salim is with him. They have support of Jaish-e-mohammad organization. We will seek money from there. Those people will send men and provide weapon. Salim has contact with Jaish-e-Mohammad and Tanzeem. He had said that these people are being sent for committing carnage (kand). On listening to this, I got up and felt afraid. When I got up, Adambhai had made me to sit by holding my hand and had stated that we will also have to take advice from big persons in this regard. Thereafter, we had met with Mufti Aiyub Qaiyum and Maulvi Abdullah at the office outside hall. Both of them had informed that guests will arrive for carnage. The work of arranging for their house has been assigned to Abdul Rehman. Adam had asked for a local phone number. Therefore, Doman Bhai had given his house telephone number. ... On second time, I, Abdul Rehman, Nasir Doman, Adam had met in presence of Mufti Qaiyum and Abdullah at Bawahir Hall. At that time, Adam had informed that talk has been done at Saudi, and number of Doman's house has been given. Therefore, phone will come over there. Thereafter, Mufti Qaiyum and Maulvi Abdullah had asked to four of us to go and discuss at Nasir's house, so that the phone call at Nasir's can be attended to .... But since no call came, we had departed. Therefore, Rehman and Adam had gone on Rehman's scooter to talk from PCO/ STD at railway station. And after returning from Bawahir Hall, they had stated that after trying to Saudi, nobody was found present.
>
> After some days of it, when I had gone to Dariapur from Kalupur, Abdullahmiya and Mufti Qayuim was stopped me and said that the guests who were going to arrive have

arrived , and you will hear in sometime about the work which is to be done. And therefore, I had got afraid and had left, and had said don't say it to me. Guest means terrorist. After sometime, I got to hear the news of Akshardham incidence. Police had taken my statement with regards to the facts mentioned by me today. I was taken to Gandhinagar court for statement. Since I had not seen the court, I asked the police to take me along. ... .

Immediately after April 2002 that is after about one month, I did not reveal to anybody that such carnage is going to happen. I don't have relations with any police personnel. I know Crime Branch Officer Mr. Singhal. I came to know him when he called me for the first time for statement. My friends are in garage profession. After I came to know regarding this carnage, I was not afraid at any time that I may be implicated in this carnage. Witness himself states that I don't know anything about it so why should I be afraid? I was suddenly called at Crime Branch on 6.9.2003. It is true that next day, on 7th, my statement was recorded. It is not true that I was kept for one month at Crime Branch. I have never met any body after this. I had not talked with any one of them.

.....

It is true that there was no activity in the relief camp at Bawahir Hall. It is true that I don't know anything about if there was any daily note in register for entry/ exit in Bawahir Hall. It is true that I have stated in examination in chief that no work was assigned to me. It is true that when I was informed during cross examination about my statement having been recorded on 7.9.2003, at that time I got idea about the date, month and year. .....

Question: Had you understood at the respective time that confession of the offences is being written?

Answer: No, I have not committed any offence at any time, then how such confession can be written.

I don't remember if Magistrate Sir had asked me that the statement that will be given by you, can be used against you.

Question: If the Magistrate sir had asked you that if police has done any misbehavior with you?

Answer: No misbehavior was done. Although I was asked as such.

It is not true whole of my reply (statement) was got written before Magistrate from my statement and I didn't say anything. I had placed only one signature in my statement, which was recorded before the Magistrate. It is true that I had placed the

> signature on the last page. It is not true that I am giving false deposition on oath. It is not true that the police had written my statement by threatening me to make me accused. It is not true that I am giving false deposition even today under the threat of police.
>
> (emphasis laid by this Court) (translation extracted from the Additional documents submitted the appellants)

93. Before examining the evidence of the accomplices on merit, we need to satisfy ourselves that the evidence of the accomplices is acceptable. The twin test on this point has been laid down by this Court in the three judge bench decision of this Court in Ravinder Singh v. State of Haryana49 which was reiterated in the case of Mrinal Das & Ors. v. State of Tripura50, wherein this Court in the Ravinder Singh case (supra) held as under:

> "12. An approver is a most unworthy friend, if at all, and he, having bargained for his immunity, must prove his worthiness for credibility in court. This test is fulfilled, firstly, if the story he relates involves him in the crime and appears intrinsically to be a natural and probable catalogue of events that had taken place. The story if given, of minute details according with reality is likely to save it from being rejected brevi manu.

Secondly, once that hurdle is crossed, the story given by an approver so far as the accused on trial is concerned, must implicate him in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt. In (1975) 3 SCC 742 (2011) 9 SCC 479 a rare case taking into consideration all the factors, circumstances and situations governing a particular case, conviction based on the uncorroborated evidence of an approver confidently held to be true and reliable by the court may be permissible. Ordinarily, however, an approver's statement has to be corroborated in material particulars bridging closely the distance between the crime and the criminal. Certain clinching features of involvement disclosed by an approver appertaining directly to an accused, if reliable, by the touchstone of other independent credible evidence, would give the needed assurance for acceptance of his testimony on which a conviction may be based." (emphasis laid by this Court) A perusal of the evidence of all the three accomplices in the present case shows that all of them intended to absolve themselves of the liability for the conspiracy with respect to the attack on Akshardham, going as far to mention that they were not involved in the incident and only the accused persons knew about the intricate details of the chain of events that ultimately led to the execution of their plan of 'carnage'. Even then, if, we were to presume that the accomplices have implicated themselves by mentioning that they were aware about some incident which was about to happen and thus, were part of the criminal conspiracy, the evidence of the accomplices fail the second test, in that it fails to prove the guilt of the accused persons beyond reasonable doubt. All the three accomplices mentioned about the plan of 'carnage' which the accused persons had planned together. However, no link can be established between the accused persons and the attack on Akshardham since the evidence of the accomplices is far too vague and they fail to provide any form of substantive evidence against the accused persons. Therefore, we need to examine the statements of the accomplices in the light of the legal principle laid down by this Court in the case of Mohd.

Husain Umar Kochra Etc. v. K.S. Dalipsinghji & Anr. Etc.51 which held as under: (1969) 3 SCC 429 "21. On the merits, we find that the two courts have recorded concurrent findings of fact. Normally this Court does not re-appraise the evidence unless the findings are perverse or are vitiated by any error of law or there is a grave miscarriage of justice. The courts below accepted the testimony of the accomplice Yusuf Merchant. Section 133 of the Evidence Act says:

"An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." Illustration (b) to Section 114 says that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. The combined effect of Sections 133 and 114, Illustration (b) is that though a conviction based upon accomplice evidence is legal the Court will not accept such evidence unless it is corroborated in material particulars. The corroboration must connect the accused with the crime. It may be direct or circumstantial. It is not necessary that the corroboration should confirm all the circumstances of the crime. It is sufficient if the corroboration is in material particulars. The corroboration must be from an independent source. One accomplice cannot corroborate another, see Bhiva Doulu Patil v. State of Maharashtra and R. v. Baskerville. In this light we shall examine the case of each appellant separately." Therefore, in the light of the case mentioned above, we begin with examining in detail the evidence of PW-

50. He has stated in his deposition about watching videos of riots and killing of Muslims in Gujarat in the house of A-3 at Riyadh, which act, by itself does not constitute a criminal offence. On being asked during the cross examination before the Special Court (POTA) if the money donated by the gathering in Saudi Arabia to A-3, was used for running the relief camps in Gujarat, he was not able to answer for what purpose exactly the money was collected. Therefore, at the most, even if his evidence is taken to be true for the sake of argument, some suspicion, if at all, can be cast on the involvement of A-3 in some sort of illegal activity at the most. But culpability of a person in as grievous an offence as this, cannot be premised on mere suspicion without knowledge of the nature of the illegal activity.

94. Next, with respect to PW-51, the evidence is not reliable because of two reasons. Firstly, according to his evidence, it was reported to him by A-2 that the fidayeens had arrived from Hyderabad which contradicts the claim of the prosecution. Secondly, A-2 did not state anything beyond the alleged arrival of the fidayeens which cannot be connected to the event of attack on Akshardham beyond reasonable doubt. It again, merely arouses suspicion about the involvement of A-2 and the passive approval of A-4 and A-5 in the incident.

Even with respect to PW-52, other than the fact that he mentioned about A-2 telling him that they are planning a 'carnage' and that some 'guests' have arrived, no other detail was provided by PW-52 in his evidence. It is also pertinent to mention here that A-6 had not been mentioned at all in the evidence of any of the accomplices. Therefore, the twin test to establish the credibility of the guilt of the accused persons based on the evidence of the accomplices, fails miserably in the present case.

Further, on the aspect of guilt to be proved beyond reasonable doubt, it is pertinent to mention the case of Vijay Kumar Arora v. State(Govt. of NCT of Delhi) , wherein the Court held 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 suspicion 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 cannot 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 (2010) 2 SCC 353 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.” (emphasis laid by this Court)

95. Thus, as can be seen from the above mentioned case, the evidence of the accomplices at the most, raises suspicion and conjectures but the same cannot be construed as legal evidence against the accused persons, relying solely on which they can be convicted, as has been done by the courts below. Moreover, it is a settled principle of law that the confessional statements of accomplices form a very weak form of evidence, to prove the culpability of the accused persons if the guilt of the accused cannot be proved, independent of the statements of the accomplices. Therefore, the same cannot be used to corroborate the confessional statements of an accused. Instead, there should be independent evidence to corroborate the evidence of the accomplice to establish the culpability of the accused. In this regard, we intend to rely upon the three Judge bench decision of this court as early as 1952 which still holds its field. In the case of Kashmira Singh v. State of Madhya Pradesh53, this court held as under:

> “8. Gurubachan's confession has played an important part in implicating the appellant, and the question at once arises, how far and in what way the confession of an accused person can be used against a co-accused? It is evident that it is not evidence in the ordinary sense of the term because, as the Privy Council say in Bhuboni Sahu v. The King, 76 Ind App 147 at p.155 :-

"It does not indeed come within the definition of 'evidence' contained in S.3, the Evidence Act. It is not required to be given on oath, nor in the presence of the AIR 1952 SC 159 accused and it cannot be tested by cross examination."

Their Lordships also point out that it is "obviously evidence of a very weak type..... It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities."

....

10. Translating these observations into concrete terms they come to this. The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

11. Then, as regards its use in the corroboration of accomplices and approvers. A co-accused who confesses is naturally an accomplice and the danger of using the testimony of one accomplice to corroborate another has repeatedly been pointed out. The danger is in no way lessened when the "evidence" is not on oath and cannot be tested by cross-examination. Prudence will dictate the same rule of caution in the case of a witness who though not an accomplice is regarded by the judge as having no greater probative value. But all these are only rules of prudence. So far as the law is concerned, a conviction can be based on the uncorroborated testimony of an accomplice provided the judge has the rule of caution, which experience dictates, in mind and gives reasons why he thinks it would be safe in a given case to disregard it. Two of us had occasion to examine this recently in Rameshwar v. The State of Rajasthan,Cri. App. No.2 of 1951 : (AIR 1952 SC 54). It follows that the testimony of an accomplice can in law be used to corroborate another though it ought not to be so used save in exceptional circumstances and for reasons disclosed. As the Privy Council observe in Bhuboni Sahu v. The King, 76 Ind. App. 147 at p.157 :

"The tendency is include the innocent with the guilty is peculiarly prevalent in India, as judge have noted on innumerable occasions, and it is very difficult for the court to guard against the danger.... The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on independent evidence which in some measure implicates such accused."

12.....We do not doubt that a rickshaw was used because rickshaw tracks were discovered by the well long before anybody had suggested that a rickshaw had been used. But we find it difficult to resist the inference that this witness was an accomplice so far as the disposal of the body was concerned.

Consequently, he is in much the same category so far as credibility is concerned. That brings us at once to the rule that save in exceptional circumstances one accomplice cannot be used to corroborate another; nor can he be used to corroborate a person who though not an accomplice is no more reliable than one. We have therefore either to seek corroboration of a kind which will implicate

the appellant apart from the confession or find strong reasons for using Gurubachan's confession for that purpose. Of course against Gurubachan there is no difficulty, but against the appellant the position is not as easy.

We will therefore examine the reliability of Gurubachan's confession against the appellant. Now there are some glaring irregularities regarding this confession and though it was safe for the Sessions Judge and the High Court to act on it as against Gurubachan because he adhered to it throughout the sessions trial despite his pleader's efforts to show the contrary, a very different position emerges when we come to the appellant.

The first point which emerges regarding this is that the confession was not made till the 25-2- 1950, that is to say, not until two months after the murder..." (emphasis laid by this Court) In the present case, the prosecution did not make any effort to substantiate the evidence of the accomplices with independent material evidence. Rather, the confessional statements of the accomplices have been used to corroborate the confessional statements of the accused persons, in the absence of any independent evidence.

96. But, apart from all these aspects on the statements of the accomplices, we fear that the story against the accused persons and its corroboration through the statements of accomplices is an act of concoction to make up a case against them. It was recorded in the statement of PW-126 that the information regarding PW-50 was given to him by D.G. Vanzara. However, D.G. Vanzara had not even been examined in this case and there is no information as to how he came to know about PW-50 after almost a year of the attack on Akshardham. This very important aspect of the lapse in investigation had been ignored by the courts below. The learned senior counsel for the accused persons have contended that there has been a delay of around a year from the time of the attack on Akshardham in recording the statements of the accomplices which shrouds the case of the prosecution. We have to accept the contention of the learned senior counsel for the accused persons in this regard as there is an inordinate delay in recording of the statements of the accomplices and this casts a grave suspicion on the reliability of the testimony of the accomplices.

It has been held by this Court in the case of State of Andhra Pradesh v. Swarnalatha & Ors.54 as under:

> " 21. It stands accepted that the statements of PW 3 and PW 6 were recorded only on 31-1-1998. The investigating officer did not assign any reason as to why so much delay was caused in recording their statements. A panchnama in regard to the scene of offence was conducted. PW 6 was admittedly not present at that time. The statements of PW 3 and PW 6 were recorded under Section 164 of the Code of Criminal Procedure much before their recording of their statements under Section 161 thereof.
>
> 22. In Ganesh Bhavan Patel v. State of Maharashtra this Court held:

"47. All the infirmities and flaws pointed out by the trial court assumed importance, when (2009) 8 SCC 383 considered in the light of the all-pervading circumstance that there was inordinate delay in recording Ravji's statement (on the basis of which the 'FIR' was registered) and further delay in recording the statements of Welji, Pramila and Kuvarbai. This circumstance, looming large in the background, inevitably leads to the conclusion, that the prosecution story was conceived and constructed after a good deal of deliberation and delay in a shady setting, highly redolent of doubt and suspicion." (emphasis laid by this Court) Further, PW-51 on being cross examined by the counsel for A-1, A-3 and A-5, Shri H.N. Jhala before the Special Court (POTA), stated that:

> "It is true that I was taken to the Crime Branch 60 days earlier when my statement was taken. I was severely beaten up and therefore even my thumb had got broken. I was told that I as well as my family will be taken as accused. I have not done anything wrong in my life. I was beaten up at the Crime Branch for 15 to 20 days. I am coming just now from the Crime Branch. I was called today at 9:30 in the morning and was also called yesterday at 6:00 p.m. It is true that I was told at Crime Branch that you have to depose as we say or else you will get in trouble. It is true that whatever I have stated in the examination in chief, the said has been stated by me at the instance of the Crime Branch. The fact as stated by me in examination in chief that Mufti Abdullah and Maulvi Abdullahmiya met me after Godhra carnage, the said has been false stated by me.

Prior to the time when I was deposing, I was said that I have to state before the Court that guests are going to come and they are terrorists ans they were still reading over the said facts to me. It is true that Maulana Abdullahmiya leads in prayer in Haji Saki Mosque. It is true that the facts stated by me to have sought Rs. 20 lakhs from Saudi Arabia on phone, the said facts are false. It is true that I have stated in the chief- examination that when I was asked who are guests, at that time I have said that the guests will survey the Hindu areas and will do the killings which are to be done, the said facts have been stated falsely. It is true that I stated in examination in chief that while I was passing from the near the Bawahir Hall, at that time Maulana Abdullahmiya and Mufti Abdul Qaiyum met me, had exchanged greetings and they also said that the guests have arrived and God willing in some days victory will be ours, the said facts have been stated by me falsely....." (translation extracted from the Additional documents submitted on behalf of the appellants) Also on cross examination by Adv. Shri R.K. Shah for A-2 and A-4, PW-51 said:

> ".....It is true that around 700 people lived in the said camp. I don't know if except for me, many other workers were taken by the Crime Branch personnel and there were protest in this regard. The witness states that Khalid Sheikh was taken from our place. The witness himself states that I was kept blind folded (by tying strip on eyes) and therefore, I don't know. I was questioned about identification of accused no. 2 and 5.

I do not know after how many days these accused persons were brought when I was taken by the Crime Branch personnel because I could not make out about dates and days. It is true that I was released after two months by the crime branch and remand of the accused had completed prior to

the time when I was released. It is true that when I was taken to the magistrate, I was told that this confession could be used against me in the Court.....It is true that the statement written by the Magistrate Sir was written from the statement at Crime Branch." (translation extracted from the Additional documents submitted on behalf of the appellants) During cross examination by the Special Public Prosecutor, Shri H.M. Dhruva, he stated thus:

> ".....I was taken to Crime Branch in seventh or Eighth month of the year 2003. I was confined continuously for two months and was not allowed to go anywhere. Application was not submitted by any of my relative in this regards. My relative had not filed any case with regards to my wrongful confinement nor was any application filed. After I got released 2 months later, I have not submitted any application anywhere. I was questioned with regard to the case. The witness himself states that questioning was done just with regards to the camp. With regards to all the other facts, only written statements were given. It is true that I was taken to the Magistrate Sir regarding what I know about this statement. It is not true that the Magistrate had asked any question to me and I had replied to the Sir. It is true that I did state the fact to the magistrate that I was confined for two months and was beaten up. The witness himself states that I was told not to say it. It is true that from the time I was released from Crime Branch and till the time when I came to give this deposition, I have not submitted any application in this regards, nor have I made any complaint. ....It is true that I did not give any written or oral complaint on the last court date with regards to having been confined for 60 days and having been threatened by the Crime Branch. It is true that I am stating these facts for the first time after my deposition on the last date 15.7.2005. It is true that I went to Crime Branch after I had deposed on the last occasion, and thereafter I had gone to my house. .....The witness himself states that I made daily phone calls to Crime Branch.....Crime Branch officer used to investigate if I am threatened by anybody. It is not true that when I went even today, I was questioned if anybody has threatened me.

..... It is not true that I am giving such deposition since I have received threats from the accused persons. It is not true that I received such threats after I deposed on the last court date." (emphasis laid by this Court) (translation extracted from the Additional documents submitted on behalf of the appellants) The statement made by PW-51 during the cross examination along with the legal principle laid down by this Court leads us to the conclusion that there was a serious attempt on the part of the investigating agency to fabricate a case against the accused persons and frame them with the help of the statements of the accomplices, since they had not been able to solve the case even after almost a year of the incidence.

97. Therefore, we hold that the evidence of the accomplices cannot be used to corroborate the confessional statements of the accused persons in the absence of independent evidence and the delay of more than one year in recording their statements causes us to disregard their evidence. Therefore, we answer this point in favour of the appellants.

Answer to point no. 4

98. The two Urdu letters were mentioned for the first time in the list of Muddammal articles (Ex.524) collected from the fidayeens by Major Lamba (PW-91) and handed over to PW-126 by Panchnama drawn up for the same(Ex.440). In the same, the mention of the two Urdu letters comes as under:

> "(7). Two white papers upon the same some writing have been made in Urdu language estimated price of the same can be assumed at Rs. 0.00" Further, the receipt voucher of articles recovered from the body of the fidayeens and handed over to the I.O. by PW-91 (Ex.524) merely makes a mention of 'handwritten letters in Urdu'.

PW-91, in his deposition before the Special Court (POTA) (Ex.522), had made the following statement:

> "Thereafter, we had carried out search of entire area of Akshardham and all explosives those were not exploded, we had destroyed all of them at the same place. Thereafter, I handed over two dead bodies, two AK 47/56 Rifles, chocolates, one live hand grenade, two chits found from dead body, and other articles by preparing its separate list to D.S.P. Shri G.L. Singhal.
>
> ..... I am shown the articles of list Exhibit 524.

I am shown both the letters written in Urdu language Mark-P. After seeing that I say that the same were found from pocket of cloth on body of those persons. One letter was found from each both of them, and at backside part of the letter signature has been made by Force Command Brigadier Rajsitapati, and I identify his signature. I was knowing him for one year of incident and I was serving with him, therefore I identify his signature. I was commander of task force and Brigadier Sitapati was as Force Commander. One maulvi was called in presence of us both and other persons, who was conversant with the Urdu language. The letters which were obtained by me from pocket of cloth put on by terrorists, he had done translation of its writing, wherein as per my memory such fact was written that, this attack was by way of reply to the communal riots took place in Gujarat state, wherein both terrorists were of "Atok" region of Pakistan. I am shown muddamal. After seeing that, I say that, this is the same muddamal, as had been handed over to Gujarat police by me after preparing list thereof." (emphasis laid by this Court) (translation extracted from the Additional documents submitted on behalf of the appellants) Further, during cross examination by the counsel on behalf of the accused persons, PW-91 deposed that:

> "At the time of seizing the articles whichever were found as articles which ever found from the bodies of both the terrorists, from their pockets and Rucksack I was continuously present there. I don't remember that by which of my army man these articles had been obtained. It is not true that I cannot say as to which of the army man had taken out which of the articles and from where taken out. I don't remember name of Jawan who had prepared list of Exhibit 524, but list was prepared in my presence. It is true that no signature of concerned Jawan has been obtained on

Exhibit

524. ..... Both the two chits, which I state to have been found, were found from pocket of pant of terrorists. The search of both of them was carried out by one Junior Commissioned Officer and two Jawans, wherein Junior Commissioned Officer was carrying out search and both the jawans were collecting the articles found.

..... On suggesting me to give name of any junior Commissioned Officer, I state he was Subedar Suresh Yadav. He was expired at that time. I handed over all those articles and dead bodies to the police. I handed over the same in Akshardham temple itself. They were checking as per list of Exhibit 524 and they had prepared voucher thereof and in that manner they had seized the articles. The Maulvi was called in Akshardham temple itself. He came during period of 8:00 AM to 9:00 AM. I don't remember certain time. I cannot give his name. His signature is not obtained at any place. When we had seized the articles of Exhibit 524 from the terrorists, at that time no police officers were present, because, that premises was in our possession. I don't know as to where Shri Singhal kept all those items after I handed over to him. I don't know the Urdu language. It is true that for showing that both these chits were seized by us, there is no other evidence with me to show except the signature of Brigadier Sitapati. It is true that there is no date therein. It is not the same as were seized at the relevant time. Witness willingly states that, these are these chits, which had been seized from the dead body by me. It is not true that, Brigadier Sitapati has not made any signature in my presence.

(emphasis laid by this Court) (translation extracted from the Additional documents submitted on behalf of the appellants) The learned senior counsel on behalf of the accused persons had expressed strong suspicion as to whether the letters produced before the court as Ex.658 were the same letters which were found from the pocket of the trousers of the fidayeens. While making the above contention, the learned senior counsel on behalf of the accused persons placed reliance upon the FIR registered under Section 154 CrPC by PW-126 on 25.09.2002 (Ex.680). The FIR mentioned about the seizure of some articles from the body of the fidayeens which were mentioned in the list handed over by PW-91 to PW-126. It was imperative therefore, on the part of the prosecution to ensure that Brigadier Sitapati was required to be examined before the Court so as to prove that he signed on the letters marked as Ex.658 and they were the same letters recovered by Maj. Jaydeep Lamba (PW-91) from the bodies of the fidayeens. Otherwise, the absence of such evidence adversely affects the case of the prosecution. However, the statement of PW-91 under Section 161 CrPC was not recorded. The necessary implication of this is that he could not have been presented as a chargesheet witness, as his evidence is recorded for the first time before the Special Court (POTA). and his statement under Section 161 CrPC was not taken by the I.O. However, Brigadier Sitapati, who is the most important witness for proving the recovery of the alleged letters from the pockets of the trousers of the fidayeens, was not examined either under Section 161 or before the Court.

99. It is a settled position of law in the criminal jurisprudence that a witness, whose evidence is placed reliance upon by the Court, has to be examined and questioned during the course of

investigation by the police and his name has to appear in the chargesheet so that the accused gets a fair chance to cross examine such witness. It was held in the case of Ram Lakhan Singh & Ors. v. State of Uttar Pradesh55 as under:

> "37. It is true that no enmity or grudge is suggested against this witness, but we find that this witness was not even examined by the police nor was he cited in the chargesheet. In a grave charge like the present, it will not be proper to place reliance on a witness who never figured during the investigation and was not named in the chargesheet. The accused who are entitled to know his earlier version to the police are naturally deprived of an opportunity of effective cross-examination and it will be difficult to give any credence to a statement which was given for the first time in court after about a year of the occurrence. We cannot, therefore, agree that the High Court was right in accepting the evidence of this witness as lending assurance to the testimony of other witnesses on the basis of which alone perhaps the High Court felt unsafe to convict the accused." The legal principle laid down by this Court in the aforementioned case renders the case of the prosecution with respect to the recovery of the alleged letters from the dead bodies of the fidayeens, (1977) 3 SCC 268 fatal. We however, intend to further examine the contents of the letters (Ex.658) to determine if they are the same letters which were alleged to be recovered from the pockets of the trousers of the fidayeens. It is pertinent here to examine the deposition of PW-121(Ex.657), the translator of the Urdu letters before the Special Court (POTA). The translation of his statement from Gujarati to English, as per the documents submitted on behalf of the accused persons, reads as under:
>
> "I know Urdu, Arabic and Persian languages. I have studied all these languages by living at Bihar, U.P and Ahmedabad. The said degree is called Aalim.
>
> After three days of Akshardham incidence, DSP Shri B.D Waghela had given news to me at Petlad, and I had received news at my village Bisnoli from Petlad, I had come to the office of L.C.B at Gandhinagar as I had received the news. I was said that, "sir (bapu), translate the two papers which we take out from the cover. I had read both the papers which were written in Arabic language, and thereafter had translated the same to Gujrati from Urdu. That was written by writer of Tolia Sir. I was speaking and he was writing. Police had taken my statement on the same day on which I had translated. On showing me letters of Mark-P and Mark-F/1 written in Gujarati script, I state that the said is not same which was read by me on the relevant day and it is not the same which was given to me to read. He was writing whatever was spoken by me, and at present on reading the same, I state that this writing is same which has been written as spoken by me.
>
> (emphasis laid by this Court) (translation extracted from the Additional documents submitted on behalf of the appellants) During the cross examination before the Special Court (POTA) by the learned counsel for A-2 and A-4, it was stated by him as under:

"No certificate was taken from me for the translation done by me, so that there is writing that the said translation was done by me.

There is no other written base that the said translation was done by me. I don't know the name of the person who had written the translation. Translation was not written by Tolia sir. It is not true that Tolia sir had written the translation of both the letters. It is true that the letters which were translated by me on that day were not seen by me thereafter till today. It is not true that the said letters were not there at the respective time.

It is not true that I have not done any translation. It is not true that I don't know difference between Arabic and Urdu language.

There are similar writings in both the papers, but as per my opinion the writer is not the same, writer has changed." (translation extracted from the Additional documents submitted on behalf of the appellants) The statement of PW-121 as per the documents submitted on behalf of the prosecution, to the extent of contradiction, reads as under:

"I was told to read two letters from an envelope and to translate them. I read both the letters which were in Arabic language, then entire matter was in Urdu language. I translated Arabic language to Urdu language into Gujarati language. There was a writer appointed by Shri Tolia. I stated and he typed them. My statement was taken by the police on the day I did the translation".

(translation extracted from the Additional documents submitted on behalf of State of Gujarat)

100. We are therefore, not inclined to accept any of the contradictory versions of either of the parties.

It is pertinent to mention here that the poor translation of the documents from Gujarati language to English submitted by both the parties have majorly inconvenienced us. Therefore, instead of relying on either of the versions, particularly the aspect of the statement of the translator, since the same has been majorly contested before us, we intend to closely consider the other relevant evidence on this aspect which is brought to our notice. The excerpts of the translation of letter marked as Ex. 775 read as under:

"Tehrik-e-Kassas, Gujarat Hind. .....

Now each young boy of Tehreek-e-kassas will take revenge of the Muslims.

..... Muslims of Gujarat come and by joining steps with young boys of Tehrik-e-Kassas, we should rebuild our mosques and take revenge of killings of

Muslims.

.....

Allah may give us guidance to point true path for Muslims and may keep alive Tehrik-e-Kassas till the time revenge of each one killed is not taken.

..... From: Real Representatives of Group of Muslims of Gujarat Tehrik-e-Kassas, Gujarat.

Sd/- V.S.M.

PMG Raj Seethapathi" (translation extracted from the Additional documents submitted on behalf of the appellants) The contents of the letter nowhere mention the name of the place 'Atok' in Pakistan from where the fidayeens had allegedly come, as had been mentioned by PW-91 in his deposition before the Special Court (POTA).

101. Further, the statement of PW- 105, Prakash Chandra Mehra (Ex.592), Police Inspector of Gandhi Nagar only raises our doubts further. PW-105 stated as under:

"....During this time, NSG Major Joydeep Lamba had produced a list before me and before divisional officer Shri Singhal, by which he had handed over the articles recovered from the dead bodies, like weapons, ammunitions, cash as well as papers written in Urdu and edible items etc, and the said were seized by me by calling panchas and in presence of panchas as per instruction of Mr. Singhal. During questioning, Major Lamba Sir had stated that the Urdu papers were recovered from the right pocket of pant of deceased persons. The said panchnama is by exhibit- 440, and it being shown to me, and on seeing the same, I state that the panchas have signed therein before me, and it has my signature as before me, and facts written therein are true. I am being shown list of Exh- 524, the said is the list given by Major Lamba and it has my signature.

(translation extracted from the Additional documents submitted on behalf of the appellants) During the cross examination, he further stated that:

"I was the very first officer to reach Akshardham. At present I cannot say whether S.P Brahmbhatt and Dy Shri Singhal were present there before I had reached over there or not, but I had seen them at that place. After I had reached at the site, I immediately came to know that cognizable offence has been committed. It is true that the two dead bodies which I had seen, all of their cloths were stained with blood, I had questioned Major Lamba, but I had not recorded his statement.

It is true that it has happened that the seized papers were not kept in sealed covers. It is true that there is no description of the said papers in panchnama except for the

description that the said papers were written in Urdu language. It has not happened that the said papers were seized by any other officer before me.

It is true that panchnama of dead bodies of two terrorists which I stated to have been done, its videography was done. I presently don't remember as to who had done the said videography. After getting the videography done, I have not received it cassettes or CD, because immediately thereafter investigation was handed over to another officer. It is true that my statement which is recorded by P.S.I Shri Padheriya has no clear mention about Urdu papers.

The order to hand over the investigation to Shri Tolia was not of Shri Singhal, but of Shri Brahmbhatt." (translation extracted from the Additional documents submitted on behalf of the appellants) He further stated during the examination by the Judge of the Special Court (POTA):

"I am being shown signature of Brig. Raj Sitapati from the time when both the papers of Mark-P were produced before me, I don't remember about the same presently and I cannot identify the said signature. It has not happened that any Maulvi (Muslim priest) was called before me, and the said papers were got translated." (translation extracted from the Additional documents submitted on behalf of the appellants) He also stated during the cross examination by the learned counsel for A-2 and A-4:

"I have not recorded any statement of Brig. Raj Sitapati during my investigation, nor have I met with him." (translation extracted from the Additional documents submitted on behalf of the appellants) If the statement of PW-105 is taken into consideration, it would mean that no signature was made on the back of the letters, and that the letters seized were not kept in sealed covers which increased the chance of letters being replaced subsequently. It is also on record that the photographer and the videographer who had recorded the scene of offence as per the instruction of PW-126 had not been examined.

102. Further, the post mortem report of the fidayeens (Ex.492) stated that all their clothes were stained with blood and mud and all clothes bore multiple tears and holes due to perforation by bullets. In such a case, the fact that the letters remained clean, without any tear, soiling or stains of blood and soil is highly unnatural and improbable.

103. Therefore, we cannot accept the recording of the High Court that the secret behind the crease-free unsoiled and unstained letter lies in the divine philosophy of "Truth is stranger than fiction" for this renowned epithet by the author Mark Twain comes with a caveat that says, "Truth is stranger than fiction. Fiction must make sense". We accordingly accept the contentions of the learned senior counsel on behalf of the accused persons and hold that the two letters marked as Ex. 658 cannot be taken as evidence in order to implicate the accused persons in this crime. Hence, we answer this point in favour of the appellants.

Answer to point no. 5

104. The learned senior counsel on behalf of the prosecution, Mr. Ranjit Kumar contended that the two Urdu letters allegedly recovered from the pockets of the trousers of the fidayeens had been written by A-4, as he had admitted the same in his confessional statement as under:

> ".....On the next day night Aiyub came at my office and he stated that persons come by taking goods (arms). Tomorrow they three will come here at the time of noon's prayer here, at that time I and both fidayins will have to go to Akshardham separately, therfore Adam be called at noon time before Johar's prayer with rickshaw to take me, and keep ready by writing two chits in Urdu to the effect that this massacre is committed as a revenge of torture beyond limit committed on Muslims, and as writer of that chit name of group taking revenge on Gujarat i.e. "tehrik-e-qisas Gujarat" be written..... ...On that night at late hours, in my office of Zankar sound by closing shutter, I and Maulvi Abdulla made discussion and I wrote two chits in Urdu in my handwriting wherein we wrote that "violence on Muslims in Gujarat due to which feeling of revenge is spread in Muslims, now blood of Hindus, police will come out and now Shiv Sena, VHP and temple will be burnt and due to that Muslims will get relief and called upon all Muslims to take revenge by shaking shoulders, and if you want to live, live with pride and if you want to die, then die with pride. This gift of massacre is for Advani and Modi....by saying to give both these chits and pen to fidayins on next day, I had given it to Maulvi Abdullah... .....we performed two rakat fazal namaz, and as I called upon both fidayins to state their real names to make prayer for success of massacre, their safety and if they are died then they are going to heaven, doctor-2 stated his real name as Hafiz Yasir res. Lahore, Pakistan and Doctor-3 (Ashraf) stated his real name as Mohammed Faruk residence Ravalpindi, Pakistan and for their prayer we all five persons performed two rakat nafal namaz and gave hug to each other. At that time Maulvi Abdullah had given one chit each to the fidayin written by me in Urdu yesterday as per my instruction and if in future chits are caught to show that chits are written by fidayins he had also given them pen.

During this in the encounter with armed forces, they both terrorists are also killed and one chit each having one kind of urdu writing have been found from pockets of both. I had seen photographs of those chits and photographs of both the terrorists killed afterwards in T.V and newspapers. I identified that those chits are same which I and Maulvi Abdullah made discussion and both terrorists who died were doctor-1 and doctor-2." (emphasis laid by this Court) (translation extracted from the Additional documents submitted on behalf of the State of Gujarat) Therefore, by placing reliance upon the confessional statement of A-4, read with the contents of the letters mentioned above and the opinion of the hand writing expert,Jagdish Bhai(PW-89) the learned counsel on behalf of the prosecution contended that the alleged letters had been written by A-4.

105. The learned counsel for the accused persons have contended that the statement under Section 161 of the CrPC, of the key witness PW-91, Maj.Jaydeep Lamba was not recorded. We have to accept this contention as the investigating officers have conveniently omitted to record the statements of

witnesses which could have established beyond reasonable doubt that the letters were the same ones as discovered from the site of offence. They tied A-4 to the letters merely based on his confessional statement whereas the opinions of the hand writing experts are merely indicative and not conclusive beyond reasonable doubt. We begin with the comment made by the translator of the Urdu letters (PW-121: Ex.657) who had categorically stated that:

> "The matter in both the letters was same but the persons who wrote it are not the same as per my opinion".

(translation extracted from the Additional documents submitted on behalf of the appellants) But considering the fact that he was not a hand writing expert, we shall refer to the statement of the evidence of the hand writing expert, Jagdish Bhai (PW- 89: Ex.507) who had assigned the following reasons for recording his finding in his report that the hand writing of A-4 matches with the letters allegedly found from the pockets of the trousers of the fidayeens:

> "Pictorial appearance of all the disputed specimen and natural writings are similar. All these writings are written freely with speed showing natural variation among themselves.
>
> They agree in the writing habits such as movements, slants, spacing, relative size and proportion of characters, line quality, alignment of characters; manner of accommodation etc. They also show similarities in the execution of various commencing, terminal and connecting strokes.

..... However, during cross examination by the learned counsel on behalf of A-2 and A-4 while deposing before the court, he has stated as under:

> "Question: Hand writing science is not a perfect science.
>
> Answer: It is also not imperfect science. It can be called developing science. .....
>
> Question: What basic knowledge of Urdu you have? Answer: The Urdu language is written from right to left, the said fact as well as the fact that the complete word is written in combination that initial, medial and final. Also, wherever there is double pronunciation like in bachcha, kachcha then letter like little 'W' like English is made. I have studied 'Kaaf', 'Gaaf', 'Nukta', 'Hamja', 'Tasdid', 'full- stop, 'comma', small S, big SW, vowels and Sh thereby all words. ...I cannot write Urdu. I cannot read Urdu language, But by taking reliance of book, I can read it. ....

It is true reason that there is no mention about the discussion of the reasons given by me with the Expert of Hyderabad. It is true that in the reasons given by me, there is no signature of any examiner except for me. It is true that in my reasons, general characteristics, which are given, in the said, details like measurements have not been mentioned. It is true that the sample documents were compared mutually has not been mentioned in my reasons. It is true that the specimen and natural

hand writings were compared with each other, but it is not written in my reasons. It is true that I have written natural variations in my reasons, but I have not mentioned details about what these variations are." (translation extracted from the Additional documents submitted on behalf of the appellants) On cross examination by the Judge of the Special Court (POTA) however, he was asked whether the hand writing expert can also give opinion on the language which is not known to him. To this, he answered that:

> "It is necessary to have basic knowledge of the concerned language. Even many signatures are written illegibly in monogramatic formation, even then also by examining different characteristics of hand writing, one can come to the conclusion from the same." (translation extracted from the Additional documents submitted on behalf of the appellants) Further, he was asked, if the person who analyses such a document can read or write the language of the document and whether the opinion given by such a person can be called more reliable than the opinion given by the person who does not know to read or write the language, he answered:
>
> "I don't agree that the opinion can be called more reliable, but I can just say that the knower of the language can give reasons in more details. The witness states on his own that apart from me, two other experts of Hyderabad were taken, and they knew Urdu language better than me." (translation extracted from the Additional documents submitted on behalf of the appellants) The hand writing expert had stated that he cannot read or write the Urdu language. He can read Urdu language only with the aid of a book.
>
> 106. We state that considering the seriousness of this case and the gravity of the offences, it was the duty of the handwriting expert to seek opinion of other experts which he claimed to have done. PW-89 stated that he requested the Director of FSL to seek the service of the Central Government Laboratory, and the photocopies of the documents were sent to the Government Examiner of Questioned Documents(in short 'GEQD'), Ministry of Home Affairs, Hyderabad for the preliminary examination. Accordingly, Assistant Government Examiner, Shri A.K Singh and Shri R.K Jain, the senior most GEQD of the Central government had arrived at the FSL of Gujarat. It was further stated by PW-89 that the officers from Hyderabad had worked independently and prepared their opinion. Accordingly, PW-89 formed a final opinion based upon the opinion of the aforesaid officers (Ex.511). The senior most officer, Mr. R.K Jain, sent certificate via fax on 14.09.2003 in which he had stated that he was in consent with the opinion of PW-89. However, objection was raised by the counsel for the accused persons at the Special Court (POTA) for taking this certificate on record, since this document of certificate was never given to the defence in the chargesheet papers, or at any time thereafter. Moreover, the prosecution had also submitted that even they were unaware of the existence of this document, and this knowledge had come before them only during the course of recording of the deposition of PW-89 before the Special Court (POTA). Therefore, the certificate was taken on record with the objection of the defence.

107. After perusing the above mentioned evidence on record, we decipher that the prosecution had contended that the Urdu letters (Ex.658) were written by A-4 by only placing reliance upon the opinion of the handwriting expert, PW-89. However, the certificate of the seniormost official of FSL, Hyderabad was not admitted on record till a much later stage, after the charge sheet was prepared and PW-89 gave his statement before the court. It was at this stage that his evidence was admitted with protest from the defence. PW-89 in his evidence had stated that he has basic knowledge of Urdu and cannot differentiate between Urdu, Arabic and Persian. He further stated that the opinion of handwriting experts is not conclusive. Therefore, we hold that the prosecution had failed to establish beyond reasonable doubt that the Urdu letters (Ex.658) were written by A-4. Accordingly, we answer this point in favour of the appellants. Answer to point no.6

108. As per the Order of the CJM of Budgam, Jammu and Kashmir (Ex.674) dated 11.10.2003, A-6 was arrested from Bareilly during investigation in the case FIR no. 130 of 2003 for offences under Sections 120-B, 153-A RPC, Section 10 of one 'C.B.A. Act' and Sections 7 and 27 of Arms Act registered at the police station at Nowgam, Jammu and Kashmir. A car bearing Registration no. CHOIX- 3486 was seized as the vehicle was subjected to checking, and arms and ammunitions were recovered from the vehicle. The driver disclosed his name as Chand Khan, resident of Barsia Tehsil Nawabgunj, Dist. Bareilly, U.P. The seizure memo was drawn up immediately and A-6 was taken into custody. He thereafter, allegedly confessed that he was affiliated to militant outfits in the style of Lashkar-e-Toiba and was involved in subversive activities outside Jammu and Kashmir as well. A-6 had further allegedly confessed that he was using one ambassador car bearing Registration no. KMT 413 for subversive activities outside Jammu and Kashmir, which was recovered by the Jammu & Kashmir police from the workshop under the name of 'Chand Motor Khanabai Anantnag' as stolen property, under Section 550 of the Jammu and Kashmir CrPC. Thereafter, the car was subsequently handed over to Gujarat Police, on their requisition, for investigation in the present case which was registered vide FIR 314 of 2002. In this regard, we shall examine the statements of Police Inspector Shabbir Ahmed (PW-123), Sub-Inspector, Gulam Mahammed (PW-124) who are from the Jammu & Kashmir Police and Ibrahim Chauhan, Police Inspector of Crime Branch, Ahmedabad (PW-125).

109. The statement of PW- 123 is extracted as under:

> "the car was seized in our police station limit. The car was seized in September 2003. I do not remember exact date. There may be letters of seizing car in our police station. I did not seize the car, but investigating officer of the case did it. The car was seized by Gulam Mohammad Dar. I do not know if there were documents of the car. It is true that this car was seized by our police station and then by the Gujarat Police by Exhibit 671. During this course, I saw papers of seizure. The witness himself states that the papers would have been given to Gujarat Police, but I am not sure in this regard, but our case papers are those papers. It is true that we seized the car on the basis of suspect for investigation. I do not know the condition of the car when we seized it for our police station case. Whether it was as written in existing panchnama. My Investigation Officer must be knowing it. It is true that I saw seizure papers including panchnama before Gujarat police seized it. .... When the car was seized, it

was in our custody, but kept in S.O.G. camp. Then the car was handed over to Ahmedabad police. Thereafter, I had an occasion to see the car. It was true that when the car was given to Gujarat police, it was not in working condition.

..... Question: Are you prepared to produce panchnama and other papers in court when you seized the car in suspected condition?

Reply: Our file has been submitted to the government for sanction. I am prepared to produce when it comes. I am prepared to produce when court orders after getting sanction.

After getting reply from R.T.O., we came to know that its owner's name is Abdul Majid Rathor. We enquired in this regard but no such person exists. The car was registered in pseudonym. It is true that panchnama was made to handover the car to the police. There is record in my police record in this regard.... There were engine number and chasis number in the inner part of the car. No photographs were taken of the car in my presence then. It was seized in our police station. Then also no photographs were taken. It is true that there are no photographs of the car in our record.

(basically they talk about the seizure of the car by Gujarat Police and not the police of J&K)." (emphasis laid by this Court) (translation extracted from the Additional documents submitted on behalf of State of Gujarat)

110. Therefore, it is clear from the deposition of PW- 123 that firstly, A-6 is not the owner of the car since it was registered in the name of some other person as per the report of R.T.O (Ex.672). Secondly, as per the Order of the CJM of Budgam, Jammu and Kashmir (Ex.674) dated 11.10.2003, A-6 was not in physical possession of the car which was allegedly used for carrying weapons for the attack on Akshardham whereas he was actually found in possession of another car bearing Registration no. CHOIX-3486. Finally, though a panchnama was drawn up of the alleged car, by the police of Jammu and Kashmir, it was for them to hand over the car from their custody to the Gujarat police. No panchnama or document of seizure of the car had been produced before us to show that the car was recovered from the workshop/ garage of A-6 or even that the garage/ workshop from which the car was allegedly recovered belongs to A-6. Therefore, we cannot see how the car can be linked to A-6 in the absence of any independent evidence other than his confessional statement which had been subsequently retracted.

111. It is also of the utmost importance for us to mention the statement of PW-125, Ibrahim Chauhan, Crime Branch, Ahmedabad regarding the seizure of the car since it is reflective of how casually and with what impunity the investigation has been conducted in the instant case by the investigating officer. PW-125, who was a part of the investigation of this case in Kashmir, and who was also responsible for escorting A- 2, A-4 and A-5 to Srinagar, Kashmir, states as under:

"After knowing the facts of seizing car in the case 130/ 2003, I had no occasion to ask for papers regarding vehicle seized, because I was engaged in other works. It is in my view that panchnama regarding seizure of car no. KMT- 413 existed earlier to panchnama of Exhibit 671. I have not seen panchnama." (emphasis laid by this Court) (translation extracted from the Additional documents submitted on behalf of the State of Gujarat) He again went on record to state that:

"I do not believe that if any car is seized in one crime, seizure, panchnama and other papers should be possessed before seizing car in another crime. It is true that when the car is confiscated, its panchnama is made, that panchnama should be obtained while seizing car in another crime. As I was engaged in other work, I did not get panchnama. It is not true that panchnama of Cr. No. 130/ 2003 was not produced because its details were not in consonance with Panchnama Exhibit 671……." (emphasis laid by this Court) (translation extracted from the Additional documents submitted on behalf of State of Gujarat) It is clear from the statement of PW-125 that neither the panchnama nor seizure memo of the car no. KMT 413, made during its alleged seizure in case no. 130 of 2003 was seen by PW-125 since, "he was engaged in other work". However, without verifying the contents of the panchnama and the seizure memo of the car in Case No.130 of 2003, the involvement of the car had been admitted in evidence on record by the courts below, merely on the basis of the subsequent panchnama drawn by the Gujarat police, which was only for the transfer of possession of the car from the police of Jammu and Kashmir to the Gujarat police.

In light of the evidence mentioned above, we are not inclined to give any weightage to the panchnama drawn by the Gujarat police at Jammu and Kashmir for the seizure of car already in the possession of the Jammu and Kashmir police at SOG Camp, in the absence of the original panchnama and seizure memo drawn by the police of Jammu and Kashmir. In view of the evidence on record, and the reasons recorded by us, we answer this point in favour of the appellants and hold that the prosecution had failed to prove that the car was used by A-6 to carry weapons from Jammu and Kashmir to Bareilly for carrying out the attack on Akshardham.

Answer to point no.7

112. The independent documentary evidence produced before us against the accused persons are the two letters in Urdu allegedly recovered from the pockets of the trousers of the fidayeens, upon which the prosecution had placed strong reliance to establish the involvement of A-4 in the offence. The other independent evidence is the blue ambassador car in which A-6 was alleged to have brought the fidayeens and the weapons to Ahmedabad through Bareilly from Jammu and Kashmir. We have already ascertained while answering the point about the above letters that neither the two letters produced before the Special Court (POTA) nor the procedure by which the ambassador car was seized by the Gujarat police, inspires confidence in our minds to show that these are genuine evidence to implicate the accused persons in the offence. The only other material evidence on record on the basis of which the prosecution had argued the involvement of the accused persons, are the

confessional statements given by A-1, A-2, A-3, A-4 and A-6 before the Gujarat police under Section 32 of POTA. We have already mentioned that the confessional statements had not been recorded as per the strict statutory mandate provided for under Section 32 of POTA, which made their confessional statements inadmissible as evidence. However, we also intend to record certain other reasons as to why the conviction and sentencing of the accused persons by the Special Court (POTA), which was upheld by the High Court in the appeals and reference order, is liable to be set aside.

113. We cannot lose sight of the fact that the confessional statements of the accused persons were recorded by the DCP, PW-78 in extremely suspicious circumstances. We have already held that the procedure of presenting them before the CJM and subsequently sending them to judicial custody mandatorily had been reduced to a mere, empty formality. This above said procedural lapse coupled with the fact that the letters of caution to be given to them, before the making of such statements, mandated under Section 32(2) of POTA, and the process of recording their confessional statements were done in an extremely casual manner which is not the conduct expected from such high ranking police officers of the state government. Since we have already recorded our findings and reasons in this regard, while answering the point no.2 on confessional statements, we therefore do not intend to reiterate the same here.

114. Even if the confessional statements of the accused persons are made admissible, that alone could not have been made the only ground for convicting them, as it would amount to a violation of the legal principle laid down in the five judge bench decision of this court in the case of Hari Charan Kurmi and Jogia Hajam v. State of Bihar56 , wherein this Court held as under:

> “12. As we have already indicated, this question has been considered on several occasions by judicial decisions and it has been consistently held that a confession cannot be treated as evidence which is substantive evidence against a co-accused person. In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge AIR 1964 SC 1184 framed against the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right. As was observed by Sir Lawrence Jenkins in Emperor v. Lalit Mohan Chuckerburty, I.L.R.

38 Cal. 559 at p.588 a confession can only be used to "lend assurance to other evidence against a co-accused". In Peryaswami Moopan v.Emperor,I.L.R. 54 Mad. 75 at p.77: (AIR 1931 Mad. 177 at p.178) Reilly, J., observed that the provision of S. 30 goes not further than this, "where there is evidence against the co- accused sufficient, if believed, to support his conviction, then the kind of confession described in S. 30 may be thrown into the scale as an additional reason for believing that evidence." In Bhuboni Sahu v. The King, 76 Ind App 147 at p.155: (AIR 1949 PC 257 at p.260) the Privy Council has expressed the same view. Sir John Beaumont who spoke for the Board, observed that, “a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come

within the definition of "evidence" contained in S. 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities. S. 30, however, provides that the Court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence."

It would be noticed that as a result of the provisions contained in S. 30, the confession has no doubt to be regarded as amounting to evidence in a general way. because whatever is considered by the court is evidence; circumstances which are considered by the court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of S. 30, the fact remains that it is not evidence as defined by S.3 of the Act. The result, therefore, is that in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. That, briefly stated, is the effect of the provisions contained in S. 30. The same view has been expressed by this Court in Kashmira Singh v. State of Madhya Pradesh 1952 SCR 526 :(AIR 1952 SC 159) where the decision of the Privy Council in Bhuboni Sahu's case, 76 Ind App 147 (AIR 1949 PC 257) has been cited with approval.

..

14. The statements contained in the confessions of the co-accused persons stand on a different footing. In cases where such confessions are relied upon by the prosecution against an accused person, the Court cannot begin with the examination of the said statements. The stage to consider the said confessional statements arrives only after the other evidence is considered and found to be satisfactory. The difference in the approach which the Court has to adopt in dealing with these two types of evidence is thus clear, well-understood and well-established. It, however, appears that in Ram Prakash's case, 1959 SCR 1219: (AIR 1959 SC

1), some observations have been made which do not seem to recognize the distinction between the evidence of an accomplice and the statements contained in the confession made by an accused person." (emphasis laid by this Court)

115. Again, in the present case, there is nothing on record other than the statements of the accomplices (of which PW- 51 retracted from his confession) and the confessional statements of the accused persons which were retracted and this aspect of the matter was required to be considered by the courts below while recording the findings on the charges framed against the accused persons. The retraction of the confessional statements of the accused persons A-2, A- 3, A-4 and A-6 and that of PW-51 revealed that they were tortured by the police to extract their confessional statements.

Therefore, the confessional statements of A-2, A-3, A-4 and A-6 cannot be relied upon for this reason also i.e they have been retracted vide Exs. 779 (A-2), 780 (A-4), 33 (A-3) and 32 (A-6). A-2 had retracted his confessional statement vide Ex.779, wherein he had detailed the account of how he was detained on the charge of 'autorickshaw theft' and was brought to the Crime Branch, Ahmedabad and forced to confess regarding the crime of attack on the Akshardham temple. He had stated that he was put to intense physical and psychological torture and the police threatened him and his family members with the motive of eliciting a confession out of him which he stated to be 'false' as he is not guilty of the same and had been falsely charged. Relevant portions of the retraction statement(Ex.779) are extracted hereunder in order to examine the import of his statement of retraction:

> "I, Ajmeri Suleman Adam, state in writing that five to six officers of Ahmedabad City Crime Branch from Gaekwad haveli came in maruti car at the corner of my mohalla at about 1.30-2.00 in the night and they called me. They asked my name and occupation. I told the officers that I am rickshaw driver. They told me to sit in our maruti car. We have to take you for enquiry. They told me that the rickshaw which them that the rickshaw that I drive is not be theft.He has owner. Then the officer abused me, beat me and seated me in the car by coercion. I was taken into the crime branch office at night they tied a strip on eyes and placed me at such a place that I do not know. Then I could not sleep for whole night. I was thinking that I have not done any wrong. Then why I was brought here, then on 10-8-2003, on next day at 1.00 noon a constable came and told me to come with him as higher officer call you. At that time a strip tied on my eyes. The constable caught me and put in an office and opened the strip from my eyes. I saw four officer sitting there. Shri Vanzara, DCP Shri Singhal, ACP Shri Vanar PI and Shri patel PI, I came to know afterwards that these officers are from crime branch. Shri DCP Vanzara asked me whether I know after works that these officers are from crime branch. Shri DCP Vanzara asked me whether I know why I was brought here. I replied that you other officers told me that the rickshaw that I drive is by thefts and I am to be asked about it. He told me that I was not brought here for that crime but for other crime. I told that I not have made such crime that I should be brought here. Then Singhal Sahib abused me and told that should agree to what they say. I should agree that I am the criminal of Akshardham carnage. I told them that I have never gone to Akshardgam nor have I seen it. Kindly do not involve me. He immediately called five or six persons and told me to have handcuffs and fetters. Vanar Saheb beat me on soles. Shri Singhal Saheb told me that I agree with the crime of Askhardham , they shall not beat me and have some benefits. Then they beat me in such a way that I became unconscious and fell down. ..
>
> ..When I became conscious I was near Vanar Saheb office. I suffered much difficulty. I was weeping. It was night. At that time one constable came and told me that superior sahib was calling. I had no strength to walk or stand. I was caught and taken to Vanzara Saheb office. All four officers were present there. They told me to agree the crime, otherwise I shall be encountered. But I did not believe.

Then they brutally beat me. There was bleeding in back portion....They gave me currents. Then I told them, sir, have mercy on me. I am not culprit. Pardon me. Please don't make me criminal wrongly. I do not know anything in this regard. They threatened me to harass me and my family members. Even though I have not committed any crime, they wanted to agree Akshardham crime." (emphasis laid by this Court) (translation extracted from the Additional documents submitted on behalf of the State of Gujarat) A-2 further stated:

> "One day Singhal Saheb called me to office and asked me to do as we say. I know that you are a good congress worker. The relief materials received from congress at the time of godhra episode were distributed among Muslims and poor persons as said by congress leader you contested as an independent candidate in 1998. We know that congress candidate was defeated and BJP candidate won the election. You made a case against BJP in the High Court. The case was extended to Supreme Court but you could not do anything. What shall you able to do now. ...
>
> ...I was harshly beaten from 9-8-2003 to 28-8- 2003 without my fault and behaved rudely. ...Singhal Saheb came to my office at night (29-8-2003) and told me, " We have declared you as criminal. We shall take you to court and present before Judge. You should not speak anything against us, otherwise we shall get you down on the way and encounter you. You shall not come alive. Then I requested Vanzara Saheb, Singhal Saheb, Vanar Saheb and Patel Saheb that you have beaten the truth and placed lying in a higher position.....They told me to sign where they say...
>
> ...They threatened me and presented to the court . Hon.Court gave remand. During court, I was in crime branch. Shri Vanzara Saheb, Singhal Saheb, Vanar Saheb and Patel Saheb behaved with me as if I am an animal. During that time, I was taken to VS Hospital. They told me one thing that I should not narrate my difficulties to the Doctor, otherwise I shall be harassed like anything. I should say to the doctor I am healthy and I shall get treatment from the private doctor who comes in crime branch for any trouble. ...
>
> ....Singhal Saheb seated me in his office on 4- 9-03 at night and told me to write in my handwritings as he says, otherwise I shall be finished. I went to writing as he stated. I have not written this willingly but as per wish of Singhal Saheb. If I would not have written so, I would have been encountered on that very day or night. I was frightened and I wrote on account of fear. I was taken to Ahmedabad airport on 5-9-03. Vanzara Saheb, Patel Saheb, AA Chauhan Saheb and other three PSI s were with me....IG Shrinagar called me on 7-9-03. At that time three officers of Shrinagar were present. He told me to tell the truth. Then I told on oath of kuran-sharif true facts. I was arrested on 9-8-03. Till them I am beaten. I do not know anything about Akshardham. They have threatened my family members and threatened me to encounter. I have been forced to agree to the crime. I told officers of Shrinagar to help me, otherwise these officers shall kill me. Then they told me that we also know that you are innocent.....

...I reached to Ahmedabad on 9-9-03....Then I was taken to POTA Court. Prior to it Singhal and Vanar Saheb told me that I was to be taken to the Court. " If you complain, you shall not be kept alive. You might not be knowing what we can do. We can take out prisoner from the Central Jail and encounter him, while you are with us. Latif was in jail. We brought him out and killed. What can you do against us." I was not allowed to speak anything in the Court... I was taken on 23-9-2003 with strips on my eyes. I was told that Doctor had come for my treatment. ..I was given two injections on my right hand....On the next day I told them that I have many difficulties on account of your injections. Then Vanar Saheb and Patel Saheb told me that our work is over and I am not required now. On 25-9-03, Vanar Saheb, Singhal Saheb and other officers seated me in a jeep and took me to old high court. Singhal Saheb and vanar Saheb informed me that here in big judge. You should sign where he says, otherwise you know what we can do. Here court is ours, Govt. is ours, polics is ours and judge sahib is also ours. I was taken to judge sahib room. There were some written papers. I do not know what was written in it. Without allowing me to read anything judge sahib and crime branch officers took my signatures thereon.....Singhal,Vanar and other officers at in judge hamber. They took snacks and tea. After one hour all officers came out smiling saying our work is over. We shall present him in Pota court and send them to Central Jail.... ...I request you that since last two months I remained in crime branch as helpless and humble....

...I f you want the truth in this case to be revealed, hand over the case to CBI officers. It is my humble request to you to hand over the investigation to the CBI and truth shall be revealed to you. Sir, when I was sent to central jail I told the jail authorities that I required treatment...

...I am hopeful that you shall prevent me and my family from ruin and do justice. I am hopeful that you shall do justice to me and my family after considering my request." (emphasis laid by this Court) (translation extracted from the Additional documents submitted on behalf of the State of Gujarat)

116. Excerpts from the statement of retraction of A-4 (Ex. 780), reads as under:

"I state with request that I am (Mufti) Abdul Kayyam Ahmedhussain Mansuri...I taught namaz at Haji Sakhi Masjid charvat and teach Koran to children....

...On 17/8/2003, Sunday, in the evening, I was at Haji Sakhi Masjid, Dariyapur when four people came in the Masjid in civil dress and asked me if I was Mufti A.Kayyam. I replied that I am and they told me that I had to come to crime branch office as senior officer was calling me. ...

One of them told me that some enquiry has to be made and I would be left after enquiry in 3-4 days. ..they took me to Haveli crime Branch office. They blindfolded me and made me sit down later. At about 10.00 to 11.00 pm in the night they took me

to some officer. They removed the blindfold and released my hands. Later I learnt that the name of the Saheb was ACP GL Singhal.Shri Singhal asked me as to why I was brought here. I told him that I did not know....Then Singhal asked me questions about my family, friends etc...and I satisfactorily answered them. Suddenly, Singhal started beating me on my backside and told me to go and you would know as to why I was brought there on next day. Then I was blindfolded again and my hands were tied up and taken back again. .. ...Then everyday from 18/8/03 to 29/8/03, at noon and at night, that is two to three times a day I was taken to the office of Singhal Vanzara sir. Vanar sir also remained present there. They presented a story of Akshsardham before me and asked me to repeat that story before senior officer and confess it. I refused and so mental and physical torture was effected on me. I was beaten with a stick everyday on my backside, feet and palms. They used to beat me so badly that I fell down on the floor. Sometimes, lips were attached on my hand fingers and current was given to me. Pins were pierced below the nails of my finger tips. Such inhuman torture wad done on me for about ten days from 17/8/03 to 29/8/03. I was illegally kept in the Crime Branch office and tortured and threatened. ..

..Later on 29-8-03, Friday at 3.00 pm noon, on officer (whose name I learnt later) PI RI Patel called my father and me too. My and fathers signatures were taken on some papers. Neither do I or my father know what was written on those papers. But we were helpless and had to sign them. At about 3-4 o clock many photographers came and made me cover my face with a bukha (cloth) and clicked photographs. That day at about 10.00 pm night Singhal Saheb called me and told me that I was arrested in Akshardham case. He told me that I would be presented in the court the next day. ...I was presented in court the next day. Judge asked me whether I had any complain but due to fear I could not say anything...

...Later on the day I got remand on 30-8-03 at night I was called to Singhals office by Shri Singhal and VD Vanar. They told me that letters were found from both the dead terrorists at Akshardham complex. They asked me if I had written those letters. I replied that I had not written them and I do not know anything about it. On this they started torturing me mentally and physically. Then Singhal said it was ok, they knew I had not written those letters. He asked me read and rewrite the copy of the two letters. Saying so he gave me a copy of those two letters. I trusted them and copied those two letters. Due to innocence I could not understand their conspiracy and I was repeatedly asked to copy those letters by Vanar and RI Patel for three four days every night Patel and those urdu letters and asked me to copy them till three four o clock late night. They used bad words and said those letters were found from terrorists. They asked me to match the handwritings of these letters and exactly write in those many lines and paragraphs also must be at the same place. ...They threatened and forced me to write 40-50 copies of those letters.

Later on 5.9.03 they took me to Srinagar (Kashmir). Out of the officers present with me RI Patel repeatedly told me that there I would be presented before officer. He

would ask me about Akshardham and I must repeat the false story which they had told me earlier. They threatened me if I revealed the truth, they would kill me and throw my body somewhere. They would inform my family that i would be killed in an encounter with the terrorists. They told me that I would be shown a person, they told me to identify him and then they presented me before those officers. I learnt the names of officers later as DIG K Rajendra, ACP Sandip vazir and ACP Saheb of these officers showed me a person and asked me if I knew him. I did not know that person at all. So I dared to say that I did not know him....

...So those officers made the officers of Crime Branch, Ahmedabad sit in another room. They asked me to speak the truth. I replied that if I did so these officers would kill me and trouble my family too. At this DIG K Rajendra answered me that they would not let any trouble fall upon my family, if I told the truth. I was impressed with his words and started owning loudly. Due to his humanitarian approach, I gained confidence and told him that I was innocent and knew nothing about Akshardham. They answered me that they would not let injustice happen to innocent as they had arrested the person involved in this scandal. ...

....Later on 9-9-03 I was brought again to Ahmedabad... I was brought to Crime Branch on 14-9-03, Vanar Saheb called me...he was writing something on some papers...Then he gave those papers to me(which he was writing). He asked me to read those papers. In them, I was accused of crime and falsely trapped in Akshardham case by these officers. After reading, I pleaded and requested Vanar saying that I was innocent and such allegations must not be charged on me....He asked me to read those papers in same way and confess in front of live camera, as they had written my role in those papers. ...At about 10.00 pm they compelled me to tell the false story in front of video camera....I used to forgot and make mistakes in telling the written story. At this PI Vanar used to sign me and remind me....He also made the camera close and abused me and reminded me the untrue story in this way by beating and threatening me they made me reveal an absolutely untrue story. ..

...I swear I have been wrongly trapped by Crime branch Officers in Akshardham case. I am absolutely innocent and do not know anything about Akshardham case..." (emphasis laid by this Court) (translation extracted from the Additional documents submitted on behalf of State of Gujarat) This Court in the case of Navjot Sandhu (supra) while deciding whether the same rule of prudence for confessions under the general law would apply for confessions under the POTA as well, held as under:

> "46. .... The better view would be to follow the same rule of prudence as is being followed in the case of confessions under the general law.

The confessional statement recorded by the police officer can be the basis of conviction of the maker, but it is desirable to look to corroboration in a broad sense, when it is retracted. The non obstante provision adverted to by the learned Judges should not, in our considered view, affect the

operation of the general rule of corroboration broadly." Further, in the case of Parmanada Pegu v. State of Assam57, this Court relied upon many judgments, most important of which is Subramania Goundan v. State of Madras58 which was relied upon in the case of Navjot Sandhu (supra), in order to hold that the confessional statement of the accused which is retracted, cannot be relied upon to convict him in the absence of corroborating evidence. In the Subramania Goundan case (supra), this Court held thus:

> "14. The next question is whether there is corroboration of the confession since it has been retracted. A confession of a crime by a person, who has perpetrated it, is usually the outcome of penitence and remorse and in normal circumstances is the best evidence against the maker. The question has very often arisen whether a retracted confession may form the basis of conviction if believed to be true and voluntarily made. For the purpose of arriving at this conclusion the court has to take into consideration not only the reasons given for making the confession or retracting it but the attending facts and circumstances surrounding (2004) 7 SCC 779 AIR 1958 SC 66 the same. It may be remarked that there can be no absolute rule that a retracted confession cannot be acted upon unless the same is corroborated materially. It was laid down in certain cases one such being In re. Kesava Pillai ILR 53 Mad 160: (AIR 1929 Mad 837) (B) that if the reasons given by an accused person for retracting a confession are on the face of them false, the confession may be acted upon as it stands and without any corroboration. But the view taken by this court on more occasions than one is that as a matter of prudence and caution which has sanctified itself into a rule of law, a retracted confession cannot be made solely the basis of conviction unless the same is corroborated one of the latest cases being 'Balbir Singh v. State of Punjab (S) AIR 1957 SC 216 (C) , but it does not necessarily mean that each and every circumstance mentioned in the confession regarding the complicity of the accused must be separately and independently corroborated nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made. It would be sufficient, in our opinion, that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession. In this connection it would be profitable to contrast a retracted confession with the evidence of an approver or an accomplice. Though under S. 133 of the Evidence Act a conviction is not illegal merely because it proceeds on the uncorroborated testimony of witnesses, illustration (b) to S. 114 lays down that a court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In the case of such a person on his own showing he is a depraved and debased individual who having taken part in the crime tries to exculpate himself and wants to fasten the liability on another. In such circumstances it is absolutely necessary that what he has deposed must be corroborated in material particulars. In contrasting this with the statement of a person making a confession who stands on a better footing, one need only find out when there is a retraction whether the earlier statement, which was the result of remorse, repentance and contrition, was voluntary and true or not and it is with that object that corroboration is sought for. Not infrequently one is apt to fall in error in

> equating a retracted confession with the evidence of an accomplice and therefore, it is advisable to clearly understand the distinction between the two. The standards of corroboration in the two are quite different. In the case of the person confessing who has resiled from his statement, general corroboration is sufficient while an accomplice's evidence should be corroborated in material particulars. In addition the court must feel that the reasons given for the retraction in the case of a confession are untrue." (emphasis laid by this Court) This above said view of this Court has been endorsed in various judgments subsequently and we find it necessary to reiterate the same herein. The rule of prudence as applying to confessions of the accused under the general law, being that the confessional statements which were retracted must be corroborated by independent evidence, must be followed to convict the accused for the charges framed against them. The findings and reasons for conviction and sentencing of the accused persons in this case were the confessional statements of A-2, A-3, A-4 and A-6 and the two Urdu letters which are purportedly written by A-4. A-2, A-

3, A-4 and A-6 had retracted their confessional statements as per the exhibits aforementioned and all of them had alleged that they were tortured and threatened with dire consequences of death through 'encounter' and death of their loved ones. All the accused persons speak of torture by beating, especially on the legs and this corresponds to their complaints of pain 'under the feet'.

117. Further, A-5 also made a statement as per Ex.778 that he was tortured in police custody and that he had no role in the conspiracy to attack the Akshardham temple and he was being framed in the case. The statements of retraction also referred to the repeated entreaties by accused persons before the Special Court (POTA) as well as by A-2, A-4 and A-5, before the DIG of Police at Jammu and Kashmir, Mr. K Rajendra Kumar to transfer the case to the CBI for an independent investigation and enquiry.

118. Further, A-6 had also retracted his confessional statement (Ex.32), wherein he had also alleged severe torture and beating by the Srinagar police as well as the Crime Branch, Ahmedabad and he alleged that he was arrested at Nagpur and sent to Srinagar and a compulsory confession had been extracted from him in order to implicate him in the crime.

119. Further, with respect to the two Urdu letters, which were purportedly written by A-4, upon which the prosecution placed such an unflinching reliance in order to establish a link between the fidayeens and the accused persons, has already been answered by us in point nos. 4 and 5 to be completely unreliable for the reasons stated by us in this judgment.

120. The story of the prosecution crumbles down at every juncture. Most importantly, the case laws relied upon above show that the statements of confession of the accused persons cannot be relied upon if they are retracted, unless corroborated by independent evidence. In this case, as already elucidated, the case of the prosecution rests on the confessional statements on the accused persons, the confessional statements of the accomplices and their evidence and the two Urdu letters purportedly found in the pockets of the trousers of the fidayeens and written by A-4, and apart from

this, it is very clear that there is absolutely no independent evidence to implicate the accused persons for the crime. The evidence of the accomplices, PW-50, PW-51 and PW-52 are also rejected for the reasons given in the answer to point no.3. Therefore, there is no independent evidence on record which corroborates the confessions of the accused persons which were subsequently retracted.

Further, a retracted confessional statement of an accused person cannot be used to corroborate the retracted confessional statement of a co-accused. In the case of Aloke Nath Dutta & Ors. V. State of West Bengal59, this Court held as under:

> "110. A retracted confession of a co-accused cannot be relied upon for the purpose of finding corroboration for the retracted confession of an accused....

116. Whatever be the terminology used, one rule is almost certain that no judgment of conviction shall be passed on an uncorroborated retracted confession. The court shall consider the materials on record objectively in regard to the reasons for retraction. It must arrive at a finding that the confession was truthful and voluntary. Merit of the confession being the voluntariness and truthfulness, the same, in no circumstances, should be compromised. We are not oblivious of some of the decisions of (2007) 12 SCC 230 this Court which proceeded on the basis that conviction of an accused on the basis of a retracted confession is permissible but only if it is found that retraction made by the accused was wholly on a false premise.....

117. There cannot, however, be any doubt or dispute that although retracted confession is admissible, the same should be looked with some amount of suspicion - a stronger suspicion than that which is attached to the confession of an approver who leads evidence to the court. " (emphasis laid by this Court)

121. Thus, for the above reason also, the confessional statements of the accused persons cannot be relied upon and the case of the prosecution fails. Accordingly, we hold that there is no independent evidence on record to prove the guilt of the accused persons beyond reasonable doubt in the face of the retractions and grave allegations of torture and violation of human rights of the accused persons against the police. We accordingly answer this point in favour of the appellants.

Answer to point no. 8

122. The accused persons have been found guilty of the offence of criminal conspiracy by both the courts below. It was contended before us by the learned senior counsel for the prosecution that the accused persons in the instant case are guilty of criminal conspiracy and though the accused persons did not know each other, it is not a prerequisite for establishing the offence of criminal conspiracy provided under Section 120-A of IPC. On the other hand, it was contended by the learned senior counsel for the accused persons that neither the common intention nor the common object of the accused, i.e attack on Akshardham temple in the intervening night between 24.09.2002 and 25.09.2002, has been established by the prosecution.

To begin with, we intend to reiterate the provisions of the relevant section of the IPC.

> "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:
>
> Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof."

Explaining what constitutes the offence of criminal conspiracy, it was held by this Court in the case of K.R Purushothaman v. State of Kerala60 as under:

> "13. To constitute a conspiracy, meeting of minds of two or more persons for doing an illegal act or an act by illegal means is the first and primary condition and it is not necessary that all the conspirators must know each and every detail of the conspiracy.

Neither is it necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial acts. The agreement amongst the conspirators can be inferred by necessary implication. In most of the cases, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair. The (2005) 12 SCC 631 existence of conspiracy and its objects are usually deduced from the circumstances of the case and the conduct of the accused involved in the conspiracy. While appreciating the evidence of the conspiracy, it is incumbent on the court to keep in mind the well-known rule governing circumstantial evidence viz. each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn, and no other hypothesis against the guilt is possible. Criminal conspiracy is an independent offence in the Penal Code. The unlawful agreement is sine qua non for constituting offence under the Penal Code and not an accomplishment. Conspiracy consists of the scheme or adjustment between two or more persons which may be express or implied or partly express and partly implied. Mere knowledge, even discussion, of the plan would not per se constitute conspiracy. The offence of conspiracy shall continue till the termination of agreement." (emphasis laid by this Court)

123. The ingredients necessary to establish the offence of criminal conspiracy have been discussed by a three Judge bench of this Court in the case of Ram Narayan Popli & Ors. & Ors v. Central Bureau of Investigation61 in a portion of the below para, as under:

> "342. ....The elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and

(d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act needs be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence...." As far as the role of each individual accused is concerned, it has been established by this Court that each individual conspirator need not know the contents of the entire conspiracy, or each and every step. It (2003) 3 SCC 641 is possible that the co-conspirator's knowledge of the conspiracy is limited to his role in the conspiracy, and he may have no knowledge about the actions of the other co-conspirators. In the case of Yash Pal Mittal v. State of Punjab62 it was held by this Court as under:

"9. The offence of criminal conspiracy under Section 120-A is a distinct offence introduced for the first time in 1913 in Chapter V-A of the Penal Code. The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested.

There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspirators. In achieving the goal, several offences may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted (1977) 4 SCC 540 and illegal acts done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or over-shooting by some of the conspirators. Even if some steps are resorted to by one or two of the conspirators without the knowledge of the others it will not affect the culpability of those others when they are associated with the object of the conspiracy...." It was also observed in the case of Ajay Aggarwal v.

Union of India & Ors.63 that:

"8....It is not necessary that each conspirator must know all the details of the scheme nor be a participant at every stage. It is necessary that they should agree for design or object of the conspiracy. Conspiracy is conceived as having three elements: (1) agreement; (2) between two or more persons by whom the agreement is affected; and (3) a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aim is to be accomplished....."

124. In the present case, the prosecution had relied upon the information contained in the confessional 1993 (3) SCC 609 statements of the accused persons in order to set up the plea that the offence of criminal conspiracy had been committed by each one of them. A careful examination of this information will reveal that this claim of the prosecution does not hold water.

125. To punish an accused under section 120-B of the IPC, it is essential to establish that there was some common object to be achieved and that there was an agreement by the accused persons to achieve that object i.e there was a 'meeting of minds'. In the present case, it cannot be said that the conspiracy was hatched by the accused persons in furtherance of some common object.

The common object, according to the case of the prosecution was to take revenge for the Godhra Riots of 2002. But this object is vague, and is not very specific and the charge of criminal conspiracy against the accused persons cannot be proved on its basis. Further, even the confessional statements of the accused persons did not help the prosecution to establish the chain of events in pursuance of the alleged conspiracy. In fact, they are highly contradictory and improbable in nature.

126. According to the prosecution, as disclosed in the confessional statements of A-1, A-2, A-3, A-4 and A-6, the conspiracy was hatched in Saudi Arabia, and money was delivered to India through havala; the two fidayeens were apparently escorted to Ahmedabad by one Aiyub Khan and they also brought the arms and ammunition with them. It was stated that A-2 then took the fidayeens in his auto rickshaw and helped them reccie places in Ahmedabad and Gandhinagar, and finally helped them in choosing the Akshardham temple at Gandhinagar as a suitable place to carry out the attack and hence take the revenge against Hindus for the Godhra riots. According to the prosecution, A-2 also stated that the accommodation of the fidayeens was set up at Bavahir Hall.

Per contra, as per the confessional statement of A-6, he was the one who brought the two fidayeens from Kashmir, and drove the car with ammunitions from Kashmir to Bareilly, and then came to Ahmedabad in a train, and carried the ammunitions in bedding. A-6, according to the prosecution, was also the one who recceied Gandhinagar and Ahmedabad with the two fidayeens, before finally settling on Akshardham as the site of the attack. A-6 also stated, according to the prosecution, that the fidayeens stayed at the Gulshan Guest House. Interestingly though, neither A-2 nor A-6 speak of each other or each other's role in the planning and conspiracy, even though they were both seemingly doing the same task, i.e, of arranging for the accommodation of the fidayeens, and making them reccie the cities of Gandhinagar and Ahmedabad and we wonder how there can be two versions of the same event.

127. It is true that in order to establish criminal conspiracy, it is not required of every co-conspirator to know the entire sequence of the chain and events, and that they can still be said to be conspirators even if they are only aware of their limited roles and are not able to identify the role of any other conspirator. But that is not the case here. It is not the case here that the knowledge of the conspirators is limited to their role. Each accused claims to have complete knowledge of the conspiracy, while contradicting the other's version of the same events to constitute the act of criminal conspiracy.

128. Therefore, the confessional statements of the accused persons and the accomplices do not complement each other to form a chain of events leading to the offence. Rather, the depositions of the prosecution witnesses were contradictory and disrupt the chain of events and turn it into a confusing story with many discrepancies, defeating the roles of each of the accused persons which have been allegedly performed by them. Also, none of the events of the alleged criminal conspiracy was supported by independent evidence that inspires confidence in our minds to uphold the conviction and sentences meted out to the accused persons.

128. Hence, we hold that the prosecution has failed to prove beyond reasonable doubt, the guilt against the accused persons, for the offence of criminal conspiracy under Section 120-B of the IPC. We, therefore answer this point in favour of the appellants.

Answer to point no. 9

129. Article 136 of the Constitution confers appellate jurisdiction on this court, the scope and powers of which has been discussed by this court in a catena of decisions.

In the case of Arunachalam v. P.S.R. Sadhanantham & Anr.64, Chinappa Reddy, J. observed:

> “4.... Article 136 of the Constitution of India invests the Supreme Court with a plenitude of plenary, appellate power over all Courts and Tribunals in India. The power is plenary in the sense that there are no words in Article 136 itself qualifying that power. But, the very nature of the power has led the Court to set limits to itself within which to exercise such power. It is now the well established practice of this Court to permit the invocation of the power under Article 136 only in very exceptional circumstances, as when a question of law of general public importance arises or a decision shocks the conscience of the Court.

But within the restrictions imposed by itself, this Court has the undoubted power to interfere even with findings of fact making no distinction between judgment of acquittal and conviction, if the High Court, in arriving at those findings, has acted "perversely or otherwise improperly”....” (1979)2 SCC 297 (emphasis laid by this Court) While examining as to whether this Court has the power to interfere with the concurrent findings of fact recorded by the courts below, it was held in the case of Indira Kaur & Ors. v. Sheo Lal Kapoor65 as under:

> “7.... Article 136 of the Constitution of India does not forge any such fetters expressly. It does not oblige this Court to fold its hands and become a helpless spectator even when this Court perceives that a manifest injustice has been occasioned. If and when the Court is satisfied that great injustice has been done it is not only the “right” but also the “duty” of this Court to reverse the error and the injustice and to upset the finding notwithstanding the fact that it has been affirmed thrice..... It is not the number of times that a finding has been reiterated that matters. What really matters is whether the finding is manifestly an unreasonable, and unjust one in the context of evidence on record. It is no doubt true that this Court will unlock the door opening

into the area of facts only sparingly and only when injustice is perceived to have been perpetuated. But in any view of the matter there is no jurisdictional lock which cannot be opened in the face of grave injustice..." (1988) 2 SCC 488 (emphasis laid by this court) Further, this court has explained the circumstances in which it can interfere with the findings of the fact recorded by the courts below. In the case of Bharwada Bhoginbhai Hirjibhai v. State of Gujarat66, it was held by this Court that:

"5. .....Such a concurrent finding of fact cannot be reopened in an appeal by special leave unless it is established : (1) that the finding is based on no evidence or (2) that the finding is perverse, it being such as no reasonable person could have arrived at even if the evidence was taken at its face value or (3) the finding is based and built on inadmissible evidence, which evidence, if excluded from vision, would negate the prosecution case or substantially discredit or impair it or (4) some vital piece of evidence which would tilt the balance in favour of the convict has been overlooked, disregarded, or wrongly discarded...." (1983)3 SCC 217 More recently, in the case of Ganga Kumar Shrivastav v. State of Bihar67 it was stated while discussing previous cases on the subject that, the following principles could guide the courts in determining the scope of the criminal appellate jurisdiction exercised by the Supreme Court, especially on the issue of reversing findings of fact by the lower courts:

"10.

.....

i) The powers of this Court under Article 136 of the Constitution are very wide but in criminal appeals this Court does not interfere with the concurrent findings of the fact save in exceptional circumstances.

ii) It is open to this Court to interfere with the findings of fact given by the High Court if the High Court has acted perversely or otherwise improperly.

iii) It is open to this Court to invoke the power under Article 136 only in very exceptional circumstances as and when a question of law of general public importance arises or a decision shocks the conscience of the Court.

(2005)6 SCC 211

iv)When the evidence adduced by the prosecution fell short of the test of reliability and acceptability and as such it is highly unsafe to act upon it.

v) Where the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record

130. From the aforementioned two cases, the legal principles laid down regarding the scope and ambit of exercise of this Court's power, it is clear that even though the powers under Article 136 must be exercised sparingly, yet, there is absolutely nothing in the Article which prohibits this Court from reversing the concurrent findings of fact by the courts below, if it is of the opinion on the basis of the evidence on record, that affirming the findings of the courts below will result in a grave miscarriage of justice. Moreover, it has been held by this Court in the case of Mohammad Ajmal Mohammad Amir Kasab v. State of Maharashtra68 that if the case is of death sentence, this Court can exercise its power to examine material on record first hand and come to its own conclusion on facts and law, unbound by the findings of the Trial Court and the High Court.

131. Here, we intend to take note of the perversity in conducting this case at various stages, right from the investigation level to the granting of sanction by the state government to prosecute the accused persons under POTA, the conviction and awarding of sentence to the accused persons by the Special Court (POTA) and confirmation of the same by the High Court. We, being the apex court cannot afford to sit with folded hands when such gross violation of fundamental rights and basic human rights of the citizens of this country (2012) 9 SCC 1 were presented before us. The investigation process post Akshardham attack happened as under: • The incidence of Akshardham happened in the intervening nights between 24.09.2002 and 25.09.2002. An FIR was registered by PW-126 on 25.09.2002.

• According to the instruction of Superintendent of Police, the investigation of the complaint was handed over to Police Inspector Shri V.R. Tolia (PW-113).

• The investigation was then handed over to the Anti Terrorist Squad on 03.10.2002. • The investigation was thereafter handed over to the Crime Branch which was assigned to PW-126 on 28.08.2003 at 6:30 p.m. • The statement of PW-50 was taken at 8 p.m, on the same night of 28.08.2003, after receiving verbal instruction from higher officer-D.G. Vanzara in the morning.

• A-1 to A-5 were arrested on 29.08.2003. • POTA was invoked on 30.08.2003.

• The I.G.P. Kashmir sends a fax message to I.G.P. operations ATS Gujarat state on 31.08.2003 regarding A-6 being in the custody of Kashmir Police and that he has stated that he was involved in the Akshardham attack. • A-6 was brought to Ahmedabad on 12.09.2003 and was arrested at 9:30 p.m. • A-1 and A-3 confessed on 17.09.2003. • A-2 and A-4 confessed on 24.09.2003. • A-6 confessed on 05.10.2003.

• A-6 was brought to Ahmedabad on 12.09.2003 and was arrested at 9:30 p.m. A careful observation of the above said dates would show that the ATS was shooting in the dark for about a year without any result. No trace of the people associated with this heinous attack on the Akshardham temple could be found by the police. Then on the morning of 28.03.2003, the case is transferred to Crime Branch, Ahmedabad. This was followed by D.G. Vanzara giving instructions to the then-ACP G.S. Singhal (PW-126) about one Ashfaq Bhavnagri (PW-50). PW-126 was thereafter made in charge of the case on the same evening at 6:30 p.m. and the statement of PW- 50 was recorded at 8 p.m., i.e within one and a half hours. This shrouds our minds with suspicion as to why such a vital witness-

D.G. Vanzara, who discovered the link to the accused persons, was not examined by the Special Court (POTA). The courts below accepted the facts and evidence produced by the police without being suspicious about the extreme coincidences with which the chain of events unfolded itself immediately that is, within 24 hours of the case being transferred to the Crime Branch, Ahmedabad.

132. We are reminded of the legendary lines of Justice Vivian Bose in the case of Kashmira Singh's case (supra) wherein he cautioned that:

> "2. The murder was a particularly cruel and revolting one and for that reason it will be necessary to examine the evidence with more than ordinary care lest the shocking nature of the crime induce an instinctive reaction against the dispassionate judicial scrutiny of the facts and law." (emphasis laid by this court) The courts below have not examined the evidence with 'more than ordinary care'. Firstly, the Special Court (POTA) accepted the justification made by the prosecution in sending the accused persons to police custody after being produced before the CJM on the ground that there was no complaint made by them.

Secondly, the courts below held that the fact that A-1 to A-5 did not know A-6, does not disprove the theory of criminal conspiracy, rather it displays the extreme caution with which the conspiracy was hatched. We are unable to bring ourselves to agree with this reasoning of the courts below, as in the instant case, not only did A-1 to A-5 not know A-6 and vice versa, but also A-2, A-4 and A-6 had narrated different versions of the same story, each of which contradicted the other and was actually fatal to the case of the prosecution. The courts below mechanically and without applying their mind, discarded this contention of the learned counsel on behalf of the accused persons.

Thirdly, the two Urdu letters purported to have been recovered from the pockets of the trousers of the fidayeens (Ex.658), did not have even a drop of blood, mud or perforation by the bullets, whereas on physical examination of the trousers by us, which are marked as mudammal objects, we found that the clothes on the pockets of the fidayeens were perforated with bullets and smeared with dried blood even after 12 years of the incident.

The Special Court (POTA) however, did not find it imperative to examine why the letters recovered from the pockets of the trousers of the fidayeens were spotless. It admitted the letters as evidence merely on the basis of the confessional statement of A-4 who had, in his statement recorded that he had written the letters and had also kept the pen to prove that the letters were written with the same pen. The Special Court (POTA) also admitted the letters as evidence on the ground that signatures of Brigadier Raj Sitapati as per the statement of PW-91 Major Lamba, were present on those letters. The High Court admitted the letters as evidence on the ground that "truth is stranger than fiction" by overlooking not only the most impossible fact that the letters marked by the police were spotless, but also ignoring the evidence of PW-105 who in his deposition recorded that there were no signatures of Brigadier Sitapati or anyone else on the letters when they were handed over to PW-

126.

133. Another error of the courts below is reflected in the fact that they have not given the same weightage to the defence witnesses as they have to the prosecution witnesses. The learned senior counsel for the accused persons contended that the courts below should have given same weigthage to the evidence of the defence witnesses as that of the prosecution witnesses. However, the evidence of DW-3 was not only discarded but also not mentioned in the decision of the Special Court (POTA). DW-3 stated as under:

> "Nazneen Bastawala was a Municipal Corporator in Dariyapur area in the year 2003. All those were arrested on 25.8.2003 under POTA. Therefore, a rally was organized for going from Dariyapur Lake to Kalupur. 200-300 women gathered near Dariyapur Talawadi at ten o clock in the morning. While we were going for rally, police made lathi charges and Nazneen was forced to sit in vehicle.
>
> ....
>
> Thereafter, we were taken to the Office of the Commissioner at Shahibag in vehicle. Police personnel said that you have to engage advocate for obtaining bail. We were taken to Court no. 10 from there at Meghaninagar. Nazneen Ben called an advocate by making a phone and thereafter we were released on bail at about 5 o' clock in the evening on the relevant day. ....

The persons who were taken from Dariyapur Kalupur under POTA were- Maulvi Ahmed, Maulvi Abdulla, Mufti Kayum and many such people. All these people were taken before eight to nine days of the rally." In Cross Examination by Special P.P. Shri H.M. Dhruv for the state, DW-3 states as under:

> "..... I had given the names of the boys who were arrested under POTA to Nazneenben. Boys were talking in Mohalla. Maulvi Ahmed resides in Kalupur. It takes five to seven minutes if we go to Kalupur on foot from my house which is situated at Dariyapur. Maulvi Abdullah resides at Baluchawad Moti Haveli in Kalupur area. Mufti Kayum resides in Dariyapur and his house is situated at a distance of two to three minutes from my house. It is true that there may not be any occasion for me to visit houses of these people, only we meet on the way. It is true that Nazneen Ben told for arranging the rally in respect of their arrest under POTA. It is true that boys were saying that Maulvi Abdulla, Mufti Kayum and Maulvi Ahmed had been taken away by arresting them under POTA. It is not true that I had stated falsely that Mufti Abdulla, Mufti Kayum and Maulvi Ahmed were taken before 8 to 9 days of 25.8.2003. They were not my kin or kith out of the persons who have been arrested in POTA. We reside in one Mohalla and we belong to one caste. Mufti Kayum is my neighbour. There is distance of two or three minutes between our houses. .....Mother of Mufti Kayum met me and she told that they have been taken and no one is released and therefore, a rally is required to be arranged.

There were two vehicles of police. Fifty or sixty women went in them and the rest of them had left." (emphasis laid by this Court) (translation extracted from the Additional documents submitted on behalf of the appellants) It has been held by this Court in a catena of cases that while examining the witnesses on record, equal weightage shall be given to the defence witnesses as that of the prosecution witnesses. In the case of Munshi Prasad & Ors. v. State of Bihar69, this Court held as under:

> "3.....Before drawing the curtain on this score however, we wish to clarify that the evidence tendered by the defence witnesses cannot always be termed to be a tainted one by reason of the factum of the witnesses being examined by the defence. The defence witnesses are entitled to equal respect and treatment as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution - a lapse on the part of the defence witness cannot be differentiated and be treated differently than that of the prosecutors' witnesses." (emphasis laid by this Court) (2002) 1 SCC 351 Further, it has been held in the case of State of Haryana v. Ram Singh70 as under:

> "19. .....Incidentally, be it noted that the evidence tendered by defence witnesses cannot always be termed to be a tainted one — the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution. Rejection of the defence case on the basis of the evidence tendered by the defence witness has been effected rather casually by the High Court. Suggestion was there to the prosecution witnesses, in particular PW 10 Dholu Ram that his father Manphool was missing for about 2/3 days prior to the day of the occurrence itself — what more is expected of the defence case: a doubt or a certainty — jurisprudentially a doubt would be enough: when such a suggestion has been made the prosecution has to bring on record the availability of the deceased during those 2/3 days with some independent evidence. Rejection of the defence case only by reason thereof is far too strict and rigid a requirement for the defence to meet — it is the prosecutor's duty to prove beyond all reasonable doubts and not the defence to prove its innocence — this itself is a circumstance, which cannot but be termed to be suspicious in nature." (2002) 2 SCC 426 (emphasis laid by this Court) Also, in the case of State of U.P. v. Babu Ram71, this court held as under:

> "21. Shri N.P. Midha, learned counsel for the respondent submitted written submissions over and above the oral arguments addressed by him. One of the contentions adverted to by the learned counsel is pertaining to the evidence of the defence witness (DW 1 Moharam Ali). Counsel contended that if the evidence of DW 1 Moharam Ali can be believed it is sufficient to shake the basic structure of the prosecution evidence. Shri N.P. Midha invited our attention to the following observations contained in the decision of this Court in Dudh Nath Pandey v. State of U.P.: (SCC p. 173, para 19) "Defence witnesses are entitled to equal treatment with

those of the prosecution.

And, courts ought to overcome their traditional, instinctive disbelief in defence witnesses."

22. We may quote the succeeding sentence also from the said decision for the sake of completion of the observations of their Lordships on that score. It is this: "Quite often they tell lies but so do the prosecution witnesses."

23. Depositions of witnesses, whether they are examined on the prosecution side or defence (2000) 4 SCC 515 side or as court witnesses, are oral evidence in the case and hence the scrutiny thereof shall be without any predilection or bias. No witness is entitled to get better treatment merely because he was examined as a prosecution witness or even as a court witness. It is judicial scrutiny which is warranted in respect of the depositions of all witnesses for which different yardsticks cannot be prescribed as for those different categories of witnesses. " (emphasis laid by this Court)

134. The courts below had ignored these basic legal principles while admitting the statement of witnesses while weighing the case against the accused persons. While the decision of the Special Court (POTA) found mention of DW-1, DW-2, DW-4, DW-5 and DW-6, the evidence of DW-3 which indicated that some of the accused persons might have actually been detained in police custody much before the official date of arrest, had been completely overlooked. However, FIR-ICR No. 3090 of 2003 (Ex.733) in the present case shows that DW-3 was arrested along with some other women under Section 188 IPC for protesting against detention of some persons from their area. This, read with the notification G.P.K./V.S./774/2003 by the Police Commissioner Ahmedabad City holding that from date 16.08.2003 00/00 hrs. to 31.08.2003 at 24.00 hrs., not more than four persons shall gather for holding or calling any meeting or shall take out any procession, indicates a story under the layers of truth which the police has managed to suppress and the courts below overlooked.

Therefore, according to us, this is a fit case for interference by this Court under Article 136 of the Constitution, as we are of the firm view that the concurrent findings of fact of the Special Court (POTA) and the High Court are not only erroneous in fact but also suffers from error in law. Answer to point no. 10

135. On the basis of the issues we have already answered above based on the facts and evidence on record and on the basis of the legal principles laid down by this Court, we are convinced that accused persons are innocent with respect to the charges leveled against them. We are of the view that the judgment and order of the Special Court (POTA) in POTA case No. 16 of 2003 dated 01.07.2006 and the impugned judgment and order dated 01.06.2010 of the High Court of Gujarat at Ahmedabad in Criminal Confirmation Case No.2 of 2006 along with Criminal Appeal Nos. 1675 of 2006 and 1328 of 2006 are liable to be set aside. Consequently, the sentences of death awarded to A-2, A-4 and A-6, life imprisonment awarded to A-3, 10 years of Rigorous Imprisonment awarded to A-5 are set aside. Since we are acquitting all the accused in appeal before us for the reasons

mentioned in this judgment and also, since A-1 was convicted and sentenced on the basis of the same evidence which we have already rejected, we also acquit A-1 who is not in appeal before us, of the conviction and sentence of 5 years Rigorous Imprisonment awarded to him by the courts below, exercising the power of this Court under Article 142 of the Constitution and hold him not guilty of the charges framed against him. We are aware that he has already served his sentence. However, we intend to absolve him of the stigma he is carrying of that of a convict, wrongly held guilty of offences of terror so that he is able to return to his family and society, free from any suspicion.

136. Before parting with the judgment, we intend to express our anguish about the incompetence with which the investigating agencies conducted the investigation of the case of such a grievous nature, involving the integrity and security of the Nation. Instead of booking the real culprits responsible for taking so many precious lives, the police caught innocent people and got imposed the grievous charges against them which resulted in their conviction and subsequent sentencing.

137. We allow the appeals accordingly by setting aside the judgment and order of Special Court (POTA) in POTA case No. 16 of 2003 dated 01.07.2006 and the impugned common judgment and orders dated 01.06.2010 of the High Court of Gujarat at Ahmedabad in Criminal Confirmation Case No.2 of 2006 along with Criminal Appeal Nos. 1675 of 2006 and 1328 of 2006. Accordingly, we acquit all the appellants in the present appeals, of all the charges framed against them. The appellants who are in custody shall be set at liberty forthwith, if they are not required in any other criminal case. We also set aside the conviction and sentence awarded to A-1, though he has already undergone the sentence served on him. All the applications filed in these appeals are accordingly disposed of.

.....J.

[A.K. PATNAIK] .....J.

[V. GOPALA GOWDA] May 16, 2014 NEW DELHI