

Supreme Court of India

Md. Jamiludin Nasir vs State Of West Bengal on 21 May, 1947

Author:J.

Bench: A.K. Patnaik, Fakkir Mohamed Kalifulla

Crl.A. Nos. 1240-1241 of 2010 etc.

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ITEM NO.1C
[FOR JUDGMENT]

COURT NO.2

SECTION II

S U P R E M E

C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CRIMINAL APPEAL NO(s). 1240-1241 OF 2010

MD.JAMILUDDIN NASIR

Appellant (s)

VERSUS

STATE OF WEST BENGAL

Respondent(s)

WITH

CRIMINAL APPEAL NOS. 1242-1243 of 2010

[AFTAB AHMED ANSARI @AFTAB ANSARI V. STATE OF WEST BENGAL]

Date: 21/05/2014

These Appeals were called on for pronouncement of judgment today.

For appellants

in Crl.A. 1240-1241 &

1242-1243 of 2010 Ms. Nitya Ramakrishnan, Adv.

Mr. Saren Naved, Adv.

Ms. Ria Singh, Adv.

Mr. A.K. Roy, Adv.

Ms. Manika Tripathy Pandey, Adv.

For Respondents

in Crl.A. 1240-1241 &

1242-1243 of 2010 Mr.

Mr.

Mr.

Mr.

Mr.

Ms.

Ashok Kumar Panda, Sr. Adv.

Kabir S. Bose, Adv.

Anip Sachthey, Adv.

Mohit Paul, Adv.

Saakaar Sardana, Adv.

Shagun Matta, Adv.

Mr. A.K. Roy, Adv.

Crl.A. Nos. 1240-1241 of 2010 etc.

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Hon'ble Mr. Justice Fakkir Mohamed Ibrahim
Kalifulla pronounced the judgment of the Court for a
Bench comprising of Hon'ble Mr. Justice A.K. Patnaik
and His Lordship.

For the detailed reasons recorded in the signed
reportable judgment, the appeals are partly allowed
to the extent that the imposition of death penalty
for offence under Section 27(3) of the Arms Act is
set aside and imposition of death penalty for
offences under Sections 121, 121A, 122 read with
120B IPC is modified into one of life and in the
case of appellant Aftab such life imprisonment
should be suffered by him till the end of his life
and in the case of appellant Nasir life imprisonment
should be for a minimum period of 30 years without
any remission. Appeals stand disposed of in terms
of the signed reportable judgment.

[KALYANI GUPTA]
COURT MASTER

[RENU DIWAN]
COURT MASTER

[SIGNED

REPORTABLE JUDGMENT IS PLACED ON THE FILE.]
Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.1240 -1241 OF 2010

Md. Jamiludin Nasir

... Appellant

VERSUS

State of West Bengal

... Respondent

With

CRIMINAL APPEAL NOS.1242 -1243 OF 2010

Aftab Ahmed Ansari @ Aftab Ansari

...Appellant

VERSUS

The State of West Bengal

...Respondent

JUDGMENT

Fakkir Mohamed Ibrahim Kalifulla, J.

1. These appeals arise out of the common Judgment of the High Court of Calcutta in Criminal Appeal No.428 of 2005 which was preferred by Nasir and Aftab together. The said Judgment was rendered on 05.02.2010 in Death Reference Case No.2 of 2005 in Sessions Case No.79 of 2002 as well as Criminal Appeal Nos.247 of 2005, 377 of 2005, 425 of 2005 and 428 of 2005. The Appellant in Criminal Appeal Nos.1240-41 of 2010 is Mohd. Jamiludin Nasir CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 1 of 195 (hereinafter referred to as 'Nasir'). The Appellant in Criminal Appeal Nos.1242-43 of 2010 is one Aftab Ahmed Ansari (hereinafter referred to as 'Aftab').

2. The Sessions Case was tried by the learned Judge XIIth Bench, City Sessions Court at Calcutta in Sessions Case No.79 of 2002. The FIR was registered on 22.01.2002 in FIR No.19 for offences under Sections 121, 121A, 122, 120B, 302, 333, 427 and 21 Indian Penal Code, 1860(hereinafter referred to as 'IPC'), as well as Sections 25(1B)(a) and 27 of the Arms Act, 1959(hereinafter referred to as 'Arms Act'). The FIR was registered at 06.36 a.m. The date and time of the occurrence was noted as 22.01.2002, 06.30 a.m. The General Diary (hereinafter referred to as 'G.D.') entry number was 1889 in the Shakespeare Sarani Police Station. The place of occurrence was noted as in front of the American Centre, 38H, Jawaharlal Nehru Road, which was stated to be located 1¼ km North-West of the Police Station. The name of the Complainant was Shri Barun Kumar Saha. According to the Prosecution, as many as 17 accused were involved in the offence, out of which only 9 faced Trial and from the remaining 8, there were 6 absconders out of whom one is now facing Trial and the remaining 5 continue to remain absconding. Two of the offenders, namely, Zahid and Salim died in an encounter on 27.01.2002, at a place called Hazaribagh, that is how 9 accused CRL.

A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 2 of 195 alone came to be tried in the Sessions Case No.79 of 2002. By a Judgment dated 26.04.2005, the Trial Court found A1-Mohd. Jamiludin Nasir, A2-Adil Hassan, A3-Rehan Alam, A6-Musarrat Hussain, A7-Nushrat Alak, A8-Aftab Ahmed Ansari and A9-Shakir Akhtar guilty of charges under Sections 121A, 121, 122 of IPC and Sections 302, 307, 333, 467, 471 and 468 IPC read with Section 120B of IPC. They were also found guilty of the offences under Sections 25(1A), 27(2), and 27(3) of the Arms Act read with Section 120B of IPC. The trial Court in its Judgment ultimately convicted A1- Jamiludin Nasir, A2-Adil Hussain, A3-Rehan Alam, A6-Musarrat Hussain, A7-Hasrat Alam, A8-Aftab Ahmed Ansari and A9-Shakir Akhtar and acquitted A4-Mohd. Shakeel Mallick and A5-Patel Dilip Kumar Kantilal of all the charges framed against them and were set at liberty forthwith if not required in any other case. Thereafter, by its order dated 27.04.2005, imposed the sentence of death for the offence under Section 27(3) of the Arms Act as mandated under the said provision, sentenced them to death for the charge under Section 121 IPC apart from other sentences of imprisonment for offences under Sections 121A, 122, 302 read with 120B, 307 read with 120B, 333 read with 120B, 467 read with 120B, 471 read with 120B and 468 read with 120B of IPC 25(1A), 27(2) and 27(3) of the Arms Act read with 120B IPC. The trial Court held that all the CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 3 of 195 convicts who were found guilty were to be hanged till death subject to confirmation by the High Court and all the sentences to run concurrently.

3. By the impugned Judgment, the High Court acquitted A2-Adil Hussain, A3-Rehan Alam of all the charges. In so far as A6-Musarrat Hussain, A7-Nushrat Alak and A9-Shakir Akhtar are concerned, the Court acquitted them of the offence of waging of war but convicted them only for the offences under Sections 467 read with 120B, 468 read with 120B and 471 read with 120B IPC and thereby imposed a lesser sentence. As far as A1-Mohd. Jamiludin Nasir and A8-Aftab Ahmed Ansari are concerned, the High Court confirmed their conviction, as well as the sentence imposed by the trial Court on all counts. While A1-Nasir and A8-Ansari have come forward with the above appeals, the State has filed Criminal Appeal Nos.1244 to 1247 of 2010 as against that part of the Judgment of the High Court which modified the conviction and sentence in respect of A6- Musarrat Hussain, A7-Hasrat Alam and A9-Shakir Akhtar. Though, the above appeals were also posted along with the present appeals, which were being disposed of by this Judgment by our order dated 23.04.2014, we have de-tagged the said appeals for want of time. We are, therefore, now concerned only with the appeals filed by Nasir and Aftab. One other fact to be mentioned is that the acquittal CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 4 of 195 of A4-Mohd. Shakil Mallick and A5-Patel Dilip Kumar Kantilal by the trial Court was not even challenged by the State before the High Court.

4. The case of the Prosecution as narrated before the Courts below can be stated as thus: one Asif Reza Khan(hereinafter referred to as 'Asif'), who was detained in October-November, 2001 in connection with the kidnapping of one Khadim, happened to meet Aftab in Tihar Jail where both of them were under detention. While Asif is a resident of Calcutta, Aftab is stated to be an Indian National as per the Chargesheet. While they were in detention in Tihar Jail, they stated to have developed friendship which later on gave scope for Aftab's involvement in the crime with which we are concerned. As the narration goes, Asif and Nasir were childhood friends as they happened to have their initial education in a Madarsa upto High School level though thereafter, they were

separated. It is also the case of the Prosecution that some time in 1991 Asif had been to Kashmir and was in contact with one Salahuddin and Dr. Mushtaq Ahmed who made him feel that he should involve himself much more deeply in Jehadi movement. In the above-stated background when Asif happened to meet Aftab in Tihar Jail, where both of them were under detention in the year 1998/1999, their ideology seemed to have enabled them to develop close relationship. It is also stated CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 5 of 195 that Asif was released from Tihar Jail in the year 1999 and met Nasir in Calcutta who was by then married and was on the look out for a job as he had just then left the avocation in which he was placed. Asif stated to have assured Nasir of continued employment with him having regard to their childhood relationship, which persuaded Nasir to join hands with Asif in the year 1999. Asif while inviting Nasir to extend his services in his business ventures, namely, export of leather garments along with his associates, also wanted him to get a suitable accommodation for one Niaz Hussain to set up his leather export business venture. Nasir was a resident of No.46, Tiljala Lane. When the building in No.1, Tiljala Lane was developed at that time, Nasir stated to have approached the developer, namely, PW-47, who also offered one of the flats in the ground floor of No.1, Tiljala Lane. At the behest of Nasir, Niaz Hussain was able to clinch the deal of securing the ground floor premises of No.1, Tiljala Lane, initially by paying an advance sum of Rs.98,000/- and the balance amounts in Rs.2000/-, Rs.1,00,000/- and Rs.60,000/-, in all a sum of Rs.2,60,000/-. The possession of the said premises was stated to have been handed over to Niaz Hussain, as well as his brother Fiaz Hussain in the month of April/July 2001. Be that as it may, after the initial association of Nasir with Asif in the year 1999 as their close intimacy developed further, Asif stated to have issued directions to CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 6 of 195 Nasir for carrying out various assignments such as securing a fake passport for himself, as well as, for his friend, namely, Aftab in different names. Such fake passports stated to have been arranged by Nasir through a person in the passport office of Bihar. That apart, as was instructed by Asif, Nasir was sent to Agra and Jaisalmer. Nasir was introduced initially at Banaras to Aftab who according to Asif was his fast friend and that Nasir should function as directed by his close friend Aftab in all future endeavours through emails.

5. In October, 2001 Asif introduced Nasir to Zahid, Salim and Sadakat when he went to Agra for the second time. In the first week of September, 2001 as per Asif's email, Nasir secured a rented flat at Khan Road, Khirgaon, Hazaribagh. After taking over possession of the ground floor flat at No.1, Tiljala Lane, it is stated that that was a place earmarked for all future meetings and on one occasion Asif deliberated that to raise more funds they should indulge in kidnapping activities. It appears that it was in that process Asif stated to have been detained in the case of kidnapping of one Khadim some time in October-November, 2001. It is further stated that in December, 2001 while he was in detention and was being enquired at Bhawani Bhawan, he was shifted to Rajkot at Gujarat where he was stated to have been killed in an encounter on 08.12.2001. When Asif met with his death on 08.12.2001, Zahid CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 7 of 195 stated to Nasir and other gang members to take certain serious revenge actions and that they should wait for Aftab's orders for the same. Based on certain instructions issued by Aftab to Nasir, Sadakat and Zahid who came to Calcutta on 14 th to 16 th January, 2002, were lodged in the No.1, Tiljala Lane, Calcutta. The e-mail messages forwarded to Nasir and exchanged between Zahid, Sadakat and Aftab stated to have revealed that the untimely death of Asif in the encounter at Rajkot required to

be retaliated in equal force and that should teach a lesson to the Government of India and the Police Personnel. With that object in mind, the whole emissary of the gang led by Aftab, which included Nasir, Sadakat, Zahid, Salim and others operated. The master mind was stated to be that of Aftab who was also supported with different ideas by Zahid, Salim, Sadakat and Nasir. In one of the messages forwarded to Nasir by Aftab which was also forwarded to the other accomplices it was said that there should be an attack on Bhawani Bhawan, where Asif was taken after his detention in Khadim's case for interrogation. To the said suggestion, Nasir stated to have replied that it would not be a good proposition as many civilians would be seriously affected and the Minority Commission office was also near to Bhawani Bhawan. Thereafter, Aftab stated to have suggested as to whether their attack can be directed towards any American base where also large CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 8 of 195 number of police security was being provided. While the said proposal of Aftab was considered for implementation by the other gang members, namely, Nasir, Zahid, Salim, Sadakat and others in the month of January, 2002, namely, on 19, 20 th and 21 st survey was stated to have been made by the above stated gang members of the Consulate Office of America, as well as the American Centre. Thereafter, it was suggested again by way of an e-mail message to Aftab that the American Centre would be an ideal target as they found that the police security personnel were in large number, that they were operating in shifts, that one such shift was taking place in the early morning at around 6-6.30 a.m. and that the police personnel were very lackadaisical in their duties. The said proposal was suggested by the gang members to Aftab. It was thus stated to have been cleared by Aftab and thereafter, the plan was worked out by the other gang members of course with the consultation of Aftab by which a close survey was made on 20 th and 21 st, January, 2002.

Initially a decision was taken to cause the attack on 21.01.2002, which was not carried out and Aftab was informed through an email about the same while he was assured that the attack will be successfully carried out on 22.01.2002.

6. In pursuance of the above object, it is stated that the gang members had assembled at No.1, Tiljala Lane where Blue Colour Maruti 800 CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 9 of 195 Car bearing Registration No.BRK-4907 and a Black Colour Suzuki Motorcycle WB-01-P 2144 were also kept in the premises which was used on 19 th, 20 th, 21st and 22 nd January, 2002. After the initial rehearsal, stated to have been made on 19 th, 20 th and 21 st, on 22.01.2002 morning while Nasir and Khurram Khaiyam @ Abdullah left No.1, Tiljala Lane in the Maruti Car and parked their vehicle at Rippon Street Circular Road Crossing opposite Panjabi Tea Stall that (deceased) Zahid and Sadakat (now facing Trial) who also left No.1, Tiljala Lane in the early hours of the morning went to the targeted place, namely, American Centre around 6.30 a.m., that while Zahid was riding the bike at the spot in a slow speed, Sadakat stated to have opened fire with AK-47 rifle/automatic gun in a close range of about 10 to 15 feet towards the police personnel who were changing their shift and while carrying out the said operation, shouting "A sob sarkari kutta logo key markey ura deo" got into the pillion of the bike driven by Zahid which reached Rippon Street Circular Road Crossing where Nasir and Abdullah were waiting in the Maruti Car. After reaching the said spot Zahid stated to have proclaimed that the mission was carried out (KAAM HO GAYA) as planned and that Sadakat who was the pillion rider with Zahid stated to have got into the back seat of a Maruti Car and thereafter, the car and the bike left the Rippon Street Circular Road

Crossing. Since, in CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 10 of 195 the rehearsal session on 20 th and 21 st some passer byes at Rippon Street Circular Road Crossing happened to note the presence of the Maruti Car driven by Nasir and the Bike driven by Zahid due to some minor altercation at the spot, they were cited as Witnesses. In fact, PW-62 who along with one Gilbert Gomes were present during the said altercation at the same place, came to hear about the incident at American Centre after they came back to the neighbourhood. They went to Lalbazar to meet PW-101, Abu Saleh who was their neighbour and was posted at OC. They shared their apprehensions of the connection of the same vehicles and the persons involved at the altercation with the American Centre attack. PW-101 reported the same to PW-123 and stated that the description of the attackers' attire, the vehicles and the time of attack match with the incident reported to him by PW-62 and his friend. However, based on the complaint made by Barun Kumar Saha PW-6 to Shakespeare Sarani Police Station through Wireless Centre, an FIR was registered. PW-123 was entrusted with the investigation along with a team. Subsequently, a team from Delhi stated to have visited Calcutta City Police informing about the hiding of certain militants in the city who are to be apprehended. A team was formed to find out the hideouts, through a reliable information about the hideout of the terrorists in Khan Road, Khirgaon and Hazaribagh. In pursuance to the said CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 11 of 195 development, that place was surrounded by the police to nab the terrorists.

7. The police team which proceeded to Khan Road, Khirgaon, Hazaribagh at 6.45 a.m. cordoned the premises and suspecting the inmates to be militants, stated to have announced that they should surrender putting down whatever weapons they possessed. While doing so, when they noticed two of the inmates escaped through the side gate shooting at the police and in the cross fire both of them were injured. When the injured were taken to the hospital, on the way, one of the injured by name Zahid made an oral dying declaration to PW-113 that he was one of the persons involved in the shooting spree at the American Centre, that he was the shooter and one Sadakat was the driver of the motor bike. The said Zahid stated to have died enroute the hospital. The other person Salim was admitted in the hospital who too later died. This happened on 27-28.01.2002. After the encounter that had taken place at Hazaribagh, while the shootout incident at American Centre was investigated by PW-123, who was heading the special investigation team, he received a vital information on the intervening night of 28-29.01.2002 at about 1.30 a.m. According to PW-113, on 20.01.2002, Calcutta Police arrived at Hazaribagh and a seizure list Exhibit-246 of PW-106's house which was rented to Nasir was CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 12 of 195 handed over. According to the seizure list, two jackets were found which matched the attire of the American Centre attackers. This is how the search for Nasir since he was the tenant was started at 64, Tiljala Lane which was the fake address given by him at the instance of Asif on the said rent agreement. Through investigation, Nasir's address was found to be 46, Tiljala Lane. In pursuance of the said search, PW-123 went to No.13, Dargah Road which is the house of in-laws of Nasir, where he took Nasir into custody and based on his information made a search at No.1, Tiljala Lane where the Maruti Car and the Motor bike were seized. In fact after the commencement of his investigation on 22.02.2002 evening, the team of PW-123 was approached by PW-62, and one Gilbert Gomes (not examined) through the Inspector PW-101, Lalbazar who made statements relating to the incident of firing in front of American Centre and their statement revealed the use of Maruti Car and the Suzuki Motor bike at Rippon Street Circular Road Crossing. After landing at No.1, Tiljala Lane PW-123

could gather very many vital clues which led him to ultimately arrest of Aftab, who was already arrested by Dubai Police on 23.01.2002 and deported him to India on 09.02.2002. PW-123 could secure his custody through Court order on 23.02.2002. Based on Aftab's information, the residence of Asif was also searched where a diary maintained by Asif and a letter CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 13 of 195 Exhibit-46/1 written by Aftab to the wife of Asif after Asif's demise was also seized. The letter was addressed to Bhabhiji for taking aveng on death of Asif. Later PW-105, a handwriting expert proved the handwriting of Aftab. In the Hazaribagh hideout after the encounter, PW-113 made a search of the premises where he could recover arms and ammunition such as AK-47 rifles, Pakistan's national flag, bullets etc. According to PW-113, the deceased Zahid and Salim were Pakistani nationals and were members of Lashkar- e-Taiba, while Sadakat belonged to Uttar Pradesh.

8. It is in the above stated background that the investigation team after a detailed inquiry ultimately filed its final report in Chargesheet No.38 of 2002 dated 26.04.2002 as against 15 persons and the charges were under Sections 121, 121A, 302, 307, 333 read with 122, 427, 467, 468 and 471 IPC. The Sessions Court, namely, the Calcutta City Court framed the charges against A1 to A9 on 29.08.2002 for offences under Sections 121A, 121, 122, 302 read with 120B, 307 read with 120B, 333 read with 120B, 467 read with 120B, 471 read with 120B, 468 read with 120B and 427 read with 120B IPC apart from offences under Sections 25(1), 27(2) and 27(3) of Arms Act. As stated by us earlier, the trial Court acquitted A4 and A5 of all the charges while A1 to A3 and A6 to A9 were convicted of charges levelled against them.

CRL. A.NOS.1240-1241 OF 2010

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CRL. A.NOS.1242-1243 OF 2010

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9. In the death reference, as well as in the appeals preferred by Nasir and Aftab as well as the other convicts, the High Court having confirmed the conviction and sentence imposed on Nasir and Aftab in toto and acquitted A2 and A3 while modifying the conviction and sentence in respect of A6, A7 and A9 for lesser offence by the impugned common Judgment, we heard these appeals preferred by Nasir and Aftab.

10. We heard Ms. Nitya Ramakrishnan for the Appellants and Mr. Siddharth Luthra, learned Additional Solicitor General for the Respondent State. We also considered the written submissions filed on behalf of the Appellants, as well as the State and deal with such of those submissions which are really relevant and deliver this Judgment. At the very outset, it must be stated that there was a detailed consideration made by the learned Sessions Judge of the oral evidence, as well as documentary evidence and material objects placed before it, while passing its Judgment on 26.04.2005. Equally, the Division Bench of the High Court has made a thorough consideration of the material evidence and also the correctness of the Judgment of the learned Sessions Judge. In fact, though more than 100 Witnesses were examined on the side of the Prosecution and more than 250 documents were placed before the trial Court, we find that the crucial evidence which led to the ultimate conviction CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 15 of 195 of Nasir and Aftab were mainly based on the confession of Nasir and the oral evidence of PWs 1 to 123 and the Exhibits. Also based on the above evidence, certain questions put to Nasir and Aftab under

Section 313 of Cr. P.C. were also referred.

11. Before proceeding further to examine the respective contentions, at the very outset, it will have to be stated that the conviction and sentence imposed on the Appellants under Section 27(3) of the Arms Act has to be set aside since the said provision was struck down by this Court in *State of Punjab vs. Dalbir Singh* – (2012) 3 SCC 346. We can usefully refer to the relevant conclusions reached in the said decision which has been set out in paragraphs 85 to 91. The said paragraphs are as under:

“85. All these concepts of “due process” and the concept of a just, fair and reasonable law have been read by this Court into the guarantee under Articles 14 and 21 of the Constitution. Therefore, the provision of Section 27(3) of the Act is violative of Articles 14 and 21 of the Constitution.

86. Apart from that the said Section 27(3) is a post- constitutional law and has to obey the injunction of Article 13 which is clear and explicit. Article 13(2) is as follows:

‘13.(3) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.’

87. In view of the aforesaid mandate of Article 13 of the Constitution which is an article within Part III of our Constitution, Section 27(3) of the Act having been enacted in clear contravention of Part III rights, Section 27(3) of the Act is repugnant to Articles 14 and 21 and is void.

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88. Section 27(3) of the Act also deprives the judiciary from discharging its constitutional duties of judicial review whereby it has the power of using discretion in the sentencing procedure. This power has been acknowledged in Section 302 of the Penal Code and in *Bachan Singh* case it has been held that the sentencing power has to be exercised in accordance with the statutory sentencing structure under Section 235(2) and also under Section 354(3) of the Code of Criminal Procedure, 1973. Section 27(3) of the said Act while purporting to impose mandatory death penalty seeks to nullify those salutary provisions in the Code. This is contrary to the law laid down in *Bachan Singh*.

89. In fact the challenge to the constitutional validity of death penalty under Section 302 of the Penal Code has been negated in *Bachan Singh* in view of the sentencing structure in Sections 235(2) and 354(3) of the Criminal Procedure Code. By imposing mandatory death penalty, Section 27(3) of the Act runs contrary to those statutory safeguards which give judiciary the discretion in the matter imposing death penalty. Section 27(3) of the Act is thus ultra vires the concept of judicial review which is one of the basic features of our Constitution.

90. It has also been discussed hereinabove that the ratio in both *Bachan Singh* and *Mithu* has been universally acknowledged in several jurisdictions across the world and has been accepted as correct

articulation of Article 21 guarantee. Therefore, the ratio in Mithu and Bachan Singh represents the concept of jus cogens meaning thereby the peremptory non-derogable norm in international law for protection of life and liberty. That is why it has been provided by the Forty-fourth Amendment Act of 1978 of the Constitution, that Article 21 cannot be suspended even during the proclamation of emergency under Article 359 [vide Article 359(1-A) of the Constitution].

91. This Court, therefore, holds that Section 27(3) of the Arms Act is against the fundamental tenets of our constitutional law as developed by this Court. This Court declares that Section 27(3) of the Arms Act, 1959 is ultra vires the Constitution and is declared void.” CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 17 of 195

12. In the light of the said legal position, we have no hesitation in setting aside that part of the Judgment of the trial Court as well as the High Court imposing the punishment of death sentence as against the Appellants for the offences found proved under Section 27(3) of Arms Act.

13. Having steered clear of the said position, when we proceed to examine the correctness of the conviction and sentence imposed on the Appellant, at the forefront, we find that the case of the Prosecution broadly depended upon the confession of Nasir, the Appellant in Criminal Appeal No.1240-41 of 2010. In fact realizing the serious implications of the said piece of evidence relied upon by the Prosecution, Ms. Nitya Ramakrishnan for the Appellants profusely attacked the reliance placed upon the said material evidence in the form of confession recorded under Section 164 of Cr.P.C. on its acceptability, reliability, veracity and also its applicability as against the co-accused. We shall consider the submission of the counsel for the Appellant at a later stage. For the present, we wish to examine as to what the confession contains and to what extent the gravity of the offence and the extent and involvement of the accused who were proceeded against in this case were touched upon in order to appreciate the case of the Prosecution.

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14. The confession of Nasir is marked at Exhibit-201. The confession has been recorded by PW-97-SDJM on 22.02.2002. After the compliance of the ingredients set out in Section 164 Cr.P.C., the confession was recorded in the form of question and answer and contained as many as 19 such questions and answers. In fact question No.1 to 18 were all questions which were put by PW-97 in order to ensure that the Appellant Nasir who made the confession should feel at ease, that there was no necessity in law for him to make the confession, that he was not supposed to make this confession at the instance of anyone much less the police authorities, that the facts and details mentioned in the confession may be detrimental to his interest and may land him in conviction and that if he so wished he can take some more time and decide whether or not he should make the confession. We find that to the questions put by PW-97, the Magistrate, namely, question Nos.1 to 18, Appellant Nasir made it clear that he came forward to make the confession voluntarily, that he was troubled by his conscience and to give vent to his feelings, namely, the sin which he committed by carrying out the attack at the American Centre on 22.02.2002 along with other gang members which he did in his own homeland, he was having sleepless nights and therefore, decided to make

his confession.

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15. While examining the said part of the confession recorded by the Magistrate PW-97, namely, the questions and answers from 1 to 18, the ingredients of Section 164 Cr.PC. can also be noted. The ingredients of the said provision states that any metropolitan or judicial Magistrate can record any confession or statement made to him in the course of investigation of crime under the Chapter XI. The proviso to sub-section (1) also empowers the Magistrate recording the confession to record it by audio-video electronic means in the presence of the advocates of the person accused of an offence. Sub section (2) stipulates that the Magistrate should before recording any such confession explain to the person making it that he is not bound to make a confession, that the said confession maybe used as evidence against him and that that apart if the Magistrate gets the impression that the person making the confession was not making it voluntarily he should not record such a confession. Under sub- section (3) the person who initially comes forward to make a confession can at any time while before the confession is recorded express his desire or unwillingness to make the confession and in such an event the Magistrate should not authorize police custody for such person. Under sub-section (4) any confession should be recorded in the manner provided under Section 281 which provides for the recording the examining of the accused. The confession CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 20 of 195 should be signed by the person making the confession and the Magistrate should record at the foot of the confession the prescribed format provided in the said sub-section (4). Under sub-section (6) the Magistrate who records the confession or statement under Section 164 should forward to the Magistrate by whom the case is to be enquired into or tried. Going by the prescriptions contained in Section 164, what is to be ensured is that the confession is made voluntarily by the offender, that there was no external pressure particularly by the police, that the concerned person's mindset while making the confession was uninfluenced by any external factors that he was fully conscious of what he was saying, that he was also fully aware that based on his statement there is every scope for suffering the conviction which may result in the imposition of extreme punishment of life imprisonment and even capital punishment of death, that prior to the time of the making of the confession he was in a free state of mind and was not in the midst of any persons who would have influenced his mind in any manner for making the confession, that the statement was made in the presence of the Judicial Magistrate and none else, that while making the confession there was no other person present other than the accused and the Magistrate concerned and that if he expressed his desire not to make the confession after appearing before the Magistrate, the CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 21 of 195 Magistrate should ensure that he is not entrusted to police custody.

All the above minute factors were required to be kept in mind while recording a confession made under Section 164 in order to ensure that the confession was recorded at the free will of the accused and was not influenced by any other factor. Therefore, while considering a confession so recorded and relied upon by the Prosecution, the duty of the Sessions Judge is, therefore, to carefully analyse the confession keeping in mind the above factors and if while making such analysis the learned

Session Judge develops any iota of doubt about the confession so recorded, the same will have to be rejected at the very outset. It is, therefore, for the Sessions Judge to apply his mind before placing reliance upon the confessional statement made under Section 164 and convince itself that none of the above factors were either violated or given a go by to reject the confession outright. Therefore, if the Session Judge has chosen to rely upon such a confession recorded under Section 164, the appellate Court as well as this Court while examining such a reliance placed upon for the purpose of conviction should see whether the perception of the Courts below in having accepted the confession as having been made in its true spirit provide no scope for any doubt as to its veracity in making the statement by the accused concerned and only thereafter the contents of the confession can be examined.

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16. Keeping the above prescription of Section 164 in mind, when we examine the answers of Nasir to the questions 1 to 18 we find that PW-97 explained to Appellant Nasir that his confession should be voluntary and that whether he was really making it on his own. Appellant Nasir also specifically stated that nobody including the police, enticed him to make the statement, that no 3rd degree method was applied on him by the police for making his confession. PW-97 also made it clear to him that he was not a police officer, that he is a Magistrate of a Court, that he was not under any compulsion to make a statement, that if he withdraws from his offer to make the confession he will not hand him over to the police and that he will be sent back to the jail. After explaining all the above when he asked the Appellant Nasir about his desire to make the confession, he stated that he still wanted to give his statement by adding that he was not able to bear the pain of his conscience and wanted to get rid of it. He also stated that he was brought from the jail, that the previous night he was only staying in the jail, that he had absolutely no fear in his mind and that he wanted to depose on his own accord. In question No.11, the Magistrate while stating that Nasir was free to make his statement, mentioned that such statement might ultimately lead to his conviction and might attract either a life sentence or even capital punishment and even after explaining to that extent, when CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 23 of 195 PW-97 asked him whether the Appellant Nasir still wanted to give the statement and asked him to give a serious thought before answering the said question, Nasir's answer to question No. 11 was "I know. I have sinned and I deserve punishment." Again in question No.12, PW-97 wanted to ascertain whether he was voluntarily making the statement or under any compulsion to which Nasir replied that it was absolutely voluntary. When he was asked as to why he wanted to make the statement Nasir replied that because of the sin he committed by carrying out the attack on the American Centre on 22.01.2002 along with his gang members, his conscience was heavy and he felt guilty that he carried out the attack on his own homeland and that he could not eat or sleep and, therefore, he came forward to give the statement. PW-97 thereafter again gave 10 minute's time for Nasir to think over, for which Nasir replied that he did not need any more time and only thereafter, the Magistrate PW- 97 proceeded to record the statement.

17. We find that the Magistrate did not want to give any chance to anyone to gain the impression that the confession which the Appellant Nasir wanted to make was recorded without giving him any scope to rethink or that unaware of the consequences that he came forward to make the statement. In fact it must be stated PW-97 was thorough with the ingredients prescribed in Section 164 CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 24 of 195 relating to the recording of a confession by an accused and that he was not carrying out the exercise in a mechanical way but with all earnestness and in a highly dispassionate manner. Therefore, that part of the requirement, namely, the procedure to be followed while recording a confession statement has been scrupulously adhered to by PW-97 before allowing the Appellant Nasir to make his confession. Again at the end, the Magistrate certified in the manner required under Section 164(4) and it was mentioned that no police personnel was allowed in his chambers when the confession was recorded.

18. Ms. Nitya Ramakrishnan, learned counsel while attacking the reliance placed upon the confession by the learned Sessions Judge, as well as the High Court submitted that there is a serious lacuna in the recording of the confession and, therefore, the same ought not have been relied upon. The learned counsel for the Appellant took us through the evidence of PW-123, the head of the special investigating team, Mr. Anil Kar who in his evidence stated that Appellant Nasir was in judicial custody as between 13.02.2002 and 27.02.2002 but on 21.02.2002, PW-110 sub-inspector M.A. Ahad produced Appellant Nasir before PW-123 stating that the Appellant Nasir desired to make a confessional statement before the Court in connection with this case and that PW-123 thereafter, sent him CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 25 of 195 before the learned Chief Metropolitan Magistrate, Calcutta with a prayer for recording the confessional statement of the accused. The learned counsel submitted that if between 13.02.2002 to 27.02.2002, Appellant Nasir was in the judicial custody, going by the version of PW-110 and PW-123 on 21.02.2002, it was not known how the accused was in the custody of PW-110 the Sub-Inspector of police who stated that the Appellant expressed his desire to make his confession. The learned counsel would contend that if the said statement of fact as deposed by PW-110 and PW-123 is to be accepted, the confession which was recorded on 22.02.2002 when the Appellant was in the custody of police, will have to be rejected at the very outset. According to the learned counsel, in the above said background, the recording of the confession creates serious doubts and aspersions inasmuch as there was every scope for the police to have applied pressure on him and as is the practice, custodial confession cannot be the basis for conviction. The sum and substance of the learned counsel was that when Appellant was in police custody, as has been stated by the investigating officer PW-123 on 21.02.2002, the confession on 22.02.2002 will not satisfy the ingredients set out in Section 164 Cr.P.C. and consequently, such a confession cannot be taken as a valid confession made by the accused in order to put the same against him for his ultimate CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 26 of 195 conviction.

19. As against the above submission, learned Additional Solicitor General brought to our notice a requisition made by PW-123 on 21.02.2002 to the Chief Metropolitan Magistrate, Calcutta on 21.02.2002 and the directions issued by the learned Magistrate for the production of Appellant Nasir for recording the confession on the next day, i.e. 22.02.2002 at 1 p.m. A perusal of the letter dated 21.02.2002 of PW-123 to the Chief Metropolitan disclose that while Appellant Nasir was in judicial custody till 27.02.2002 in connection with the American Centre case, in between he was also

taken into custody by the police in respect of another case in case No.53 dated 11.02.2002 for an offence under Section 25(1B)(a) of Arms Act, that he was being produced before the learned Chief Metropolitan Magistrate for remanding him in judicial custody till 07.03.2002 pending further investigation. Simultaneously, a request was also made to the learned Chief Metropolitan Magistrate for recording the confessional statement of Appellant Nasir who volunteered to make the said statement relating to the incident of American Centre. While considering the said request made by PW-123, learned Metropolitan Magistrate 14th Court, Calcutta passed the directions as under: "Thus I think that time should be given for his reflection of mind before making any statement before me though he volunteered himself for making confession."

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Thus the Superintendent, Presidency Correctional Home, Alipore is directed to keep this accused Md. Jamiludin Nasir in complete segregation from other undertrial prisoner or stranger or from any unwarranted elements for his reflection of mind and produce this accused before me at 1 pm on 22.2.2002 i.e. tomorrow."

20. By referring to the above, learned Additional Solicitor General contended that the submission of counsel for the Appellant Nasir by making reference to what was deposed by PW-123 is fully explained.

21. Having perused the above proceedings which are part of the record of the trial Court, in particular the letter of PW-123 dated 21.02.2002, we find that the custody of the Appellant Nasir with the police on 21.02.2002 was in connection with a different case, namely, case No.53 dated 11.02.2002. Therefore, the judicial custody of the Appellant as between 13.02.2002 and 27.02.2002 in connection with case No.19, namely, the American Centre case was independent of the custody of the Appellant with the police on 21.02.2002 when he was produced before the learned Metropolitan Magistrate, 14 th Court with the requisition to record his confession. In fact in the said letter dated 21.02.2002, PW-123 has requisitioned the learned Magistrate to provide judicial custody even in case No.53 dated 12.02.2002 up till 07.03.2002, while simultaneously making a request for recording the confession of the Appellant Nasir. Further even while CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 28 of 195 considering the requisition made by PW-123 in the letter dated 21.02.2002 for recording the confession, the learned Magistrate being aware of the statutory prescription contained in Section 164 Cr.P.C. rightly decided not to record the confession but issue directions to keep Appellant Nasir in the custody of the Superintendent, Presidency Correctional Home Alipore and produced him on 22.02.2002 at 1 p.m. in order to ensure that the Appellant was free from the influence of police. Therefore, the Magistrate having thus ensured that the Appellant Nasir was taken into custody of the Court and was entrusted with the Superintendent of the Presidency Correctional Home till his production on the next day at 1 p.m. It must be stated that by resorting to such a course, the Magistrate ensured that there was no scope for any lacuna being created in the recording of the confession of the Appellant. In the light of our above findings, we do not find any force in the submissions of the learned counsel for the Appellant on this score.

22. Ms. Nitya Ramakrishnan further contended that PW-97, the Judicial Magistrate who recorded the confession of Appellant Nasir did not follow the proper procedure as prescribed by law. In support of the said submission, learned counsel took us through the cross- examination of PW-97 wherein PW-97 stated that he did not ask Appellant Nasir as to when he was arrested, as to where he was CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 29 of 195 kept before his production in Court, as to whether he was kept in police custody after the remand, as to whether he was in the police custody prior to the recording of the statement under Section 164, as to whether the police behaved properly towards the accused, that he did not ascertain from the Correctional Home authority about the order passed by him to ensure that the Appellant was segregated from other accused, as to whether the place where the accused was kept was free from the influence of the police, whether after his order prior to recording of the confessional statement the accused was taken to a place of segregation or was taken to jail directly and whether the accused was taken to Court prior to the recording of the confessional statement with the other accused persons or alone. Based on such answers elicited from PW-97, the learned counsel for the Appellant argued that the Magistrate PW-97 who recorded the confession statement failed to follow the procedure as prescribed under Section 164. While considering the said submission, it will also be appropriate to refer to the question and answers 1 to 18 in the confessional statement Exhibit-201 recorded by PW-97 and also that part of the deposition in chief examination which is relevant on this aspect which reads as under:

“In connection with the same case (G.R.190 of 2002) the record was sent to me enter (?) on 21.2.2002 for recording confessional statement of Md. Jamiludin Nasir. The accused Md. Jamiludin Nasir was produced before me and identified by CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 30 of 195 Constable No.724 Swapan Kumar Sanyal. After production I asked the constable to leave my chamber and I also asked Md. Jamiludin Nasir to sit on chair for recording his statement under Section 164 Cr.P.C. He was given necessary caution and even after giving caution that he will not be sent back to the police even if he declines to make confessional statement but he was very much inclined to make confessional statement. After having talk with the accused and giving necessary pre-caution once again as per provisions of Section 164(2) Cr.P.C. regarding each of the contention of instant section, he submitted before me that he will make confessional statement before me. I thought that time should be given for his reflection of mind before making any statement before me though he volunteer himself for making confessional statement. I thereafter asked the Superintendent, Presidency Correctional Home, Alipore to keep the accused in complete segregation from other undertrial prisoners or any stranger or from any unwanted element for his reflection of mind and produce this accused person before me on 22nd February, 2002 at 1 p.m. I, thereafter sent the accused Jamiludin Nasir for reflection. On the second day accused Md. Jamiludin Nasir was produced before me and identified by Constable No.4390 Tapanendu Pati and Constable No.6062 Sujit Kumar Saha for recording confessional statement under Section 164 Cr.P.C. These constables were asked to leave the chamber and I asked the accused person to sit on chair. When he was being asked as to wherefrom he was coming, he replied to me that he came from jail and inclined to make confessional statement. He was given necessary caution once again as laid down in Section 164 Cr.P.C. but he still wanted to make statement. He was kept in segregation in J.C. but he was inclined to make confessional statement after having talk with him. I explained once again each matter containing in Section 164 Cr.P.C. sub-clause (2) and I properly

confined him that he ought to have reflex carefully before making such a statement. He was given a 10 minutes gap for his reflection of mind. After pause of 10 minutes he was given caution again but still he was inclined to make confessional statement inspite of statutory warning. As such, I recorded his confessional statement following all the procedures as far as possible. The statement was in 23 pages and it was kept in sealed cover. I, thereafter forwarded the same before the Ld. C.M.M. for perusal. The accused was sent back to J.C.” CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 31 of 195

23. When we read this part of the deposition of PW-97 along with the answers to questions 1 to 18 in Exhibit-201, we find that PW-97 had ensured prior to the recording of the confessional statement as to the mindset of Appellant Nasir, his readiness to make the confessional statement without any hindrance and uninfluenced by any other force including police authorities and only thereafter, proceeded to record the statement. Having seen the above part of the deposition of PW-97 and the answers to questions 1 to 18 in Exhibit-201, the confessional statement of Nasir, we are convinced that the Magistrate had exhaustively dealt with the statutory prescription under Section 164 Cr.P.C. and there is absolutely no flaw in the recording of the said statement. Therefore, the said contention of the learned counsel also does not merit any consideration.

24. Having held that the confession statement of Appellant Nasir made under Section 164 was free from any technical flaw in its recording, as well as the procedures contemplated under the said provision, we now proceed to examine the truthfulness of its contents.

25. When we consider the various facts narrated by Appellant Nasir which are found in his answer to question No.19 which runs to as many as 16 pages since the confession of Appellant Nasir who is CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 32 of 195 one of the main accused in the case on hand has been relied upon by the trial Court, as well as the High Court to a great extent, we wish to examine the same threadbare before expressing our views on such reliance placed upon by the Courts below. When we read the confession, we find that it contains very many details pertaining to himself, his family members, his earlier contact with deceased Asif and his subsequent contact with Asif in the year 1999 and thereafter how through Asif he became part of the group of other accused persons and at various stages he came in contact with different accused at different places and as to how ultimately the conspiracy was hatched for making the attack at the American Centre and as to how it was finally executed successfully. It also explains as to how subsequently he came to be apprehended by the police and thereafter, his repentance for whatever had happened to which he was also a party which pricked his conscience and ultimately made him to volunteer himself and make the statement on his own uninfluenced by any other external force as he felt that he committed a great sin by being part of the occurrence against his own homeland. In fact we feel that we should make reference to the above factors noted by us in his confession before dealing with the submission of learned counsel Ms. Nitya Ramakrishnan as to the various deficiencies in the confession as compared to other CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 33 of 195 evidence which according to learned counsel should dissuade us from relying upon the said confession statement.

26. As stated by us in the confession, he described as to how he was living with his parents and his other brothers and sisters in a rented house at 30/18/1A Rai Charan Ghose Lane, Calcutta-39 and where his parents continued to live. According to him, Asif who was also living in Calcutta was his classmate at Beniapukur High Madarasa and that they were good friends in school days. He also mentioned that Asif after his schooling became a member of a Students Islamic Organisation and that he wanted Nasir also to join, which he was not inclined. According to Nasir, he not only knew Asif but also all his family members. He made a reference to Asif's visit to Kashmir in 1991 where he became a 'Jehadi' and that he wanted Nasir to be by his side. Nasir would state that earlier he was working in some companies to earn his livelihood, that in 1994 he came to know that Asif was arrested by Delhi Police under the provisions of TADA and that in 1999 he fled from Tihar Jail and landed at Calcutta. According to Nasir in 1999, he met Asif again when Asif wanted Nasir to arrange for a passport for him as he wanted to go abroad stating that since he has become a jailbird and everybody is looking at him with some sort of suspicion, he therefore, wanted to go and earn his livelihood in some foreign country. Nasir, thereafter stated CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 34 of 195 to have taken Asif to his native town and introduced him to Akil who is a tout in the passport office, Patna for getting a fake passport for Asif which deal was stated to have been struck after meeting him. He would then say that during Mohram festival, when he met Akil he informed that his friend Asif did not get a passport for him but got a passport for one of his friends in a fake name 'Farhan Mullick' who is none other than Aftab. Later when Nasir met Asif and asked him as to why he got a passport for another person, Asif informed him that that person is his close friend Aftab Ansari who lives in Banaras, as he offered him a job and that the said friend was in a hurry to get a passport, he got him a passport. Nasir further informed that thereafter, Asif offered a salary of Rs.2000/- to him stating that he is going to start a business of construction of buildings. He would however, say that no such construction activity was carried on by Asif.

27. In January 2001, Nasir got his first month's salary and thereafter, Asif wanted Nasir to find a space for one of his friends by name Niaz Hussain (absconding accused) for starting a leather import export business. The said Niaz Hussain was also introduced to Nasir. Appellant Nasir stated to have arranged the ground floor Flat of No.1, Tiljala Lane for Niaz Hussain which deal was finalized for a total consideration of Rs.2,66,000/- in April, 2001 through PW-47 CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 35 of 195 Dilip Kumar Singh. According to him after taking possession of No.1 Tiljala Lane by making some alteration, a garage was set up in the said flat where Niaz brought a blue Maruti 800 bearing registration No.BRK 4907 and thereafter, Niaz and his brother Fiaz used to visit the place. Around April-May 2001 when Nasir, Asif, Niaz and his brother Fiaz were at No.1, Tiljala Lane, Asif suggested the idea of indulging in kidnapping of big businessmen in various cities in order to make more money and that Aftab would lead them all meaning thereby that Aftab would tell them where, how and what to do. Asif asked Nasir to look after his gang members and collect cash from wherever he wanted him to get it promising that he would continue to pay his monthly salary of Rs.2000/-. Asif also stated to have said that for kidnapping purposes they would require arms and ammunitions and vehicles which should be gathered. In May 2001, Nasir stated to have gone to Agra as per the instructions of Asif, where he was received by one Arsad Khan @ Aslam (herein after referred to as 'Arsad') who was also a member of the gang of Asif. Arsad stated to have handed over Rs.1 lakh cash to Nasir which he brought back and handed over to Asif.

28. In August, 2001 Asif stated to have taken Nasir to a Cyber Café and opened an e-mail account and taught him how to check and receive e-mails. The e-mail account opened for Nasir was CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 36 of 195 'basketball4my@hotmail.com' and the password was '7days13harj.' The second e-mail address was 'z4zipzap@hotmail.com' and the password was '100dinsonarka'. Both the e-mails were in Nasir's name. Asif instructed Nasir to keep checking the e-mails. Subsequently, in August 2001 based on an e-mail message of Asif, he went to Banaras where he introduced him to his friend Aftab Ansari and said that he can be called as 'Bhaisaheb'. Aftab stated to have paid Rs.5000 along with a black suitcase with wheels and asked Nasir to keep in touch with him through e-mail. In the first week of September, 2001 as directed by Asif, Nasir fixed a rented flat at Khan Road, Khirgaon, Hazaribagh. He was assisted by Hassan Imam and another man by name Sarwar. The name of the landlord was Majid Khan and the rent was fixed for Rs.1500 per month. The tenancy was for a period of 11 months. Nasir stated to have informed the landlord and his children that the premise was booked for running a business in Chappals, while in reality it was a hide out of Asif's gang members. Zahid was also one of the gang members who stayed in that place.

29. In October-November 2001, Aftab started sending e-mails to Nasir and his e-mails used to be in the name of 'Karan' and sometimes in the name of 'Aman', 'Abdul', etc. In October, 2001 Nasir went to Agra for a second time at the instructions of Asif where he was again CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 37 of 195 received by Arshad and introduced to Zahid, Salim and Sadakat.

Nasir was also informed that Zahid and Salim were Pakistan Nationals while Sadakat was from Uttar Pradesh. Nasir was directed to take them to Hazaribagh premises and lodge them there. The next day morning they all left Agra and went to Hazaribagh in the Maruti 800 and a Maruti Zen. Again he received an e-mail from Bhaisahab (Aftab) saying Asif had been nabbed by the police which was received by him in the first week of November. In the last week of November 2001, Bhaisahab again e-mailed Nasir and asked him to go to Jaipur. When Nasir went to Jaipur he met Hassan Imam and they stayed in Uday Palace Hotel. As per the instructions of Bhaisahab they met one Dilip Bhai at Jaipur and by exchanging two separate Rs.10 notes, they received Rs.2 lakh from him. Based on further instructions of Bhaisahab they proceeded to Jaisalmer where they purchased a Jeep of 1988 make for Rs.80000/- from where they were asked to go to Barmer to fetch 15 kg of Atta, which means 'RDX'. However, the subsequent e-mail sent by Aftab they were told that the party cancelled the consignment and they can return back to Jaipur. Nasir returned back to Calcutta, while Hassan Imam went back to his home. This stated to have happened in the first week of December, 2001.

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30. After Nasir returned to Calcutta, Aftab informed him through e-mail that Asif was shot dead in an encounter by the Gujarat Police and his dead body was being flown to Calcutta. According to Nasir, the said information was a shocking news to him. Nasir confirmed that he used to receive mails through 'b4bapu@hotmail.com' and 'behzad50@hotmail.com' as well as 'z4zipzap@hotmail.com'. In December, 2001 he went to Khan Road, Khirgaon, Hazaribagh where Zahid, Sadakat, Salim and Hassan Imam were present. They set down together for a meeting. Zahid and Sadakat said that police had killed Asif and they should avenge it and they should not spare the Calcutta police either. In the meeting it was deliberated that they should blow off Government buildings and carry out killing of Policemen and show them the consequence of taking on the Jehadis. They also stated that the Calcutta police were never before faced with an encounter by Jehadis and that they should teach them a lesson. In the meeting it was decided that they would wait for the instructions of Bhaisahab and that wherever he asked them to attack they should attack. Zahid and Sadakat who were in a fit of anger shown two AK-47 rifles and huge collection of cartridge and said that they were fully ready and only awaiting Bhaisahab's order. According to Nasir, all of them were using the cyber café in Hazaribagh for communication. Zahid and Sadakat, who had been CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 39 of 195 to Jodhpur returned back to Calcutta on 14 th and 16 th January, 2002 respectively who were received by Nasir at the station. They brought large leather bags along with them and as per the instructions of Bhaisahab through e-mail, Nasir lodged both of them at Niaz Hussain's flat at No.1, Tiljala Lane and that Nasir was taking care of them.

31. On 18.01.2002, Hassan Imam stated to have visited Nasir's flat with a black Motorcycle bearing Registration No.WB-01-P2144 which he left at Hazaribagh. On that day Abdullah also came to his flat and stayed with him. They were waiting for the message from Bhaisahab. Thereafter, Zahid told them that Bhaisahab sent a message as per which they should launch an attack on the Central Investigation Department Bhawani Bhawan where Asif was kept for interrogation. According to Nasir, the said proposal was opposed by him stating that such an attack would be unjust as chances of innocent people becoming casualties and also the office of Minority Commission was located there. Nasir's view point was conveyed to Bhaisahab and Bhaisahab agreed to Nasir's view point. He suggested a place of American base and where there would be policemen as well as from where they could escape after carrying out the attack. On 19.01.2002, Nasir got the motorcycle repaired at a cost of Rs.400/- and that around 4-4.30 p.m., Nasir along with Zahid, CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 40 of 195 Sadakat, Abdullah went out of Niaz's flat in a blue Maruti 800 (BRK 4907) and went to the American Embassy where the police were checking the cars. From there they went to American Centre at Chowringhee Road. After three or four rounds they saw that there was no checking of cars at the American Centre and that policemen sitting there appeared to be very slack in their duties. Thereafter, Zahid stated to have decided that they should carry out their attack in that place.

32. On 20.01.2002, by way of rehearsal they all went to American Centre in the Motorcycle, as well as in the Maruti Car, that Zahid was driving the Motorcycle and Sadakat was the pillion rider. The car was driven by Nasir and Abdullah was sitting along with him. Around 6.30 a.m., they noticed that lot of policemen were present at the American Centre as shifting of duties was taking place. He also referred to the manner in which he drove the Maruti Car and stopped it while going at a high

speed opposite to a tea stall in front of Jeevan Deep building in which process a gentleman who was taking tea got the tea spilled over his hand and that an altercation stated to have taken place and that the issue was sorted out amicably. Thereafter, they returned back to the flat at No.1, Tiljala Lane. It is stated that Zahid fixed 6.30 a.m. on 21.01.2002 to be the time for CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 41 of 195 attack but then he changed it and said they would carry out the attack on 22.01.2002 at 6.30 a.m.

33. After the said decision they stated to have proceeded to the American Centre in the Car, as well as the Motorcycle and watched the shifting of duties by the police at the American Centre. After taking tea in the same place, they returned back to No.1, Tiljala Lane. As they were not clear about the location of the American Centre building and the route to the said place Nasir stated to have prepared a rough sketch map of the American Centre and the route to it. This was shown to Zahid and he was convinced and could comprehend the route. Thereafter, Nasir, Zahid, Sadakat and Abdullah set down and decided as to who would do what during the attack. Zahid stated to have mentioned that he would be driving the motorcycle along with a pistol and that Sadakat would be the pillion rider carrying an AK-47 and that Sadakat would launch the attack on American Centre. Zahid directed Nasir to drive the Maruti 800 by taking Abdullah along with him and park the car by the side of the crossing of Rippon Street and Circular Road and wait for Zahid and Sadakat. After carrying out the attack they would return to that place and Sadakat would move into the car with the AK-47 rifle and Nasir should speed of towards the flat at No.1, Tiljala Lane. Zahid then informed Bhaisahab through e-mail about the date, time and place of CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 42 of 195 attack, i.e. 22.01.2002 at 6.30 a.m. at American Centre and Bhaisahab also confirmed the proposal. On 22.01.2002, Nasir stated to have woken up at 5 a.m. and thereafter, he woke up everybody else asking them to get ready, that Zahid wore a Chocolate colour Jacket and armed himself with a pistol and Sadakat wore a green colour Jacket with an AK-47 rifle from a long pillow and placed it inside a cricket bat cover. As planned, Zahid drove the motorcycle along with Sadakat as the pillion rider and Nasir drove the Maruti 800 along with Abdullah. Nasir, as per the plan, stated to have parked the car at Rippon Street Circular Road Crossing and they got out of the car and started facing the street. Around 6.45 a.m., Zahid came speeding down in his motorcycle with Sadakat in the pillion and pulled out beside the car. Immediately thereafter, both said 'job done' (KAAM HO GAYA). Sadakat got down and got into the car with the AK-47 rifle with the cricket bat cover and thereafter, they sped of towards No.1 Tiljala Lane and Zahid followed them.

34. On the way, Sadakat stated to have narrated in detail how the attack was carried out. After reaching the flat, Sadakat said it will not be right for him to stay at Calcutta as people had seen him while he was launching the attack. While leaving Calcutta, Sadakat stated to have handed over the AK-47 to Zahid and left along with Abdullah to the station and that thereafter, Abdullah did not return. On CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 43 of 195 23.01.2002 Zahid also stated to have left Calcutta having packed the AK-47 and his own pistol in his bag who was seen of by Nasir in the Howrah station. After seeing of Zahid, Nasir went to his in-laws place. On 26.01.2002, Nasir went to the flat at Khan Road, Khirgaon, Hazaribagh where he met Zahid, Salim and Sadakat and they celebrated their successful attack at the American Centre. He thereafter, returned back to Calcutta. On 29.01.2002, Nasir sent an e-mail to Bhaisahab informing him that Zahid and Salim have been killed in an encounter by the police which was widely published

in the newspaper. On the night of 29.01.2002, he was arrested by the police at his in-laws' place and thereafter, he took the police and showed the flat of Niaz Hussain, i.e. No.1 Tiljala Lane from where the police seized the motorcycle and Maruti 800 which was used in the attack and several other documents. He also took them to his flat at No. 46 Tiljala Lane where the police seized some more documents including his driving licence, passport, pocket notebook, sketch map of the American Centre and a National Flag of Pakistan, which Zahid left with him while fleeing.

35. Nasir took the police to the cyber café at Kustia Road and also showed the whole route to the police that had been used before and after the attack. A revolver which was given to him by Zahid for his protection was also seized by the police. At the end, Nasir stated CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 44 of 195 that earlier he was scared of Aftab and that now since he has also been nabbed, he did not want to be a traitor against his country and therefore, came forward with his statement.

36. Having noted the various facts in the confession of Nasir, it must be stated that such a meticulous description of men and material, date, time and events including the passwords and e-mail addresses could have been revealed only by a person who was really acquainted with those details. It is very difficult for anyone to imagine these facts and put it in a narrative form. In fact, whatever lacunae that could be pointed out by Ms. Nitya Ramakrishnan was in our considered opinion a very insignificant one which would not in any manner either discredit the statement or would go to the extent of saying that the statement was designed and procured or tailor- made at the instance of someone, much less the investigation team to suit the case of the Prosecution. It must be remembered that PW-97 who being a Judicial Magistrate, nothing could be stated that he was in any way either influenced or prejudiced or in any manner persuaded to tow in line with the Prosecution to record such a statement. There was not even a remote suggestion to PW-97 that he was under the grip of the Prosecution while recording the confession of Appellant Nasir.

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37. Ms. Nitya Ramakrishnan pointed out the following non-corroborative factors to discredit the confessional statement of Nasir. The non- corroborative factors, which were pointed out by Ms. Nitya Ramakrishnan were:

(a)The month and year when No.1 Tiljala Lane flat was booked and possession handed over to Niaz Hussain.

(b)The opening of the e-mail account as per record and as per the statement of Nasir.

(c)About the factum of who was riding the bike and who was shooting on the date of occurrence.

(d)At the site of conspiracy what was the decision taken as to shooting and riding

(e)The time delay considering the distance from the site of conspiracy to the place of occurrence as well as the returning time.

(f) If Nasir's confession is to be believed, the AK-47 should have been recovered.

(g)The unexplained access to Nasir by police.

(h)Make the confession unreliable and the custodial confession always to be treated with a pinch of suspicion.

38. When we deal with the above non-corroborative factors referred to by learned counsel for the Appellant, the first one related to the month and year of the handing over of the flat at No.1, Tiljala Lane to Niaz Hussain. In the confession, Nasir stated that around April– May 2001, he along with Asif, Niaz and his brother Fiaz were involved in a discussion at flat No.1, Tiljala Lane, Calcutta-700031.

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The learned counsel referred to the evidence of PW-47 Dilip Kumar Singh, who was the promoter of the said building at No.1, Tiljala Lane, which stated that the agreement was dated 11.07.2001, which was signed in the presence of the owner of the building witnessed by Nasir and Benod Kumar Roy and that on that day itself he handed over possession to Niaz Hussain based on the agreement. The learned counsel, therefore, contended that there is a vast difference in taking over possession of the flat as between what was stated by Nasir and the flat promoter PW-47.

39. When we consider the said contention we can only say that PW-47 had the agreement in his hand which was dated 11.07.2001 while Nasir who was making his confessional statement was not referring to any specific document. While according to Nasir it was April-May 2001 as per the document, it is found to be 11 th July 2001. There is no difference in the year concerned, namely, 2001. In fact, Nasir himself was not sure as to whether it was April or May. Therefore, he said April-May, 2001. As between April-May, 2001 and July 2001 it must be stated that the same cannot be held to be such a serious discrepancy in order to state that on that score the confession which he was able to narrate with high amount of cogency which explains the sequence of events as from the early childhood of the Appellant till he realised his folly in 2002 when he came forward to make the CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 47 of 195 confession should be rejected. We therefore, reject the said submission as the same does not seriously impinge upon the confession made by the Appellant.

40. The next submission of the learned counsel for the Appellant related to the fact about as to who was riding the bike and who was shooting at the occurrence as to whether it was Zahid or Sadakat. In the confession, we find, according to Nasir, Zahid made a statement that he would drive the motorcycle with a pistol and that Sadakat would be the pillion rider with AK-47 rifle in his hand who would attack the people at the American Centre. Again while narrating the events starting from the

early morning of 22.02.2002, Nasir stated that Zahid wore a chocolate colour jacket arming himself with a pistol and Sadakat wore a green colour jacket and drove out with an AK-47 rifle and placed it in the cricket bat cover. He also stated that Zahid drew the motor bike while Sadakat was the pillion rider with the AK-47. It must be stated that since the above statement of facts have come from the horse's mouth who was fully involved in the conspiracy as well as the ultimate execution along with the other conspirators and the executants, his word must carry weight. We say so because when once the confession made by Nasir is free from any flaw either technical or factual and as stated earlier he was part CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 48 of 195 of the perpetrators of the crime, his word should carry weight in so far as the execution of the crime is concerned.

41. Nasir having participated in the crime right from its initiation till its execution and was taking care of the whole gang besides his own participation, it should be held that the facts stated by him as regards the crime part of it must carry due weightage and must be accepted. Therefore, when Nasir stated that as decided by Zahid on the previous day, i.e. on 21.01.2002 he would drive the bike along with the pistol and Sadakat would carry out the shooting with AK-47 as a pillion rider and when the same was stated to have been carried out meticulously on 22 nd January, 2002 making further description about the colour of the jackets worn by Zahid and Sadakat and that as planned Zahid, drove the vehicle carrying a pistol and Sadakat was the pillion rider with the AK-47, the said statement of Nasir must be accepted without any hesitation.

42. While, thus accepting the said position as stated by Nasir in his confession, the non-corroborative factors pointed out was the version of PW-62 and PW-113 and some variation in the version of eye-Witnesses, namely, PWs-6, 9, 15, 16, 18, 19 and 20. It is necessary, however, to refer to those Witnesses before answering the submission of the learned counsel for the Appellant. The learned CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 49 of 195 counsel drew our attention to the deposition of Witnesses, namely, PW-6, PW-9, PW-15, PW-16, PW-18, PW-19, PW-20, PW-62 and PW-113. Learned counsel for the Appellant by referring to the version of the above Prosecution Witnesses as compared to the confession made by Nasir submitted that while according to Nasir, Zahid was riding the bike wearing a chocolate colour jacket and Sadakat was the shooter wearing the green colour jacket, which was also the version of PW-62 who happened to see the person wearing chocolate colour jacket driving the motor bike and person with green colour jacket as pillion rider carrying a cricket bat cover. PWs-6, 9, 15, 16, 18, 19, and 20 who are all claimed to be eye-Witnesses to the shooting incident stated that the person who was shooting with the AK-47 was wearing a chocolate or brown colour jacket and the rider of the bike was wearing a green colour jacket. She also pointed out to us that all the above Witnesses identified Exhibit-XXVI, the photograph of Zahid taken after his death. Learned counsel further referred to evidence of PW-113 who was part of the team which carried out the encounter at Hazaribagh stated that Zahid while being taken to the hospital in a serious condition, made a dying declaration that he was the person who shot at the police personnel at the American Centre while Sadakat was the driver. By pointing out the above evidence of different Witnesses, learned counsel CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 50 of 195 submitted that here again there is a pointed variation as between the version of the Prosecution Witnesses and that of the confession of Nasir.

43. The contention, therefore, was that the said variation would create serious lacuna in the evidence of the Prosecution inasmuch as there was no definite evidence as to who was the shooter and who was the rider. It was therefore, contended that the said factor is another vital non-corroborative factor which would seriously impinge the confession. When we consider the said submission, we have to point out that PWs-6, 9, 15, 16, 18, 19 and 20 were all eye- witnesses to the shooting occurrence. Many of them were injured eye-witnesses. The evidence of PW-6 discloses that the shooting by the person with AK-47 was taking place within a distance of 10-15 feet only. The time of occurrence was 6.35 a.m. All the eye- witnesses also stated that the shooter was wearing Chocolate or Brown colour jacket and the rider was wearing a Green colour jacket. Therefore, it is relevant to keep in mind that as per the eye- witnesses' version the person who was shooting was wearing chocolate/brown colour jacket and the person who was driving was wearing green colour jacket.

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44. When we consider the above evidence, we find that according to PW-113, Zahid made a declaration, while he was sinking, that he did the shooting operation and Sadakat was the rider. As far as PW-113's evidence is concerned, the same cannot be relied upon for the simple reason that what was stated to him by Zahid cannot be taken as a dying declaration. In order to be a valid dying declaration as specified under Section 32, primarily such statement of a dead person would be relevant to the cause of his death or any of the circumstances of the transactions which resulted in his death and that too in cases in which the cause of his death comes into question. That apart, it is by now well settled that for a statement to be accepted as a dying declaration, it should have passed the rigorous tests laid down in various judicial pronouncements as such a statement would be a self-inflicting one. More so, when it is claimed to be a oral declaration not supported by any other evidence, be it oral or documentary, therefore, based on the ipsi dixit of PW-113 referring to Zahid's declaration, it cannot be accepted as a valid piece of evidence. Therefore, the said part of the evidence of PW-113 relating to the so-called dying declaration of Zahid will have to be eschewed from consideration. When we say so, we are cautious of the fact that the Hazaribagh encounter gave a vital clue to the Investigating Team dealing with the American Centre case, CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 52 of 195 which in our considered opinion will not be in any way hindered by eschewing from the considering the dying declaration aspect of PW-113's evidence. If the so-called dying declaration of Zahid is eschewed from consideration, what is left is the evidence of the eye- witnesses, i.e. PWs-6, 9, 15, 16, 18, 19, 20, 62 and the confessional statement of Nasir. The eye-witnesses account merits acceptance as they had the full view of the assailants. In fact, according to some of them, both were shooting, some of them identified the photo of Zahid as the person who was riding the bike and shooting. Going by the version of Nasir, Zahid was riding and Sadakat was the pillion rider. We only point out that there was no non-corroborative factor as was sought to be demonstrated on behalf of the Appellant in order to state that the whole evidence

of the eye-witnesses should be rejected and that on that ground, the confession cannot also be relied upon. We will have to bear in mind that the confession has unfurled the whole of the story of the Prosecution, while this part of the evidence is confined to the act of shooting by one of the conspirators and that of riding a bike by another conspirator. We are convinced that the evidence on record in particular the eye-witness account who had the benefit of looking at the person who was shooting at the spot in the close vicinity and who are able to note a glaring feature namely, the dress worn by the shooter and the driver CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 53 of 195 and also identified the photograph of the driver when shown to them, there is no reason why their version should not be believed for the purpose of identifying the assailant at the place of occurrence. Therefore, a cumulative consideration of our above discussion makes it clear that the confession of Nasir as it stands was not in any way contradicted by any of the Prosecution Witnesses, namely, PWs-6, 9, 15, 16, 18, 19 and 20.

45. When we come to PW-62, according to whom at Rippon Street Circular Road Crossing when he was looking at Maruti car driven by Nasir with co-passenger, two persons arrived in a motor cycle stating that their mission was accomplished and that the person wearing green colour jacket who was a pillion rider, got down from the bike carrying a cricket bat cover, got into the car and thereafter, the car and the bike left the spot. Here again, we are not impressed by the submission that going by his version it should be held that there was a serious contradiction as regards the shooter and the rider which will lead to a conclusion of non-corroborative factor to discard the confession. Firstly, PW-62 was not an eye-witness to the shooting occurrence; secondly as between the place of occurrence and Rippon Street Circular Road Crossing what really transpired as between the rider and shooter was not known to him. The significance of PW-62's evidence would mainly relate to the CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 54 of 195 identification of Nasir who had parked the vehicle at the spot where PW-62 and his friend were taking tea and by virtue of the haphazard parking on the road, there was a traffic jam which necessitated PW-62 to approach Nasir and ask him to park the vehicle properly in order to clear the way for smooth movement of vehicles. It was in that aspect the version of PW-62 assumes more significance. It is true at that point of time a little later he also witnessed the two persons who arrived at the spot in a motor bike expressing their successful achievement of their operation and one of them who was the pillion rider got into the Maruti car after which both the vehicles left the spot. It can only be stated that even assuming for the sake of argument based on the PW-62's version some contradiction as regards the jacket colour having regard to the overwhelming evidence pointed out by us by making reference to PWs-6, 9, 15, 16, 18, 19 and 20, evidence of PW-62 should be ignored as a very insignificant one. Therefore, on this ground we are not convinced that any non-corroborative factor can be attributed to dislodge the confession.

46. Learned counsel for the Appellant also argued by stating that there was time delay involved considering the site of conspiracy the place of occurrence and the returning time to the site which was all improbable. As per the confession of Nasir, they all left No. 1, Tiljala CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 55 of 195 lane at 5.30 a.m. The occurrence stated to have taken place at 6.30 a.m. at the American Centre. The contention is that having regard to the location of the place of conspiracy and the site of occurrence, it is highly improbable that the occurrence could have taken place at 6.30 a.m., when the conspirators left the place of conspiracy at

5.30 a.m. We do not find any substance in the said submission since with reference to such time factor there should always be some time allowance given, in which event, the said factor cannot be taken as a non-corroborative factor at all to reject the confession made by Nasir.

47. One other submission made was that if the confession of Nasir is to be believed, the AK-47 should have been recovered. We are at a loss to understand as to how the non-recovery of AK-47 rifle would vitiate the confession. In fact, learned Additional Solicitor General in his submissions stated that the AK-47 rifles seized at the hideout of the conspirators at Hazaribagh along with the recovered bullet jackets at the occurrence spot, namely, the American Centre were all sent to Forensic Science Laboratory for an expert opinion and it turned out that none of the bullets fired and recovered at the American Centre matched with the gun recovered at Hazaribagh premises. Learned Additional Solicitor General, therefore, contended that the non-recovery of the AK-47 which was used at the place of CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 56 of 195 occurrence cannot be a factor to reject the Prosecution case as framed against the accused. We find force in this submission. In fact, as per the confession of Nasir, after the shooting operation and after they all returned back to No. 1, Tiljala Lane, both Sadakat and Zahid left Calcutta carrying their baggages. Zahid lost his breath in the encounter on 28-29.01.2002. Whatever arms and ammunition including the AK-47 rifles at the premises at Hazaribagh was found to be the weapons not used for shooting at the American Centre. Sadakat was an absconder, though, later he was apprehended and is now being tried. Therefore, any recovery made at the instance of Sadakat, who is now facing the trial, is not known. In such circumstances, the non-recovery of the AK-47 which was used for shooting at the American Centre cannot be a ground to disbelieve the statement contained in the confession of Nasir.

48. As far as the contention made on behalf of the Appellant that non-

production of the weapon used in the attack is fatal to the case of the Prosecution is concerned, the reliance placed upon by the learned Additional Solicitor General to the decision reported in Ram Singh vs. State of Rajasthan - (2012) 12 SCC 339 would meet the said contention. In paragraphs 8 and 10, this Court has also held that the non-production of the weapon used in the attack is neither CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 57 of 195 fatal to the Prosecution case nor any adverse inference can be drawn on that score. Therefore, the said submission is also rejected.

49. While referring to the non-corroborative factors the learned counsel for the Appellant submitted that the unexplained access to Nasir by police when he was produced before the Magistrate on 21.02.2002 for recording his confession read along with the above factors makes the confession fully unreliable. We have referred to the requisition made by PW-123 and the order passed by the Magistrate, 14 th Court Calcutta on 21.02.2002 by which he issued directions to lodge the Appellant Nasir in the Calcutta Presidency Correction Home on that day by segregating him from other accused and strangers for being produced on 22.02.2002 to give enough time for Appellant Nasir to rethink as to whether or not he should make the confession. We have found that the Appellant was in the custody in connection with case No.53 dated 12.02.2002 for certain offences under the Arms

Act while he was in judicial custody up till 22.02.2002 and, therefore, those materials disclose as to how Appellant Nasir happened to be in the custody of the police on 21.02.2002. Inasmuch as the said situation has been explained by valid documents, the said circumstance also does not in any way vitiate the confession made by Nasir.

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50. Learned counsel then submitted that custodial confession should always be treated with suspicion. Learned counsel referred to the decisions reported in Shivappa vs. State of Karnataka - (1995) 2 SCC 76, Bhagwan Singh and others vs. State of M.P. - (2003) 3 SCC 21 and Alope Nath Dutta and others vs. State of West Bengal - (2007) 12 SCC 230 in support of her submissions. Learned counsel then referred to some of the answers made by Appellant Nasir in the Section 313 questioning. Specific reference was made to question Nos.562, 563, 564, 770, 771 and 772. For question No.562, the answer was 'I do not know, I am innocent'. The question was with reference to PW-97, namely, the Magistrate who recorded the confession of the Appellant, who stated that he certified about the voluntariness of the statement and proved the statement before the Court marked as Exhibit-201 and what was the reaction of the Appellant. By saying that he was innocent and he did not know anything, we do not find anything to be implied that the whole of the confession has to be rejected based on the said answer. Question No.563 was again related to PW-97 wherein it was put to Appellant Nasir that learned Chief Metropolitan Magistrate sent Nasir the case record of GR190 of 2002 for recording the confessional statement of Nasir and what he had to say. The answer was that 'on 21.02.2002, I was on police record, I was not sent to CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 59 of 195 any Magistrate for recording confessional statement', though, the said answer contradicted the factum of the confessional statement recorded by PW-97. By merely accepting such a denial of the factum of production of the Appellant for the purpose of recording of confessional statement before PW-97, it cannot be inferred that as between the version of PW-97 and the stand of the Appellant without anything more, the stand of the Appellant should be believed. In fact, for question No.564, it was explained to the Appellant that PW-97 gave necessary caution to him, assured him that if he declined to make any statement he will not be sent to police custody and that thereafter, PW-97 sent him for jail custody for refreshment of his mind with a direction to the Superintendent, Presidency Correction Home to keep him in complete segregation. Here again the Appellant came forward with only an answer that it was false and that he was innocent. We can understand if the Appellant had stated that nothing transpired on 21 st February, 2002 and 22 nd February, 2002 when the confession was recorded by the Magistrate PW-97. On the other hand, according to PW-97, the Appellant wrote the statement in his own handwriting and proved the statement before the Court which was marked as Exhibit-201. When that fact was put to the Appellant by way of question No.567, the Appellant pleaded ignorance. Therefore, the Appellant's answers to those questions CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 60 of 195 does not reflect the true state of affairs, therefore, based on that it cannot held that the confession should be disbelieved.

51. Similarly, for question No.770, it was specifically stated that the Appellant Nasir gave a confessional statement under Section 164 Cr.P.C. before the Metropolitan Magistrate, 14 th Court on 22.02.2002 and what he had to say. A simple answer was that it was false and that he was innocent. For question No.771, where it was put to Appellant that he gave a statement before the Magistrate, that he was put in segregation in Presidency Correctional Home for reflection of memory and the Magistrate gave sufficient warning as contemplated under the Act. Before recording his statement the answer was;

“ I was taken to Correctional Home on 22.02.2002 that he was innocent that at 7 p.m from a small (illegible) of Hugly river coming office (illegible) bridge Sagar Setu.”

52. The said answer does not in any way give any acceptable ground for rejecting the confession made by the Appellant. Again for question No.772, the Appellant answered that he did not give any statement. Except mere denial about the confession made, we do not find any other positive evidence on the side of Appellant to reject the confession. In fact, other than the above answers there was nothing on record to show that the Appellant retracted from his confession.

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Therefore, the confession made by the Appellant before PW-97 does not suffer from any infirmity in law or facts. The purport of Section 313 questioning is to enable the accused to come forward with the acceptable explanation while refuting the various evidence alleged against him. Unfortunately, the Appellants failed to avail the opportunity to confront the facts support by valid evidence.

53. As far as the reliance placed upon the decision of this Court in Shivappa (Supra), paragraph 6 is relevant, which reads as under: “6. From the plain language of Section 164 CrPC and the rules and guidelines framed by the High Court regarding the recording of confessional statements of an accused under Section 164 CrPC, it is manifest that the said provisions emphasise an inquiry by the Magistrate to ascertain the voluntary nature of the confession. This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused under Section 164 CrPC. The failure of the Magistrate to put such questions from which he could ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the same. Full and adequate compliance not merely in form but in essence with the provisions of Section 164 CrPC and the rules framed by the High Court is imperative and its non-compliance goes to the root of the Magistrate’s jurisdiction to record the confession and renders the confession unworthy of credence. Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the Prosecution still lurking in the mind of an accused. In case the Magistrate discovers on such enquiry that there is ground for such supposition he should give the accused sufficient time for CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF

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54. When we apply the various principles set out in the said paragraph to the case on hand, we find the Magistrate PW-97 had elaborately applied all the principles laid down therein before recording the confession. Therefore, the said decision fully supports the action of the Magistrate PW-97 in having recorded the confessional statement in accordance with law.

55. Reliance was then placed upon the decision in Bhagwan Singh (supra). Paragraph 30 was referred to which reads as under: “30. It has been held that there was custody of the accused Pooran Singh with the police immediately preceding the making of the confession and it is sufficient to stamp the confession as involuntary and hence unreliable. A judicial confession not given voluntarily is unreliable, more so when such a confession is retracted. It is not safe to rely on such judicial confession or even treat it as a corroborative piece of evidence in the case. When a judicial confession is found to CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 63 of 195 be not voluntary and more so when it is retracted, in the absence of other reliable evidence, the conviction cannot be based on such retracted judicial confession. (See Shankaria v. State of Rajasthan, SCC para 23)”

56. In the first place in the case on hand, the confession was recorded after the Appellant was directed to be kept in the Presidency Correctional Home under the custody of its Superintendent and, therefore, he was not in the police custody. Thereafter, the Appellant never retracted from the confession made before PW-97 except his incoherent answers to some of the questions relating to the confession in the Section 313 questioning. We, therefore, do not find any scope to apply the said decision to the facts of this case.

57. Reliance was then placed upon the decision in Alope Nath Dutta (supra). In paragraphs 104 to 107, this Court has explained as to how the Court must be extremely cautious in dealing with confession made under Section 164 especially such confession is retracted, which read as under:

“104. Section 164, however, makes the confession before a Magistrate admissible in evidence. The manner in which such confession is to be recorded by the Magistrate is provided under Section 164 of the Code of Criminal Procedure. The said provision, inter alia, seeks to protect an accused from making a confession, which may include a confession before a Magistrate, still as may be under influence, threat or promise from a person in authority. It takes into its embrace the right of an

accused flowing from Article 20(3) of the Constitution of India as also Article 21 thereof. Although, Section 164 provides for safeguards, the same cannot be said to be CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 64 of 195 exhaustive in nature. The Magistrate putting the questions to an accused brought before him from police custody, should sometime, in our opinion, be more intrusive than what is required in law. (See Babubhai Udesinh Parmar v. State of Gujarat.)

105. In a case where confession is made in the presence of a Magistrate conforming the requirements of Section 164, if it is retracted at a later stage, the Court in our opinion, should probe deeper into the matter. Despite procedural safeguards contained in the said provision, in our opinion, the learned Magistrate should satisfy himself whether the confession was of voluntary nature. It has to be appreciated that there can be times where despite such procedural safeguards, confessions are made for unknown reasons and in fact made out of fear of police.

106. Judicial confession must be recorded in strict compliance with the provisions of Section 164 of the Code of Criminal Procedure. While doing so, the Court shall not go by the black letter of law as contained in the aforementioned provision; but must make further probe so as to satisfy itself that the confession is truly voluntary and had not been by reason of any inducement, threat or torture.

107. The fact that the accused was produced from the police custody is accepted. But it was considered in a routine manner. The learned Magistrate in his evidence could not even state as to whether the Appellant had any injury on his person or whether there had been any tainted marks therefore.

58. Having referred to the above paragraphs, we find that none of the instances and principles referred to therein when applied to the facts of the present case persuade us to hold that the confession made by the Appellant cannot be relied upon.

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59. Learned counsel for the Appellant in her submissions, argued about the truthfulness in respect of the statements contained in the confession as compared to the other evidence of the Prosecution. Learned counsel prefaced her submission by saying that the confession will have to be seen as to whether it was to buttress the various contradictions in the evidence of the Prosecution. The learned counsel referred to the fact about the contradiction as regards the handing over of the flat at No.1, Tiljala Lane, which according to PW-47 was on 11.7.2001, while in the confession it was stated to be in April-May, 2001. Reference was then made to the fact about whether Zahid was the shooter or the pillion rider. As far as the above two factors are concerned, we have already dealt with the same in detail and found that there was no material contradiction over the same. Learned counsel then pointed out that in the confession, Appellant Nasir alleged to have stated that after getting out of No.

1, Tiljala Lane flat he advanced towards the Rippon Street Circular Road crossing, where he parked the car and his co- passenger Abdullah as well as himself got out of the car and were facing the street. As compared to the said statement, learned counsel referred to the evidence of PW-62 who was examined to establish that on 22.01.2002 Appellant Nasir along with another person were found at that spot. The learned counsel pointed out that CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 66 of 195 according to PW-62 on 22.1.2002 at about 6.20/6.30 a.m., he was in Beniapukur lane after crossing of AJC Bose road in the shop of one Ashok Nandi to purchase milk where he met his friend Gilbert Gomes. He further stated in front of the shop of Nandi he noticed the Maruti 800 blue colour car parked in a wrong trajectory and that a lorry which came from Beniapukur side could not pass the road due to such wrong parking by the driver of Maruti car. He further stated that in order to clear the traffic jam he and his friend approached the Maruti car driver who though initially did not respond properly, when they noted the registration number of the car, the driver set right the parking of the car which ultimately cleared the traffic jam. He also stated that the registration number of the Maruti car was BRK 4907. However, in the course of the cross examination he stated that Rippon Street Circular Road Crossing is almost in the opposite of Beniapukur Lane and AJC Bose road towards right and that there are footpath in Rippon Street Circular Road Crossing on both sides. Learned counsel contended that according to Appellant Nasir he parked the car at Rippon Street Circular Road Crossing and he and Abdullah got out of the car facing the street. According to PW-62 the car was parked in Beniapukur Lane which is a material contradiction.

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60. On a consideration of the above facts stated by Appellant Nasir in his confession and PW-62 as regards the location where the car was parked on 22.01.2002 in the early morning, we find that in the cross examination it was elicited from PW-62 to the effect that Rippon Street Circular Road Crossing, Beniapukur Lane and AJC Bose Road were all situated adjacent to each other and therefore, we do not find any material contradiction on the said aspect.

61. It was submitted that in the light of the said contradiction, it will have to be inferred that PW-62 could not have identified the Appellant and the co-passenger who was in the car and therefore, the reliance placed upon PW-62's memory was not strong enough to support the circumstance.

62. On this aspect reliance was placed upon State (NCT of Delhi) vs. Navjot Sandhu @ Afsan Guru – (2005) 11 SCC 600. As far as the decision in Navjot Sandhu @ Afsan Guru (supra) is concerned, our attention was drawn to paragraphs 304, 306, 315 and 320. In paragraph 304 this Court after adverting to certain deficiencies in the recording of the confession this Court declined to rely upon it. Thereafter, in paragraph 306 excluding the confession from consideration this Court proceeded to examine the circumstantial evidence against the accused and assess whether he CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 68 of 195 joined the conspiracy. After

discussing the various circumstances, this Court also referred to the reliance placed upon the evidence of a witness who was examined as PW-45 in the case to implicate the accused in the factum of conspiracy and found that there were no clinching circumstance so as to reach a conclusion unaffected by reasonable doubt that the particular accused was a party to the conspiracy along with his cousin, the prime accused. In the case on hand we have held that there was no deficiency much less any serious one in accepting the confession recorded by the Magistrate under Section 164 as we have found that the Magistrate was examined as PW-97 observed all the ingredients required in law in particular Section 164 Cr.P.C. As the facts involved in Navjot Sandhu (supra) are not comparable to the one in the case on hand, we cannot apply the reasoning stated in that case to the facts of this case. In the light of our above finding on the confession of Appellant Nasir, we find that the reliance placed upon Navjot Sandhu @ Afsan Guru (supra) is of no assistance to the Appellant.

63. Having dealt with the issue relating to confession and before examining the other corroborative materials in the form of evidence, both oral and documentary, placed in support of the Prosecution, we wish to note the submissions of learned counsel in relation to the appeal filed by Aftab in Criminal Appeal Nos.1242-43 of 2010. Ms. CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 69 of 195 Nitya Ramakrishnan submitted that Aftab was arrested on 22.03.2002 and that his conviction was mainly based on the confession of Appellant Nasir. After referring to the same the learned counsel submitted that the confession of the co-accused cannot be relied upon as the same is not substantive evidence under Section 30 of the Evidence Act, 1872 (hereinafter referred to a 'Evidence Act').

64. Learned counsel contended that the evidence of PW-123, Investigation Officer, relating to the recovery of a letter and notebook marked as Exhibit-46/1 cannot be taken as a recovery made at the instance of Aftab and, therefore, no reliance can be placed upon the said document. According to the learned counsel, the said document can only be stated to have been taken on record by way of a seizure and not by way of recovery at the instance of Appellant Aftab. When we refer to the said part of the evidence of PW-123, we find that after taking Appellant Aftab into judicial custody, PW-123 recorded his statement and pursuant to his statement conducted a search of the house of deceased Asif at No.38D, Mofidul Islam Lane with the help of the local police and based on the admissible part of the said statement seized one notebook and one letter written in Hindi from a small almirah kept inside the room of Asif in the presence of Witnesses. The seizure list prepared was marked as Exhibit-44 and CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 70 of 195 the signature of Appellant Aftab was also marked which form part of the record. That apart there is also the evidence of PW-105, handwriting expert, who after examining the letter Exhibit-46/1 opined that the handwriting found in the letter and some of the writing in the diary are in the handwriting of the Appellant. Apart from PW-123, the seizure witness PW-63 and PW-119 were also examined. Asif's brother PW-39 was also examined on the side of the Prosecution.

65. Evidence of PW-105, the handwriting expert, has opined that the writings found in Exhibit-46/1 and the specimen handwritings of Aftab produced before him were similar. That part of the evidence of PW-105 is as under:

“Manner of writing Hindi writings ‘Aftaab’, ‘Ahmed’; ‘Ansari’, with the formation of ‘Awe’ in Aftaab and ‘Awe’ in Ahemed and Ansari, formation of ‘Haw’, ‘maw’, ‘Daw’ (18 th letter in the alphabet), manner of putting the matra of ‘eekar’ in ‘Ansari’ are found similar in Q37 and S57, S58 and S62. In short, all the significant characteristics as observed in the questioned writings are found similarly exemplified at one place or the other in the standard writings and they are within the limits of natural variations. The cumulative consideration of all the writing habits leads me to the irresistible opinion of common authorship.”

66. Learned counsel for the Appellant also brought to our notice the evidence of PW-39 Ali Reza Khan who is the younger brother of the CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 71 of 195 deceased Asif. In his evidence PW-39 identified Appellant Nasir in the Court. While referring to his brother Asif, he stated that after his schooling, Asif did his graduation from Maulana Azad College, thereafter went to Aligarh Muslim University (hereinafter ‘AMU’) for studying a course in journalism and that he was also member of Student Islamic Organisation. He further stated that when Asif was studying in AMU sometime in 1993-94 he was arrested in TADA case. When he referred to one of Asif’s friend Abdullah who came to visit Asif in Calcutta along with some others, one of whom was Dr. Mushtaq Ahmed a Kashmiri, he stayed in their house for two days and that thereafter, when he met Asif after his arrest in TADA case he found Dr. Mushtaq Ahmad was also a co-accused before the Tees Hazari Court. He further stated that Asif once introduced PW-39 to another gentleman who was also arrested and whose name was Aftab Ansari. PW-39 thereafter identified Appellant Aftab in the Court. In the latter part of his evidence he stated that Asif was released in the year 1999 when he came back to Calcutta and was residing with them and after 1999 when Abdullah came to their residence to meet Asif, his mother was annoyed and asked him to leave the house forthwith and also threatened him with a broomstick and thereafter, none of Asif’s friends visited their house. He also referred to the subsequent arrest of Asif in 2001 in connection with CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 72 of 195 Khadim’s kidnapping case and that he was taken to Calcutta Bhavani Bhavan. He mentioned about the killing of Asif on 08.12.2001 by the Rajkot Police in a fake encounter. He also referred to the visit of the police at the residence on 02.04.2002 and the search made in their house. When PW-39 was specifically asked as to whether police searched the room of Asif, he replied as under: “our room was not searched by police on 02.04.2002”. The Prosecution requested the Court to treat the witness as hostile at that point of time and cross examined him thereafter. Subsequently he denied the suggestion that police entered the room of Asif searched and recovered the notebook Exhibit-45/1 and the letter dated 14.1.2002 written by Aftab marked as Exhibit-46/1. However, he admitted the signatures found in Exhibits-44/1, 45/1, 46/1, 46/2, 46/3 and 46/4. He also confirmed that he informed the police that Asif went to Kashmir and became a Jehadi, though he could not remember the date. He also stated that he informed the police about Asif’s meeting with one Salahuddin, leader of Hizbul MuZahideen and also Dr. Mushtaq Ahmad another leader, when they discussed about terrorism to be continued in India by them. He further stated that he informed the police that Asif developed an impression that the Government of India was not taking proper care of Muslims and therefore, they wanted to teach a lesson to the CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 73 of 195 Indian Government with the help of militant groups of Kashmir. Dr. Mushtaq Ahmad who came to their residence sometime back was the very same person who visited them later. He would further state that he informed the police that Dr. Mushtaq

Ahmad stayed in the room of Asif and held closed-door meetings but he did not state to police as to whether he heard them discussing about Jihad against India.

67. In the course of his cross examination on behalf of Appellant Aftab and others, PW-39 addressed the Court and gave a statement. In the said statement he attempted to throw allegations against the police that he was forced to affix his signatures antedating them and that he was under mental pressure by police authorities. However, certain statements made by PW-39 are significant which are as under:

“I was put into belief that Aftab Ansari is the root cause of all evils caused to by elder brother from his arrest to death and I began to hate Aftab Ansari. I came to learn about Asif’s various activities from the chargesheet of TADA case at Delhi. The statement which is made to police is on the basis of chargesheet of TADA case. There is no man named Aftab Ansari in the chargesheet. I have read only one chargesheet against my elder brother. I gave statement to police, to some extent truly voluntarily and to some extent under pressure; later it transpired that some statements were inserted that which I did not state. I state about the mental state of Asif and his disillusionment against the Government of India which I gathered from the chargesheet of Tada case.” (underlining is ours) CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 74 of 195

68. At the end of the cross examination on behalf of Appellant Aftab, he confirmed that it was a fact that he identified Aftab Ansari and Jamiludin Nasir in Court under the pressure of Police. Again he stated that it was not a fact that under pressure of police ‘I indentified these persons’. Learned counsel by referring to the above evidence of PWs-123, 105 and 39 submitted that the above evidences were not sufficient enough to convict the Appellant Aftab. Again, the learned counsel by referring to Section 30 of the Evidence Act would contend that they were not substantive enough to be relied upon. Learned counsel relied upon Haricharan Kurmi vs. State of Bihar - AIR 1964 SC 1184, Mohd. Khalid vs. State of W.B. - (2002) 7 SCC 334, Navjot Sandhu @ Afsan Guru (supra), Kehar Singh and others vs. State (Delhi Administration) - (1988) 3 SCC 609 for the purpose of clarifying the position that various reference to car numbers in diary Exhibit-45/1 would not be sufficient to convict the Appellant however much suspicious it may be. The learned counsel therefore, contended that neither the letter nor the diary entry can be relied upon or believed to prove the conspiracy. Reliance was place upon State through Superintendent of Police, CBI/SIT vs. Nalini and others - (1999) 5 SCC 253 and Alamgir vs. State (NCT, CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 75 of 195 Delhi) - (2003) 1 SCC 21, wherein it was cautioned by this Court not to rely upon such slippery evidence and that by barely relying upon handwriting expert’s opinion, a conclusion cannot be drawn.

69. As against the above submission of Ms. Nitya Ramakrishnan learned counsel for the Appellant, Mr. Siddharth Luthra, learned Additional Solicitor General in his submission contended that the confession of Appellant Nasir was voluntary and can therefore be relied upon by the Court. The Learned Additional Solicitor General contended that the contents of the confession of Appellant Nasir was fully corroborated inasmuch as the Prosecution was able to retrieve all the e-mails based on some of the entries found in the diary maintained by Asif, the passwords given by Appellant Nasir and the downloaded messages from the various e-mail accounts revealed how the entire

operation was carried out. Learned Additional Solicitor General would describe the whole scheme of the operation carried out by the Appellants into four parts, namely, forming a Jehadi movement, visiting Kashmir for that purpose and subsequent meeting of Asif with Appellant Aftab when they conspired and subsequently at the instance of Appellant Aftab a further conspiracy was carried out to take a revenge for the killing of Asif. Learned Additional Solicitor General, however, fairly submitted that the acquittal of A4 and A5 became final as the same was not CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 76 of 195 challenged by the State. As far as the acquittal of A2 and A3 is concerned, he contended that the same has been challenged in Criminal Appeal Nos.1244 to 1247 of 2010 and in the very same appeal, the state has also challenged the reduction of offence and sentence imposed on A-6, 7 and 9 who were acquitted of conspiracy for murder but were convicted for forgery by the High Court. It will have to be reiterated that we have de-tagged the said Criminal Appeal Nos.1244-47 of 2010 for want of time.

70. As far as the conviction and sentence imposed on Appellant Nasir and Aftab is concerned, learned Additional Solicitor General pointed out that altogether 17 persons were involved out of whom 9 of them were prosecuted and dealt with by the trial Court and the High Court. One absconder by name Sadakat is now facing trial and that Niaz Hussain, Fiaz Hussain, Hazrat Imam and Abdullah are still absconding while Asif is no more. Two others namely Zahid and Salim died in the Hazaribagh encounter. Learned Additional Solicitor General referred to the testimony of PW-6 and whose information was noted in Exhibit-11 in the form of a statement and that the wireless information given by him was forwarded to the Shakespeare Sarani Police Station which was entered in the G.D. as entry No.1899 at 6.36 a.m. Learned Additional Solicitor General also referred to a formal FIR Exhibit-261. Learned Additional Solicitor CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 77 of 195 General therefore, contended that there was no doubt as to the registration of the FIR, that the evidence of PW-121 disclose that the statement was recorded between 9-10 a.m. and that after visiting the spot, he went to SSKM Hospital and recorded the statement. He also pointed out that the hospital was just about 1 km from the place of occurrence. The learned Additional Solicitor General then referred to the evidence of PWs-9, 15, 18, 19 and 20 who were all eye-witnesses to the incident, as well as the evidence of PW-62 who happen to note the presence of Appellant Nasir along with the absconding accused Abdullah the two assailants, namely, the deceased Zahid and accused Sadakat who is now facing trial. Leaned Additional Solicitor General also pointed out that the colour of the jacket owned by the shooter and the driver of the bike were uniformly stated by the eye-witnesses to the occurrence and the only variation was by PW-62 who interchanged the jacket. The learned Additional Solicitor General submitted that the plausible explanation can be that in between the place of occurrence namely the American Centre and the Rippon Street Circular Road Crossing, where PW-62 noted the presence of Zahid and Sadakat, what really happened as regards the wearing of jacket cannot be stated with any certainty. The learned Additional Solicitor General stated that when there was overwhelming evidence of the eye-witness as well as the witness CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 78 of 195 who noticed the jackets of the driver of the bike and the pillion rider at No.1 Tiljala Lane, the change of colour mentioned by PW-62 will not materially affect the case of the Prosecution. The learned Additional Solicitor General further pointed out that in any event, PW-62 was able to identify Appellant Nasir in the Test Identification Parade and also the photograph of the deceased Zahid Exhibit-XXVI and, therefore, there was enough evidence supporting the case of the Prosecution to

confirm the conviction. The learned Additional Solicitor General again fairly submitted that though the AK-47 Rifle seized from Hazaribagh was different from the one which was used at American Centre, an attempt was made to find out whether the weapon seized in Hazaribagh were used in the offence. However, the forensic report disclosed that those weapons were not used. The Additional Solicitor General therefore, submitted that the Prosecution never attempted to insist that those weapons seized including the AK-47 rifle were the weapons used in the attack at American Centre. While referring to the evidence of PW-113, who was posted as the O.C. of Hazaribagh Police Station and was part of the investigation team at the Hazaribagh incident, learned Additional Solicitor General submitted that those contradictions pointed by learned counsel for the Appellant were minor and the said witness was really important to support the nabbing of Zahid who died in the encounter and CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 79 of 195 whose link to the incident on 22.2.2002 was found out in that process. Learned Additional Solicitor General by referring to the evidence of PW-83 Dr. Lakshmikanta Ghose who conducted the post mortem of one of the victims, specifically stated that the death was due to a gun shot injury and that the injuries were from high velocity self loading automatic weapons. It was however, pointed out that PW-83 fairly admitted that such an information was not referred to in the post mortem report. The learned Additional Solicitor General also referred to the evidence of PW-95, the Senior Scientific Officer and the report Exhibit-190 and the forensic report and submitted that a cumulative consideration of the above material evidence conclusively established the offence for which the Appellants were charged.

71. While summing up his arguments, the learned Additional Solicitor General submitted that the e-mails exchanged between Nasir and Aftab, its contents revealed the stay of Aftab in Banaras, the purchase of a Jeep, meeting of different persons by Appellant Nasir, the contact of Asif and Aftab, the plan hatched after 14.01.2002, the decision taken to shift the target of attack from Bhawani Bhawan to American Centre, the decision to carry out the mission initially on 21.01.2002, which was postponed to 22.01.2002 read along with the evidence of PW-39, the younger brother of Asif, who confirmed the CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 80 of 195 mindset of Asif after his joining with Jehadi movement when he met several of his like minded persons in their own house where they were discussing about their hatred towards the Government of India as in their opinion Muslims were not given their due share and, therefore, they should take a revenge as against the Government. The said version of PW-39 was fully supporting the confessional statement of Appellant Nasir wherein he also referred to the declaration made by Asif of having joined the Jehadi movement after his visit to Kashmir sometime in the year 1991 and thereafter, Asif's introduction of Appellant Nasir to Aftab, the opening of the e-mail accounts in the name of Appellant Nasir to enable him to keep in touch with Aftab and carry out all the directions issued by Aftab, on various occasions when as per the direction of Aftab and Asif, Appellant Nasir went to Agra and Jaisalmer for collecting cash and on one occasion to collect consignment of Atta which is the other name for RDX, though the consignment was not procured at that time, the untimely death of Asif in an encounter on 08.12.2001, which angered the gang members of Asif, the resolution of their desperate mood expressed in Exhibit-46/1, written by Aftab to the wife of Asif, the subsequent arrival of Zahid, Sadakat, Salim and other members who were initially lodged at Hazaribagh premises and after the demise of Asif stayed in No.1, Tiljala Lane flat where CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 81 of 195 the conspiracy was hatched

in the meeting which was attended by Appellant Nasir, Zahid, Sadakat, Niaz Hussain, Fiaz Hussain, who were every now and then given e-mail instructions by Appellant Aftab. The decision taken by the conspirators in the meeting held at No.1, Tiljala Lane flat were that they decided to attack Bhawani Bhawan, but heeding to the advice of Appellant Nasir that such an attack may result in more casualties of civilians, as well as to the Minority Commission Office located in the said premises, they refrained from attacking. The leader of the gang Aftab was subsequently, consulted through e-mail who suggested to explore the possibility of attacking the American Consulate or American Centre where after the gang members surveyed both the places and ultimately felt that attack on the American Centre would be more appropriate as they found heavy police security being posted on the main road adjoining the American Centre and who were not alert in their duties and in the early morning the change of shift of police personnel was taking place. The said decision of the gang was again forwarded to Appellant Aftab who having agreed to the proposal, initially agreed to lodge the attack on 21.01.2002, which was postponed to 22.01.2002 and was successfully executed as decided by the conspirators.

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72. Learned Additional Solicitor General submitted that all the above factors were fully established by legal evidence in the form of a confession made under Section 164 of Cr. P.C. by Appellant Nasir corroborated by the various e-mails, which were retrieved and were proved through PW- 67 and 104, the acquisition of the flat by one of the gang members Niaz Hussain, absconding accused, based on documents Exhibit 63 as well as the oral evidence of PW-47, the use of Maruti 800 bearing registration No.BRK-4907 and the Suzuki Motorcycle bearing registration No.WB-01-P2144, which were recovered from the premises at No.1, Tiljala Lane, the fake passports secured by Aftab with the assistance of Appellant Nasir, the securing of Hazaribagh premises on rent supported by the evidence of the owner, the encounter which had taken place at Hazaribagh wherein one of the assailant Zahid and other gang member Salim, were secured and, the recovery of arms and ammunitions from the Hazaribagh premises, the diary of Appellant Nasir whose handwriting was established through the evidence of handwriting expert PW-105, the arrest of Appellant Aftab in March 2002 and based on the admissible portion of statement, search was conducted in the premises of deceased Asif's bedroom where a diary Exhibit-45/1 and the letter written by Aftab himself to the wife of Asif marked as Exhibit-46/1 which revealed the mindset of Aftab to CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 83 of 195 take revenge for the death of Asif, were all sufficient to conclude the conspiracy hatched by the Appellants and other gang members, their loaded mens rea to wage a war against the State as part of their Jehadi movement and having unfortunately successfully executed the said event of attacking the police personnel at the American Centre on the morning of 22.01.2002 in which operation as many as 18 police personnel received gun shot injuries out of which five lost their lives apart from civilians. The learned Additional Solicitor General, therefore, contended that the imposition of death sentence on the Appellants for the offences for which they were convicted by the trial Court as confirmed by the

High Court, does not call for any interference. Reliance was placed upon the decision reported in Khushal Rao vs. State of Bombay - AIR 1958 SC 22 for the proposition that confession if corroborated by the other evidence against a co-accused can be relied upon and that the same principle was followed recently in the decision reported in Ram Singh (supra).

73. The sum and substance of the submission of learned counsel for the Appellant was that all events prior to the killing of Asif such as Appellant Nasir's childhood relationship with Asif, his involvement in Jihad, visit to Kashmir, attempt for procurement of Atta-RDX, opening of e-mails, etc., were all wholly irrelevant. Subsequently, it CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 84 of 195 was submitted that taking a flat in No. 1, Tiljala Lane was also irrelevant to the allegation of conspiracy to the attack of the American Centre. Equally Asif's detention along with Aftab at Tihar Jail was also irrelevant. Therefore, according to the learned counsel prior to 07.12.2001, i.e. the killing of Asif which took place on 08.12.2001, whatever referred to were wholly irrelevant. The learned counsel would contend that whether involvement in petty land crimes are connected with attack on American Centre will have to be examined. It was submitted that as per Section 10 of the Evidence Act, it was only after 07.12.2001 the conspiracy was stated to have been hatched. Therefore, identification of the persons involved and the materials were more relevant. While examining the said aspect, the learned counsel submitted that the so-called dying declaration of Zahid after the Hazaribagh encounter to PW-113 was counter to the other evidence and that it was Zahid who was driving and Sadakat was the pillion rider and, therefore, that was a material contradiction compared to the statement of Nasir by way of a confession under Section 164. The learned counsel submitted that this was not answered either by the trial Court or by the High Court and by the learned Additional Solicitor General. She also contended that PW-113 was totally ignorant as to how the photograph of the deceased Zahid was taken, who took it, the details as to the CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 85 of 195 negatives and the person who handed over the photos to him.

Therefore, the identification of Zahid in Exhibit-XXVI and Salim in Exhibit-XXVII by PW-113 cannot be relied upon. In the said background, it was contented that the evidence of PW-62 on the identification of the deceased Zahid was also unreliable. It was, therefore, contended that if the oral dying declaration of Zahid to PW-113 is to be taken as true in all respects, as per which Zahid was the shooter and Sadakat was the driver then the statement contained in Nasir's confession as well as that of PWs-47, 48 and 62 will be wholly untrue. By referring to the eye-witnesses, the learned counsel submitted that on the 7 spot eye-witnesses, 3 have said that Zahid was involved in the shooting, while PWs-15, 18 and 19 only stated that he was one of the two who was involved in the shooting and PWs-16 and 19 identified Zahid as one of the miscreants. Therefore, such a reference made by the eye-witnesses cannot form the basis to conclude as to who was the shooter and who was the driver of the motor bike. The contention was that the contradictions on identification was therefore overwhelming with reference to the person, as well as the dress worn by the two so-called assailants and, therefore, it will be wholly unsafe to rely on such a weak evidence to confirm the conviction. While referring to PW-62, the learned counsel contended that he identified, only based on his CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 86 of 195 memory, of the driver with the particular colour jacket and the other person who got into the parked car driven by Appellant Nasir and not based on their respective facial features. Therefore, the learned counsel

contended when there is serious doubt about the place where he saw them where the car was stated to have been parked and the difference in the colour of the jacket and the contradiction is serious enough to reject his evidence. It was also contended that according to PW-62, he approached a known police officer on his own accord and disclosed what he saw on the date of the incident. The learned counsel contended that such a claim of PW-62 would attract Sections 7 and 11 of the Evidence Act inasmuch as persons who were involved in such a planned crime would not have given scope for creating a traffic jam or high acceleration of the vehicle and, therefore, it is hard to believe that PW-62 could have witnessed such an incident and reported to the police. Therefore, the evidence of PW-62 in referring to the traffic jam, colour of the jacket of the assailants is wholly unbelievable. The learned counsel submitted that PW-62 who had the glimpse of the assailants deceased Zahid, Sadakat and Appellant Nasir could not have identified Zahid by looking into the photo after 1½ year of the incident and, therefore, the evidence of PW-62 should be put to a litmus test. The learned counsel therefore contended that even the Test Identification Parade CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 87 of 195 of Appellant Nasir, who was apprehended on 29.01.2002 and the holding of the Test Identification Parade on 11.03.2002, creates serious doubts and aspersions inasmuch as in between the two dates, he was taken to several places. The learned counsel therefore contended that no reliance can be placed upon PW-62 or other Witnesses.

74. As far as PW-47 was concerned, the learned counsel contended that he himself was involved in a dacoity case, that while his statement was recorded on 29 -30th January 2002 he was in the th police custody from that very date till 7 th February 2002 and, therefore, his version is also wholly unreliable. As far as PW-48 is concerned, according to the learned counsel, his evidence cannot also be relied upon, inasmuch as, he denied his role as a Witness in some other case and, therefore, he must have been a stock witness. If the above evidence of the Witnesses is eschewed then virtually there is no corroboration of the confession of Appellant Nasir. Consequently, there was no reliable evidence on which the case of the Prosecution was built and consequently, the conviction cannot be sustained. The learned counsel for the Appellant reiterated her submission as to why the confession of Nasir should not be relied upon as the recording of his confession was made when he was in police custody on 21.02.2002 and that the Magistrate did not CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 88 of 195 properly ensured his segregation and relieved from the clutches of police before recording his confession on 22.02.2002.

75. The learned counsel contended that as a Constitutional Right when the retraction of the confession was made, the other requirements ought to be fulfilled to ensure in criminal trial that the confessional statement can be relied upon. It was submitted that the every detail of the confessional statement was prepared as early as on 12.02.2002 itself based on e-mails and it was a tailor-made statement on 22.02.2002 when he was in police custody and such recording was made up to 7 p.m. On corroboration the learned counsel contended that the weapons seized were admittedly not used at the place of occurrence and there was no evidence as to what happened to those weapons if the weapons seized at Hazaribagh were nothing to do with the incident. It was contended that the parking of the car at Rippon Street Circular Road Crossing was not proved inasmuch as the contradiction was not explained and, therefore, what could not be supported by way of legally acceptable evidence was sought to be filled up with the tailor-made confession.

76. Learned counsel therefore, contended that all the above factors only shows considerable doubt and that the benefit of doubt should go in CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 89 of 195 favour of the Appellants. The learned counsel relied upon the decisions reported in Rabindra Kumar Pal @ Dara Singh vs. Republic of India - (2011) 2 SCC 490 at page 508 paragraphs 41, 42, 44, 45, 50 and 53. Reliance was also placed upon the decision Navjot Sandhu @ Afsan Guru (supra) at pages 746, 747, 748, 750, 751 paragraph 229. Learned counsel also relied upon Rabindra Kumar Pal @ Dara Singh (supra), paragraph 64 for the principles on 164 confession. Reliance was also placed upon the decisions in Subash and Shiv Shankar vs. State of U.P. - AIR 1987 SC 1222 at 1224 paragraphs 8 and 9 and Nalini (supra) at paragraph 7 for the proposition that mere presence of accused with the gang of conspirators will not be sufficient and that there must have been an agreement to the conspiracy. Reliance was also placed upon paragraphs 603, 604 and 607 of the said Judgment. Reliance was also placed upon Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid vs. State of Maharashtra - (2012) 9 SCC 1 at page 201 paragraph 526 for the above proposition.

77. As far as Appellant Aftab's case was concerned, the learned counsel contended that the Prosecution primarily relied upon Appellant Nasir's confession and since the confession of a co-accused is not substantive evidence the same can be examined only as provided CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 90 of 195 under Section 30 of the Evidence Act. Therefore, if only the rest of the evidence can be believed the conviction of Aftab cannot be approved. The Learned counsel contended that in the first place the retracted confession of Nasir cannot be relied upon. If confession of Appellant Nasir cannot be relied upon what left is a letter said to have been written by Aftab to Asif's wife and a diary which was seized from Asif's house. As far as the diary is concerned, learned counsel contended that it does not contain any details except some entry relating to a stolen car. That at best, it can only lead to a charge of stealing of the car and nothing more. As far as the letter Exhibit-46/1 is concerned the learned counsel contended that it only states that Amir was making all preparation and it does not show who that Amir was and at best it can only be stated that an expression of anguish was made in that letter over the killing of Asif and in the absence of the examination of the lady namely the 'Bhabhi ji' no reliance can be placed upon the said exhibit. As far as the evidence of PW-39 was concerned, it was contended that he admitted and signed a backdated statement and therefore, a letter recovered in such murky circumstances cannot be relied upon and in any case the said letter was not in any way connected with the incident occurred on 22.01.2002. Learned counsel therefore, contended that the letter cannot be the basis for supporting the CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 91 of 195 confession or to prove the conspiracy. By referring to the e-mail messages, the learned counsel contended that the messages also do not make any reference to the conspiracy and no explosive was used in the attack. The learned counsel, therefore, contended that there was virtually no evidence against Aftab in order to support the conviction. The case at best is only suspicion in so far as Aftab is concerned and there is no legally acceptable evidence against him. In support of her submission reliance was place upon Haricharan Kurmi (supra) at paragraph 12, Navjot Sandhu @ Afsan Guru (supra) at paragraph 38, Kehar Singh (supra) at page 730 paragraphs 269 & 270 and Alamgir (supra) at paragraph 13. The learned counsel therefore contended that the appeal deserved to be allowed and the Appellants should be set at liberty.

78. Having heard learned for the Appellant as well as learned Additional Solicitor General for the State, we formulate the following questions for consideration in this appeal:

- 1) Whether the charge under Section 27 (3) of the Arms Act can be maintained in the light of the decision of this Court in Dalbir Singh (supra)?
- 2) Whether apart from the confession of Appellant Nasir what are the material legal evidence oral and documentary as well as in the form of material objects to support the case of Prosecution?

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Whether the confession of Appellant Nasir was

recorded in accordance with Section 164 Cr.P.C?

- 4) To what extent the contents of the confession can be used by the Prosecution?
- 5) Whether there was any contradiction in the evidence both oral as well as documentary vis-à-vis the confession made by Appellant Nasir?
- 6) Whether the confession of Appellant Nasir can be relied upon as against the co-accused/Appellant Aftab?
- 7) Whether there was sufficient corroboration of the contents of the confession of Appellant Nasir with the other evidence both oral and documentary relied upon by the Prosecution?
- 8) Whether the offence charged against the Appellant for which the Appellants were proceeded against were conclusively proved?
- 9) If the offence was made out as held by the Courts below whether the sentence of death can be held to be the appropriate punishment, if not, what is the punishment to be imposed?

79. Having formulated the questions, we now proceed to answer the same in seriatum.

80. Question No.1: Whether the charge under Section 27(3) of the Arms Act can be maintained in the light of the decision of this Court in Dalbir Singh (supra)?

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We have considered this question in the very beginning of our Judgment and by referring to paragraphs 85 to 91 which we have extracted earlier, we have held that Section 27(3) of the Arms Act having been struck down on the ground that it was ultra vires of the Constitution and declared as

void, the convictions and sentence imposed on the Appellants under Section 27(3) of the Arms Act cannot survive and the said question is, therefore, answered in the affirmative.

81. Question No.2: Whether apart from the confession of Appellant Nasir what are the material legal evidence oral, documentary as well as in the form of material objects to support the case of Prosecution?

When we proceed to answer the said question, we will have to refer to the Witnesses who were examined in support of the charges and whose evidence touches upon the crucial facts involved in the case. The Witnesses are PW-6, PW-9, PW-15, PW-16, PW-18, PW-19, PW-20, PW-37, PW-38, PW-39, PW-47, PW-62, PW-83, PW-95, PW-97, PW-105, PW-113, and PW-123. Having noted the Witnesses who were examined in support of the charges, it is necessary to briefly note the version of those Witnesses and to what extent the said version supported the case of the Prosecution. To start with, we can refer to the evidence of PW-6, who is the Complainant. PW-6 is one Barun Kumar Saha who was working as a Sergeant on the date of occurrence, namely, 22.01.2002. He was posted CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 94 of 195 in the Wireless Branch of Calcutta Police and was on night duty from 21.01.2002. According to him, at 6.30 a.m. of 22.01.2002 when he was on night shift duty in the vehicle No.WG-60 he went to the American Centre as part of his duty. The vehicle was parked by his driver in front of the American Centre. He got down from the vehicle on the left side, while the driver was in his seat. The time, according to him, was about 6.30 a.m. and that suddenly he saw one boy of 25-30 years not known to him wearing a pant, shirt and an open jacket of brown colour holding AK-47 rifle in his hand and started shooting towards the police force who were changing over duty at American Centre and another person of same age group also wearing a pant and shirt as well as a green colour jacket following the other boy in a black colour motorcycle and the boy firing at the police force while moving also abused the police personnel. PW-6 would say that when he tried to counter both of them by pulling his revolver the man who was firing with AK-47 aimed at him while firing and therefore, he ducked by the side of his Jeep. He also stated that thereafter, the said boy boarded the motorcycle run by the other man and fled away towards South in full speed while he continued to fire the gun. He further stated that he saw several men of the police force in duty before the American Centre were lying down bleeding on the footpath on the ground, etc. PW-6 identified the person who was driving the motor bike by referring to his photograph which was marked as Exhibit-XXVI and the colour photograph which was CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 95 of 195 marked as Exhibit-XXVII. He identified the green colour jacket worn by the driver of the motorcycle which was marked as material Exhibit-XXVIII. According to PW-6, both the persons who were firing at the police force were at a distance of 10-15 feet from the prison van in the North-West direction. PW-6 through wireless communicated the said incident on 22.01.2002 at 6.36 a.m. which was in turn communicated to the jurisdiction police station, namely, Shakespeare Sarani Police Station and the information which was received at 6.36 a.m. was entered in the G.D. bearing No.1889. The summary of the content of the information was recorded and the same was treated as the FIR. The statement of PW-6 was also recorded which form part of the FIR and on 23.01.2002 a further statement of PW-6 was also received in the police station wherein PW-6 mentioned that he forgot to mention about the gun-man who was firing from AK-47 rifle was wearing a Green colour jacket and the man on motorcycle who was wearing a Brown colour jacket.

This is the sum and substance of the evidence of PW-6. From the evidence of PW-6, it transpires that there was a firing incident at the American Centre towards the police force by two miscreants, that one who was wearing a Brown colour jacket was firing with AK-47 rifle while the person who was wearing a Green colour jacket was closely following him in a Black colour motorcycle, that PW-6 identified the photograph of the person who was driving the motor bike marked as Exhibit-XXIV. The Green colour jacket CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 96 of 195 worn by him was marked as Exhibit-XXVI-II. Further, having witnessed the incident himself and as he was the Sergeant of the wireless section of Calcutta police, he immediately conveyed the information through wireless to the Control Room of the Calcutta police. PW-6 also identified the motor bike which was marked as material Exhibit-XXX.

82. The next witness is PW-9. On the relevant date he was working as Inspector attached to Calcutta Armed Police, 9 th Battalion. His name is Gopal Chandra Dubey. He in his evidence while confirming the version of PW-6 as to what happened in the early morning of 22.01.2002 he also confirmed that due to the firing by the two miscreants, police personnel were got injured, that the person who was firing towards the police force with AK-47 rifle was wearing Chocolate (Brown) colour jacket while the person who was riding the motorcycle was wearing Green colour jacket and that he was also firing with 9 mm pistol. PW-9 identified the Green colour jacket worn by the rider of the motorcycle as material Exhibit-XXIX and the colour photograph of the man who was driving the motor bike as material Exhibit-XXVI. He also identified the Chocolate (Brown) colour jacket worn by the man who was firing as material Exhibit- XXVIII.

83. PW-15 is another eye-witness to the incident who was Constable attached to Calcutta Armed Police who was on duty in the night shift CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 97 of 195 of 21.01.2002 before the American Centre and after performing his night duty on the early morning of 21.01.2002 while the shifting was taking place he confirmed the version of PW-6 and PW-9 and stated that the person who was firing with AK-47 rifle was wearing a Brown colour jacket and the person who was driving the motor bike was wearing Green colour jacket. He also identified the material exhibit bike as well as the photograph of the shooter.

84. PW-16 is one Rana Pratap Sinha another Constable working in Armed police who was also on duty at the relevant point of time, i.e. on 21.01.2002 who also confirmed the version of PWs-6, 9 and 15. According to him, he saw the man wearing Chocolate (Brown) colour jacket firing towards the police force with AK-47 rifle and the man who was riding the bike was wearing a Green colour jacket. He also identified the photo of the person who was firing with AK-47 rifle.

85. PW-18 Roshan Chhetri stated that another Constable of Armed Police who was on the night duty on 21.01.2002 in the wireless van, witnesses the man wearing Chocolate (Brown) colour jacket firing with AK-47 rifle and before PW-18 could fire at the miscreants, bullets shot fired by the miscreants hit him in his ring finger and that he fell down. He, however stated that he saw the other miscreants CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 98 of 195 wearing Green colour jacket riding the motor bike. He also identified the jacket which was marked.

86. Identical version was spoken to by the other two eye-witnesses, namely, PWs-19 and 20.

87. All the above eye-witnesses uniformly confirmed that of the two miscreants the one who was firing towards the police force at 6.30 a.m. on 21.01.2002 was wearing a Chocolate (Brown) colour jacket and the person who was riding the motor bike was wearing a Green colour jacket. The evidence of PW-6 is categoric to the effect that the shooting operation, at the instance of the miscreants, was from a distance of 10 to 15 feet. Therefore, a cumulative consideration of the above version of the eye-witnesses confirm the involvement of the two miscreants, that the one who was shooting was wearing a Chocolate (Brown) colour jacket, that the one who was wearing a Green colour jacket was riding the motor bike who was also firing with aid of 9 mm pistol, that the occurrence took place on 22.01.2002 at about 6.30 a.m., that due to the firing incident many of the police personnel who were on duty both in the previous shift of 21-22.01.2002 and the other group of personnel who were changing over the duty from the morning of 22.01.2002 were injured severely as many of them were found lying on the ground and the empty CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 99 of 195 bullets were scattered all around the place. It was also confirmed that the shooting was within a distance of 10 to 15 feet from the miscreants and the target of attack.

88. Having noted the above eye-witness account of the Witnesses PW-6, PW-9, PW-15, PW-16, PW-18, PW-19 and PW-20, we can proceed to consider the version of the other Witnesses.

89. Going by seriatum we can refer to PWs-37 and 38. The sum and substance of the evidence of PW-37 can be noted as under.

90. As per the version of PWs-37 and 38 Sanjay Paul and Jayant Kumar Bose, both were taking tea at the crossing of Middleton Street and Rippon Street Circular Road Crossing in the Punjabi Tea Stall. That on 20 th January, 2002 at 6.30 a.m., they saw a Blue colour Maruti Car which came in high speed and sudden brake was applied and in that process another person who was sipping his tea got it spilled over his hand pursuant to which an altercation took place between the said man and the driver of the vehicle. They, therefore, noted the number of the vehicle as BRK-4907. They also stated that motor bike followed the said Maruti Car and the rider of the motorcycle joined with the driver of the car in abusing the other person who got his tea spilled over. They further stated that on 22.01.2002 they noticed a motor bike crossing PW-37 in full speed towards Camac CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 100 of 195 Street. From the evidence of PWs-37 and 38 what all could be gathered was that they happened to see the Maruti 800 car bearing Registration No.BRK-4907 parked at the crossing of Middleton Street and Rippon Street Circular Road Crossing near Punjabi Tea Stall.

91. Keeping the said part of the evidence of PW-37 in mind, the evidence of other Witnesses PWs-47 and 62 can be referred to. According to PW-47, Dilip Kumar Singh, who is a building promoter and who promoted the building at No.1, Tiljala Lane in July 2001 handed over possession of the flat in the ground floor of the said building to one Niaz Hussain who was introduced to him by Appellant Nasir, who was also living in the same lane in a different building. According to PW-47 on 20.01.2002, he noticed Appellant Nasir along with another person went out in the early morning 5.30 a.m. in the Maruti 800 Car and two other persons who were also staying in No.1, Tiljala Lane followed the said Maruti Car in a motor bike. It is, however, elicited in cross-examination that he

was in the custody of the police between 30.01.2002 and 07.02.2002 in connection with the dacoity case which was disposed on 07.02.2002. The other part of his evidence related to the sale effectuated by him in favour of one Niaz Hussain, absconding accused, the ground floor flat in No.1, Tiljala Lane for a sale CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 101 of 195 consideration of Rs.2,66,000/- and that possession was handed over to Niaz Hussain and the same date when the document was executed, namely, 11.07.2001. Since the execution of the document for flat No.1, Tiljala Lane was born out by Exhibit P-4 which was also witnessed by the owner of the land who was also examined as PW-48 apart from the exhibit having been marked, to that extent, the evidence of PW-47 can be accepted. PW-48 is one Benod Kumar Roy who is also resident of No.1, Tiljala Lane living in the first floor. He witnessed the sale document to Niaz Hussain. In his evidence he confirmed the seizure of Pakistan National Flag from the ground floor flat occupied by Niaz Hussain at No.46, Tiljala Lane on 5.2.2002.

92. The other relevant witness is PW-62. PW-62 is one Shahid Iqbal.

According to him, on 22.01.2002 at 6. a.m., he went to Beniapukur Lane to purchase milk and at that time his friend one Gilbert Gomes was also present, (not examined) as a witness as he was not keeping good health. PW-62 deposed that while he was in front of the shop of one Ashok Nandi at Beniapukur Lane he saw a Maruti Car parked in front of the shop of Nandi, that a Lorry got struck in the said road due to the haphazard parking of the Maruti Car, therefore, out of curiosity he noticed the number of the vehicle which was BRK-4907. He would say that to clear the traffic jam he asked CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 102 of 195 the car driver to set right the parking of his vehicle, that with some hesitation the driver corrected the parking and that a little later he saw a Black colour motor bike which came there from which one gentleman was the pillion rider got down telling the driver of Maruti Car 'KAAM HO GAYA' and that the said person holding a cricket bat bag on his shoulder, which contains some material inside. PW-62 also noted the number of the motor bike which he later identified in the Court at the time of his examination. According to PW-62, on that day, in the forenoon when news spread about the firing which had taken place at the American Centre, he felt that the occupants of Maruti Car and the Black motor bike might be involved in the occurrence and since he knew one PW 101 Police Inspector of Lalbazar by name Shaleh Babu, he along with his friend Gilbert Gomes approached him and informed as to what they witnessed in the morning. He further stated that as per his direction, he gave his statement to the officer of the Special Investigation Team. There was a Test Identification Parade in which PW-62 identified Appellant Nasir. He also identified the photo of the motor bike rider which was marked as Exhibit-XXVI.

93. Though, extensive cross-examination of PW-62 was made and learned counsel for the Appellant tried to prick-holes in his evidence, we are convinced that the version of PW-62 being an independent CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 103 of 195 witness and having been able to pass on the information whatever he noticed in the morning on the very same day in the forenoon to one of his known police officer, namely, Mr. Shaleh Babu, Inspector of Lalbazar, there is no reason why his version should not be accepted in the absence of any other serious deficiency pointed out either as interested witness or a stock witness or any other deficiency on his part. As far as the non-examination of his friend Gilbert Gomes was concerned, it was

established before the Court that at the time of trial, the said person was seriously ill and the necessary medical records were also produced in support of the said stand. Therefore, non-examination of friend of PW-62 also does not cause any dent in his version.

94. The next witness is PW-39. PW-39, Ali Reza Khan, is the younger brother of the deceased Asif. The evidence of PW-39 is to the effect that Appellant Nasir was the childhood friend of Asif, that Asif after his schooling and graduation went to Aligarh Muslim University to study Journalism, that he joined the Student Islamic Organisation and that in 1993-94 he was arrested in a TADA case. PW-39 while revealing the names of the friends of Asif referred to Abdullah who is one of the absconding accused. He also referred to Dr. Mushtaq Ahmed, a Kashmiri, who once came and stayed in their house along with Asif. According to PW-39, Dr. Mushtaq Ahmed was also a co-

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accused with Asif which he noticed when he visited Tees Hazari Court. PW-39 also referred to Appellant Aftab who was introduced to him by his brother Asif at Delhi. In one place PW-39 mentioned that when Abdullah came to their residence after 1999 his mother was seriously perturbed and scolded him and also showed him a broom stick and thereafter, none of the friends of Asif visited their house. The further evidence of PW-39 was that Asif was involved in the kidnap of Khadim and that he was taken into custody and kept at Calcutta Bhawani Bhawan. He also referred to the killing of Asif in December, 2001 at Rajkot in a fake encounter. Though, PW-39 referred to the visit of police officers to their house on 2 nd April 2002 he denied any search conducted in the house. At that stage at the request of Public Prosecutor he was treated as a hostile witness and the Public Prosecutor was allowed to cross-examine him. In the cross-examination though PW-39 admitted his signatures in Exhibits-44/1, 45/1, 46/1, 46/2, 46/3 and 46/4, he took the stand that he put his signature out of compulsion. In the cross-examination PW-39, however, stated that he did inform police that Asif went to Kashmir and became Jehadi. He further elaborated by saying that he came to know that Asif went to Kashmir met one Mr. Salahuddin leader of Hijbul MuZahiddin and Dr. Mushtaq Ahmed another leader and discussed about the terrorism to be continued in India. PW-39 CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 105 of 195 confirmed that he informed the police that Asif developed an impression that the Government of India was not taking proper care of Muslims and for that they wanted to teach a lesson to the Indian Government with the help of militant groups of Kashmir. He also confirmed that Dr. Mushtaq Ahmed who earlier visited their house was the very same person whom he referred as Dr. Mushtaq Ahmed. He also deposed that he did inform police that Dr. Mushtaq Ahmed stayed in their residence in the room of Asif and held close door meeting though he did not state that such discussion pertain to Jihad against India. It is also the evidence of PW-39 that he was made to believe that Aftab was a root cause for all the evil caused to his elder brother from the date of his arrest till his death and that PW-39 developed hatred for Aftab. Though, PW-39 turned hostile towards the end of his chief examination, almost at the point of conclusion of his evidence, he made a statement that whatever statement he gave to police was to some extent true and voluntary and to some extent under pressure. He also stated that the mental state of Asif and his disillusionment against the Government of India was gathered by him from the Chargesheet filed against Asif in the TADA case.

PW-39 in the course of his chief-examination identified both Nasir and Aftab in Court though, at the end of his deposition, he stated that he identified both of them under the pressure of the CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 106 of 195 police. From the version of PW-39 which even according to his own version contain half-truth and half of it was voluntary. From the manner in which he deposed before the Court, it can be safely stated that whatever he stated about Asif's contact with Appellant Nasir and Aftab and also Asif's deep involvement in Jehadi movement with the support of one Mr. Salahuddin, a leader of Hizbul MuZahiddin as well as another leader by name Dr. Mushtaq Ahmed, a Kashmiri, with whom he used to discuss about the militant activities and the hatred towards the Government of India were all spontaneous statements. In fact, his version that he gained a feeling that the fate of Asif ended in a tragic manner because of his association with Appellant Aftab, whom according to him was the root cause for the untimely demise of his elder brother. To that extent, the evidence of PW-39 can be noted.

95. We also refer to the evidence of PW-46 who was one of the detenue along with the deceased Asif in the Tihar Jail and according to PW-46 he had witnessed the close contact of Asif with Aftab.

96. The next witness is PW-83, who is the postmortem doctor, who did the postmortem on four of the dead bodies of the policemen who were killed in the occurrence on 22.01.2002 at about 6.30 a.m. at the American Centre. After giving a detailed narration of the CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 107 of 195 outcome of the postmortem conducted by him on the various bodies, PW-83 stated as under:

“Considering the different wounds of entry on all four dead bodies and keeping in mind to distance of firing it appears to me that the bullets were ejected from a high velocity self- loading automatic weapon. The injuries present on all the four dead bodies, particularly the extent injuries caused on the vital organs of the persons were sufficient to cause death in ordinary course.”

97. Therefore, the said part of the evidence of PW-83 makes it clear that the shooting indulged in by two miscreants was from a very sophisticated automatic weapon, namely, AK-47 and it had resulted in the instantaneous death of the police personnel. To be fair to the said witness, it must be stated that in the course of his cross- examination he stated that his opinion to the effect that the bullets were ejected from high velocity self-loading automatic weapon was not mentioned in any of his postmortem reports.

98. The next witness is PW-95. PW-95 is one Dr. Ardendu Sengupta, who held the post of Senior Scientific Officer, Ballistic Division, Forensic Science Laboratory, Government of West Bengal. According to him, he visited the site of occurrence, namely, the American Centre on 22.01.2002 and after extensive search of number of physical evidence of violence of various nature in different spots of that place, the recoveries of blood, small bone fragments, CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 108 of 195 fresh mark of violence, scattered presence of rifle bullets and bullet parts, steel core jackets, blood stains marks in various places, holes found in different places of the fans, building, walls, trees, etc., dents found in the pavements, the back rest of chairs, reception entrance, front wall, side wall, main gate, grill, the bullet jackets, steel course stated that such holes and size of the dents and other damages, indicated that they were all caused by gun shot

and the distribution of this holes, dents and damages suggested that automatic or semi- automatic type of firearm was involved in the crime, that the nature of portions of bullets recovered in the place of occurrence indicated that rimless ammunition of caliber 7.62 x 39 mm were used in the crime. He further stated that the directions of the holes and dents suggested that the projections were directed from the Western side excepting those on the police post when which appeared to have been caused by projectiles fired from its back. PW-83 also identified his signature in his report marked Exhibits-190 and 190/1. The version of PWs-83 and 95 therefore, confirms the force with which the shooting activity was indulged in by the two miscreants towards the police force on the early hours of 22.01.2002 at the American Centre.

99. PW-100 is one Kumar Upendra Narayan was attached to Shakespeare Sarani Police Station on 21.01.2002 as its A.S.I. and CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 109 of 195 according to him on 22.01.2002 he received an information at about 6.36 a.m. from O.C. control reporting a firing before 38A, Jawaharlal Road, that he informed the O.C. to the duty officer and other officers of Thana, that he entered a G.D. entry to that effect at about 6.36 a.m. vide a G.D. No.1889 dated 22.01.2002. The said record was marked as Exhibit-215 and his signature as Exhibit-215/1. The said evidence of PW-100 shows that immediately after the occurrence the information was communicated to the police station and necessary entries were made in the G.D. and thereby, provide no scope for any delay being involved in registering the crime.

100. The next witness is PW-113. His name is Kaushalya Nand Chowdhury. On 28.01.2002 he was posted as O.C. Sadar Police Station, Hazaribagh. He led one of the teams to ambush some terrorist who were staying in Hazaribagh on 27-28.01.2002. He further narrated about the manner in which the ambush of the premises at Hazaribagh was made between 2.30 a.m. and 6.45 a.m. For the present, we can make reference to his evidence in so far as it related to apprehension of Zahid and Salim in the course of the encounter of the premises at Hazaribagh. He stated that at 6.45 a.m. they saw two of the persons escaping from the side door and were also shooting against the police which was retaliated by the police. He further stated that they were able to apprehend two whose name CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 110 of 195 was Zahid and Salim. PW-113 stated that when they were carrying the injured man to the hospital he disclosed his name as Zahid and also revealed that he was a resident of Pakistan and that he was involved in the shooting incident that took place on 22.01.2002. According to PW-113, Zahid further informed him that in the said shooting incident his companion was one Sadakat and that the said Sadakat was driving the motor bike and himself, i.e. Zahid was the pillion rider of the motor bike and was firing from AK-47. PW-113 further stated that the other injured persons name was Salim and he is also a man of Laskar-e-Taiba and a resident of Pakistan. PW-113 confirmed that while taking to the hospital Zahid died on the way while the other injured was admitted as impatient in the hospital who also later died and that the said person did not make any statement. Since PW-113 being a police officer and if his claim that Zahid's statement should be construed as a dying declaration, it should satisfy the rigorous tests of Section 32 of the Evidence Act, we feel that it will be highly risky to rely on the said part of his version of PW-113. It must be noted that except the ipsi dixit of PW-113 as regards the so-called dying declaration of Zahid there was no other supporting material in that respect. It should also be kept in mind that PW-113 was not the only person who was accompanied Zahid in the vehicle, in fact, while Zahid was stated to have died before CRL. A.NOS.1240-1241 OF

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101. We are, however, very much conscious of the fact that the encounter and the nabbing of the Zahid, Salim and the seizure of large quantity of arms and ammunition at Hazaribagh definitely gave a clue for the investigating machinery of the American Centre case to track the miscreants involved in the offence. It must be stated that the inability to rely upon the so-called oral dying declaration for want of legal sanction cannot be taken to mean that the entirety of the evidence of PW-113 can be eschewed from consideration. We are not prepared to accept the claim of oral dying declaration of Zahid to PW-113, inasmuch as, if it were to be accepted, it should fall within the four corners of the prescription contained in Section 32 of the CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 112 of 195 Evidence Act or otherwise it will create a bad precedent. We, therefore, do not propose to rely on the said part of the version of PW-113 and proceed to find out as to how the case of the Prosecution, as against the Appellants, was proved and whether they succeeded in their attempt.

102. Only other witness who is to be referred is the Investigating Officer, namely, PW-123-Anil Kar. He was the Inspector of Police attached to the Detective Department as Officer In-charge to Homicide Squad, Lalbazar. He was entrusted with the task of investigation of the case relating to the shooting incident in front of the American Centre. In fact, his deposition discloses that he was nominated as Chief Investigating Officer to investigate the said case. According to him, on 22.02.2002 at about 7.35 a.m., when he received a telephone information from the DCDD about the shoot out took place at the American Centre he immediately reached that spot by 8.15 a.m. and started the investigation process. He was supported by a team of officials with whom he commenced the operation. He explained as to how he was gathering the details from 22.01.2002 onwards on day to day basis. According to him, he gathered information on 28.01.2002 that the terrorist who were apprehended in the Hazaribagh encounter may have some link with the case relating to the American Centre and based on the information CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 113 of 195 gathered, he searched for the Appellant Nasir and that he also visited his house at No. 46, Tiljala Road, along with his team and ultimately he could nab Nasir on the evening of 29.01.2002 at No.13, Dargah Road which is the house of Nasir's in-laws. After arresting Jamilludin Nasir, PW-123 based on the interrogation was able to unearth the concealment of the Maruti Car and Motorcycle at No. 1, Tiljala Lane, apart from certain other recoveries at the residence of Nasir himself. The evidence of PW-123, the investigation officer, disclose the collection of material evidence through the apprehended accused and from whom the recoveries made based on the admissible portion of the statement of Appellant Nasir and Appellant Aftab, such as, the Maruti Car, the Motorcycle, the e-mail particulars, the driving licences of the Appellant Nasir, Asif, Abdullah, Sadakat, Zahid, National Flag of Pakistan, sketch map, some letters, certificates, railway

tickets, air tickets from Jaipur to Calcutta, one pistol 7.62 bore ammunition, 12 printed pages of e-mails by entering the mail box of the I.D.s, specimen handwriting and signature of Appellant Nasir, recorded confessional statement of Nasir as well Shakir Akhtar, the arrest of accused Musharraf Hussain @ Bobby and the deed of agreement pertaining to No. 1, Tiljala Lane flat, arrest of Appellant Aftab, and the recoveries made from the admissible portion of the statement of Aftab at the CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 114 of 195 residence of the deceased Asif, namely, a diary and a letter written in Hindi by Aftab to the wife of Asif expressing his deep anguish and the plan to take revenge from the police. The holding of Test Identification Parade for Appellants Nasir and Aftab, as well as the photograph of the deceased Zahid and Salim, obtaining of sanction from Prosecution under Sections 121 and 121A IPC from the authorities, preparation of the Chargesheet dated 26.02.2002 against 15 accused wherein 5 absconding accused detained were also disclosed the collection of different reports from the experts such as FSL, handwriting expert and the opinion of the Public Prosecutor, as well as the Serological Report received from the experts and based on the above evidence gathered in the course of investigation, he submitted the Chargesheet as against 15 accused mentioning that accused 10 to 15 were absconding accused.

103. In the evidence of PW-123, the most significant aspect related to his requisition for recording the confession of Appellant Nasir, another accused Shakir Akhtar and the seizure of vital documents at the residence of Asif at the instance of Appellant Aftab. On behalf of the Appellant serious arguments were made contending that the confession of Appellant Nasir was not recorded in accordance with the prescription contained under Section 164 of Cr. P.C. as stating that he could not have been voluntary as he was in police custody.

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While specifically dealing with the confession of Appellant Nasir we have extensively dealt with the said issue and, therefore, we do not propose to deal with the same again. We have found that the said submission on behalf of the Appellant has no substance. Similarly, the recoveries made at the instance of Appellant Aftab at the residence of Asif with reference to that also we have dealt with in detail and reached a conclusion that the same was done in accordance with law and, therefore, there is no infirmity on that score. In other respects there was not much of controversy relating to evidence of PW-123. Therefore, the Final Report filed by PW-123, as against the accused, formulating the charges based on the evidence collected by the investigation machinery was duly considered by the trial Court as well as the High Court.

104. Having dealt with the oral evidence of the Prosecution Witnesses, it will also be necessary to refer to other documentary evidence which are relevant in connection with the charge laid against the accused and as found proved by the Judgments impugned in these appeals. The vital documents pertaining to the conspiracy and the documents and material objects pertaining to the occurrence can be independently set out, in order to appreciate the respective submissions and for reaching our own conclusion.

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105. As far as the conspiracy is concerned, it can be referred to those materials which existed or came into being as between the date Appellant Nasir had come in contact with Asif in the year 1999 till the death of Asif and the materials which came into being after his demise. While dealing with the said materials, the attendant events can also be noted as has been discussed in detail in the earlier part of the Judgment after the contact of Appellant Nasir with Asif in school days. Both the statements of Nasir as well as PW-39 disclosed that they met again in the year 1999 after Asif was released from Tihar Jail. Thereafter, Appellant Nasir was persuaded by Asif to assist him in his future endeavours which according to Asif was starting of construction of buildings and later some leather business for which he wanted Appellant Nasir to fetch a premises for accused Niaz Hussain who is absconding. De-hors, the confession of Appellant Nasir the arrangement of securing a ground floor flat at No.1, Tiljala Lane for Niaz Hussain was born out by the sale agreement dated 11.07.2001 which was witnessed by PWs-37 and

48. PW-37 is the promoter of the said building while PW-48 was one of the Witnesses along with Appellant Nasir to the document. Therefore, after the reunion of Appellant Nasir with Asif in 1999, the significant event which took place was securing of the ground floor flat No.1, Tiljala Lane for carrying on the so-called business CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 117 of 195 operation of Asif along with Niaz Hussain and his brother Fiaz Hussain for doing some leather business. But it transpired that as a matter of fact no such leather business was carried on. On the other hand it came to light through PW-39 that there were frequent meetings of Asif with number of his other friends of whom his meeting with Salahuddin, a leader of Hijbul Muzahiddin and another Kashmiri by name Dr. Mushtaq Ahmed were significant apart from meeting one Abdullah. According to PW-39 when Abdullah came to meet Asif at the residence of Asif, the same was not liked by his mother who showed a broom stick to Abdullah and whereafter none of Asif's friends gathered at his residence. Therefore, the premises of No.1, Tiljala Lane was the meeting point for his gang. While that be so, at the instance of Asif, Appellant Nasir went to Banaras where Asif introduced his close friend Appellant Aftab. Thereafter, e-mail accounts were opened for Nasir, the details of which were gathered by the Prosecution and placed before the Court in the form of Exhibit-105. Various messages transmitted through e-mail were also gathered from the different e-mail centres such cyber café, cyber centre etc., the Air Travel undertaken by Appellant Nasir from Jaipur to Calcutta under the alias name of Bobby was also gathered through the Airport Authorities which were all marked. The diary, driving licence, National Flag of Pakistan, a revolver, a rough sketch CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 118 of 195 showing the location of American Centre drawn by Appellant Nasir were all certain other vital documents which were marked before the trial Court.

106. That apart, at the instance of Aftab a diary maintained by deceased Asif where the accounts of expenses were all noted and a letter written by Aftab himself to the wife of Asif were also recovered from the residence of Asif. Further, after the encounter incident of Khan Road Khirgaon,

Hazaribagh which led to the nabbing of deceased Zahid and Salim, a large quantity of arms and ammunitions were also recovered from that place, as spoken to by PW-113. The above materials were considered both by the trial Court as well as by the High Court. We find from those documents and the oral evidence gathered by the Prosecution particularly that of PWs-37, 38, 39 and 48 read along with the e-mail messages disclose that after Asif came in contact with Aftab in Tihar Jail, there was a serious development in the mind set of Asif which was revealed on several occasions in the meetings held at his residence with Mr. Salahuddin, leader of Hizbul Muzahiddin, Dr. Mushtaq Ahmed and Abdullah wherein the deep rooted anguish of Asif that the Government of India did not meet the requirements of Muslims in this country and, therefore, they should teach a lesson to the State. This anguish expressed did not seem to be sporadic one but the evidence of CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 119 of 195 PW-39 and the e-mail messages confirmed that having regard to the association of Asif with the leaders of Hizbul MuZahiddin and another Kashmiri Dr. Mushtaq Ahmed as well as Appellant Aftab, persuaded Asif and his associates to gather arms an ammunition for insurrection an against the State.

107. Having dealt with the conspiracy aspect of the Appellants it will be worthwhile to refer to the principles applicable to conspiracy as has been laid down by this Court in various decisions. It will be suffice if we refer to the decision of this Court reported in Yakub Abdul Razak Mamon vs. The State of Maharashtra, through CBI, Bombay - JT 2013 (5) SC 142. Part of paragraphs 62 and 65 will be relevant for our purpose, which are as under:

“62. An important facet of the Law of Conspiracy is that apart from it being a distinct offence, all conspirators are liable for the acts of each other of the crime or crimes which have been committed as a result of the conspiracy. This principle has been recognized right from the early Judgment in Regina v. Murphy (1873) 173 ER 502.....”

65. Since conspiracy is hatched in secrecy, to bring home the charge of conspiracy, it is relevant to decide conclusively the object behind it from the charges levelled against the accused and the facts of the case. The object behind it is the ultimate aim of the conspiracy. Further, many means might have been adopted to achieve this ultimate object. The means may even constitute different offences by themselves, but as long as they are adopted to achieve the ultimate object of the conspiracy, they are acts of conspiracy.” CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 120 of 195

108. Having applied the abovesaid principles to the case on hand, it must be stated that though the conspiracy in this case was hatched in secrecy having regard to the various circumstances exhibited in the form of oral and documentary evidence supported by the confession of Appellant Nasir, we find the existence of the conspiracy, the object of the conspiracy and the knowledge on the above for the participants of the conspiracy were all fully established. The outcome of the said conspiracy, therefore, attracted the charge under Sections 121, 121A and 122 IPC read along with 120B.

109. In this context, we also wish to refer and rely upon the decision reported in Govt. of NCT of Delhi vs. Jaspal Singh - (2003) 10 SCC 586 when the law on this provision has been succinctly stated. Paragraph 10 along with the extract of the Judgment reported in Baburao Bajirao Patil vs.

State of Maharashtra - (1971) 3 SCC 432 at page 433, can be usefully referred to. “10. So far as the charge under Section 120-B IPC is concerned, it stands proved by showing that two or more persons have agreed to do or cause to do an illegal act or an act which is not illegal by illegal means and that some overt act was done by one of the accused in pursuance of the same. Where their common object or design is itself to do an unlawful act, the specification of such act itself which formed their common design would suffice and it would even be unnecessary or superfluous to further substantiate the means adopted by all or any of them to achieve such object. All the more so, when their common object or design appears to be to commit a series of such serious crimes and proof of any CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 121 of 195 overt act in such cases also is a mere surplusage and that mere proof that they or some of them were concerned in the overt acts alleged would, per se, go a long way to establish that there existed such agreement among them. It is well known and as observed by this Court in Baburao Bajirao Patil v. State of Maharashtra: (SCC p. 433, para 3) [I]ndeed it is seldom — if ever — that direct evidence of conspiracies can be forthcoming. Conspiracy of the present type from its very nature must be conceived and hatched in complete secrecy, for otherwise the whole purpose would fail.”

110. The recovery of large quantities of arms and ammunition from the premises at Khan Road, Khirgaon, Hazaribagh, a revolver recovered from Appellant Nasir, the contents of the e-mail messages and the letter of Aftab to the wife of Asif after the killing of Asif read along with some of the vital statements made by PW-39 in his evidence to the effect that the untimely death of Asif and his involvement in this antinational activities were all after his contact with Aftab when cumulatively considered, it is revealed that every preparation was made during the lifetime of Asif which got intensified after his demise on 08.12.2001 in the encounter at Rajkot which was masterminded by Appellant Aftab with the wholehearted support of Appellant Nasir by arranging for the stay of the other accused by securing a premises at Khan Road, Kirgaon, Hazaribagh by bringing those gang members, namely, deceased Zahid, deceased Salim, Hassan Imam, Sadakat from Agra to Hazaribagh with their heavy luggage CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 122 of 195 which ultimately transpired to be arms and ammunitions stored in the premises of Hazaribagh.

111. From 14.01.2002 the various e-mail messages transacted between Appellant Nasir with Appellant Aftab and other conspirators which took place up to 29.01.2002 revealed the loaded mind set with which each one of them were operating for executing the plans which were originally developed by the deceased Asif and Aftab which were ultimately implemented with much more vehemence and vengeance by resorting to shooting spree towards the police force who were posted at the American Centre. In fact, the messages between 14.01.2002 and 21.01.2002 exchanged between Appellant Nasir, Zahid and Aftab disclose the mind set with which the gang members hatched the conspiracy to operate and to carry out their mission of attacking the police force posted at the American Centre. Having regard to the above overwhelming documentary evidence which was placed before the Courts below it will have to be held that the conclusion ultimately reached by the Courts below based on the above materials coupled with the oral evidence sufficiently establish that the Appellants along with the other accused conspired for waging a war against the State.

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a12. Question No. 3: Whether the confession of Appellant Nasir was

recorded in accordance with Section 164 of Cr.P.C.? As far as the said question is concerned, we have dealt with the same in detail in the earlier part of our Judgment and have found that PW-97-Magistrate, who recorded the confession of Appellant Nasir, applied all precautions required under law before the confession of Appellant Nasir was recorded. We have also found that the submission made on behalf of the Appellant Nasir that at the date of recording of confession he was in police custody was proved to be not correct and that as per the direction of PW-97 himself on 21.02.2002 he was sent to the Presidency Correctional Home of Calcutta with a specific direction to keep him in segregation so that he was not mingled with other accused or strangers before he was produced on 22.02.2002 at 1 p.m. In fact, we have noted that Appellant Nasir's answers to questions 1 to 18 recorded in the confession itself, as well as, the last part of the confessional statement amply disclose that Appellant Nasir was conscious of the implications of making a confession and in spite of that he proceeded to make the confession before PW-97. Further, we have found that at the time of recording of the confession PW-97 ensured that such recording took place in his chambers and that except himself and Appellant Nasir nobody else was present in the chamber much less any of the police personnel.

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Therefore, there was no scope for the Appellant now to contend that the confession was not recorded in accordance with law.

113. Before answering this question, we wish to refer to some of the decisions relied upon by Ms. Nitya Ramakrishnan in support of her submissions. Reliance was placed upon a decision of this Court reported in Navjot Sandhu (Supra) in particular paragraphs 38 to 40 and 306 and 315. In paragraphs 38 to 40 and paragraph 304 it was held that a confession statement cannot be straightaway relied upon and the proper way to approach is to marshal the evidence against the accused excluding the confession and the Court may take into consideration the confession if the other evidence disclose the offence alleged against the accused. We have dealt with in detail the confession of Appellant Nasir, the procedure followed by PW-97 while recording the confession apart from finding out the truthfulness of the statement contained in the confession, as well as, various other evidence led by the Prosecution which also supported to a very large extent the statement made by Nasir in his confession. Even in paragraph 304 of the said decision the truthfulness of the confession in that case was not accepted whereas in the case on hand we have found that the confession is fully acceptable and the details contained in the confession were all

true. We have also dealt with the retraction alleged to have been made by Appellant Nasir in CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 125 of 195 the course of 313 questioning and found that the same does not in any way cause any hindrance in accepting the confession. We, therefore, do not find any support for the Appellant in the reliance placed upon the said decision.

114. Reliance was placed upon the decision of this Court in Bodhraj @ Bodha (supra). Paragraph 16 was referred to, where the principles to be followed in analyzing a case dependant upon circumstantial evidence were noted from an earlier decision of this Court in Hanumant Govind Nargundkar and another vs. State of Madhya Pradesh - AIR 1952 SC 343. We do not wish to refer to the said decision in detail, inasmuch as, we find that in the case on hand it is not merely dependant upon circumstantial evidence alone. We have referred to the eye-witness' account which fully corroborated the confession apart from other circumstances relied upon by the Prosecution. We, therefore, do not find any scope to apply the said decision to the facts of this case.

115. As far as the decision reported in Haricharan Kurmi (supra), the said decision is on the implication of Section 30 of the Evidence Act as regards applying the confession of an accused as against the offence alleged against the co-accused. We have dealt with the said legal aspect extensively before considering the contents of the CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 126 of 195 confession made by Appellant Nasir for its applicability as against the co-accused Appellant Aftab. We have also applied the principles set down in paragraphs 10 and 11 of the said decision while holding that in the case on hand, we are fully fortified in applying the confession made by Appellant Nasir as against Appellant Aftab based on the independent evidence which is available in abundance as against Appellant Aftab which sufficiently supported the case of the Prosecution. Therefore, the confession of Appellant Nasir could also be used while finding Appellant Aftab guilty of the charges levelled against him.

116. The decision reported in Mohd. Khalid (supra) was relied upon for the very same purpose for which Haricharan Kurmi (supra) was referred to. Therefore, we do not find any necessity to deal with the said decision in detail.

117. Reliance was placed upon a recent decision of this Court reported in Rabindra Kumar Pal @ Dara Singh (supra). After referring to paragraphs 41 to 50 the learned counsel for the Appellant took us through the principles laid down in paragraph 64 and submitted that paragraph 64(iii), (v), (viii) and (ix) gets attracted to the case on hand. Applying the principles stated in the said sub-paragraphs, we do not find any scope to reject the confession of Appellant Nasir. We CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 127 of 195 have found that every one of the principles laid down therein has been sufficiently taken care of by the learned Magistrate/PW-97 while recording the confession of Appellant Nasir. By applying the twin test, namely, the voluntariness in making the confession and its truthfulness, we are convinced that the reference to the said paragraph 64 and sub-paragraphs (iii), (v), (viii) and (ix) does not in any way affect the case of the Prosecution. As far as identification of the Appellants, as well as, the photographs of deceased Zahid and Salim and the other material objects, such as, Maruti 800 car, Suzuki Motorbike, the Chocolate and Green colour jackets worn by the assailants, we find that there

was no lacunae in the evidence of those Witnesses who identified the accused as well as the material objects. We find that it has been made clear that identification of accused persons by Witnesses in the dock for the first time, though permissible cannot be given credence without further corroborative evidence. What has been stated is that the dock identification alone cannot be treated as substantial evidence though it is permissible. In the case on hand, the PW-62 who was not known to the accused was able to identify Appellant Nasir in a TIP Parade which was conducted in the Month of March, 2002, i.e. within a period of about 2½ months after the incident. Therefore, when the said witness was able to identify Appellant Nasir there is no scope to doubt such CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 128 of 195 identification. Further, the identification of the photograph of the assailant Zahid and the jacket worn by him as identified by PW-62 as well as the other eye-witnesses cannot be rejected, as no serious deficiency in their identification could be noted by us in this case. Therefore, the said decision also does not support the case of the Appellants. It is to be remembered that identity of Appellants Nasir and Aftab was made by PW-39, brother of Asif, whose identification was not questionable on any account.

118. Even the so-called retraction was not by way of a specific pleading made on behalf of Appellant Nasir. It was sought to be demonstrated that in the Section 313 Cr.P.C questioning, Appellant Nasir denied to have made any confession in the presence of PW-97 and, therefore, that would amount to a retraction. In fact, while referring to those questions and the answers made by Appellant Nasir, we have recorded our finding and that the same did not in any way affect the genuineness of the confession made by Appellant Nasir. Further, the manner in which the confessional statement was made starting from the days when Appellant Nasir developed his friendship with deceased Asif in the school days, their subsequent reunion in the year 1999 and the ultimate execution of the horrendous attack on the police force at the American Centre in which as many as five police personnel died and 13 number of police personnel suffered CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 129 of 195 gun shot injuries along with civilians, which narration could not have been prepared by the Prosecution agency with so many details pertaining to men and material and the sequence with which it was disclosed. The narration so made in the confession by Appellant Nasir was natural and cogent and, therefore, that also establish that the confession of Appellant Nasir was not only recorded in accordance with Section 164 Cr.P.C. but deserves to be given due consideration while appreciating the evidence relied upon by the Prosecution. We, therefore, hold that the confession of Appellant Nasir was recorded in accordance with Section 164 Cr.P.C.

119. Question No. 4: As to what extent the contents of the confession can be used by the Prosecution? While dealing with the said question we feel that Question No. 5 can also be simultaneously dealt with, namely, whether there was any contradiction in the evidence both oral as well as documentary vis-à-vis the confession made by the Appellant Nasir?

We find that the above two questions are interrelated and, therefore, a combined consideration can be made. As has been stated by us earlier, the confession of Appellant Nasir having been recorded in accordance with law and since it contains facts and figures disclosing reflection of what really transpired in relation to the transaction indulged by the Appellant, CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 130 of 195 namely, the crimes in which they were involved as a

gang by conspiring together with the evil mindset guided by the foreign nationals, namely, deceased Zahid and Salim who were all Pakistanis along with some terrorist organisation namely, Salahuddin, leader of Hizbul MuZahideen and Kashmiri militant by name Dr. Mushtaq Ahmad and one Abdullah. It is imperative that we must find out as to the extent to which the contents of the confession could be used by the Prosecution and whether such confession is corroborated by other materials in order to state that there was no contradiction in the evidence both oral as well as documentary when compared with the confession made by Appellant Nasir.

120. When we examine the said aspect, we find that the following were the relevant details which can be culled out from the confession of Appellant Nasir.

i) Nasir met Asif after his school days in the year 1999 when Asif was released from Tihar Jail. Before his meeting Nasir used to work in leather import-export company as a helper/checker getting a salary of Rs.700/- per month. Asif offered him a monthly remuneration of Rs.2000/- per month for his continued assistance.

ii) Asif revealed about his close friendship with Appellant Aftab who was residing at Banaras. The confession of Appellant Nasir as well as Shakir Akhtar confirms the same.

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In January, 2001 Niaz Hussain was introduced by Asif to

Appellant Nasir and asked Appellant Nasir to look for a flat of 600 to 800 square feet in ground floor in No. 1, Tiljala Lane. Nasir who was also residing at No. 46, Tiljala Lane arranged for a ground floor flat at No.1, Tiljala Lane for a consideration of Rs.2,66,000/- which was duly executed by the owners of No.1, Tiljala Lane, with the help of the promoter PW-47 Dilip Singh in July, 2001 when the flat was handed over to Niaz Hussain under Exhibit 63 dated 11.07.2001.

iv) Asif while meeting with other members including Appellant Nasir suggested that they should kidnap big businessmen in various cities to make money and so that they would be able to collect required arms and ammunition to carry out their mission. In fact, Asif was arrested in connection with the kidnapping of one Khadim and was interrogated and arrested by police and taken to Rajkot, Gujarat where he was killed in an encounter.

v) In May, 2001 as per Asif's direction Appellant Nasir went to Agra and met one Asad Khan who is also a member of Asif's gang and collected a sum of Rs.1 lakh from him.

vi) In August, 2001 as per the instruction of Asif and with his assistance e-mail account was opened for Appellant Nasir in a Cyber Café and the e-mail accounts were a) basket4my@hotmail.com with the password '7days13harj'. The CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 132 of 195 address of the second e-mail was z4zipzap@hotmail.com with the password

‘100dinsonarka’.

vii) Again in August, 2001 as directed by Asif's e-mail Appellant Nasir went to Banaras. At Banaras he met Asif's close friend Aftab Ansari who was introduced to him. With the help of Appellant Nasir, Appellant Aftab got a fake passport under the name Farhan Mullick through Asif in the passport office of Bihar.

viii) As per Asif's instructions, Nasir went to the flat at Khan Road, Khirgaon, Hazaribagh which flat was arranged by Appellant Nasir as per instructions of Asif for the hideout of Asif's gang members. The tenancy agreement of the said premises were established.

ix) In October-November 2001 Appellant Aftab sent series of e-mails through his name or under the name Karan, Amaan, Abdul, etc. to Nasir and other gang members.

x) In October, 2001 at Agra, Asif introduced Zahid, Salim and Sadakat. Zahid and Salim were Pakistanis while Sadakat was from Uttar Pradesh. They were all brought to Hazaribagh in two cars Maruti 800 and Maruti Zen. The cars were all parked in the premises at Khan Road, Hazaribagh which were later seized by police.

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In October, 2001, Appellant Nasir bought two cottas of

land in Hazaribagh for Rs.50,000/- which was funded by Asif.

xii) There was an e-mail from Appellant Aftab informing about the detention of Asif in the Khadim Kidnapping case in November, 2001.

xiii) As per Appellant Aftab's e-mail, Nasir went to Jaisalmer and Darmar to fetch 15 kgs of Atta-RDX. However, it was not purchased and Nasir returned back to Calcutta in the first week of December. The travel by Nasir was supported by documents.

xiv) Appellant Aftab sent e-mail informing about the killing of Asif in an encounter by Gujarat Police and his body being flown to Calcutta. PW-39 also supported the said message of Appellant Aftab.

xv) Conspiracy was hatched at Appellant Nasir's flat at Khirgaon along with deceased Zahid, Sadakat, deceased Salim and Imam Hussain to take revenge for Asif's death which meeting took place as per the instruction/guidance of Appellant Aftab. In the said meeting they conspired to blow off government buildings and to kill police force to show the strength of 'Jehadis'. They also waited for the order of Bhaisaheb, namely, Appellant Aftab.

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Deceased Zahid and accused Sadakat came to No.1, 134 of 195

Tiljala Lane on 14

th

and 15 th January, 2002 respectively carrying a large leather bag containing things which later came to be revealed as arms and ammunitions.

xvii) Appellant Aftab sent an e-mail directing the gang members to blow off Bhavani Bhawan where Asif was kept for interrogation. This decision was however, opposed by Nasir stating that innocent people would be killed apart from the fact that the Minority Commission office was also located in the same building. When this view of Appellant Nasir was forwarded by Zahid to Appellant Aftab, an alternate suggestion was made by him to attack any American base and kill the policemen.

xviii) On 19.01.2002 at about 4-4.30 p.m. Appellant Nasir along with Zahid, Sadakat, Abdullah made a survey of the American Embassy and the American centre and found that American Centre would be more convenient as police security people were sitting in open and were not alert.

xix) Another survey was made on 20 th and 21 st of the American Centre to work out the details of attack to be made.

xx) On 21 st evening after returning from survey, deceased Zahid chalked out the programme. Zahid was to drive the motorcycle while Sadakat was to shoot at the police force. Nasir CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 135 of 195 was directed to take Maruti 800 and park it in a place where the assailants at American Centre could join after carrying out their assignment.

xxi) On 22.01.2002, all the gang members got up by 5 a.m., got ready while Zahid wore a chocolate (brown) colour jacket arming himself with pistol, Sadakat wore a green colour jacket and took an AK-47 rifle in a cricket bat cover. Zahid drove the motorbike and Sadakat was sitting in the pillion with the AK-47 rifle. The jackets were alter recovered and exhibited xxii) At 6.30 a.m. on 22.01.2002, Nasir along with Abdullah parked Maruti 800 car bearing Registration No. BRK 4907 at Rippon Street Circular Road Crossing and around 6.45 a.m. Zahid and Sadakat came there in the motorbike announcing that 'Kaam ho gaya' meaning thereby 'job was done'. Thereafter, Sadakat got into the rear side of the car and both the car and the bike proceeded to No.1, Tiljala Lane. On the way Sadakat narrated the details about the attack. After reaching No.1, Tiljala Lane, Sadakat left Calcutta handing over the rifle AK-47 to Zahid. Maruti car bearing registration No.BRK 4907 and Motor bike bearing registration No.WB-01-P2144 were recovered from No.1, Tiljala Lane xxiii) On 23.01.2002 Zahid also left Calcutta and took the AK-47 rifle along with him. Appellant Nasir went to his in-laws place.

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On 26.01.2002 Appellant Nasir went to Khan Road,

Khirgaon, Hazaribagh were Zahid, Salim and Sadakat were also present and they all celebrated their success. Thereafter, Nasir returned to Calcutta.

xxi) On 29.01.2002, Appellant Nasir informed Appellant Aftab through e-mail about the encounter killing of Zahid and Salim through his e-mail address b4babu@hotmail.com. On the same day Nasir was arrested by police at his in-laws place thereafter Nasir took the police to No.1 Tiljala Lane where search and seizure took place.

xxvi) From No.1, Tiljala Lane police went to 46, Tiljala Lane the residence of Nasir where also police seized documents including a pocket notebook a sketch map of American Centre and national flat of Pakistan given to Nasir by Zahid. A revolver given to Nasir by Zahid was also recovered. All the recoveries both at No.1, Tiljala and No.46, Tiljala Lane were made based on the admissible portion of the statement of Appellant Nasir.

xxvii) Appellant Nasir gave reasons as to why he came forward to make the confession namely

a) to relive his conscience

b) he felt that he had committed a sin, CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 137 of 195

c) according to him he was earlier afraid of Aftab and now Aftab has been apprehended on 13.3.2002, he was free from the clutches of Aftab

d) he stated that he did not want to be a traitor against his own country.

e) all whatever he did earlier was under total misapprehension

f) now that there is no escape route for him.

121. From what has been noted above, we find that there was no contradiction to any of the statement of Appellant Nasir in his confession but has fully corroborated those facts and events in the form of oral and documentary evidence. Therefore, the Prosecution was fully justified in relying upon the confession while resting its case on the other evidences.

122. Question No. 6: Whether the confession of Appellant Nasir can be relied upon as against Appellant Aftab?

The submission made on behalf of the Appellant was two-fold. In the first place, it was contended that a confession made by an accused is not substantive evidence as against co-accused falling under Section 30 of the Evidence Act. When we consider the said question, the legal position under the provisions of the Evidence Act requires to be noted. Sections 10 and 30 of the Evidence Act are relevant, which are as under:

“10. Things said or done by conspirator in reference to common design.-Where there is reasonable ground to believe that two or more persons have conspired CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 138 of 195 together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

30. Consideration of proved confession affecting person making it and others jointly under-Trial for same offence.-When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.”

123. Going by the above provisions, the relevance, efficacy and reliability of the confessional statement of Appellant Nasir when examined in the touchstone of Sections 10 and 30 of the Evidence Act, it will have to be stated that the confession of a co-accused cannot be treated as substantive evidence to convict other than the person who made the confession on the evidentiary value of it. It is, however, well established and reiterated in several decisions of this Court that based on the consideration of other evidence on record and if such evidence sufficiently supports the case of the Prosecution and if it requires further support, the confession of a co-accused can be pressed into service and reliance can be placed upon it. In other words if there are sufficient materials to reasonably believe that there was concert and connection between the persons charged with a commission of an offence based on a conspiracy, it CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 139 of 195 is immaterial even if they were strangers to each other and were ignorant of the actual role played by them of such acts which they committed by joint effort. Going by Section 30 of the Evidence Act, when more than one person are being tried jointly for the same offence and a confession made by one of such persons is found to affect the maker as well as the co-accused and its stand sufficiently proved, the Court can take into consideration such confession as against other persons and also against the person who made such confession from the above proposition, we can make reference to the decisions of this Court in the case of Natwarlal Shankarlal Modi vs. State of Bombay – (1961) B.L.R. 661 and The Govt. of NCT of Delhi vs. Jaspal Singh - (2003) 5 SCC 589.

124. Having noted the above legal principles relating to the application of confession made by an accused as against the co-accused, we wish to first consider and find out whether there is enough evidence independent of the confession of the Appellant Nasir in respect of the charge levelled against Appellant Aftab. In sum and substance the charges are conspiracy, common intention which

resulted in serious charges falling under Sections 121, 121A, 122 as well as Sections 302, 307, etc. of IPC. Keeping the confession of Appellant Nasir aside, when we examine the evidence available on record, we find that the evidence of PW-39 proves that Appellant Aftab was a CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 140 of 195 close friend of Asif, that according to PW-39 after Asif's contact with Aftab the life of Asif was ruined which ultimately resulted in his death. The documentary evidence namely, the sale agreement dated 11.07.2001 pertaining to ground floor flat at No.1, Tiljala Lane confirmed the factum of Asif having arranged for getting the flat for the absconding accused Niaz Hussain under the pretext of starting a leather business. The evidence of PW-39 again discloses that Asif and Appellant Nasir were childhood friends and they were associated together after 1999 when Asif was released from Tihar Jail. The opening of the e-mail account in the name of Appellant Nasir in the cyber café at the instance of Asif through which messages were exchanged between Nasir and Appellant Aftab is a matter of record right from 2001, that too prior to the demise of Asif. It is the not case of anyone that Appellant Nasir knew Appellant Aftab on his own. Nasir was directed by Asif to go to Banaras where Nasir was introduced to Aftab by Asif as his close friend for which the hotel records were produced which was not disputed before us. Even prior to that Asif made use of Nasir to get a fake passport for Aftab in different name called 'Farhan Mullick'.

125. Similarly, when Nasir was summoned by Appellant Aftab to go to Jaipur for the purpose of getting a consignment of Atta-RDX the relevant air travel document supported the said fact apart from e-

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mail messages. The letter of Aftab addressed to the wife of Asif has been proved with the help of handwriting expert. There is no scope to dispute the existence of that letter and about the author of the said letter, namely, Aftab. Based on the admissible part of the statement of the Appellant Aftab the bedroom of Asif was searched where the letter and the diary maintained by Asif was recovered. The e-mail message sent by Aftab about the death of Asif in an encounter on 08.12.2001, also confirmed their joint operation during the lifetime of Asif as well as subsequently. Subsequent to Aftab's letter to Asif's wife, a serious development took place. Even before that the flat at Khan Road, Khirgaon Hazaribagh, arranged by Appellant Nasir was proved by the evidence of its owner. The rental receipts signed by Appellant Nasir on some occasions and by the deceased Zahid on some other occasions also proved the tenancy secured in respect of the said premises at Hazaribagh. The parking of Maruti 800 and Maruti Zen in which Zahid, Salim, Sadakat and Imam Hasan who were lodged in the Hazaribagh flat was also spoken to by the landlord of the said building. The meeting of Zahid, Salim Sadakat and Appellant Nasir in the premises at No.1, Tiljala Lane as from 14.01.2002 was supported by e-mail messages exchanged between Nasir and Zahid on the one side and Aftab on the other. The contents of those messages disclose the exact CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 142 of 195 manner in which the accused planned to execute their mission of taking a revenge on the police. The specific message of Aftab directing that Zahid, Nasir, Salim and Sadakat should launch an attack on Bhavani Bhawan further reinforced the case of the Prosecution about the full involvement of Aftab in the transaction. The reply message sent to Aftab

wherein the objection raised by Nasir as to why the attack should not be made on Bhavani Bhawan and the further reply from Aftab through e-mail that in that event they can look for an American Base and pursuant to which Zahid, Salim, Sadakat and Nasir visited both American Embassy as well as American Centre and thereafter, sent a further message to Aftab that the American centre would be the more fitting place to carry out their mission and the green signal given by Aftab again by way of an e-mail were all factors which independently established the full fledged role played by Appellant Aftab in the whole transaction which ultimately resulted in the hazardous attack on the police force posted at the American Centre. When such overwhelming evidence independent of confession of Appellant Nasir is on record we are convinced that the confession of Appellant Nasir can be fully applied and thereby, the involvement of Aftab in the criminal conspiracy and the following insurrection on the police force at the American Centre stands fully established and accordingly we answer the said CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 143 of 195 question to the effect that the confession of Appellant Nasir can be relied on as against Appellant Aftab.

126. Question No. 7: Whether there was sufficient corroboration of the contents of the confession of Appellant Nasir with the other evidence i.e. oral, documentary and material objects relied upon by the Prosecution ?

The substantive part of the confession of Appellant Nasir can be formulated into the following segments and while listing out those different segments the corroborative materials in the other evidence can also be noted which can be gathered from the following details:

a) Nasir met Asif again in 1999 after he was released from Tihar Jail. Nasir who used to work in the leather export –import company as a helper/checker, used to get Rs.700/- and later he started getting Rs.2,000/- from Asif.

PW-39 who is the brother of deceased Asif has confirmed the fact that Asif was in Calcutta from 1999 after his release from Tihar jail. PW-46 who was co-accused with Asif in the same case and was undergoing sentence in Tihar jail with him has confirmed that the sentence got over in 1999. PW-39 has also confirmed that Asif and Nasir were class-fellows in school and also stated that he knew about Nasir's family members.

CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 144 of 195 PW-47 and PW-48 have both confirmed that they have seen Nasir in the company of Asif in No.1, Tiljala Lane, Calcutta. Both have identified the photo of Asif as Exhibit-LXXIV.

b) Asif revealed about his close friendship with Appellant Aftab Ansari, resident of Banaras.

P.W.-46's statement again confirmed that Asif considered Aftab as his friend from Benaras and introduced him to Aftab at Tihar jail. Statement given by Shakir Akhtar also stated that Aftab Ansari was introduced by Asif as his friend from Benaras. Nasir's trip to Banaras to meet Aftab at the instance of Asif was also established. The passport secured in the name of Farhan Mullick for Aftab

with the help of Asif and Nasir was also proved.

c) In January, 2001, Niaz Hussain was introduced by Asif to Nasir. Nasir was asked by Asif to look for a flat for him of 600/800 sq space on the ground floor. At the instance of Asif, Nasir arranged for a ground floor flat: No. 1, Tiljala Lane, Calcutta for one Niaz Hussain. He paid Rs.2,66,000/- to Dilip Singh, PW-47 in April 2001 the flat was handed over to Niaz. Evidence of P.W.s 47 and 48 has confirmed the above. PW-47 has stated that he executed an agreement under Exhibits-63/1, 63/2, 63/3, 63/4 and 63/5 with Niaz Hussain and CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 145 of 195 handed over the possession on 11 th July, 2001. The witness to the said agreement is Appellant Nasir himself and PW-48 who resided in the 1st floor of the said building.

d) Asif suggested kidnapping of big businessmen in various cities to make money and for that purpose to gather arms and ammunition. In May 2001, as per Asif's directions Nasir went to Agra and met one Asad Khan who is also a member of Asif's gang. He collected Rs.1 lakh from Asad Khan. Asad Khan and Aftab Ansari were both wanted under P.S. Case no. 232/2001. Asif's detention in connection with the kidnapping of Khadim was proved. Subsequently, Asif stated to have died in an encounter by Rajkot police.

e) In August, 2001 at the instance of Asif e-mail account was opened in a cyber café: First e-

basketball4my@hotmail.com, password:7days13harj, second e-mail : z4zipzap@hotmail.com, password: 100dinsonarka. Both PW-68 and PW-104 were involved in the retrieving of the e-mails which were sent and received by Nasir. Nasir confessed about the e-mail ids and their respective passwords involved. Through investigation from a cyber café in Kustia, Calcutta, owned by one PW-67, five computers were seized who also signed the Exhibit-104/1 for the printouts of the e-

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mails sent/received by Nasir. PW-68 is a sub-inspector who took the printouts of the e-mails. Exhibit-104/2. Later PW-104 also retrieved 15 printouts of e-mails as per the direction of PW-123.

f) In August 2001 as per Asif's e-mail Nasir went to Banaras. At Banaras, second Appellant Aftab was introduced to Nasir. Based on Nasir's acquaintance, Asif got a fake passport made under the name Farhan Mullick in Bihar Passport office which was to be used by Aftab.

PW-111 is attached with Bihar Police who has seized the passport of Farhan Mullick and identified Aftab in Court as Farhan Mullick.

g) As per Asif's instructions Nasir went secured a flat in Khan Road, Khirgaon and the said the premises was used by Asif's gang members as a hideout.

PW-106 is the owner who rented out the flat to Nasir confirmed that he was residing there. And in the cross- examination, he stated that he has met Sadakat and Zahid and they were introduced as staff members of Nasir by one Hasan Imam. That time Nasir was not present. Subsequently, on 27-28.01.2002, in the encounter at Khan Road flat, Zahid and Salim were nabbed as stated by PW-113.

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h) In October-November 2001, second Appellant Aftab started

sending his e-mails through his name or under the name 'Karan', 'Aman', 'Abdul' etc.

i) In October 2001 at Agra, Asif introduced Zahid, Salim and Sadakat. He said Zahid and Salim were from Pakistan and Sadakat was from UP. All of them proceeded to Hazaribagh in two cars- Maruti 800 and Maruti Zen.

PW-106 has confirmed in cross-examination that he saw one Maruti car and one Maruti Zen parked outside the flat. Later incident of encounter and nabbing of Zahid and Salim in January, 2002 and confirmed the said fact.

j) In October 2001 Nasir bought two cottahs of land from Hazaribagh for Rs.50,000/-. Asif gave him the money. PW-73 has deposed that she was the seller of the said 2 cottahs land and Nasir was the buyer during the said time period. She has also recognized the Appellant in the Court.

k) E-mail from Aftab was sent informing about the detention of Asif in the first week of November 2001. That very email retrieval vouchsafe the said fact.

l) As per Aftab's e-mail, Nasir went to Jaisalmer, Damar to fetch 15 kg. of Atta/RDX. Atta-RDX was not purchased. Nasir returned back to Calcutta in first week of December.

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PW-105 was the Handwriting expert of documents. He examined the Entries in the registration book of Hotel Golden City, Jaisalmer which had Nasir's entry Exhibit-LLXXXIII/2. The air ticket registration of Nasir's return trip to Calcutta was also proved.

m) Aftab sent e-mail informing about the killing of Asif in an encounter by Gujarat police and his body being flown to Calcutta. Miaz also gave this message through e-mail: b4babu@hotmail.com

and behzad50@hotmail.com Exhibit-46/1, the letter sent by Aftab to Asif's wife confirmed the said fact apart from the retrieval of the email messages.

n) Conspiracy was hatched at Nasir's Khan Road, Khirgaon tenanted flat along with Zahid, Sadakat, Salim and Imam Hussain to take a revenge of Asif's death. They planned to blow off government buildings and to kill corps to show the strength of 'Jehadis'. They all waited for Bhaisaheb, Aftab's order. Zahid and Sadakat came to No.1, Tiljala Lane, Calcutta on 14-15 January, 2002. They brought a large leather bag with them. A mail was sent by Aftab to blow off Bhavani Bhawan where Asif was kept for interrogation. This decision was opposed by Nasir as innocent people would be killed and the office of the Minority Commission was also there. This CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 149 of 195 view was forwarded by Zahid to Aftab. An alternate plan was suggested by Aftab to attack any American base and to kill policemen.

o) All the above facts were also proved by the retrieved email messages transacted between Nasir, Zahid on the one side and Aftab on the other side. On 19.01.2002 at about 4-4.30 p.m. Nasir along with Zahid, Sadakat and Abdullah made a survey of the American Embassy and the American Centre. They found the American Centre more convenient as the police security people appeared slack in their duties. PW-47 saw them leaving the building at around same time.

p) Another survey was made by them on 20th and 21st Janu

2002 of the American Centre to note the features. Both PWs-47 and 48 saw them leaving the building at around same time.

q) On 21st January evening after retiring from survey Zahid chalked out the programme. Zahid was to drive the motorcycle, Sadakat was to shoot and Nasir was to drive the Maruti 800. PW-48 saw Nasir and Abdullah in the Maruti 800 Car and Zahid and Sadakat to be on the Motorcycle.

r) On 22.01.2002 everybody woke up at 5 a.m. and got ready.

Zahid wore a chocolate colour jacket and armed himself with CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 150 of 195 pistol. Sadakat wore a green colour jacket and took an AK-47 rifle in a cricket bat cover. Zahid drove the vehicle and Sadakat as a pillion rider with the AK-47 rifle. PW-48 saw them and is also the seizure list witness who saw the cricket bat cover.

On 22.01.2002 Nasir along with Abdullah parked Maruti 800 BRK 4907 at Rippon Street Circular Road Crossing in the early morning. Around 6.45 a.m. Zahid and Sadakat came to the place where Nasir parked the car answering that 'job done'. Sadakat got into the car and the bike went to No.1 Tiljala Lane. Zahid followed. On the way Sadakat narrated the details about the attack. PW-62 also confirmed the same gathering at around same time. PW-62 also noticed the presence of Nasir along with Maruti 800 parked at Rippon Street and a little later the joining of Zahid and Sadakat in the black colour motor bike. PW-62 identified Nasir in TIP and the photo of Zahid Exhibit XXVI.

s) Then Sadakat left Calcutta. AK-47 was handed over to Zahid.

On 23.01.2002, Zahid also left Calcutta and took AK-47 and the pistol along with him. Nasir booked Sadakat's ticket in Chambal Express. Thereafter, Nasir went to his in-laws' place. One Reservation/Cancellation of Chambal Express 1159 Uttar CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 151 of 195 Pradesh of same date in Sadakat's name was found from Howrah Reservation Supervisor in Exhibit-14.

t) On 26.01.2002 Nasir went to Khan Road, Khirgaon, Hazaribagh where Zahid, Salim and Sadakat were there. They celebrated their success. Nasir returned to Calcutta.

Their stay can be confirmed as after two days later the encounter at Haziribagh took place where Salim and Zahid died as spoken to by PW-113.

u) On 29.01.2002, Nasir informed Aftab Ansari through an e-mail about the encounter killing of Zahid and Salim. E-mail address: b4babu@hotmail.com. On 29.01.2002 police arrested Nasir at his in-laws' place. Nasir took the police to No.1, Tiljala Lane, a search and seizure took place. From No.1 Tiljala Lane Nasir took the police to his flat at No. 46, Tiljala Lane. Police seized some documents including a pocket notebook, a sketch map of American Centre and a National Flag of Pakistan which Zahid left. A revolver given to Nasir by Zahid was also seized.

PW-48 was a seizure witness to the entire procedure.

127. Here before answering the question, we wish to deal with the decision relied upon by the learned counsel for Appellant. Reliance was placed upon the decision reported in Kehar Singh (supra).

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Particular reference was made to paragraph 269 of the Judgment, which reads as under:

“269. In the document, there is no reference to killing of the Prime Minister. In fact, except for a “felt like killing” in early June as an immediate reaction to the “Bluestar Operation”, even the manifestation of this feeling does not exist anywhere in subsequent part of the document. The document refers to bare meetings, visits of persons, or visiting somebody's house. It is, however, not possible to find out to whom the document was intended to be used.”

128. Referring to the above passage Ms. Nitya Ramakrishnan contended that even assuming Appellant Aftab was the author of Exhibit-46/1, it does not reflect anything which can be stated to have supported the case of Prosecution of waging of war against the State or any other serious offence to be committed and therefore, the said exhibit cannot form the basis for finding Appellant Aftab guilty of the offences alleged against him. In paragraph 269, after referring to the document, which was authored by the accused in that case, this Court found that the only set of expressions

which attracted the Court's attention was 'felt like killing' and nothing else could be found in the said document in order to find the accused guilty of charge of murder. As far as Exhibit-46/1, which has been found to have been written by Appellant Aftab, as per expert witness, we find that apart from expressing his anguish over the untimely demise of his close friend Asif in an encounter which according to him was a fake one, CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 153 of 195 he while consoling the wife of Asif expressed his reaction to such an extent stating that appropriate measures would be taken for a revenge. Therefore, Exhibit-46/1 is not a simple letter expressing condolence to the wife of Asif. It goes one step further and states that necessary steps would be taken for a revenge. In other words, the tone and tenor of the letter spoke for itself reflecting the adverse mindset of Appellant Aftab and his craving for taking revenge on the police. Therefore, the reliance placed upon the said paragraph is of no assistance to the Appellant.

129. Reliance was also placed upon the decision reported in the Rajiv Gandhi murder case in Nalini (supra). The proposition relied upon is found in paragraph 607 which reads as under; "607. We have carefully gone through the evidence against Vijayan (A-12), Selvaluxmi (A-13) and Bhaskaran (A-14) and the submissions of the Prosecution as to how they are members of the conspiracy with the object to kill Rajiv Gandhi. The evidence at the most merely shows that they associated with Sivarasan. The evidence that they had knowledge of the conspiracy is lacking. Their knowledge about the murder of Rajiv Gandhi by Sivarasan, Suba and Dhanu was acquired by them only after Rajiv Gandhi was killed. As we have repeatedly said in any case mere knowledge of the existence of conspiracy is not enough. One has to agree to the object of conspiracy to be guilty of the offence under Section 120-A IPC. Vijayan (A-12) would not know the nature of the messages which were transmitted or received from the wireless set installed in his house as all these were in coded language. Two code-sheets were given by Murugan (A-3) to Padma (A-21) to be kept in safe custody. Vijayan (A-12), Selvaluxmi (A-13) and Bhaskaran (A-14) have been charged for offence under Section 3(3) of TADA and have been jointly CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 154 of 195 charged for offence under Section 3(4) TADA but these charges must fail and they are acquitted of these charges. Then Vijayan (A-12), Selvaluxmi (A-13) and Bhaskaran (A-14) are charged for an offence under Section 212 IPC for having harboured Sivarasan, Suba and Nero in order to screen them from legal punishment knowing that they had committed murder of Rajiv Gandhi and others. They all have been convicted and sentenced. Vijayan (A-12) and Selvaluxmi (A-13) are also charged for offence under Section 6(1-A) of Wireless Telegraphy Act, 1933 for having unauthorised possession of unlicensed wireless transmitter used for transmitting messages by Sivarasan and Nero using code- sheets for such transmissions to other conspirators residing in Sri Lanka, namely, absconding accused Prabhakaran and Pottu Omman and they have been convicted and sentenced for this offence. Though in our view Vijayan (A-12) and Bhaskaran (A-14) have been rightly convicted and sentenced under these charges but these charges cannot stand against Selvaluxmi (A-13). All members of the household cannot be charged like this without more. A-13, being the wife of A-12, was living with her husband A-12 and merely on that account knowledge and intention cannot be attributed to her, particularly when no overt act is alleged against her. She is acquitted of all these charges and her conviction and sentence set aside.

Shanmugavadelu (A-15)"

130. The learned counsel, therefore, contended that in order for an accused to be a member of the conspiracy, it must be shown that there was enough evidence, that they also had knowledge of the conspiracy and if that was lacking, mere knowledge of existence of the conspiracy was not enough. In other words, the accused who is alleged to have involved in the conspiracy should also know the object of the conspiracy, not merely that there was a conspiracy. Even if we apply the said principles to the case on hand, we have CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 155 of 195 dealt with in extent so as to how apart from earlier meetings of the Appellants along with Asif and others prior to the demise of Asif, as from 14-15.01.2002 onwards, the participation of Appellants in the conspiracy was intense and every minute details of the act to be performed on 22.01.2002 was deliberated upon threadbare before its execution. Therefore, the deceased Zahid, deceased Salim, Sadakat, Imam Hussain Appellants Nasir, Aftab and others, participated in the conspiracy, were fully aware of what they were conspiring and the object of such conspiracy and the ultimate execution. Therefore, the said passage fully supports the case of the Prosecution rather than the Appellants.

131. Reliance was then placed on Bhagwan Singh (supra) in particular paragraphs 13 and 14. It related to the extent to which the handwriting expert's opinion can be relied upon. In fact in paragraph 13 of the said Judgment the contention was that the Prosecution fabricated evidence and with that preface the submission was made. However, while considering the submission in the middle of the said paragraph this Court has expressed the view as under: "In our view, however, reliance on Magan is rather misplaced in the contractual facts since no conviction is based on the opinion of the handwriting expert but admittedly it can be relied upon when supported by other items of internal and external evidence. The handwriting expert's opinion simply corroborates the circumstantial evidence and as such we are CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 156 of 195 unable to record our occurrence with the submissions of Mr. Singh on this score."

132. Having noted the above passage in the said Judgment, we have to point out that that was a case which solely depended upon circumstantial evidence. Secondly, the passage which we have extracted makes the position clear that handwriting expert's opinion can be relied upon when supported by other items of internal and external evidence. As has been exhaustively discussed by us in the earlier paragraphs, we have found that the handwriting expert's opinion on Exhibit-46/1 and other documents was only one piece of evidence in a voluminous documentary and other evidence, which has been let in by the Prosecution to support the charges levelled against the Appellant. Therefore, the said decision also does not support the case of the Appellant.

133. Reliance was placed upon the decision reported in Subash and Shiv Shankar (supra), in particular paragraphs 8 and 9 to contend that there was delay in holding Test Identification Parade so far as PW-62 was concerned and that there was no description made while identifying the photograph of deceased Zahid. It is true, in the said decision, while rejecting the TIP in respect of one of the accused this Court expressed serious doubts about the identification of the accused by the Witnesses in the TIP which was held three weeks CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 157 of 195 after the arrest of the accused and that there was no explanation. It must be stated that each case depends upon the peculiar facts of that case. In the case

on hand, we have noted that having regard to the magnitude of the offence committed, namely, the attack on the police force at the American Centre, where indiscriminate shooting was carried out by the assailants in which five policemen lost their life and several others got seriously injured. The further fact remains that before executing the attack on 22.01.2002, a rehearsal was held by Appellant Nasir along with the assailants on the previous days. Therefore, the witness who identified the Appellant, namely, PW-62 had the advantage of looking at the Appellant with some amount of anxiety as Appellant Nasir created a ruckus while parking the car on two occasions prior to the date of occurrence, namely, 22.01.2002. In such circumstances, it is difficult to apply the said decision to the facts of this case. That apart, PW-39 who identified Appellant Nasir and Aftab had known both of them earlier and, therefore, the identification of the Appellants cannot be controverted at all. We, therefore, do not find any scope to apply the said decision to the facts of this case.

134. Thus the various witnesses/facts which were all crucial to the case of the Prosecution as found in the confession of Appellant Nasir noted in sub-paragraphs (a) to (u) were all corroborated fully by other CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 158 of 195 evidence, with oral and documentary as well as material objects and, therefore, this question is also answered in the affirmative.

135. Question No. 8: Whether the offence charged against the Appellants for which the Appellants were proceeded against were conclusively proved ?

In the light of our discussion made for the questions 1 to 7, we have no hesitation in holding that the Appellants are guilty of the charges levelled against them as found proved except the charge under Section 27(3) of the Arms Act which we have held that cannot be maintained in the light of the decision of this Court reported in Dalbir Singh (supra), therefore, we hold that the Appellants are guilty of all the other charges as found proved against them by the Courts below.

136. Question No. 9: If the offence was made out against the Appellants as held by the Courts below whether the sentence of death can be held to be the appropriate punishment, if not, what is the punishment to be imposed ?

For answering the said question, it is necessary to note the charges framed against the Appellants. As many as 12 charges were levelled against the Appellants. As far as the last of the charge is concerned, as held by us, the same was not maintainable in the light of the decision of this Court in Dalbir Singh (supra) whereunder the very CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 159 of 195 Section 27(3) of the Arms Act was struck down as unconstitutional. As far as the rest of the charges are concerned, when we consider the charges under Sections 121, 121A, 122 read with 120B IPC, it relates to waging of war against the government of India or attempt to wage such war or abetting the waging of such war and conspiring for committing the said offences and for that purpose collecting arms, etc. with the intention of waging war against the State.

137. As held by us, the said charge has been conclusively proved. In this context it will be worthwhile to note the concept of waging of war against the State as has been explained in detail over a period of

time in the pre Independence era as well as the post-Independence era. An elaborate consideration of this concept has already been made by this Court in the decision reported in Navjot Sandhu @ Afsan Guru (supra). After making a detailed reference to the interpretation of the expression 'waging war' where reference has been made to various English and Indian Judgments both of pre-Independence era and post-Independence era, this Court has crystallized the concept as under in paragraphs 282 to 284: "282. On the analysis of the various passages found in the cases and commentaries referred to above, what are the highlights we come across? The most important is the intention or purpose behind the defiance or rising against the Government. As said by Foster, "The true criterion is *quo animo* did the parties assemble?" In other words the intention CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 160 of 195 and purpose of the warlike operations directed against the governmental machinery is an important criterion. If the object and purpose is to strike at the sovereign authority of the Ruler or the Government to achieve a public and general purpose in contradistinction to a private and a particular purpose, that is an important indicia of waging war. Of course, the purpose must be intended to be achieved by use of force and arms and by defiance of government troops or armed personnel deployed to maintain public tranquillity. Though the *modus operandi* of preparing for the offensive act against the Government may be quite akin to the preparation in a regular war, it is often said that the number of force, the manner in which they are arrayed, armed or equipped is immaterial. Even a limited number of persons who carry powerful explosives and missiles without regard to their own safety can cause more devastating damage than a large group of persons armed with ordinary weapons or firearms. Then, the other settled proposition is that there need not be the pomp and pageantry usually associated with war such as the offenders forming themselves in battle line and arraying in a warlike manner. Even a stealthy operation to overwhelm the armed or other personnel deployed by the Government and to attain a commanding position by which terms could be dictated to the Government might very well be an act of waging war.

283. While these are the acceptable criteria of waging war, we must dissociate ourselves from the old English and Indian authorities to the extent that they lay down a too general test of attainment of an object of general public nature or a political object. We have already expressed reservations in adopting this test in its literal sense and construing it in a manner out of tune with the present day. The Court must be cautious in adopting an approach which has the effect of bringing within the fold of Section 121 all acts of lawless and violent acts resulting in destruction of public properties, etc., and all acts of violent resistance to the armed personnel to achieve certain political objectives. The moment it is found that the object sought to be attained is of a general public nature or has a political hue, the offensive violent acts targeted against the armed forces and public officials should not be branded as acts of waging war. The expression "waging war" should not be stretched too far to hold that all the acts of disrupting public order and peace irrespective of their magnitude and CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 161 of 195 repercussions could be reckoned as acts of waging war against the Government. A balanced and realistic approach is called for in construing the expression "waging war" irrespective of how it was viewed in the long long past. An organised movement attended with violence and attacks against the public officials and armed forces while agitating for the repeal of an unpopular law or for preventing burdensome taxes were viewed as acts of treason in the form of levying war. We doubt whether such construction is in tune with the modern day perspectives and standards. Another aspect on which a clarification

is called for is in regard to the observation made in the old decisions that “neither the number engaged, nor the force employed, nor the species of weapons with which they may be armed” is really material to prove the offence of levying/waging war. This was said by Lord President Hope in *R. v. Hardie* in 1820 and the same statement finds its echo in many other English cases and in the case of *Maganlal Radhakishan v. Emperor* (AIR at p. 185). But, in our view, these are not irrelevant factors. They will certainly help the Court in forming an idea whether the intention and design to wage war against the established Government exists or the offence falls short of it. For instance, the firepower or the devastating potential of the arms and explosives that may be carried by a group of persons — may be large or small, as in the present case, and the scale of violence that follows may at times become useful indicators of the nature and dimension of the action resorted to. These, coupled with the other factors, may give rise to an inference of waging war.

284. The single most important factor which impels us to think that this is a case of waging or attempting to wage war against the Government of India is the target of attack chosen by the slain terrorists and conspirators and the immediate objective sought to be achieved thereby. The battlefield selected was the Parliament House complex. The target chosen was Parliament — a symbol of the sovereignty of the Indian republic. Comprised of peoples’ representatives, this supreme law-making body steers the destinies of a vast multitude of Indian people. It is a constitutional repository of sovereign power that collectively belongs to the people of India. The executive Government through the Council of Ministers is accountable to Parliament. Parliamentary democracy is a basic and inalienable feature of the Constitution. Entering CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 162 of 195 Parliament House with sophisticated arms and powerful explosives with a view to lay a siege to that building at a time when members of Parliament, members of the Council of Ministers, high officials and dignitaries of the Government of India gathered to transact parliamentary business, with the obvious idea of imperilling their safety and destabilising the functioning of the Government and in that process, venturing to engage the security forces guarding Parliament in armed combat, amounts by all reasonable perceptions of law and common sense, to waging war against the Government. The whole of this well-planned operation is to strike directly at the sovereign authority and integrity of our Republic of which the Government of India is an integral component. The attempted attack on Parliament is an undoubted invasion of the sovereign attribute of the State including the Government of India which is its alter ego. An attack of this nature cannot be viewed on the same footing as a terrorist attack on some public office building or an incident resulting in the breach of public tranquillity. The deceased terrorists were roused and impelled to action by a strong anti-Indian feeling as the writings on the fake Home Ministry sticker found on the car (Ext. PW-1/8) reveals. The huge and powerful explosives, sophisticated arms and ammunition carried by the slain terrorists who were to indulge in “fidayeen” operations with a definite purpose in view, is a clear indicator of the grave danger in store for the inmates of the House. The planned operations if executed, would have spelt disaster for the whole nation. A warlike situation lingering for days or weeks would have prevailed. Such offensive acts of unimaginable description and devastation would have posed a challenge to the Government and the democratic institutions for the protection of which the Government of the day stands. To underestimate it as a mere desperate act of a small group of persons who were sure to meet death, is to ignore the obvious realities and to stultify the wider connotation of the “expression of war” chosen by the drafters of IPC. The target, the obvious objective which has political and public dimensions

and the modus operandi adopted by the hard core “fidayeens” are all demonstrative of the intention of launching a war against the Government of India. We need not assess the chances of success of such an operation to judge the nature of criminality. We are not impressed by the argument that the five slain terrorists ought not to be “exalted” to the status of warriors participating in a war. Nor do we endorse the argument of the CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 163 of 195 learned Senior Counsel Mr Sushil Kumar that in order to give rise to the offence of waging war, the avowed purpose and design of the offence should be to substitute another authority for the Government of India. According to the learned counsel, the deprivation of sovereignty should be the pervading aim of the accused in order to bring the offence under Section 121 and that is lacking in the present case. We find no force in this contention. The undoubted objective and determination of the deceased terrorists was to impinge on the sovereign authority of the nation and its Government. Even if the conspired purpose and objective falls short of installing some other authority or entity in the place of an established Government, it does not in our view detract from the offence of waging war. There is no warrant for such truncated interpretation.”

138. A close reading of the above referred to paragraphs is sufficient for anyone to understand the concept and to apply the same in a given case in order to find out as to how the sentence can be imposed in such cases. Having read the above well laid down principles, we can cull out the following general principles to be applied:

- a) The most important is the intention and purpose behind the defiance or raging against the government.
- b) Though the modus operandi of preparing for the offensive act against the government may be quite akin to the preparation in a regular war, it is often said that the number of force, the manner in which they are arrayed, the arm and or equipments are immaterial.
- c) Even a limited number of persons who carry powerful explosives and missiles without regard to their own safety can cause more CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 164 of 195 devastating damage than a large group of persons armed with ordinary weapons or firearms.
- d) There need not be the pomp or pageantry usually associated with war such as the offenders forming themselves in battle line and arraying in a war-like manner.
- e) The Court must be cautious in adopting an approach which has the effect of bringing within the fold of Section 121 all acts of lawless near and violent acts resulting in destruction of public property, etc.
- f) The moment it is found that the object sought to be attained is of a great public nature or has a political hue the offensive violent act targeted against the armed force and public officials should not be branded as acts of ‘waging war’.

g) The expression 'waging war' should not be stretched too far to hold that all acts of disrupting public order and peace irrespective of their magnitude and repercussions could be reckoned as acts of 'waging war' against the government.

h) A balanced and realistic approach is called in construing the expression 'waging war' irrespective of how it was viewed in the long long past.

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i) An organized movement attended with violence and attacks against the public officials and armed forces while agitating for the repeal of an unpopular law or for preventing burdensome taxes were viewed as acts of treason in the form of 'waging war'.

j) Neither the number engaged nor the force employed nor the species of weapon with which they may be armed is really material to prove the offence of waging war.

k) The single most important factor should be to think that in a case that is being considered of waging or attempting to wage war against the Government of India, what is the target of attack chosen by the conspirators and the immediate objective sought to be achieved thereby.

l) The planned operations if executed what is the extent of disaster spelt out to the whole nation. Whether a war like situation lingering for days or weeks would have prevailed and such offensive acts of unimaginable description and devastation would have posed a challenge to the government and the democratic institutions for the protection of which the government of the day stands.

m) Was it mere desperate act of a small group of persons who were sure to meet with death is to ignore the obvious realities and to CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 166 of 195 stultify the wider connotation of the expression of war chosen by the drafters of IPC.

n) The undoubted objective and the determination of the offenders was it to impinge on the sovereign authority of the nation and its government.

139. After the said decision, we have a recent decision of this Court in Mohammed Ajmal Mohammad Amir Kasab (supra). Here again this Court had to deal with the offences under Sections 121, 121A read with 122, 120B. While analyzing the concept 'waging war' against the Government of India, this Court has explained the concept in the said decision. This Court has expressed as to how the expression Government of India should be understood in the context of a charge under Sections 121, 121A and 122. The relevant paragraphs are 537, 538, 540 and 543. We can carefully refer to paragraph 543, which reads as under:

“543. Coming back to the facts of the case in hand, we find that the primary and the first offence that the Appellant and his co-conspirators committed was the offence of waging war against the Government of India. It does not matter that the target assigned to the Appellant and Abu Ismail was CST Station (according to Mr Ramachandran, no more than a public building) where they killed a large number of people or that they killed many others on Badruddin Tayabji Marg and in Cama Hospital. What matters is that the attack was aimed at India and Indians. It was by foreign nationals. People were killed for no other reason than they were Indians; in case of foreigners, they were killed because their killing on Indian soil CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 167 of 195 would embarrass India. The conspiracy, in furtherance of which the attack was made, was, inter alia, to hit at India; to hit at its financial centre; to try to give rise to communal tensions and create internal strife and insurgency; to demand that India should withdraw from Kashmir; and to dictate its relations with other countries. It was in furtherance of those objectives that the attack was made, causing the loss of a large number of people and injury to an even greater number of people. Nothing could have been more 'in like manner and by like means as a foreign enemy would do'.”

140. Having noted the principles on waging of war as held by this Court in the above two decisions, when we apply those principles to the case on hand we find the following factors are relevant to be noted.

a) Of the 17 accused who were proceeded against Appellant Aftab, deceased Zahid and deceased Salim are all Pakistani nationals which is not in dispute.

b) We have found that Asif who had developed close contact with Appellant Aftab having joined Jehadi movement was in close contact with the leader of Hizbul MuZahideen Mr. Salahuddin and one Dr. Mushtaq Ahmad in Kashmir in the years 1991 to 1993.

c) Asif along with Appellant Aftab were undergoing punishment in Tees Hazari Court for such related offences under POTA/ TADA.

d) After his release from Tihar Jail when Asif came back to Calcutta in 1999 there was no repentance, instead his agenda in association with Appellant Aftab was to intensify his Jehadi CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 168 of 195 activities and for that purpose associated his childhood friend Appellant Nasir as has been brought in evidence in detail.

e) In pursuance of the said objective we have found out that Appellant Nasir, Aftab, Asif along with Zahid, Salim Sadakat, Hasan Imam, Abdullah and others formed a group and were in close contact with each other from the middle of 2001 and the various circumstances satisfactorily demonstrated before the Court by the Prosecution till the final act of commission of attack on the American Centre disclose that there was definite mindset in them to wreck vengeance against the state.

f) The activities of the deceased Asif immediately after the formation of their movement after 1999 along with Appellant Nasir and under the leadership of Appellant Aftab, wanted to make quick money by indulging in kidnapping activities and from the ill-gotten money procured arms and

ammunitions and organized a movement along with Pakistani nationals to wreck vengeance by developing an impression as though the Muslims in this country were not properly taken care by the State.

g) In that process, when Asif got killed on 08.12.2001, the intention of the members of the gang got further intensified and the prime accused Appellant Aftab who was the guiding factor for the other members of the gang felt that killing of Asif by the police is an CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 169 of 195 affront to their movement and that a serious revenge was called for against the police and the state. In this respect, the letter of Appellant Aftab assumes great significance. That apart the evidence of PW-39, younger brother of Asif as stated in his evidence that he had heard his brother discussing with Dr. Mushtaq Ahmad and Abdullah that Government of India was not considerate towards Muslims and therefore, the government should be taught a lesson.

h) A cumulative effect of the above factors apparently resulted in the Appellants along with the absconding accused and the deceased Zahid, Salim and Sadakat, who is now facing trial who were all determined to commit hazardous attack which would make the State feel the vulnerability of their actions.

i) In the course of the conspiracy the gang members made deliberations in consultation with Appellant Aftab through electronic communication namely e-mail as to which place is to be attacked and if attacked whether such attack would have serious repercussions on the State and the extent of disturbance it would create among the public at large.

j) The ultimate act committed namely, planned attack on the police force who were assigned the duty of providing security of the American Centre on 22.01.2002 at 6.30 a.m. was felt by the CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 170 of 195 assailants as the greatest achievement on their part which was celebrated by them on 24.01.2002 in the flat of Appellant Nasir.

k) It is also relevant to note that the Indian Government as a member of the United Nations is duty bound to provide necessary security to the foreign consulate officers located in this country by virtue of international treaties. Therefore, the decision of the Appellants along with the other gang members in having chosen the police security force posted outside the American Centre to launch their attack and having succeeded in their attempt, is yet another factor in this regard.

141. The above factors noted by us which have been found established in the case on hand in our considered opinion would go to show that the Appellants along with the absconding accused and Sadakat, who is now facing trial, really waged a war or attempted to wage a war against the Government of India, for which they all conspired together and thereby, committed the offence falling under Sections 121, 121A and 122 read with 120B IPC. Our conclusions are based on our findings as recorded below:

- From the evidence on record, we find that the intention of the accused collectively and individually was a defiant of raging attitude against the State.
- Though the number of accused were not many in number like CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 171 of 195 that of a manpower required in a battle field, the mindset of each of the accused was loaded with such animosity against the State and its machinery (viz) the police force, the act of the assailants at the spot virtually displayed the vicious mindset of all those who were behind it.
- Though the chosen assailants by the conspirators were only two in number, the vengeance with which they indulged in the attack at the spot (viz) the American Centre towards the police force and the extent of damage they caused demonstrated the diabolic mindset of all the conspirators in committing the crime. • Though the actual assailants were only two in number at the spot of occurrence, the execution of the assault, which resulted in the killing of five policemen and injury caused to around 13 number of personnel, as described by the eye-witnesses, disclosed the merciless conduct of the whole lot of accused. The scene of occurrence as stated by the Witnesses, make us feel as though it was like a battle field and a war like situation was created, though no pomp and pageantry usually associated with war was not present.
- This is not an offence due to an outcome of a lawlessness of a group of individuals who indulged in such a crime unaware of the damage and destruction it would cause. On the other hand, it CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 172 of 195 was an act committed with all preparation and with a determination to cause damage of unimaginable extent to men and material.
- The act indulged in by the accused cannot also be attributed to any public cause or public good in order to state that even though the target of attack was towards police force posted at American Centre, there was no hippocratic mindset behind such attack. • However, much one would attempt to mitigate the acts indulged in by the accused and the assailant it is difficult to comprehend that the accused did not intend to commit an offence of such high magnitude, but were only intended to resort to a simple revenge. On the other hand, the intent and purpose of the attack was to create an indelible mark in the mind of the State that their group can go to any extent when it comes to the question of implementing their wrong perceptive Jehadi movement. • The target of attack chosen after considerable deliberation by the conspirators, namely, the American Centre and the police force posted there was sufficient to demonstrate that once the attack is executed, the State Machinery should realise the vulnerability of the group committing such offence who cannot be ignored for all time to come.
- We find that the object of the conspirators was to create a panic CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 173 of 195 in the mind of the public at large and a horrendous threat to be felt by the State about the accused/assailants and all those who are behind such conspiracy. The consequence of such an attack also conveys an impression on the State to be on the alert always to face such and even more intense attacks in future which would pose a constant challenge to the State and the democratic Constitution.

- In the ultimate analysis, the act of the accused/assailants was not a mere desperate act of a small group, but was an act of higher magnitude with a clear object and determination to impinge on the SOVEREIGN AUTHORITY of the Nation and its Government.

142. Our detailed discussion of the charges found proved and based on the medical evidence it was sufficiently established that in the attack made by the Appellants along with the absconding accused and Sadakat at American Centre on 22.01.2002 had killed as many as five police personnel and injured 13 number of police personnel and other persons. Such offence committed and found proved against them certainly constitute offences falling under Sections 302, 307 333 read with 120B IPC. Similarly, the other offences which were found proved against the Appellants, namely, the offence of forgery falling under Sections 467, 471 read with 468 read with Section 120B of IPC were also proved.

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143. We are also convinced that the findings of the trial Court as upheld by the High Court in respect of the offences charged against the Appellant under Section 427 read with Section 120B IPC was also proved. The offences found proved against the Appellant for having acquired and possessed firearm ammunition AK series rifles pistol 7.62 bore ammunition in contravention of Sections 3 and 7 punishable under Section 25(1) of the Arms Act read with 120B IPC as well as punishable under Section 27(2) of the Arms act read with 120B IPC were also proved.

144. Having reached the conclusion, when we come to the imposition of sentence the trial Court imposed the punishment of death sentence for offences under Sections 121A, 121, 122 of IPC and Sections 302, 307, 333, 467, 471 and 468 IPC read with Section 120B of IPC and other punishments for offences under Sections 25(1A), 27(2), and 27(3) of the Arms Act read with Section 120B of IPC. On the question of sentencing, it will be useful to refer to certain decisions of this Court. In the decision reported in State of Uttar Pradesh vs. Sanjay Kumar – (2012) 8 SCC 537, the sentencing policy has been explained in paragraph 21 which reads as under: “21. Sentencing policy is a way to guide judicial discretion in accomplishing particular sentencing. Generally, two criteria, that is, the seriousness of the crime and the criminal history of CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 175 of 195 the accused, are used to prescribe punishment. By introducing more uniformity and consistency into the sentencing process, the objective of the policy, is to make it easier to predict sentencing outcomes. Sentencing policies are needed to address concerns in relation to unfettered judicial discretion and lack of uniform and equal treatment of similarly situated convicts. The principle of proportionality, as followed in various Judgments of this Court, prescribes that, the punishments should reflect the gravity of the offence and also the criminal background of the convict. Thus, the graver the offence and the longer the criminal record, the more severe is the punishment to be awarded. By laying emphasis on individualised justice, and shaping the result of the crime to the circumstances of the offender and the needs of the victim and community, restorative justice eschews uniformity of sentencing. Undue sympathy to impose inadequate sentence would do more harm to the public system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats.”

145. In another recent decision of this Court in Alister Anthony Pareira vs. State of Maharashtra - AIR 2012 SC 3802, the principles have been stated thus in paragraphs 70 and 71:

“70. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The Courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the Court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

71. The principle of proportionality in sentencing a crime-doer is well entrenched in criminal jurisprudence. As a matter of CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 176 of 195 law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime- doer. The Court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

146. In this context, we can also refer to yet another decision of this Court in Mohd. Arif vs. State (NCT of Delhi) - 2011 13 SCC 621 paragraphs 211 and 212 are relevant which are as under: “211. No other point was argued before us at the instance of the defence. That leaves us with the question of punishment. The Trial Court awarded the death sentence to the Appellant Mohd. Arif alias Ashfaq for the offence under Section 121 IPC for waging war against the Government of India. Similarly, he was awarded death sentence for the offence under Section 120-B read with Section 302 IPC for committing murder of Naik Ashok Kumar, Uma Shankar and Abdullah Thakur inside Red Fort on 22-12-2000. For the purpose of the sentences, the other convictions being of minor nature are not relevant. On a reference having been made to it, the High Court ultimately confirmed the death sentence. The High Court also concurred with the finding of the Trial Court that this was a rarest of the rare case. The High Court has observed that the counsel appearing for him did not highlight any mitigating circumstance justifying the conversion of death sentence to life imprisonment perhaps because the learned counsel was conscious of the futility of the submission.

212. The High Court specifically found that the accused had hatched a conspiracy to attack the Indian Army stationed inside the national monument for protecting it from any invasion by the terrorists and had executed also that conspiracy with the help of his other associate militants and in that process they had killed three army jawans and more could also have lost their lives but for the immediate retaliation by the members of the quick reaction team of the army. In that view, the High Court concurred with the finding of this being a rarest of the rare case. The question is whether we should CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 177 of 195 give the same verdict in respect of the death sentence.”

147. While considering the question of sentence we feel that the various factors taken into account by this Court in the case of Mohammed Ajmal Mohammad Amir Kasab (supra), in paragraphs 555 and 556 would be more relevant. The same are as under: “555. We are unable to accept the

submission that the Appellant was a mere tool in the hands of the Lashkar-e- Toiba. He joined the Lashkar-e-Toiba around December 2007 and continued as its member till the end, despite a number of opportunities to leave it. This shows his clear and unmistakable intention to be a part of the organisation and participate in its designs. Even after his arrest he regarded himself as a “watan parast”, a patriotic Pakistani at war with this country. Where is the question of his being brainwashed or acting under remote control? We completely disagree that the Appellant was acting like an automaton. During the past months while we lived through this case we have been able to make a fair assessment of the Appellant’s personality. It is true that he is not educated but he is a very good and quick learner, has a tough mind and strong determination. He is also quite clever and shrewd. Unfortunately, he is wholly remorseless and any feeling of pity is unknown to him. He kills without the slightest twinge of conscience. Leaving aside all the massacre, we may here refer only to the casualness with which the Appellant and his associate Abu Ismail shot down Gupta Bhelwala and the shanty-dwellers Thakur Waghela and Bhagan Shinde at Badruddin Tayabji Marg; the attempt to break into the wards of Cama Hospital to kill the women and children who were crying and wailing inside; and the nonchalance with which he and Abu Ismail gunned down the Police Officer Durgude on coming out of Cama Hospital.

556. The saddest and the most disturbing part of the case is that the Appellant never showed any remorse for the terrible things he did. As seen earlier, in the initial weeks after his arrest he continued to regard himself as a “watan parast”, a patriotic Pakistani who considered himself to be at war with this country, who had no use for an Indian lawyer but needed CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 178 of 195 a Pakistani lawyer to defend him in the Court. He made the confessional statement before the Magistrate on 17-2-2009, not out of any sense of guilt or sorrow or grief but to present himself as a hero. He told the Magistrate that he had absolutely no regret for whatever he had done and he wanted to make the confession to set an example for others to become fidayeen like him and follow him in his deeds. Even in the course of the Trial he was never repentant and did not show any sign of contrition. The Judge trying him had occasion to watch him closely and has repeatedly observed about the lack of any remorse on the part of the Appellant. The High Court, too, has noticed that the Appellant never showed any remorse for the large-scale murder committed by him. This, to our mind, forecloses the possibility of any reform or rehabilitation of the Appellant. The alternative option of life sentence is thus unquestionably excluded in the case of the Appellant and death remains the only punishment that can be given to him.”

148. A decision of this Court of recent times on the question of sentence is reported in Ramnaresh and Others vs. State of Chhattisgarh – (2012) 4 SCC 257. The principles laid down therein have been summarized as under in paragraphs 77 and 78: “77. While determining the questions relatable to sentencing policy, the Court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence. Principles (1) The Court has to apply the test to determine, if it was the “rarest of rare” case for imposition of a death sentence.

(2) In the opinion of the Court, imposition of any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice. (3) Life imprisonment is the rule and

death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 179 of 195 nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

78.....It is difficult to state it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the Court may consider in its endeavour to do complete justice between the parties.”

149. One other recent decision on imposition of death penalty is reported in State of Maharashtra vs. Goraksha Ambaji Adsul – (2011) 7 SCC 437. Paragraph 33 is relevant which reads as under: “33. The Constitution Bench Judgment of this Court in Bachan Singh has been summarised in para 38 in Machhi Singh v. State of Punjab and the following guidelines have been stated while considering the possibility of awarding sentence of death: (Machhi Singh case, SCC p. 489) “(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the ‘offender’ also requires to be taken into consideration along with the circumstances of the ‘crime’.

(iii) Life imprisonment is the rule and death sentence is an exception. ... death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 180 of 195 circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.”

150. On the question of sentence, we can make useful reference to recent decision of this Court Sanjay Kumar (supra) wherein after referring to the earlier decisions reported in Swamy Shraddananda (2) vs. State of Karnataka - (2008) 13 SCC 767, Rameshbhai Chandubhai Rathod (2) vs. State of Gujarat - (2011) 2 SCC 764 and Brajendrasingh vs. State of Madhya Pradesh - (2012) 4 SCC 289, observed as under paragraph 24:

"24. In view of the above, we reach the inescapable conclusion that the submissions advanced by the learned counsel for the State are unfounded. The aforesaid Judgments make it crystal clear that this Court has merely found out the via media, where considering the facts and circumstances of a particular case, by way of which it has come to the conclusion that it was not the "rarest of rare cases", warranting death penalty, but a sentence of 14 years or 20 years, as referred to in the guidelines laid down by the States would be totally inadequate. The life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years, rather it always meant as the whole natural life. This Court has always clarified that the punishment so awarded would be subject to any order passed in exercise of the clemency powers of the President of India or the Governor of the State, as the case may be. Pardons, reprieves and remissions are granted in exercise of prerogative power. There is no scope of judicial review of such orders except on very limited grounds, for example, non-application of mind while passing the order; non-consideration of relevant material; or if the order suffers from arbitrariness. The power CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 181 of 195 to grant pardons and to commute sentences is coupled with a duty to exercise the same fairly and reasonably. Administration of justice cannot be perverted by executive or political pressure. Of course, adoption of uniform standards may not be possible while exercising the power of pardon. Thus, such orders do not interfere with the sovereign power of the State. More so, not being in contravention of any statutory or constitutional provision, the orders, even if treated to have been passed under Article 142 of the Constitution do not deserve to be labelled as unwarranted. The aforesaid orders have been passed considering the gravity of the offences in those cases that the accused would not be entitled to be considered for premature release under the guidelines issued for that purpose i.e. under the Jail Manual, etc. or even under Section 433-A CrPC."

151. Sentencing is a delicate task requiring an interdisciplinary approach and calls for special skills and talents. A proper sentence is the amalgam of many factors, such as, the nature of offence, circumstances – extenuating or aggravating – of the offence, prior criminal record of the offender, age and background of the offender with reference to education, home life, sobriety, social adjustment, emotional and mental condition, the prospects for his rehabilitation etc. The above passage can be found in Ratanlal & Dhirajlal's Law of Crimes, 26th Edition at page 185 on the topic 'Of Punishments'.

152. We also keep in mind that under Section 121 for the offence of waging or attempting to wage war or abetting waging of war against the Government of India, the punishment provided is with death or imprisonment for life and also liable to imposition of fine. We have CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 182 of 195 also noted that under Section 354(3) of Cr.P.C., when the conviction is for an offence punishable with death or in the alternative with imprisonment for life or imprisonment for term of years, the Judgment should state the reasons for the sentence awarded and in the case of sentence of death the special reasons for awarding such sentence.

153. Having noted the above decisions on the question of sentence we formulate the following fundamental principles to be borne in mind while dealing with the sentence to be imposed in respect of crimes committed of such grotesque nature.

- 1) The sentence to be awarded should achieve twin objectives
 - a) Deterrence
 - b) Correction
- 2) The Court should consider social interest and consciousness of the society for awarding appropriate punishment.
- 3) Seriousness of the crime and the criminal history of the accused is yet another factor.
- 4) Graver the offence longer the criminal record should result severity in the punishment.
- 5) Undue sympathy to impose inadequate sentence would do more harm to the public
- 6) Imposition of inadequate sentence would undermine the public confidence in the efficacy of law and society cannot endure such threats.

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154. In cases of this nature where charges under Sections 121, 122, 121A read with 120B IPC as well as 302 IPC are involved, other principles should also be kept in mind, namely: A) Most important factor should be the intention and purpose behind the waging of war against the State should be ascertained B) The modus operandi adopted which involved mobilization of men materials such as arms and ammunitions indulging in serious conspiracy over a period of time are another relevant factor C) It will not depend upon the number of persons – even limited persons can indulge in more harmful crime than large crowd of persons could do.

D) There need not be pomp and pageantry like a battle field. E) Not all violent behaviour would fall within the prescription of waging war as stipulated under Sections 121, 121A, 122 read with 120B.

F) The object sought to be achieved should be directed against the sovereignty of the State and not merely commission of crime even if it is of higher velocity.

G) The concept of ‘waging war’ should not be stretched too far.

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H)

A balanced and realistic approach should be maintained while

construing the offence committed and find out whether it would amount to waging of war against the State I) Mere organized movement with violence without any intention of acting against the interest of the nation has to be examined. J) Neither the number engaged nor the power employed nor the arms used can be the criteria.

K) It should be seen as to what is the purpose behind the choosing of a target of attack L) When a planned operation is executed, what was the extent of disaster resulted, is to be seen M) It is to be seen whether it is a mere desperate act of a small group of persons who indulged in the crime.

N) It must be seen whether the undoubted objective and determination of the offender was it to impinge on the sovereignty of the nation O) In this context the expansive definition of government of India should be understood

155. Having thus found that the Appellants have committed the offences for which they are charged, except the charge under Section 27(3) CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 185 of 195 of the Arms Act, we have also concluded that the all the offences committed by the Appellants are of a very high magnitude and it has created an indelible scar especially when the offence of such nature has been committed with the support of foreign nationals of the neighbouring country. Therefore, there is every justification in the State machinery in having proceeded against the Appellants and other accused for the offences under Sections 121, 121A, 122 read with 120B IPC as well as the charges under Sections 302, 307, 333 read with 120B IPC. The magnitude of the offences, the manner in which it was carried out, the disastrous effect it caused which resulted in loss of life of five police personnel apart from seriously injuring around 13 number of police personnel and other civilians, the animus with which the offence came to be committed were all factors which persuaded the Courts below to hold that the extreme punishment of DEATH should be awarded for the Appellants. We, however, gave a serious thought and consideration to the nature of punishment to be imposed on the Appellants. While doing so, we find that from the year 1999 after the release of Asif from Tihar Jail where he developed close contact with Appellant Aftab and whereafter when he came to Calcutta, the evil desire was formulated for which purpose the assistance of Appellant Nasir was also taken by luring him with sustained income for him. Though we could CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 186 of 195 notice that at the time when Appellant Nasir joined hands with Asif, his involvement in such serious activities affecting the society was not existing, after associating himself with Asif, he was definitely aware of the nature of activities indulged in by Asif along with Aftab and others. Even on his own self, it was revealed that he was aware that in 1991 Asif went to Kashmir and joined Jehadi movement. In spite of such knowledge about the involvement of Asif in such unlawful activities, affecting the nation as a whole, when he gained further knowledge about his involvement and association with persons like Appellant Aftab and other Jehadis, it did not occur to him to detach himself from the association of Asif. On the other hand, when in the initial stages of his re-union with Asif, Appellant Nasir was introduced to Appellant Aftab, Zahid, Salim, Sadakat, Hasan Imam and others over a period of time, it has come out that knowing full well of the illegal activities of the associated accused, Appellant Nasir continued to join hands along with them in executing very many tasks assigned to him by Asif

and Aftab till the demise of Asif and thereafter by Appellant Aftab who was in constant touch with Appellant Nasir and other accused by passing on messages through email. In fact, Aftab was called by the gang members as 'Bhaisahab' signifying that he was leading the whole group of the conspirators.

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156. Having noted the extent of participation of Appellant Nasir and Aftab in detail in the earlier part of our Judgment, we are convinced that while the role of Appellant Aftab is of very high magnitude, the role of Appellant Nasir is slightly lesser in degree as compared to that of Appellant Aftab, though the magnitude of the crime committed by both of them along with the other accused cannot be differentiated amongst them. In the light of our assessment relating to the nature of involvement of Appellant Nasir who was mainly acting based on the directions of Appellant Aftab and other accused, on many occasions he also played a key role, such as in the matter of arranging for fake passports, getting premises for the gang members to hold their meetings for conspiracy, accommodating the arms and ammunitions brought by other members in pursuit of their common object, arranging for the transportation of other accused to the city Calcutta, i.e. the place of occurrence and also by drawing the required sketch for the movement of co-accused to carry out the operation to be executed at the targeted place (viz) American Centre. We must state that based on the evidence on record, we have found that Appellant Aftab, though was operating behind the screen, he was the brain behind the whole scene of occurrence. He was the mastermind and schemed it in such a way to make it appear as though he had no role to play but in CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 188 of 195 reality he formulated the evil design and by using Asif, Appellant Nasir, Zahid, Salim, Sadakat and the rest of the conspirators tow in line with him and executed the inferno (Scene of Horror) successfully to the detriment of the State. Therefore, while the involvement of Appellants Aftab and Nasir in respect of the offences for which they were charged and found proved are devilish, diabolic, horrendous, vicious, wicked and its magnitude cannot be lessened on any account in our considered opinion, the role of Appellant Nasir was always a shade lesser than what can be attributed to Appellant Aftab.

157. Having regard to our above conclusion while at the same time in our view the nature of crime namely, the attack on the police force posted at the American Centre on 22.01.2002 at 6.30 a.m. in which five police personnel were killed and around 13 number of police personnel and other civilians were grievously injured apart from causing damage to the public property which definitely constituted the offences falling under Sections 121, 121A, 122, 302, 307, 333 read with 120B as well as other provisions of IPC and of Arms Act, it must be stated that this case cannot be equated with the case in Navjot Sandhu @ Afsan Guru (supra) or the one dealt with by this Court relating to Mohammed Ajmal Mohammad Amir Kasab (supra). Similarly, in Mohd. Arif @ Ashfaq vs. State CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 189 of 195 (NCT of Delhi) – (2011) 13 SCC 621, the facts relating to attack on Red Fort were different from the present case and hence cannot be used for the purpose of deciding the sentence to be imposed on the accused. Therefore, even while holding that the charges found proved against the Appellant are of grave in

nature, when it comes to the question of sentence we wish to hold that the imposition of death penalty is not warranted in the facts and circumstances of the case though it calls for other deterrent punishment.

158. In this context, we wish to follow our earlier decision wherein we have referred to the decision reported in Gopal Vinayak Godse vs. The State of Maharashtra and others – AIR 1961 SC 600 and applying Section 45 IPC which defines life to mean the life of a human being unless the contrary appears from the context, the Appellant Aftab deserves to be imprisoned for life for the entirety of his life while in the case of Appellant Nasir he can be imposed with a life imprisonment for a minimum period of 30 years. For reaching our above conclusions, we can refer to the line of cases on this aspect which we have noted in detail in the decisions reported in Sandeep vs. State of Uttar Pradesh – (2012) 6 SCC 107, paragraph 72, and Mohinder Singh vs. State of Punjab - (2013) 3 SCC 294, paragraph 40, which reads as under:

CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 190 of 195 Paragraph 72 of Sandeep (supra) “72. It is, therefore, well settled that awarding of life sentence is the rule, death is an exception. The application of “the rarest of the rare case” principle is dependent upon and differs from case to case. However, the principles laid down earlier and restated in the various decisions of this Court referred to above can be broadly stated that a deliberately planned crime, executed meticulously in a diabolic manner, exhibiting inhuman conduct in a ghastly manner, touching the conscience of everyone and thereby disturbing the moral fibre of society would call for imposition of capital punishment in order to ensure that it acts as a deterrent.” Paragraph 40 of Mohinder Singh (supra)

40. Be that as it may. When we come to the question of applying the various principles culled out from the decisions right from the Constitution Bench decision in Bachan Singh right up to the case of Mohd. Ajmal Amir Kasab as held by my learned Brother P. Sathasivam, J. for the various reasons referred to therein, we find that the case still does not fall within the category of the “rarest of the rare case” though it calls for a stringent punishment. Therefore, while modifying the sentence from one of death penalty to that of life imprisonment till the end of his life we apply the earliest decision of this Court in Gopal Vinayak Godse v. State of Maharashtra wherein this Court held in para 5 as under: (Gopal Vinayak case, AIR p. 603) “5. ... It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words ‘imprisonment for life’ for ‘transportation for life’ enable the drawing of any such all-embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person’s natural life.” The said principle was followed subsequently in Mohd. Munna v. Union of India, SCC p. 426, para 15.” CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 191 of 195

159. In the light of our above conclusions, while we do not find any merits in these appeals and while dismissing the appeals and confirming the guilt of all the charges found proved against both the Appellants by the trial Court, as confirmed by the High Court, except the charge under Section 27(3) of the Arms Act which alone is set aside. For the offences which have been found proved and

confirmed in these appeals against the Appellants, while for the Appellant Nasir in Criminal Appeal No.1240-41 of 2010 the punishment of death for the offence under Sections 121, 121A, 122 read with 120B IPC is modified as one of life and we hold that he should undergo Rigorous Imprisonment for a minimum period of 30 years without any remission. In so far as Appellant Aftab in Criminal Appeal No.1242-43 of 2010 is concerned for the offences found proved under Sections 121, 121A, 122 read with 120B IPC, the punishment of death shall stand modified and he shall undergo imprisonment of life till the end of his life. All the other sentences imposed on the Appellants are maintained which as held by the Courts below shall run concurrently.

160. Before parting with the case, we must place on record and appreciate the work of the Investigation Team headed by PW-123- Anil Kar. On the very date of the incident when he was entrusted with the task of investigation, he swung into action and from then CRL. A.NOS.1240-1241 OF 2010 & CRL. A.NOS.1242-1243 OF 2010 192 of 195 onwards, we found that he relentlessly carried on the investigation with the wholehearted assistance of each one of his team members and they deserve appropriate encouragement in their services.

161. These appeals are, therefore, partly allowed to the extent that the imposition of death penalty for offence under Section 27(3) of the Arms Act is set aside and imposition of death penalty for offences under Sections 121, 121A, 122 read with 120B IPC is modified into one of life and in the case of the Appellant Aftab such life imprisonment should be suffered by him till the end of his life and in the case of Appellant Nasir life imprisonment should be for a minimum period of 30 years without any remission. Appeals stand disposed of on the above terms.

.....J.

[A.K. Patnaik]J.

[Fakkir Mohamed Ibrahim Kalifulla] New Delhi;

May 21, 2014.

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