HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

D.B. Criminal Death Reference No. 2/2020

State Of Rajasthan, Through P.P.

----Petitioner

Versus

Saifur @ Saifur Rehman Ansari S/o Abdul Rehman Ansari, Aged About 32 Years, R/o 246, Badarka, Ps Kotwali Distt. Azamgarh, (Uttar Pradesh)

----Respondent

Connected With

D.B. Criminal Appeal (DB) No. 216/2022

Saifur @ Saifur Rehman Ansari S/o Abdul Rehman Ansari, R/o 246, Badarka, Police Station Kotwali, District Azamgarh , Uttar Pradesh Presently Confined In Central Jail, Jaipur

----Petitioner

Versus

State Of Rajasthan, Through Its Public Prosecutor

----Respondent

D.B. Criminal Appeal (DB) No. 217/2022

1. Mohd. Sarvar Azmi, S/o Mohd. Haneef, R/o Post Chandpatti, Tehsil Sagri, Ps Ronapar, District Azamgarh, Uttar Pradesh (Presently Confined In Central Jail, Jaipur)
2. Mohd. Saif S/o Shadab Ahmed, R/o Gram Post Sanjarpur Tehsil Nizamabad, Ps Saraimeer District Azamgarh, Uttar Pradesh (Presently Confined In Central Jail, Jaipur)
3. Mohd. Salman S/o Shakeel Ahmed, R/o Gram Post Sanjarpur, Tehsil Nizamabad Ps Saraimeer, District Azamgarh, Uttar Pradesh ((Presently Confined In Central Jail, Jaipur)

----Petitioners

Versus

State Of Rajasthan, Through Its Public Prosecutor

----Respondent

D.B. Criminal Appeal (DB) No. 252/2022

State Of Rajasthan, Through PP

----Petitioner

Versus

1. Shri Shahbaz Hussain @ Shahbaz Ahmed @ Shanu S/o Shri Mumtaz Ahmad, Aged About 42 Years, R/o Mohalla Katra Bazar, Bahdohi (Up) At Present R/o House No. 155/117(2) Hata Sulema Kadar, Molviganj P.s. Naka Hindoli, Lucknow. U.p.

2. Shri Mohammad Saif @ Kairion S/o Shri Shadab Ahmad, Aged About 32 Years, R/o Village Sanjrpur, P.s. Saraimeer, Distt. Azamgarh (Up)

3. Shri Mohammad Sarver Azami @ Rajhans Yadav S/o Shri Mohammad Hanif, Aged About 34 Years, R/o Chand Patti Bazar, P.S. Ronapar Zila, Distt. Aazamgarh, (Up)

4. Shri Saifur @ Saifurrehman Ansari S/o Shri Abdul Rehman Ansari, Aged About 32 Years, R/o 246, Badarka, P.s. Kotwali, Distt. Aazamgarh (Up)

5. Shri Mohmmad Salman S/o Sakil Ahamad, Aged About 26 Years, R/o Sanjarpur, P.s. Saraimeer, Distt. Azamgarh (Up)

----Respondents

For State(s) : Ms. Rekha Madnani, Addl.G.A. assisted by Ms. Savita Nathawat

For Accused(s) : Ms. Nitya Rama Krishnan, Sr. Adv. Assisted by Mr. Vibhor Jain, Mr. Shivam Sharma, Mr. Mayank Sapra, Mr. Syed Saddat Ali, Mr. Aswath Sitaraman, Mr. Raghav Tankha, Ms. Stuti Rai

Mr. Shri Singh, Mr. Siddarth Satija, Mr. Rajat Kumar, Ms. Tusharika Mattoo, Ms. Ipsita Agarwal, Mr. Akash Sachan, Ms. Zehra Khan, Mr. Syed Saddat Ali

Mr. Vishal Gosain, Ms. Seema Mishra, Ms. Deeksha Dwivedi, Mr. Harsh Bohra, Mr. Syed Saddat Ali

Mr. Ashok Agarwal, Mr. Nishant Vyas, Mr. Mujahid Ahmed, Ms. Aditi Sarswat

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HON'BLE MR. JUSTICE PANKAJ BHANDARI
HON'BLE MR. JUSTICE SAMEER JAIN

Judgment

RESERVED ON :: 03/11/2022

PRONOUNCED ON :: 29/03/2023

(Per Hon'ble Pankaj Bhandari, J.)

D.B. Criminal Death Reference No.2/2020, D.B. Criminal Appeal Nos.216/2022, 217/2022, 252/2022:

1. Present D.B. Criminal Death Reference No.2/2020 has been moved by Court of Special Judge, Jaipur Bomb Blast Cases, Jaipur for confirmation of Death Sentence awarded by the Court vide judgment of conviction dated 18.12.2019 and order of sentence dated 20.12.2019 to accused Mohammad Saifurrehman, in Sessions Case No.2A/2010 – State Versus Mohammad Saif & Ors., FIR No.118/2008, Police Station, Kotwali, Jaipur City (North). Aggrieved by the judgment of conviction dated 18.12.2019 and order of sentence dated 20.12.2019 passed in Sessions Case No.2A/2010, accused Mohammad Saifurrehman preferred D.B. Criminal Appeal No.216/2022, Mohammad Sarvar Azmi @ Rajhans Yadav, Mohammad Salman and Mohammad Saif preferred D.B. Criminal Appeal No.217/2022 against the judgment of conviction dated 18.12.2019 and order of sentence dated 20.12.2019 passed in Sessions Case Nos.2/2010 and 2A/2010. By the aforesaid judgment dated 18.12.2019 Shahbaz Hussain @ Shahbaz Ahmed @ Shanu was acquitted from the charges levelled against him. State of Rajasthan has also preferred D.B. Criminal Appeal No.252/2022 against the acquittal of Shahbaz Hussain @ Shahbaz Ahmed @ Shanu and for enhancement of sentence of other accused. Accused Mohammad Saifurrehman has been acquitted for the offence under Sections 4, 5 & 6 of the Explosive Substances Act, 1908 and Sections 3/10, 20 and 38 of the Unlawful Activities Act, 1967 and other accused namely

Mohammad Sarvar Azmi, Mohammad Saif and Mohammad Salman were acquitted for the offences under Sections 4 & 5 of the Explosive Substances Act, 1908 read with Section 120-B IPC, Section 6 of the Explosive Substances Act, 1908 and Sections 3/10, 20 and 38 of the Unlawful Activities Act, 1967. Accused Mohammad Saifurrehman Ansari, Mohammad Saif, Mohammad Salman and Mohammad Sarvar Azmi were convicted for the following offences:

Mohammad Saifur @ Saifurrehman:-

Offence	**Sentence**	**Fine**	**Sentence in default of fine**
U/s 302 IPC	Death penalty	Rs.50,000/-	
U/s 307 IPC	7 years R.I.	Rs.10,000/-	3 months
U/s 326 IPC	5 years R.I.	Rs.10,000/-	3 months
U/s 324 IPC	3 years R.I.	Rs.5,000/-	3 months
U/s 427 IPC	1 year S.I.	Rs.1,000/-	3 months
U/s 121-A IPC	Life Imprisonment	Rs.50,000/-	3 months
U/s 124-A IPC	Life Imprisonment	Rs.50,000/-	3 months
U/s 153-A IPC	3 years R.I.	Rs.50,000/-	3 months
U/s 3 of Explosive Substances Act, 1908	Life Imprisonment	Rs.50,000/-	3 months
U/s 13 of Unlawful Activities (Prevention) Act, 1967	7 years R.I.	Rs.50,000/-	3 months
U/s 16(1)A of Unlawful Activities (Prevention) Act, 1967	Death Penalty	Rs.50,000/-	
U/s 18 of Unlawful Activities (Prevention) Act, 1967	Life Imprisonment	Rs.50,000/-	3 months

All sentences were directed to run concurrently.

Mohammad Sarvar Azmi @ Rajhans Yadav, Mohammad Saif @ Karain and Mohammad Salman:-

Offence	**Sentence**	**Fine**	**Sentence in default of fine**
U/s 302/120-B, 307/120-B, 121-A,124-A/120-B IPC, Section 3 of Explosive Substances Act, 1908 r/w Section 120-B IPC	Life Imprisonment	Rs.50,000/-	3 months
U/s 326/120-B IPC	5 years R.I.	Rs.10,000/-	3 months
U/s 324/120-B IPC	3 years R.I.	Rs.5,000/-	3 months
U/s 153-A/120-B IPC	3 years R.I.	Rs.50,000/-	3 months
U/s 13 of Unlawful Activities (Prevention) Act, 1967	7 years R.I.	Rs.50,000/-	3 months
U/s 18 of Unlawful Activities (Prevention) Act, 1967	Life Imprisonment	Rs.50,000/-	3 months

All sentences were directed to run concurrently.

2. Succinctly stated the facts of the case are that a spate of explosions took place in the crowded market, places of the walled pink city of Jaipur on Tuesday, May 13, 2008 within a short span of 20 minutes, resulting into death of 71 persons and injuries to 185 persons. In each of the blast sites, the bombs were planted on brand new bicycles, which were placed at carefully selected crowded market places near temples and police stations. In total 8 FIRs were registered, 4 FIRs were registered at Police Station

Kotwali and 4 FIRS were registered at Police Station Manak Chowk.

3. The present case pertains to FIR No.118/2008, Police Station Kotwali, Jaipur City. The author of the FIR was Madanlal Saini (PW-83). The place of incidence of blast in this FIR is Phool walon ka khanda, Choti Chaupar. The total number of persons injured are 15 and those who died in the blast are 2.

4. On next day of the incident i.e. 14.05.2008, an Email was received by TV Channels and News Agencies- India TV and Aaj Tak by which Indian Mujaheedeen Organization took the responsibility of serial bomb blasts in Jaipur. Along with the Email, one video clip was also received, which pertained to bicycle and a bag on that bicycle. In the first part of the Email, there is mention about the bicycle with frame No.129489, which was placed near Police Station, Kotwali at Chhoti Chaupar. The bicycle with the same frame number was seized from the blast site near Police Station, Kotwali in a damaged condition in FIR No.117/2007. Exactly 4 months after the Jaipur blasts i.e. on 13.09.2008, there were serial bomb blasts at 5 places in Delhi. On 19.9.2008, a Team of Delhi Police Special Cell raided a Batla House Flat in Jamia Nagar in South Delhi following a tip-off that terrorists allegedly involved in the Delhi serial bomb blasts were holed up there. In the operation, two terrorists, Chhota Sajid and Aatif Ameen were killed and one Police Officer, Inspector-Mohan Chand Sharma expired. Accused Mohammad Saif was arrested from the flat. On 02.10.2008 accused Mohammad Saif made a disclosure statement which was recorded by the Delhi Police. Saif admitted his active role in the Jaipur bomb blast case and also named 9 other accused and their direct involvement in planting the bombs at various

places in Jaipur. In the disclosure statement, it was mentioned that all these 10 accused had come in groups on 11th May 2008 to do reconnaissance "Reki" of the places where they intended to plant bombs and returned on the same day. On 12thMay, 2008 they made bombs at Batla House and on 13th May, 2008 they all came to Jaipur in a Volvo Bus in different groups and returned back on the same day in the evening by Ajmer Shatabdi Train in fake Hindu names.

5. Mohammad Saifurrehman was identified in test identification parade by Lalit Lakhwani, owner of Hemraj Cycle & Store Works. After due investigation, charge-sheet was filed. The trial Court framed charges under Sections 302, 307, 326, 324, 427, 121-A, 124-A, 153-A of IPC, Sections 3, 4, 5, 6 of Explosive Substances Act, 1908, Sections 3/10, 13, 16(1)A, 18, 20, 38 of the Unlawful Activities (Prevention) Act, 1967. The accused denied the charges and sought trial, upon which, in Sessions case no.02/2010, 122 witnesses, PW-1 to PW-122 were examined; documents Exhibit-P1A to Exhibit-P308 were exhibited and Articles 1 to 51 were also exhibited on behalf of the prosecution. Accused were examined under Section 313 Cr.P.C. In defence, Exhibit-D1 to Exhibit-D97 were exhibited and 2 witnesses, namely, Shahbaj Ahmed (DW-1) and Sarvar Azmi (DW-3) were examined. In Sessions case no.2A/2010, 129 witnesses, PW-1 to PW-129 were examined; documents Exhibit-P1A to Exhibit-P299 were exhibited and Articles 1 to 51 were also exhibited on behalf of the prosecution. Accused were examined under Section 313 Cr.P.C. In defence, Exhibit-D1 to Exhibit-D13 were exhibited and 1 witness, namely, Mohammad Saif (DW-2) was examined. After hearing the parties, the learned trial Court has convicted the accused for the offences stated

above, aggrieved by which, Mohammad Saifur @ Saifurrehman, Mohammad Sarvar Azmi, Mohammad Salman and Mohammad Saif have preferred the present appeals. Against the acquittal of Shahbaz Hussain and for enhancement of sentence, State has preferred appeal. Reference has been moved by the Special Judge, Jaipur Bomb Blast Cases for confirmation of death sentence of Saifurrehman.

6. It is contended by the learned Additional Government Advocate that the case rests on circumstantial evidence. The first circumstance against Saifurrehman is that his name was mentioned by co-accused Mohammad Saif in his disclosure statements dated 01.10.2008 and 02.10.2008. Accused Mohammad Saif was arrested on 19.09.2008 in Batla House Encounter case for Delhi bomb blasts. It is his arrest that gave a break through to the ATS in the investigation of Jaipur bomb blasts. In his disclosure statement, Saif named 9 other accused, who were involved in planting bombs at various places. It is argued that there was no pressure on accused Mohammad Saif to make an admission of the offence of planting bombs in Jaipur, after 4 months of the incident. The disclosure statement of Mohammad Saif was later on corroborated by the disclosure statement of accused Saifurrehman and is thus relevant under Section 10 of the Evidence Act.

7. It is contended that the next circumstance against accused Saifurrehman is his admission before the CJM, Bhopal about his involvement in Jaipur and Faizabad Bomb Blasts. This fact, according to learned Additional Government Advocate, is mentioned in the order-sheet of the CJM, Bhopal (Exhibit-75A). It is argued by learned Additional Government Advocate that there

was no pressure on accused Saifurrehman to admit his crime as he was before the CJM Court. The admission by accused Saifurrehman about his involvement both in Jaipur and Faizabad Bomb Blasts before the CJM, Bhopal is a very strong and incriminating circumstance against accused Saifurrehman.

8. According to learned Additional Government Advocate, the next circumstance against accused- Saifurrehman is the disclosure statement made by him in FIR No.118/2008, Police Station, Kotwali, in which he has stated that he planted bomb behind flower shops in Choti Chaupar and identification memo of place of incident. It is contended by learned Additional Government Advocate that in FIR No.118/2008, Saifurrehman gave a disclosure statement (Exhibit-P221A) that he purchased cycle from cycle market, which is near Choti Chaupar. He also said that he can point out the place where he planted the bomb behind flower shops in Choti Chaupar. At the instance of accused Saifurrehman, a site plan was prepared, which is exhibited as Exhibit-P7A. It is argued that it was for the first time that it came to the notice of the Police that it was Saifurrehman, who had placed the cycle behind flower shops in Choti Chaupar and thus, it is a fact discovered in terms of Section 27 of the Evidence Act. It is also argued that Saifurrehman has not only admitted his crime of planting bomb at *Phoolwalon Ka Khanda* behind Flower Shops, Choti Chaupar, but he has also corroborated the disclosure statement of accused Mohammad Saif and admitted the offence of conspiracy in serial bomb blasts. It is further argued that direct evidence to prove conspiracy is rarely available, therefore, the circumstances proved before and during the offence have to be considered to decide the involvement of the accused.

9. The next circumstance which is the main circumstance against accused Saifurrehman is his identification by Lalit Lakhwani (PW-85), owner of the cycle shop in the test identification parade (Exhibit-P174) and later, identification by him in Court. It is argued by learned Additional Government Advocate that in the bill number 3411, frame number of Hercules cycle of silver black colour was not mentioned. Similarly, the cycle, which was recovered from the blast site was also not having any frame number. Thus, it was proved that the cycle which was sold by Lalit Lakhwani (PW-85) was the cycle which was used at the blast site. It is contended that Lalit Lakhwani (PW-85) has deposed that on 13.05.2008 a person aged about 24 years had purchased a Hercules cycle of silver black colour, however, the bill mentions the date as 12.05.2008, which was wrongly written by mistake. He has also deposed that in reality, he had sold the cycle on 13.05.2008. It is argued by learned Additional Government Advocate that the statement of Lalit Lakhwani (PW-85) was recorded under Section 161 Cr.P.C. on 14.05.2008 i.e. on the very next day of the incident in which he has admitted that he has wrongly mentioned the date of sale of cycle on the bill as 12.05.2008 instead of 13.05.2008.

10. Learned Additional Government Advocate has drawn our attention to Exhibit-D13. It is argued by learned Additional Government Advocate that Lalit Lakhwani was examined as PW-85 in Sessions Case No.2A/2010 and as PW-2 in Sessions Case No.2/2010. In Sessions Case No.2/2010, he has deposed that he remembers the physiognomy of accused as the accused neither saw any other model of cycle nor negotiated on price. However, in his cross-examination, he has deposed that he has two shops in

Kishan Pole Bazar, one is shop No.84 "Hemraj Cycles" and second is shop No.264 "Hariom Cycles". He has also deposed that he sits on Hemraj Cycles and his father and younger brother sit on the other shop.

11. Lalit Lakhwani (PW-85) has stated that he remembers the purchaser of the cycle as he had sold the cycle on 13.05.2008 and on the same day, there were bomb blasts in the evening. It is argued by learned Additional Government Advocate that since the statement of Lalit Lakhwani (PW-85) was recorded on the very next day of the incident, it is very natural for the cycle owner to recollect the physiognomy of the customers to whom he had sold the cycles on 13.05.2008. It is further contended that test identification parade was conducted by Vinod Giri (PW-110), Additional Chief Judicial Magistrate No.2 and he has deposed that Lalit Lakhwani (PW-85) had correctly identified accused Saifurrehman as the person, who purchased cycle from his shop.

12. The next circumstance against accused Saifurrehman is his identification by witness Lalit Lakhwani (PW-85) in the Court.

13. The next circumstance against accused Saifurrehman is his call details with other co-accused. It is the case of the prosecution that 9711109691 mobile number belonged to Saifurrehman (Exhibit-151A), 9990852818 belonged to Atif Ameen (Exhibit-152A). There was a call between Atif Ameen and Saifurrehman on 13th May, 2008 at 6:00 a.m. The other mobile number 9873574603 belonged to Jafar, who is father of wanted accused Arif @ Junaid. There were calls between Saifurrehman and this mobile number also. To establish the call details, on behalf of prosecution, Vibhor Rastogi (PW-65), Nodal Officer of Vodafone

Hutch Company and Ramesh Singh Bisht (PW-66), Nodal Officer of Idea Company have been examined.

14. Learned counsel appearing for accused Saifurrehman contends that disclosure statement of Mohammad Saif mentioning the name of Saifurrehman and pointing out spot of blast vis-a-vis Saifurrehman is totally inadmissible. It is contended that in the disclosure statement of Mohammad Saif, he has mentioned names of 9 co-accused. He has only mentioned Saifurrehman and there is no mention about the parentage of Saifurrehman, place of residence of Saifurrehman and so, there is no evidence as to how the Police came to the conclusion that name Saifurrehman stated by Mohammad Saif is the same as the present accused. It is also contended that any disclosure statement made by Mohammad Saif is inadmissible in evidence as it is hit by Section 162 of Cr.P.C. and Sections 25 and 26 of the Indian Evidence Act. It is further contended that there was no discovery under Section 27 of the Indian Evidence Act on the basis of the disclosure statement made by Mohammad Saif.

15. It is further contended that pointing out to the place of bomb blasts is inadmissible and cannot be used as evidence against Saifurrehman for the very reason that the place where the bomb blasts took place was already in the knowledge of the Anti Terror Squad (ATS) and the general public at large, hence, there was no discovery of fact under Section 27 of the Indian Evidence Act with regard to pointing to the place of bomb blasts and is thus, of no value and cannot be used against present accused Saifurrehman. The pointing out to the place of bomb blasts only amounts to confession made to a Police Officer, which is hit by Sections 25 and 26 of the Indian Evidence Act, which states that the

confession made to a Police Officer is not admissible against accused under any circumstance. Reliance in this regard is placed on *Aghnoo Nagesia Versus State of Bihar*: **AIR 1966 SC 119** and Indra *Dalal Versus State of Haryana*: **(2015) 11 SCC 31**.

16. It is contended by learned counsel appearing for accused Saifurrehman that various authorities commencing from a 5-Judge Bench of the Privy Council in 1936, have consistently held that the only confession made to Magistrates, which can be proved according to Section 164 Cr.P.C. are admissible in a trial and can be held to be a confession. Any such confession supposedly made to a Magistrate de-hors Section 164 of the Cr.P.C. is held to be inadmissible in a trial. It is argued that if a Magistrate has to record a confession, it has to be done in accordance with Sections 164 and 281 of Cr.P.C. and the mandatory warning and certification provided under Sections 164 and 281 Cr.P.C. are the statutory requirements to record a confession. By legal precedents, additional safeguards have been held to be essential. In the light of the categorical and settled position, that no recording of an incriminating statement of an accused even by a Magistrate, which is not fully complied with Section 164 Cr.P.C., is permissible. This apparent paraphrasing of what Saifurrehman is supposed to have said, whether in response to an unrecorded query or other unrecorded preface in the remand order, is impermissible. The said circumstance or incriminating allusion against Saifurrehman in the order sheet is absolutely inadmissible.

17. Reliance in this regard is placed on *State of U.P. Vesus Singhara Singh*: **(1964) 4 SCR 485** wherein the Hon'ble Supreme Court relying on Taylor Versus Taylor held that "the rule adopted in Taylor Versus Taylor" is well recognized and is founded on sound

principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A Magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164 Cr.P.C. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of Section 164 Cr.P.C. including the safeguards contained in it for the protection of accused persons would be rendered nugatory.

18. A mere mention in the order-sheet when a remand is being sought that the accused appeared before the CJM, Bhopal and said that he was involved in the Jaipur & Faizabad bomb blasts cannot be said to be a confession duly recorded in accordance with the provisions of Section 164 Cr.P.C. and thus, cannot be considered to be an incriminating circumstance against accused Saifurrehman in the light of the judgment of the Apex Court in *State of U.P. Versus Singhara Singh* (supra).

19. Learned counsel appearing for accused Saifurrehman contends that the crime bicycle found at the site of *Phoolwalon Ka Khanda* vide seizure memo and examined by the FSL was a Hercules bike on which no frame number could be detected, owing to damage. So there was no frame number that could be matched on the crime bicycle. Hence, there is no basis for saying that this crime bicycle was sold by Shop No.84, Hemraj Cycle. Therefore,

identifying the shop that sold the bicycle on the basis of frame number is ruled out.

20. It is argued that there are more than 40 shops in Kishan Pole Bazar, which are selling the cycles. The bill books of all the cycle shops were not seized by the Investigating Officer to ascertain as to how many of them had sold Hercules cycles on that day and merely because there was no mention of the frame number in the bill book and there was no frame number on the cycle, which was recovered from the site, the Police has connected the crime bicycle with the one sold by Lalit Lakhwani (PW-85). It is contended that the cycle which was recovered from the blast site, was the same which was sold by Lalit Lakhwani (PW-85) is also doubtful, as Rajesh Maheshwari (PW-2 in Sessions Case No.2A/2010) has stated that the tyre of the cycle was a bit worn out. It is argued that a new cycle cannot have a worn out tyre and because there was no frame number, it cannot be established that the same cycle was sold by Lalit Lakhwani (PW-85). It is also argued that it is a mystery how the Police Authorities came to know about Hemraj Cycle Store.

21. It is contended that Mahendra Singh Chaudhary (PW-107) states that shops were identified by matching of frame numbers, however, since there was no frame number on the cycle seized in this matter, so it cannot be a basis for reaching the shop. It is also argued that Jai Singh in Sessions Case No.2A/2010 has deposed that Rajendra Singh Nain and Madan Singh conducted the investigation as to which shop sold which crime bike and informed him that the cycle recovered from *Phoolwalon Ka Khanda* was purchased from shop No.84, Kishan Pole Bazar. It is contended that both Rajendra Singh Nain and Madan Singh have not been

produced before the Court. They were material witnesses on whose saying the statement under Section 161 Cr.P.C. of Lalit Lakhwani was recorded. It is also contended that Jai Singh did not seize the bill book. The bill book was an important document from which it could have been established that a cycle was sold on 13.05.2008. No reason or justification has been given by Jai Singh in his statement before the Court with regard to non-seizure of the bill book.

22. It is contended that bill book (Article 51) was brought to the Court for the first time on 26.05.2011 i.e. after a lapse of three years in Sessions Case No.2/2010 at the time of evidence by Lalit Lakhwani (PW-85) and the same cannot be relied upon. It is argued that corrections in bill numbers 3406 (Exhibit-D3), 3407 (Exhibit-D4), 3408 (Exhibit-D5), 3409 (Exhibit-D6) and 3412 (Exhibit-D7) have been made on the carbon copy by original link indicating that these corrections were made behind the respective customers' back. The bill book is thus a doubtful document, which was not seized by the Police immediately after the incident and which remained with the shop keeper. It is argued by learned counsel appearing for accused Saifurrehman that a series of corrections were made to push forward the date of sale on bill No.3411. It is contended that seizure of bill book on 14.05.2008 would have revealed many important things and failure to explain the alterations made on the bills in ink only on bill just preceding and following bills creates a doubt about genuinity of the bill book.

23. It is contended by the counsel for the accused that there is no certificate under Section 65B of the Evidence Act with regard to call details between Saifurrehman & other co-accused and thus, the call details cannot be read in evidence. It is also contended

that Atif Ameen is a co-accused, is also not established since as per the prosecution, Atif Ameen was killed in the encounter at Batla House and he was the mastermind of this case. It is further contended that the police has not shown the photographs of Atif Ameen to the cycle owners from where the cycles were sold, to establish that Atif Ameen was one of the conspirator and the mastermind in Jaipur Bomb Blasts case. It is argued that as per the prosecution, Arif @ Junaid is one of the wanted co-accused, however, all this is only on the basis of the disclosure statement made by Mohammad Saif, which is not admissible in evidence. It is also argued that though the mobile call records are not admissible in evidence since there is no certificate under Section 65B of the Evidence Act, however, even if, it is assumed that there are call details, it is not established from the same that Atif Ameen and Arif @ Junaid were co-accused in this case. Hence, even if, there were some calls exchanged between Atif Ameen & Saifurrehman and Arif @ Junaid & Saifurrehman, the same would not lead to the conclusion that Saifurrehman was part of the conspiracy in Jaipur Bomb Blasts case.

24. We have considered the contentions, for deciding the present set of appeals, we have to ponder upon the following points:

1. Whether on 13.05.2008 at Phool walon ka khanda, Choti Chaupar, a blast took place in which 2 persons died and 15 persons were injured?

2. Whether Shahbaz sent the mail from Sahibabad and is a co-conspirator?

3. Whether Saifur @ Saifurrehman planted the bomb on a bicycle on 13.05.2008 at Phool walon ka khanda, Choti Chaupar, Jaipur?

4. Whether Bill Books establishes sale of bicycles to the accused on 13.05.2008 and whether the blasts took place on the bicycles sold to the accused?

5. Whether Mohammad Saif, Mohammad Salman and Mohammad Sarvar Azmi are co-conspirators?

Before adverting to the facts of the case and role of each accused individually, we would like to deal with the judgments cited on behalf of the State as well as on behalf of the accused. For the sake of convenience, the judgments cited by the parties are being discussed under various heads.

A. <u>CIRCUMSTANTIAL EVIDENCE</u>:

I. Learned Additional Government Advocate has placed reliance on *Pawan Kumar Versus State of Haryana*: **(2001) 3 SCC 628** wherein it has been held that though it is true that there should be no missing link in the chain of events so far as the prosecution is concerned, but it is not that every one of the links must appear on the surface of the evidence, since some of the links, can only be inferred from the proven facts.

II. *Contra*, a catena of judgments have been cited on behalf of learned counsels appearing on behalf of different accused. Reliance is placed on *Hanuwant Govind Nargundkar Versus State of Madhya Pradesh*: **AIR 1952 SC 343** wherein it has been held as under:

> "10. Assuming that the accused Nargundkar had taken the tenders to his house, the prosecution, in order to bring the guilt home to the accused, has yet to prove the other facts referred to above. No direct evidence was adduced in proof of those facts. Reliance was placed by the prosecution and by the courts below on certain circumstances, and intrinsic evidence contained in the impugned document,Exhibit-P-3A.

> In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof and therefore it is right to recall the warning addressed by Baron Alderson, to the jury in Reg v. Hodge (1838) 2 Lew. 227, where he said:-
>
> "The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again,

> the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. In spite of the forceful arguments addressed to us by the learned Advocate-General on behalf of the State we have not been able to discover any such evidence either intrinsic within Exhibit P-3A or outside and we are constrained to observe that the courts below have just fallen into the error against which warning was uttered by Baron Alderson in the above mentioned case."

III. Reliance is also placed on *Sharad Birdhichand Sarda Versus State of Maharashtra*: **(1984) 4 SCC 116** wherein the Court has held as under:

"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh: 1953CriLJ129. This case has been uniformly followed and applied by this Court in a large number of latter decisions up-to-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh: (1969)3SCC198 and Ramgopal v State of Maharashtra MANU/SC/0168/1971 : 1972CriLJ473. It may be useful to extract what Mahajan, J. has laid down in Hanumant's case:

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra MANU/SC/0167/1973 : 1973CriLJ1783 where the following observations were made:

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only

with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
(3) the circumstances should be of a conclusive nature and tendency.
(4) they should exclude every possible hypothesis except the one to be proved, and
(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.
154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.
158. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor-General relying on a decision of this Court in Deonandan Mishra v. State of Bihar MANU/SC/0030/1955: 1955CriLJ1647, to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:

> But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation… such absence of explanation or false explanation would itself be an additional link which completes the chain.

159. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied:
(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved.
(2) the said circumstance point to the guilt of the accused with reasonable definiteness, and
(3) the circumstance is in proximity to the time and situation.
160. If these conditions are fulfilled only then a Court

can use a false explanation or a false defence as an additional link to lend an assurance to the Court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in Shankarlal's case MANU/SC/0211/1980: 1981CriLJ325 (supra) where this Court observed thus:

> Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused.
>
> 161. This Court, therefore, has in no way departed from the five conditions laid down in Hanumant's case MANU/SC/0037/1952: 1953CriLJ129 (supra). Unfortunately, however, the High Court also seems to have misconstrued this decision and used the so-called false defence put by the appellant as one of the additional circumstances connected with the chain. There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the Court. When the prosecution is unable to prove any of the essential principles laid down in Hanumant's case, the High Court cannot supply the weakness or the lacuna by taking aid of or recourse to a false defence or a false plea. We are, therefore, unable to accept the argument of the Additional Solicitor-General."

IV. Reliance is next placed on *Musheer Khan Versus State of M.P.*: **(2010) 2 SCC 748** wherein it has been held as under:

> "39. In a case of circumstantial evidence, one must look for complete chain of circumstances and not on snapped and scattered links which do not make a complete sequence. This Court finds that this case is entirely based on circumstantial evidence. While appreciating circumstantial evidence, the Court must adopt a cautious approach as circumstantial evidence is "inferential evidence" and proof in such a case is derivable by inference from circumstances.
> 40. Chief Justice Fletcher Moulton once observed that "proof does not mean rigid mathematical" formula since "that is impossible". However, proof must mean such evidence as would induce a reasonable man to come to

a definite conclusion. Circumstantial evidence, on the other hand, has been compared by Lord Coleridge "like a gossamer thread, light and as unsubstantial as the air itself and may vanish with the merest of touches". The learned Judge also observed that such evidence may be strong in parts but it may also leave great gaps and rents through which the accused may escape. Therefore, certain rules have been judicially evolved for appreciation of circumstantial evidence.

41. To my mind, the first rule is that the facts alleged as the basis of any legal inference from circumstantial evidence must be clearly proved beyond any reasonable doubt. If conviction rests solely on circumstantial evidence, it must create a network from which there is no escape for the accused. The facts evolving out of such circumstantial evidence must be such as not to admit of any inference except that of guilt of the accused. (See Raghav Prapanna Tripathi and Ors. v. State of U.P. MANU/SC/0127/1962 : AIR 1963 SC 74).

42. The second principle is that all the links in the chain of evidence must be proved beyond reasonable doubt and they must exclude the evidence of guilt of any other person than the accused. (See: State of UP v. Ravindra Prakash Mittal MANU/SC/0402/1992 : 1992 Crl.L.J 3693(SC))

43. While appreciating circumstantial evidence, we must remember the principle laid down in Ashraf Ali v. Emperor 43 Indian Cases 241 at para 14 that when in a criminal case there is conflict between presumption of innocence and any other presumption, the former must prevail.

44. The next principle is that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and is incapable of explanation upon any other reasonable hypothesis except his guilt.

45. When a murder charge is to be proved solely on circumstantial evidence, as in this case, presumption of innocence of the accused must have a dominant role. In Nibaran Chandra Roy v. King Emperor MANU/WB/0164/1907: 11 CWN 1085 it was held the fact that an accused person was found with a gun in his hand immediately after a gun was fired and a man was killed on the spot from which the gun was fired may be strong circumstantial evidence against the accused, but it is an error of law to hold that the burden of proving innocence lies upon the accused under such circumstances. It seems, therefore, to follow that

whatever force a presumption arising under Section 106 of the Indian Evidence Act may have in civil or in less serious criminal cases, in a trial for murder it is extremely weak in comparison with the dominant presumption of innocence.

46. The same principles have been followed by the Constitution Bench of this Court in Govinda Reddy v. State of Mysore MANU/SC/0160/1958 : AIR 1960 SC 29 where the learned Judges quoted the principles laid down in Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh MANU/SC/0037/1952 : AIR 1952 SC 343. The ratio in Govind (supra) quoted in paragraph 5, page 30 of the reports in Govinda Reddy (supra) are:

> In cases where the evidence of a circumstantial nature, the circumstances which lead to the conclusion of guilt should be in the first instance fully established, and all the facts so established should be consistent only with the guilt of the accused. Again the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words there must be a chain of evidence so complete as not to leave any reasonable doubt for a conclusion consistent with the innocence of the accused and it must be shown that within all human probability the act must have been committed by the accused.
>
> The same principle has also been followed by this Court in Mohan Lal Pangasa v. State of U.P. MANU/SC/0425/1974 : AIR 1974 SC 1144."

V. Reliance is also placed on *Mousam Singha Roy Versus State of West Bengal*: **(2003) 12 SCC 377** wherein the Court has held as under:

> "27. Before we conclude, we must place on record the fact that we are not unaware of the degree of agony and frustration that may be caused to the society in general and the families of the victims in particular, by the fact that a heinous crime like this goes unpunished, but then the law does not permit the courts to punish the accused on the basis of moral conviction or on suspicion alone. The burden of proof in a criminal trial never shifts, and it is always the burden of the prosecution to prove its case beyond reasonable doubt on the basis of acceptable evidence. In a similar circumstance this Court in the case of Sarwan Singh

Rattan Singh v. State of Punjab MANU/SC/0038/1957 : 1957CriLJ1014 stated thus :

"It is no doubt a matter of regret that a foul cold-blooded and cruel murder should go unpunished. There may also be an element of truth in the prosecution story against the accused. considered as a whole, the prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by the prosecution by legal, reliable and unimpeachable evidence before an accused can be convicted."

28. It is also a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof, since a higher degree of assurance is required to convict the accused."

VI. Reliance is next placed on *Narendra Kumar Versus State of Rajasthan*: **(2020) SCC 1414** wherein the warning addressed by Baron Alderson, to the jury was quoted:

"In Inspector of Police, Tamil Nadu v. John David MANU/SC/0461/2011 : (2011) 5 SCC 509, Hon'ble Supreme Court has held that a court must be cautious against conjectures and surmises taking place of proof. It was further observed that in a case depending largely upon circumstantial evidence there is always a danger that conjectures and surmises may take place of legal proof. The court has to be watchful and avoid the danger of allowing suspicion to take place of legal proof.

In Anjan Kumar Sarma and Ors. v. State of Assam MANU/SC/0656/2017 : (2017) 14 SCC 359, factors to be taken into account in adjudication of cases of circumstantial evidence, have been laid down by the Hon'ble Apex Court and it has been observed:

13. Admittedly, this is a case of circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence laid down by this Court are:

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be'established;

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other

hypothesis except that the Accused is guilty;

(3) The circumstances should be of a conclusive nature and tendency;

(4) They should exclude every possible hypothesis except the one to be proved; and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the Accused and must show that in all human probability the act must have been done by the accused.

Similar principles of law have been reiterated in Ashish Batham v. State of Madhya Pradesh MANU/SC/0757/2002 : (2002) 7 SCC 317, and in Inspector of Police, Tamil Nadu v. John David (supra).

12. Thus, as per the law settled by the judgments of Hon'ble Supreme Court, the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established. The facts so established should be consistent only with the hypothesis of the guilt of the accused. They should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of conclusive nature and tendency and they should exclude every possible hypothesis except the one to be proved. There must be a chain of evidence so complete as not to leave any reasonable ground for conclusion consistent with the innocence of accused and must show that in all human probability the act must have been done by the accused."

VII. Reliance is also placed on *Padala Veera Reddy Versus State of Andhra Pradesh & Ors.*: **(1989) Supp 2 SCC 706** wherein also the Court again reiterated the tests which are required and held as under:

> "10. Before adverting to the arguments advanced by the learned Counsel we shall at the threshold point out that in the present case here is no direct evidence to connect the accused with the offence in question and the prosecution rests its case solely on circumstantial evidence. This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the

following tests :

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See Gambhir v. State of Maharashtra).”

VIII. Reliance is also placed on *C. Chenga Reddy & Ors. Versus State of Andra Pradesh*: **(1996) 10 SCC 193** wherein it has been held hereunder:

“21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence.”

IX. Reliance is also placed on *Madhu Versus State of Kerala*: **(2012) 2 SCC 399** wherein it was held as under:

“5. The care and caution with which circumstantial evidence has to be evaluated stands recognized by judicial precedent. Only circumstantial evidence of a very high order can satisfy the test of proof in a criminal prosecution. In a case resting on circumstantial

evidence, the prosecution must establish a complete unbroken chain of events leading to the determination that the inference being drawn from the evidence is the only inescapable conclusion. In the absence of convincing circumstantial evidence, an accused would be entitled to the benefit of doubt. During the course of deliberations of the present controversy, we shall endeavour to evaluate the worthiness of circumstantial evidence produced by the prosecution to prove the guilt of the accused. But more importantly, our endeavour would be to evaluate the admissibility of the statements made by the accused to the police, during the course of their detention by the police, resulting in the discovery of the gold ornaments, belonging to Padmini Devi, after having committed her murder. This piece of evidence has been relied upon to connect the accused with the crime."

X. Reliance is also placed on *Tanviben Pankaj Kumar Divetia Versus State of Gujarat*: **(1997) 7 SCC 156** wherein it has been held by the Court as under:

"45. The principle for basing a conviction on the basis of circumstantial evidences has been indicated in a number of decisions of this Court and the law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. This Court has clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held that the Court has to be watchful and avoid the danger of allowing the suspicion to make the place of legal proof for some times, unconsciously it may

happen to be a short step between moral certainty and legal proof. It has been indicated by this Court that there is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions. Jaharlal Das v. State of Orissa MANU/SC/0586/1991 : 1991CriLJ1809

46. We may indicate here that more the suspicious circumstances, more care and caution are required to be taken otherwise the suspicious circumstances may unwittingly enter the adjudicating thought process of the Court even though the suspicious circumstances had not been clearly established by clinching and reliable evidences. It appears to us that in this case, the decision of the Court in convicting the appellant has been the result of the suspicious circumstances entering the adjudicating thought process of the Court."

XI. In *Pawan Kumar Versus State of Haryana*: **(2001) 3 SCC 628** wherein the Court has held as under:

"2. Before adverting to the rival contentions, be it noted that the entire matter hinges on circumstantial evidence. There is also however existing on record, a dying declaration, but its effect on the matter, shall be discussed shortly hereafter in this judgment. Incidentally success of the prosecution on the basis of circumstantial evidence will however depend on the availability of a complete chain of events so as not to leave any doubt for the conclusion that the act must have been done by the accused person. While however, it is true that there should be no missing links, in the chain of events so as far as the prosecution is concerned, but it is not that every one of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts. Circumstances of strong suspicion without however any conclusive evidence are not sufficient to justify the conviction and it is on this score that great care must be taken in evaluating the circumstantial evidence. In any event, on the availability of two inferences, the one in favour of the accused must be accepted and the law is well settled on this score, as such we need not dilate much in that regard excepting however, noting the observations of this Court in the case of State of U.P. Vs. Ashok Kumar Srivastava MANU/SC/0161/ 1992 : [1992]1SCR37 wherein this Court in paragraph 9 of the report observed:-

"9. This Court has, time out of number, observed that while appreciating circumstantial evidence the Court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete pointing to the guilt of the accused and every hypothesis of innocence is capable of being negatived on evidence. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. The circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. But this is not to say that the prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise. ....."

3. The other aspect of the issue is that the evidence on record, ascribed to be circumstantial, ought to justify the inferences of the guilt from the incriminating facts and circumstances which are incompatible with the innocence of the accused or guilt of any other person. The observations of this Court in the case of Balwinder Singh Vs. State of Punjab MANU/SC/0160/1986: 1987CriLJ330 lends concurrence to the above."

XII. From the judgments referred to herein-above, it can be safely deduced that in cases pertaining to circumstantial evidence, the circumstance from which conclusion of guilt is to be drawn should be fully established i.e. (i) the circumstances concerned 'must or should' be established and not 'may' be established, (ii) the fact so established should be consistent only with the hypothesis of the guilt of the accused that is to say there should not be explainable on any other hypothesis except that the accused is guilty, (iii) circumstances should be of a conclusive nature and tendency, (iv) the circumstances should exclude every possible hypothesis except the one to be proved and (v) there

must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. Courts should be watchful and avoid the danger of allowing the suspicion to take the place of legal proof and that there is a long distance between "may be true" and "must be true".

B. <u>EVIDENCIARY VALUE OF A DISCLOSURE LEADING TO A DISCOVERY U/S 27 OF THE EVIDENCE ACT</u>:

I. Learned Additional Government Advocate has placed reliance on *Mehboob Ali & Anr. Versus State of Rajasthan*: **(2016) 14 SCC 640** wherein it was held as under:

> "20. Considering the aforesaid dictums, it is apparent that there was discovery of a fact as per the statement of Mehmood Ali and Mohd. Firoz. Co-accused was nabbed on the basis of identification made by the accused Mehboob and Firoz. He was dealing with fake currency notes came to the knowledge of police through them. Recovery of forged currency notes was also made from Anju Ali. Thus the aforesaid accused had the knowledge about co-accused Anju Ali who was nabbed at their instance and on the basis of their identification. These facts were not to the knowledge of the Police hence the statements of the accused persons leading to discovery of fact are clearly admissible as per the provisions contained in Section 27 of the Evidence Act which carves out an exception to the general provisions about inadmissibility of confession made under police custody contained in Sections 25 and 26 of the Evidence Act."

II. Reliance is also placed on *State (NCT of Delhi) Versus Navjot Sandhu*: **(2005) 11 SCC 600** wherein it has been held as under:

> "There is one more point which we would like to discuss i.e. whether pointing out a material object by the accused furnishing the information is a necessary concomitant of Section 27. We think that the answer

should be in the negative. Though in most of the cases the person who makes the disclosure himself leads the Police Officer to the place where an object is concealed and points out the same to him, however, it is not essential that there should be such pointing out in order to make the information admissible under Section 27. It could very well be that on the basis of information furnished by the accused, the Investigating Officer may go to the spot in the company of other witnesses and recover the material object. By doing so, the Investigating Officer will be discovering a fact viz., the concealment of an incriminating article and the knowledge of the accused furnishing the information about it. In other words, where the information furnished by the person in custody is verified by the Police Officer by going to the spot mentioned by the informant and finds it to be correct, that amounts to discovery of fact within the meaning of Section 27. Of course, it is subject to the rider that the information so furnished was the immediate and proximate cause of discovery. If the Police Officer chooses not to take the informant- accused to the spot, it will have no bearing on the point of admissibility under Section 27, though it may be one of the aspects that goes into evaluation of that particular piece of evidence."

III. Counsel appearing for the accused has placed reliance on *Ashish Jain & Ors. Versus Makrand Singh & Ors.*: **(2019) 3 SCC 770** wherein the Apex Court reproduced the observations of the Supreme Court regarding the relationship between Section 27 of the Evidence Act and Article 20(3) of the Constitution of India and held as under:

> "23. As regards the recovery of incriminating material at the instance of the Accused, the Investigating Officer K.D. Sonakiya, PW35, has categorically deposed that all the confessions by the Accused persons were made after interrogation, but the mode of this interrogation does not appear to be of normal character, inasmuch as he himself has deposed that the Accused persons were further grilled and interrogated multiple times before extracting the confessions which lead to the recovery of the ornaments, cash, weapons and key.
> 24. We find from the totality of facts and circumstances

that the confessions that led to the recovery of the incriminating material were not voluntary, but caused by inducement, pressure or coercion. Once a confessional statement of the Accused on facts is found to be involuntary, it is hit by Article 20(3) of the Constitution, rendering such a confession inadmissible. There is an embargo on accepting self-incriminatory evidence, but if it leads to the recovery of material objects in relation to a crime, it is most often taken to hold evidentiary value as per the circumstances of each case. However, if such a statement is made under undue pressure and compulsion from the investigating officer, as in the present matter, the evidentiary value of such a statement leading to the recovery is nullified.

25. It is noteworthy to reproduce the observations of this Court regarding the relationship between Section 27 of the Evidence Act and Article 20(3) of the Constitution in Selvi v. State of Karnataka, MANU/SC/0325/2010 : (2010) 7 SCC 263:

"102. As mentioned earlier "the right against self-incrimination" is now viewed as an essential safeguard in criminal procedure. Its underlying rationale broadly corresponds with two objectives-firstly, that of ensuring reliability of the statements made by an Accused, and secondly, ensuring that such statements are made voluntarily. It is quite possible that a person suspected or Accused of a crime may have been compelled to testify through methods involving coercion, threats or inducements during the investigative stage. When a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false. False testimony is undesirable since it impedes the integrity of the trial and the subsequent verdict. Therefore, the purpose of the "rule against involuntary confessions" is to ensure that the testimony considered during trial is reliable. The premise is that involuntary statements are more likely to mislead the Judge and the prosecutor, thereby resulting in a miscarriage of justice. Even during the investigative stage, false statements are likely to cause delays and obstructions in the investigation efforts.

103. The concerns about the "voluntariness" of statements allow a more comprehensive account of this right. If involuntary statements were readily given weightage during trial, the investigators would have a strong incentive to compel such statements-often through methods involving coercion, threats, inducement or deception. Even if such involuntary

statements are proved to be true, the law should not incentivise the use of interrogation tactics that violate the dignity and bodily integrity of the person being examined. In this sense, "the right against self-incrimination" is a vital safeguard against torture and other "third-degree methods" that could be used to elicit information. It serves as a check on police behaviour during the course of investigation. The exclusion of compelled testimony is important otherwise the investigators will be more inclined to extract information through such compulsion as a matter of course. The frequent reliance on such "short cuts" will compromise the diligence required for conducting meaningful investigations. During the trial stage, the onus is on the prosecution to prove the charges levelled against the Defendant and the "right against self-incrimination" is a vital protection to ensure that the prosecution discharges the said onus.

133. We have already referred to the language of Section 161 Code of Criminal Procedure which protects the Accused as well as suspects and witnesses who are examined during the course of investigation in a criminal case. It would also be useful to refer to Sections 162, 163 and 164 Code of Criminal Procedure which lay down procedural safeguards in respect of statements made by persons during the course of investigation. However, Section 27 of the Evidence Act incorporates the "theory of confirmation by subsequent facts" i.e. statements made in custody are admissible to the extent that they can be proved by the subsequent discovery of facts. It is quite possible that the content of the custodial statements could directly lead to the subsequent discovery of relevant facts rather than their discovery through independent means. Hence such statements could also be described as those which "furnish a link in the chain of evidence" needed for a successful prosecution. This provision reads as follows:

> 27. How much of information received from Accused may be proved.-Provided that, when any fact is deposed to as discovered in consequence of information received from a person Accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

IV. Reliance is also placed on *Niwas @ Patel Versus State*: **ILR 2010 (1) Delhi 342** wherein the Apex Court observed that a disclosure statement do not inspire confidence and being not explained as to why they were recorded, the same have to be viewed with suspicion. Since, the clouds of suspicion have not been removed in that nothing has been shown to us by the prosecution, where from we can independently gather that the same inspire confidence. The Apex Court held the evidence to be tainted evidence and the prosecutor was not held entitled to the fruits of such a poison tree.

V. Reliance is also placed on *Digamber Vaishnav & Anr. Versus State of Chhattisgarh*: **(2019) 4 SCC 522** wherein it has been held as under:

> "29. The second circumstance relied upon by the prosecution is the evidence of recovery. Under Section 27 of the Indian Evidence Act, it is not the discovery of every fact that is admissible but the discovery of relevant fact is alone admissible. Relevancy is nothing but the connection or the link between the facts discovered with the crime. The recovery of the motorcycle is sought to be relied upon as a circumstance against the Appellants. There is nothing on record to show that the motorcycle recovered at the instance of Appellant No. 1, belongs to him. PW-13, IO, in his cross-examination admits that he does not know whether the Appellant No. 1 is the owner of the motorcycle. He further admits that no attempts were made by him to enquire about the owner of the vehicle."

VI. Reliance is also placed on *Sangappa Basalingappa Rabasetty Versus State of Karnataka*: Criminal Appeal No.**37/1982** wherein it was held as under:

> "The confessions made to the police are irrelevant and inadmissible in evidence under Sections 24, 25 and 26 of the Evidence Act. Section 27 makes a departure from the principle laid down in Sections 24 and 26 of the

Evidence Act. When the information contained in the statements (whether amounting to a confession or not) made by an accused person in police custody is confirmed by the finding of some object or fact, the danger disappears; for the discovery of the stolen goods, the instrument of crime, the dead body, the clothes which the deceased was wearing or any other material thing, which are capable of being perceived by the senses demonstrates conclusively that these portions at least of the confession cannot have been false. In such a case so much of the information given by the accused as relates distinctly to the fact thereby discovered becomes relevant under Section 27. The Section is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence. It can be seen that simply discovery of fact as a result of information from accused does not make it admissible unless its relevancy is established by other evidence showing the connection between the fact discovered and the offence charged and the accused. Section 27 involves the principle of confirmation by subsequent facts.

There appears to be a distinction between a statement that "it is lying hid or buried at a certain place" and "I hid or buried it at a certain place". For instance, in the case of a dead body, a statement of the latter kind involves a confession of concealing evidence or conniving at such being done; or the statement" I stole and buried or concealed" or "the stolen property was hid at a certain place" includes a confession of theft and it might also be hit by Sections 25 or 26. In the application of the rule it should never be lost sight of that part of a statement wherein the accused admits his guilt in regard to an offence is inadmissible as it does not in any sense relate distinctly to the discovery of any fact."

VII. Reliance is next placed on *Prabhu Versus State of U.P.*: **AIR 1963 SC 1113** wherein the Apex Court has held as under:

> "Section 27 provides that when any fact is deposed to and discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to

the fact thereby discovery may be proved. In Pulukuri Kotayya v. King Emperor I.L.R. (1947) IndAp 65 the Privy Council considered the true interpretation of s. 27 and said:

"It is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact. Information as to past user or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the information to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which stabbed A.', these words are inadmissible since they do not related to the discovery of the knife in the house of the informant." (p. 77)

VIII. Reliance is also placed on *State of NCT Delhi Versus Navjot Sandhu* (supra) commonly known as "Parliament Attack Case" wherein it was held that a fact should be discovered in consequence of the information received from the accused. If the name and address of the shop was already known to the police from the packets of seized article, the shop pointed out by the accused could be admitted under Section 27 of the Indian Evidence Act. It is argued by counsel for the accused that relationship of cause and effect must exist between information and fact discovered. In this regard, they have placed reliance on *Himachal Pradesh Administration Versus Om Prakash*: **(1972) 1 SCC 249** wherein it was held as under:

> "13. Thereafter on the information furnished by the accused that he had purchased the weapon from Ganga

Singh P.W. 11 and that he would take them to him, they went to the that of P.W. 11 where the accused pointed him out to them. It is contended that the information given by the accused that he purchased the dagger from P.W. 11 followed by his leading the police to his than and pointing him out is inadmissible under Section 27 of the Evidence Act. In our view there is force in this contention. A fact discovered within the meaning of Section 27 must refer to a material fact to which the information directly relates. In order to render the information admissible the fact discovered must be relevant and must have been such that it constitutes the information through which the discovery was made. What is the fact discovered in this case? Not the dagger but the dagger hid under the stone which is not known to the police. (See Pulukuri Kotayya and Ors. v. King-Emperor 74 India Appeals p. 65. But thereafter can it be said that the information furnished by the accused that he purchased the dagger from P.W. 11 led to a fact discovered when the accused took the police to the than of P.W. 11 and pointed him out? A single Bench of the Madras High Court in Public Prosecutor v. India China Lingiah and Ors. AIR 1954 Mad. 333, and in re Vellingiri MANU/TN/0259/1950: AIR1950Mad613, seems to have taken the view that the information by an accused leading to the discovery of a witness to whom he had given stolen articles is a discovery of a fact within the meaning of Section 27. In Emperor v. Ramanuja Ayyangar AIR 1935 Mad. 528, a Full Bench of three Judges by a majority held that the statement of the accused "I purchased the mattress from this shop and it was this woman (another witness) that carried the mattress" as proved by the witness who visited him with the police was admissible because the word 'fact' is not restricted to something which can be exhibited as a material object. This judgment was before Pulukuri Kotayya's case 74 I.A. 64 when as far as the Presidency of Madras was concerned the law laid down by the Full Bench of that Court, in Re Athappa Goundan ILR 1937 Mad 695 prevailed. It held that where the accused's statement connects the fact discovered with the offence and makes it relevant, even though the statement amounts to a confession of the offence, it must be admitted because it is that has led directly to the discovery. This view was over-ruled by the Privy Council in Pulukuri Kotayya's case 74 I.A. 64 and this Court had approved the Privy Council case in Ramkishan Mithanlal Sharma v. The State of Bombay MANU/SC/0044/1954:

1955CriLJ196.

14. In the Full Bench judgment of seven Judges in Sukhan v. The Crown ILR Lah 283, which was approved by the Privy Council in Pulukuri Kotayya's case 74 I.A. 64, Shadi Lal, C.J., as he then was speaking for the majority pointed out that the expression 'fact' as defined by Section 3 of the Evidence Act includes not only the physical fact which can be perceived by the senses but also the psychological fact or mental condition of which any person is conscious and that it is in the former sense that the word used by the Legislature refers to a material and not to a mental fact. It is clear therefore that what should be discovered is the material fact and the information that is admissible is that which has caused that discovery so as to connect the information and the fact with each other as the 'cause and effect'. That information which does not distinctly connect with the fact discovered or that portion of the information which merely explains the material thing discovered is not admissible under Section 27 and cannot be proved. As explained by this Court as well as by the Privy Council, normally Section 27 is brought into operation where a person in police custody produces from some place of concealment some object said to be connected with the crime of which the informant is the accused. The concealment of the fact which is not known to the police is what is discovered by the information and lends assurance that the information was true. No witness with whom some material fact, such as the weapon of murder, stolen property or other incriminating article is not hidden sold or kept and which is unknown to the Police can be said to be discovered as a consequence of the information furnished by the accused. These examples however are only by way of illustration and are not exhaustive. What makes the information leading to the discovery of the Witness admissible is the discovery from him of the thing sold to him or hidden or kept with him which the police did not know until the information was furnished to them by the accused. A witness cannot be said to be discovered if nothing is to be found of recovered from him as a consequence of the information furnished by the accused and the information which disclosed the identity of the witness will not be admissible. But even apart from the admissibility of the information under Section 27, the evidence of the Investigating Officer and the panchas that the accused had taken them to P.W. 11 and pointed him out and as corroborated by P.W. 11

himself would be admissible under Section 8 of the Evidence Act as conduct of the accused."

IX. Reliance is also placed on *Sukhan Versus The Crown*: Criminal Appeal No.**1388 of 1928** decided by Full Bench of Lahore High Court wherein it has been held as under:

"Having ascertained the fact discovered we proceed to determine how much of the information supplied by the accused may be proved. The language of section 27, when analysed, shows that the Legislature has prescribed the following two limitations in order to define the scope of the information provable against the accused :-—(!) The information must be such as has caused the discovery of the fact. This condition follows from the phrase "discovered in consequence of information" and also from the expression "thereby discovered" used by the Legislature with reference to the fact. In other words, the fact must be the consequence, and the information the cause of its discovery. The information and the fact should be connected with each other as cause and effect. If any portion of the information does not satisfy this test, it should he excluded. (2) The information must "relate distinctly" to the fact discovered. The word, "relate' means "to have reference to" or "to connect" and the word "distinctly" means "clearly, unmistakably, decidedly or indubitably." To put it in a different language, the information, must be clearly connected with the fact.

It is an established rule of the Indian law that every confession must be rejected which has been improperly obtained or has been made by an accused person to a police officer or whilst be is in the custody of a police officer. The principle upon which the rejection is founded is that a confession thus made or obtained is untrustworthy. If circumstances, however, appear which rebut the presumption of its being false and demonstrate its truth, the confession should be allowed. When, in consequence of information furnished by the accused, a fact is discovered; then the discovery of that fact supplies a guarantee of the truth of the information which may amount to a confession. The confession in so far as it is confirmed by the discovery should be deemed to be true.

This, no doubt, is the rationale of the exception

enacted by section 27, but its scope must depend upon the actual language employed by the Legislature. As I have pointed out, the wording of the section shows that the requirement of both conditions specified above must be satisfied before an incriminating statement can be received in evidence. These conditions, when combined, lead us to conclusion that only that portion of the information is provable which was the immediate or proximate cause of the discovery of the fact. Anything, which is not connected with fact as its cause, or is connected with it, not as its immediate or direct cause, but as its remote cause, does not come within the ambit of the section and should be excluded."

X. The impact and effect of Sections 25 and 27 of the Evidence Act have been dealt with in *Indra Dalal Versus State of Haryana*: **(2015) 11 SCC 31** wherein it was held as under:

"16. The philosophy behind the aforesaid provision is acceptance of a harsh reality that confessions are extorted by the police officers by practicing oppression and torture or even inducement and, therefore, they are unworthy of any credence. The provision absolutely excludes from evidence against the accused a confession made by him to a police officer. This provision applies even to those confessions which are made to a police officer who may not otherwise be acting as such. If he is a police officer and confession was made in his presence, in whatever capacity, the same becomes inadmissible in evidence. This is the substantive rule of law enshrined under this provision and this strict rule has been reiterated countlessly by this Court as well as the High Courts.

17. The word 'confession' has no where been defined. However, the courts have resorted to the dictionary meaning and explained that incriminating statements by the accused to the police suggesting the inference of the commission of the crime would amount to confession and, therefore, inadmissible under this provision. It is also defined to mean a direct acknowledgment of guilt and not the admission of any incriminating fact, however grave or conclusive. Section 26 of the Evidence Act makes all those confessions inadmissible when they are made by any person, whilst he is in the custody of a police officer, unless such a confession is made in the immediate presence of a Magistrate. Therefore, when a person is in police custody, the confession made by him

even to a third person, that is other than a police officer, shall also become inadmissible.

18. In the present case, as pointed out above, not only the confessions were made to a police officer, such confessional statements were made by the Appellants after their arrest while they were in police custody. In Bullu Das v. State of Bihar MANU/SC/0689/1998 : (1998) 8 SCC 130, while dealing with the confessional statements made by accused before a police officer, this Court held as under:

7. The confessional statement, Ex. 5, stated to have been made by the Appellant was before the police officer in charge of the Godda Town Police Station where the offence was registered in respect of the murder of Kusum Devi. The FIR was registered at the police station on 8-8-1995 at about 12.30 p.m. On 9-8-1995, it was after the Appellant was arrested and brought before Rakesh Kumar that he recorded the confessional statement of the Appellant. Surprisingly, no objection was taken by the defence for admitting it in evidence. The trial court also did not consider whether such a confessional statement is admissible in evidence or not. The High Court has also not considered this aspect. The confessional statement was clearly inadmissible as it was made by an accused before a police officer after the investigation had started.

19. Notwithstanding the same, the trial court as well as the High Court had relied upon these confessions on the basis of these statements, coupled with 'other connected evidence available on the record', particularly the recovery of the scooter from the old house of accused Indra Dalal and the disclosure/confessional statement (Mark A) made by Jaibir in another case bearing FIR No. 718 dated November 30, 2001 registered Under Sections 420/407/463/471/120-B Indian Penal Code and Sections 25/54/59 of the Arms Act, 1959 registered at Police Station: Civil Lines, Hisar, which has been proved by Inspector Ram Avatar (PW-15).

20. What follows from the above reasoning given by the High Court is that the confessional statements were supported with other evidence. Though the High Court has mentioned 'other connected evidence', what is relied upon is the recovery of scooter and the disclosure/confessional statement made by Jaibir in some other case. No other evidence is pointed out by the High Court. On our specific query to the learned Counsel for the State during the arguments, he also

conceded that the only 'connected evidence available on record' was the recovery of scooter and the confessional statement (Mark A) made by Jaibir in FIR No. 718 dated November 30, 2001. This approach of the High Court relying upon the confessional statements, otherwise inadmissible, with the aid of 'other connected evidence' is contrary to law. We harbour serious doubts about basing criminal punishment on such an unapproach, not permissible in law. This conclusion gets strengthened as we proceed to discuss the nuances of legal principles and its application to the factual canvas herein.

21. The question is as to whether these could be taken into consideration to believe the confessional statements by the Appellants, which were otherwise inadmissible in law.

22. The only portion of the information contained in the confessional statements that may be proved is provided Under Section 27 of the Evidence Act, which reads as under:

"27. How much of information received from accused may be proved. - Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

23. It is clear that Section 27 is in the form of proviso to Sections 25 and 26 of the Evidence Act. It makes it clear that so much of such information which is received from a person accused of any offence, in the custody of a police officer, which has led to discovery of any fact, may be used against the accused. Such information as given must relate distinctly to the fact discovered. In the present case, the information provided by all the accused/Appellants in the form of confessional statements, has not led to any discovery. More starkly put, the recovery of scooter is not related to the confessional statements allegedly made by the Appellants. This recovery was pursuant to the statement made by Harish Chander Godara. It was not on the basis of any disclosure statements made by these Appellants. Likewise, insofar as confessional statement (Mark A) allegedly given by Jaibir is concerned, that is again in another FIR. We shall come to its admissibility separately. Therefore, the situation contemplated Under Section 27 of the Evidence Act also does not get attracted. Even if the scooter was recovered pursuant to

> the disclosure statement, it would have made the fact of recovery of scooter only, as admissible Under Section 27 of the Evidence Act, and it would not make the so-called confessional statements of the Appellants admissible which cannot be held as proved against them.
> 24. At this juncture, let us discuss as to whether the disclosure/confessional statement (Mark A) made by Appellant Jaibir in another case would be relevant to prove the charge of conspiracy. It would be pertinent to point out that this statement is made by Jaibir much after the incident, when, naturally, the common intention had ceased to exist. On this ground alone it would not be admissible."

XI. What can be logically deduced from the above judgments is that any confession made to a police or while in police custody is not admissible in evidence, however, Section 27 of the Evidence Act is an exception. Any information given to a police which leads to discovery of a fact is admissible to the extent a fact or a material object is discovered. If a place is already known to the police, there is no discovery of a fact. The fact, which is already in notice of the police is not a fact discovered on account of disclosure made under Section 27 of the Evidence Act. If confessions that led to the recovery of incriminating materials were not voluntary, but caused by inducement, pressure or coercion, it is hit by Article 20(3) of the Constitution, rendering such confessional statement inadmissible.

C. <u>TEST IDENTIFICATION PARADE</u>:

I. Learned Additional Government Advocate has placed reliance on *Brij Mohan & Ors. Versus State of Rajasthan*: **AIR 1994 SC 739**. That was a case where accused was identified by 11 witnesses. The Court observed that even when the test identification parade was conducted after three months, the same cannot be rejected merely on this ground as the test identification

parade was conducted within 24 hours of the arrest in connection with the case. The Court further observed that it was not an ordinary case of dacoity; four persons were killed, one of them being a lady. The *gruesome and callous manner*, in which the dacoity was committed by the culprits must have left a deep impression on the mind of the witnesses, who had occasioned to see such culprits in the electric light during the course of commission of assault, firing and removal of the articles from the house in question. This deep impression will also include the facial impression of the culprits, which in normal course must not have been erased only within a period of three months.

II. In *Daya Singh Versus State of Haryana*: **AIR 2001 SC 739** where accused was identified in Court by two witnesses from amongst the accused by pointing to them out of 14 persons. It was observed by the Court that the offence has taken place in the presence of the witnesses and their son and daughter-in-law were murdered by the accused. Thus, they must have left an impression in the mind of the witnesses and merely because test identification parade was not got conducted, their evidence cannot be disbelieved. That was a case where the identification in Court was after 8 years of the incident.

III. In *Heera & Ors. Versus State of Rajasthan*: **AIR 2007 SC 2425**, the Apex Court referred to the observations made by the Supreme Court in *Matru Versus State of U.P.*: **MANU/SC/0141/1971** wherein the Court observed that identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with investigation into the offence is proceeding on the right lines. The identification

can only be used as corroborative of the statement in Court. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime.

IV. Learned Additional Government Advocate has also placed reliance on *Pramod Mondal Versus State of Bihar*: **(2004) 13 SCC 150** wherein the Court has held as under:

> "20. It is neither possible nor prudent to lay down any invariable rule as to the period within which a Test Identification Parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the Courts of fact to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the Test Identification Parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their very nature may be witnessed by a single witness, such as rape. The offender may be unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquittal because of there being only one identifying witness? Prudence therefore demands that these matters must be left to the wisdom of the courts of fact which must consider all aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or rejection of such identification."

V. Reliance is also placed on *Raja & Ors. Versus State of Karnataka*: **(2020) 15 SCC 562** wherein it has been held by the Apex Court as under:

> "16. Again, there is no hard and fast Rule about the period within which the TIP must be held from the arrest of the Accused. In certain cases, this Court considered delay of 10 days to be fatal while in other cases even delay of 40 days or more was not considered to be fatal at all. For instance, in Pramod Mandal v. State of Bihar MANU/SC/0765/2004 : (2004) 13 SCC 150 the Accused was arrested on 17.01.1989 and was put up for Test Identification on 18.02.1989, that is to say there was a delay of a month for holding the TIP. Additionally, there was only one identifying witness against the said Accused. After dealing with the decisions of this Court in Wakil Singh v. State of Bihar MANU/SC/0277/1981 : (1981) Suppl. SCC 28, Subhash v. State of Uttar Pradesh (1987) 3 SCC 231 and Soni v. State of Uttar Pradesh (1982) 3 SCC 368 in which benefit was conferred upon the Accused because of delay in holding the TIP, this Court considered the line of cases taking a contrary view as under:
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> > 18. Learned Counsel for the State submitted that in the instant case there was no inordinate delay in holding the test identification parade so as to create a doubt on the genuineness of the test identification parade. In any event he submitted that even if it is assumed that there was some delay in holding the test identification parade, it was the duty of the Accused to question the investigating officer and the Magistrate if any advantage was sought to be taken on account of the delay in holding the test identification parade. Reliance was placed on the judgment of this Court in Bharat Singh v. State of U.P. MANU/SC/0092/1972 : (1973) 3 SCC 896 In the aforesaid judgment this Court observed thus: (SCC p. 898, para 6)
> >
> > 6. In S.K. Hasib v. State of Bihar MANU/SC/0180/1971 : (1972) 4 SCC 773 it was observed by the Court that identification

parades belong to the investigation stage and therefore it is desirable to hold them at the earliest opportunity. An early opportunity to identify tends to minimise the chances of the memory of the identifying witnesses fading away due to long lapse of time. Relying on this decision, counsel for the Appellant contends that no support can be derived from what transpired at the parade as it was held long after the arrest of the Appellant. Now it is true that in the instant case there was a delay of about three months in holding the identification parade but here again, no questions were asked of the investigating officer as to why and how the delay occurred. It is true that the burden of establishing the guilt is on the prosecution but that theory cannot be carried so far as to hold that the prosecution must lead evidence to rebut all possible defences. If the contention was that the identification parade was held in an irregular manner or that there was an undue delay in holding it, the Magistrate who held the parade and the police officer who conducted the investigation should have been cross-examined in that behalf.

In the instant case we find that the defence has not imputed any motive to the prosecution for the delay in holding the test identification parade, nor has the defence alleged that there was any irregularity in the holding of the test identification parade. The evidence of the Magistrates conducting the test identification parade as well as the investigating officer has gone unchallenged. Learned Counsel for the State is, therefore, justified in contending that in the facts and circumstances of this case the holding of the test identification parade, about one month after the occurrence, is not fatal to the case of the prosecution as there is nothing to suggest that there was any motive for the prosecution to delay the holding of the test identification parade or that any irregularity was committed in holding the test identification parade."

VI. In *Jagnya Versus State of Rajasthan*: D.B. Criminal Appeal No.**540 of 1975**: **MANU/RH/0309/1980** wherein it has been held as under:

> "17. It is contended by the learned Advocate that the identification parade in this case is far from satisfactory, and it cannot be pressed in to service to corroborate the statements of the witnesses recorded in the court, so far as the identification of the accused persons is concerned. Rule 7.31 of the Rajasthan Police Rules, 1965 deals with the identification of suspects. It requires that these proceedings should be held soon after the arrest of the suspects, and it should be vouchsafed that a suspect put to identification proceedings has been put under veil, (Ba Parda) since the time of arrest till the proceedings for his identification were actually arranged. It also provides that the suspect should be placed among other persons similarly dressed and of the same stature in the proportion of 8 to 10 persons to one suspect. There should be resemblance in facial outlook of persons so mixed up with that of the suspect. It further provides that the officer conducting the parade should question the witnesses as to the circumstances in which they saw the suspect whom they claim to identify and to record the answer in the proper column of the form. While every precaution shall be taken to prevent collusion, the identifying witness must be given a fair chance, and condition must not be imposed which would make it impossible for a person honestly capable of making an identification, to do so. It further lays down that in this connection it is of paramount importance that no alteration in any way of personal appearance of unconvicted persons should be made so as to make it difficult to recognise them. We will like to make an important observation here that the tendency of the Magistrate that while conducting identification proceedings of suspects, they conceal specific signs (as the mole and till or mark of injury by paper chits, and similar paper chits or the like are placed on these mixed in the identification parade is not in accordance with rule 7.31 of the Rajasthan Police Rules, 1965, which, as already observed above, lays down that no alteration in any way of personal appearance of unconvicted persons should be made so as to make it difficult to recognise them. We will also like to observe that specific signs

(like mole, till etc) on the face of the suspect can go a long way for the witnesses identifying the suspect in the identification parade, as the witness is likely to observe those specific signs at the time of the incident and keep them in his memory, and concealing those signs will amount to deprive the witness of reasonable opportunity to identify the suspect. Care should be taken by the Magistrate to see that those who are mixed in the parade resemble in facial outlook with that of the suspects."

VII. Reliance is also placed on *State of Rajasthan Versus Ranjita Ladhuram*: **AIR 1962 RAJ 78** wherein the Full Bench of the Rajasthan High Court has held that it is not necessary that entries should be made in the various police records of the precautions that were to be taken for keeping accused person *ba-parda* while under police custody. It is also not necessary to specify in the warrant of commitment of the accused, when he is sent to judicial custody that he is to be kept *ba-parda* till identification parade takes place nor is it necessary to specify the precautions that the jail authorities are to take for keeping accused *ba-parda*. It was also held that it is not necessary that entries should be made in the jail record for keeping the accused *ba-parda* while he is in judicial lockup. It is for police authorities to specify administratively what precautions they would like to take in order to avoid the accused being seen by identifying witnesses prior to test identification parade so that value of their identification may not be lost; but it is unnecessary for Court to lay down hide-bound rules for conduct of police in matter of this nature, much will depend upon circumstances of each case in evaluating evidence of identification, to lay down any hard and fast rule would be to

unduly curtail judicial discretion of the Courts which after all, was best judge of evidence placed before it.

VIII. Reliance is also placed on *Asharfi & Ors. Versus State*: **AIR 1961 ALL 163** wherein Allahabad High Court held as under:

> "36. The only argument put forward upon this point has been that it stands to reason that no man can identify after four or five years a man whom he had only seen once. We do not accept) the argument. It is based on pure assumption and contradicted by the fact of the identification itself. Men differ very largely in their powers of observation. One man will remember a face for a very long period though he has only seen its possessor once, and for a very short time. Other men who are unobservant may not be able to identify persons whom they had a good opportunity of identifying even a short time afterwards. The power to identify varies according to the power of observation and the observation may be based upon small minutiae which a witness cannot describe himself or explain. It has no necessary connection with education or mental attainments."
>
> Accordingly the test is not that the identification parade was held after a long period but whether the power of observation of the witness was adequate. Were delay alone to be made the test, a premium would manifestly be placed on absconding, and all that would be necessary for a criminal for evading justice would be to promptly abscond and to appear only after the lapse of a long period of time. We refuse to believe that this could be the intention of the law. At the same time we must stress that whenever a test identification is discovered to have been held with delay, the-prosecution should explain it, and that the absence of a reasonable explanation will detract from the value of the test. The police can seldom be blamed for arresting a suspected criminal with delay, but once his arrest has been effected there can be no excuse for failure to hold his identification within two or three weeks."

IX. On the question of test identification parade, learned counsel for accused has placed reliance on *Rameshwar Singh Versus State*

of Jammu and Kashmir: **(1971) 2 SCC 715** wherein it has been held as under:

> "6. We may now turn to the evidence on the record. Abdul Ghani Sheikh who claims to be the eye witness to the occurrence lodged the first information report (Ex. P-1) at 11-30 a.m. at the police station only about 200 feet away from the stadium. In order to appreciate the value of this report and the value of the testimony of this witness in court in regard to the description of the alleged culprit we consider it proper to reproduce the whole of this report. It says:
>
> At the Stadium a football match was being played. From there the P.A.C. men chased and turned out the people. All the people came out from the gates on the East and North. They were going back through the Hazuri Bagli Road. I was standing near the cycle-shop which is situated close to the Stadium chowk. A P.A.C. jawan came out of the main gate. He carried a rifle. He fired a shot towards the road. It went in the direction of the Militia wall. Thereafter the P.A.C. Jawan came on the road and fired shots. He went towards the Militia gate and inflicted bullet injuries on three of the persons going on the Road. Then a P.A.C. Sardar and a B.S.F. Jawan with three P.A.C. men who carried, Dandas in the hands, got held of the said Jawan. They took him inside the stadium. The said Jawan fired nine or ten shots recklessly, though the way-tarers were going on the road in a peaceful manner. There was no crowd, nor was there any breach. * * * *"

X. Reliance is also placed on *Mohd. Farooq Abdul Gafur & Ors. Versus State of Maharashtra*: **(2010) 14 SCC 641** wherein it has been held by the Court as under:

> "109. The contention of the learned Counsel appearing for accused persons that there was inordinate delay in conducting the TIP cannot be accepted in view of the fact that both the accused persons were taken into custody on 25.06.1999 whereas the TIP was held on 10.08.1999. therefore, the TIP was conducted only after a period of 45 days which is not such a long period to cast any doubt over the evidentiary value of the TIP. Even otherwise, a TIP does not constitute substantive evidence but can only be used for

corroboration of the statement in court. It is primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation is proceeding on the right lines. The substantive evidence is the evidence of identification in court, which in the present case has been done by PW-18. This Court in the case of Amitsingh Bhikamsingh Thakur v. State of Maharashtra MANU/SC/7004/2007 : (2007) 2 SCC 310, at page 315, has succinctly observed as follows:

13. As was observed by this Court in Matru v. State of U.P. identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. (See Santokh Singh v. Izhar Hussain.) The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime. The identification proceedings are in the nature of tests and significantly, therefore, there is no provision for it in the Code of Criminal Procedure, 1973 (in short "the Code") and the Evidence Act, 1872 (in short "the Evidence Act"). It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. This is a very common plea of the accused and, therefore, the prosecution has to be cautious to ensure that there is no scope for making such allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution.

14. "It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the

position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration.

110. Next contention of the learned Counsel appearing for the accused persons that the photograph of Accused No. 5 was published in an Urdu daily thereby making the identity of Accused No. 5 public also does not find favour in view of the fact that the witnesses are Maharashtrians and, therefore, there is no likelihood of their reading the paper and seeing the photograph of Accused No. 5."

XI. Reliance is also placed on *Umesh Chandra & Ors. Versus State of Uttarakhand*: **2021 SCC OnLine SC 689** wherein it was held as under:

"A test identification parade under Section 9 of the

Evidence Act is not substantive evidence in a criminal prosecution but is only corroborative evidence. The purpose of holding a test identification parade during the stage of investigation is only to ensure that the investigating agency prima facie was proceeding in the right direction where the accused may be unknown or there was a fleeting glance of the accused. Mere identification in the test identification parade therefore cannot form the substantive basis for conviction unless there are other facts and circumstances corroborating the identification."

XII. Reliance is also placed on *Chunthuram Versus State of Chattisgarh*: **(2020) 10 SCC 733** wherein the Apex Court has held as under:

"10. The infirmities in the conduct of the Test Identification Parade would next bear scrutiny. The major flaw in the exercise here was the presence of the police during the exercise. When the identifications are held in police presence, the resultant communications tantamount to statements made by the identifiers to a police officer in course of investigation and they fall within the ban of Section 162 of the Code. (See Ramkishan Mithanlal Sharma v. The State of Bombay MANU/SC/0044/1954 : (1955) 1 SCR 903)"

XIII. Reliance is next placed on *Wakil Singh & Ors. Versus State of Bihar*: **1981 (Supp) SCC 28** wherein test identification parade was conducted after three and a half months after the dacoity and in view of long lapse of time, the Court considered it unsafe to convict an accused on the basis of test identification parade. It was further held that no precautions were made to cover the cut mark on the cheek or to put some person having similar marks or to conceal these cut marks. The Apex Court confirmed the order of acquittal.

XIV. Reliance is next placed on *Musheer Khan Versus State of MP*: **(2010) 2 SCC 748** wherein it was held as under:

> "24. It may be pointed out that identification test is not substantive evidence. Such tests are meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines. (See Matru Alias Girish Chandra v. The State of Uttar Pradesh MANU/SC/0141/1971 : 1971(2) SCC 75 at para 17) 25. It is also held by this Court that identification test parade is not substantive evidence but it can only be used in corroboration of the statements in Court. (See Santokh Singh v. Izhar Hussain and Anr. MANU/SC/0165/1973 : (1973) 2 SCC 406 at para 11) 26. Recently in the case of Amitsingh Bhikam Singh Thakur v. State of Maharashtra MANU/SC/7004/2007 : (2007) 2 SCC 310 this Court held on a consideration of various cases on the subject that the identification proceedings are in the nature of tests and there is no procedure either in Cr. P.C., 1973 or in the Indian Evidence Act for holding such tests. The main object of holding such tests during investigation is to check the memory of witnesses based upon first impression and to enable the prosecution to decide whether these witnesses could be cited as eye witnesses of the crime. It has also been held that the evidence of the identification of accused for the first time is inherently weak in character and the court has held that the evidence in test identification parade does not constitute substantive evidence and these parades are governed by Section 162 of Code of Criminal Procedure and the weight to be attached to such identification is a matter for the courts."

XV. Reliance is also placed on *Dana Yadav @ Dahu & Ors. Versus State of Bihar*: **(2002) 7 SCC 295** wherein the Apex Court after analyzing the law concluded and one of the conclusions was that evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of accused by a witness in court.

XVI. On the question of identification, learned counsel appearing for accused Mohammad Salman has also placed reliance on *Mohd. Sajjad Alias Raju Alias Salim Versus State of West Bengal*: **(2017) 11 SCC 150** wherein it has been held as under:

> "15. In Lal Singh and Ors. v. State of U.P. MANU/SC/0871/2003 : 2003 (12) SCC 554, this Court in Paragraphs 28 and 43 dealt with the value or weightage to be attached to Test Identification Parade and the effect of delay in holding such Test Identification Parade. The said paragraphs are as under:
>
> > "28. The next question is whether the prosecution has proved beyond reasonable doubt that the Appellants are the real culprits. The value to be attached to a test identification parade depends on the facts and circumstances of each case and no hard-and-fast Rule can be laid down. The court has to examine the facts of the case to find out whether there was sufficient opportunity for the witnesses to identify the accused. The court has also to Rule out the possibility of their having been shown to the witnesses before holding a test identification parade. Where there is an inordinate delay in holding a test identification parade, the court must adopt a cautious approach so as to prevent miscarriage of justice. In cases of inordinate delay, it may be that the witnesses may forget the features of the accused put up for identification in the test identification parade. This, however, is not an absolute Rule because it depends upon the facts of each case and the opportunity which the witnesses had to notice the features of the accused and the circumstances in which they had seen the accused committing the offence. Where the witness had only a fleeting glimpse of the accused at the time of occurrence, delay in holding a test identification parade has to be viewed seriously. Where, however, the court is satisfied that the witnesses had ample opportunity of seeing the accused at the time of the commission of the offence and there is no chance of mistaken identity, delay in holding the test identification parade may not be held to be fatal. It all depends upon the facts and circumstances of each case.
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> > 43. It will thus be seen that the evidence of

identification has to be considered in the peculiar facts and circumstances of each case. Though it is desirable to hold the test identification parade at the earliest-possible opportunity, no hard-and-fast Rule can be laid down in this regard. If the delay is inordinate and there is evidence probabilising the possibility of the accused having been shown to the witnesses, the court may not act on the basis of such evidence. Moreover, cases where the conviction is based not solely on the basis of identification in court, but on the basis of other corroborative evidence, such as recovery of looted articles, stand on a different footing and the court has to consider the evidence in its entirety."

16. In the case in hand, apart from the fact that there was delay in holding the Test Identification Parade, one striking feature is that none of the concerned prosecution witnesses had given any identification marks or disclosed special features or attributes of any of those four persons in general and the accused in particular. Further, no incident or crime had actually taken place in the presence of those prosecution witnesses nor any special circumstances had occurred which would invite their attention so as to register the features or special attributes of the concerned accused. Their chance meeting, as alleged, was in the night and was only for some fleeting moments."

XVII. Reliance is next placed on *State of Maharashtra Versus Syed Umar Sayed Abbas & Ors.*: **(2016) 4 SCC 735** wherein it was held as under:

"17. It is very clear that in the present case the incident of firing occurred in the circumstances wherein much time was not available for the eye-witnesses to clearly see the accused. In such a situation, it was of much more importance that the Test Identification Parades were to be conducted without any delay. The first Test Identification Parade was held by PW21 after about 1 1/2 months of the incident. The second Test Identification Parade was conducted by PW18 after more than a year of the incident. Even if it is taken into account that A12 was arrested after a year and within one month thereafter the test Identification Parade was conducted, still it is highly doubtful whether the eye-

witnesses could have remembered the faces of the accused after such a long period. Though the incident took place in broad daylight, the time for which the eye-witnesses could see the accused was not sufficient for them to observe the distinguishing features of the accused, especially because there was a commotion created after the firing and everyone was running to shelter themselves from the firing."

XVIII. Reliance is next placed on *Budhsen & Anr. Versus State of U.P.*: **(1970) 2 SCC 128** wherein the Court has held as under:

"18. Before us the entire case depends on the identification of the appellants and this identification is founded solely on test identification parades. The High Court does not seem to have correctly appreciated the evidentiary value of these parades though they were considered to be the primary evidence in support of the prosecution case. It seems to have proceeded on the erroneous legal assumption that it is a substantive piece of evidence and that on the basis of that evidence alone the conviction can be sustained. And then that court also ignored important evidence on the record in regard to the manner in which the test identification parades were held, and other connected circumstances suggesting that they were held more or less in a mechanical way without the necessary precautions being taken to eliminate unfairness. This is clearly an erroneous way of dealing with the test identification parades and has caused failure of justice. Shri Rana laid great emphasis on the fact that there is no enmity shown between the witnesses and the appellants. In our opinion, though this factor is relevant it cannot serve as a substitute for reliable admissible evidence required to establish the guilt of the accused beyond reasonable doubt. The evidence in regard to identification having been discarded by us as legally infirm and which does not connect the appellants with the alleged offence it cannot by itself sustain the conviction of the appellants."

XIX. Reliance is also placed on *Greesan Nair & Ors. Versus State of Kerala*: **2022 LiveLaw (SC) 955** wherein the Apex Court held that test identification parade conducted in the presence of a Police Officer is inadmissible. It was also held that test

identification parade should be conducted without avoidable and unreasonable delay after the arrest of accused and further that there shall be healthy ratio between suspects and non-suspects and that test identification parade is not just an empty formality. Relevant paragraphs of the aforesaid judgment are quoted hereunder:

> "25. Analysis: Heard the learned counsel for the parties and perused the case records. We may, at the outset, note that the eyewitnesses questioned by the prosecution did not give out the names or identities of the Accused participating in the riot and involved in the destruction of public property. Therefore, the IO (PW-84) had to necessarily conduct a TIP. The object of conducting a TIP is threefold. First, to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the crime. Second, to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. Third, to test the witnesses' memory based on first impression and enable the prosecution to decide whether all or any of them could be cited as eyewitnesses to the crime.
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> 26. TIPs belong to the stage of investigation by the police. It assures that investigation is proceeding in the right direction. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant (Matru alias Girish Chandra v. State of U.P.; Mulla and Anr. v. State of U.P. and C. Muniappan and Ors. v. State of Tamil Nadu). The evidence of a TIP is admissible under Section 9 of the Indian Evidence Act. However, it is not a substantive piece of evidence. Instead, it is used to corroborate the evidence given by witnesses before a court of law at the time of trial. Therefore, TIPs, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of an accused can be sustained (State of H.P. v. Lekh Raj and Anr.; and C. Muniappan and Ors v. State of T.N.).
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> 27. It is a matter of great importance both for the investigating agency and for the accused and a fortiori

for the proper administration of justice that a TIP is held without avoidable and unreasonable delay after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses before the test identification parade. This is a very common plea of the accused, and therefore, the prosecution has to be cautious to ensure that there is no scope for making such an allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution. But reasons should be given as to why there was a delay (Mulla and Anr. v. State of U.P. and Suresh Chandra Bahri v. State of Bihar).

28. In cases where the witnesses have had ample opportunity to see the accused before the identification parade is held, it may adversely affect the trial. It is the duty of the prosecution to establish before the court that right from the day of arrest, the accused was kept "baparda" to rule out the possibility of their face being seen while in police custody. If the witnesses had the opportunity to see the accused before the TIP, be it in any form, i.e., physically, through photographs or via media (newspapers, television etc…), the evidence of the TIP is not admissible as a valid piece of evidence (Lal Singh and Ors v. State of U.P. Suryamoorthi and Anr. v. Govindaswamy and Ors.)

29. If identification in the TIP has taken place after the accused is shown to the witnesses, then not only is the evidence of TIP inadmissible, even an identification in a court during trial is meaningless (Shaikh Umar Ahmed Shaikh and Anr. v. State of Maharashtra). Even a TIP conducted in the presence of a police officer is inadmissible in light of Section 162 of the Code of Criminal Procedure, 1973 (Chunthuram v. State of Chhattisgarh and Ramkishan Mithanlal Sharma v. State of Bombay).

30. It is significant to maintain a healthy ratio between suspects and nonsuspects during a TIP. If rules to that effect are provided in Prison Manuals or if an appropriate authority has issued guidelines regarding the ratio to be maintained, then such rules/guidelines shall be followed. The officer conducting the TIP is under a compelling obligation to mandatorily maintain the prescribed ratio. While conducting a TIP, it is a sine-quanon that the nonsuspects should be of the same

agegroup and should also have similar physical features (size, weight, color, beard, scars, marks, bodily injuries etc.) to that of the suspects. The concerned officer overseeing the TIP should also record such physical features before commencing the TIP proceeding. This gives credibility to the TIP and ensures that the TIP is not just an empty formality (Rajesh Govind Jagesha v. State of Maharashtra and Ravi v. State).

31. It is for the prosecution to prove that a TIP was conducted in a fair manner and that all necessary measures and precautions were taken before conducting the TIP. Thus, the burden is not on the defence. Instead, it is on the prosecution (Rajesh Govind Jagesha v. State of Maharashtra).

42. This Court in Budhsen and Anr. v. State of UP, had directed that sufficient precautions have to be taken to ensure that the witnesses who are to participate in the TIP do not have an opportunity to see the accused before the TIP is conducted. In Lal Singh v. State of U.P., this Court had held that a trial would be adversely affected when the witnesses have had ample opportunity to see the accused before the identification parade is held. It was held that the prosecution should take precautions and establish before the court that right from the day of his arrest, the accused was kept "baparda" to rule out the possibility of his face being seen while in police custody. Later, in Lalli v. State of Rajasthan and Maya Kaur Baldevsingh Sardar and Anr. v. State of Maharashtra, this Court has categorically held that where the accused has been shown to the witness or even his photograph has been shown by the investigating officer prior to a TIP, holding an identification parade in such facts and circumstances remains inconsequential. Another crucial decision was rendered by this Court in Shaikh Umar Ahmed Shaikh and Anr. v. State of Maharashtra, where it was held:

"8. …. But, the question arises: what value could be attached to the evidence of identity of accused by the witnesses in the Court when the accused were possibly shown to the witnesses before the identification parade in the police station. The Designated Court has already recorded a finding that there was strong possibility that the suspects were shown to the witnesses. Under such circumstances, when the accused were already shown to the witnesses, their identification in the Court by the

witnesses was meaningless. The statement of witnesses in the Court identifying the accused in the Court lost all its value and could not be made the basis for recording conviction against the accused. The reliance of evidence of identification of the accused in the Court by PW 2 and PW 11 by the Designated Court, was an erroneous way of dealing with the evidence of identification of the accused in the Court by the two eyewitnesses and had caused failure of justice. Since conviction of the appellants have been recorded by the Designated Court on wholly unreliable evidence, the same deserves to be set aside."

45. In view of the above, we are of the opinion that there existed no useful purpose behind conducting the TIP. The TIP was a mere formality, and no value could be attached to it. As the only evidence for convicting the appellants is the evidence of the eye witnesses in the TIP, and when the TIP is vitiated, the conviction cannot be upheld. We will now examine the other lapses while conducting the TIPs.

46. Re: Delay in conducting the TIP: Undue delay in conducting a TIP has a serious bearing on the credibility of the identification process. Though there is no fixed timeline within which the TIP must be conducted and the consequence of the delay would depend upon the facts and circumstances of the case[42], it is imperative to hold the TIP at the earliest. The possibility of the TIP witnesses seeing the accused is sufficient to cast doubt about their credibility. The following decisions of this Court on the consequence of delay in conducting TIP have emphasised that the possibility of witnesses seeing the accused by itself can be a decisive factor for rejecting the TIP. In Suresh Chandra Bahri v. State of Bihar, it was held that:

"It is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions and safeguards were effectively taken so that the investigation proceeds on correct lines for punishing the real culprit. It is in adopting this course alone that justice and fair play can be assured both to the accused as well as to the prosecution. But the position may be different when the

accused or a culprit who stands trial had been seen not once but for quite a number of times at different point of time and places which fact may do away with the necessity of a TIP."

47. In Budhsen & Anr. v. State of UP, this Court set aside the conviction imposed on the appellant therein, on the ground that no conviction can be based by solely relying on the identification made in a TIP. While holding that a 14-day delay by itself in conducting the TIP may not cause prejudice to the accused, it observed that there is a high chance of accused being seen by the identifying witnesses outside the jail premises. In Subash and Shiv Shankar v. State of U.P., this Court acquitted an accused on the ground that the TIP was held three weeks after the arrest was made. This Court suspected that the delay in holding the TIP could have enabled the identifying witnesses to see the accused therein in the police lockup or in the jail premises. In State of A.P. v. Dr M.V. Ramana Reddy and Ors., this Court acquitted respondent nos. 2 and 3 therein on the ground that there was a delay of 10 days in conducting the TIP, and in those 10 days, there was a high likelihood of their photographs being shown to the witnesses. In Rajesh Govind Jagesha v. State of Maharashtra, a delay of about one month was viewed seriously by this Court since there was a possibility of the accused being shown to the witnesses.

48. Returning to the facts of the present case, we have already noted that Accused Nos. 116 were arrested on 13.07.2000. Instead of filing an application for conducting a TIP at the earliest, the IO (PW84) filed a remand application, pursuant to which the Accused were remanded to police custody. There is strong evidence that the Accused were shown to the witnesses during their police custody period. The fact that an application for conducting a TIP was filed on 23.07.2000, i.e., the very next day after the police custody period ended, leads to the inevitable conclusion that the Accused were taken into police custody to facilitate their easy identification during the TIP. Otherwise, we see no reason why an application for conducting a TIP was not filed immediately after the arrest of the Accused. In such circumstances, we firmly believe that the delay in holding the TIP coupled with other circumstances has cast a serious doubt on the credibility of the TIP witnesses.

49. Re: Legality of the TIP and the presence of the IO during the conduct of the TIP: A threejudge bench of this Court in Chunthuram v. State of Chhattisgarh, by relying on Ramkishan Mithanlal Sharma v. State of Bombay, has held that any identification made by witnesses in a TIP in the presence of a police officer tantamount to statements made to the police officer under Section 162 Cr.P.C. The Court held:

"The infirmities in the conduct of the test identification parade would next bear scrutiny. The major flaw in the exercise here was the presence of the police during the exercise. When the identifications are held in police presence, the resultant communications tantamount to statements made by the identifiers to a police officer in course of investigation and they fall within the ban of Section 162 of the Code."

XX. That which can be deduced from the judgments relied upon by the counsel for the State as well as learned counsel for the accused is that the value to be attached to a test identification parade depends on the facts and circumstances of each case and no hard and fast rule can be laid down. The Court has to examine the facts of the case to find out whether there was sufficient opportunity for the witness to identify the accused. The Court has also to rule out the possibility of accused having been shown to the witness before holding a test identification parade. Where there is an inordinate delay in holding a test identification parade, the Court must adopt a cautious approach so as to prevent miscarriage of justice. In cases of an inordinate delay, it may be that the witness may forget the features of the accused put up for identification in the test identification parade. This, however, is not an absolute rule because it depends upon the facts of each case and the opportunity which the witnesses had to notice the features of the accused and the circumstances in which they had

seen the accused committing the offence. Where the witness had only a fleeting glimpse of the accused at the time of occurrence, delay in holding a test identification parade has to be viewed seriously. Where, however, the Court is satisfied that the witnesses had ample opportunity of seeing the accused and there is no chance of mistaken identity, delay in holding the test identification parade may not be held to be fatal. Further, the witness should at the first instance must disclose some identification marks or disclose special features or attributes in particular. It can also be deduced that the identification parades belong to the investigating stage, they are generally held during the course of investigation with the primary object of enabling the witnesses to identify person concerned in the offence, who are not previously known to them. This serves to satisfy the Investigating Officers of the bonafide of the prosecution witnesses and also to furnish the evidence to corroborate their testimony in Court. Identification proceedings in their legal effect amounts simply to this that certain persons are brought to jail or some other place and make statement either express or implied that certain individuals whom they point out are persons whom they recognize as having been concerned in the crime. They do not constitute substantive evidence. These parades are essentially governed by Section 162 Cr.P.C. The test identification parade to be of value should be held without much delay. The number of persons mixed up with the accused should be reasonably large and their bearing and general appearance not glaringly dissimilar. The Investigating Officer or Police Personnel assisting him should not be present at the time of test identification parade. The evidence as to

identification deserves to be subjective to a close and careful scrutiny by the Courts.

D. <u>PROSECUTION NOT BOUND TO PRODUCE EVERY WITNESS</u>:

I. Learned Additional Government Advocate has placed reliance on *Mohd. Khalid Versus State of West Bengal*: **(2002) 7 SCC 334** wherein it was held as under:

> "14. Normally, the prosecution's duty is to examine all the eyewitnesses selection of whom has to be made with due care, honestly and fairly. The witnesses have to be selected with a view not to suppress any honest opinion, and due care has to be taken that in selection of witnesses, no adverse inference is drawn against the prosecution. However, no general rule can be laid down that each and every witness has to be examined even though his testimony may or may not be material. The most important factor for the prosecution being that all those witnesses strengthening the case of the prosecution have to be examined, the prosecution can pick and choose the witnesses who are considered to be relevant and material for the purpose of unfolding the case of the prosecution. It is not the quantity but the quality of the evidence that is important. In the case at hand, if the prosecution felt that its case has been well established through the witnesses examined, it cannot be said that non-examination of some persons rendered its version vulnerable.
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> 15. As was observed by this Court in Habeeb Mohammad v. State of Hyderabad MANU/SC/0034/1953 : [1954]1SCR475 prosecution is not bound to call a witness about whom there is a reasonable ground for believing that he will not speak the truth."

II. Reliance is also placed on *Babu Versus State of MP*: **MANU/MP/0187/1967** wherein the Court has held as under:

> "14. The law does not provide a number of witnesses to be examined in a particular case. One witness, if he is reliable, is sufficient to prove any fact. It is the quality that matters, not the quantity. In this connection reference may be made to a decision reported in

Narayan v. State MANU/SC/0039/1958 : AIR 1959 SC 484 in which their lordships have observed that "it is not that the prosecution is bound to call all the witnesses who may have seen the occurrence and so duplicate the evidence. No doubt material witnesses have to be examined and in particular the witnesses who unfold the story. The test whether a witness is material in the case is not whether he may have given evidence in support of the defence, but the test is whether it is essential for unfolding of the narrative".

III. The Court also referred to the judgment of the Supreme Court in *Masatali & Ors. Versus State*: **AIR 1965 SC 202** wherein it was observed as under:

> "It is undoubtedly the duty of the prosecution to lay before the Court all material evidence available to it which is necessary for unfolding its case; but it would be unsound to lay a general rule that every witness must be examined even though his evidence may not be very material or even if it is known that he has been won over or terrorized. In such a case it is always open to the defence to examine such witnesses as their witnesses and the Court can also call such witnesses in the box in the interest of justice."

IV. Learned Additional Government Advocate has also placed reliance on *Sarwan Singh & Ors. Versus State of Bihar*: **AIR 1976 SC 2304** wherein the Court has held as under:

> "13. Another circumstance which appears to have weighed heavily with the Additional Sessions Judge was that no independent witness of Salabatpura had been examined by the prosecution to prove the prosecution case of assault on the deceased, all though the evidence shows that there were some persons living in that locality like the 'Pakodewalla', Hotelwalla, shopkeeper and some of the passengers who had alighted at Salabatpura with the deceased. The Additional Sessions Judge has drawn an adverse inference against the prosecution for its failure to examine any of those witnesses. Mr. Hardy has adopted this argument. In our opinion the comments of the Additional Sessions Judge are based on serious misconception of the correct legal position. The onus of

proving the prosecution case rests entirely on the prosecution and it follows as a logical corollary that the prosecution has complete liberty to choose its-witnesses if it is to prove its case. The Court cannot compel the prosecution to examine one witness or the other as its witness. At the most, if a material witness is withheld, the Court may draw an adverse inference against the prosecution. But it, is not the law that the omission to examine any and every witness even on minor points would undoubtedly lead to rejection of the prosecution case or drawing of an adverse inference against the prosecution. The law is well settled that the prosecution is bound to produce only such witnesses as are essential for unfolding of the prosecution narrative. In other words, before an adverse inference against the prosecution can be drawn it must be proved to the satisfaction of the Court that the witnesses who had been withheld were eye-witnesses who had actually seen the occurrence and were therefore material to prove the case. It is not necessary for the prosecution to multiply witnesses after witnesses on the same point; it is the quality rather than the quantity of the evidence that matters. In the instant case, the evidence of the eye-witnesses does not suffer from any infirmity or any manifest defect on its intrinsic merit. Secondly, there is nothing to show that at the time when the deceased was assaulted a large crowd bad gathered and some of the members of the crowd had actually seen the occurrence and were cited as witnesses for the prosecution and then withheld. We must not forget that in our country there is a general tendency amongst the witnesses in mofussil to shun giving evidence in Courts because of the cumbersome and dilatory procedure of our Courts, the harassment to which they are subjected by the police and the searching cross-examination which they have to face before the Courts. Therefore nobody wants to be a witness in a murder or in any serious offence if he can avoid it. Although the evidence does show that four or five persons had alighted from the bus at the time when the deceased and his companions got down from the bus, yet there is no suggestion that any of those persons stayed on to witness the occurrence. They may have proceeded to their village homes. So far as Pakodewalla and Hotelwalla etc. are concerned there is positive evidence to show that they were interrogated by the police but they expressed ignorance about the occurrence. In this connection the evidence of P.W. 5

Harnek Singh clearly shows that the Investigating Officer interrogated the Hotelwalla and the Pakodewalla but they stated before him that they had not witnessed the occurrence. In these circumstances, therefore, there was no obligation on the prosecution to examine such witnesses who were not at all material. It is not a case where some persons were cited as eye-witnesses by the prosecution on material points and were deliberately withheld from the Court. For these reasons, therefore, the learned Additional Sessions Judge was not at all justified in raising an adverse inference against the prosecution case from this fact and the High Court was right in rejecting this part of the reasoning adopted by the learned Additional Sessions Judge."

V. Reliance is also placed on *Gulam Sarbar Versus State of Bihar*: **(2014) 3 SCC 401** wherein it was held as under:

"14. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time- honoured principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Even in Probate cases, where the law requires the examination of at least one attesting witness, it has been held that production of more witnesses does not carry any weight. Thus, conviction can even be based on the testimony of a sole eye witness, if the same inspires confidence. (Vide: Vadivelu Thevar and Anr. v. State of Madras MANU/SC/0039/1957 : AIR 1957 SC 614; Kunju @ Balachandran v. State of Tamil Nadu MANU/SC/7065/2008 : AIR 2008 SC 1381; Bipin Kumar Mondal v. State of West Bengal MANU/SC/0509/2010 : AIR 2010 SC 3638; Mahesh and Anr. v. State of Madhya Pradesh MANU/SC/1125/2011 : (2011) 9 SCC 626; Prithipal Singh and Ors. v. State of Punjab and Anr. MANU/SC/1292/2011 : (2012) 1 SCC 10; and Kishan

Chand v. State of Haryana MANU/SC/1120/2012 : JT 2013 (1) SC 222)."

VI. *Contra*, it is argued by the counsel for the accused that non-production of material witnesses has a serious impact on the prosecution case and adverse inference should be drawn due to the above. In this regard, reliance is placed on *Habeeb Mohammad Versus State of Hyderabad*: **AIR 1954 SC 51** wherein it has been held as under:

> "In a long series of decisions the view taken in India was, as was expressed by Jenkins C.J. in Ram Ranjan Roy v. Emperor I.L.R. 43 Cal. 422, that the purpose of a criminal trial is not to support at all costs a theory but to investigate the offence and to determine the guilt or innocence of the accused and the duty of a public prosecutor is to represent not the police but the Crown, and this duty should be discharged fairly and fearlessly with full sense of the responsibility attaching to his position and that he should in a capital case place before the court the testimony of all the available eye-witnesses, though brought to the court by the defense and though they give different accounts, and that the rule is not a technical one, but founded on common sense and humanity. This view so widely expressed was not fully accepted by their Lordships of the Privy Council in Stephen Senaviratne v. The King A.I.R. 1936 P.C. 289., that came from Ceylon, but at the same time their Lordships affirmed the preposition that it was the duty of the prosecution to examine all material witnesses who could give an account of the narrative of the events on which the prosecution is essentially based and that the question depended on the circumstances of each case. In our opinion, the appellant was considerably prejudiced by the omission on the part of the prosecution to examine Biabani and the other officer in the circumstances of this case and his conviction merely based on the testimony of the police jamedar, in the absence of Biabani and other witnesses admitted present on the scene, cannot be said to have been arrived at after a fair trial, particularly when no satisfactory explanation has been given or even attempted for this omission."

VII. Reliance is also placed on *State of U.P. Versus Punni & Ors.*: **(2008) 11 SCC 153** wherein placing reliance on *Habeeb Mohammad* (supra), it was held by the Apex Court that witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.

VIII. Reliance is also placed on *State of U.P. & Ors. Versus Jaggo & Ors.*: **(1971) 2 SCC 42** wherein similar view was expressed by the High Court placing reliance on *Habeeb Mohammad* (supra). Reliance is also placed on *Sri Rabindra Kumar Dey Versus State of Orissa*: **(1976) 4 SCC 233** wherein it was held as under:

> "36. There is yet another very important document which has been brought on record by the appellant which is Ext. A dated December 8, 1965. This is a statement by P.W. 3 which to a very great extent supports the case of the accused, but as we do not propose to rely on the evidence of P.W. 3, we would exclude this document from consideration. Another document Ext, H is a statement of the Accountant Ghansham Das which appears at p. 215 of the Paper Book wherein Mr. Ghansham Das clearly mentions that when he found that Rs. 10,000/- were not traceable, he brought the matter to the notice of the officer in charge and he was told by the Nazir that the amount of Rs. 10,000/- had been left with him by the appellant with instructions not to refund in the treasury. This statement clinches the issue so far as the defence case is concerned and fully proves that the explanation given by the appellant was correct. This document would also have falsified the evidence of P.W. 1 who has tried to put the entire blame on the shoulders of the appellant. Unfortunately, however, the prosecution did not choose to examine Ghansham Das the Accountant who was a very material witness in order to unfold the prosecution narrative itself, because once a reasonable explanation is given by the appellant that he had entrusted the money to the Nazir on his return from Balichandrapur on January 20, 1965 which is supported by one of the

prosecution witnesses, P.W. 9, as referred to above, then it was for the prosecution to have affirmatively disproved the truth of that explanation. If Ghansham Das would have been examined as a witness for the prosecution, he might have thrown a flood of light on the question. In his absence, however, Ext. H cannot be relied upon, because the document is inadmissible. At any rate, the Court is entitled to draw an inference adverse to the prosecution for not examining Ghansham Das Accountant as a result of which the explanation given by the appellant is not only reasonable but stands unrebutted by the prosecution evidence produced before the Trial Court."

IX. Reliance is also placed on *State of Maharashtra Versus Suleman Sultan Mujawar*: **2020 SCC Online Bom 10595** wherein it has been held as under:

> "Interestingly and which is the main dent in the case of prosecution is that the Investigating Officer was never examined. Illustration (g) of Section 114 of the Indian Evidence Act, 1872 provides the Court may presume that evidence which could be and is not produced would, if produced be, unfavourable to the person who withholds it. The fact that the Investigating Officer also has not been examined would show that if examined, his evidence would have been unfavourable to complainant. Non examining the Investigating Officer as a witness in the circumstances of the case would have caused grave prejudice to accused. The Apex Court in Habeeb Mohammad V/s. The State of Hyderabad1 observed that it was the bounden duty of the prosecution to examine the Investigating Officer, who is a material witness in the case particularly when no allegation was made that if produced, he would not speak the truth and in any case, the Court would have been well advised to exercise its discretionary powers to examine the witness."

X. The law which can be deduced from the judgments referred herein-above is that though it is not necessary for the prosecution to produce all witnesses, but it is necessary for the prosecution to produce the witnesses essential to the unfolding of the narrative on which the prosecution is based, whether in the result the effect

of their testimony is for or against the prosecution. Non-production of material witnesses may compel the Court to draw adverse inference against the prosecution. As to who is a material witness, it is for the Court to ascertain looking to the facts and circumstances of that particular case.

E. <u>CRIMINAL CONSPIRACY</u>:

I. Reliance is placed on *Firozudeen Basheerudin & Ors. Versus State of Kerala*: **(2001) 7 SCC 596** wherein it was held as under:

> "23. Like most crimes, conspiracy requires an act (actus reus) and an accompanying mental state (mens rea). The agreement constitutes the act, and the intention to achieve the unlawful objective of that agreement constitutes the required mental state. In the face of modern organised crime, complex business arrangements in restraint of trade, and subversive political activity, conspiracy law has witnessed expansion in many forms. Conspiracy criminalizes an agreement to commit a crime. All conspirators are liable for crimes committed in furtherance of the conspiracy by any member of the group, regardless of whether liability would be established by the law of complicity. To put it differently, the law punishes conduct that threatens to produce the harm, as well as conduct that has actually produced it. Contrary to the usual rule that an attempt to commit a crime merges with the completed offense, conspirators may be tried and punished for both the conspiracy and the completed crime. The rationale of conspiracy is that the required objective manifestation of disposition to criminality is provided by the act of agreement. Conspiracy is a clandestine activity. Persons generally do not form illegal covenants openly. In the interests of security, a person may carry out his part of a conspiracy without even being informed of the identify of his co-conspirators. Since an agreement of this kind can rarely be shown by direct proof, it must be inferred from circumstantial evidence of co-operation between the accused. What people do is, of course, evidence of what lies in their minds. To convict a person of conspiracy, the prosecution must show that he agreed with others that together they would accomplish the unlawful object of the conspiracy.

25. Conspiracy is not only a substantive crime. It also serves as a basis for holding one person liable for the crimes of others in cases where application of the usual doctrines of complicity would not render that person liable. Thus, one who enters into a conspiratorial relationship is liable for every reasonably foreseeable crime committed by every other member of the conspiracy in furtherance of its objectives, whether or not he knew of the crimes or aided in their commission. The rationale is that criminal acts done in furtherance of a conspiracy may be sufficiently dependent upon the encouragement and support of the group as a whole to warrant treating each member as a casual agent to each act. Under this view, which of the conspirators committed the substantive offence would be less significant in determining the defendant's liability than the fact that the crime was performed as a part of a larger division of labor to which the accused had also contributed his efforts.

26. Regarding admissibility of evidence, loosened standards prevail in a conspiracy trial. Contrary to the usual rule, in conspiracy prosecutions an declaration by one conspirator, made in furtherance of a conspiracy and during its pendency, is admissible against each co-conspirator. Despite the unreliability of hearsay evidence, it is admissible in conspiracy prosecutions. Explaining this rule, Judge Hand said:

> "Such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of crime. When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime'. What one does pursuant to their common purpose, all do, and as declarations may be such acts, they are competent against all (Van Riper v. United States 13 F.2d 961, 967, (2d Cir. 1926). "
>
> 27. Thus conspirators are liable on an agency theory for statements of co-conspirators, just as they are for the overt acts and crimes committed by their confreres."

II. Reliance is also placed on *State of Maharashtra Versus Somnath Thapa & Ors.*: **(1996) 4 SCC 659** wherein the Court has held as under:

> "23. Our attention is pointedly invited by Shri Tulsi to what was stated in para 24 of Ajay Aggarwal's case

wherein Ramaswamy, J. stated that the law has developed several or different models or technique to broach the scope of conspiracy. One such model is that of a chain, where each party performs even without knowledge of the other, a role that aids succeeding parties in accomplishing the criminal objectives of the conspiracy. The illustration given was what is done in the process of procuring and distributing narcotics or an illegal foreign drug for sale in different parts of the globe. In such a case, smugglers, middlemen, retailers are privies to a single conspiracy to smuggle and distribute narcotics. The smugglers know that the middlemen must sell to retailers; and the retailers know that the middlemen must buy from importers. Thus the conspirators at one end at the chain know that the unlawful business would not, and could not, stop with their buyers, and those at the other end know that it had not begun with their settlers. The action of each has to be considered as a spoke in the hub - there being a rim to bind all the spokes together in a single conspiracy.

24. The aforesaid decisions, weighty as they are, lead us to conclude that to establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or service in question could not be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do, so long as it is known that the collaborator would put the goods or service to an unlawful use."

III. Reliance is also placed on *Mohammad Usman Mohammad Hussain Maniyar & Ors. Versus State of Maharashtra*: **(1981) 2 SCC 443** wherein it has been held as under:

"17. Now to turn to the conviction under Section 120B of the Penal Code. Section 120B provides:
120B. (1) Whoever is a party to a criminal conspiracy to commit an offence punishable.... 'Criminal conspiracy'

has been defined under Section 120A of the Penal Code as follows:

120 A. When two or more persons agree to do, or cause to be done-(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some fact besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation- It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object,

The contention of learned Counsel is that there is no evidence of agreement of the appellants to do an illegal act.

It is true that there is no evidence of any express agreement between the appellants to do or cause to be done the illegal act. For an offence under Section 120B, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or cause to be done the illegal act; the agreement may be proved by necessary implication. In this case, the fact that the appellants were possessing and selling explosive substances without a valid licence for a pretty long time leads to the inference that they agreed to do and/or cause to be done the said illegal act, for, without such an agreement the act could not have been done for such a long time."

IV. Reliance is next placed on *Chamanlal & Ors. Versus State of Punjab & Anr.*: **(2009) 11 SCC 721** wherein the elements of criminal conspiracy was explained as under:

> "The elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when

the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime, is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. (See American Jurisprudence, Vol. II, Section 23, p. 559.) For an offence punishable under Section 120B, the prosecution need not necessarily prove that the perpetrators expressly agreed to do or caused to be done an illegal act; the agreement may be proved by necessary implication. The offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means."

V. On the other hand, learned counsel appearing for the accused has placed reliance on *Kehar Singh & Ors. Versus State (Delhi Administration)*: **(1988) 3 SCC 609** wherein it was held as under:

"274. It will be thus seen that the most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may not be done in pursuance of agreement, but the very agreement is an offence and is punishable. Reference to secs. 120-A and 120-BIPC would make these aspects clear beyond doubt. Entering into an agreement by two or more persons to do an illegal act or legal act by illegal means is the very

quintessence of the offence of conspiracy.

275. Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the Court must enquire whether the two persons are independently pursuing the same and or they have come together to the pursuit of the unlawful object. The former does not render them conspirators, but the latter is. It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient.Gerald Orchard of University of Canterbury, New Zealand 1974 C L R 297 explains the limited nature of this proposition:

Although it is not in doubt that the offence requires some physical manifestation of agreement, it is important to note the limited nature of this proposition. The law does not require that the act of agreement take any particular form and the fact of agreement may be communicated by words or conduct. Thus, it has been said that it is unnecessary to prove that the parties "actually came together' and agreed in terms" to pursue the unlawful object; there need ever have been an express verbal agreement, it being sufficient that there was "a tacit understanding between conspirators as to what should be done.

276. I share this opinion, but hasten to add that the relative acts or conduct of the parties must be conscientious and clear to mark their concurrence as to what should be done. The concurrence cannot be inferred by a group of irrelevant facts artfully arranged so as to give an appearance of coherence. The innocuous, innocent or inadvertent events and incidents should not enter the judicial verdict. We must thus be strictly on our guard."

VI. Reliance is also placed on *State of Kerela Versus P. Sugathan & Ors.*: **(2000) 8 SCC 203** wherein it has been held by the Court as under:

> "12. We are aware of the fact that direct independent evidence of criminal conspiracy is generally not available and its existence is a matter of inference. The inferences are normally deduced from acts of parties in pursuance of purpose in common between the conspirators. This Court in V.C. Shukla v. State MANU/SC/0545/1980 : (1980)2SCC665 held that to prove criminal conspiracy there must be evidence direct or circumstantial to show that there was an agreement between two or more persons to commit an offence. There must be a meeting of minds resulting in ultimate decision taken by the conspirators regarding the commission of an offence and where the factum of conspiracy is sought to be inferred from circumstances, the prosecution has to show that the circumstances giving rise to a conclusive or irresistible inference of an agreement between the two or more persons to commit an offence. As in all other criminal offences, the prosecution has to discharge its onus of proving the case against the accused beyond reasonable doubt. The circumstances in a case, when taken together on their face value, should indicate the meeting of the minds between the conspirators for the intended object of committing an illegal act or an act which is not illegal, by illegal means. A few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy. It has to be shown that all means adopted and illegal acts done were in furtherance of the object of conspiracy hatched. The circumstances relied for the purposes of drawing an inference should be prior in time than the actual commission of the offence in furtherance of the alleged conspiracy."

VII. Reliance is also placed on *P.K. Narayan Versus State of Kerela*: **(1995) 1 SCC 142** wherein it was held as under:

> "10. The ingredients of this offence are that there should be an agreement between the persons who are alleged to conspire and the said agreement should be for doing of an illegal act or for doing by illegal means

an act which by itself may not be illegal. Therefore the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. But if those circumstances are compatible also with the innocence of the accused persons then it can not be held that the prosecution has successfully established its case. Even if some acts are proved to have been committed it must be clear that they were so committed in pursuance of an agreement made between the accused who were parties to the alleged conspiracy. Inferences from such proved circumstances regarding the guilt may be drawn only when such circumstances are incapable of any other reasonable explanation. From the above discussion it can be seen that some of the circumstances relied upon by the prosecution are not established by cogent and reliable evidence. Even otherwise it can not be said that those circumstances are incapable of any other reasonable interpretation."

VIII. Reliance is further placed on *Central Bureau of Investigation, Hyderabad Versus K. Narayana Rao*: **(2012) 9 SCC 512** wherein it has been held as under:

> 20. The ingredients of the offence of criminal conspiracy are that there should be an agreement between the persons who are alleged to conspire and the said agreement should be for doing of an illegal act or for doing, by illegal means, an act which by itself may not be illegal. In other words, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both and in a matter of common experience that direct evidence to prove conspiracy is rarely available. Accordingly, the circumstances proved before and after the occurrence have to be considered to decide about the complicity of the accused. Even if some acts are proved to have committed, it must be clear that they were so committed in pursuance of an agreement made between the accused persons who were parties to the alleged

conspiracy. Inferences from such proved circumstances regarding the guilt may be drawn only when such circumstances are incapable of any other reasonable explanation. In other words, an offence of conspiracy cannot be deemed to have been established on mere suspicion and surmises or inference which are not supported by cogent and acceptable evidence."

IX. Further, reliance is placed on *State Versus Mohd. Afzal & Ors.*: **2003 SCC Online Del 935** wherein it has been held as under:

211. A conspiracy is a march under a banner. The very agreement, concert or league is the ingredient, of the offence like most crimes, conspiracy requires an act (actus reus) and an accompanying mental State (mens rea). From the definition of conspiracy in Section 120-A, it is evident that the agreement constitutes the act and the intention to achieve unlawful object constitutes the mental State . All conspirators are liable for the crimes committed in furtherance of the conspiracy besides being liable for committing an offence of conspiracy itself. Pertaining to conspiracy, law punishes conduct that threats to produce the harm as well as the conduct that actually produces the harm. In this, lies the difference between the offence of conspiracy and general penal offences. In case of general offences, attempt to commit a crime merges when the crime is completed but in case of conspiracy, punishment is for both, the conspiracy and the completed crime. This distinctiveness of the offence of conspiracy makes all conspirators as agents of each other. Conspiracy, Therefore, criminalizes the agreement to commit a crime. Inherently, conspiracy is a clandestine activity. Its covenants are not formed openly. It has to be inferred from circumstantial evidence of co-operation.

212. If conspiracies are hatched in the darkness of secrecy and direct evidence is seldom forthcoming and if the offence is to be proved in relation to the acts, deeds or things done by the co-conspirators, the question would arise as to what is the nature of these acts, deeds or things. Is merely moving around together or seen in each other's company sufficient? If not, what more should be there from which it could be inferred that the conspirators were acting to achieve the desired offence in furtherance of a crime.

213. A charge of conspiracy, inherently causes prejudice to an accused because it forces him into a joint trial and the entire mass of evidence against all the accused persons is presented for consideration of the court. This prejudice may get compounded when prosecutors seek to sweep within the dragnet of conspiracy all those, who have been associated in any degree whatsoever with the main offenders. But the prosecution also has a difficulty at hand. It is difficult for it to trace the exact contribution of each member of a conspiracy besides, direct evidence is seldom forthcoming. In the judgment MANU/SC/0451/1996: 1996CriLJ2448, State of Maharashtra and Ors. v. Som Nath Thapa and Ors., the Hon'ble Supreme Court illuminating on this grey area, observed that for a person to conspire with another, he must have knowledge of what the co-conspirators were wanting to achieve and thereafter having the intent to further the illegal act takes recourse to a course of conduct to achieve the illegal end or faciliState its accomplishment. Except for extreme cases, intent could be inferred from knowledge for example whether a person was found in possession of an offending article, no legitimate use of which could be done by the offender. To illustrate, a person is found in possession of 100 Kg. of RDX, is proved to be visiting or visited by "A" against whom there is a charge of conspiring to blow up a public place. Here, the recovery of the offending article would be enough to infer a charge of conspiracy. However, such instances apart, it was held that law would require something more. This something more would be a step from knowledge to intent. This was to be evidenced from informed and interested cooperation, simulation and instigation. The following passage from People v. Lauria 251, California APP 2 (d) 471 was cited.

"All articles of commerce may be put to illegal ends,.... but all do not have inherently the same susceptibility to harmful and illegal use.This different is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to show that by the same he intends to further promote and cooperate in it. This intent, when given effect by overt act, is the gist of conspiracy. While it is not identical with mere knowledge that another proposes unlawful action, it is not unrelated to such knowledge... The step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifferent, lack of concern. There is informed and interested

cooperation, simulation, instigation."

214. Thus, the proof of offence of conspiracy would require in most cases some kind of physical manifestation of agreement.The physical manifestations may not be proved by overt acts but may be evidenced by conscience acts or conduct of parties and reasonably clear to mark their concurrence. Where evidence is clear, offence of conspiracy may be proved by necessary implications. Innocuous, innocent or inadvertent acts and events should not enter the judicial verdict. The court must be cautious not to infer agreement from a group of irrelevant facts carefully arranged so as to give an assurance of coherence. Since more often than not conspiracy would be proved on circumstantial evidence, four fundamental requirements as laid down as far back as in 1881 in the judgment reported 60 years later at the suggestion of Rt. Hon'ble Sir Tej Bahadur Sapru 1941 All ALJR 416, Queen Empress v. Hoshhak may be re-emphasised:-

1. that the circumstances from which the conclusion is drawn be fully established;
2. that all the facts should be consistent with the hypothesis;
3. that the circumstances should be of a conclusive nature and tendency;
4. that the circumstances should, by a moral certainty, actually exclude every hypothesis but the one proposed to be proved."

25. From the judgments referred to herein-above, it is evident that to bring home the offence of criminal conspiracy, there must be a meeting of minds resulting in ultimate decision taken by the conspirators regarding the commission of an offence and when the factum of conspiracy is sought to be inferred from circumstances, the prosecution has to show that the circumstances give rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence. The prosecution has to discharge its onus of proving the case against the accused beyond reasonable doubt. The circumstances when taken together on their face value should indicate the meeting of the minds between

conspirators for they intended object of committing an illegal act. It can also be inferred from the judgments cited by the parties that a few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused with the commission of the crime of criminal conspiracy. It has to be shown that the means adopted and illegal acts done were in furtherance of the object of the conspiracy hatched. The circumstances relied for the purpose of drawing an inference should be prior in time than the actual commission of offence in furtherance of the alleged conspiracy. It is also inferred from the perusal of the judgments cited at bar that conspiracy is a continuing offence, which continues to subsist till it is executed and during its subsistence whenever anyone of the conspirators does an act or series of act, he should be held guilty under Section 120-B of the Indian Penal Code.

26. **Point No.1**- Whether on 13.05.2008 at Phool walon ka khanda, Choti Chaupar, a blast took place in which 2 persons died and 15 persons were injured?

27. It is not disputed by the counsels appearing for the parties that a blast did take place at Phool walon ka khanda, Choti Chaupar, Jaipur. The fact that 2 persons died and 15 injured is established before the trial Court and no objection has been raised to the said finding drawn by the trial Court. We are, therefore, not inclined to take up this issue. It is thus established that a blast took place on 13.05.2008 near Phool walon ka khanda, Choti Chaupar, wherein 2 persons died and 15 were injured.

28. **Point No.2**-Whether Shahbaz sent the mail from Sahibabad and is a co-conspirator?

29. The State has challenged the acquittal of accused Shahbaz. It is contended by learned Additional Government Advocate that the incident i.e. Jaipur Bomb Blasts took place on 13.05.2008. An email was received by two newspaper agencies on 14.05.2008 wherein the responsibility of causing the bomb blasts was taken up by Indian Mujaheedeen. With the attachments, which were made part of the email, a photograph of cycle bearing frame No.129489 was also received. The same cycle with the same frame number was found involved in one of the blast sites, which goes to show that the person, who had sent the mail was also a co-conspirator in the Jaipur Bomb Blasts case.

30. It is contended that from the IP Address, the police on the same day i.e. on 14th May, 2008 came to know that the email has been sent from Sahibabad and the IP Address belonged to Madhukar Mishra. The police immediately went to the Cyber Cafe belonging to Madhukar Mishra. The CPU was seized and after arrest of Shahbaz, he was subjected to test identification parade, in which Madhukar Mishra identified Shahbaz. Madhukar Mishra also identified Shahbaz in the court proceedings. Thus, the fact that the mail was sent by Shahbaz was proved before the Court. It is argued that the person, who has sent the mail, was part of the conspiracy as he was knowing about the Jaipur Bomb Blasts.

31. Learned counsel appearing for accused Shahbaz has opposed the appeal. It is contended that the learned trial Court has discussed the entire evidence and has come to the conclusion that Shahbaz was not involved in the Jaipur Bomb Blasts. He was not having any connection with the accused named in the Jaipur Bomb

Blasts. It was not established that he was having any links with SIMI or Indian Mujaheedeen Organization and no incriminating material was seized from him. It is argued by the counsel that Shahbaz was picked from his house by ATS. He had a function at his house on account of birth of his child. It is also contended that the Police has falsely implicated him in this case. It is also argued that the test identification parade was not conducted properly as Shahbaz was shown to Madhukar Mishra prior to the test identification parade. In this regard, our attention has been drawn to various documents produced by the prosecution.

32. It is contended that an application for test identification parade was moved before the Magistrate on 02.09.2008 in which the Magistrate posted the matter on 03.09.2008 at 03:00 PM in the jail premises. It is also contended that Madhukar Mishra was residing at a distance of 400 kms and so it was not possible for him to come to Jaipur after the notices were served upon him. Our attention has also been drawn to the notices, which were sent to Madhukar Mishra. From the service report, it is evident that the notices were issued on 02.09.2008 and were served upon Madhukar Mishra on the same day i.e. 02.09.2008. He appeared in the jail on the very next day i.e. 03.09.2008, it is evident that Madhukar Mishra was in Jaipur itself during the period when Shahbaz was taken in the police custody. It is also evident that Shahbaz was in police custody and during the police custody, application was moved for test identification parade. Shahbaz was deposited in the jail on 03.09.2008 itself and on that day itself, test identification parade was conducted. It is the case of defence that Shahbaz has appeared as defence witness and he has stated that while he was in the custody of ATS/SOG, a boy wearing

maroon coloured clothes and a cap came to the place where he was kept by the ATS. He has also stated that when the test identification parade was conducted, the same boy wearing the same maroon coloured clothes came to identify him. It is also contended that the test identification parade looses its value since there is a specific allegation that the accused Shahbaz was shown to the witness.

33. It is contended that Madhukar Mishra has not mentioned about any specific features of Shahbaz so as to identify him in jail. It is also contended that the email as per Madhukar Mishra was sent on 14.05.2008 and the identification parade took place on 03.09.2008 i.e. after 3 months and 20 days. It is further contended that Shahbaz was having a cut mark on his eyebrow and it was not concealed. Thus, the test identification parade looses its credibility. It is also contended that as per the prosecution case, some sketches were got prepared from Madhukar Mishra, but the same were not produced before the Court to establish that Shahbaz had any resemblance with the sketches, which goes to show that the sketches must not be matching with that of Madhukar Mishra and that is why they were not produced before the Court.

34. It is contended that the original CPU on which the CDs were written and then from which it was transferred to another computer from where it is said to have been sent to the newspaper agencies, was not seized by the Police. It is also contended that the register in which entry of persons coming to the Cyber Cafe was maintained, was also not seized by the Police to establish that Shahbaz visited the Cyber Cafe on 14.05.2008. It is further contended that there is no evidence to the effect that

the CDs were sent to Shahbaz. It is also not proved as to who sent the CD to Shahbaz. It is further contended that from the evidence of Investigating Officers, it is clear that there is no material to connect Shahbaz with the other co-accused. No material whatsoever has been recovered to suggest that Shahbaz was having any connections with the banned Organizations. There is no record that he has ever sent any incriminating material to other persons to propagate hatred or wage war against the country.

35. It is contended that Shahbaz was having his exams in the month of May itself and he cleared his B.Tech. with first division. He was employed and a missing person report was also filed by his employer, when he was secretly picked up by the ATS and taken to Jaipur. It is also contended that accused Shahbaz moved an application to the Court to subject himself to lie detector test, which was opposed by the State for the reasons best known to the prosecuting agency. It is further contended that truth would have surfaced, if Shahbaz would have been subjected to lie detector test and State i.e. the prosecution agency purposely opposed the application as it was known to them that Shahbaz had no connection whatsoever with the email, which is said to have been sent from Cyber Cafe belonging to Madhukar Mishra. It is also contended that no information has been given by Shahbaz under Section 27 of the Evidence Act and no recovery has been made from him, which would connect Shahbaz with the Jaipur Bomb Blast cases. It is further contended that the Investigating Officers have admitted in their cross-examination that they could not find any material, which would link Shahbaz with the other co-accused in these cases.

36. We have considered the contentions and have carefully perused the evidence on record with regard to accused-Shahbaz.

37. The main CPU on which the CDs were written and from which it was transferred to the other CPU from which it was mailed, has not been seized to establish that the same was sent from the Cyber Cafe belonging to Madhukar Mishra. The absence of Madhukar Mishra at the time when the CPU was seized also raises doubt for the very reason that the Officer, who went to seize the CPU, has stated that Madhukar Mishra was not present at that time and in his presence, father of Madhukar Mishra talked to Madhukar Mishra on mobile and after inquiring from him, handed-over a CPU to the Seizing Officer. The Seizing Officer did not even talked directly to Madhukar Mishra to inquire about the CPU, which was used to load the contents of the CD and from which it was transferred to another CPU. The absence of Madhukar Mishra and his going away to his parental home also appears to be a made up story. As the mail was the first link to the bomb blasts, the Police could have waited to question him about the person who had sent the mail and would have seized the original CPU in which the CDs were written. The prosecution has thus failed to establish that the CD was given to Madhukar Mishra, he loaded the CD and had transferred it to another computer from which it was mailed.

38. The possibility of accused Shahbaz being shown to Madhukar Mishra cannot be ruled out as Shahbaz was in the custody of SOG and during the police remand, an application was moved for test identification parade. The said application was moved on 02.09.2008 and the test identification parade was scheduled on 03.09.2008. The accused remained in custody of the police on 2nd night and possibility that he was shown to Madhukar Mishra in

police custody on 2nd & 3rd and in the jail on 3rd morning cannot be ruled out. Madhukar Mishra whose residence in the notice is shown as Sahibabad, which is at a distance of around 400 kms, was served on the same day on which the summons were issued i.e. on 02.09.2008 and he appeared in the jail on 03.09.2008. This clearly goes to show that Madhukar Mishra was in Jaipur itself where the notices were served upon him. The chances of the accused being shown to Madhukar Mishra can thus be a possibility, more particularly when Shahbaz has appeared as a defence witness and he has stated that while he was in custody of ATS/SOG, he was shown to a boy, who was wearing maroon coloured clothes and was having a cap. He has stated that the same boy came to identify him in jail, which was told to the Magistrate but, the same was not recorded and he was only asked to sign the memo.

39. Non-seizure of the register in which entries were made of the persons, who had used the Cafe on 14.05.2008, also creates doubt about the involvement of Shahbaz, since from the register it could have revealed as to who visited the Cyber Cafe to send the mail. The non-production of the sketches also casts doubt on the prosecution case, thus, the possibility that the sketches were not produced as they must not be matching with accused Shahbaz cannot be ruled out. It is also evident that Madhukar Mishra has not even given any specific details or features of the person who came to the Cyber Cafe to send the mail, thus his test identification parade and identification in Court looses credibility.

40. It has been held by Apex Court in various cases that if a witness does not give any specific details or features of the person, who he is identifying, his identification parade looses

credibility, more particularly if the test identification parade is conducted after a lapse of time. In the present case in hand, the identification parade was conducted after 3 months and 20 days of the alleged date of sending the email i.e. 14.05.2008. Thus, the identification parade by a person, who had seen the sender of the email for a short duration and who has not given any specific features, looses its credibility. Further, the test identification parade is also not strictly in accordance with the Rajasthan Police Rules as there was a cut mark on the eyebrow of Shahbaz. No effort was made by the Magistrate to conceal the mark and put a tape on the same and on the other persons, who were placed along with the accused for test identification parade.

41. It is evident that the test identification parade is the only circumstance against Shahbaz on the basis of which he has been connected with the Jaipur Bomb Blasts cases and since the test identification parade was not conducted in a proper manner, since the same was conducted after 3 months and 20 days and since there is a possibility that accused was shown to the witness prior to the test identification parade, this circumstance cannot be made a ground to hold Shahbaz guilty.

42. The trial Court has discussed in detail each and every aspect of the matter and has rightly come to the conclusion that the prosecution has utterly failed to establish that Shahbaz was the person, who sent email from Cyber Cafe at Sahibabad. The trial Court has rightly come to the conclusion that there is no evidence whatsoever to connect Shahbaz with the alleged Jaipur Bomb Blasts. It has also rightly come to the conclusion that there is no evidence to the effect that Shahbaz was having any connection with any of the accused in this case or he was having any

connection with the banned Organizations. Learned trial Court has thus committed no error in acquitting accused Shahbaz from the alleged offences. We would like to add that no certificate under Section 65-B of the Evidence Act was produced to establish the receipt of mail by India TV and Aaj Tak and material witnesses Mr. A.K. Jain and Officers of News Agency were not produced to establish receipt of E-mail. The point No.2 is therefore answered in negative.

43. **Point No.3**- Whether Saifur @ Saifurrehman planted the bomb on a bicycle on 13.05.2008 at Phool walon ka khanda, Choti Chaupar, Jaipur?

44. It is admitted by learned Additional Government Advocate that there is no eyewitness to the planting of bomb near Phool walon ka khanda, Choti Chaupar and the case rests on circumstantial evidence. For reaching the conclusion as to whether the bomb was planted by Saifurrehman or not, this Court is required to scan the circumstances and as per the law settled by the Apex Court, the circumstances should be so linked so as to form a chain and the chain should be complete and there should be no other chance of anyone else committing the offence.

45. The first circumstance as pointed out by learned Additional Government Advocate is the disclosure statement given by Mohammad Saif. It has been argued by learned Additional Government Advocate that the disclosure statement made by Mohammad Saif is covered under Section 10 of the Evidence Act and as all the accused persons had conspired, the statement made by one of the conspirators can be read against the other co-accused also. It would be relevant to quote Section 10 of the Evidence Act:

> "**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 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.
> Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the 1 [Government of India]. The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Kabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it."

46. From bare perusal of Section 10 of the Evidence Act, it is clear that each of the co-conspirator is responsible for the act done by one, but the point in issue is whether the statement made by one accused can be read against other, when the statement is made after the conspiracy seizes. Admittedly, the bomb blast took place on 13.05.2008, disclosure statement was recorded on 01.10.2008 and 02.10.2008 i.e. more than 4 months and 20 days of the bomb blast. The conspiracy came to an end after the bomb blast and the statement or the disclosure made by Mohammad Saif cannot be said to be during the subsistence of conspiracy and

is thus not covered under Section 10 of the Evidence Act. In this regard, we may refer to *Mirza Akbar Versus King Emperor*: **Manu/PR/0082/1940** and *Bhagwan Swarup Lal Bishan Lal Versus State of Maharashtra*: **AIR 1965 SC 682**. It is a settled proposition of law that for a case to fall under Section 10 of the Evidence Act, there has to be a prima facie case of criminal conspiracy. The disclosure statement or any fact, which is brought to the notice of the authorities should have been made during the pendency of the conspiracy and after the event has taken place, any disclosure statement made by one of the accused cannot be used under Section 10 of the Evidence Act against the other co-accused. Sanjeev Kumar Yadav (PW-160) has stated that on 02.10.2008 Mohammad Saif gave the following disclosure statement. Saif has stated that on 13.05.2008, he along with other Cadre of Indian Mujaheedeen, Ariz Khan @ Junaid, Mirza Shadab Beg @ Malik, Mohammad Khalid, Saifur, Sajid Chhota, Sajid Bada, Salman, Sarvar, Mohammad Atif Ameen were involved in planting bombs at Jaipur. Mohammad Saif has narrated that on 11th May, 2008 on the advise of Atif, everyone left their mobile at Delhi and left for Jaipur from Bikaner House, via Volvo Bus and reached at Jaipur 02:00 p.m. and distributed themselves in groups of 4 each. He has also stated that in his group, there was Chhota and Bada Sajid and Salman. Bada Sajid showed the site where the blast was to be done. He also showed the cycle shop from where the cycle was to be purchased. Thereafter, Bada Sajid took them to the railway station and after seeing the railway station, they returned to the bus stand and thereafter, all of them left for Delhi in a non-air conditioned bus. Saif has further stated that on 12th May, 2008 they prepared the bombs at Batla House in Delhi. An

Amount of Rs.3,000/- each was given by Atif to each accused for purchase of cycle. The return tickets from Jaipur to Delhi by Ajmer Shatabdi Express was also given to each person. Saif has further stated that on 13th May, 2008 in the morning Chhota Sajid, Bada Sajid and Salman brought bombs in school bags and reached Bikaner House in an auto. Thereafter, from Bikaner House, they booked tickets to Jaipur in fake Hindu names and then all 7 including Ariz Khan, Mohammad Khalid and Saifur reached Jaipur. The other co-accused came by a different bus. As per his disclosure statement, all members of his group had food at a hotel and thereafter, each purchased a cycle, then planted bombs on them and after putting the timer, reached Jaipur railway station by auto. He has further stated that everyone reached the railway station by 05:00 p.m. they departed for Delhi by Ajmer Shatabdi Express. Saif has further stated that for sending the mail on 14.05.2008, Atif by a phone, which was not having any sim, sent the video recording. In his disclosure statement, Saif has further stated that he can point out to the place where he has placed his cycle bomb. He has also stated that he can help in getting the other co-accused arrested.

47. A bare reading of the statement, which was recorded by the Police on 01.10.2008 and 02.10.2008 reveals that it was a statement made to the Police in the form of a confession. A confession made to a Police Official is hit by Sections 25 and 26 of the Evidence Act and such statement is inadmissible in view of Section 162 of Cr.P.C. also. It is also pertinent to note that what is recorded by the Police Officer/ATS is that Mohammad Saif has stated that he was involved in the Jaipur bomb blast and along with him, 9 other persons were also involved. However, he has

simply named the other co-accused and has not given any details about them with regard to their parentage, their place of living etc. The names which have been mentioned in the disclosure statement are common Muslim names such as Salman, Saifurrehman, Atif and so on. It is also important to note that no fact was discovered in furtherance of the disclosure statement made by Mohammad Saif. No persons named in the disclosure statement were arrested on account of disclosure statement made by Mohammad Saif, therefore, the disclosure statement is neither admissible under Section 10 of the Evidence Act nor it is admissible under Section 27 of the Indian Evidence Act, as no fact was discovered from such disclosure statement. No attempt was made by the ATS to get his statement recorded under Section 164 Cr.P.C. The disclosure statement thus cannot be taken aid of and cannot be considered to be a circumstance against accused Mohammad Saifurrehman.

48. The fact that Mohammad Saif was arrested on 19.09.2008 in FIR No.166/2008, Police Station, Karol Bagh, Delhi is established from the statement of Sanjeev Kumar Yadav (PW-160). The trial Court has considered the disclosure statement made by Mohammad Saif as a relevant fact under Section 10 of the Evidence Act. We are in total disagreement with the conclusion arrived at by the learned trial Court in dealing with the disclosure statement as a relevant fact under Section 10 of the Evidence Act for the very reason that the disclosure statement was not made during the pendency of the conspiracy and it was only after the incident had taken place that the disclosure statement was made. Further, the disclosure statement at most was made to a Police

Officer whilst in custody and was thus, inadmissible in view of the bar contained under Sections 25 and 26 of the Evidence Act.

49. According to learned Additional Government Advocate, the next circumstance against accused Saifurrehman is the disclosure statement made by him in FIR No.118/2008, Police Station, Kotwali, in which he has stated that he planted bomb behind flower shops in Choti Chaupar and identification memo of place of incident. It is contended by learned Additional Government Advocate that in FIR No.118/2008, Saifurrehman gave a disclosure statement (Exhibit-P221A) that he purchased cycle from cycle market, which is near Choti Chaupar. He also said that he can point out the place where he planted the bomb behind flower shops in Choti Chaupar. At the instance of accused Saifurrehman, a site plan was prepared, which is exhibited as Exhibit-P7A. It is argued that it was for the first time that it came to the notice of the Police that it was Saifurrehman, who had placed the cycle behind flower shops in Choti Chaupar and thus, it is a fact discovered in terms of Section 27 of the Evidence Act. It is also argued that Saifurrehman has not only admitted his crime of planting bomb at Phoolwalon Ka Khanda behind Flower Shops, Choti Chaupar, but he has also corroborated the disclosure statement of accused Mohammad Saif and admitted the offence of conspiracy in serial bomb blasts. It is further argued that direct evidence to prove conspiracy is rarely available, therefore, the circumstances proved before and during the offence have to be considered to decide the involvement of the accused.

50. The next circumstance pointed out by the Additional Government Advocate against Saifurrehman is his own disclosure statement made in FIR No.130/08 on 18.04.2009 in which he has

admitted that on 13.05.2008 that he along with other 9 accused came from Bikaner house via bus and reached Jaipur between 2-2:30 pm. bombs were brought by Atif and Junaid. He has also stated that in his disclosure statement that if he is taken through Jaipur City, he can point out the place where he had planted the bomb. This witness has also stated in his disclosure statement given after his arrest on 23.04.2009 in FIR No. 118/2008, under Section 27 of the Evidence Act with regard to the place where the cycle was placed. He has stated that he does not remember the shop but can identify it if he is taken there. He has further stated in his disclosure statement that he planted the bomb behind flower shops in Choti Chaupar. The same were recorded as Exhibit-P221A and P222A. Satyendra Singh Ranawat (PW-128) has stated that on the basis of the information given by Saifurehman, he was taken to Choti Chaupar in a muffled condition, where he pointed out to the place where he had planted bomb on the cycle and on that basis, a site plan was prepared (Exhibit- P7A). The trial Court has come to the conclusion that the information given by the accused with regard to the place where he had placed the cycle is admissible.

51. We have considered the provisions of Section 27 of the Evidence Act. It is a settled proposition of law that some fact should be discovered on the basis of the information furnished by the accused. The fact that a bomb blast took place near Phool walon ka khanda, Choti Chaupar Jaipur is a fact, which was known to everyone in Jaipur City to the ATS and every Police Officer. Thus, the disclosure statement with regard to the place of bomb blasts cannot be considered to be an information under Section 27 of the Evidence Act as no fact was discovered on the basis of this

information. The pointing out to the place where he planted cycle bomb cannot thus be considered to be a circumstance against Mohammad Saifurrehman.

52. The next circumstance and as per the prosecution the main circumstance against accused Saifurrehman is his test identification by the shop keeper–Lalit Lakhwani in test identification parade held in jail and later on identifying accused Saifurrehman in Court at the time of recording of evidence. Lalit Lakhwani (PW-85), shop keeper, who has allegedly sold a Hercules cycle of silver black colour to a person aged about 24 years. He has stated that he was called at Jail to identify the person to whom he sold the cycle on 13.05.2008 and he identified Saifurehman as the same person. Satyendra Singh Ranawat (PW-128) has stated that accused Saifurrehman was sent to judicial custody and on 24.04.2009 he sought permission for conducting test identification parade of accused Saifurrehman. The report of the test identification parade has been exhibited as Exhibit-P174A. This witness has deposed in his chief examination that TIP in jail was conducted after 1 year of the incident.

53. Lalit Lakhwani (PW-2 in Sessions Case No.2/2010) in his cross-examination has clearly admitted that he cannot remember the purchaser who purchased bicycle from bill No.3412. He has also stated that he cannot recognize any of the purchasers, who had purchased cycles from that bill book i.e. bill book pertaining to bill No.3411 vide which cycle was sold to Ajay Singh. This witness has further stated that he cannot even remember the purchaser, who had purchased cycle 10 days ago. This witness has also stated that the purchaser of cycle vide bill No.3411 was standing away from the shop and was continuously talking on his mobile for

the duration in which cycle was being assembled. This witness has stated that Kareem had shown cycle to the purchaser and cycle was prepared by Shabir. It is pertinent to note that both Kareem and Shabir have not been produced as witnesses in this case. From the testimony of this witness, it is evident that he is having a cloudy memory. He cannot even remember the person to whom he had sold the cycle few days back. As to how he could remember the person, who had purchased cycle a year ago, is something which has to be carefully looked into. The reason which this witness has assigned for remembering the purchaser is that the purchaser did not bargain for the price, he did not bargain for the model and he got the cycle assembled in a hurry.

54. We are of the considered view that this by itself cannot be a justifiable reason for remembering the person who had purchased the cycle a year ago. It is also pertinent to note that in the evidence given before the Court, this witness has not given any specific description or attributes of the purchaser of the cycle. As the witness- Lalit Lakhwani is not having razor sharp memory, it is not safe to rely on the test identification parade, which was conducted after a year of the incident.

55. It is also pertinent to note that certain safeguards are mandatory while conducting a test identification parade and one of the important requirement is that the Police Officer conducting the investigation or any Police Officer assisting him, should not have any access whatsoever to the suspect or the witness. From perusal of Exhibit-D12 in Sessions Case No.2A/2010, it is evident that the Investigating Officer along with Police Officers, Banwari Lal, Jagdish Prasad and Dharmveer and the Magistrate entered the jail premises at 10:35 a.m. and exited at 10:55 a.m. Thereafter,

the Magistrate reentered the jail premises at 11:00 a.m., witness entered the jail premises at 11:10 a.m., witness exits jail premises at 11:20 a.m. and the Magistrate exits the jail premises at 11:49 a.m. If the statement of Vinod Kumar Giri (PW-110), Magistrate, who conducted the test identification parade is correct that he met the witness outside when he reached the jail, then from 10:35 a.m. to 11:10 a.m., the witness was outside and the Investigating Officer who exited at 10:55 a.m. had access to the witness on that day for at least 15 minutes.

56. Vinod Kumar Giri, Magistrate at other place in the statement has stated that the witness was already inside when he entered the jail. If that is considered to be correct, then the Investigating Officer had access to the witness from 10:35 a.m. to 10:55 a.m. inside the jail. The statement of Vinod Kumar Giri, Magistrate (PW-110) assumes importance because he says that "मेरे जेल में पहुंचने से पूर्व ही गवाह जेल से बाहर खडा था। यदि उसकी मुलजिम से पहले ही पहचान करवा ली गई हो तो मुझे जानकारी नहीं है।" At other place the Magistrate states that "मुझे कारागृह के अधीक्षक ने यह बताया था कि गवाह आ चुका है और उसने अपने चैम्बर में गवाह को बुलाकर उसे बताया था कि यह गवाह है।" Meaning thereby that when the Magistrate entered, the witness was already inside. Vinod Kumar Giri, Magistrate (PW-110) further states that ''यदि बुलाने वाले ने गवाह से मुल्जिम के बारे में पहले से बता दिया हो तो इसकी जानकारी नही है। पहले से मौजूद गवाह को यदि मुल्जिम को या जैल के किसी अन्य कर्मी ने मुल्जिम को पहचानवा दिया हो तो मुझे जानकारी नहीं है''।

57. From the above statement, it can be inferred that the test identification parade of accused Saifurrehman was not conducted with all the necessary precautions and the Magistrate was also not sure as to whether the accused was shown to the witness.

58. Vinod Kumar Giri (PW-110) has stated that on 01.05.2009 he went to the Central Jail and in his presence TIP was conducted. In chief examination the witness has deposed that Lalit lakhwani identified the accused- Saifurrehman in jail by touching him, as the person who purchased cycle from him. In Cross examination, the witness has admitted that Lalit lakhwani did not identify Saifurrehman immediately but took some time and then pointed towards him. It was stated that distance between Lalit Lakhwani and the accused was around 1feet. The witness has further stated that while preparing TIP report, Saifurrehman told him that police had taken his photos from every angle and had shown these photos to Lalit lakhwani before the TIP was conducted. The testimony of this witness dated 05.08.2011 is marred by contradiction as to whether the accused- saifurrehman told him that his photos, taken by the police were actually shown to the witness-Lalit Lakhwani before test identification parade.

59. In the present case, test identification parade is of utmost importance because that is the main circumstance. This Court observes that the incident is of 13.05.2008 and the TIP of the accused was conducted on 1.05.2009 i.e. after about 1 year of the incident. As per the testimony of Lalit Lakhwani, he is unable to identify customers who have purchased cycles few days back. His claim that he can identify accused Saifurehman one year after the incident is incredulous and does not win the confidence of this court. Further, Lalit lakhwani (PW-85) has not pointed out any special features or attributes of the person who had purchased cycle from his shop. No features were told to the Court which

made it possible for Lalit lakhwani (PW-85) to recognize the purchaser after more than a year of the sale of the cycle.

60. From the judgments referred to herein-above under the heading 'test identification parade', we have enumerated that if there is delay in conducting test identification parade, then there ought to be some specific features on the basis of which the witness could identify the accused. *Brij Mohan & Ors. Versus State of Rajasthan* (supra) was a case where dacoity was committed wherein four persons were killed. The *gruesome and callous manner*, in which the dacoity was committed by the culprits must have left a deep impression on the mind of the witnesses and therefore, they were identified by eleven witnesses. In that case, delay of 3 months in test identification period was not considered to be an inordinate delay.

61. *Daya Singh Versus State of Haryana* (supra) was a case where son and daughter-in-law of the witnesses were murdered in their presence. It was observed by the Apex Court that the incident must have left an impression in the mind of the witnesses and merely because test identification parade was not got conducted, even then their evidence cannot be disbelieved. That was a case where the identification in Court was done after 8 years of the incident.

62. In *Pramod Mondal Versus State of Bihar* (supra) and *Raja & Ors. Versus State of Karnataka* (supra), the Apex Court held that no hard and fast rule about the period within which test identification parade must be held from the arrest of the accused, can be laid. In some cases, the Court considered delay of 10 days

to be fatal while in other cases even delay of 40 days or more was not considered to be fatal.

63. *Contra* to the above, in *Wakil Singh v. State of Bihar* (supra), the test identification parade was conducted after three and a half months of dacoity. The Court considered it unsafe to convict the accused on the basis of the test identification parade. In *Chunthuram Versus State of Chattisgarh* (supra) the presence of the Police during the test identification parade was considered to be an infirmity and the same was considered to be a statement made to a Police Officer in course of investigation. In *Amitsingh Bhikam Singh Thakur v. State of Maharashtra* (supra), the Apex Court observed that the main object of holding such tests during investigation is to check the memory of witnesses based upon first impression and to enable the prosecution to decide whether these witnesses could be cited as eye witnesses of the crime. It was held that the evidence of the identification of accused for the first time is inherently weak in character and the court has held that the evidence in test identification parade does not constitute substantive evidence and these parades are governed by Section 162 of Code of Criminal Procedure and the weight to be attached to such identification is a matter for the courts.

64. It is also settled proposition of law as held by the Apex Court in *Dana Yadav @ Dahu & Ors. Versus State of Bihar* (supra) that evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but it is not a substantive one, and the same can be used only to corroborate identification of accused by a witness in court. In *Mohd. Sajjad Alias Raju Alias Salim Versus State of West Bengal* (supra), the

Apex Court held that the value to be attached to a test identification parade depends on the facts and circumstances of each case and no hard-and-fast Rule can be laid down. The court has to examine the facts of the case to find out whether there was sufficient opportunity for the witnesses to identify the accused. The court has also to rule out the possibility of their having been shown to the witnesses before holding a test identification parade. Where there is an inordinate delay in holding a test identification parade, the court must adopt a cautious approach so as to prevent miscarriage of justice. In cases of inordinate delay, it may be that the witnesses may forget the features of the accused put up for identification in the test identification parade. The Court however observed that it was not an absolute rule because it depends upon the facts of each case and the opportunity which the witnesses had to notice the features of the accused.

65. As to whether Lalit lakhwani (PW-85) had enough time or opportunity to see the particular features of the person who bought the cycle is an important fact. For this purpose, we have perused the statement of Lalit lakhwani (PW-85). The statement of the witness that he cannot remember the face of any other customer as mentioned in the bill book and that he recognizes only the person who had purchased cycle on 13.05.2008 goes to show that he is a planted witness, who was asked purposedly to identify Saifurrehman. If a witness cannot remember the person, who had purchased cycles in any of the dates except 13.05.2008 as mentioned in the bill book, it is hard to believe how he can recognize Saifurrehman when he was having no unique features or attributes in particular that would set him apart from the others.

66. The next circumstance against accused Saifurrehman is his call details with other co-accused.

67. Section 65B of the Indian Evidence Act requires a certificate in the form prescribed therein, in case of secondary electronic evidence. The certification is for the purpose of proving that the information which constitutes the computer output was produced by a computer, which was used regularly to store or process information and that the information so derived was regularly fed into the computer in the ordinary course of the said activities. In *State (NCT of Dehli) Versus Navjot Sandhu alias Afsan Guru*: **(2005) 11 SCC 600**, it was held by the Apex Court that irrespective of the compliance with the requirements of Section 65-B of Evidence Act, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence of an electronic record under Sections 63 and 65 of Evidence Act. The law laid down in *Navjot Sandhu* (supra) was set aside by the Apex Court in *Anvar P.V. Versus P.K. Basheer & Ors.*: **(2014) 10 SCC 473** in which it was held that certificate as required under Section 65B is mandatory for the admissibility of secondary evidence. It was further held that if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section 65B of the Evidence Act. After the judgment of *Anvar P.V.* (supra), another three judge bench of the Apex Court in *Tomaso Bruno Versus State of U.P.*: **(2015) 7 SCC 178** has held that the computer generated electronic records stored in optical or magnetic media produced by a computer, subject to the fulfillment of the conditions specified in sub-section (2) of Section 65-B. Secondary evidence of the

contents of document can also be led under Section 65 of the Evidence Act. Thereafter, in *Shafhi Mohammad Versus State of Himachal Pradesh*: **(2018) 2 SCC 801**, the Apex Court discussed both *Anwar P.V.* and *Tomaso Bruno* (supra) and held that "accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced, such party cannot be required to produce certificate under Section 65B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by the court wherever interest of justice so justifies.

68. The legal corrigendum surrounding the issue whether as per Section 65B, a certificate is mandatory or not, has lived on for almost two decades before it was finally put to rest in 2020 by the judgment of the Hon'ble Apex Court in *Arjun Panditrao Khotkar Versus Kailash Kushanrao Gorantyar & Ors.*: **(2020) 7 SCC 1**, wherein it was held that certificate under Section 65-B(4) of the Indian Evidence Act is a necessary pre-requisite to produce electronic record, which is sought to be introduced as secondary evidence in trials with some exceptions. The Apex Court clarified that a certificate is not required if the original document is produced as primary evidence.

69. What can be deduced from the above is that a certificate under Section 65-B(4) of the Indian Evidence Act is a necessary pre-requisite to produce electronic record. It is evident that both Vibhor Rastogi (PW-65) and Ramesh Singh (PW-66) have not produced a certificate under Section 65-B(4) of the Evidence Act in support of the call details that they have submitted before the Court and thus, that evidence cannot be read against the accused.

However, even otherwise, this Court is of the view that the call details, which have been produced, pertains to some calls made by Atif Ameen. As per the prosecution, Atif Ameen was a co-accused in this case, however, no effort was made by the prosecution to produce the photographs of deceased Atif Ameen, who died in Batla House Encounter, to the witness-shopkeepers, who had sold the cycles. Thus, it is not established that Atif Ameen is the main conspirator of Jaipur Bomb Blasts and any calls made between Atif Ameen and Saifurrehman cannot lead to the conclusion that Saifurrehman was having a role in the conspiracy for Jaipur Bomb Blasts.

70. The other call made from Saifurrehman's phone is to one Arif @ Junaid, who is also projected as a co-conspirator in this case. However, neither Arif @ Junaid has been arrested nor is it established that he was one of the purchaser of the cycle. The only evidence against Arif @ Junaid and Atif Ameen is the disclosure statement made by Mohammad Saif, which as per the discussions, we have earlier made in this judgment, cannot be read as evidence against the co-accused, as there was no discovery of fact from the disclosure statement and the said statement made by Mohammad Saif was made in police custody and was thus, not admissible in evidence under Section 162 Cr.P.C. and Sections 25 and 26 of the Indian Evidence Act. The circumstance pertaining to there being call details between Saifurrehman and Mohammad Arif @ Junaid and Atif Ameen, thus cannot be considered to be a linking chain.

71. There is yet another mobile seized from Saifurrehman. Satyendra Singh Ranawat (PW128 in Sessions Case No.2A/2010) in his cross-examination has stated that Manohar Singh Nain has

seized Samsung Company Mobile Phone bearing Number 9935469043 from Saifurrehman, which he had received from Anoop Singh Nain. He has admitted that the said mobile was not used two days prior to 11th May, 2008 and two days after 13th May, 2008. He has also admitted that they have not obtained any call details of Mobile Number 9935469043. As to why call details of Mobile Number 9935469043 admittedly seized from Saifurrehman has not been produced before the Court remains a mystery. The call details therefore cannot be considered to be a circumstance.

72. Lalit Lakhwani (PW-85) has stated that the cycle was actually sold on 13.05.2008, but erroneously the bill was issued on dated 12.05.2008. A wrong date was mentioned on the bill. It is pertinent to note that a Hercules Cycle was sold on 12.05.2008 as per the bill book by Lalit Lakhwani. As to how Lalit Lakhwani came to know that the cycle, which was used in the blast, was sold from his shop, is not revealed from any evidence. As to how the Police reached his shop is also not disclosed. The fact that no cycle frame number was mentioned in the bill book and no cycle frame number was found on the cycle, cannot be said to be a link so as to establish that cycle used in the blast was sold by Lalit Lakhwani. It is also pertinent to note that as per the evidence of the witnesses, there are more than 30-40 shops selling cycles in Kishan Pole Bazar. The prosecution has not recovered or seized the bill books of all the shops to establish that only one Hercules Cycle was sold on 13.05.2008 and that it was Lalit Lakhwani alone, who had sold the cycle to Ajay Singh. The Officer, Rajendra Singh Nain, who had came to the conclusion about the shops, which have sold the bicycles, has not been examined before the Court. Hence, it is not even established that Lalit Lakhwani was

the seller of the bicycle, which was used in the bomb blasts. It is not even established that Hercules Cycle on which the blast took place, was actually sold by Lalit Lakhwani.

73. The statement of Lalit Lakhwani (PW-85) was recorded on 05.05.2016. On that date, when he was questioned about the cycle sold by him, a day before i.e. 04.03.2016, this witness stated that he had sold 3 bicycles on 04.03.2016. He does not remember the names of the purchasers nor he can identify them. This itself goes to show that Lalit Lakhwani had a jellyfish memory and he could not even remember the purchaser, who had purchased the cycle a day ago. His dock identification after 8 years of the incident, thus does not have any evidenciary value. Similarly, the test identification parade conducted after a year does not inspire confidence for the very reason that he could not even recognize the person, who had purchased cycle a day ago; as to how he could remember the purchaser, who had purchased the cycle a year ago is not borne out from his evidence, more particularly, when he has not disclosed any specific features or attributes in particular of the purchaser.

74. Moreover, from perusal of the bill book and from perusal of the evidence of Lalit Lakhwani (PW-85), it is revealed that changes have been done in the dates pertaining to sale of cycles. Changes are made in bill Nos.3406, 3407, 3408, 3409 and 3412 whereas, disputed bill is bill No.3411. It is to be noted that the changes are made with blue ink in the carbon copy, which is evident from bare perusal of the bill book itself. As to why changes have been made in the bill book has not been explained and the only conclusion which can be drawn is that the date has been changed as an afterthought so as to bring the disputed bill No.3411 in continuity

with the prior bills. Thus, there are clear-cut manipulations and fabrications in the material evidence. Since, manipulations have been made in the bills, the bill book cannot be considered as having been maintained in ordinary course of business. The witnesses were unable to depose when these corrections were made and why these corrections were made only in the bills preceding bill No.3411 and bill bearing No.3412.

75. Lalit Lakhwani (PW-85) has admitted that in bill book, bill Nos. 3406, 3407, 3408, 3409 and 3412 are the bills in which changes have been done in the date of sale of the cycles.

76. Further, as to whether Ajay Singh travelled from Delhi to Jaipur and from Jaipur to Delhi is also not established from the perusal of the statements of Surendra Singh (PW-23) and Satyendra Singh (PW-128). There is no mention of Ajay Singh's name in the reservation chart of Bus No.0008 from Delhi to Jaipur and similarly, there is no mention of the name of Ajay Singh in the list of travellers, who travelled from Jaipur to Delhi in the reservation chart (Exhibit-P139A). There is no passenger by the name of Ajay Singh in the railway reservation chart, thus it is not established that Saifurrehman travelled in the name of Ajay Singh from Delhi to Jaipur and then back from Jaipur to Delhi in Shatabdi Express. Thus, it is not established that Saifurrehman travelled by a Hindu name on 13.05.2008.

77. **Point No.4** – Whether Bill Books establishes sale of bicycles to accused on 13.05.2008 and whether the blasts took place on the bicycles sold to the accused?

78. To establish sale and use of bicycles for planting bombs, the prosecution has produced the bill books. We have perused each bill book very minutely.

79. So far as bill book of Anju Cycle Company is concerned, we have found that there were two bills bearing No.682 and bill in dispute pertained to cycle having frame number 97908 whereas, the cycle, which was recovered from the blast site, was having frame number 30616. The other anomaly, which we found on minute perusal of the bill book is that there were two bills of same serial No.682. In the entire bill book, in the main bill, there were grooves to facilitate tearing of main bill, however, there were no grooves in the disputed bill No.682, thus giving this Court an impression that it has been inserted afterwards with an intention to implicate Mohammad Saif. Original Bill No.682, which was there in the bill book, was changed to 681 in the carbon copy by making '2' as '1' with blue ink. Even the font of original bill No.682, which has been made 681, is not matching with the disputed bill No.682, which also fortifies our conclusion that the bill appears to have been inserted later on. This bill book is further not maintained in the regular course of business as no VAT has been charged in the bill book and the column against which the VAT is to be charged is empty in all the bills whereas in all the other bill books, which have been produced before the Court, VAT has been charged. This bill book was also not seized by the Investigating Officer immediately after the blast, even when it was known that cycle was sold from Anju Cycle Company.

80. In bill book of Hemraj Cycle & Stove Works in bill No.3411, no frame number is mentioned. The bill is in the name of Ajay Singh whereas there is no evidence that any person with the name of Ajay Singh travelled from Delhi to Jaipur and Jaipur to Delhi. The bill is dated 12.05.2008 whereas as per the prosecution

case cycles were purchased on 13.05.2008. In the bill book in bill Nos.3406, 3407, 3408, 3409 and 3412 in carbon copy, dates have been changed with ink. These bills are just preceding bill No.3411 and one bill is succeeding bill No.3411.The corrections were not made in the main bill and have been made in the carbon copy. Thus, there is fabrication of the documents. The bill book was also not seized and without there being any frame number, the same has been connected with the bomb blasts, which took place at *Phoolawalon ka khanda* near Choti Chaupar. It is an admitted case of the prosecution that there are more than 50 shops selling cycles in Jaipur and bill books of all the shops were not seized. As to how Rajendra Singh Nain came to the conclusion that the cycle involved in blast, which took place at *Phoolawalon ka khanda* near Choti Chaupar was sold from Hemraj Cycle & Stove Works, is not explained by the prosecution.

81. So far as bill No.1796 of Hemraj Cycle & Stove Works, Shop No.64, Kishanpole Bazar is concerned, the frame number on the bill is matching with the frame number of the cycle recovered from the blast site near Purva Mukhi Hanuman Temple, Sanganeri Gate . This cycle as per the witness-Rajesh Lakhwani was actually sold from Hari Om Cycle Works, Shop No.264, Kishanpole Bazar, Jaipur. Rajesh Lakhwani has admitted that both the shops have different registration numbers and different accountant and both are filing separate returns. As to why bill of Shop No.264, Hariom Cycle Works was not given to the purchaser is also a mystery. Thus, it is evident that the bill book was not maintained in the ordinary course of business for Shop No.264. This bill book was

also not seized by the police and was produced for the first time in the Court after a lapse of 4 years.

82. So far as bill No.3105 of Nand Cycle Works is concerned, the bill is dated 12.05.2008 whereas as per the prosecution version, the cycles were sold on 13.05.2008. The frame number mentioned in the bill book is I023625, however, the frame number mentioned in the seizure memo is I042625 whereas in the site plan frame number mentioned is I062625. Thus, the frame number mentioned on the bill book is not matching with the frame number of the cycle recovered from the blast site. In the bill book, initially the name of purchaser was mentioned as 'Raje', which was later on being cut and in its place 'Rajhans Sharma' has been mentioned. As per Laxman Jajhani, he had wrongly mentioned the frame number of the cycle on saying of the *Mistri*. The said *Mistri* was not produced as a witness before the Court, hence, it is not established that the cycle which as per the bill was having frame number I023625 and which was sold on 12.05.2008 was used in the bomb blast. The cycle as per Laxman Jajhani was sold from Mohit Cycle Works, Shop No.80, Kishanpole Bazar whereas the bill was of Nand Cycle Company, Shop No.273, Kishanpole Bazar. As per the witness shop no. 273 belongs to his brother and as per Laxman Jajhani, both brothers are filing returns separately and are having separate registration numbers under the Shops Act. The *Mistri* who had dictated the number has also not been produced by the prosecution to establish that he had dictated a wrong frame number. No record of the shop has been produced to establish that the frame number involved in the bomb blasts which is I042625, was actually purchased by Nand Cycle Company/Mohit

Cycle Company. As to how Laxman Jajhani came to know that the frame number mentioned in bill book I023625 is wrong and actually it was I042625, is also not explained. As per the prosecution evidence, only one blast took place near Hanuman Temple, Chandpole Bazar and that the blast took place on a PENY cycle.

83. When frame number mentioned in the bill book was not matching with the frame number of cycle found on the blast site and the date of sale was not matching with the prosecution story, as to how Rajendra Singh Nain singled out this particular shop as the one from where cycle was sold, is also not clear. The prosecution has failed to seize the material evidence, which is the bill book and this bill book was produced before the Court for the first time on 04.07.2011 i.e. after a lapse of more than 3 years.

84. We can thus conclude that the bill books in these cases were material evidences but they suffer from many infirmities such as mismatch of frame numbers, date of sale and seeming fabrications and manipulations in the bill books including insertion of disputed bill in the bill book of Anju Cycle company. The frame number of cycles sold did not match with the frame number of the cycles recovered from blast site. Thus, we are of the considered view that it is not established that the cycles were sold to the accused and were planted by the accused.

85. **Point No.5**-Whether Mohammad Saif, Salman and Sarvar Azmi are co-conspirators?

86. Learned Additional Government Advocate has set up a case that all the accused were knowing each other. They came to Jaipur on 11.05.2008 and after doing 'Reki' returned on the same day.

They made bombs on 12.05.2008, came to Jaipur on 13.05.2008 afternoon and returned by Ajmer Shatabdi on 13.05.2008 itself. We deem it fit to reproduce Section 120-A of IPC as under:

> "120-A. Definition of criminal conspiracy.—When two or more persons agree to do, or cause to be done,— (1) an illegal act, or
> (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. Explanation.—It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

87. Disclosure statements of Saif, Saifurrehman, Sarvar Azmi and Salman have been discarded by the Court and are hit by Sections 25 & 26 of the Evidence Act and Section 162 Cr.P.C. Disclosure statement pertaining to pointing out to the place of bomb blasts and shops from where cycles were purchased, have also been discarded by the Court, as these facts were already in the notice of the Investigating Agency and no new fact has been discovered under Section 27 of the Evidence Act.

88. This Court in earlier part of the judgment discarded the evidence pertaining to test identification parade as the same was conducted after inordinate delay, the same was recorded in the presence of Police Official, the possibility that accused was shown to the witness cannot be ruled out. The witnesses deposed that they cannot identify purchasers, who had purchased cycles few days back, in those circumstances, seeing a purchaser for few minutes and then identifying him after many months and due to non-production of sketches, their evidence was disbelieved by the Court.

89. It is to be noted that no evidence has been adduced to establish that Mohammad Saif, Saifurrehman, Salman and Sarvar Azmi were known to each other or there was any meeting of mind prior to the date of bomb blasts. The prosecution has been unable to establish either agreement to do an illegal act or a concert of action to cause an illegal act. Thus, the prosecution has utterly failed to establish the requisites of Section 120-A of IPC which defines criminal conspiracy. Further, anything said by a co-conspirator is relevant under Section 10 of the Indian Evidence Act and in this regard, State has relied on the disclosure statement of Mohammad Saif. While dealing with this argument, we have already held that any disclosure statement made by a co-accused is admissible against co-conspirator only if disclosure is made during the subsistence of the conspiracy. The disclosure statement of Mohammad Saif in this case was made many months after the bomb blasts and no conspiracy was subsisting as on the date of disclosure. Otherwise also, in the disclosure statement, generic muslim names were used and they do not disclose the identify of the co-conspirators.

90. Admittedly, the case rests on circumstantial evidence and till arrest of Mohammad Saif, the prosecution had no link or clue with regard to the bomb blasts. The cases of all the accused as per the prosecution version is so interlinked that each chain is required to be established. In the deliberations made above, we have come to the conclusion that none of the link in the chain is established so as to bring home conviction of the accused, rather not a single link has been established before the Court. The links which should

have been established and have not been established are: journey on 11.05.2008 from Delhi to Jaipur; making bombs at Delhi on 12.05.2008; coming to Jaipur by bus on 13.05.2008, having lunch at Hotel Kareem; purchasing cycles, planting bombs on them and; returning by Ajmer Shatabdi Train on 13.05.2008 itself. Since none of the link is established, the judgment of the conviction dated 18.12.2019 and order of sentence dated 20.12.2019 are quashed and set-aside.

91. While deciding Death Reference Nos.1, 3 & 4, this Court has come to the conclusion that the prosecution has not been able to establish beyond reasonable doubt the involvement of Saif, Sarvar Azmi and Salman in Jaipur Bomb Blasts. While deciding Reference No.1/2020, we have come to the conclusion that Mohammad Salman is not guilty; in Death Reference No.3/2020, we have held Mohammad Sarvar Azmi as not guilty and in Death Reference No.4/2020, we have held Mohammad Saif as not guilty. Since the prosecution has failed to establish beyond reasonable doubt the guilt of Mohammad Sarvar Azmi, Saif and Mohammad Salman, they cannot be held guilty as co-conspirators in the present case. Accordingly, this point is also decided against the State and in favour of accused.

92. Before we conclude, we must place on record the fact that we are not unaware of the degree of agony and frustration that may be caused to the society in general and the families of the victims in particular by the fact that a heinous crime like this goes unpunished but, then law does not permit the Courts to punish the accused on the basis of moral conviction or on suspicion alone. It is always the burden of the prosecution to prove their case beyond

reasonable doubt on the basis of acceptable evidence. The Apex Court in *Sarwan Singh Versus State of Punjab*: **AIR 1957 SC 637** observed as under:

> "It is no doubt a matter of regret that a foul cold-blooded and cruel murder should go unpunished. There may also be an element of truth in the prosecution story against the accused. Considered as a whole, the prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by legal, reliable and unimpeachable evidence before an accused can be convicted.

93. It is also a settled principle of criminal jurisprudence that more serious the offence, the stricter the degree of proof, since higher degree of assurance is required to convict the accused.

94. From what we have discussed herein-above, it is evident that the prosecution has failed to establish beyond reasonable doubt that Saifurrehman came to Jaipur in the name of Ajay Singh, planted the cycle near Phool Walon Ka Khanda, Choti Chaupar and left by Ajmer Shatbadi Train on the same day; we, therefore, decline the reference, allow the appeal filed by accused – Saifurrehman, Mohammad Sarvar Azmi, Mohammad Saif and Mohammad Salman and dismiss the appeal filed by the State challenging the acquittal of Shahbaz and for enhancement of sentence of Salman, Mohammad Saif and Sarvar Azmi. As a result thereof, accused Shahbaz, Salman, Mohammad Saif and Sarvar Azmi are acquitted and judgment of the trial Court to the extent it has acquitted Shahbaz is upheld. Consequently, D.B. Criminal Death Reference No.2/2020 is declined, D.B. Criminal Appeal Nos.216/2022 and 217/2022 are allowed and accused Saifurrehman, Mohammad Salman, Mohammad Saif and Sarvar

Azmi are acquitted of all the charges. D.B. Criminal Appeal No.252/2022 preferred by the State is dismissed. The impugned judgment of conviction dated 18.12.2019 and the order of sentence dated 20.12.2019 are accordingly quashed and set aside.

95. The accused, who are in custody, be set at liberty forthwith, if not required in any other case or for any other purpose.

96. Accused appellants–Mohammad Saif, Mohammadb Saifurrehman, Mohammad Sarvar Azmi and Mohammad Salman are directed to furnish personal bond in the sum of Rs.5,00,000/- and a surety bond in the like amount in accordance with Section 437-A of Cr.P.C. before the Registrar (Judicial) within two weeks from the date of release to the effect that in the event of filing of Special Leave Petition against this judgment or on grant of leave, Accused Appellants – Mohammad Saif, Mohammad Saifurrehman, Mohammad Sarvar Azmi and Mohammad Salman on receipt of notice thereof, shall appear before the Hon'ble Apex Court. The bail bond will be effective for a period of six months.

97. It is apparent that the investigation was not fair and it appears that nefarious means were employed by the Investigating Agencies, material witnesses required to unfold the events were withheld and apparent manipulations and fabrications have been done during the investigation. We therefore deem it proper, in interest of society, justice and morality, to direct the Director General of Police, Rajasthan, to initiate appropriate enquiry/disciplinary proceedings against the erring officers of the investigating team.

98. Since, sealed articles were opened in the Court, the Registrar (Judicial) is directed to reseal the same and return the record to the trial Court forthwith.

99. All the pending applications stand disposed.

(Per Hon'ble Sameer Jain, J.)

CONCURRING VIEW WITH ADDITIONAL OBSERVATIONS AND DIRECTIONS:

1. I have had the pleasure of reading the academic and erudite judgment authored by my brother judge and I am in complete and respectful agreement with him on every point involved. However, having regard to the importance of the issue involved, I deem it appropriate to pen down a few of my own views, in addition to the opinion of my brother judge. The following observations and directions are common to all the death references and appeals adjudicated, irrespective of fact that the said death references and appeals were adjudicated individually and independently on their own facts and arguments in great details in the above part of the judgment.

2. At the outset, the well established rule of criminal jurisprudence of *"fouler the crime, higher the proof"* is required to be noted. In the instant case, the life and liberty of convicts, who are young individuals, is at stake. As the accused were given death sentence, a very careful, conscious and meticulous approach was necessarily required to be made. It is well settled that the prosecution must stand or fall on its own legs and that it cannot derive any strength from the weakness of the defence. It is also a settled law that wherever there are two possibilities, one reasonably indicating commission of crime and the other

reasonably indicating innocence of accused(s), the accused(s) must be given the benefit of doubt. When any fact asserted by the prosecution runs doubtful, the benefit should go to the accused and not to the prosecution; that is the settled position of law. In this regard, reliance is invited upon judgment of the Hon'ble Apex Court rendered in *Digamber Vaishnav & Anr. Vs. State of Chhattisgarh*: **(2019) 4 SCC 522** wherein it was held as under:-

> "14. One of the fundamental principles of criminal jurisprudence is undeniably that the burden of proof squarely rests on the prosecution and that the general burden never shifts. There can be no conviction on the basis of surmises and conjectures or suspicion howsoever grave it may be. Strong suspicion, strong coincidences and grave doubt cannot take the place of legal proof. The onus of the prosecution cannot be discharged by referring to very strong suspicion and existence of highly suspicious factors to inculpate the Accused nor falsity of defence could take the place of proof which the prosecution has to establish in order to succeed, though a false plea by the defence at best, be considered as an additional circumstance, if other circumstances unfailingly point to the guilt.
>
> 16. In order to sustain the conviction on the basis of circumstantial evidence, the following three conditions must be satisfied:
> i.) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
> ii.) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; and
> iii.) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the Accused.
> 18. In Sujit Biswas v. State of Assam (2013) 12 SCC 406, this Court, while examining the distinction between 'proof beyond reasonable doubt' and 'suspicion' has held as under:

> 13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved, and something that "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an Accused is condemned as a convict, and the basic and golden Rule must be applied."

Bearing these principles in mind, this Court, after careful considerations, has consciously decided both the references and appeals in favour of the convicts. This Court has observed that the learned trial court has erroneously relied upon inadmissible evidence, ignored material contradictions, and has also not properly considered the legal provisions enumerated in The Indian Evidence Act, 1872 (for short "Evidence Act"); Information and Technology Act, 2000 (for short "I&T Act") and the Code of Criminal Procedure, 1973 (for short "CrPC"), which has led to passing of the erroneous impugned order(s) which is against the settled position of law.

3. In the instant matters, the following instances are note-worthy:

i. The blasts occurred on 13th May 2008 in the city of Jaipur (Rajasthan). Subsequently, after four months, similar blasts took place in the capital city of New Delhi on 13th September

2008. For these four months, little to nothing was done by the investigation agencies in the State of Rajasthan.

ii. The Special Cell of Delhi Police, on a tip off, raided the Batla House in Jamia Nagar of South Delhi on 19.09.2008, where the alleged perpetrators of the crime were holed up. Only one of the accused, Mohd. Saif, was apprehended and his statements were recorded under police custody, did the investigation actually begin.

iii. The prosecution has attempted to disguise the alleged statements made by the accused under police custody as disclosure statements. However, the said statements were not confessions or admission of guilt, as the same were recorded in police custody and are hit by the provisions of Section 162 Cr.P.C read with Sections 25, 26 and 27 of the Evidence Act. Further, the same has not been corroborated by the recovered evidence and material and is, therefore, unreliable and inadmissible. The statements so recorded were extra judicial statements made under police custody. The prosecution ought to have recorded the statement under Section 164 Cr.P.C before the learned Magistrate and for the lack thereof, along with absence of any supporting corroborating evidences, the alleged statements are hit by provisions of Section 162 Cr.P.C. read with Sections 25, 26 and 27 of the Evidence Act and are therefore inadmissible. Reliance in this regard is placed on the judgment of Apex Court in *Indra Dalal vs. State of Haryana:* **(2015) 11 SCC 31**.

iv. The alleged travel made by the accused/convicts between Delhi and Jaipur has also not been conclusively proved. No CCTV footage and no call details were produced from the seized mobile from the accused in order to support the alleged travel made on 11.05.2008 or 13.05.2008.

v. The email allegedly sent by the accused assuming responsibility for the blasts to the media houses, including India TV and Aaj Tak, and to Mr. A.K. Jain, then ADG, Rajasthan Police on 14.05.2008, was neither supported by the mandatory certificate as required under Section 65B of Evidence Act nor was it corroborated by the statements of Mr. A.K. Jain, Mr. Prakash Tandon or other people from the media houses who received such email. In the absence of mandatory certificate as required under Section 65B of the Evidence Act, as held by the Apex Court in *Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal and Ors.*: **(2020) 7 SCC 1**, and in the absence of corroborative statements of Mr. A.K. Jain, Mr. Prakash Tandon or other people from the media houses, the email relied upon by the prosecution is also an inadmissible piece of evidence. Further, even the header and tail of the email are not proper. In a nutshell, qua email, requisites of Section 88A of the Evidence Act read with Section 65B of the Evidence Act and Section 2 of the I&T Act are not followed and therefore, adverse inference under Section 114(g) of the Evidence Act has to be drawn.

vi. It is the case of the prosecution that the accused/convicts allegedly sent the email from 'Naveen Café', operated by Mr. Madhukar Mishra. However, the relevant CPUs and the

relevant register/record were never seized and examined. The site plan prepared is also not reflecting the existence of the relevant CPU system. All this added with the fact Mr. Madhukar Mishra was not present on the spot at the relevant time casts a shadow of a doubt.

vii. The Investigation Agency have also failed to impound/seize, at the initial stage of the investigation, the relevant bill books from the bicycle vendors who allegedly sold the bicycles, which were used in the explosions, to the accused/convicts. The bill books were a substantial piece of evidence and could have been relied upon under Section 34 of the Evidence Act. Further, Mr. Dinesh Mahawar, the *mistri* at the Anju Cycle Shop, who assembled/fixed the bicycles was also not examined. Also, the invoices and the bill books that were produced before this Court appeared to be tampered with, which makes the same a weak evidence.

viii. There was no scientific evidence examining or comparing the ball bearings seized from the site of blasts to that seized from the shop of Mr. Subhash Chandra. There was a mismatch in the size of ball bearings which were produced and which were recovered from the site, which has created a doubt and there is no further investigation by the prosecution on the same.

ix. The Test Identification Parade (in short "TIP") is also vitiated for non-compliance of the Rajasthan Police Manual and Rules. There was a clear violation of Clause 7.31 as the TIP was conducted in the presence of the Investigating Officer, which is apparent from the statements made in the cross

examination by Mr. Bhanwar Singh and Satyendra Singh Ranawat as also by the prosecution witness Laxman Jhajhani, Prakash Sain and Lalit Lakhwani. The Jail Registrar has also given testimony that the Investigating Officer was present along-with the witnesses in Jail. The non-compliance of necessary provisions for conducting TIP were overlooked which has vitiated the entire procedure. Further, the TIP was also conducted after a lapse of substantial period of time and it is likely that the witness may have forgotten the features of the accused and thus it was very likely that mistakes might have been committed. Reliance in this regard is placed on Apex Court judgment of *Wakil Singh and Ors. vs. State of Bihar*: **1981 (Supp) SCC 28**.

x. The prosecution has also failed to produce/examine some of the key witnesses. The most crucial example of this is the absence of examination of Mr. Rajendra Singh Nain, who allegedly conducted the entire investigation with cycle shop vendors. Other important witnesses who were not examined includes Mr. A.K. Jain, Mr. Prakash Tandon or other people from the media houses who allegedly received the email, Mr. Dinesh Mahawar, the *mistri* who allegedly assembled/fixed the bicycle, and the handwriting expert on whose opinion reliance was placed upon by the prosecution.

4. Having regard to the totality of circumstances and the evidence on record, it is difficult to hold that the prosecution had proved the guilt of the accused by adducing cogent and clinching evidence. As per the settled legal position, in order to sustain conviction, the circumstances taken cumulatively should form a

chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused only and no one else. The circumstantial evidence must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. As held by the Apex Court in *Rahul vs. State of Delhi, Ministry of Home Affairs and Ors.:* **(2023) 1 SCC 83**, the prosecution has to bring home the charges levelled against the accused beyond reasonable doubt. In the present case(s), the prosecution has failed to do so, resultantly, the Court is left with no alternative but to acquit the accused. It may be true that if accused(s) in a heinous crime go unpunished or are acquitted, a kind of agony and frustration may be caused to the society in general and to the family of the victims in particular, however the law does not permit the Courts to punish the accused on the basis of moral conviction or on suspicion alone. No conviction should be based merely on the apprehension of indictment or condemnation over the decision rendered. Every case has to be decided by the Courts strictly on merits and in accordance with law without being influenced by any kind of outside moral pressures or otherwise.

5. The Court is constrained to make these observations as the Court has noticed, as mentioned above, many glaring lapses having occurred during the course of the investigation. It is noted by this Court that the Investigation Agency has miserably failed in the discharge of their duties; they have performed poorly, the investigation was not only flawed but was also shoddy and the

provisions of law as well as their own rules were overlooked. It is also observed by this Court that the Investigating Agency lacked the required legal skills as they were not aware about the statutory pre-requisites and mandatory requirements. They have approached this case in a callous manner i.e. unbecoming of the members of uniformed posts. The approach of the Investigation Agency was plagued by insufficient legal knowledge, lack of proper training and insufficient expertise of investigation procedure, especially on issues like cyber crimes and even basic issues like admissibility of evidence. The failure on the part of the Investigation Agency has frustrated the case of the prosecution and the evidence so recorded is not fulfilling the chain of evidence.

6. Though the efforts of the arguing counsel, Ms. Rekha Madnani, Addl. Govt. Advocate, have to be appreciated, but it is also glaringly obvious that, in the present case, no integrated approach was adopted by the State. It was also admitted in written submission that since blast matter was first of its kind, certain technical errors were there on the part of the State to carry out the investigation and therefore, the seizures, non-production of evidences, non-production of material witnesses etc. have taken place.

7. Under Schedule-7 of List-II of the Constitution of India, the police is a subject governed by the State whose primary role is to provide security for the people, to investigate the crime, and to maintain law and order. It is indeed true that they have to be given operational freedom to carry out their role and responsibility but while discharging this important public duty, the

police/investigation agency may be held publicly accountable for their poor performance. The police/investigation agency is expected to perform their duty in a very cautious, sincere, devoted, diligent manner in accordance with law as per the statutory mandate and in accordance with settled position of law. It is duty of the police/investigation agency to secure and record the complete evidence, to investigate in a sincere manner, to identify the culprits/accused, frame charges and assist the prosecution. However, in the instant case, the investigation agency has utterly failed to do so. This Court has no hesitation to hold that the investigation was flawed, shoddy and there were lapses on the part of the investigation team. The Apex Court has time and again, more particularly in *Gajoo Versus State of Uttarakhand*: **(2012) 9 SCC 532** and *Dayal Singh and Ors. Versus State of Uttaranchal*: **(2012) 8 SCC 263**, held that in criminal case of heinous nature, if the investigation is shoddy/flawed which resulted from a callous, lethargic and negligent approach adopted by investigation agencies, then it will be the duty of the Court to pass appropriate strictures and/or to give appropriate directions as the occurrence of crime is a breach of public right which affects the whole community and is harmful for the society in general.

8. For the reasons stated above, we hold that the Investigation Agency in the given case should be made responsible/accountable for their negligent, cursory and inefficient actions. In the given case, for the reasons stated above, in spite of the case being of heinous nature, 71 persons losing their lives and 185 persons

sustaining injuries, causing unrest in the lives of every citizen, not just in the city of Jaipur, but all across the country, we deem it appropriate to direct the Director General of Rajasthan Police to initiate appropriate Enquiry/Disciplinary Proceedings against the erring officers of the Investigating Team.

9. Before parting, it must be added that the Apex Court, in the celebrated judgment of *Prakash Singh and Ors. vs. Union of India (UOI) and Ors.*: **(2006) 8 SCC 1**, had contemplated formation of a 'Police Complaints Authority' which is still not adequately constituted in the State of Rajasthan. This case is a classic example of institutional failure resulting in botched/flawed/shoddy investigation. We fear this isn't the first case to suffer due to failure of investigation agencies and if things are allowed to continue the way they are, this certainly won't be the last case in which administration of justice is affected due to shoddy investigation. Therefore, we direct the State, the Chief Secretary in particular, to look into the matter, which is in the larger public interest. .

(SAMEER JAIN),J (PANKAJ BHANDARI),J

SUNIL SOLANKI /PS