

(2011) 01 GUJ CK 0053
In the Gujarat High Court

Case No : Criminal Appeal No. 1148, 1149, 1150, 1151, 1155 and 1686 of 2006

Anas Abdul Rashid Machiswala

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 24-01-2011

Acts Referred:

Bombay Police Act, 1951 — Section 130, 135(1)
Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 162, 164, 190, 219, 306
Evidence Act, 1872 — Section 10, 132, 24, 25, 26
Explosive Substances Act, 1908 — Section 4, 5
Penal Code, 1860 (IPC) — Section 120(B), 120B, 307, 307
Prevention of Damage to Public Property Act, 1984 — Section 4
Prevention of Terrorism Act, 2002 — Section 20, 20, 21(2), 21(2)(b), 22(3)
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 15

Citation : (2011) 01 GUJ CK 0053

Hon'ble Judges : Jayant Patel, J; H.B. Antani, J

Bench : Division Bench

Advocate : Nitya Ramakrishnan, Rohit S. Verma and Somnath M. Vatsa, for the Appellant; J.M. Panchal, Spl. Public Prosecutor and K.J. Panchal, Addl. Spl. PP, for the Respondent

Judgement

H.B. Antani, J.—As all the appeals involve common question of law and arise from the common judgment rendered in POTA Case No. 7

of 2003 and 9 of 2003, they are heard together and disposed of by this common judgment.

2. It is pertinent to note that Criminal Appeal Nos. 1148 of 2006, 1149 of 2006, 1150 of 2006, 1151 of 2006 and 1155 of 2006 are preferred

by the Appellants who are convicted by the Special [POTA] Court and sentenced u/s 3[1] of the [""POTA"" for short] to undergo RI for a period

of ten years and fine of Rs. 5000/- each, in default, to undergo simple imprisonment for a period of one year; u/s 3[3] of POTA to undergo RI for

a period of eight years and fine of Rs. 3000/- each and in default to undergo simple imprisonment for a period of one year; u/s 4 read with Section

3[3] of the POTA to undergo RI for a period of five years and fine of Rs. 3000/- each and in default, to undergo simple imprisonment for a period

of six months. The above Appellants are also convicted and sentenced u/s 120B of Indian Penal Code [""IPC"" for short] to rigorous imprisonment

for a period of eight years and fine of Rs. 3000/- each, in default, they are ordered to undergo simple imprisonment for a period of one year; u/s

120B read with Section 307 of IPC RI for a period of ten years and fine of Rs. 5000/- each and in default to undergo simple imprisonment for a

period of one year; u/s 3 of the Prevention of Damage to Public Property Act, all the five Appellants are imposed simple imprisonment for a period

of one year and to pay fine of Rs. 2000/- each and in default, to undergo simple imprisonment for a period of six months; u/s 4 of the Prevention of

Damage to Public Property Act, they are sentenced to rigorous imprisonment of two years and fine of Rs. 3000/- each, in default to undergo

further simple imprisonment of six months; u/s 4 of the Explosive Substance Act, the Appellants are sentenced to rigorous imprisonment for a

period of five years and to pay fine of Rs. 3000/- and in default, to undergo further simple imprisonment for one year and; u/s 135[1] of the

Bombay Police Act, they are punished for a period of three months and to pay fine of Rs. 500/- each and in default to undergo simple

imprisonment for a period of one month. Five Appellants who are convicted and sentenced under the various provisions of POTA Act as well as

IPC, Prevention of Damage to Public Property Act, Explosive Substance Act and under the Bombay Police Act by a judgment rendered in Special

POTA Case Nos. 7 and 9 of 2003 respectively have preferred the present appeals challenging the conviction and imposition of sentence by the

Special Judge [POTA] vide judgment and order dated 12th May, 2006 passed in Special POTA case Nos. 7 and 9 of 2003; whereas the State

has preferred Criminal Appeal No. 1686 of 2006 challenging the judgment and order passed by the Special Judge [POTA] in Special POTA

Case No. 7 and 9 of 2003 respectively for enhancement of the sentence imposed by the learned Special Judge [POTA] on the present Appellants.

3. Prosecution case, in brief, is stated as under:

3.1 On 27.2.2006, S-6 coach of Sabarmati Express Train was set on fire near Godhra Railway Station and 59 persons were burnt alive. It sent

shock wave across the State and the country and a call for Bandh was given by Vishwa Hindu Parishad, a religious organization on 28.2.2002.

The State, thereafter, witnessed the worst ever communal riots, wherein, hundreds of people lost their lives and the properties of number of people

were damaged or destroyed. Communal frenzy continued in Ahmedabad as well as in the State for few months and it divided the communities on

religious basis.

3.2 The prosecution case is that some clerics of the Muslim community, with a strong conviction of taking revenge of these events, joined hands

with terrorist organizations and worked against the unity and sovereignty of the nation. Cassettes and C Ds were distributed to show the version of

the communal riots which created an atmosphere whereby Muslims youths were instigated. Muslim youths, in connection with banned militant

organizations operating from the neighbouring country worked in tandem with banned organizations and wrought havoc in the aftermath of of

Godhra incident.

3.3 As per the prosecution case, a conspiracy was hatched by these youths by collecting funds from the militant organizations for the purpose of

purchasing arms and ammunitions and also explosive substances with a view to use them in committing bomb blasts in the buses owned by

Ahmedabad Municipal Transport Service [""AMTS"" for short] with an intention of injuring and killing people of Hindu community and causing

apprehension and terror in their minds. In pursuance thereof, tiffin bombs were prepared and planted in five different AMTS buses running in the

city of Ahmedabad. Conspiracy was executed with precision on 29.5.2002 and tiffin bomb boxes were placed in five different buses and they

were allegedly planned to be blasted almost at the same time in all the buses on the routes where predominantly, people of Hindu community

resided. As per the prosecution case, in the AMTS buses bearing route Nos. 46 and 46 of Kalupur and Sanand, blast did not occur; whereas in

the buses bearing route Nos. 13/1, 47/1 and 90/6, tiffin bombs exploded causing injuries to 5,2 and 6 persons respectively. In bus route No. 46,

unclaimed box was found and one was found in Sanand bus route No. 49. Even

during the process of defusal of bombs by the Bomb Defusal

Squad, a pipe exploded injuring some team members of the Bomb Defusal and Disposal Squad. A complaint bearing Ist CR No. 90 of 2002 was

registered with Kalupur Police Station u/s 307 of Indian Penal Code and under Sections 3[3], 4, 20, 21[2][b] and 22[3] of the Prevention of

Terrorism Act, 2002; under Sections 4 and 6 of Explosive Substance Act and; u/s 135[1] of the Bombay Police Act for conspiracy of the blasts in

the bus route No. 46 where unclaimed tiffin box with unexploded bomb was found. A complaint was given on 29.5.2002 by Bus Conductor of

AMTS bus route No. 46 at about 10.50 a.m. stating therein that some passengers of the bus had noticed a plastic tiffin and on opening the same,

some electric timer and a circuit were found therein and accordingly, offences were registered against the accused. Another complaint being Ist CR

No. 79/02 was filed before Sanand police Station with regard to unclaimed tiffin box found in bus route No. 49 at around 10.45 a.m. on

29.5.2002, in which connection, Bomb Defusal and Disposal Squad and sniffer dogs were called in and during the process of defusing the said

bomb from plastic tiffin, a pipe had exploded which had caused injuries to some of the members of the squad.

3.4 Tiffin bombs were found in AMTS buses which had caused blasts in bus route Nos. 13/1, 47/1 and 90/6, where offences in respect of the said

blasts were registered as Ist CR No. 184 of 2002 at Kagdapith Police Station, Ist CR No. 244/02 at Satellite Police Station and Ist CR No. 116

of 2002 at Vejalpur Police Station. Initially, in connection with Ist CR No. 90 of 2002 and Ist CR No. 79 of 2002, Police Inspectors of the

concerned police stations were investigating the offence. From 3.6.2003, one Mr. Dodia, Police Inspector, by virtue of the order of Commissioner

of Police investigated into all these cases except the Ist CR No. 79/02 and ""A"" Summary was filed on 18.8.2002 by him before the Court pointing

out truthfulness of the happening of the incident and no whereabouts of the accused known to the investigating agency. It was only after 19.4.2003

when investigation in Ist CR No. 6 of 2003 of DCB Crime was going on, it was revealed that some of the accused were also involved in the tiffin

bomb blasts case. Consequently, Crime Branch was handed over investigation of all these cases and Mr. H.P. Agrawat-PW 37 was assigned the

responsibility of investigating into these offences. As it was found to be a result of criminal conspiracy hatched for terrorizing particular section of

people and also for jeopardizing sovereignty and unity of the nation, provisions of POTA were made applicable on 19.7.2003 and accordingly,

Mr. G.L. Singhal, ACP PW-38 took over the investigation of all the five offences of the bomb blasts. 21 accused were arrested as required u/s 51

of the POTA. The case was, thereafter, transferred to the designated POTA Court under the provisions of Section 23 of the POTA and were

numbered as POTA Case Nos. 7/03, 8/03, 9/03, 13/03 and 14/03. In view of the application dated 7.10.03 preferred by the Special Public

Prosecutor u/s 219 of the Code of Criminal Procedure [""Code"" for short], POTA Case Nos. 7 and 9 of 2003 were clubbed into a single case

where proceedings were directed to be recorded in POTA Case No. 7 of 2003, whereas POTA Case Nos. 8, 13 and 14 were directed to be

clubbed together and converted into one case and proceedings were directed to be recorded in POTA Case No. 8 of 2003. Thus, only two

POTA cases out of five cases mentioned herein above being POTA Case No. 7 of 2003 and 8 of 2003 arising out of five different complaints of

the alleged tiffin bomb blasts in AMTS buses of different routes in Ahmedabad city, came up for trial before the learned designated POTA Court.

After completion of investigation against 21 accused, they were charge-sheeted on obtaining sanction from the State Government u/s 50 of POTA

for the offence punishable under Sections 3[3], 4, 20, 21[2][B] and 22[3] of the POTA; under Sections 307 and 120B of IPC; under Sections 4

and 6 of Explosive Substance Act as well as u/s 135[1] of the Bombay Police Act.

3.5 All the accused preferred discharge applications, however, out of them four accused were discharged and four accused were shown as

absconding. Charge against against rest of the accused was framed vide exh.44 for the offence punishable under Sections 120B, 307 read with

Section 120B as well as under Sections 3, 4, 20, 21[2][b], 22[3] A.B. of POTA and under Sections 4 and 6 of Explosive Substance Act and

under Sections 3 and 4 of the Prevention of Damage to Public Property Act as well as under Sections 130 and 135[1] of the Bombay Police Act.

All the accused pleaded not guilty to the charge levelled against them and they claimed to be tried.

3.6 The prosecution has examined as many as 40 witnesses in order to bring home the guilt against the accused. The prosecution also produced

documentary evidence in support of the oral depositions adduced by prosecution witnesses in Special POTA Case No. 7 of 2003 which are as

under:

PW No.

Name of prosecution witness Exh. No.

PW-1 Manibhai Mohanbhai Patel, Complainant and driver of AMTS Bus route No. 46 in Kalupur area registered as Ist CR No. 90 of 2002 of

Kalupur Police Station.

Exh.94

PW-2 Narendrasinh Jagdevsinh Jhala, Police Inspector of Sanand Police Station and complainant in Ist CR No. 79 of 2002.

Exh.96

PW-3 Mohd. Samir Siddikbhai Sheikh, witness to the alleged incident whose statement is recorded u/s 164 of Cr.P.C.

Exh.99

PW-4 Abdul Hamid Abdul Rahim Sheikh, witness to the alleged incident, whose statement is recorded u/s 164 of Cr.P.C.

Exh.100

PW-5 Abdul Rahim Jalaluddin Sheikh, witness to the alleged incident whose statement is recorded u/s 164 of Cr.P.C.

Exh.104

PW-6 Azizurehman Riyazahmed Machiswala, witness to the alleged incident, whose statement is recorded u/s 164 of Cr.P.C.

Exh.105

PW-7 Dilipsinh Khengarbhai Chauhan, panch witness to the panchnama of A-17 pointing at the place of making bombs.

Exh.106

PW-8 Mustakahmed Chandmiya Sheikh, witness to the alleged conspiracy and incident, whose statement is recorded u/s 164 of Cr.P.C.

Exh.113

PW-9 Mohd. Sajid Ahmedhussain Sheikh, witness to the alleged incident.

Exh.114

PW-10 Sanjaybhai Shridharbhai Bhojkar, panch witness to the pointing of A-19 of purchase of material of bomb.

Exh.115

PW-11 Firozkhan Abdurashidkhan Mevati, witness to the alleged incident.

Exh.117

PW-12 Mr. Mansing Bavasing Shikh, panch witness to panchnama Exh.119 recovering the articles soldering iron etc.

Exh.118

PW-13 Baldev Keshavlal Chauhan, Traffic Inspector of AMTS bus route No. 46.

Exh.151

PW-14 Govindbhai Kantilal Patel, Driver, AMTS bus route No. 46.

Exh.152

PW-15 Ashvinsinh Ranjitsinh Padhiyar, injured witness and PSI, Bomb Detection and Disposal Squad.

Exh.153

PW-16 Ramjibhai Jivaji Chaudhary, injured witness and Member, Bomb Detection and Disposal Squad.

Exh.154

PW-17 Bachubhai Sadhubhai Bharvad, injured witness and Member, Bomb Detection and Disposal Squad.

Exh.155

PW-18 Pankajbhai Vadilal Darji, Driver, AMTS Bus route No. 49.

Exh.156

PW-19 Aarifkhan Munnakhan Pathan, witness to purchase of explosive.

Exh.157

PW-20 Altabhussain Hajimiya Sheikh, witness to purchase of explosive.

Exh.158

PW-21 Khalidkhan Mohd. Naeemkhan Pathan, witness to the alleged conspiracy.

Exh.159

PW-22 Dipeshbhai Parasmal Jain, vendor of tiffin.

Exh.160

PW-23 Mandip Chandravadan Shah, doctor treating the injured.

Exh.163

PW-24 Jethabhai Punjabhai Parmar, panch witness to the bus route panchnama exh.69 Exh.190

PW-25 Narendrabhai Bechardas Kahar, panch witness of bus ticket exh.193.

Exh.191

PW-26 Gopalbhai Bababhai Darji, Sr. Police Officer recording the complaint of PW1 Exh.195

PW-27 Dhirendrasinh Lakhaji Dodia, investigating officer from dt.3.6.2002 Exh.201

PW-28 Haiderkhan Mustufakhan Pathan, witness to the conspiracy.

Exh.202

PW-29 Shoaib Munaverhussain Mansuri, vendor selling hardware items.

Exh.203

PW-30 Yakub Abdul Rehman Chhipa, vendor of chemicals allegedly used in explosives.

Exh.206

PW-31 Anandkumar Khushalbhai Pandya, Dy. Police Commissioner, Ahmedabad Zone III recording the confessional statement of eight accused.

Exh.207

PW-32 Rajendrasinh Hathisinh Rathod, Sr. Police Inspector, Dariapur Police Station and Investigating Officer in the complaint of Kagdapith,

Vejalpur and Satellite Police Stations.

Exh.216

PW-33 Ms. Malvikaben Dilipkumar Bhatt, Judicial Officer-Metropolitan Magistrate Court No. 5 recording statement u/s 164 of Cr.P.C.

Exh.217

PW-34 Ms. Anita Atul Karwal, District Magistrate giving consent to prosecute under the Explosive Substance Act in cases of Kalupur, Sanand

and Satellite Police Stations.

Exh.227

PW-35 Kuldeep Chand Kapoor, Principal Secretary, Home Department, Gandhinagar for sanction u/s 50 of POTA.

Exh.234

PW-36 Ms. Urmila Dhansukhlal Patel, District Magistrate granting consent under the Explosive Substance Act to prosecute in cases of Vejalpur

and Kagdapith police stations.

Exh.273

PW-37 Hareshkumar Prafulchandra Agrawat, P.I. Crime Branch and Investigating Officer of all the cases from April 2003.

Exh.281

PW-38 Girishkumar Laxmanbhai Singhal, ACP Crime Branch & I.O. From dt.19.7.2003 Exh.294

PW-39 Natwarlal Babulal Raneksha, Judicial Officer verifying confessional statements u/s 32[4] of POTA of four accused A-12, A-19, A-20 and

A-21.

Exh.298

PW-40 Niranjanbhai Pravinkant Purani, Judicial Officer verifying confessional statement u/s 32 of POTA of five accused A-5, A-6, A-7, A-8 and

A-9.

Exh.311

3.7 The prosecution has also produced the following documentary evidence to indicate involvement of the accused in the commission of offence:

PARTICULARS OF DOCUMENT EXH. No.

List of documents u/s 293 and 294 of Cr.P.C.

Exh.63

Original complaint of complainant [Kalupur Police Station], dated 29.5.2002.

Exh.95

Report of registration of offence dated 29.5.2002 Exh.65

Panchnama of defusal of tiffin bomb found in this case and seizure of this tiffin bomb in presence of expert from F.S.L. Dated 29.5.2002.

Exh.66

Panchnama of drawing of diagram of circuit of tiffin bomb found, dated 6.6.2002.

Exh.67

Route panchnama of bus route No. 46 as shown by accused Nisar Ahmed and accused Firozkhan, dated 24.4.2003.

Exh.192

Tickets purchased of AMTS bus route No. 46 by r the accused dated 24.4.2003.

Exh.193

Discovery panchnama of solder machine, clay role and micro meter etc. used by accused Mohmed Habib Hava in making tiffin bomb, dated

1.5.2003.

Exh.119

Copy of receipt given to accused for discovery of muddamal, dated 1.5.2003.

Exh.282

Panchnama of factory shown by Mohmed Hanif Abdul Rajak, dated 1.5.2003 [zerox copy from Kagdapith police station]

Exh.107

Panchnama pointing out the shop Navrang Paint & Hardware Mart by accused Kalim Ahmed from where pieces of pipe were purchased for making tiffin bomb, dated 28.5.2003.

Exh.286

Copy of bill of purchase of pipe allegedly by accused Kalim Ahmed, dated 27.5.2002 Exh.68

Panchnama of pointing out the shop by accused Kalim @ Kalim mulla where he had allegedly made circuit for tiffin bomb, dated 4.6.2003.

Exh.69

Copy of dispatch note, dated 10.6.2002.

Exh.70

Receipt for acceptance of muddamal, dated 10.6.2002.

Exh.71

Receipt for acceptance of muddamal, dated 10.6.2002.

Exh.72

Opinion of FSL dated 17.6.2002.

Exh.73

Copy of notification issued by Police Commissioner dated 26.4.2002.

Exh.74

Copy of consent taken for prosecuting accused of this case under Explosive substance Act, dated 1.9.2003.

Exh.75 [Exh.228]

Copy of sanction given for prosecuting accused of this case under Prevention of Terrorism Act by the competent authority, dated 4.9.2003.

Exh.76 [Exh.235]

Original complaint of complainant, dated 29.5.2002 [Sanand Police Station].

Exh.194

Report of registration of offence, dated 29.5.2002.

Exh.77

Panchnama of scene of offence dated 29.5.2002.

Exh.78.

Route panchnama of bus route No. 49 as shown by accused Mohmed Parvez Abdul Kayum, dated 13.5.2003.

Exh.79

Tickets purchased of AMTS bus route No. 49 by the accused.

Exh.80

Medical certificate of injured witness Bachubhai, dated 2.8.2002.

Exh.81

Medical certificate of injured witness Ashwinbhai Padhiyar, dated 20.7.2002.

Exh.82

Medical certificate of injured witness Ashwinbhai dated 20.7.2002.

Exh.83

Medical certificate of witness Ramjibhai Jivabhai [Police Constable], dated 20.7.2002.

Exh.84

Copy of dispatch note, dated 17.6.2002.

Exh.85

Receipt from FSL, dated 21.6.2002.

Exh.86

Opinion of FSL dated 26.8.2002.

Exh.87

Letter of FSL after examination intimating to bring back the muddamal, dated 14.11.2002.

Exh.88

Copy of notification of District Magistrate, dated 9.5.2002.

Exh.89

Copy of consent given by District Magistrate for prosecuting against the accused of this case under the Explosive Substance Act, dated 8.9.2003.

Exh.229

Copy of sanction given by the competent authority for prosecuting against the accused of this case under the Prevention of Terrorism Act, dated 6.9.2003.

Exh.236

Statement recorded u/s 164 of Cr.P.C.

Exh.99

Statement of Aziz-u-rehman [PW6]

Exh.221

Statement of Abdul Rahim Jalaluddin Sheikh Exh.222

Statement of PW 4 Abdulhamid Abdulrahim Sheikh.

Exh.223

Statement of PW 3 Mohd. Samir Siddikbhai Sheikh.

Exh.225

Retraction of Nisarahmed Gulamahmed Sheikh [accused No. 2]

Exh.3

Retraction of Firozkhan @ Ranu ahmedshahkhan Pathan [accused No. 1].

Exh.4

Retraction of Mohd. Habib Mohd. Safi Hawa [accused No. 4]

Exh.5

Retraction of Sanovarkhan Shahrukhkhan Pathan [accused No. 10].

Exh.6

Retraction of Soyeb Abdulrehman Surti [accused No. 11]

Exh.7

Retraction of Mohd. Parvez Abdulkayum Sheikh [accused No. 5]

Exh.8

Retraction of Mohd. Yunus Abdulrahim Sareshwala [accused No. 7]

Exh.9

Retraction of Mohd. Riyaz @ Goru Abdulyahid Sareshwala [accused No. 8].

Exh.10

Retraction of Rehan Abdulmajid Punthawala.

Exh.11

Retraction of Munaverbeg @ Captain Yakubbeg Mirza [accused No. 9]

Exh.12

Purshis of retraction by a discharged accused Afzalkhan @ Babu Murtuzakhan Pathan [accused No. 13].

Exh.13

Purshish of retraction by a discharged accused Idrishkhan Yakubkhan Pathan [accused No. 12]

Exh.14

Purshis of retraction by a discharged accused Mehamood Rajasa Saiyed [accused No. 15].

Exh.15

Purshis of retraction by a discharged accused Mohd. Hanif @ Pakitwala @ Teliwala Abdulrazak Sheikh [accused No. 17]`

Exh.16

Purshis of retraction by a discharged accused Ahmedhussain Allarakha Mansuri [accused No. 18]

Exh.17

Purshis of retraction by a discharged accused Kalimahmed @ Kalim Mulla Mohd. Habib Karimi [accused No. 19]

Exh.18

Purshish of retraction of accused Shahnawaz @ Sonu Mohammadbhai Gandhi]

[accused No. 20]

Exh.19

Purshish of retraction of accused Anas Abdulrashid Machiswala [accused No. 21].

Exh.20

3.8 Confessional statements of the following accused were recorded:

Accused No.

Explanation/Warning Confessional statement u/s 32 of POTA

Accused No. 5 Exh.211 Exh.314

Accused No. 6 Exh.215 Exh.318

Accused No. 7 exh.213 Exh.316

Accused No. 8 Exh.214 Exh.317

Accused No. 12 Exh.319 Exh.320

Accused No. 19 Exh.209 Exh.303

Accused No. 20 Exh.210 Exh.304

Accused No. 21 Exh.208 Exh.302

3.9 Vide List Exh.279, following documents were produced.

Exh. No.

Particulars of document

Exh. 347 Letter addressed to the Chief Metropolitan Magistrate Court for recording statement u/s 164 of Code of Criminal Procedure From P.I.

Crime Branch on 12.5.2003.

Exh.348 Letter addressed to Metropolitan Magistrate, Court No. 5 by the Chief Metropolitan Magistrate, Ahmedabad.

Exh.349 Letter addressed to the Chief Metropolitan Magistrate Court for recording statement u/s 164 of Code of Criminal Procedure From P.I.

Crime Branch on 13.5.2003.

Exh.350 Letter addressed to Metropolitan Magistrate, Court No. 5 by the Chief Metropolitan Magistrate, Ahmedabad dated 13.5.2003.

Exh.293 Letter dated 21.5.2003 addressed to the Chief Metropolitan Magistrate Court for recording statement u/s 164 of Code of Criminal

Procedure From P.I. Crime Branch.

Exh.351 Letter dated 21.5.2003 addressed to the Metropolitan Magistrate, Court No. 5 by the Chief Metropolitan Magistrate, Ahmedabad.

Exh.352 Request dated 30.4.2003 from ACP Mr. G.L. Singhal for recording statement of witness u/s 164 of Cr.P.C.

Exh.353 Letter dated 30.4.2003 addressed to the Metropolitan Magistrate, Court No. 5 by the Chief Metropolitan Magistrate, Ahmedabad.

Exh.265 Index of Kalupur Police Station 1st CR No. 90/02.

Exh.344 Letter dated 31.5.2003 addressed to Metropolitan Magistrate Ms. M.D. Bhatt, Court No. 11 by the Chief Metropolitan Magistrate, Ahmedabad, handing over his statement recorded u/s 164.

Exh.228 Sanction [consent] under the Explosive Substances Act - 1st CR No. 90/02 of Kalupur Police Station.

Exh.229 Sanction [consent] under the Explosive Substances Act- 1st CR No. 79 of 2002 of Sanand Police Station.

Exh.231 Request from Dy. Commissioner of Police, Mr. Vanjhara addressed to the District Collector along with letter of Mr. G.L. Singhal and the details of the accused.

Exh.232 Request from Dy. Commissioner of Police Mr. Vanjhara addressed to the District Collector along with letter of Mr. G.L. Singhal and the details of the accused.

Exh.233 Sanction [consent] under the Explosive Substances Act of Satellite Police Station.

Exh.238 Sanction.

Exh.240 Letter to the Principal Secretary, Home Department for grant of sanction u/s 50 of POTA.

Exh.341 Letter of Joint Police Commissioner, Crime Branch addressed to Police Commissioner, Ahmedabad City.

Exh.242 DCP Mr. Vanjhara's letter to the Joint Police Commissioner.

Exh.243 Letter addressed to the Principal Secretary, Home Department along with list of the accused [Exh.247]

Exh.245 Letter of In charge Police Commissioner, Ahmedabad addressed to the Principal Secretary, Home Department seeking permission for prosecution.

Exh.246 Letter addressed by Shri P.P. Pandya, Joint Police Commissioner to the

Police Commissioner.

Exh.247 Request of DCP, Crime Branch, for sanction.

Exh.248 Detailed report of Mr. G.L. Singhal.

Exh.249 List of accused at the time of arrest.

Exh.250 Letter of In charge Police Commissioner, Ahmedabad to the Principal Secretary, Home Department seeking permission for prosecution.

Exh.251 Letter addressed by Shri P.P. Pandya, Joint Police Commissioner to the Police Commissioner.

Exh.252 Request of DCP Crime Branch, for sanction.

Exh.253 Detailed report of Mr. G.L. Singhal.

Exh.254 List of the accused at the time of arrest.

Exh.255 Letter of In charge Police Commissioner, Ahmedabad, addressed to the Principal Secretary, Home Department seeking permission for prosecution.

Exh.256 Letter of Shri P.P. Pandya, Joint Police Commissioner.

Exh.257 Request of DCP Crime Branch, for sanction.

Exh.258 Detailed report of Mr. G.L. Singhal.

Exh.259 List of the accused at the time of arrest.

Exh.269 Index of Kagdapith police station.

Exh.270 Draft of proposed charge-sheet.

Exh.271 Index of Sanand Police Station.

Exh.272 Draft of proposed charge-sheet.

Exh.267 Index of Vejalpur Police Station.

Exh.268 Draft of proposed charge-sheet

Exh.265 Index of Kalupur police station.

Exh.266 Draft of proposed charge-sheet.

Exh.289 Letter dated 14.5.2003 of Police Commissioner, Mr. Kaushik for handing over investigating to the Crime Branch of Ist CR No. 79 of 2002, Sanand Police Station.

Exh.290 Letter dated 14.5.2003 addressed by the Joint Police Commissioner communicating the order of Police Commissioner, Ahmedabad

City.

Exh.291 Letter dated 8.4.2003 of Mr. G.L. Singhal directing Mr. H.P. Agravat to take over the investigation.

Exh.292 Letters of advocate, injury certificates of V.S. Hospital and case papers of V.S. Hospital, totally page Nos. 1 to 117.

Exh.299 Letter dated 18.5.2003 of request for verification from ACP Mr. Singhal to the chief Metropolitan Magistrate.

Exh.300 Letter dated 19/20.5.2003 addressed by ACP Mr. Singhal to the Chief Metropolitan Magistrate of handing over of the custody and

endorsement of Metropolitan Magistrate.

Exh.301 Letter addressed to the learned Principal Judge, Sessions Court, Bhadra by the Chief Metropolitan magistrate sending original

confessional statements.

Exh.306 Letter of request dated 18.5.2003 for verification from ACP Mr. Singhal to the Chief Metropolitan Magistrate.

Exh.305 Letter addressed to the learned Principal Judge, Sessions Court, Bhadra by the Chief Metropolitan Magistrate sending original

confessional statements.

Exh.312 Letter addressed to the learned Chief Metropolitan magistrate requesting production u/s 32 of POTA.

Exh.313 Letter addressed to the Chief Metropolitan Magistrate by Mr. M.P. Purani, Metropolitan Magistrate, Court No. 15, making over

confessional statements to the Chief Metropolitan Magistrate.

Exh.320 Closing purshish.

3.10 Learned Special Judge [POTA], after recording the entire gamut of oral depositions, recorded further statements of accused u/s 313 of the

Code of Criminal Procedure and the accused emphatically denied every incriminating evidence against them. They also stated that the confessional

statements were forcibly recorded by the police and pleaded vindictiveness in the investigation as well as physical and mental cruelty during the

police custody and remand and thereafter, they chose to examine three defence witnesses in support of their version, namely, DW 1 - Bharat

Govindsinh Parmar, Social Worker and activist who has been examined vide exh. 325, DW 2 Dr. Peggy Mohan, Linguist, who has been

examined vide exh.327 and DW 3 Jabirhussain Allarakhabhai Mansuri, Social Activist and stenographer, who has been examined vide exh.333.

3.11 Learned Special Judge [POTA], after considering the entire oral depositions and documentary evidence adduced by the prosecution, held

that the prosecution has established involvement of the present Appellants in the commission of offence punishable under Sections 3[1], 3[3] as

well as Section 4 read with Section 3[3] of POTA, u/s 120B of IPC, Section 307 read with Section 120B of IPC, u/s 4 of Explosive Substance

Act, under Sections 3 and 4 of the Prevention of Damage to Public Property Act as well as u/s 135[1] of the Bombay Police Act. Learned Special

Judge [POTA] placed reliance on the evidence of PW-4 Abdulhamid Abdulrahim Sheikh examined at exh.100, PW-8 Mustakahmed Chandmiya

Sheikh examined at Exh.113, PW-11 Firozkhan Abdulrashidkhan Mevati, examined at Exh.117, PW-19 Aarifkhan Munnakhan Pathan, examined

at Exh.157, PW-20 Altabhussain Hajimiya Sheikh examined at Exh.158, PW-22 Dipeshbhai Parasmal Jain, vendor, examined at Exh. 160, PW-

29 Shoaib Munaverhussain Mansuri, examined at Exh. 203 and PW-30 Yakub Abdul Rehman Chhipa, examined at Exh.206, who are material

witnesses examined by the prosecution and held that the prosecution, on the basis of the depositions adduced by the witnesses, has established

complete chain connecting the Appellants with the commission of offence. Learned Judge also discussed exhaustively the depositions adduced by

PW-31 Anandkumar Khushalbhai Pandya, examined at Exh. 207 who recorded confessional statements of eight accused and PW-39 N.B.

Raneksha, Metropolitan Magistrate examined at Exh. 298 and held that these witnesses corroborate the prosecution story about involvement of all

the Appellants in the commission of offence. Confessional statements were recorded u/s 32 of POTA in free atmosphere and no coercion or

pressure was exerted on the Appellants while recording their confessional statements u/s 32 of POTA. PW-10 Sanjay Bhojkar, Panch witness

who is examined at Exh. 115 has not supported the case of the prosecution, but he has pointed out the discovery made at the behest of accused

No. 19 in this case. PW-12 Mansing Bavasing Shikh who is panch witness examined at Exh.118 has been examined to prove recovery of articles

of the accused No. 4. PW-7 Dilipsinh Khengarbhai Chauhan is also a panch witness who has been examined at Exh.106 wherein, he has clearly

pointed out the role of accused No. 17. PW-24 Jethabhai Punjabhai Parmar who pointed out the role of accused Nos. 19, 20 and 21 has been

examined at Exh. 190. Panchnama of the tiffin box is produced at exh.66 and panchnama of the sketch of electronic circuit prepared by Shri

Vikrambhai Desai, Professor of L.D. Engineering College has been produced vide exh. 67. These panch witnesses corroborate the prosecution

story about involvement of accused in the commission of offence. Learned Judge has also placed reliance on FSL report Exhs. 87 and 73 and held

that the FSL reports provide further corroboration to the prosecution story about the involvement of the Appellants in the commission of crime.

Thus, the learned Judge, after considering the the entire evidence on the record and depositions of the prosecution witnesses held that the

prosecution has established the entire link connecting the Appellants with the commission of crime and convicted and sentenced them for the

offences as stated herein above.

4. Mohd. Habib Hawa, Appellant of Criminal Appeal No. 1151 of 2006, Mohd. Hanif @ Pakitwala Abdul Razak Sheikh, Appellant of Criminal

Appeal No. 1149 of 2006, Anas Abdul Rashid Machiswala, Appellant of Criminal Appeal No. 1148 of 2006, Kalim Ahmed @ Kalim Mulla

Mohd. Habib Karimi, Appellant of Criminal Appeal No. 1150 of 2006 and Ahmed Hussain Allarakha Mansuri, Appellant of Criminal Appeal No.

1155 of 2006, who are aggrieved by the judgment and order rendered by the learned Special Judge [POTA], have preferred the above appeals

separately challenging the order of their conviction and sentence.

5. Ms. Nitya Ramakrishnan, learned Counsel appearing with Mr. Rohit S. Verma with Mr. Somnath M. Vatsa for the Appellants made following

submissions in respect of each Appellant of each Criminal Appeal.

SUBMISSIONS ON BEHALF OF AHMED HUSSAIN ALLARAKHA MANSURI, APPELLANT OF CRIMINAL APPEAL No. 1155

OF 2006 [ORIGINAL ACCUSED No. 18 IN POTA CASE No. 7 OF 2003 AND ORIGINAL ACCUSED No. 21 IN POTA CASE No. 8

OF 2003]:

5.1 Learned Counsel submitted that the Appellant is an innocent person and he has not committed any offence as alleged against him. It is

submitted that no confessional statement of the Appellant was recorded u/s 32

of POTA. Considering the entire evidence on record of the case, nothing has been recovered or discovered from the present Appellant nor any arms or explosives were found from his possession. Learned Counsel submitted that prosecution has placed reliance on the evidence of three witnesses in order to bring home the guilt against the Appellant, apart from the examinations-in-chief of two Investigating Officers, namely, PW-37 H.P. Agrawat exh. 281 and PW-38 G.L. Singhal, exh. 294. The prosecution has examined PW-19 Arifkhan Munnakhan Pathan vide exh. 157, PW-20 Altabhussain Hajimiya Sheikh vide exh. 158 and PW-30 Yakub Abdul Rehman Chhipa vide Exh. 206, to prove the involvement of the Appellant in the commission of crime.

5.2 PW-19 Arifkhan Munnakhan Pathan, who is examined at exh. 157 has deposed in his testimony that he is staying in house No. 2723 at

Kadiyakui Naka, Chappal Bazar, Relief Road and having a shop, namely, ""Kohinoor Stores"" near Kalupur Darwaja. He also has a factory in the

name and style of ""Karnavati Fire Works"" situated in Ramol. He has stated that one Altaf Hajimiya was working in his fire cracker factory. He has

further deposed that after Godhra incident, when he was proceeding towards his home during the relaxation of curfew, Maulvi Ahmed who stays

close to his house and imparts education to the children and used to read Namaz [Pesh Imam] had met him. When Maulvi Ahmed met him, he

inquired from him as to from where he was bringing chemicals used for preparing fire crackers. He told him that there are two or three persons

who are selling chemicals, however, the same are not given without any license. Maulvi Ahmed told him to introduce him to the person who is

selling chemicals used in preparing the fire crackers. The witness therefore told Altaf who was serving at his factory to introduce Maulvi to such

person. Thereafter, Maulvi went with Altaf at the place of Yakub. It is stated by this witness that he could not say as to what had transpired or

happened thereafter. In his cross-examination, this witness has deposed that he could not say as to when Maulvi met him. He has stated that he

knows Maulvi because he is a religious head. It is stated by him that there was no stock in his factory as he was doing work of preparing fire

crackers only for limited period during Diwali. He has stated that save and except the aforesaid version, he had no conversation with Maulvi

Ahmed.

5.3 Altafhussain Hajimiya Shaikh, PW-20 is examined at Exh.158. He has deposed in his testimony that he is staying in house No. 2929 beside

Dhupelvali Pole situated in Kalupur area. He was working in the factory of Arif Munnabhai Pathan, situated in Ramol. He also at times, was sitting

at the shop of brother of Arif. It is stated by this witness that when he was passing by the house of Arif he was called by Arif and Arif told him to

take and introduce Maulvi Ahmed to Yakubchacha. Thereafter, he took Maulvi Ahmed near Astodia Bus Stand in front of Dhal Ni Pole with a

view to introduce Maulvi Ahmed to Yakubchacha. He has stated that he could not say as to what transpired between Yakubchacha and Maulvi

Ahmed. But thereafter, he along with Maulvi Ahmed returned to Kalupur. During his examination-in-chief, he also identified Maulvi Ahmed. It is

submitted by the learned Counsel that nothing turns out from the cross-examination of this witness so as to indicate the involvement of Maulvi

Ahmed.

5.4 Yakub Abdul Rehman Chhipa - PW-30 is examined at Exh. 206. He has deposed in his testimony that he is staying in M.A. Chhipa Pole in

Astodia Chakla along with his family and doing business of preparing chemicals, more particularly, of aluminum powder and barium nitrate which is

used in preparing fire crackers. Altaf, a person of Arif who is having cutlery shop used to come to him to take chemical powder. There are two or

four other businessmen who are engaged in the work of preparing chemicals used in preparation of fire crackers. Altaf used to come to him even

for the purpose of obtaining chemicals from his factory. This witness has further deposed in his testimony that he does not keep any record about

the sale of chemicals and does not pay Income Tax; he does not have the record as to who had purchased the chemicals from him and does not

keep bills or the bill books in respect thereof.

5.5 Thus, considering the depositions adduced by these witnesses, it becomes clear that witness Arifkhan has deposed about the fact that the

Appellant made an inquiry about the place from where the chemicals which are used in making fire crackers are purchased. Arif has only stated in

his deposition that the present Appellant was sent by him along with Altaf to meet one Yakub Chhipa-PW-30. Altaf PW-20 has deposed in his

evidence that he took the Appellant to meet Yakub Chhipa PW-30, but was not aware as to what had transpired between the present Appellant

and Yakub Chhipa PW-30. While PW-30 Yakub Chhipa has deposed in his testimony that he is doing business of selling aluminum powder and

barium nitrate. This witness is absolutely silent on the aspect of the Appellant having met him at all. Evidence of PW-30 Yakub Chhipa clearly

indicates that he was in the business of selling aluminum powder and barium nitrate. If FSL report is perused, then, the chemical found in the

muddamal was potassium chlorate, arsenic and sulphide which are not the components which the witness Yakub Chhipa used to deal in while

preparing chemical for fire crackers. Thus, the nature of evidence against the Appellant, even if it is accepted in its entirety, does not go beyond the

point of making inquiry on the subject, which being not barred and is not an offence in the eye of law. It is submitted that the learned Special Judge

[POTA] ought not to have placed reliance on Section 53 of POTA since it is not applicable in case of this Appellant. Section 53 is with regard to

presumption as to the offences u/s 3. Considering the aforesaid section and bare reading of the same, it becomes clear that it is attracted only in

cases where actual possession is proved either by physical recovery or where the fingerprints are found at the site of the offence. However, in the

present case, there is no recovery or discovery of any kind from the possession of the Appellant and, therefore, no presumption could be raised

u/s 53 of POTA. Learned Counsel placed reliance on the judgment rendered in case of Kehar Singh and Others Vs. State (Delhi Administration),

wherein, the Apex Court, after considering the decision rendered in the case of Sardar Sardul Singh Caveeshar v. State of Maharashtra, held in

para-44 as under:

This section, as the opening words indicate will come into play only when the Court is satisfied that there is reasonable ground to believe that two

or more persons have conspired together to commit an offence or an actionable wrong, that is to say, there should be a prima facie evidence that a

person was a party to the conspiracy before his acts can be used against his co-conspirators. Once such a reasonable ground exists, anything said,

done or written by one of the conspirators in reference to the common intention, after the said intention was entertained, is relevant against the

others, not only for the purpose of proving the existence of the conspiracy but also for providing that the other person was a party to it. The

evidentiary value of the said acts is limited by two circumstances, namely, that the acts shall be in reference to their common intention and in

respect of a period after such intention was entertained by any one of them. The expression "in reference to their common intention" is very

comprehensive and it appears to have been designedly used to give it a wider scope than the words "in furtherance of" in the English law; with the

result, anything said, done or written by a co-conspirator, after the conspiracy was formed, will be evidence against the other before he entered the

field of conspiracy or after he left it. Another important limitation implicit in the language is indicated by the expressed scope of its relevancy.

Anything so said, done or written is a relevant fact only "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." It can be used only for the purpose

of proving the existence of the conspiracy or that the other person was a party to it. It cannot be used in favour of the other party or for the

purpose of showing that such a person was not a party to the conspiracy. In short, the Section can be analysed as follows: (1) There shall be a

prima facie evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy; (2) if the said

condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other; (3)

anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them; (4) it would

also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the

conspiracy or after he left it; (5) it can only be used against a conspirator and not in his favour.

5.6 The learned Counsel also placed reliance on the judgment of the Apex Court in State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru,

wherein, the Apex Court has held in para-79 as under:

79. We do not find an such deeming provision in Section 10. No doubt, Section 10 rests on the principle of agency. But, it does not in terms treat

the statements made and acts done by one conspirator as the statements or acts of all. Section 10 only lays down a rule of relevancy. It says that

anything done or said by one of the conspirators in reference to the common intention is a relevant fact as against each of the conspirators to prove

two things: [i] existence of the conspiracy and [ii] that they were parties to the conspiracy. As pointed out by the Privy Council in *Mirza Akbar's*

case, the thing done, written or spoken in the course of carrying out the conspiracy ""was receivable as a step in the proof of the conspiracy"". This

dictum was approvingly referred to in the 1st *Caveeshar* Case.

5.7 Thus, learned Counsel submitted that in view of the provision contained in Section 10 of the Evidence Act, the same cannot be attracted in

absence of reasonable ground by which the present Appellant could be linked to the conspiracy. Section 10 of the Evidence Act provides that

normal rule of hearsay in the trial of any offence of an individual kind will not operate in a trial of conspiracy. Even after admitting the evidence

against the alleged co-conspirators, if the same does not implicate an accused or is not proved beyond reasonable doubt qua him, in absence of

other reliable evidence worthy of conviction against such an accused, Section 10 of the Evidence Act cannot be relied upon to secure conviction of

such an accused.

5.8 Learned Counsel also placed reliance on para-50 of the judgment of the Apex Court rendered in the *Parliament Attack* Case [supra] wherein

it is held as under:

We are, therefore, of the view that having regard to all these weighty considerations, the confession of a co-accused ought not be brought within

the sweep of Section 32(1). As a corollary, it follows that the confessions of the 1st and 2nd accused in this case recorded by the police officer u/s

32(1), are of no avail against the co-accused or against each other. We also agree with the High Court that such confessions cannot be taken into

consideration by the Court u/s 30 of the Indian Evidence Act. The reason is that the confession made to a police officer or the confession made

while a person is in police custody, cannot be proved against such person, not to speak of the co-accused, in view of the mandate of Sections 25

and 26 of the Evidence Act. If there is a confession which qualifies for proof in accordance with the provisions of Evidence Act, then of course, the

said confession could be considered against the co-accused facing trial under POTA. But, that is not the case here.

For these reasons, the contention of the learned senior counsel for the State that even if the confession of co-accused is not covered by Section

32(1), it can still be taken into account by the Court u/s 30 for the limited purpose of corroborating or lending assurance to the other evidence on record cannot be accepted.

Learned senior counsel appearing for the State submits that there is no conflict between Section 32 of POTA and Section 30 of the Evidence Act

and therefore the confession recorded u/s 32(1) of POTA can be taken into consideration against the co-accused, at least to corroborate the other

evidence on record or to lend assurance thereto. There is no difficulty in accepting the contention that Section 30 of the Evidence Act can also play

its part in a case of trial under POTA, especially when the other offences under the IPC are also the subject matter of trial. But a confession to the

police officer by a person in police custody is not within the realm of Section 30 of the Evidence Act and therefore such a confession cannot be

used against the co-accused even u/s 30 of the Evidence Act.

5.9 The Apex Court, with regard to use of confessional statement of the accused against the co-accused by applying Section 10 of the Evidence

Act, has further held in para-84 as under:

84. The case of R. v. Blake is illustrative of the parameters of the common law rule similar to Section 10 of the Indian Evidence Act. The Privy

Council in the case of R v. Blake referred to that case and observed thus:

... The leading case [of] R. v. Blake illustrates the two aspects of it, because that authority shows both what is admissible and what is inadmissible.

What, in that case, was held to be admissible against the conspirator was the evidence of entries made by his fellow conspirator contained in

various documents actually used for carrying out the fraud. But a document not created in the course of carrying out the transaction, but made by

one of the conspirators after the fraud was completed, was held to be inadmissible against the other ... It had nothing to do with carrying the

conspiracy into effect.

In the light of the foregoing discussion, we have no option but to reject the contention of Mr. Gopal Subramaniam on the interpretation of Section

10, though not without hesitation. However, in view of the fact that confessional statement is not being relied on, the question of applicability of

Section 10 fades into insignificance.

5.10 Decision rendered in the State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, has been approved by unreported decision of the

Hon"ble Apex Court dated 11.8.2010 in the case of Saquib Abdul Hameed Nachan V. State of Maharashtra in Criminal Appeal Nos. 419-421

of 2008. Learned Counsel thus submitted that considering the evidence on record of the case, the prosecution has not proved involvement of the

Appellant Maulvi Ahmed Hussain Allarakha Mansuri in the commission of offence and since complete chain of circumstances against the Appellant

in light of the settled principles of law on circumstantial evidence is not established by the prosecution, the Appellant deserves to be acquitted.

SUBMISSIONS ON BEHALF OF MOHD. HANIF @ PAKITWALA ABDUL RAZAK SHEIKH-APPELLANT OF CRIMINAL APPEAL

No. 1149 OF 2006 [Original accused No. 17 in POTA Case No. 7/03 and Original accused No. 17 in POTA Case No. 8 of 2003]:

5.11 Learned Counsel appearing for the Appellant submitted that confessional statement of the Appellant has not been recorded u/s 32 of POTA.

On perusal of the evidence on the record of the case, it becomes clear that no incriminating material has been recovered or discovered from the

possession of this Appellant so as to indicate his involvement in the commission of crime. Even the panchnama at the instance of the Appellant

showing his own workshop, wherein, it has been stated that nothing incriminating was found as a result of his alleged pointing out the shop. It is

submitted that prosecution has placed heavy reliance on the depositions adduced by PW-4 Abdul Hamid who is examined at Exh. 100, PW-7

Dilip Khengar, examined at Exh. 106 and PW-33 Malvikaben Bhatt, examined at Exh. 217 as well as statement of PW-4 Abdul Hamid vide Exh.

223 recorded u/s 164 of Code of Criminal Procedure and panchnama drawn at the instance of the Appellant indicating the place of his own

workshop vide Exh. 287 with a view to indicate involvement of the Appellant in the commission of offence.

5.12 PW-4 Abdul Hamid Sheikh, examined at Exh. 100 has deposed in his testimony that he is staying in Karoda Pole, Kalupur and doing starter

repairing work in the name and style of Janta Auto Electric. It is stated by him that he is having five brothers, namely, Mehboobhai, Razakbhai,

Mohammad Aiyub, Mohammad Hanif. He is the youngest of five brothers. It is stated by him that Mohammed Hanif is aged about 31-32 years

and staying at Sarkhej. It is stated by him that he knows Kalimbhai who used to go for the purpose of reading Namaz. Kalim-accused No. 19 was

doing work of electrical appliances. After Godhra incident, Kalim came to his house at night and took him to the factory of Hanif Pakitwala at

Lakhota Pole. It is stated by this witness that Hanif is doing the work of preparing school bags. When he went to the shop of Hanif Pakitwala,

another person, namely, Habib Hawa was also present there. He also saw red colour powder and they were putting the powder in an iron pipe.

There were seven to eight pipes lying in the premises. He has deposed that he could not say as to what was done after filling the pipe with red

powder. Habib Hawa is identified by this witness. Statement which was recoded before the Magistrate was identified by this witness. He also

identified muddamal article No. 4 a box during the course of his deposition.

5.13 PW-7 Dilip Khengar is examined at Exh.106. He has deposed in his testimony that he was summoned at Crime Branch office at Haveli

Police Station on 9.5.2003. It is stated by him that another panch witness Vinod was also called at the police station. Thereafter, he along with

another panch witness and three or four policemen along with accused Mohammed Hanif proceeded in a jeep. They went to Lakhota Pole.

Thereafter, they went to the place where in a room, one loft was situated. Material for preparing bags and other instruments were also lying in the

said room. He has deposed that the accused had pointed out the place where bombs were prepared. Thereafter, panchnama in respect thereof

was prepared in his presence.

5.14 PW-33 Ms. Malvikaben Bhatt has been examined at Exh. 217. She has deposed in her testimony that since 1983, she has been working as

Judicial Officer and in June, 2001, she was transferred in the court of Metropolitan Magistrate. She recorded the statement u/s 164 of the Code of

Criminal Procedure. On 12.5.1993, Abdul Rahim Jalaluddin Sheikh and on 13.5.2003 Azizurehman Riyazurehman were sent for recording

statements. On 19.5.2003, Azizurehman was produced before her and after

giving an understanding about the statement to him, his statement was recorded. He was also given time to think over and when he showed willingness for recording statement, his statement was recorded on 20.5.2003. Likewise, on 21.5.2003 Abdul Rahim was produced and statement given by him was recorded after explaining to him. He was given time of 24 hours and his statement was recorded when he showed willingness for recording the statement. Thereafter, his left thumb impression was obtained and she had also put her signature below the statement.

5.15 Learned Counsel for the Appellants, placing reliance on the deposition adduced by Abdul Hamid, Exh. 100, submitted that the learned Special Judge [POTA] has not taken into consideration the fact that his statement was recorded by the police on 11.5.2003 which is produced after the arrest of the Appellant and close to 13 days after the arrest of another Appellant Mohammed Habib Hawa. Therefore, version of this witness becomes necessarily a post-arrest version which, without corroboration ought to have been discarded by the learned Special Judge.

Considering the deposition adduced by PW-37 - Investigating Officer H.P. Agrawat, Exh. 281, he has stated in his deposition that he had no basis to arrest the accused in this case on the dates on which arrests were made. There is no explanation forthcoming either from the prosecution or this witness for his tacit silence for a period of 12 months which makes the version of the witness even more vulnerable and doubtful. Learned Counsel further submitted that it is highly unlikely that a group of conspirators, as per the prosecution, would go out of their way to invite or let a rank outsider to the conspiracy to witness their incriminating preparation without any purpose or role of such a person. The present witness deposes of course of the events which are grossly improbable and improper and unworthy of any credence. PW-4 Abdul Hamid has not identified the Appellant in the court and no attempt was made even by the prosecution to get the present Appellant identified by PW-4 Abdul Hamid. It is submitted that during the period and time that PW-4 asserts of having gone to the workshop of the Appellant on scooter, admittedly there was continuous night curfew after 19.00 hours prevailing in the police station areas of both Kalupur and Dariyapur with a specific ban on the mobility and use of two-wheelers. Thus, it is highly unlikely that conspirators would

choose to violate the notification unnecessarily and tangle both with the authorities and a witness to the guilty operation at a time when undisturbed secrecy would be considered essential. PW-33 learned Metropolitan Magistrate recorded confessional statement of PW-4 Abdul Hamid referring him as an accused of the present case. But considering the entire evidence of this witness on record of this case as well as depositions of PW-37 H.P. Agrawat at Exh. 281 and PW-38 G.L. Singhal at Exh. 294, who are the investigating officers, PW-4 Abdul Hamid was under constant threat of implication in the present case and, therefore, his version requires to be discarded. The defence was not provided with adequate opportunity of cross-examination of PW-4 Abdul Hamid on vital issues. These issues were important to be put to PW-4 Abdul Hamid for just decision in the case. With a view to seek explanation from PW-4 Abdul Hamid, two applications u/s 311 of the Code of Criminal Procedure were filed for recalling him. However, both these applications were rejected by the learned Special Judge [POTA] and thereby, grave prejudice was caused to the defence side including the present Appellant.

5.16 Existence of the identifications has not been challenged by the prosecution. They constitute the fact that makes the prosecution and the version of PW 4-Abdul Hamid improbable u/s 11 of the Evidence Act. Thus, in absence of identification in the court either of A-17 or a positive identification of the pipes, it would be unsafe to place reliance on the deposition of PW-4 Abdul Hamid. Learned Judge has also committed an error in placing reliance on the panch witness PW-7 Dilip Khengar, who was the panch of panchnama dated 9.5.2003 at Exh. 107 and who has been examined vide Exh. 106. Learned Counsel has placed reliance on the judgments of the Apex Court rendered in the case of Himachal Pradesh Administration Vs. Om Prakash, as well as in the case of Prakash Chand Vs. State (Delhi Administration), and submitted that the statement of an accused purported to be made during the course of drawing of the panchnama is hit by Section 162 of the Code of Criminal Procedure. It is submitted that what is inadmissible in evidence cannot be made admissible through an independent witness. The fact discovered must necessarily be the consequence of the disclosure so made and cannot be subsequently confirmed by an independent witness whose identify is

not disclosed. It is a consequential link rather than subsequential link. Further the version of the independent witness has to stand on its own legs on the basis of credit worthiness and trustworthiness. What is incriminating in the panchnama is not the act of pointing out to his own factory from where nothing is recovered, but the accompanying statement alone, i.e. that bombs in past were prepared. The same is clearly inadmissible in evidence under Sections 25 and 26 of the Evidence Act as well as Section 162 of the Code of Criminal Procedure Learned Judge has lost sight of the aforesaid aspect and the judgments in the case of Prakash Chand and Om Prakash [supra]. Thus, considering the depositions and the documentary evidence, no case is made out against the Appellant Mohd. Hanif Pakitwala and, therefore, the judgment of conviction passed against him deserves to be quashed and set aside and he be acquitted.

SUBMISSIONS ON BEHALF OF MOHD. HABIB MOHD. SHAFI HAWA, APPELLANT OF CRIMINAL APPEAL No. 1151 OF 2006

[ORIGINAL ACCUSED No. 4 IN POTA CASE No. 7/03 AND ORIGINAL ACCUSED No. 15 IN POTA CASE No. 8/03]:

5.17 Learned Counsel submitted that so far as the present Appellant is concerned, there is no confessional statement of the Appellant recorded u/s 32 of the POTA. The prosecution has placed heavy reliance on the depositions adduced by PW-4 Abdul Hamid, who is examined at Exh.100, PW-12 Mansingh Shikh, who has been examined at Exh. 118, PW-22 Dipesh Jain, examined at Exh. 160 as well as statement recorded u/s 164 of the Code of Criminal Procedure of PW-4 Abdul Hamid at Exh. 223, panchnama at Exh. 119 drawn at the instance of the Appellant-accused which resulted in the seizure of electrical gadgets from his own shop and receipt of seizure of muddamal from the shop of the Appellant proved by PW-37 H.P. Agravat who has been examined at Exh. 281.

5.18 Deposition of PW-4 Abdul Hamid is recorded at Exh. 100. He has deposed in his testimony that he is staying in Karoda Pole, Kalupur and having a shop for repairing starters in the name and style of Janta Auto Electric. He is having five brothers. It is stated by him that he knows Kalim who used to come for reading Namaz. He also identified accused No. 19 who was doing electric business. After Godhra incident, Kalim came to his house at 10.30 p.m. He took him to the factory of Hanif Pakitwala at Lakhota

Pole. Hanif Pakitwala is engaged in the work of preparing school bags and is having a factory. It is stated by this witness that when he went to the factory of Hanif, Mohd. Habib Hawa was also present there and he had seen red powder lying in the room and they were filling up the powder in the iron pipes. There were seven to eight iron pipes in the room. This witness could not say as to what happened to those pipes. He has identified the muddamal articles during the course of the deposition.

5.19 Mansingh Shikh, PW-12 is examined at Exh. 118. He has deposed in his testimony that on 1.5.2003 at about 7.30 p.m., he was called at Zakaria masjid in Kalupur area and panchnama of a shop was required to be prepared. Name of the accused was Mohd. Habib Hawa. He agreed to work as Panch witness. Thereafter, he went to the shop as shown by one person called up by Police Inspector Agrawat on phone and the shop was opened. Thereafter, Mohd. Habib Hawa had shown soldering wire, soldering iron as well as micro-meter and the same were seized by the police and report was prepared. Panchnama of the aforesaid article was prepared wherein, he had put his signature. Second panch witness had also put his signature below the panchnama.

5.20 PW-22 Dipesh Jain, who has been examined at Exh. 160, has deposed in his testimony that he is staying in Gagan Vihar Flats at Bahai Centre, Shahpur. He is having his shop bearing No. 1825 at Teen Darwaja. Police visited his shop in May, 2003 in order to inquire about the bomb blasts. He was asked as to whether a tiffin was purchased from his shop. The police gave the name of Habib Hawa. On showing muddamal article-red and cream colour tiffin to him, he admitted that such tiffins were sold by him.

5.21 PW-4 Abdul Hamid has identified the present Appellant in the court. Other evidence which is relied upon by the learned Special Judge

[POTA] is in the nature of oral deposition of panch witness PW-12 Mansingh Shikh and panchnama at Exh.119. The same cannot be relied upon, because, electrical gadgets like the one which was found from the shop of PW-22 are usually found in any electric shop and recovery thereof is of no significance. Even the aforesaid aspect is admitted by the Investigating Officer PW-37 H.P. Agrawat in his deposition and no incriminating

material was found against the present Appellant. It is submitted by the learned Counsel that though PW-22 Dipesh Jain has not identified the

present Appellant in the court and even the police disclosed the name of the present Appellant to him and even muddamal article-tiffin box was

also not identified by this witness, the learned Special Judge [POTA] has committed an error in placing reliance on the deposition adduced by

PW-22 Dipesh Jain. It is submitted that there is no corroborative evidence to substantially corroborate the version given by PW-22 Dipesh Jain.

Learned Counsel, placing reliance on the deposition of PW-12 Mansingh Shikh, submitted that a statement of the accused purported to have been

made during the course of drawing of panchnama is hit by Section 162 of the Code of Criminal Procedure What is inadmissible in evidence cannot

be admissible through independent witness. In support of this submission, the learned Counsel has placed reliance on the judgment of the Apex

Court in the case of Salim Akhtar @ Mota Vs. State of Uttar Pradesh, Thus, there is no adequate material to implicate the present Appellant in the

commission of offence and, therefore, he also deserves to be acquitted.

SUBMISSIONS ON BEHALF OF KALIM AHMED @ KALIM MULLA MOHD. HABIB KARIMI, APPELLANT OF CRIMINAL

APPEAL No. 1150 OF 2006 [ORIGINAL ACCUSED No. 19 IN POTA CASE No. 7/03 AND ORIGINAL ACCUSED No. 19 IN POTA

CASE No. 8/03:

5.22 Learned Counsel for the Appellant submitted that on perusal of the evidence on the record of the case, no incriminating material has been

recovered or discovered from the Appellant. Panchnama in the present case was drawn at the behest of the Appellant showing his own shop

which is on the record of the case. The Appellant has also shown another shop from where alleged pipes were purchased. Learned Counsel

submitted that in order to prove the involvement of the Appellant in the commission of offence, the prosecution has placed heavy reliance on the

oral depositions adduced by PW-8 Mustak Chandmiya Sheikh, examined at Ex.113, PW-4 Abdul Hamid examined at Exh. 100, PW-10 Sanjay

Bhojkar, examined at Exh.115, PW-24 Jethabhai Parmar, examined at Exh. 190, PW-29 Shoaib Mansuri, examined at Exh. 203, PW-31 A.K.

Pandya, Deputy Police Commissioner, examined at Exh. 207, PW-33 Malvikaben

Bhatt, examined at Exh. 217 and PW-39 N.B. Ranekshaw, examined at Exh. 298. The prosecution has also placed reliance on the statement recorded u/s 164 of Code of Criminal Procedure of PW-4 Abdul Hamid at Exh. 223 as well as statement of the Appellant recorded by DCP Shri A.K. Pandya u/s 32 of POTA at Exh. 303, documents relating to production of three accused including the present Appellant proved by witness PW-39 Raneksha, learned Metropolitan Magistrate at Exh.299, documents relating to confirmation proceedings proved by PW-39 Raneksha at Exh. 300, xerox copy of bill of Navrang Mart proved by PW-29 Shoaib Mansuri at Exh. 68, panchnama Exh. 286 drawn at the instance of the Appellant pointing out the place from where the pipes were purchased and panchnama exh. 69, drawn at the instance of the Appellant pointing out the place of his electric shop.

5.23 Deposition of PW-4 Abdul Hamid is recorded at Exh. 100. He has deposed in his testimony that he is staying in Karoda Pole, Kalupur and

having a shop for repairing starters in the name and style of Janta Auto Electric. He is having five brothers. It is stated by him that he knows Kalim

who used to come for reading Namaz. He also identified accused No. 19 who was doing electric business. After Godhra incident, Kalim came to

his house at 10.30 p.m. He took him to the factory of Hanif Pakitwala at Lakhota Pole. Hanif Pakitwala is engaged in the work of preparing

school bags and is having a factory. It is stated by this witness that when he went to the factory of Hanif, Mohd. Habib Hawa was also present and

he had seen red powder lying in the room and they were filling up the powder in the iron pipes. There were seven to eight iron pipes in the room.

This witness could not say as to what happened to those pipes. He has identified the muddamal articles during the course of the deposition.

5.24 Learned Counsel, with regard to the reliability and trustworthiness of PW-4 Abdul Hamid, submitted that it is an undisputed fact that

statement of PW-4 was recorded by the police on 11.5.2003. It is submitted that the version of this witness is required to be discarded as no

corroborative piece of evidence is available so as to indicate involvement of the Appellant. This witness remained silent for a period of nearly 12

months which makes his version doubtful and untrustworthy. It is also highly unlikely that a group of conspirators, as per the prosecution case

would go out of their way to invite or allow a rank outsider to conspiracy to witness their incriminating preparation without any purpose or role of such a person. It is submitted that this would amount to their willfully creating evidence against themselves and inviting vulnerability. The essence of conspiratorial conduct has been recognized to be complete secrecy and there is no explanation for improbable conduct of this witness. It is submitted that a fact is proved only when it is inconsistent with any improbability and consistent only with what any reasonable person would call probable. The present witness, as per the submission of the learned Counsel speaks of a course of events which are grossly improbable and therefore, untrustworthy of any credence. It is submitted that the defence side was not provided with any adequate opportunity of cross-examination of this witness on factual issues and it was absolutely necessary to put PW-4 Abdul Hamid to cross-examination for just decision of the case. Even with a view to seek an explanation from PW-4 Abdul Hamid, two applications u/s 311 were filed for recalling him but both these applications were turned down by the learned Special Judge [POTA] and thereby, grave prejudice was caused to the defence side. Thus, evidence adduced by this witness requires to be discarded. Learned Special Judge [POTA] has placed heavy reliance on the oral evidence of PW-8 Mustak Chandmiya examined at Exh. 113. This witness implicates two of the five Appellants which include the present Appellant and the Appellant of Criminal Appeal No. 1148 of 2006. Learned Counsel submitted that despite the statement of PW-8 Mustak Chandmiya is on the record of the case, neither the investigating agency nor learned Special Judge [POTA] took legally mandated steps u/s 190[1][b] of the Code of Criminal Procedure to array the said witness as accused in the present case. The instant case being a case where committal proceedings have been given a go bye under the statute, the learned Special Judge [POTA] has been empowered to take cognizance upon a police report u/s 29 of POTA, language of which is akin to Section 190[1] of the Code of Criminal Procedure It is now well settled that ""cognizance is taken of the offence and not of the offender"". Learned Counsel submitted that if the cognizance is always invariably taken of the offence then, bounden duty is cast upon the Court to see that no person who is found to have been involved in commission of any offence is allowed to go scot-free. Learned

Counsel placed heavy reliance on the judgment of the Apex Court in the case of M/s. SWIL Ltd. Vs. State of Delhi and Another, wherein, it has

been held in para-6 as under:

In our view, from the facts stated above it is clear that at the stage of taking cognizance of the offence, provisions of Section 190, Code of

Criminal Procedure would be applicable. Section 190 inter alia provides that the Magistrate may take cognizance of any offence upon a Police

report of such facts which constitute an offence. As per this provision, Magistrate takes cognizance of an offence and not the offender. After taking

cognizance of the offence, the Magistrate u/s 204, Code of Criminal Procedure is empowered to issue process to the accused. At the stage of

issuing process, it is for the Magistrate to decide whether process should be issued against particular person/persons named in the charge-sheet

and also not named therein. For that purpose, he is required to consider the FIR and the statements recorded by the Police Officer and other

documents tendered along with charge-sheet. Further, upon receipt of Police report u/s 173[2] Cr.P.C., the Magistrate is entitled to take

cognizance of an offence u/s 190[1][b] even if the Police report is to the effect that no case is made out against the accused by ignoring the

conclusion arrived at by the Investigating Officer and independently applying his mind to the facts emerging from the investigation by taking into

account the statement of the witnesses examined by the Police. At this stage, there is no question of application of Section 319, Code of Criminal

Procedure. Similar contention was negated by this Court in Raghubans Dubey Vs. State of Bihar, by holding thus:

In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes

cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent

up by the Police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part

of the proceedings initiated by his taking cognizance of an offence.

However, inspite of the aforesaid settled legal position and inspite of the fact that there was self-incriminating Section 161 statement of PW-8

Mustak Chandmiya Sheikh on the record of the learned Special Court, no steps

for arraying this witness as an accused in the present case were taken by the learned Special Court. Learned Counsel submitted that even the belated application filed by the accused persons u/s 319 of the Code of Criminal Procedure was of no avail for the very reason that by the time the application came to be preferred, witness PW-8 Mustak Chandmiya Sheikh had already entered into the witness box and had deposed and therefore in view of the explicit bar contained in Section 132 of the Evidence Act, no proceedings could have been initiated against him except the proceedings of perjury. Learned Special Judge [POTA] placed reliance on the incriminating evidence of PW-8 Mustak Chandmiya at Exh. 113 through a mode and method which is completely alien and unknown to law and thereby, the present Appellant has been seriously prejudiced. Learned Counsel has placed reliance on the judgment of the Apex Court reported in the case of Hukam Chand Shyam Lal Vs. Union of India (UOI) and Others, and more particularly on para-18 which reads as under:

It is well settled that where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performance are necessarily forbidden. It is all the more necessary to observe this rule where power is of a drastic nature and its exercise in a mode other than the one provided, will be violative of the fundamental principles of natural justice.

Learned Counsel submitted that if PW-8 Mustak Chandmiya was arrayed as an accused, there could have been only two modes of bringing evidence against the co-accused; either his confessional statement u/s 164 of Code of Criminal Procedure could have been recorded or the Investigating Agency could have made him a witness/approver u/s 306/307 of the Code of Criminal Procedure. In the instant case, extralegal immunity is given to PW-8 Mustak Chandmiya and that too by the investigating agency on its own sweet will which is not permissible in the eye of law and such practice has been deprecated by the Apex Court in the case of P. Sirajuddin, etc. Vs. State of Madras, etc., wherein, in para-21, it has been held as under:

In our view the enquiring officer pursued the investigation with such zeal and vigor that he even enquired into and took down statements of persons

who were supposed to have provided the Appellant with articles of food worth trifling sums of money long before the launching of the enquiry. The whole course of investigation as disclosed in the affidavits is suggestive of some predetermination of the guilt of the Appellant. The enquiring officer was a high-ranking police officer and it is surprising that simply because he was technically not exercising powers under Chapter XIV of the Code of Criminal Procedure in that a formal first information report had not been lodged he overlooked or deliberately over-stepped the limits of investigation contained in the said Chapter. He recorded self-incriminating statements of a number of persons and not only secured their signatures thereto obviously with the idea of pinning them down to those but went to the length of providing certificates of immunity to at least two of them from the evil effects of their own misdeeds as recorded. It was said that the certificates were given after the statements had been signed. It is difficult to believe that the statements could have been made before the grant of oral assurances regarding the issue of written certificates. There can be a very little doubt that the persons who were given such immunity had made the statements incriminating themselves and the Appellant under inducement, threat or promise as mentioned in Section 24 of the Indian Evidence Act.

In para-26, it is observed by the Apex Court as under:

In our view the granting of amnesty to two persons who are sure to be examined as witnesses for the prosecution was highly irregular and unfortunate. It was rightly pointed out by the High Court:

Neither the Code of Criminal Procedure nor the Prevention of Corruption Act recognizes the immunity from prosecution given under these assurances and that the grant of pardon was not in the discretion of police authorities.

Thus, it is submitted by the learned Counsel for the Appellant that in the present case, provisions of Sections 306 or 307 could have been

attracted. Placing reliance on Sections 164, 306, 307 learned Counsel submitted that both the provisions inherently have judicial oversight into

executive actions and, therefore, any extralegal considerations could easily have been detected and cured at the earliest. Learned Counsel placing

reliance on the deposition of PW-8 Mustak Chandmiya submitted that in the

present case, the POTA court found that the evidence of this witness is tainted. The judgment also notes his complicity but finds an ex post facto explanation and exoneration for his silence and not for his acts.

Statement of PW-8 Mustak Chandmiya contains admission of a conspiracy to murder a Hindu cobbler as well as complete complicity up to and after the execution of the tiffin bombs. PW-8 never exited the conspiracy. Thus, considering the aforesaid aspect, it is submitted that no part of the deposition of PW- Mustak Chandmiya who got extralegal immunity, should be relied upon against the present Appellant who otherwise has a fundamental right under Article 21 of Constitution to be prosecuted as per the procedure established by law. It is submitted that deposition of the present witness is devoid of any moral or ethical ground which in turn affects his unworthiness and therefore statement itself is unreliable. Even a suggestion was put to the Investigating Officer during the course of deposition of PW-38 G.L. Singhal, examined at Exh.294 that shielding PW-8 from the legal consequences amounts to harboring. On 19.7.2003, his statement was recorded by the police which is after the arrest of the present Appellant and, therefore, the version given by this witness deserves to be discarded. Learned Special Judge [POTA] has also placed reliance on the purported statement of the present Appellant u/s 32 of POTA which is at Ex. 303 on the record of the case. This statement has been relied upon based on the evidence adduced by PW-31 A.K. Pandya and PW-39 N.B. Ranekshah. However, the confession suffers from both the vices which are held fatal by the Apex Court in the State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, PW-31 A.K. Pandya admits that he gave only five minutes" time of reflection to the present Appellant, while the Apex Court has held that even 10-15 minutes is wholly inadequate.

5.25 There is another major contradiction which the learned Special Judge [POTA] has brushed aside. PW 31 A.K. Pandya in his evidence states that the Appellant had signed all the pages in his presence except on the last page. Likewise, PW-39 N.B. Ranekshah also states in his deposition that the present Appellant signed all the pages in his presence including the last page. Now, if the original confessional statement of the present Appellant is perused which is at Exh. 303, there appears to be only one signature of the present Appellant meaning thereby that only the version of

one of these witnesses could be true. These inherent flaws are fatal to the confessions. Learned Special Judge [POTA] has sought corroboration

with respect to the evidence against the present Appellant from the confessional statement of other co-accused which is otherwise impermissible in

view of the decision of the Apex Court in the Parliament Attack Case. Learned Special Judge [POTA] has placed reliance on the depositions

adduced by panch witnesses, namely, PW-10 Sanjay Shridhar Bhojkar and PW-24 Jethabhai Parmar. The learned Special Judge [POTA] ought

not to have placed reliance on the depositions of these two witnesses in view of the provision of Section 8 of the Evidence Act. Learned Special

Judge [POTA] has placed reliance on the evidence of PW-29 Shoaib Mansuri. His evidence could not have been relied upon by the learned

Judge, because, he had not identified the present Appellant in the Court. He himself has admitted in his evidence that the police disclosed the name

of the present Appellant to him. Purported bill which this witness has identified is the bill dated 27.5 without there being any reference to any year.

It is also not clear that in what manner and under what circumstances, purported bill Exh.68 came in possession of the police. Thus, considering the

entire oral depositions and documentary evidence against the present Appellant, he ought to have been acquitted by the learned Special Judge.

SUBMISSIONS ON BEHALF OF ANAS ABDUL RASHID MACHISWALA, APPELLANT OF CRIMINAL APPEAL No. 1148 OF

2006 [Original accused No. 21 in POTA Case No. 7/03 and Original accused No. 18 in POTA Case No. 8 of 2003]:

5.26 Learned Counsel at the outset submitted that the present Appellant has been falsely implicated in the commission of crime and there is no

incriminating material recovered or discovered from the possession of the present Appellant. The prosecution has, with a view to prove inextricable

involvement of the present Appellant, placed reliance on the depositions adduced by PW-3 Mohd. Samir examined at Exh. 99; PW-8 Mustak

Chandmiya, examined at Exh. 113; PW-11 Firoz Mevati examined at Exh. 117; PW-21 Khalid Pathan, examined at Exh. 159; PW-28

Haiderkhan examined at Exh. 202; PW-31 A.K. Pandya examined at Exh. 207; PW-33 Ms. Malvikaben Bhatt, examined at Exh.217 and; PW-

39 N.B. Ranekshah, examined at Exh. 298. The prosecution has also placed reliance on the documentary evidence such as statement of Mohd.

Samir PW-3 recorded u/s 164 of the Code of Criminal Procedure at Exh. 225 ; statement of the Appellant recorded u/s 32 of POTA by DCP

Shri A.K. Pandya at Exh. 302; documents relating to production of three accused including the present Appellant proved by PW-39 Ranekshah at

Exh.299 and; documents relating to confirmation proceedings proved by PW-39 Ranekshah at Exh. 300.

5.27 Learned Counsel submitted that the learned Special Judge [POTA] has found the evidence of Mohd. Samir - PW-3 reliable and trustworthy

to certain extent for proving suspicious conduct of the present Appellant.

The learned Special Judge [POTA] has also believed the evidence of PW-8 Mustak Chandmiya. This witness implicates two of the five Appellants

which include the present Appellant. Learned Counsel submitted that inspite of the statement of PW-8 Mustak Chandmiya is on the record of the

case, neither the investigating agency nor learned Special Judge [POTA] took legally mandated steps u/s 190[1][b] of the Code of Criminal

Procedure to array the said witness as accused in the present case. The instant case being a case where committal proceedings have been given a

go bye under the statute, the learned Special Judge [POTA] has been empowered to take cognizance upon a police report u/s 29 of POTA,

language of which is akin to Section 190[1] of the Code of Criminal Procedure It is now well settled that ""cognizance is taken of the offence and

not of the offender"". Learned Counsel submitted that if the cognizance is always invariably taken of the offence then, bounden duty is cast upon the

Court to see that no person who is found to have been involved in the commission of any offence is allowed to go scot-free. Learned Counsel

placed heavy reliance on the judgment of the Apex Court in the case of M/s. SWIL Ltd. Vs. State of Delhi and Another, more particularly, para-6

thereof, which is reproduced herein above and, therefore, is not repeated here. However, inspite of the settled legal position in the above judgment

and inspite of the fact that there was self-incriminating Section 161 statement of PW-8 Mustak Chandmiya Sheikh on the record of the learned

Special Court, no steps for arraying this witness as an accused in the present case were taken by the learned Special Court. Learned Counsel

submitted that even the belated application filed by the accused persons u/s 319 of the Code of Criminal Procedure was of no avail for the very

reason that by the time the application came to be preferred, witness PW-8 Mustak Chandmiya Sheikh had already entered into the witness box

and had deposed and therefore in view of the explicit bar contained in Section 132 of the Evidence Act, no proceedings could have been initiated

against him except the proceedings of perjury. Learned Special Judge [POTA] placed reliance on the incriminating evidence of PW-8 Mustak

Chandmiya at Exh. 113 through a mode and method which is completely alien and unknown to law and thereby, the present Appellant has been

seriously prejudiced. Learned Counsel submitted that if PW-8 Mustak Chandmiya was arrayed as an accused, there could have been only two

modes of bringing evidence against the co-accused; either his confessional statement u/s 164 of Code of Criminal Procedure could have been

recorded or the Investigating Agency could have made him a witness/approver u/s 306/307 of the Code of Criminal Procedure In the instant case,

extralegal immunity is given to PW-8 Mustak Chandmiya and that too by the investigating agency on its own sweet will which is not permissible in

the eye of law and such practice has been deprecated by the Apex Court in the case of P. Sirajuddin, etc. Vs. State of Madras, etc., which is

referred herein above. Learned Special Judge [POTA] also placed reliance on other piece of evidence which is the purported statement of the

present Appellant u/s 32 of POTA which is at Ex. 303 on the record of the case. This statement has been relied upon based on the evidence

adduced by PW-31 A.K. Pandya and PW-39 N.B. Ranekshah. However, the confession suffers from both the vices which are held fatal by the

Apex Court in the State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, PW-31 A.K. Pandya admits that he gave only five minutes" time of

reflection to the present Appellant, while the Apex Court has held that even 10-15 minutes is wholly inadequate.

5.28 There is another major contradiction which the learned Special Judge [POTA] has brushed aside. PW 31 A.K. Pandya in his evidence states

that the Appellant had signed all the pages in his presence except on the last page. Likewise, PW-39 N.B. Ranekshah also states in his deposition

that the present Appellant signed all the pages in his presence including the last page. Now, if the original confessional statement of the present

Appellant is perused which is at Exh. 303, there appears to be only one signature of the present Appellant meaning thereby that only the version of

one of these witnesses could be true. These inherent flaws are fatal to the confessions. Learned Special Judge [POTA] has sought corroboration

with respect to the evidence against the present Appellant from the confessional statement of one other co-accused which is otherwise

impermissible in view of the decision of the Apex Court in the Parliament Attack Case. It is submitted that evidence of both the witnesses, namely,

PW-21 Khalid Pathan and PW-28 Haiderkhan Pathan could not have been relied upon by the learned Special Court in view of the fact that PW-

21 Khalidkhan was declared hostile by the prosecution whereas the other witness PW-28 Haiderkhan speaks nothing incriminating against the

present Appellant. Other evidence which is relied upon by the learned Judge is that of PW-11 Firoz Mevati. On perusal of his deposition, it

becomes clear that it is highly unlikely that the present Appellant would go to the same witness with the same offer given the fact that the previous

offer was refused by this witness. Further, the tacit silence on the part of this witness and that too without any explanation for a period of more than

12 months also discredits the testimony of this witness. Learned Judge has also relied upon the deposition adduced by PW 3 Mohd. Samir who

also could not have been relied upon by the learned Judge for the reason of tacit silence on the part of this witness and that too without any

explanation for a period of more than 12 months. There is no documentary evidence in the nature of call records produced by the Investigating

Officer along with charge-sheet to corroborate the version given by this witness. Thus, it is submitted that considering the overall evidence adduced

by the prosecution against the present Appellant, he also ought to have been acquitted.

6. Mr. J.M. Panchal, learned Special Public Prosecutor, appearing on behalf of the Respondent-State submitted that a conspiracy was hatched by

the Appellants. Purchase, procuring of the arms and ammunition as well as explosive substances was also made with precision with a view to strike

terror. In pursuance of the said conspiracy, tiffin bombs were prepared and planted in five AMTS buses bearing route Nos. 46, 49, 13/1, 47/1,

90/6. Conspiracy which was hatched was such that on 29.5.2002, these tiffin bombs/boxes were planted in buses where pre-dominantly people of

Hindu community reside and they were planned to be blasted almost at the same time in all the buses. Learned Counsel submitted that in view of

the aforesaid facts and circumstances, five offences were registered and in four cases, ""A"" summary was filed on 18.8.2002 and in one case, ""A summary was filed on 31.8.2002. During the course of investigation in CR No. I 6/03 of DCB [general conspiracy case], involvement of some of the accused was disclosed and investigation of all the five cases was handed over to Crime Branch and PW-37 H.P. Agrawat was assigned the work of investigation. During the course of the investigation, it was revealed that as part of one conspiracy to strike terror and also jeopardizing sovereignty and unity of the nation, offences were committed. Therefore, on 19.7.03, provisions of POTA were made applicable. Thereafter, PW-38 H.P. Agrawat took over the investigation. Learned Counsel submitted that in pursuance thereof, 21 accused were arrested. However, accused No. 13, accused No. 14, accused No. 15 and accused No. 16 were discharged and accused No. 9 was exonerated by the Central Pota Review Committee. However, out of the aforesaid accused, five persons, i.e. A-4, A-17, A-18, A-19 and A-21 came to be convicted. The defence has admitted the incidence of blasting of bombs in AMTS buses and also admitted that persons received injuries in bomb blasts and therefore, learned Counsel made no submissions in that regard. With regard to confessional statements, which were recorded u/s 32 of POTA, the learned Counsel placed reliance on the depositions of PW-31 A.K. Pandya at exh. 207, who recorded the confessional statements of A-21 vide exh. 208 and A-19 vide exh. 209. Learned Spl. Public Prosecutor submitted that if the deposition adduced by PW-31 is perused, then, it becomes clear that the confessional statements recorded by him were recorded as per the provisions contained in Section 32 of the POTA. The Appellants were given time to consider on reflection, they were also given to understand that the statements given by them would be used against them in the court proceedings and there was no coercion or threat administered to them nor statement given by them was under any threat. When the Appellants agreed to give voluntary statements, the same were recorded by him by applying the provisions of Section 32 of POTA. After recording the statements, this witness had obtained signatures of the Appellants and he himself had also put his signature below the statements. Nothing turns out from the cross-examination of this witness so as to dislodge his version given in his examination-in-chief as he had recorded the statements by

applying the provisions of Section 32 of POTA. Learned Spl. PP, thereafter placed reliance on the deposition adduced by PW-39 Shri N.B.

Ranekshaw who has been examined at Exh. 298. This witness has deposed in his testimony that he was working as Chief Metropolitan Magistrate

from 20.3.2003 to 31.10.2004. During his tenure, on 19.5.2003, a Yadi was sent by G.L. Singhal, Assistant Police Commissioner, Crime Branch

to record statements of Kalim Ahmed @ Mulla Kalim Mohammed Habib Kalimi, Shahnawaj Mohammedhussen Gandhi and Anas Abdul Rashid

Machiswala and on 18.5.2003, a Yadi dated 29.4.2003 was sent by Shri G.L. Singhal to record statement of Idrishkhan Yakubkhan Pathan.

Before recording the statements, he had explained to them that they are not bound to give statement u/s 32 of POTA and if statement is given by

them, then, the same can as well be used against them in the proceedings. They were also given time to think over and it was also explained to

them that they are free to give voluntary statement. This witness has deposed that no force or coercion was used to obtain their statements.

Thereafter, confessional statement of A-21 was recorded vide Exh.302 and confessional statement of A-19 was recorded vide Exh. 303. Thus,

confessional statements as per the submission of the learned Spl. PP were recorded by complying with the provisions contained in Section 32 of

POTA and no breach of the said provision was committed by these two witnesses who recorded the statements under the provisions of Section

32 of POTA.

6.1 The prosecution has also examined material witnesses in order to prove inextricable involvement of Appellants in the commission of crime.

Material witnesses who are examined by the prosecution are; PW-4 Abdul Hamid Abdul Rahim Shaikh, Exh. 100; PW-8 Mustak Chandmiya

exh. 113; PW-11 Firozkhan Mevati at Exh. 117; PW-19 Aarifkhan Pathan at Exh. 157; PW-20 Altafhussain Shaikh at Exh. 158; PW-30 Yakub

Abdulahman Chhipa at Exh. 206; PW-22 Dipesh Jain at Exh. 166 and; PW-29 Shoaib Munnavarhussain Mansuri at Exh. 203.

6.2 PW-4 Abdul Hamid is examined at exh. 100. He has deposed in his testimony that he is staying in Karoda Pole, Kalupur and doing work of

starter repairing. He is also having a shop, i.e. Janta Auto Electric. He has deposed that he is reading Namaz sometimes in Lal Masjid and

sometimes in his own house. He knows many persons who used to come to Lal Masjid for reading Namaz. He has stated that he knows one

Kalim who used to come to read Namaz. He identified Kalim [A-19] during the course of his deposition. He has stated that after the Godhra

incident, Kalim came to his house at about 10.30 at night and took him to the factory of Hanif Pakitwala who is engaged in the work of preparing

school bags. When he went to the factory of Hanif Pakitwala, he saw Hanif as well as Habib Hawa preparing red colour powder to fill up the

same in pipe. About seven to eight pipes were lying in the factory. He could not say as to what was done of those pipes. In the cross-examination,

nothing is asked to dislodge the version given by this witness in his examination-in-chief.

6.3 PW-8 Mustak Chandmiya, examined at Exh. 113 has deposed in his testimony that he is staying in Shahpur area opposite Rangila Police

Chowky. In the aftermath of Godhra incident, riots had broken out in Ahmedabad. He had talked with some persons and friends in foreign

country. He also talked with Abdul Razak who was in the Jiddah city of Saudi Arabia. Abdul Razak, at the material point of time was staying in

Juhapura area of Ahmedabad and he had talked about the damage caused to the Muslim community as well as to their property. During the course

of his deposition, this witness has revealed the name of Kalim [A-19] and Anas [A-21] who were involved in the preparation of the bombs to be

placed in AMTS buses. Thus, how the conspiracy was hatched and accused who were involved in the conspiracy and the manner in which the

conspiracy was hatched has been exhaustively narrated by this witness so as to indicate the involvement of the Appellant in the commission of

offence.

6.4 PW-11 Firozkhan Mevati, who is examined at Exh. 117 has deposed in his testimony that he is staying in house No. 1574 in Baluchawad,

Dariyapur and running type classes in the name and style of Roomi. He has stated that normally he goes to Tin Limbdi Masjid for the purpose of

reading Namaz. Namaz is read by Maulana, but he does not know the name of the Maulana. After the Godhra incident in 2002, Anas met him and

told him that he would give one item which is required to be placed in AMTS bus. Thereafter, he had left the place. He again met him after two

days and repeated the same request. This witness told him that because of the marriage of his sister, he would not be in a position to do the work.

Anas told him that the item which is required to be placed in a bus is a tiffin bomb. This witness has stated that he does not know anyone else

except Anas. In his cross-examination, he has stated that even though he was told to plant tiffin bomb in a bus, he did not place it in the bus. Anas

told him to keep the tiffin bomb in the bus on 26.5.2002. He did not inform the police, but he was aware of the fact that blast had taken place in

AMTS buses. After his talk with Anas on the next day, the blast had taken place. He came to know about the blasts through newspapers as well

as through TV news.

6.5 PW-19 Aarifkhan Munnakhan Pathan has been examined at Exh. 157. He has deposed in his testimony that he is staying in house No. 2723 at

Kadiyakui Naka on Relief Road. He is having one store, namely, Kohinoor Stores near Kalupur Gate. He is having one factory in the name and

style of Karnavati Fire Works in Ramol wherein, fire crackers are prepared. He has further deposed in his testimony that after the Godhra incident,

riots had erupted in Ahmedabad and when curfew was relaxed, Maulvi Ahmed had met him who is doing the work of reading Namaz and

imparting education to the students. He had inquired from him about the chemical which is used in preparing fire crackers. He told him that there

are two or three persons who are having chemicals. He had told that chemical is not available without obtaining necessary license. Thereafter,

when he was told to introduce the person who was preparing chemicals used in making fire crackers, he had told Altaf who was serving at his

place to take Maulvi to the place of Yakub. This witness states that he cannot say as to what transpired thereafter between Yakub and Maulvi.

6.6 PW-20 Altafhussain Shaikh has been examined at Exh. 158. He has deposed in his testimony that he is staying in house No. 2929 in

Dhupelvali Pole near Kalupur. He was serving in the factory of Arif at Ramol who stays near Biscuit Bakery situated near Saudagar Pole. He even

used to sit at the shop of his brother. Once, while he was passing by the house of Arif, he told him that Maulvi Ahmed wants to meet Yakubchacha

and therefore, he saw to it that Maulvi meets Yakubchacha. This witness states that he could not say as to what had transpired between

Yakubchacha and Maulvi Ahmed thereafter.

6.7 PW-30 Yakub Abdul Rehman Chhipa is examined at Exh. 206. He in his testimony has deposed that he is staying in Astodia Chakla along

with his family and doing business of chemicals. He is selling aluminum powder and barium nitrate which are used in preparing fire crackers. Arif

was having cutlery shop and his associate, namely, Altaf used to come to him to take chemical powder frequently and he would give it to him. He

has deposed that there are two to four businessmen who are dealing in the sale of chemical powder.

6.8 PW-22 Dipesh Jain is examined at Exh. 166, whereas PW-29 Shoaib Mansuri is examined at Exh. 203. They are vendors. PW-22 Dipesh

Jain has deposed in his testimony that he is having a shop near Teen Darwaja and he used to sell tiffins. He has deposed in his testimony that in

2003, in the month of May, the police had met him for the first time and as police wanted to inquire about the bomb blasts, they visited his shop

and inquired as to whether a tiffin was purchased from his shop and the police gave name of Habib Hawa to him. They also prepared panchnama

with regard to the same. Likewise, PW-29 Shoaib Mansuri is also a vendor and he is having his shop in Delhi Chakla. When the police visited his

shop, one person, namely, Kalimulla was present. Bill which was shown to him was with regard to pipe fitting. He had identified the bill and the

same is produced vide Exh. 68.

6.9 Learned Spl. PP submitted that on perusal of the depositions adduced by these material witnesses, conspiracy which was hatched by the

Appellants with precision and pre-planning with a view to attack innocent common people is established. Aim and the purpose of the conspiracy

was to strike terror in the society as a whole. Because of the bomb blasts, several persons sustained injuries. Over and above the oral depositions,

prosecution has also placed reliance on the depositions adduced by panch witness Sanjay Bhojkar [PW-10] at Exh. 115 who has not supported

the prosecution case, but in his cross-examination, to some extent he has supported the prosecution case with regard to discovery pointed out by

A-19 vide exh. 286. Another panch PW-12 Mansingh Shikh is examined at Exh.118 with regard to recovery of article by A-4. Panchnama is

produced vide Exh. 119. PW-7 Dilip Khengar is examined at Exh.106 and the

panchnama is produced vide Exh. 287. PW-24 Jethabhai Parmar is examined vide Exh. 190 and panchnama which is admitted is produced at Exh. 69.. Panchnama with regard to tiffin box is prepared and admitted vide exh. 66. Panchnama of the sketch of electronic circuit by Professor of L.D. Engineering Shri Vikrambhai Desai is produced at Exh. 67 and the bill of Navrang Paints/Hardware is produced at Exh. 68 which is proved by the deposition of the shop owner. Production of articles by A-4 is proved by prosecution and the same is produced vide exh. 282. Aforesaid documentary evidence is further corroborated by FSL reports exh. 87 and 73. Prosecution has also examined Ashwinsinh Ranjitsinh Padhiar, PW-15 at Exh. 153, PW-16 Ramjibhai Jivaji Chaudhari at exh. 154 and PW-17 Bachubhai Sadhubhai Bharwad at Exh. 155 in order to prove the involvement of the Appellants in the commission of crime.

Learned Spl. PP submitted that considering the entire gamut of oral depositions and documentary evidence, prosecution has established the involvement of the Appellants in the commission of crime and, therefore, the learned Special Judge has rightly awarded and imposed sentence.

Learned Spl. PP has placed reliance on the judgment of the Apex Court in the case of Utpal Das v. State of West Bengal, reported in 2010 GLHEL SC 48347, in support of the submission that statement recorded u/s 164 of Code of Criminal Procedure can never be used as a substantive evidence of truth of the facts but may be used for contradictions and corroboration of a witness who made it. Statement made u/s 164 Code of Criminal Procedure can be used to cross-examine the maker of it and the result may be to show that the evidence of the witness is false.

It can be used to impeach the credibility of the prosecution witness.

7. We have heard Ms. Nitya Ramkrishnan, learned Counsel appearing with Mr. Rohit Verma and Mr. Somnath Vatsa for the Appellants and Mr. J.M. Panchal, learned Spl. Public Prosecutor appearing for the Respondent State, at length and in great detail. The prosecution has, in order to prove the involvement of the Appellants in the commission of crime, examined as many as 40 witnesses and also produced documentary evidence vide list at Exh.63 and list at Exh. 279 to prove the involvement of the Appellants in the commission of offence. The Appellants are charged for the offence punishable under Sections 120B, 307 read with Section 120B as well as

under Sections 3, 4, 20, 21[2][b], 22[3] A.B. of POTA; under Sections 4 and 6 of Explosive Substance Act and under Sections 3 and 4 of the Prevention of Damage to Public Property Act as well as under Sections 130 and 135[1] of the Bombay Police Act. As per the prosecution case, the incident in question took place in the aftermath of Godhra riots when on 27.2.2002, S-6 coach of Sabarmati Express train which was coming from Ayodhya and proceedings towards Vadodara was set on fire on Godhra Railway Station and 59 persons were charred to death. In pursuance of the aforesaid incident, a bandh call was given by religious organization - Vishwa Hindu Parishad on 28.2.2002 and the State witnessed worst ever communal riots and unprecedented damage to the public and private properties was caused. As per the prosecution case, Mufti Sufiyan, a wanted criminal was preaching Islamic tenets and performing Namaz in Lal Masjid in the city of Ahmedabad after his long training in Madressa at Surat. It is the prosecution case that he instigated the youths in the city and incited and convinced them to work for the cause of ""Jihad"" and they conspired to commit illegal act of planting bombs in tiffins and placing them in buses plied by Ahmedabad Municipal Transport Services [AMTS] passing through various areas of Ahmedabad city. On 29.5.2002, in the morning at around 10.15 a.m., tiffin bombs which were placed in five different AMTS buses of route Nos. 13/1, 47/1, 90/6, 49 and 46 having automatic time device, blasted in three buses. Fourth blast occurred when an attempt was made to defuse the explosive whereas one tiffin bomb was successfully defused on detection. As per the prosecution case, there was no casualty but many persons sustained injuries and major damage was caused to the buses of route Nos. 46 and 49 and to the baggages carried by the passengers of these buses. Therefore, an offence bearing Ist CR No. 184/02 was registered in Kagdapith Police Station. FIR bearing Ist CR No. 244/02 was registered in Satellite Police Station. FIR bearing Ist CR No. 116 of 2002 was registered in Vejalpur Police Station, FIR being Ist CR No. 79 of 2002 was registered in Sanand Police Station, whereas FIR being Ist CR No. 90/02 was registered in Kalupur Police Station. On conclusion of the investigation, investigating agency came to the conclusion that crime was committed but as no person was traceable, ""A"" Summary was filed on 18.8.2002 and

31.8.2002. Another offence was registered by the Crime Branch being CR No. I-6/03 alleging larger conspiracy to do away with the popular

leaders, police officers and other persons by some accused having connection with banned terrorist organizations with a view to cause terror.

During the course of the investigation of the case, some of the accused were arrested and the police found clue of the bomb blasts that occurred in

AMTS buses. In all, 21 accused were arrested and some of the accused filed discharge application u/s 227 of the Code of Criminal Procedure.

Out of the above mentioned accused, five accused were discharged. Thereafter, the matter was set down for recording evidence in the present

case. In light of the oral depositions adduced by the prosecution and the documentary evidence, we would like to discuss threadbare the case of

each of the Appellants in the present appeals.

8. Before dealing with the entire gamut of oral depositions and the documentary evidence relied upon by the prosecution, we would like to deal

with the aspect of conspiracy and the whether in the facts and circumstances of the case, conspiracy hatched by the Appellants along with the

other accused is proved beyond reasonable doubt or not.

8.1 Section 120A of the Indian Penal Code defines "criminal conspiracy" which itself is a distinct offence. It is stated therein that, 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. It is immaterial whether the illegal act is the ultimate

object of such agreement, or is merely incidental to that object. Conspiracy consists in the agreement of two or more persons to do an unlawful act

or to do a lawful act by unlawful means. The essence of the offence of conspiracy is the fact of combination by agreement. The agreement may be

express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made

and the offence continues to be committed so long as the combination persists, i.e. until the conspiratorial agreement is terminated by completion of

its performance or by abandonment or frustration or however it may be.

Conspiracy is the agreement to execute illegal conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place. It is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. However, it is not necessary that each conspirator should have been in communication with every other conspirator. In case of *State v. Nalini*, reported in 1999 SCC 253, the Apex Court discussed the catena of decisions and made observations in respect of Section 120B as under:

In reaching the stage of meeting of minds, two or more persons share information about doing an illegal act or a legal act by illegal means. This is the first stage where each is said to have knowledge of a plan for committing an illegal act or a legal act by illegal means. Among those sharing the information some or all may form an intention to do an illegal act or a legal act by illegal means. Those who do form the requisite intention would be parties to the agreement and would be conspirators but those who drop out cannot be roped in as collaborators on the basis of mere knowledge unless they commit acts or omissions from which a guilty common intention can be inferred. It is not necessary that all the conspirators should participate from inception to the end of the conspiracy; some may join the conspiracy after the time when such intention was first entertained by any one of them and some others may quit from the conspiracy.

8.2 Even the discussion with regard to criminal conspiracy is extensively done in the Parliament Attack case [supra], wherein the Court held that; one more principle which deserves notice is that the cumulative effect of the proved circumstances should be taken into account in determining the guilt of the accused rather than adopting an isolated approach to each of the circumstances. Of course, each one of the circumstances should be proved beyond reasonable doubt. Lastly, in regard to appreciation of evidence relating to the conspiracy, the Court must take care to see that the acts or conduct of the parties must be conscious and clear enough to infer their concurrence as to the common design and its execution.

8.3 It has been strenuously urged on behalf of the Appellants that provision of Section 10 of the Evidence Act cannot be invoked. However, for the purpose of appreciating as to whether Section 10 can be invoked in the present case, it is necessary to reproduce Section 10 of the Evidence

Act, which is as under:

Where there is a 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.

On bare perusal of Section 10 of the Evidence Act, 1972, it becomes clear that where several persons are proved to have combined together for

the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan with reference to the common object is in

contemplation of the law, an act of the whole. Section 10 ensures that one person shall not be made responsible for the acts or deeds or another

until some bond in the nature of agency has been established between them and their acts, words or writing of another which it is proposed to

attribute variously to the person charged must be in furtherance of the common design and after such design was entertained. Provision of Section

10 of the Evidence Act has been discussed elaborately in the case of State[NCT of Delhi] v. Navjot Sandhu @ Afsan Guru 2005 SCC 1715,

which is referred to as the Parliament Attack Case, reported in 2005 SCC 1715 as under:

From an analysis of the section, it will be seen that Section 10 will come into play only when the court is satisfied that there is reasonable ground

to believe that two or more persons have conspired together to commit an offence. There should be, in other words, a prima facie evidence that

the person was a party to the conspiracy before his acts can be used against his co-conspirator. Once such prima facie evidence exists, anything

said, done or written by one of the conspirators in reference to the common intention, after the said intention was first entertained, is relevant

against the others. It is relevant not only for the purpose of proving the existence of conspiracy, but also for proving that the other person was a

party to it.

Section 10 of Evidence act is based on the principle of agency operating between

the parties to the conspiracy inter se and it is an exception to the rule against hearsay testimony. If the conditions laid down therein are satisfied, the act done or statement made by one is admissible against the co-conspirators.

8.4 We would refer to the facts of the present case which are as under:

In the aftermath of the Godhra incident, discontent, hatred and feeling of revenge were simmering among some sections of Muslim people. Many

Muslims of Gujarat who have settled in Saudi Arabia and Dubai permanently or temporarily shifted for earnings. As per the prosecution case, for

the affected people, relief camps were set up by some Trusts. Under the pretext of providing relief to the affected persons, banned militant

organizations established contacts with the religious leaders and other leaders of the community and for providing finance and other help, a

conspiracy to terrorize a particular community was hatched. One of the objects of such offence was to purchase weapons and to let loose rein of

terror amongst the people of community at large in order to take revenge in the aftermath of Godhra incident. For undertaking the task of

terrorizing the people at large and to take revenge in the aftermath of Godhra incident, young boys were instigated and they were prepared to join

and execute the conspiracy to take terrorist training outside India with the common intention to work for the goal of terrorizing the people at large.

The preparation of bombs on getting funds and support from militants was in pursuance of the said criminal conspiracy and the proof with regard to

conspiracy which was hatched will be discussed by us threadbare hereafter in each of the appeals.

AHMED HUSSAIN ALLARAKHA MANSURI, APPELLANT OF CRIMINAL APPEAL No. 1155 OF 2006 [ORIGINAL ACCUSED

No. 18 IN POTA CASE No. 7 OF 2003 AND ORIGINAL ACCUSED No. 21 IN POTA CASE No. 8 OF 2003:

9. On perusal of the evidence adduced by the prosecution and in order to prove the involvement of the Appellant in the commission of crime, the

prosecution has examined PW-19 Arifkhan exh. 157, PW-20 Altafhussen at exh. 158 and PW-30 Yakub Chhipa at exh.206 in order to

appreciate the involvement of the present Appellant in the commission of crime. If we peruse the deposition of PW-19 Arifkhan at exh. 157, he

has deposed in his testimony that he is staying in house No. 2723, Kadiyakui Naka, Chappal Bazar, situated on Relief Road and is having shop in

the name and style of Kohinoor Stores near Kalupur Darwaja. He is also having factory for preparing fire crackers at Ramol, namely, Karnavati

Fire Works. He is having five brothers and two sisters. One person, namely, Altaf Hajimiya was working in his factory. He has further deposed in

his testimony that after Godhra incident, when he was returning to his home during the relaxation of curfew, Maulvi Ahmed met him who stays in

his area and doing work of reading Namaz. He also imparts education to the youngsters and children. When Maulvi met him, he inquired from him

about the chemical which is used in preparing fire crackers. He told him that the chemical is sold by two or three persons in Ahmedabad and the

same cannot be sold without license. He told Maulvi that there were two persons, namely, Yakub Chhipa and another was Rajubhai Vaniya who

are selling the chemical. Maulvi told him to introduce him to the person who is selling the chemical. Therefore, he sent Altaf who was serving in his

factory along with Maulvi in order to have acquaintance with Yakub Chhipa. It is stated by this witness that he could not say as to what transpired

thereafter between Yakub Chhipa and Maulvi Ahmed. In the cross-examination, this witness has deposed that he could not say as to in which

month or year, he had met Maulvi and he knows him because he is a religious head. Save and except the aforesaid deposition with regard to

Appellant and introducing the Appellant with Yakub Chhipa, nothing turns out from the cross-examination of this witness. Even the questions were

also put by the Court to this witness in order to ascertain the involvement of the Appellant. But on perusal of the questions put to the witness,

nothing turns out to indicate the involvement of the Appellant in the commission of offence.

9.1 PW-20 Altaf Hussein Hajimiya Sheikh who has been examined at Exh. 158, in his testimony has deposed that he is staying in house No. 2929

situated in Dhupelvali Pole. He was working in Karnavati Fire Factory Works of Arif Pathan at Ramol who is staying in Saudagar Pole situated

just oppose Biscuit Bakery. When he was passing by the house of Arifbhai, he was told by Arifbhai to take Maulvi Ahmed and introduce him to

Yakubchacha. He thereafter took Maulvi Ahmed to the Astodiya bus station situated opposite Dhal Pole in order to introduce Maulvi Ahmed with

Yakubchacha. It is stated by this witness that he could not say as to what transpired between Yakub and Maulvi Ahmed. Thereafter, they returned to Kalupur in auto rickshaw. He has further deposed in his testimony that he knows Yakubchacha since last eight to ten years because he is engaged in providing chemical to Arifbhai used in preparing fire crackers. He supplies silver powder and barium nitrate to Arifbhai. During the course of his deposition, he identified Maulvi Ahmed. On perusal of the cross-examination, nothing turns out from the cross-examination so as to dislodge the version given by this witness in the examination-in-chief.

9.2 The prosecution has examined Yakub Abdul Rehman Chhipa - PW 30 at Exh. 206. He has deposed in his testimony that he is staying in M.A.

Chhipa Pole situated in Astodiya Chakla along with his family and he is doing business of chemicals and preparing aluminum powder and barium nitrate used in preparing fire crackers. Arif is having a cutlery shop. Altaf, a person of Arif used to come to him for the purpose of purchasing chemical powder. Another person selling the chemical is Shamaldas. Arif used to send Altaf to him for the purpose of purchasing barium nitrate. In his cross-examination, this witness has deposed that the business carried out by him is not registered under the provisions of Sales Tax Act and he does not have Sales Tax registration number. He is not paying Income Tax nor does he keep books of accounts. Save and except the aforesaid version, nothing turns out from the examination-in-chief or cross-examination of this witness so as to indicate involvement of the Appellant in the commission of offence.

9.3 Learned Special Judge [POTA] on the basis of the oral depositions and documentary evidence has held that there is sufficient incriminating material against the present Appellant. There are categorical depositions by the witnesses about the meeting of the Appellant during the communal riots in the aftermath of Godhra carnage and meeting took place during the period when curfew was lifted. Depositions adduced by PW-19 Arifkhan and PW-20 Altaf Hussien are corroborated. Yakub Chhipa also supports the version given by Arifkhan and Altaf Hussien. Learned Judge has discussed the depositions of PW-19 Arifkhan and PW-20 Altaf Hussien and held that on perusal of their depositions, the Appellant was taken to the residence of PW-30 Yakub Chhipa for purchasing chemicals. The deposition

of PW-30 Yakub Chhipa is positive that he was doing the business of selling chemicals from his residence having highly explosive capacity around the time of preparing bombs in pursuance of the criminal conspiracy which was hatched by the accused. Learned Special Judge, placing reliance on Section 10 of the Evidence Act held that reasonable ground existed to hold that prima facie evidence ensures this accused and others to have conspired to commit illegality and there appears to be bond in the nature of agency and, therefore, anything said or done by any one of them becomes relevant against others for proving the existence of conspiracy as well as for proving that he was a party to it. The Appellant's taking certain steps consistent with common design would definitely establish his complicity and, therefore, the learned Judge placed reliance on Section 53 of POTA to raise a presumption to hold that bombs were prepared and possessed by the Appellant.

9.4 On perusal of the evidence on record of the case, there was no recovery or discovery of any kind from the present Appellant and therefore, presumption in our considered view, u/s 53 of the POTA cannot be made. Section 53 of the POTA deals with presumption as to the offences u/s

3. On perusal of Section 3[1] of the POTA along with Section 53 of the said Act, it becomes clear that provisions of this section are attracted only

in cases where actual possession is proved either by physical recovery or fingerprints are found at the site of the offence. Learned Judge has also

placed reliance on Section 10 of the Evidence Act. But on perusal of the same, this section also cannot be attracted in absence of reasonable

grounds by which the Appellant could be linked with the conspiracy. Thus, Section 10 of the Evidence Act cannot be invoked against the present

Appellant.

9.5 We have considered the decisions of the Apex Court which are relied upon by the learned Counsel for the Appellant in the case of Kehar

Singh and Others Vs. State (Delhi Administration), State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, and recent decision of the Apex

Court dated 11.8.2010 in the case of Saquib Abdul Hameed Nachan v. State of Maharashtra in Criminal Appeal Nos. 419-421 of 2008, by

which the Court after referring to the judgment in the case of State through Superintendent of Police, CBI/SIT Vs. Nalini and Others, concluded as

under:

In light of the foregoing discussion, we have no option but to reject the contention of Mr. Gopal Subramaniam on the interpretation of Section 10,

though not without hesitation. However, in view of the fact that the confessional statement is not being relied on, the question of applicability of

Section 10 fades into insignificance.

9.6 Thus, prosecution, has failed to establish the involvement of the Appellant in the conspiracy or actual crime on the basis of cogent and

convincing evidence against the Appellant.

MOHD. HANIF @ PAKITWALA ABDUL RAZAK SHEIKH, APPELLANT OF CRIMINAL APPEAL No. 1149 OF 2006 [ORIGINAL

ACCUSED No. 17 IN POTA CASE No. 7/03 AND ORIGINAL ACCUSED No. 17 IN POTA CASE No. 8/03]:

10. Prosecution has placed heavy reliance on the deposition adduced by PW-4 Abdul Hamid exh. 100, PW-7 Dilip Khengar at Exh. 106, PW 33

Malvikaben Bhatt at Exh. 217 as well as statement of PW-4 Abdul Hamid recorded u/s 164 of Code of Criminal Procedure at Exh. 223 and

panchnama drawn at the instance of the Appellant pointing out the place of his own workshop.

10.1 If we discuss the deposition adduced by PW-4 Abdul Hamid examined at Exh. 100, then, he has deposed in his testimony at exh. 100 that

he is staying in Karoda Pole at Kalupur and is doing work of repairing starters of the car. He is also having one shop, namely, Janta Auto Electric.

He has further deposed that he used to visit Lal Masjid for the purpose of reading Namaz. He had acquaintance with one Kalimbhai who used to

come to Lal Masjid to read Namaz. He has identified Kalim Ahmed during the course of his deposition. He has further deposed that after the

Godhra incident, once Kalimulla came to his house at about 10.30 p.m. and took him to the factory of Mohd. Hanif Pakitwala situated in Lakhota

Pole. Hanif Pakitwala is engaged in the work of preparing school bags in his factory. When he visited the factory of Hanif Pakitwala, he was

present along with Habib Hawa. He had seen read colour powder in the factory and they were filling up the said powder in the pipe. This witness

has stated that he could not say as to how many pipes were lying there in the factory, but approximately seven to eight pipes were lying in the

factory. He has stated that he could not say as to what was done to those pipes. He also identified Habib Hawa who was present in the court. He

has also identified the statement which was recorded by the Metropolitan Magistrate. Muddamal article No. 4 which was shown to him and the

pipes lying therein were identified by him during the course of his deposition. In his cross-examination, he has deposed that he was called at the

police station for the purpose of recording statement and after recording the statement, he was permitted to go. No written summons was served

to him for the purpose of recording the statement. He had not discussed about his meeting with Kalimulla and filling of powder in the iron pipes.

Statement which was recorded by the Metropolitan Magistrate was recorded in his presence, but he could not say the date and time on which the

statement was recorded.

10.2 PW-7 Dilip Khengar is examined at Exh. 106. He has deposed in his testimony that he was called at Haveli Crime Branch Police Station on

9.5.2003 at about 8.15 p.m. Another panch, namely, Vinodbhai was also present there when he was called at the police station. Accused Mohd.

Hanif Abdul Razak Shaikh was present. He was told by the police that the entire conspiracy to prepare the bombs is required to be unearthed

and, therefore, search of the place is required to be carried out. Thereafter, he along with other panch witness and policemen along with Mohd.

Hanif went to Lakhota Pole via Mirzapur. On reaching Lakhota Pole, they were taken to one room having partition and one loft. The room was

having material for preparing bags as well as raxins. Panchnama with regard to the place pointed out by the accused was prepared in his presence.

He had identified his signature below the preliminary panchnama as well as concluding part of the panchnama during the course of his deposition.

In his cross-examination, he has deposed that except showing the place, he had not uttered any other word for preparation of the bomb.

10.3 PW-33 Malvikaben Bhatt is examined at Exh. 217. She has deposed in her testimony that since 1983, she has been working as Judicial

Officer and in June, 2001, she was transferred to Ahmedabad as Metropolitan Magistrate. When she was on her duty in May, 2003 as

Metropolitan Magistrate, Court No. 5, she was in charge of urgent matters and at that time, she had recorded statement u/s 164 of Code of

Criminal Procedure She was requested by Chief Metropolitan Magistrate on 12.5.2003 to record statement of Abdul Rahim Jalaluddin and on

13.5.2003 to record statement of Azizur Rehman Riyazur Rehman. Azizur Rehman Riyazur Rehman was produced on 19.5.2003 at 12.35 in the

afternoon. When Azizur Rehman Riyazur Rehman agreed to give statement voluntarily, he was given time to consider and was called again on

20.5.2003 at 12.40. He was again asked to consider and when he told her that there was no coercion or pressure exerted on him, his statement

was recorded by her and she had also put her signature in the statement. She has also identified the letters written to her for recording statements.

10.4 Statement of Mohd. Samir Siddikbhai Shaikh is recorded by her. She had explained to Mohd. Samir as to whether he was inclined to give

statement and whether pressure was exerted on him to give statement, to which, he had replied in the negative. Even in the questions put to the

witness by the Court on being shown Mark ""E"", ""F"", ""G"" and ""H"", she has deposed that it has been mentioned therein about the recording of the

statements of the witnesses. She has stated that she had inquired from the witnesses as to whether they were ready and willing to give statement

and whether coercion or pressure was exerted on them to give statement. She had also given them time to consider and after giving sufficient time,

statements were recorded.

10.5 Statement of Abdul Hamid Shaikh which was recorded u/s 164 is produced vide Exh. 223, wherein, he has stated that he is staying in

Karoda Pole situated in Kalupur and Lal Masjid is situated near his house. He goes to Lal Masjid to read Isha Namaz at 9.00 O'clock and at that

time, one person, namely, Kalimi Kalim used to come to read Namaz and therefore, he knows Kalimi Kalim. He also knows Mutfi Sufiyan since

his childhood, who is staying in Mogal's Pole and he also used to come to Lal Masjid for reading Isha Namaz. In the year 2002, in the month of

May, when he was sitting on Ota of Lal Masjid, Kalimi Karimi had come to him and thereafter, he was taken to the factory of Hanif Pakitwala

situated in Lakhota Pole. Thereafter, they went to the first floor of the factory where Habib Hawa was present. When he visited the first floor, they

were filling powder in the iron pipes. They were preparing tiffin bombs by filling powder in the pipe. When he was present, Abdul Rahim Jalaluddin

Shaikh had also come. On 3.4.2003, when he was present in Lal Masjid, he met Mufti Rizwan and he told him to accompany him for going to

Arkan Masjid in Bapunagar and therefore, he had gone with him to Arkam Masjid. At that time, Shoaibkhan Pathan had also arrived there. Mufti

Rizwan and Shoaibkhan had talked with each other. Shoaibkhan had told Mufti Rizwan to visit Al Fazal Mosque at Juhapura as Mufti Sufiyan was

calling him. He had seen Habib Hawa and Habib Pakitwala in May, 2002 in the factory preparing material for tiffin bombs. His statement was

recorded in the presence of Metropolitan Magistrate, Court No. 5.

10.6 Prosecution has also placed heavy reliance on the panchnama exh. 287 which was drawn at the behest of the Appellant pointing out the place

of his own workshop. Panchnama was prepared in the presence of panch witnesses. On perusal of the same, it is clear that the Appellant led the

panch witnesses and the members of the investigating team to the shop to point out the shop from where pipes to prepare tiffin bombs were

purchased.

10.7 Learned Counsel appearing on behalf of the Appellant submitted that the oral depositions adduced by PW-4 Abdul Hamid at exh. 100, PW-

7 Dilip Khengar at exh. 106, PW-33 Malvikaben Bhatt at exh. 217 do not inspire necessary confidence to indicate involvement of the Appellant in

the commission of crime. Even PW-4 Abdul Hamid who is examined vide exh. 100 has not identified the Appellant in the court and even no

attempt was made by the prosecution to get the Appellant identified through this witness. Even the deposition adduced by PW-4 Abdul Hamid

requires corroboration and that corroboration is not forthcoming on perusal of deposition of PW-7 Dilip Khengar at exh. 106. It is also contended

by the learned Counsel for the Appellant that there was no explanation by the prosecution or from the witness for his silence for a period of 12

months and, therefore, the version given by PW-4 Abdul Hamid is untrustworthy. The defence side was not provided with adequate opportunity to

cross-examine the witness PW-4 Abdul Hamid and this vital aspect was overlooked by the learned Judge while convicting the Appellant. Even the

applications given by the defence side were turned down by the learned Special Judge and, therefore, grave prejudice was caused to the defence

side including the Appellant. The deposition of Dilip Khengar - PW7 at Exh. 107

and the panchnama at exh. 287 cannot be relied upon to convict the Appellant in view of the settled legal position of law. Statement of the Appellant made during the course of panchnama is hit by Section 162 of the Code of Criminal Procedure and therefore, it is not admissible in evidence. Learned Counsel has placed heavy reliance on Sections 25 and 26 of the Evidence Act as well as Section 162 of Code of Criminal Procedure in support of the aforesaid contention.

10.8 Considering the deposition adduced by PW-4 Abdul Hamid at Exh. 100, it becomes clear that Kalimulla who used to come to read Namaz in the mosque took him to the factory of the present Appellant in the aftermath of Godhra incident. The Appellant was having his factory of preparing school bags. On reaching the factory, witness noticed red powder and several pipes to fill up the powder therein. He has identified even the muddamal article during the course of his deposition. PW-8 Dilip Khengar at Exh.107 who is panch witness has identified the place from where powder and iron pipes were recovered. Panchnama with regard to recovery of the same and produced at exh. 287 provides ample corroboration to the deposition adduced by PW-4 Abdul Hamid and PW-7 Dilip Khengar. Defence side has not dislodged the version given by PW-4 Abdul Hamid and PW-7 Dilip Khengar in their examinations-in-chief. PW-33 Malvikaben Bhatt who has been examined at Exh. 217 makes it clear that the procedure which she was required to follow while recording statement was duly followed. Investigating Officer, namely, PW-37 H.P. Agrawat at exh. 281 who is examined in the present case has deposed in his testimony that the place from where red powder and iron pipes were found was visited at the behest of Kalim and on reaching the place situated in Sufi Complex, the same were found and panchnama in respect thereof was prepared in the presence of panch witnesses. Thus, the depositions adduced by PW-4 Abdul Hamid at Exh. 100 and PW-7 Dilip Khengar at Exh. 106 are corroborated by the deposition adduced by PW-37 Agrawat and panchnama at exh. 287. Learned Special Judge has considered the aforesaid aspect as well as the reply given in further statement by the Appellant and has come to a conclusion that the Appellant was involved in the commission of offence. Thus, considering the aforesaid evidence on the record of the case and the elaborate reasons given by

the learned Judge while convicting the present Appellant, we do not see any lacuna or loophole in the evidence adduced by the prosecution so as

to upset the conviction order passed by the learned Special Judge.

MOHD. HABIB MOHD. SHAFI HAWA, APPELLANT OF CRIMINAL APPEAL No. 1151 OF 2006 [ORIGINAL ACCUSED No. 4 IN

POTA CASE No. 7/03 AND ORIGINAL ACCUSED No. 15 IN POTA CASE No. 8/03]:

11. The prosecution has placed heavy reliance on the depositions adduced by PW-4 Abdul Hamid at Exh. 100, PW-12 Mansing Shikh at Exh.

118 and PW-22 Dipesh Jain at Exh. 160. The prosecution has also placed reliance on the statement of PW-4 recorded u/s 164 of the Code of

Criminal Procedure at Exh. 23, panchnama at exh. 119 drawn at the instance of the Appellant which resulted into seizure of electrical gadgets from

his own shop and receipt at exh. 282 of muddamal from the shop of the Appellant which was proved by the deposition adduced by PW-37 P.I.

H.P. Agrawat at Exh. 282 in order to prove the involvement of the Appellant in the commission of offence.

12. PW-4 Abdul Hamid who is examined at Exh. 100 has deposed in his testimony that he stays in Karoda Pole, Kalupur, Ahmedabad and doing

business of repairing of starters of cars and having shop in the name of Janta Auto Electric Shop. He has further deposed that he used to visit Lal

Masjid with a view to read Namaz. He was knowing Kalim who used to come for reading Namaz. He has further deposed that in the aftermath of

Godhra incident, Kalimulla came to his house at 10.30 at night and took him to the factory of Hanif Pakitwala in Lakhota Pole. Hanif was engaged

in the business of preparing school bags. When he visited the factory, Hanif as well as the Appellant were present in the factory. He had seen red

colour powder along with iron pipes in the factory. He has stated that he could not say as to how many pipes were lying in the factory, but there

were about 7 to 8 pipes lying in the factory. He has further deposed that thereafter, his statement was recorded and he had identified the Appellant

who was present in the court. He has deposed in his cross-examination that the fact that when he went to the factory along with Kalimulla and he

had seen the red colour powder with the iron pipe, was recorded in the police statement, but he had never talked to his friends or relatives about

the same prior to giving statement before the police.

12.1 PW-12 Mansingh Shikh has been examined vide Exh. 118. He has deposed in his testimony that he was called on 1.5.2003 at about 7.30

p.m. near Zakaria Masjid, Kalupur and was told to accompany one accused who was arrested in connection with tiffin bomb case. Name of the

accused was Mohd. Habib Hawa. He, therefore, agreed to remain as Panch witness. Thereafter, one person, who was called by Police Inspector

Agrawat had come to a shop with the key and had opened the shop. On opening the shop, the Appellant had shown soldering iron, soldering wire

and micrometer. These articles were recovered and report in respect thereof was prepared. Panchnama with regard to the same was prepared in

his presence and he had identified the Appellant during the course of the deposition. Even the muddamal article Nos. 5, 6 and 7 which were

recovered were shown to him and the same were identified by this witness during the course of his deposition. On perusal of cross-examination,

nothing turns out from the cross-examination so as to dislodge the version given by this witness with regard to recovery of soldering iron, soldering

wire and micrometer.

12.2 The prosecution has examined PW-22 Dipesh Jain at Exh. 160. On perusal of the deposition adduced by this witness, it becomes clear that

tiffin which was used for planting the bomb was purchased from his shop. He has deposed in his testimony that he is having shop situated near Tin

Darwaja and is doing business of selling gift articles and name of his shop is Shah Sakalchand Kantilal. Police made an inquiry for the first time in

the month of May, 2003 and inquired about the fact as to whether a tiffin was purchased from his shop. He was told the name of the present

Appellant by the police. When the police visited his shop, three persons came along with the police. One person who had purchased the tiffin also

accompanied the person. He could not identify Habib Hawa who was brought by the police. His statement was also recorded by the police and he

could not identify the muddamal article No. 1 and could not say as to whether the same was being sold from his shop.

12.3 On perusal of depositions adduced by PW-4 Abdul Hamid at Exh. 100 and PW-12 Mansingh Sikh at Exh. 118, the role played by the

present Appellant comes to the fore. The Appellant was present at the factory premises of Mohd. Hanif Pakitwala where red colour powder and

pipes were found and recovered at the behest of the Appellant. The deposition given by PW-12 Mansingh Shikh at Exh. 118 clearly establishes

the fact that the shop was shown by the Appellant from where soldering iron, soldering wire and micrometer were recovered at his behest and

panchnama in respect thereof was prepared by the investigating team. Therefore, necessary corroboration is also forthcoming on perusal of the

deposition of PW-12 Mansingh. It is true that PW-22 Dipesh Jain who has been examined vide Exh. 116 could not identify the accused nor

muddamal article which was shown to him during the course of the deposition. However, if we further consider the panchnama which is produced

at Exh. 119 and drawn at the behest of the accused with regard to recovery of the gadgets, then it also supports the prosecution case about the

involvement of the Appellant along with other Appellants in the commission of offence. Receipt of the seizure of muddamal from the shop of the

Appellant which is proved by PI Shri Agrawat and produced at Exh. 282 further corroborates the prosecution story about the involvement of the

Appellant along with other accused in the commission of offence.

12.4 It has been strenuously urged by the learned Counsel for the Appellant that the deposition adduced by PW-4 Abdul Hamid at Exh. 100 is not

trustworthy and it cannot be relied upon to convict the Appellant. Heavy reliance is placed on the deposition adduced by PW-12 Mansingh Shikh

and panchnama of the electrical gadgets prepared at the behest of the Appellant vide Exh. 119. But the learned Counsel for the Appellant

submitted that the same cannot be relied upon, because, electrical gadgets could be found in any electric shop. However, PW-37 H.P. Agrawat-

Investigating Officer in his deposition has indicated the involvement of Appellants in the commission of offence which is corroborated by PW-12

Mansingh as well as panchnama drawn at the instance of the Appellant which resulted in the seizure of electrical gadgets from his own shop and

receipt of seizure of muddamal found from the shop of the Appellant which was proved through deposition of PW-37 H.P. Agrawat at Exh. 281.

Further, deposition of PW-37 makes it clear that the Appellant is involved in the commission of crime along with other Appellants and therefore,

the contention raised by the learned Counsel for the Appellant has no substance and the same deserves to be rejected in view of the discussion

made by us herein above and the reasoning given by the learned Special Judge about the involvement of the Appellant in the commission of offence.

KALIM AHMED @ KALIM MULLA MOHD. HABIB KARIMI, APPELLANT OF CRIMINAL APPEAL No. 1150 OF 2006

[ORIGINAL ACCUSED No. 19 IN POTA CASE No. 7/03 AND ORIGINAL ACCUSED No. 19 IN POTA CASE No. 8/03]:

13. Prosecution has placed reliance on the depositions adduced by PW-8 Mustaq Chandmiya examined at Exh. 113; PW-4 Abdul Hamid,

examined at Exh. 100; PW-10 Sanjay Bhojkar, examined at Exh. 115; PW-24 Jethabhai Parmar, examined at Exh. 190; PW-29 Shoaib Mansuri

examined at Exh. 203; PW-31 A.K. Pandya, examined at Exh.207; PW-33 Malvikaben Bhatt, examined at Exh. 217 and PW-39 N.B.

Raneksha, examined at Exh. 298. Documentary evidence which is relied upon by the prosecution is statement of PW-4 Abdul Hamid recorded u/s

164 of Code of Criminal Procedure at exh. 223; statement recorded u/s 32 of POTA by DCP at Exh. 303; document relating to production of

three accused including the present Appellant which is proved through deposition of witness Shri Ranekshaw at exh. 299; documents relating to

confirmation proceedings proved through deposition of N.B. Ranekshaw at exh. 300; xerox bill of Navrang Mart proved by Shoaib Mansuri at

exh. 68; panchnama exh. 286 drawn at the instance of the Appellant pointing out the place from where the pipes were purchased and panchnama

exh. 69 drawn at the instance of the Appellant pointing out the place of his electric shop.

13.1 Deposition adduced by PW-8 Mustak Chandmiya Sheikh is at exh. 113. He has deposed in his testimony that he is staying opposite Rangila

Police Choky, Shahpur along with his family. He is also aware about the riots which had broken out in February, 2002 after Godhra incident. He

has deposed in his testimony that when the riots had broken out, he had talked with Abdul Razak, in Jeddah in Saudi Arabia. Abdul Razak, at that

time was staying in Juhapura at Ahmedabad and he had a discussion with Abdul Razak with regard to loss of life and damage caused to the

property. Abdul Razak told him once that he knows one person who would render full assistance and he is also having a friend, namely, Abdul

Majid. Abdul Majid had talked to his friend Zunaid residing in Karoda Pole. Zunaid introduced him to Mufti Sufiyan. He also informed Mufti

Sufiyan about the talks he had with Abdul Razak over telephone. Mufti Sufiyan was connected with religious work at Lal Masjid. When he met

Mufti Sufiyan, Abdul Masjid and Zunaid were present. He had talked with Mufti Sufiyan with regard to the talks he had with Abdul Razak

regarding providing economic help to the Muslim community at large. Thereafter, he received another phone call from Abdul Razak from Saudi

Arabia. He informed him about the earlier talks and thereafter, he was informed to have telephonic conversation from PCO. He thereafter talked

to Yasin Farooqui from PCO for sending money from Saudi Arabia. The amount which was to be sent from Saudi Arabia was for protection of

Muslim community. No further detail was given by him. He also conveyed a message to Zunaid, Mufti Sufiyan and Abdul Majid. Thereafter, how

money could be transferred from Saudi Arabia is narrated by the witness. The amount to the tune of Rs. 1.00 Lakh which was received was to be

given to Mufti Sufiyan. Thereafter, message used to be conveyed through E-mail ID. Thereafter, a plan was hatched to cause death of one cobbler

who was sitting near Shahpur Gate and firing was resorted to, but the person was saved. Thereafter, Zunaid, Abdul Majid and Mufti Sufiyan were

sitting in the house of Zunaid and at that time, four to five young boys came there and had a discussion about the blasts which were to be

conducted in AMTS buses. During the talks with Mufti Sufiyan, Kalim and Anas were present and they were talking with him. How bombs were

required to be placed and in what manner they were to be exploded was discussed during the talks. Mufti Sufiyan told them that by way of

encouragement, they would be given Rs. 10,000/-. Thereafter, he left the place and had no idea as to what had happened. He has also deposed

that after the blasts in AMTS buses, he went to Saudi Arabia. At the behest of Mufti Sufiyan, he along with Abdul Razak, Abdul Majid, Yusuf and

Mukhtiyar went to meet Yasin Farooqui. He and Abdul Majid were called by Yasin in a separate room and they were told by him that he is from

Lashkar-e-Toiba [LeT] and inviting them to work. Initially, they were afraid to work, but when the purpose was told to them to cause damage to

Vishwa Hindu Parishad, Bajrang Dal etc and to take revenge of the damage caused to the property of the Muslims, he was afraid to work for

Yasin Farooqui and told his colleague to purchase a return ticket for him for Ahmedabad. He has identified the Appellant during the course of the deposition. He has deposed in his cross-examination that his father is known as Chandmama who is a member of Shanti Samiti. He is doing the work to establish peace and is also awarded by the Police Commissioner in that regard. His father is working for maintaining peace during the period of Rath Yatra. He has admitted in his cross-examination that he went to Jiddah on 30.6.2002 and returned on 9.7.2002. His statement was recorded on 17.7.2003. He had not informed his father or any of his friends prior to recording of his statement on 17.7.2003.

13.2 PW-4 Abdul Hamid is examined at Exh. 100. On perusal of his deposition, it becomes clear that in the aftermath of Godhra incident,

Kalimulla came to his house and took him to the factory of Hanif Pakitwala in Lakhota Pole. He was having factory to prepare school bags. When he went to the factory of Hanif, he himself along with Habib Hawa were present. He saw red colour powder and 7 to 8 pipes were lying in the factory.

13.3 PW-10 Sanjay Bhojkar is examined at exh. 115. He is one of the panch witnesses who was called by the Crime Branch personnel on

28.5.2003. He has been examined by the prosecution with a view to prove the the panchnama of the shop from where electrical gadgets were recovered. However, this witness has not supported the prosecution case.

13.4 PW-24 Jethabhai Parmar is examined at Exh. 190. He is also one of the panch witnesses with regard to panchnama of muddamal articles

which were recovered. Panchnama was prepared in his presence. Muddamal articles were also identified by this witness during the course of his

deposition. In his cross-examination, he has deposed that he had not seen as to whether shop was having registration number or any certificate

under the Shops and Establishments Act.

13.5 PW-29 Shoaib Mansuri is examined at Exh.203. He has deposed in his testimony that he is having shop of hardware since last 20 years

which includes fittings, colour etc. Police from the Crime Branch had visited his shop and inquired about the bill etc. Inquiry with regard to bill was

made. When for the first time, the police had come and inquired about the bill, one person accompanied the police and the police had told that he

was Kalimulla. The bill which was taken for articles was with regarding to fitting of the pipe. The bill was identified by him during the course of the deposition.

13.6 PW-31 A.K. Pandya is examined vide Exh. 207 while Malvikaben Bhatt PW-33 is examined vide Exh. 217 and PW-39 N.B. Ranekshaw

has been examined vide exh. 298. PW-31 Shri Pandya recorded statement of the Appellant u/s 32 of POTA; Shri N.B. Raneksha PW-39 is the

person and officer in whose presence, confirmation proceeding in terms of Section 32[5] of POTA was done. His deposition is also supported by

the deposition adduced by two Investigating Officers who are examined in the present case vide Exhs. 281 and 294.

13.7 The prosecution has also produced statement of PW-4 Abdul Hamid recorded u/s 164 of Code of Criminal Procedure at exh. 223, wherein,

he has mentioned that the statement was given by him voluntarily and without any pressure or coercion. He has further stated that he used to visit

Lal Masjid for reading Isha Namaz at 9.00 O'clock. Kalim who was staying in Mogal Pole used to come there and therefore, he had acquaintance

with Kalim. He knows Mufti Sufiyan since his childhood and at present he is staying in Timba's Pole. He also used to come to Lal Masjid to read

Isha Namaz. When he was sitting on the Ota of Lal Masjid in the month of May, 2003, Kalim Karimi came there and took him to the factory of

Hanif Pakitwala situated in Lakhota Pole. On reaching the factory of Hanif Pakitwala, red colour powder and the pipes were found lying in the

factory. Kalim Karimi and Habib Hawa who were present were talking to Hanif Pakitwala. He knows Anas Machiswala who is staying nearby his

premises. On 3.4.2003, when he was at the Lal Masjid, one person Mufti Rizwan told him to go to Arkam Masjid in Bapunagar. Thereafter, he

went to to Arkam Masjid and met Shoaibkhan Pathan. Mufti Rizwan and Shoaibkhan talked to each other and Mutfi Rizwan told Shoaibkhan that

he was called by Mufti Sufiyan at Al Fazal Masjid in Juhapura. Thereafter, he came to Lal Masjid along with Mufti Rizwan and went to his house.

13.8 Statement of Kalim Ahmed u/s 32 of POTA is recorded before Mr. A.K. Pandya, Deputy Police Commissioner, Zone-3, Ahmedabad,

wherein, he has stated that he is staying in Dariyapur area and having a shop, namely, Hi-tech Electronic Shop for repairing of TV, Tape etc. at

Dariyapur. Lal Masjid is situated near Dhandhor Pole in Kalupur and Imam of Lal Masjid is Mufti Sufiyan who also runs Madressa in the Masjid.

He has also worked in the Masjid at Surat for a period of 12 years and is proficient in giving religious discourse. He is having close relationship

with Mufti Sufiyan. He used to meet him and others. Sohailkhan Manjurkhan Pathan, Athar Parvezkhan, Haji Farooq, Afzalkhan @ Babu, Anas

Machiswala, Hanifbhai Pakitwala, Yunuskhan Hamidkhan, Idrishkhan, Zunaidbhai etc. were also having very close relationship with him. They

used to discuss the events happening in the country as well as international events. Mufti Sufiyan used to impart lectures and religious discourses

and used to encourage others to join ""Jihad"". In the aftermath of Godhra riots, he used to address several people and asked them to join Jihad. In

April, 2002, he sent him, Hanif Pakitwala, Maksud Quality, Kalambhai and Abdul Hamid to Alang for the purpose of ascertaining about the bomb

and the information with regard to the same was also obtained by him. They used to hatch a plan with a view to save property of the Muslim

community. Mufti Sufiyan also contacted Rasool Party who is a member of Abdul Latif Gang. Rafik @ RD and Zunaid Karaliya belonged to Latif

Gang and having close relations with Rasool Party. During the aforesaid period, Mohd. Zahir, Mohd. Tarik and Mohd. Saiyed came in contact

with them and Mufti Sufiyan requested them to provide ammunition and cartridges. One person, namely, Munaf Batawala used to come and meet

Mufti Sufiyan and he used to provide financial help as per the plan chalked out and bomb blasts were carried out in AMTS buses. He along with

Mufti Sufiyan, Hanif, Anas and Habib prepared bombs having electric circuit and Anas on 29.5.2002 along with Mohd. Parvez Gandhi, Yunus

Sareshwala, Riyaz @ Gosu, Rehan Punthawala etc. prepared bombs with a view to blast the same in AMTS buses and ammunition was brought

through Maulana Ahmed. He was given two revolvers by Mufti Sufiyan and thereafter, the same was given to Habib Hawa. Those young persons

having passport were required to be sent for training and Mufti Sufiyan told him and Anas as well as Sohailkhan. He was not having passport,

while Sohailkhan, Anas Machiswala, Shahnawaz Gandhi went from Ahmedabad to Mumbai and from Mumbai to Dubai and from Dubai to

Pakistan for the purpose of taking training in November, 2002. He was told by Mufti Sufiyan after ten days that Rasool Party had informed him

from Pakistan that ISI, LeT, JeM gave guidance and the entire network was created to take revenge in the aftermath of Godhra incident.

Subsequently, Mufti Sufiyan told him that even those who were not having passport were required to go for training to Pakistan and, therefore, on

20.12.2002, Mohammed Parvez, Yunus Sareshwala, Riyaz @ Goru and Munavar Beg @ Captain went to Kolkata and thereafter to Pakistan for

the purpose of training. In January, 2003, Anas Machiswala, Shoaibkhan and Shahnawaz returned from Pakistan. They had taken training in the

camp of Lashker-e-Toiba and also met Rasool Party at Karachi. At that time, Hussien Baba also joined their group. During the meeting with Mufti

Sufiyan, Yunus Khan and Hamid Khan - brothers of Rasool Party used to come and render economic help as well as ammunition. In February,

2003, as per the say of Mufti Sufiyan, he and Anas went to Surat and met Maulana Tahir. He gave two pistols and they returned to Ahmedabad.

He also kept watch over the movements of Chudasama and Barot. Thereafter, a plan was hatched to get rid of Jagdish Tiwari and, therefore, arms

which were in his possession were taken away by Sohail Khan. On 11.3.2003, firing was done on Jagdish Tiwari, but he was saved. During the

communal riots in Paldi and Vasna area, a plan was hatched to get rid of Haren Pandya. The said plan was hatched by Mufti Sufiyan and for that a

meeting was held at Lal Masjid. Thereafter, meetings were held at places such as Lucky Restaurant, Old Jumma Masjid, Juhapura. He along with

Sohail Khan, Anas, Parvez, Yunus, Rehan and Mehman etc. hatched a plan and got rid of Haren Pandya on 26.3.2003. Thereafter, Mufti Sufiyan,

Sohail Khan, Anas and Afdan @ Mehman arranged a meeting at his house. It is also stated that the statement was recorded as per his say and no

pressure or coercion was exerted while recording his statement. The statement given by the present Appellant himself u/s 32 of POTA assumes

great significance. It is this statement given by the Appellant himself which indicates as to in what manner plan was hatched and how blasts were

carried out in AMTS buses with a view to cause maximum damage to the public property and injuries to the innocent persons. This statement was

recorded in free atmosphere and no coercion or threat was exerted or given to the Appellant while recording his statement u/s 32 of POTA. The

prosecution has placed reliance on the documents relating to production of three accused persons including that of Appellant vide Exh. 299 and the

same are also proved by PW-39 N.B. Ranekshaw.

13.9 The letter dated 18.5.2003 which is written to the Chief Metropolitan Magistrate by G.L. Singhal, ACP, Crime Branch, is with regard to

production of the statements of Anas, son of Abdul Rasid Machiswala, Kalim Ahmed @ Mulla Kalim and Shahnawaz, son of Mohammedbhai

Gandhi, and this letter is duly proved by the Chief Metropolitan Magistrate PW-39 Shri N.B. Ranekshaw who has been examined in the present

case vide exh. 298. The prosecution has placed reliance on the documents relating to confirmation proceedings at Exh. 300 and the same are

proved by Chief Metropolitan Magistrate PW-39 Shri N.B. Raneksha in his deposition at Exh. 298. Xerox bill of Navrang Mart is produced at

Exh. 68 and the same is proved by Shoaib Mansuri - PW 29 in his deposition at Exh. 203. Shoaib Mansuri has deposed in his testimony that the

bill with regard to pipe fitting and other material was given by him and it is from his shop and the same was identified by him during the course of

his deposition. Further corroboration is forthcoming from the panchnama exh. 69 drawn at the instance of the Appellant pointing out the place of

his electric shop and the panchnama at exh. 286 drawn at the instance of the Appellant pointing out the place from where papers were purchased.

13.10 Thus, on perusal of the oral depositions adduced by the above mentioned witnesses and the documentary evidence, more particularly, the

statement of the Appellant recorded u/s 32 of POTA which is supported by the depositions adduced by PW-31 A.K. Pandya vide exh. 207,

PW-33 Malvikaben Bhatt vide exh. 217 and PW-39 N.B. Ranekshaw vide exh. 298, indicate the involvement of the Appellant in the commission

of offence. Contention raised by the learned Counsel for the Appellant, in view of the statement of the Appellant u/s 32 of POTA and oral

depositions as well as documentary evidence, as discussed herein above, does not hold water and all the contentions which are raised by the

learned Counsel deserve to be rejected and they are hereby rejected.

ANAS ABDUL RASHID MACHISWALA, APPELLANT OF CRIMINAL APPEAL No. 1148 OF 2006 [ORIGINAL ACCUSED No. 21

IN POTA CASE No. 7/03 AND ORIGINAL ACCUSED No. 18 IN POTA CASE No. 8/03]:

14. The prosecution has placed reliance on the oral depositions adduced by PW-3

Mohd. Samir at exh. 99; PW-8 Mustak Chandmiya at exh.

113; PW-11 Firoz Mewati at exh. 117; PW-21 Khalid Pathan at exh. 159; PW-28 Haiderkhan at exh. 202; PW-31 A.K. Pandya at exh. 207;

PW-33 Malvikaben Bhatt at exh. 217 and; PW-39 N.B. Ranksha at exh. 298. The prosecution has also placed reliance on the documentary

evidence such as statement at exh. 225 of Mohd. Samir recorded u/s 164 of the Code of Criminal Procedure by ACP Shri A.K. Pandya;

statement of Appellant Anas Machiswala at exh. 302 recorded u/s 32 of POTA recorded by DCP Shri Pandya, documents relating to production

of three accused including the present Appellant which is proved through the deposition of witness Chief Metropolitan Shri N.B. Maneksha vide

exh. 299 and the document relating to the confirmation proceedings which is proved by the witness through his deposition vide exh. 300 to the

present case. Deposition of Mohd. Samir PW-3 is recorded at exh. 99. On perusal of his deposition, he has deposed in his testimony at exh. 99

that he is staying at Kadiyakui on Relief Road along with his family. He knows Zuber and Abbas as they were studying together in school. He had

acquaintance with Nisar because of his above friends. Full name of Nisar is Nisar Ahmed Gulamnabi and he is also known as Koyla and the Nisar

who was studying with him was a different person. He believes in Muslim religion and, therefore goes to read Namaz. When he is working in the

shop, he reads Namaz in Fateh Masjid and when he is at his residence, he used to go to Nagina Masjid for the purpose of reading Namaz. Suigara

Masjid is situated in Kalupur area. When he goes to Suigara Masjid, a person from the neighbourhood used to come there to read Namaz. One

person Anas used to come there to read Namaz. He has further deposed that on 29.5.2002 at about 9.30 a.m., Anas came to his shop and asked

for his mobile and he had talked with someone on mobile. He has deposed that he could not say as to with whom Anas had talked on 29.5.2002.

This witness has not supported the prosecution case, and, therefore, he has been declared as hostile witness.

14.1 PW-8 Mustak Chandmiya is examined at exh. 113. He has deposed in his testimony that he is staying in Shahpur area opposite Rangila

Police Chowky. In the aftermath of Godhra incident, riots had broken out in Ahmedabad. He had also talked with some persons and friends in

foreign country. He also talked with Abdul Razak in the city of Jiddah of Saudi Arabia. Abdul Razak, at the material point of time was staying in

Juhapura area of Ahmedabad and he had talked about the damage caused to the Muslim community as well as to their properties. During the

course of his deposition, this witness revealed the name of Kalim [A-19] and Anas [A-21] who were involved in the preparation of the bombs to

be planted in AMTS buses. Thus, how the conspiracy was hatched by the accused and who were involved in the conspiracy has been exhaustively

narrated by this witness so as to indicate the involvement of the Appellant in the commission of offence. This witness implicates two of the five

Appellants which include the Appellant. Learned Counsel submitted that inspite of the statement of PW-8 Mustak Chandmiya is on the record of

the case, neither the investigating agency nor learned Special Judge [POTA] took legally mandated steps u/s 190[1][b] of the Code of Criminal

Procedure to array the said witness as accused in the present case. The instant case is a case where committal proceedings have been given a go

bye under the statute. The learned Special Judge [POTA] has been empowered to take cognizance upon a police report u/s 29 of POTA,

language of which is akin to Section 190[1] of the Code of Criminal Procedure It is now well settled that ""cognizance is taken of the offence and

not of the offender"". Learned Counsel submitted that if the cognizance is always invariably taken of the offence then, bounden duty is cast upon the

Court to see that no person who is found to have been involved in the commission of any offence is allowed to go scot-free. Learned Counsel

placed heavy reliance on the judgment of the Apex Court in the case of SWIL Limited v. State of Delhi reported in [2001] 6 SCC 670 [supra],

more particularly, para-6 thereof, therefore, the same is not repeated here. However, inspite of the settled legal position in the above judgment and

inspite of the fact that there was self-incriminating statement of PW-8 Mustak Chandmiya Sheikh u/s 161 on the record of the learned Special

Court, no steps for arraying this witness as an accused in the present case were taken by the learned Special Court. Learned Counsel submitted

that even the belated application filed by the accused persons u/s 319 of the Code of Criminal Procedure was of no avail for the very reason that

by the time the application came to be preferred, witness PW-8 Mustak Chandmiya Sheikh had already entered into the witness box and had

deposed and therefore in view of the explicit bar contained in Section 132 of the Evidence Act, no proceedings could have been initiated against

him except the proceedings of perjury. Learned Special Judge [POTA] placed reliance on the incriminating evidence of PW-8 Mustak Chandmiya

at Exh. 113 through a mode and method which is completely alien and unknown to law and thereby, the Appellant has been seriously prejudiced.

Learned Counsel submitted that if PW-8 Mustak Chandmiya was arrayed as an accused, there could have been only two modes of bringing

evidence against the co-accused; either his confessional statement u/s 164 of Code of Criminal Procedure could have been recorded or the

Investigating Agency could have made him a witness/approver u/s 306/307 of the Code of Criminal Procedure In the instant case, extra legal

immunity is given to PW-8 Mustak Chandmiya and that too by the investigating agency on its own sweet will which is not permissible in the eye of

law and such practice has been deprecated by the Apex Court in the case of P. Sirajuddin, etc. Vs. State of Madras, etc.,

14.2 PW-11 Firozkhan Mewati is examined at exh. 117. He has deposed in his testimony that he is staying in Baluchavad in Dariyapur and is runs

type classes in a shop which is situated near Kalupur Tower. He used to visit Tin Limdi Masjid near Kalupur Tower for the purpose of reading

Namaz. He did not know the name of Maulana who reads Namaz there. He only knew Anas and identified him during the course of his deposition.

He has further deposed that in the year 2002, in the aftermath of Godhra incident, Anas met him and told that he would give certain thing to be

planted in AMTS bus. Thereafter, he left the premises. He told him that because of the marriage of his sister, he would not be able to carry out the

work. Anas told him that the thing which he is supposed to keep in a bus was a tiffin bomb. Save and except the aforesaid aspect, he had no talk

with Anas about anything else. In the cross-examination, this witness has stated that when Anas first met him, he was asked to place something in

AMTS bus. Thereafter, he met him after 2 days and told him specifically that a tiffin bomb is required to be placed in the bus and he did not place

the tiffin bomb in the bus. However, he did not inform the police about the same. After his talk with Anas, bomb went off on the next day in AMTS

bus and he had also come to know about the same through TV news channel ""Aaj Tak"" as well as through newspapers. The blast took place on

29.5.2002 and as he was afraid to inform the police, he did not go to the police station to inform about the same. His statement was recorded in

the month of June, 2003 by the police. He had talked with Anas on the footpath of the road and had not purchased any weapon from him for his

own protection.

14.3 PW-21 Khalidkhan is examined vide exh. 159. This witness has not supported the prosecution case and therefore, he has been declared as

hostile witness.

14.4 PW-28 Haiderkhan has been examined at exh. 202. He has deposed in his testimony that he is staying in Ashiyana Apartment along with his

family and having his shop in Panch Kuva area. He went to Mecca for the purpose of Haj in 1983 and thereafter again in 1997, he went to

Mecca for Haj pilgrimage. Again in 2001 or in 2002, he went to Mecca for Haj pilgrimage. When the riots had broken out, he was in Mecca and

on 28.2.2002, he returned from Mecca to Ahmedabad. When he went to Mecca for the purpose of Haj pilgrimage, Mufti Sufiyan, Khalil Pehrani

and Farid Manekchand were also present there. He knew Mufti Sufiyan before going to Mecca for Haj pilgrimage. He stayed in Meena where he

was supposed to go for Haj pilgrimage for four days in separate tents. At that time, Mufti Ahmedkhan from Surat had also come there. Mufti

Sufiyan and another person had returned to Ahmedabad on 27th February and he returned on 28th February, 2002. He has stated that he could

not return to Ahmedabad because of the communal riots and Mufti Sufiyan also stayed in a flat in Mumbai. He used to inquire frequently from

Anas and Farooq Shaikh from Ahmedabad. He returned from Mumbai to Ahmedabad on 4.3.2002. He is also a member of Peace Committee.

After the riots, he took agency for distribution of milk and Anas was serving in his agency and he used to pay him Rs. 2000/-. After three months,

Anas left the job. The witness has stated that he was interrogated by the Crime Branch and when he inquired from the Crime Branch officers as to

why he was being interrogated, he was told that Anas had kept tiffin bomb in the godown where he used to keep milk bags. This witness has also

identified Anas, Munavarbeg and Goru during the course of his deposition.

14.5 Depositions adduced by Shri A.K. Pandya PW-31 at exh. 207; PW-33 Ms. Malvikaben Bhatt at exh. 217 and N.B. Ranekshah PW-39 at

exh. 298 also support the prosecution version as well as statement at exh. 225 recorded u/s 164 of Cr.P.C. of witness Mohd. Samir and the

statement at exh. 302 of the Appellant which was recorded u/s 32 of POTA, and the documents relating to production of three accused including

the present Appellant and the documents relating to confirmation proceedings.

14.6 The Appellant gave confessional statement u/s 32 of POTA and the same is produced at Exh. 302. On perusal of the same it becomes clear

that the statement was given by the Appellant voluntarily and no coercion or threat was administered to him while recording his statement u/s

32 of POTA. He was also given sufficient opportunity while recording the statement u/s 32 of POTA. He has stated that on 26.1.2001, in view of

the earthquake he went to hospital for the purpose of rendering help. He came in contact with Mufti Sufiyan in Lal Masjid. He along with Farooq

Shaikh, Haiderkhan Pathan and 100 to 150 other persons went to Bhuj which was affected by the earthquake for the purpose of rendering help.

When they were returning from Bhuj, their vehicle met with an accident near Chotila and he, Mufti Sufiyan, Farooq Shaikh and Haiderkhan were

admitted in V.S. Hospital for the purpose of treatment. Mufti Sufiyan used to give lectures on religion and discuss events which took place in

Afghanistan, Iraq, problems of Kashmir and Chechenya and the impact it would have on the Muslim community. He used to oppose the atrocities

on the Muslims. He also encouraged persons from Muslim community in the aftermath of Godhra incident to raise protest and used to give

instigating speeches. In April, 2002, Mufti Sufiyan told him that with a view to frighten large number of people, tiffin bombs were prepared and

they were required to be planted in AMTS buses. As he was having beard Mufti Sufiyan told him to prepare some other boys. Therefore, Rehan

Riyaz, Shahnawaz, Parvez, Yunus, Ariz Machiswala, Nishar Kolsawala, Sohail, Nasir Pathan and Sanobar were prepared to do the work. Hanif

Pakitwala and Karimulla prepared the powder and pipe as well as circuit with a view to prepare tiffin bombs. How the blast had taken place and

the manner in which the bombs were prepared and how the plan was executed has been elaborately narrated by the Appellant in his statement

recorded u/s 32 of POTA. Even the training which was imparted for the purpose of executing the blasts and to let loose the reign of terror has

been narrated by the Appellant in this statement. Thus, statement which is produced at Exh.302 and given by the Appellant assumes significance as

it was recorded voluntarily and no coercion or threat was administered to the Appellant before recording the statement. Even he was given

sufficient time. Thus, all the formalities which are enumerated in Section 32 of POTA were minutely followed while recording the statement of the

Appellant. Thus, considering the aforesaid statement and the oral depositions adduced by the witnesses and discussed by us threadbare, there is

no doubt about the involvement of the Appellant in the commission of offence. He has vividly narrated in his confessional statement about the

manner in which plan was hatched to prepare the bombs and how the bombs were to be planted in AMTS buses with a view to cause serious

injuries to the innocent people and to cause damage to the public property and to let loose the reign of terror among the innocent persons. We

have also perused the reasoning given by the learned Judge and there is no reason to upset the finding or reasoning given by the learned Judge.

14.7 In view of the foregoing discussion, the submissions canvassed by the learned Counsel on behalf of the Appellant have no merit and the same are hereby rejected.

15. We have considered the other oral depositions as well as documentary evidence which have been relied upon by the prosecution in order to

prove inextricable involvement of the Appellants in the commission of offence. The depositions of the witnesses which are discussed by us in each

of the appeals are material witnesses. Documentary evidence also provide necessary corroboration to the oral depositions adduced by these

witnesses. Apart from the aforesaid evidence, the prosecution has examined investigating officers, namely, PW-37 H.P. Agrawat at exh. 281 and

PW-38 G.L. Singhal at Exh. 294.

15.1 PW-37 H.P. Agrawat is examined at exh. 281. He has deposed in his testimony that he was working as Police Inspector, Crime Branch in

May, 2002. In the aftermath of Godhra incident, communal riots broke out in Ahmedabad, more particularly, in Kalupur, Kagdapith, Vejalpur and

Satellite areas. On 29.5.2002, bombs were also exploded in AMTS buses. Investigation into the explosion of the tiffin bombs in AMTS buses was

entrusted by the Police Commissioner, Ahmedabad to the City Crime Branch and

in pursuance thereof, Deputy Commissioner of Police, Crime

Branch handed over the investigation to him. During the course of the investigation, he recorded statements of the witnesses and prepared

panchnama of the shop of Dipesh Jain. He also prepared panchnama of the place from where tiffin bombs were distributed to various persons. He

interrogated Abdul Rahim, Abdul Hamid and Azizur Rehman during the investigation. He also sent Yadi to Chief Metropolitan Magistrate to

record statements u/s 164 of Code of Criminal Procedure Panchnama with regard to bus route No. 46 from Kalupur Police Station to Income Tax

was carried out. With regard to explosion of bomb in AMTS bus route No. 47/1 in Satellite police station area, route was pointed out by Mohd.

Afzal and Idris Shaikh as from Kalupur to Vijay Cross Roads and panchnama in that regard was prepared in presence of the panch witnesses.

Likewise, panchnama with regard to the place which took place in another AMTS bus route bearing No. 90/6 in Vejalpur Police Station area and

which route was shown by Mohd. Yunus Sareshwala, was prepared from Usmanpura to Paldi area in presence of the panch witnesses and the bus

route No. 13/1 in which blast took place in Kagdapith police station area was pointed out by Nasir Koyla and, therefore, panchnama of the said

route from Isanpur to Jawahar Chowk was prepared in presence of the panchas. Panchnama with regard to the shop of Navrang Hardware was

prepared in presence of Kalim @ Karimi as well as panch witnesses. Panchnama in respect of the shop situated in Sufi Complex was prepared at

the behest of Kalimulla Karimi during the course of investigation. As per the say of this witness, investigation in respect of DCB CR No. 6/03 was

conducted by ACP Singhal, wherein, statement of Mustak Chandmiya was recorded. Copy of the statement was given to this witness and he also

made inquiry with regard to AMTS tiffin bomb blasts and gathered information through the statement of Mustak Chandmiya. He also recorded

statement of Mohd. Samir Siddiqbhai Shaikh. Thus, investigation as per the say of the investigating officer was carried out.

15.2 On perusal of deposition adduced by PW-38 G.L. Singhal at Exh. 294, it becomes clear that he has also carried out investigation in the

present case. As per the say of this witness, on 6.4.2003, he was working as Assistant Police Commissioner, Crime Branch and was entrusted

investigation of DCB CR No. 6 of 2003 on 19.4.2003. As the investigation was conducted by H.P. Agrawat, Police Inspector, Crime Branch in

respect of the tiffin bomb blasts, subsequently, on 19.7.2003, provisions of Prevention of Terrorism Act were invoked and, therefore, he was

handed over the investigation. Some of the accused were arrested by P.I. Shri Agrawat but with regard to offence registered in Kalupur Police

Station, Satellite Police Station and Sanand Police Station, as Anas, Kalim and Shahnawaz were required to be detained, they were detained on

19.8.2003. He also arrested Maulvi Ahmed on 19.8.2003 and referred the matter to the District Collector, for the purpose of obtaining sanction

to prosecute the accused and to file charge-sheet against the accused for the offence punishable under the provisions of Explosive Substance Act.

Sanction was received u/s 50 of POTA and the Appellants were charge-sheeted in DCB Cr. No. 6/03. Statements of the accused were recorded

u/s 32 of POTA. He also recorded statement of Abdul Rahim Zalaluddin on 18.5.2003. Thus, this witness has also carried out the investigation

and recorded statements of the witnesses.

Over and above the depositions of these Investigating Officers, depositions of those who sustained injuries are also carefully perused by us.

15.3 PW-1 Manibhai Mohanbhai Patel has been examined at Exh.94. He has deposed in his testimony that on 26.5.2002, he started bus bearing

route No. 46. He was working as conductor whereas driver of the bus was Govindbhai. Bus route No. 46 is a circular route starting from Kalupur

Terminus through Sarangpur Circle, Raipur, S.T. Bus Stand, Jamalpur, Paldi, C.N. Vidhyalaya, Panjarapole, Vijay Restaurant, Commerce

College, Navrangpura, Income Tax, Shahpur, Delhi Darwaja and then to Kalupur. When the bus was proceeding towards Calico Bridge, a

passenger informed him that one tiffin was lying below the seat in rear portion of the bus. When the bus reached near Kalupur Terminus, he

informed the supervisor Gafurbhai about the unclaimed tiffin in the bus. At that time, another unclaimed tiffin from route No. 49 was also found

and, therefore, people were alerted. Thereafter, FSL officers came there and on opening the tiffin, five bombs were recovered. He had given a

complaint with regard to the same in Kalupur Police Station. The complaint given by him is produced at exh. 95, wherein he has narrated as to in

what manner bombs were planted in tiffin in AMTS buses.

15.4 Injured witness PW-15 Ashwinsinh Ranjitsinh Padhiyar, Police Sub Inspector has been examined at exh. 153. PW-16 Ramjibhai Jivaji

Chaudhari has been examined at exh. 154, PW-17 Bachubhai Sadhubhai Bharwad has been examined at exh. 155 in the present case, whereas

Dr. Mandip C. Shah PW-23 has been examined at Exh. 163.

15.5 PW-15 Ashwinsinh Padhiyar who has been examined at Exh. 153, has deposed in his testimony that he is working as PSI in Bomb Detection

and Disposal Squad. When the incident took place, Police Constable Bachubhai Sadhubhai, Ramjibhai Jivabhai, Jehabhai Jaksibhai Raval A.S.I.,

Driver Pratapsinh, Head Constable Pravinsinh Dabhi etc. were also with him. They received a message on 29.5.2002 at about 12.00 p.m.

Therefore, their team went to Kalupur terminus. When they reached the place of incident, they were told that one bomb is lying there and the area

was cordoned. The situation was such that it was not possible to take bomb to other place for the purpose of defusal and, therefore, procedure for

defusal was required to be carried out at that very place. Thereafter, they put on the clothes for the purpose of defusal of the bomb, Ramjibhai

went to the place where the bomb was lying and the procedure for defusal of the bomb was carried out and it was disposed of. On opening the

tiffin, two spice and one liter were found and the tiffin was having electric timer device. Thereafter, one Police Constable went to the place and cut

the light, removed the power and the pipe containing the explosive was removed and the sample was handed over to the Police Officer for sending

the same to the Forensic Science Laboratory. After completion of formalities at Kalupur, they went to Manipur as they received a call from Bopal.

He therefore went along with the Squad to Manipur. When they went to Manipur, they saw same type of bomb in the tiffin which was placed near

the well situated near the bus. He, therefore, initiated the procedure for disposal of the bomb. Ramjibhai started procedure who was accompanied

by Pratapbhai Dahyabhai and Bachubhai Sadhubhai. Police Inspector Shri Zala was also present and the bomb was defused. Before carrying out

the procedure, sample for sending the same to the FSL was taken out. As attempt was made to take out the material from the bomb, one blast

took place and the Police Constable Bachubhai had sustained injuries on the hand

whereas Ramjibhai sustained burn injuries on both the hands.

The present witness also sustained injuries on the leg and private part. Thereafter, he was admitted in Sainath Hospital for treatment. Bachubhai

and Ramjibhai also took treatment as indoor patient. During the treatment operation was performed by the doctor.

15.6 PW-16 Ramjibhai Jivaji Chaudhari has been examined vide exh. 154. He has also deposed in his testimony about the manner in which the

bomb was defused and how he sustained injuries. He sustained injuries in the hand and also sustained burn injuries. Thereafter, he was taken to

hospital and he remained as indoor patient in the hospital for about 20 days. He had identified the tiffin which was used in the commission of

offence.

15.7 Likewise, PW-17 Bachubhai Sadhubhai Bharwad has been examined at exh. 155. He has deposed in his testimony as to how the bomb was

exploded and he sustained injuries on both the hands while defusing the bomb. He remained as indoor patient in Sainath Hospital for a period of

45 days.

15.8 Apart from the above, PW-18 Pankajbhai Vadilal Darji has been examined at exh. 156. He has deposed in his testimony that incident took

place on 29.5.2002. He was driving the bus route No. 49 which was going towards Manipur. At that time, Ketanbhai Dalwadi was conductor of

the said bus. When the bus reached near Sarangpur, three boys informed the conductor that somebody has forgotten a tiffin. The conductor had

seen light in the tiffin which was placed in the bus. He identified the tiffin which was shown to him during the course of his deposition.

15.9 PW-23 Mandip Chandravadan Shah has been examined at exh. 163. He gave treatment to Ashwinsinh Padhiyar when he was brought to the

hospital on 29.5.2002. He has narrated the injuries sustained by the injured and also gave injury certificate. Papers which were brought by him

were collectively given exh. 114. The certificate which was given by the doctor is produced at Exh. 57. He also gave treatment to Ramjibhai

Jivabhai who also sustained injuries in the bomb blasts on 29.5.2002 and certificate in that regard was given by him vide exh. 84. The treatment

papers are produced collectively at exh. 165.

15.10 PW-2 Narendrasinh Jagdevsinh Jhala, Police Inspector of Sanand Police

Station and complainant of Ist CR No. 79 of 2002 has been examined vide exh.96. He in his testimony has deposed that he came to know at 9.45 a.m. on the date of the incident at Manipur village that one tiffin was recovered. On reaching the place of incident, he met driver and conductor of the AMTS bus. Driver narrated the incident which was taken down by him and the entry with regard to the same was made in the police station. He also informed the higher officer about the tiffin which was recovered. When he was doing the aforesaid process, officers from the FSL and officers from Bomb Difusal Squad also reached at the place of the incident. When the bombs were being defused, one bomb was exploded and PSI Shri Padhiyar, Police Constable Shri Bachubhai and other persons sustained injuries. He had given complaint with regard to the same and it was identified by him during the course of his deposition. The complaint is produced at exh. 97. A yadi was sent to the PSO for the purpose of registering an offence which is produced at exh. 77 which was also identified by this witness during the course of his deposition. Panchnama with regard to the place of incident which was prepared in presence of two panch witnesses was also identified by this witness which is at exh.78. He also recorded statements of the conductor of the bus and the two boys who brought the tiffin as well as the persons from the neighbourhood. The prosecution has examined PW-7 Dilip Khengar vide exh. 106. He was panch witness to the panchnama of the place of the incident. Panchnama of the place for making bombs in respect thereof was prepared in his presence. Place was shown by accused No. 17 - Mohd. Hanif @ Pakitwala. PW-10 Sanjay Bhojkar who is a panch witness is examined at exh. 115. Material of the bomb which was purchased was pointed out by A-19 Kalim Ahmed @ Kalim Mulla Mohd. Habib Karimi. PW-12 Mansingh Sikh, who is a panch witness to the recovery of the articles including soldering iron etc. has been examined at exh. 118. PW-19 Aarifkhan Munnakhan Pathan, who is a witness to the purchase of explosives is examined at exh. 157. PW-20 Altaf Hussain Hajimiya Sheikh who is also witness to the purchase of explosive is examined at exh. 158. PW-24 Jethabhai Punjabhai Parmar who is also panch witness to the panchnama of the bus route which is produced at exh. 69 is examined at exh. 190. PW-25 Narendrabhai Bechardas Kaher, who is a panch witness to the bus

ticket, which is produced at exh. 193 has been examined at exh. 191, while PW-28 Haiderkhan Mustufakhan Pathan who is a witness to the

conspiracy is examined at exh. 202. Another witness who was also witness to the alleged conspiracy, being PW-21 Khalidkhan Mohd.

Naeemkhan Pathan, is examined at exh. 159. These two witnesses have elaborately deposed in their testimony as to how the conspiracy was

hatched and ultimately, tiffin bombs were placed in AMTS buses with a view to cause maximum damage to the innocent people and property at

large. PW-22 Dipesh Parasmal Jain who is vendor of the tiffin is examined at exh. 160 and another person, namely, PW-29 Shoaib

Munaverhussain Mansuri, who is vendor of selling hardware items has been examined at exh. 203. These two witnesses also corroborate the

prosecution story with regard to the conspiracy hatched by the accused in secrecy with a view to cause maximum damage to the public property

and let loose the reign of terror amongst the innocent persons. Likewise, there are panchnama of the scene of offence dated 29.5.2002 at exh.78,

panchnama of drawing of diagram of circuit of tiffin bomb found dated 6.6.2002 produced at exh. 67 and panchnama of the factory shown by

accused-19 Mohd. Hanif Abdul Razak on 1.5.2003 produced at exh.107. Discovery panchnama of soldering machine, clay role and micrometer

etc. used by accused Mohmed Habib Hawa in making tiffin bomb, was prepared on 1.5.2003 in presence of panch witness and the same was

produced at exh.119. Panchnma of the shop of Navrang Hardware Mart pointed out by accused Kalim Ahmed from where pieces of pipes were

purchased for making tiffin bomb was prepared on 28.5.2003 and the same is produced at exh. 286. Panchnama of the shop which was pointed

out by accused Kalim @ Kalimmulla where he had allegedly made circuit for tiffin bomb and recorded on 4.6.2003 is produced at exh. 69. These

documents also further corroborate the prosecution story about the involvement of the Appellants in the commission of offence. Copy of the

dispatch note dated 10.6.2002 is produced at exh. 70, receipt of acceptance of muddamal by FSL dated 10.6.2002 at exh. 71, receipt of

acceptance of muddamal by FSL dated 10.6.2002 at exh. 72 and detailed opinion of the FSL dated 17.6.2002 is produced at exh. 73. These

documents also lend necessary corroboration to the prosecution story indicating inextricable involvement of the Appellants in the commission of

offence. Thus, oral depositions as well as documentary evidence which we have discussed exhaustively herein above establish the entire link

connecting the Appellants with the commission of offence.

16. In light of the aforesaid discussion and on perusal of the material which is on record of the case, it becomes clear that there was not only a

thinking process in the minds of the accused concerned about the sufferings of Muslim community after Godhra carnage, but there was also

consideration of relevant literature by the accused so as to consider the base camps of terrorist activity, availability of the space, requirement of

space in context to the political atmosphere prevailing at the relevant point of time by a particular political party having affinity with a particular

section of the Society. Overall perusal of the material would lead to show that it is to pamper and instigate the religious feelings of a particular

community, namely, Muslim community to take revenge from Hindu community.

17. It is hardly required to be stated that our country is wedded to a secular State policy. The State or a nation as a whole cannot be branded with

religion of a particular class or community. If the citizens of the country start with mental strategy of division based on the religion followed by them,

it may result into, if not division of the nation, but certainly would have deleterious effect on the nation and it would consequently tinker with the

integrity and the security of the nation as a whole. Neither Hindu nor Muslim religion permits taking of revenge for an act or omission or misdeed of

A" from "B" merely because "A" and "B" are following same religion. The human psychology, if considered with the basic human tendency, may at

the most, reach to the taking of revenge on the person who has caused injury, but no religion professes that if one of the persons of "A" religion has

committed a misdeed, the revenge should be taken from all those persons who are having the same religion. If the history of the nation is taken into

consideration, the Hindu religion has accepted various persons who entered the nation following the different religion. The Hinduism, as such, is

based on the principles of "live and let others live", which is popularly known as "Sahanshilta". Hindu religion has thrived for more than 5000 years,

though the number of persons following Hindu religion is less as compared to others in the world and more particularly, the Christians, Muslims and

Buddhists. Therefore, if the feelings of Hindu community are pampered so as to

take revenge for the misdeeds of other person belonging to other religion, the same would strike at the unity of the nation and consequently, may touch the security of the nation. The aforesaid can equally be said if one is to profess and follow the basic principles of Islam being a real Muslim. At this stage, we may profitably extract certain observations of the author Maulana Wahiduddin Khan, who has worked as President of the Islamic Centre, New Delhi and in his book; ""The True Jihad"". He has, while describing the real principles of peace, tolerance and non-violence in Islam, based on the quotations of Quran, observed that Islam never permits to use violence for taking revenge or to use the power to offend somebody, but the same is to be used only as a protective measure and the war is to play the role only when it is unavoidable after all measures to bring peace have failed. Such are the principles known in Hinduism too. It is only by way of self defence, that attack is permissible and not for causing injury to somebody. Such principles are interwoven even in the Indian Penal Code for invoking the right of self defence. The aforesaid glimpse observed by us would highlight the situation that in any secular State or nation, the unity and harmony amongst various sections of the society professing various religion would be of paramount consideration. It is like a family having different way of thinking and sometimes different way of praying to the God. Merely because the ways to get the blessings of the God are different, one cannot divide the family nor the unity and security of the nation should be put to jeopardy on account of such personal feeling of any member of the family or may be consequently a section of the society in any secular nation.

18. Thus, considering the aforesaid aspect, we feel that the prosecution has adduced oral depositions and documentary evidence with a view to prove successfully the entire link connecting the Appellants with the commission of offence. We have also considered the reasoning given by the learned Special Judge [POTA], while convicting the Appellants for the offences mentioned herein above.

19. As we have discussed in the earlier part of our judgment, conviction of Ahmed Hussain Allarakha Mansuri, Appellant of Criminal Appeal No.

1155 of 2006 who is original accused No. 18 in POTA Case No. 7/03 and original accused No. 21 in POTA Case No. 8 of 2003, in our

considered view, cannot be sustained as the prosecution has not successfully established the link connecting this Appellant with the commission of

offence and as there are many chinks in the armour of the prosecution case so far as this Appellant is concerned, he, in our view, deserves to be

acquitted from all the charges levelled against him. So far as the other Appellants being Anas Abdulrashid Machiswala-Appellant of Criminal

Appeal No. 1148 of 2006 [original accused No. 21 in POTA Case No. 7/03 and original accused No. 18 in POTA Case No. 8/03]; Mohd.

Hanif @ Pakitwala @ Theliwala Abdul Razak - Appellant of Criminal Appeal No. 1149 of 2006 [original accused No. 17 in POTA Case No.

7/03 and original accused No. 17 in POTA Case No. 8/03]; Mohd. Habib Mohd. Safi Hawa - Appellant of Criminal Appeal No. 1150 of 2006

[original accused No. 4 in POTA Case No. 7/03 and original accused No. 15 in POTA Case No. 8/03] and; Kalimahmed @ Kalim Mulla Mohd.

Habib Karimi - Appellant of Criminal Appeal No. 1151 of 2006 [original accused No. 19 in POTA Case No. 7/03 and original accused No. 19

in POTA Case No. 8/03] are concerned, their appeals, in our view, deserve to be dismissed; whereas the Criminal Appeal No. 1686 of 2006

filed by the State deserves to be allowed in view of the submissions canvassed by the learned Counsel appearing on behalf of both the sides in so

far as the above Appellants are concerned.

20. It has been strenuously urged by the learned Counsel for the Appellants that the learned Special Judge [POTA] has duly struck the balance

while awarding punishment and punishment which was imposed by the learned Judge can be said to be adequate enough to create deterrence in

the Society for safeguarding the people at large and such punishment was imposed with a view to give an opportunity to the convict to return to the

main stream; while on the other hand, it was vehemently contended by the learned Special Public Prosecutor that punishment imposed by the

learned Special Judge [POTA] is not adequate enough considering the entire gamut of oral depositions and the documentary evidence adduced in

the present case and the manner in which the Appellants have committed the offence in conspiracy with other accused with a view to cause

damage to the public property and to let loose the reign of terror on the innocent persons by which some of the persons sustained serious injuries.

Even the officers of the Bomb Defusal Squad sustained injuries while defusing the bombs and this aspect also deserves serious consideration for

enhancement of punishment of the Appellants as learned Spl. PP submitted that the Appellants waged war against the nation and, therefore, no

lenient view be taken in the matter.

21. Considering the aforesaid aspect and the evidence on record of the case, the Appellants, being Anas Abdulrashid Machiswala-Appellant of

Criminal Appeal No. 1148 of 2006; Mohd. Hanif @ Pakitwala @ Theliwala Abdul Razak - Appellant of Criminal Appeal No. 1149 of 2006;

Mohd. Habib Mohd. Safi Hawa - Appellant of Criminal Appeal No. 1150 of 2006 and; Kalimahmed @ Kalim Mulla Mohd. Habib Karimi -

Appellant of Criminal Appeal No. 1151 of 2006, in our considered view, hatched a conspiracy, procured explosive material, prepared bombs and

placed the same in tiffins in various buses, as we have discussed herein above, with a view to cause damage to the property and to let loose the

reign of terror amongst the people at large. The aforesaid act cannot be viewed lightly taking into consideration the present day scenario, where,

day in and day out, incidents of explosions and loss of life are taking place. We are, therefore, of the view that the ends of justice would be met if

the above Appellants are imposed sentence of life imprisonment u/s 3[2][b] of the Prevention of Terrorism Act, 2002 instead of ten years" RI and

fine of Rs. 5000/- as imposed by the learned Special Judge [POTA] u/s 3[1] of POTA.

22. In view of the foregoing discussion, the following order is passed.

Criminal Appeal No. 1155 of 2006 is allowed and the judgment and order of conviction and sentence passed by the learned Special Judge

[POTA] dated 12th May, 2006 in Spl. POTA Case Nos. 7 and 9 of 2003 is hereby quashed and set aside and the Appellant Ahmed Hussain

Allarakha Mansuri is acquitted from all the charges levelled against him and he is hereby ordered to be set at liberty forthwith, if not required in any

other offence.

So far as Criminal Appeal Nos. 1148/06, 1149/06, 1150/06 and 1151/06 are concerned, the same are hereby dismissed and the judgment and

order of conviction and sentence passed by the learned Special Judge [POTA] dated 12th May, 2006 in Spl. POTA Case Nos. 7 and 9 of 2003

is hereby confirmed.

Criminal Appeal No. 1686 of 2006 preferred by the State for enhancement of sentence imposed by the learned Special Judge [POTA] is hereby

allowed qua Appellants of Criminal Appeal Nos. 1148 of 2006, 1149 of 2006, 1150 of 2006 and 1151 of 2006 and the sentence imposed by the

learned Special Judge [POTA] in the judgment and order dated 12th May, 2006 passed in Spl. POTA Case Nos. 7 and 9 of 2003 qua the

Appellants of these Criminal Appeal Nos. 1148 of 2006, 1149 of 2006, 1150 of 2006 and 1151 of 2006 is enhanced and instead of rigorous

imprisonment of ten years and fine of Rs. 5000/- imposed by the learned Special Judge [POTA] on the Appellants of the above appeals u/s 3[1]

of POTA, the said Appellants shall undergo life imprisonment u/s 3[2][b] of POTA. Rest of the sentences imposed by the learned Special Judge

[POTA] on the Appellants of the above appeals under other provisions of other Acts, stand confirmed. All the sentences imposed by the learned

Special Judge [POTA] as well as by this Court, shall run concurrently.

Criminal Appeal No. 1686 of 2006 preferred by the State for enhancement of sentence imposed by the learned Special Judge [POTA] is hereby

dismissed qua Ahmed Hussain Allarakha Mansuri, Appellant of Criminal Appeal No. 1155 of 2006.

[JAYANT PATEL, J.]

[H.B. ANTANI, J.]

pirzada/- (Per: HONOURABLE Mr. JUSTICE JAYANT PATEL) While concurring with the view expressed by my brother (H.B. Antani, J.), I

find it proper to supplement the reasons on certain aspects as under:

The learned Counsel for the Appellants did contend for Appellant-accused Anas Machiswala that confessional statement recorded u/s 32 of

POTA is neither voluntary since no reasonable time has been given to the accused concerned and it was contended that the requisite procedure

has also not been followed by the learned Magistrate while recording the confessional statement and if such confessional statement is discarded,

the accused would deserve acquittal.

As such, the contentions which have been raised by the learned Counsel for the Appellants for assailing the confessional statement have been

elaborately dealt with by this Court (Coram: Jayant Patel, and Z.K. Saiyed, J.J.) in the case of Mohmed Tahir Mohmed Asif Bakaswala v. State

of Gujarat in Criminal Appeal No. 1800/05 and allied matters decided on 11.05.2010, wherein one of us (Jayant Patel, J.) was party to the said

decision. It was inter alia observed at paras 20 to 27 of the said decision as under:

20. In order to consider the contention, Section 32 of the POTA would be required to be considered, which reads as under:

32. Certain confessions made to police officers to be taken into consideration.-(1) Notwithstanding anything in the Code or in the Indian Evidence

Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a

Superintendent of Police and recorded by such police officer either in writing or on any mechanical or electronic device like cassettes, tapes or

sound tracks from out of which sound or images can be reproduced, shall be admissible in the trial of such person for an offence under this Act or

the rules made thereunder.

(2) A police officer shall, before recording any confession made by a person under Sub-section (1), explain to such person in writing that he is not

bound to make a confession and that if he does so, it may be used against him:

Provided that where such person prefers to remain silent, the police officer shall not compel or induce him to make any confession.

(3) The confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the person makes

it.

(4) The person from whom a confession has been recorded under Sub-section (1), shall be produced before the Court of a Chief Metropolitan

Magistrate or the Court of a Chief Judicial Magistrate along with the original statement of confession, written or recorded on mechanical or

electronic device within forty-eight hours.

(5) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate, shall, record the statement, if any, made by the person so produced and

get his signature or thumb impression and if there is any complaint of torture, such person shall be directed to be produced for medical examination

before a Medical Officer not lower in rank than an Assistant Civil Surgeon and

thereafter, he shall be sent to judicial custody.

21. The Apex Court in the case of State (NCT of Delhi) v. Navjot Sandhu (*supra*) had an occasion to elaborately consider the case law regarding

confessions. The Apex Court after taking into consideration the provisions of POTA, at para 156, observed thus -

The peremptory prescriptions embodied in Section 32 of POTA are:

(a) The police officer shall warn the accused that he is not bound to make the confession and if he does so, it may be used against him (vide Sub-

section (2)). (b) The confession shall be recorded in an atmosphere free from threat or inducement and shall be in the same language in which the

person makes it (vide Sub-section (3)).

(c) The person from whom a confession has been recorded under Sub-section (1) shall be produced before the Chief Metropolitan Magistrate or

Chief Judicial Magistrate along with the original statement of confession, within forty-eight hours (vide Sub-section (4)). (d) The CMM/CJM shall

record the statement, if any, made by the person so produced and get his signature and if there is any complaint of torture, such person shall be

directed to be produced for medical examination. After recording the statement and after medical examination, if necessary, he shall be sent to

judicial custody (vide Sub-section (5)).

The mandate of Sub-Sections 2 & 3 is not something new. Almost similar prescriptions were there under TADA also. In fact, the fulfillment of

such mandate is inherent in the process of recording a confession by a statutory authority. What is necessarily implicit is, perhaps, made explicit.

But the notable safeguards which were lacking in TADA are to be found in Sub-Sections 4 & 5.

22. It is true that Section 32 of POTA does require to the police officer to explain the person concerned in writing that he is not bound to make a

confession and if such person does so, it may be used against him. Such intimation in writing in normal circumstances, is required to be followed,

but the compliance of such provision orally is fully established in the oral evidence of the officer who recorded the confessional statement and non-

contradiction thereof in the cross-examination, whether would not invalidate such confessional statement. Further, when the confessional statement

is found with the corroborative evidence on record coupled with the oral evidence

of the officer who recorded the confessional statement for explaining to the accused that he is not bound to make the confessions and that if any confession is made, such may be used against him, it is not possible to hold that the failure to explain in writing, though the confession by an unimpeachable evidence in the testimony of the Police Officer concerned, would be a sole base for discarding the confessional statement in toto. It appears that in such circumstances, when there is failure to communicate in writing while considering the evidentiary value of the confessional statement, the Court may consider the other oral evidence for such communication and whether such oral communication was made by an unimpeachable testimony of the witness in support thereof, would also be an aspect to be considered. If the prosecution has been able to show by an unimpeachable evidence that such procedure of explaining was followed by the concerned Police Officer, coupled with the circumstances of available corroborative piece of evidence for finding out the genuineness of the confessional statement, the principles of substantial compliance can be applied while considering the evidentiary value of such confessional statements.

23. At this stage, we may also consider the aspects of the alleged noncompliance to the provisions of the statute in recording of the confessional statement or the verification thereof by the learned Magistrate. By virtue of the provisions of Section 463 of Cr.P.C., the alleged noncompliance, though as per the reasons recorded hereinabove, is not the noncompliance, but even if it is considered for the sake of examination, such alleged noncompliance if has not injured the accused in his defence on merits, such confessional statement is required to be admitted. Section 463 of the Code of Criminal Procedure for ready reference reads as under:

Non-compliance with provisions of Section 164 or Section 281.- (1) If any court before which a confession or other statement of an accused person recorded, or purporting to be recorded u/s 164 or Section 281, is tendered, or has been received, in evidence finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it may, notwithstanding anything contained in Section 91 of the Indian Evidence Act, 1872 (1 of 1872), take evidence in regard to such non-compliance, and may, if satisfied that

such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.

(2) The provisions of this section apply to courts of appeal, reference and revision.

24. The Apex Court had an occasion to consider the question as to whether the provisions of Section 463 of the Code of Criminal Procedure

could be applied to the provisions of Section 15 of the TADA while considering the matter for confessional statement. In the case of Ahmed

Hussein Vali Mohammed Saiyed and Anr. reported at 2009(3) SCC 368, it was observed at para 53 as under:

It is also clear that while recording confessional statement, if there is omission to obtain signature of the accused at the end of the confession, the

same is admissible and the omission made by the competent officer is curable in view of the provision contained in Section 463 Code of Criminal

Procedure In the same manner, the Court has held even if there was any omission in respect of the certificate which the competent officer is

required to append under Sub-rule (3) at the foot of the confession, it can be cured as provided u/s 463 of the Code of Criminal Procedure Such

approach is permissible in view of Section 463 of the Code of Criminal Procedure in regard to the omission in recording confession u/s 164

Cr.P.C., the Court has clarified that the same approach can be adopted in respect of confession recorded u/s 15 of the TADA Act.

25. Therefore, in light of the aforesaid, the confessional statement of the accused are required to be considered.

26. On the aspects of compliance to the provisions of Section 52, the Apex Court in the case of State (NCT of Delhi) v. Navjot Sandhu (supra)

observed at para 164 as under:

In our considered view, the violation of procedural safeguards u/s 52 does not stand on the same footing as the violation of the requirements of

Sub-sections (2) to (5) of Section 32. As already observed, Sub-sections (2) to (5) of Section 32 have an integral and inseparable connection with

the confession recorded u/s 32(1). They are designed to be checks against involuntary confessions and to provide an immediate remedy to the

person making the confession to air his grievance before a judicial authority. These safeguards are, so to say, woven into the fabric of Section 32

itself and their observance is so vital that the breach thereof will normally result in eschewing the confession from consideration, subject to what we have said about the judicial custody. The prescriptions u/s 52, especially those affording an opportunity to have the presence of the legal practitioner, are no doubt supplemental safeguards as they will promote the guarantee against self-incrimination even at the stage of interrogation; but these requirements laid down in Section 52 cannot be projected into Section 32 so as to read all of them as constituting a code of safeguards of the same magnitude. To hold that the violation of each one of the safeguards envisaged by Section 52 would lead to automatic invalidation of confession would not be in consonance with the inherent nature and scheme of the respective provisions. However, we would like to make it clear that the denial of the safeguards under Sub-sections (2) to (4) of Section 52 will be one of the relevant factors that would weigh with the Court to act upon or discard the confession. To this extent they play a role vis-à-vis the confessions recorded u/s 32, but they are not as clinching as the provisions contained in Sub-sections (2) to (5) of Section 32.

27. The aforesaid goes to show that the requirement u/s 32 is a must. In case of any breach, it may result into ensuing the confession from consideration subject to the observations made about the judicial custody. It was observed that if there is denial of safeguards in Sub-section (2) to (4) of Section 52, it will be one of the relevant factors to weigh with the Court to act upon the confession or to discard the confession. It was observed that to that extent, it plays role, viz. confession recorded u/s 32, but they are not as clinching as the provisions contained in Sub-section (2) to Sub-section (5) of Section 32. The examination of the contention by the learned Counsel for one of the Appellant, Mr. Raju that there was no compliance to the provisions of Section 52 of the Act may deserve consideration only if there is denial of the safeguard under Sub-section (2) to (4) of Section 52. Nowhere, it is the case of the defence before the Trial Court that the right to consult a legal practitioner was denied to any of the accused or that the information was not communicated about the arrest of the accused to the family members or that the accused was not permitted to meet the legal practitioner. The contention that it is required for the prosecution to prove that the procedure as required u/s 52 of the

Act was followed is ill-founded inasmuch as it is only when the denial to the procedure of arrest u/s 52 comes on record, it may be required for the Court to consider the same while considering the evidentiary value of the confessional statement. It may be recorded that as per the Evidence Act, in normal circumstances, all acts in official capacity are presumed to be done in accordance with law and as per the requirement of law to rebut such presumption or to negative such presumption, it is required for the defence to put forward the case for such denial, if any. Not a single incident is put to any of the witness and more particularly the investigating officers by the counsel for the accused in the cross-examination on such aspects. Therefore, it is not possible to accept the contention that there was any denial of the procedure as required u/s 52 of the POTA. In absence of any denial, such consideration to the compliance of the provisions of Section 52 would hardly have any role to play while considering the evidentiary value of the confessional statement u/s 32 of the POTA.

It was further observed at paras 30 and 31 as under:

30. Section 32 of POTA itself does not provide for any specific time to be given by the concerned police officer to the accused concerned to think about. However, as the requirement of Sub-section (3) is to record the confessional statement in the free atmosphere from threat or inducement, it is to be read that a reasonable time is required to be given by the concerned police officer to the concerned accused to think as to whether he should or he should not give the confessional statement which may be used against him. But such reasonable time may vary from facts to facts and it is not possible to read any express time limit by stipulating the hours or the minutes. The requirement is that time should be given to the accused so as to extract free atmosphere in a cool mind. But if the accused himself has already made up his mind to give the confessional statement and he declares before the concerned police officer that he is not desirous to further think about it and thereafter if the confessional statement has been recorded with the other circumstances came on record that such confession was not under threat or inducement or compulsion, it cannot be held that such a confessional statement would lose its evidentiary value while tracing the guilt of the accused concerned. Had the accused not declared before the concerned police officer that he is not desirous to think further and he

has already made up his mind to give the confessional statement, it may be required for the police officer to give a reasonable time to the concerned accused to think about giving of confessional statement. Hence, in the fact situation of the present case, it is not possible for this Court to accept the contention of the learned Counsel for the accused that the confessional statement would lose its evidentiary value as sufficient time was not given to the accused to think about giving of confessional statement, which may be used against him.

31. The contention that the accused as were not sent to judicial custody cannot be read in absolute as sought to be canvassed and contended by the learned Counsel for the Appellants-accused. Even as per the observations made by the Apex Court in the case of State (NCT of Delhi) v. Navjot Sandhu (supra), normally he may be sent to the judicial custody unless his custody was required to be entrusted, but such is not the requirement in all cases. The Apex Court in the case of State (NCT of Delhi) v. Navjot Sandhu (supra), while considering the similar contention, has observed thus, relevant of which reads as under:

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

(Emphasis supplied)

At the bottom of the verification statement, the learned Magistrate has recorded on 24.06.2003 that the accused is not required to be sent for

medical examination and as the remand has been given by the Court, the custody of the accused is entrusted to the police officer. In the cross-

examination, of the said learned Magistrate, no such defence has been put forward to contend that that entrustment of the custody to the police

was not required or otherwise. On the contrary, the defence is absolutely silent on the said aspects in the cross examination of the learned

Magistrate. Under these circumstances, it is not possible for the us to hold that as the judicial custody has not been ordered by the learned

Magistrate, the confessional statement can be said as vitiated and it would lose its evidentiary value.

If the facts of the present case are considered for examining the contention of learned Counsel for the Appellant concerned, it cannot be said that

sufficient time was not given to the accused to make up his mind for confessional statement nor recording of the confessional statement can be said

as vitiated since the learned Magistrate entrusted the custody of the accused to the police. Further, once the Court is satisfied about the

voluntariness of the confessional statement, it can be made a basis for conviction to the accused. Even if the contention of the Appellants is

considered for the sake of examination about the voluntariness of the statement, then at the most as per the settled legal position, the Court may

verify about the other piece of evidence which may corroborate the confessional statement and if other peice of evidence corroborates the

confessional statement and the Court is satisfied about the genuineness of the confessional statement, the same can be used against the accused

while tracing the guilt of the accused as per the case of the prosecution. The examination of the facts of the present case further shows that there is

enough corroboration to the confessional statement of the accused concerned by the evidence of other witnesses, viz., Mustaqahmed Chandmiya

Sheikh, PW-8, Firozkhan Abdulrashikhan Mevatim, PW-11, Hyderkhan Mustufakhan Pathan, PW-28, and also the pointing out panchnama for

the scene of offence and the material found at the places of the offence where the blasts had taken place in the respective buses. The reference

may also be made to the observations made at paras 35 to 37 of the aforesaid decision of this Court in the case of Mohmed Tahir Mohmed Arif

Bakaswala (supra), wherein this Court observed thus -""35. At this stage, we may refer to the decision of the Apex Court in the case of Ravinder

Singh @ Bittu Vs. The State of Maharashtra, on the aspects of the evidentiary value of the voluntary confessional statement. While considering the

case under Terrorist and Disruptive Activities (Prevention) Act (for short "TADA"), the Apex Court at para 18, after considering its earlier

decision, has observed as under:

18. There can be no doubt that a free and voluntary confession deserves the highest credit. It is presumed to flow from the highest sense of guilt.

Having examined the record, we are satisfied that the confession made by the Appellant is voluntary and truthful and was recorded, as already

noticed, by due observance of all the safeguards provided u/s 15 and the Appellant could be convicted solely on the basis of his confession.

(Emphasis supplied)

36. On the aspects of use of confessional statement, in one case for the other crime, it would be worthwhile to refer to the decision of the Apex

Court in the case of State of Gujarat v. Mohammed Atik reported at 1998 SCC (Cri) 936, it was observed as under:

We have, therefore, absolutely no doubt that a confession, if usable u/s 15 of the TADA, would not become unusable merely because the case is

different or the crime is different. If the confession covers that different crime it would be a relevant item of evidence in the case in which that crime

is under trial and it would then become admissible in the case.

(Emphasis supplied)

37. The Apex Court in the case of Devender Pal Singh Vs. State National Capital Territory of Delhi and Another, while considering the evidentiary

value of the confessional statement and the requirement of the corroboration thereof, majority observed inter alia at para 33, relevant of which

reads as under:

Once this is done the prosecution discharges its burden and then it is for the accused to show and satisfy the Court that the confessional statement

was not made voluntarily. The confessional statement of the accused can be relied upon for the purpose of conviction, and no further corroboration

is necessary if it relates to the accused himself. It has to be noted that in Nalini case by majority it was held that as a matter of prudence the court

may look for some corroboration if confession is to be used against a co-accused though that will be again within the sphere of appraisal of evidence.

Hence, the confessional statement u/s 32 of POTA cannot be discarded nor its evidentiary value is lost while tracing the guilt of the accused concerned. Therefore, the contention of the learned Counsel for the Appellant concerned cannot be accepted.

The learned Counsel for the Appellants did contend that the evidence of Mustaqahmed Chandmiya Sheikh, PW-8, deserves to be discarded since it is an incriminating evidence of the said witness himself and it was also contended that the prosecution without permission of the Competent Court has allowed him to go scott-free and under these circumstances, his evidence is untrustworthy and deserves no credence. It was submitted that in any case, under these circumstances, when the said witness was facing the risk of joining as accused and when the obligation is so made by the prosecuting agency of allowing him to escape, the trustworthiness or the reliability of such evidence would be lost and in the submission of the learned Counsel for the Appellant concerned, if such evidence is ignored or taken out, the accused concerned would be entitled to the benefit and would deserve acquittal.

The contention prima facie appears to be impressive but on a detailed scrutiny, it appears that the accused concerned-Appellants herein were fully aware about the statement made u/s 164 of Code of Criminal Procedure by the said witness Mustaqahmed Chandmiya Sheikh, PW-8 when the charge-sheet was filed and the papers were served upon him. At the relevant point of time, the application was not made by the Appellants concerned herein to array the said witness as accused before the competent court. Further, the Appellants herein allowed the deposition of the witness to be recorded and also cross-examined the said witness. It is only thereafter, having found that the evidence is against him, the attempt was made by submitting the application, which has been rightly rejected by the learned Special Judge. Further, no attempt was made by the Appellants-accused to seek the sanction for prosecution against the said witness Mustaqahmed Chandmiya Sheikh, PW-8 nor the learned Special Judge could take cognizance in absence of sanction. Under these circumstances,

the contention cannot be countenanced to nullify the evidence of Mustaqahmed Chandmiya Sheikh, PW-8 nor such evidence can be discarded for all purposes as sought to be canvassed. Further, even if the contention is considered, to find out the genuineness of the evidence of the said witness, at the most, the Court may trace the corroboration. But such corroboration does exist by the evidence of other witness, viz., PW-8, Firozkhan Abdulrashikhan Mevatim, PW-11, Hyderkhan Mustufakhan Pathan, PW-28. The aforesaid is coupled with the confessional statement of the accused himself u/s 32 of the POTA. Hence, the contention sought to be canvassed by the learned Counsel for the Appellants to discard the evidence of the witness cannot be accepted. In the decision upon which the reliance has been placed by the learned Counsel for the Appellants would hardly apply to the facts of the present case.

As there is appeal for enhancement by the State, we need to consider the question of principles of imposition of sentence upon the accused, who have been found guilty, taking into consideration the seriousness of the offence, injury caused to the innocent persons including officials who played role in defusing certain unblast bombs planted in the buses concerned and we cannot forget the main important aspect that the Court concerned while imposing sentence has to keep in mind the deterrent effect upon the society. At this stage, we may advert to certain observations of the Apex Court on the question of proportionality of punishment in the case of *Siriya @ Shri Lal Vs. State of Madhya Pradesh*, had an occasion to consider the same. It was inter alia observed at paras 6,7,8,9 and 10 as under:

6. The next question is whether any lenience in sentence is called for.
7. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of "order" should meet the challenges

confronting the society. Friedman in his "Law in Changing Society" stated that, "State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

8. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in *Sevaka Perumal, etc. Vs. State of Tamil Nadu*,

9. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

10. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of

really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It has been very aptly

indicated in Dennis Councile MCG Dauth v. State of Callifornia (402 US 183: 28 L.D. 711 that no formula of a foolproof nature is possible that

would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the

gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various

circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such

judgment may be equitably distinguished.

The facts of the present case and the evidence on record clearly goes to show that intention in the mind of accused who are found guilty was

clearly of not only to take revenge but also to create a terrorised atmosphere in the society and public. Further, a planned systematic conspiracy

was hatched to implant bombs at different buses which are being operated in thickly populated area and that too during peak hours. The design to

hatch the conspiracy of blasting of all the tiffin bombs at a time apparently goes to show that innocent persons are targeted for taking revenge

resulting into creation of terrorised atmosphere. We cannot lose sight of the fact that such attempt of terrorising the society and causing injury or

taking away the life in some cases has increased day by day and number of such incidences are many in our country. If the Court shows any

leniency to the accused who are found guilty in such serious offences by showing undue sympathy and thereby imposing inadequate sentence, it

would do more harm to the justice system to undermine the public confidence of the efficacy of law and the society could no longer endure under

such serious threats. Hence, we find that considering the facts and circumstances and seriousness of the alleged offence for which the accused

concerned have been found guilty, it is a fit case to rule out personal circumstances of the accused concerned but to ensure its deterant effect to the

fullest extent for not only safety of the society, for the nation as a whole. Hence, we find that maximum sentence permissible in law deserves to be

imposed upon accused who have been found guilty. Hence, imposition of life sentence upon the accused concerned who are found guilty would be

appropriate, in the facts of the present case.

In view of the above, I agree with the ultimate conclusion recorded by my brother (H.B. Antani, J.) at para 22 of the present Judgment. Hence, ordered accordingly.