

(2007) 09 DEL CK 0036

In the Delhi High Court

Case No : Death Sentence Refrence 2 of 2005 and Criminal Appeal No. 891 of 2005

State

APPELLANT

Vs

Mohd. Arif @ Ashfaq @ Abu Hamad
 Sadakat Ali Vs
State

RESPONDENT

Date of Decision : 13-09-2007

Acts Referred:

Arms Act, 1959 — Section 25, 27, 3
Criminal Procedure Code, 1973 (CrPC) — Section 154, 196, 313, 366
Evidence Act, 1872 — Section 27, 3
Explosive Substances Act, 1908 — Section 4, 5
Foreigners Act, 1946 — Section 14
Penal Code, 1860 (IPC) — Section 118, 120B, 121, 121A, 186

Citation : (2007) 09 DEL CK 0036

Hon'ble Judges : R.S. Sodhi, J;P.K. Bhasin, J

Bench : Division Bench

Advocate : Mukta Gupta, Rajat Katyal and Rajdipa Behura, in Death Sentence Refrence 2 of 2005, R.M. Tufail, Anwar A. Khan, Sunil Sagar and Farooq Choudhary, in Criminal Appeal Nos. 891 and 927 of 2005, Kamini Jaiswal and Shomila Bakshi, in Criminal Appeal No. 892 of 2005, Anil Aggarwal and Sanjay Mishra, in Criminal Appeal No. 907 of 2005, Aman Lekhi, R.K. Chaurasia, J.S. Rai and Rakesh Kumar, in Criminal Appeal No. 944-45 of 2005, Anil Aggarwal, in Criminal Appeal No. 946 of 2005 and Mukta Gupta, in Criminal Appeal Nos. 273 and 504 of 200, for the Appellant; For Respondents/Defendant: R.M. Tufail, Anwar A. Khan, Sunil Sagar and Farooq Choudhary, in Death Sentence Refrence 2 of 2005, Mukta Gupta, Standing counsel, Rajat Katyal and Rajdipa Behura, in Criminal Appeal No. 891 of 2005, Mukta Gupta, Standing Counsel in Criminal Appeal Nos. 892, 907, 927 and 944-45 of 2005, Mukta Gupta, Standing counsel and Sanjay Mishra in Criminal Appeal No. 946 of 2005, I.U. Khan and S.A. Hashmi in Criminal Appeal No. 273 of 2006 and R.M. Tufail, A.A. Khan, Sunil Sagar, Kamini Jaiswal and Shomila, in Criminal Appeal No. 504 of 2006, for the Respondent

Final Decision : Allowed

Judgement

P.K. Bhasin, J.—India achieved independence from the British Raj on 15th August, 1947. Lal Quila in Delhi, which was built by the Mughal King Shahajahan, till then was under the control of the British Army and after achieving independence the Indian Army took it over and it became a symbol of the British power's defeat and since then every year on 15th of August the Prime Minister of independent India unfurls the Indian tricolour flag and delivers Independence Day speech from the ramparts of Lal Quila. This Quila thus became a place of utmost national importance after independence for every Indian. To protect it from being taken over once again by some foreign power various Units of the Indian Army have since then been occupying the Lal Quila. However, that Lal Quila, which was taken over by the British Army during the war of Independence in 1857 from the last Mughal Emperor Bahadur Shah Zafar and which could then be taken over from the British in August, 1947 by India after so many Indian freedom fighters lost their lives in the long fought struggle for independence from the British Raj, was suddenly attacked by some enemies of peace on the night of 22nd December, 2000 and those people armed with sophisticated arms and ammunition barged into that part of the Lal Quila which during those days was occupied by 7 Rajputana Rifles Unit of the Indian Army and started firing indiscriminately from their AK-56 Rifles and gunned down three jawans who lost their precious lives. It is that incident which led to the prosecution of eleven persons whom the police claimed to be the members of a banned militant organisation by the name of Lashker-e-Toiba. Those eleven persons along with many others who, however, could not be arrested were found to have hatched a conspiracy to wage war against the Government of India in order to grab India occupied Kashmir so that it could become a totally Muslim occupied and ruled territory. Out of those eleven accused persons seven were convicted for different offences while four were acquitted. To one of the convicted accused, namely, Mohd. Arif @ Ashfaq @ Abu Hamad (Appellant in Crl. Appeal No. 927 of 2005), death sentence was awarded and for its confirmation a reference was made to this Court by the trial Court u/s 366 Code of Criminal Procedure, 1973. The convicted accused persons filed separate appeals praying for reversal of the judgment of the trial Court. The State also filed two appeals, one of which was for converting the sentence of life imprisonment awarded to two accused persons, namely, Farooq Ahmad Qasid and Nazir Ahmad Qasid (appellants in Crl. Appeal no. of 944-45 of 2005) to death sentence and the other one was for setting aside the acquittal of the three convicted accused persons, namely, Sadakat Ali (appellant in Crl. Appeal no. 891 of 2005), Rehmana Yusuf Farukhi (appellant in Crl. Appeal no. 892 of 2005), and Babar Mohsin Baghwala (appellant in Crl. Appeal No. 946 of 2005 for the offence of conspiracy to wage war against the Government of India and to commit murders of innocent persons. The reference as well as the appeals filed by the convicted accused and the State were heard analogously and the same are now being disposed of by this common judgment.

2. The prosecution case as borne out from the trial Court record is that on the

night of 22nd December, 2000 at about 9 p.m. some terrorists belonging to a banned militant organisation Lashkar-e-Toiba armed with AK-56 rifles and hand grenades entered the Lal Quila and started firing indiscriminately and gunned down three Army jawans of 7 Rajputana Rifles. When the armymen of Quick Army Reaction Team returned the firing towards the intruders they immediately made good their escape by scaling over the rear side boundary wall of the Lal Quila towards the Ring Road side. It appears that the armymen who had fired at the intruders were conscious of the fact that due to darkness their shots could hit their own jawans also and so they did not fire back indiscriminately and none of their shots hit any of the intruders.

3. Information about the incident of firing inside the Lal Quila reached the local police station, i.e. Kotwali police station where that information was recorded vide DD No. 19-A (Ex. PW-15/B) and then Sub-Inspector Rajinder Singh(PW-137) rushed to the spot where he came to know that in the incident of firing two Army jawans had died at the spot itself while the third one had been removed to Army hospital in serious condition. Inspector Roop Lal(PW-234), who was the SHO of Kotwali police station, also reached the spot and he recorded the statement of one Capt. S.P.Patwardhan(PW-189). That statement(Ex. PW-189/A) of Capt. Patwardhan was as under:

1. At 21/05 Hrs. on 22 Dec. 2000 I was in my room in the officers mess and heard firing from the general direction of the M.T. On coming out, I learnt the following.

2. Around 21/05 hrs on 22nd December 2000 (Friday) two persons in dark clothing and armed with AK 56/47 Rifles entered the Red Fort from direction of Saleem Garh gate/Yamuna Bridge. While moving inside they came across a civilian sentry by the name of Abdullah Thakur deployed on duty at 339 (Independent) supply platoon and fired a burst hitting him in the chest and the individual died on the spot. Thereafter the intruders ran and near 7th Raj Rifles MT lines came across Rifleman (barber) Uma Shanker and fired a burst at him due to which the individual died. Thereafter the intruders ran into a room in the unit lines close to the office complex and shot Naik Ashok Kumar, who was seriously injured. The intruders then ran towards ASI Museum complex. They fired in the direction of police guard room located inside the museum. At this stage they were fired upon by the Army quick reaction team. However, intruders escaped into wooded area close to the Ring Road (Mahatma Gandhi Marg). We have recovered some fired/unfired ammunition which we will produce. The area of Red Fort has been sealed off by the army and search of the area is being carried out. At the same time, Police which had been alerted and has cordoned off the area. This is for your information and legal action please. At the time of firing, I was inside my room in the officers' mess.

Sd/-

(S.P.PATWARDHAN)

CAPTAIN,
7 RAJ RIFLE,
RED FORT,
DELHI-06.

On the basis of this statement of Capt. Patwardhan Inspector Roop Lal got a case registered under Sections 186/353/302/307/34 IPC and Sections 25/27 of the Arms Act at Kotwali police station vide FIR No. 688/00(Ex. PW-15/E).

4. At the place of occurrence the investigating officer conducted inquest proceedings in respect of the two killed jawans Uma Shankar and Abdullah Thakur and then their bodies were sent for post-mortem examination. From the place of occurrence the army men had before the arrival of police recovered one live cartridge (Ex. PW-115/38) and many assault rifle fired cartridge cases (Ex. PW-11 5/1-37 & Ex. PW-189/32-71) three magazines (Ex. PW-189/1-3) of Assault Rifles, one of which had 28 live cartridges(Ex.PW-189/4-31). These were handed over to the police vide memos Ex.PW-189/C and Ex. PW-115/A. The empties of cartridges fired in return by Quick Reaction Team of army men(Ex. PW-131/1-11) through Self Loading Rifles (SLRs) which had that day been deposited with the Ammunition Sore of the 7 Rajputana Rifles were also given to the police later on vide memo Ex. PW-131/C.

5. The third victim of the firing who had been rushed to the hospital in serious condition also could not survive and he died on the same night. The cause of death of all the three killed jawans on post-mortem examination by the autopsy surgeon PW-187 Dr. K.L.Sharma was found to be fire-arm injuries. He had also opined that the fire arm used was rifled, powerful and sophisticated as all the bullets had passed through and through the bodies of the deceased.

6. On 23-12-2000 in the morning at about 8.10 a.m. BBC flashed a news on TV that Lashkar-e-Toiba had claimed the responsibility for the shooting incident and on that news reaching the police PW-152 Constable Parveen posted at Kotwali police station entered that news in the Daily Diary vide DD No. 3-A (Ex.PW-152/B). On the same morning somebody found one Assault Rifle lying near Vijay Ghat on the backside of Lal Quila and the local police on being informed about that recovered one AK-56 rifle (Ex.PW-62/1) which was lying near Vijay Ghat. In the magazine of that rifle there were seven cartridges. The rifle and the cartridges were taken into police possession vide memo Ex. PW-62/F. Search for some possible clues around the Lal Quila was also conducted on 23-12-2000 in the morning as the incident had taken place during the night. During that search the police found a polythene bag containing some currency notes of different denominations (Ex. PW-183/11-20) and a piece of paper(Ex. PW-183/B) with a mobile telephone number 9811278510 written on it lying outside the Lal Quila near its rear side boundary wall towards the Ring Road side. As per the further prosecution case, the intruders had escaped from the place of occurrence by

scaling over the rear side boundary wall of the Lal Quila towards Ring Road side and while jumping down from the wall the cash and the said paper slip (Ex.PW-183/B) fell down from their pockets. Those currency notes and the paper slip were seized by the police vide memo Ex. PW-183/A. The police checked the call details of mobile telephone no. 9811278510 from which it transpired that between 7.40 p.m. and 7.42 p.m. on the night of the incident inside Lal Quila two calls were made from this mobile number to telephone no. 0194452918, which was found to be the number of one BBC's correspondent in Srinagar (PW-39) and then around 9. 27 p.m. after the shooting incident, one call was again made from the said mobile number to the said number in Srinagar of BBC correspondent. Three calls were made from the same mobile number to telephone no. 0113355751, which number was found to be that of BBC's correspondent in Delhi (PW-41), between 9.25 p.m. and 9.33 p.m. On further enquiry it was found out by the police that mobile number 9811278510 was being used from two instruments whose IMEI numbers (identification numbers engraved on the mobile handset by the manufacturer) were then obtained from the Mobile service provider ESSAR. Those numbers were 445199440940240 and 449173405451240 and it was also found out that the person who had mobile cash card having the number 9811278510 also had another mobile cash card of ESSAR Company with the number 9811242154. From that phone a large number of calls were found to have been made to telephone number 2720223 which on enquiry was found to be the number of telephone installed at flat no. 308-A, DDA Flats, Ghazipur, Delhi in the name of one Farzana Farukhi and similarly many calls were found to have been made from the number 2720223 to 9811242154. From the call details so collected it was also found that calls had also been made from 9811242154 to telephone no. 6315904 installed at house no. 18-C, Gaffur Nagar, Okhla where a computer centre by the name of Knowledge Plus was being run. Further investigation revealed that the said computer centre was being run by one Mohd. Arif @ Ashfaq who was residing at the aforesaid DDA flat no. 308-A in Ghazipur where telephone having number 2720223 was installed. The police kept the said flat no. 308-A and the computer centre Knowledge Plus under surveillance for two days. During that period the computer centre had remained closed. On getting some secret information a raid was conducted in the night of 25/26.12.2000 at flat no. 308-A, Gazipur and then appellant-accused Mohd. Arif @ Ashfaq was apprehended by the police while he was entering his flat. It is that Mohd. Arif @ Ashfaq who now stands convicted for various offences and sentenced to death. It was found out during investigation that Farzana Farukhi in whose name telephone number 2720223 stood was the divorcee sister-in-law (wife's sister) of accused Mohd. Arif @ Ashfaq and she was also living in the said flat with this accused and her sister Rehmana Yusuf Farukhi and their mother Ms. Qamar Farukhi (DW-1).

7. It is the further case of the prosecution that when cursory search of Mohd. Arif @ Ashfaq was taken by Inspector Ved Parkash (PW-173) immediately after his apprehension one pistol (Ex.PW-148/1) with six live rounds was found and the

same were sealed and taken into police possession. It is also the case of the prosecution that immediately after his apprehension accused Mohd. Arif @ Ashfaq admitted his involvement in the incident inside the Lal Quila and he also gave information to the policemen about the presence of his associate Abu Shamal @ Faizal and arms and ammunition at their hide-out at house no. G-73, Batla House, Muradi Road, Okhla, New Delhi. Pursuant to that information given by accused Mohd. Arif @ Ashfaq some members of the raid team headed by PW-229 Insp. Mohan Chand Sharma were taken by accused Mohd. Arif @ Ashfaq immediately thereafter to house no. G-73, Batla House, Murari Road, Okhla, New Delhi where the associate of Mohd. Arif @ Ashfaq was to be found. Insp. Ved Parkash and some other policemen had, however, remained at that flat in Gazipur for searching that flat. As per the further prosecution case when the raiding team reached House No. G-73, Batla House, Okhla the house was found locked. However, at about 5.15 a.m. one person had gone inside that house and closed the door from inside. The police knocked at the door and asked that person to open the door but that person instead of opening the door started firing from inside upon the police party. The police party in order to save themselves also returned firing with their firearms and during that firing the person inside died and later on he was identified by appellant-accused Mohd. Arif @ Ashfaq to be one Abu Shamal @ Faizal. From that house one AK-56 rifle (Ex.PW-229/1), two hand grenades one of which was kept in a bandoleer (Ex.PW-229/5), two magazines (Ex.PW-229/2 & 3), one of which had 30 live cartridges, some material for cleaning arms kept in a pouch (Ex.PW-229/6) and one khaki coloured uniform (Ex.PW-229/8) were recovered and the same were seized by the police vide seizure memos Ex.PW-229/D&E. Fired cartridge cases of AK-56 rifle used by the deceased terrorist were also taken into police possession. In respect of that incident of firing upon the policemen by the deceased Abu Shamal @ Faizal and the recovery of AK-56 Rifle and ammunition from his house a separate case under Sections 186/353/307 IPC and Sections 4 & 5 of the Explosive Substances Act as well as under Sections 25/27 of the Arms Act was registered at New Friends Colony police station vide FIR No. 630/00. That case, however, ended up in the preparation of a closure report because the accused had already died in the encounter with the police.

8. After the above encounter accused Mohd. Arif @ Ashfaq was brought back to his flat where in the meantime search had been conducted by the policemen who had remained there and during that search one ration card (Ex.PW-164/A) (which was on enquiry found to be forged), driving license in the name of Ashfaq (Ex. PW-13/1), one cheque book of HDFC Bank in the name of Ashfaq, one ATM Card, one cheque book of State Bank of India in the name of Rehmana Yusuf Farooqui, who is the wife of accused Mohd. Arif @ Ashfaq and who was also arrested in this case and now stands convicted under Sections 216/118 IPC, and one pay-in-slip of Standard Chartered Grindlays Bank (Ex. PW-173/K) showing deposit of five lacs of rupees in the account of Nazir & Sons (which firm, as per the prosecution, was of other convicted accused Nazir Ahmad Qasid and the

amount deposited in that account by Mohd. Arif @ Ashfaq was received through hawala from the high-ups of Lashkar-e-Toiba for being distributed amongst the terrorists operating in India) and some other articles were seized. When accused Mohd. Arif @ Ashfaq was brought back there PW-194 SI Harender Singh, who had also reached there when the police team Along with Mohd. Arif @ Ashfaq was leaving for G-73, Batla House and who had been entrusted the case regarding recovery of pistol from this accused which had also been in the meantime registered vide FIR No. 419/2000 u/s 25 of the Arms Act at Kalyan Puri police station within whose jurisdiction Gazipur area fell, arrested Mohd. Arif @ Ashfaq. Then PW-194 also formally searched Mohd. Arif @ Ashfaq and at that time one Motorola mobile handset was recovered from his possession. The number of that phone was found to be 9811278510, which number, as has been noticed already, was found written on the piece of paper which had been recovered from the backside of Lal Quila on 23/12/2000. The IMEI No.(which is the identification number of the handset engraved on the instrument by the manufacturer) of that Motorola handset Ex.PW-194/A was found to be 445199440940240 and the same was taken into police possession.

9. Accused Mohd. Arif @ Ashfaq was then interrogated by SI Harender Singh and this accused made a disclosure statement Ex.PW-148/E. In that disclosure statement he had disclosed about one Assault Rifle having been thrown near Vijay Ghat behind Lal Quila after the incident by one of his associates and one AK-56 rifle and some ammunition behind the rear wall of Lal Quila by another associate of his. It is also the prosecution case that pursuant to the said disclosure statement Ex.PW-148/E made by accused Mohd. Arif @ Ashfaq he had also then taken the police party to the back side of the Lal Quila on 26/12/2000 and from there on his pointing out one AK-56 rifle(Ex. PW-125/1), two magazines(Ex. PW-125/2 & 3) having live cartridges Ex. PW-175/4-35, one bandoleer and four hand grenades were recovered in the presence of ballistic experts (PWs 125 and 202) which were then taken to the police station where the ballistic expert defused the hand grenades and their detonators were separated. The AK-56 Rifle, magazines, cartridges, the hand grenades and their detonators were taken into possession vide memo Ex. PW-218/C. As far as the assault rifle which according to Mohd. Arif @ Ashfaq had been thrown near Vijay Ghat is concerned, as noticed already, the same had already been noticed by somebody lying there and from Vijay Ghat it had been recovered by the police on 23/12/2000. While in police custody accused Mohd. Arif @ Ashfaq had made another disclosure statement(Ex. PW-168/A) on 01-01-01 and pursuant thereto also he got recovered three hand grenades from a place near Jamia Milia University on the back side of his Computer Centre "Knowledge Plus" where they were found hidden under the bushes. The hand grenades were seized vide seizure memo Ex. PW-168/B. In respect of that recovery also a separate case under Sections 4 & 5 of the Explosive Substances Act was got registered at New Friends Colony police station vide FIR no. 3/2001.

10. As per the further prosecution case, accused Mohd. Arif @ Ashfaq was a

resident of Pakistan and had joined Lashker-e-Toiba, an organisation which had been formed with the object of taking over the control of the territory of Kashmir occupied by India, and after getting training for using sophisticated arms like AK-56 rifles, hand grenades etc. he had illegally entered the Indian territory along with arms and ammunition in August, 1999 and camped himself at Sri Nagar in the company of other members of Lashkar-e-Toiba who were already there with the object of undertaking terrorist activities in different parts of India in order to grab the India occupied Kashmir. Towards the achievement of that object only these militants had planned an attack on the Army Force stationed inside Lal Quila. For carrying out terrorist activities money required was collected by Mohd. Arif through hawala channels. During investigation he had led the police to one of the hawala dealers in Ballimaran area in Old Delhi. It appears that that hawala dealers Sher Jamal Afghani and Saherullah got information about the visit of the police and so they left the shop before the arrival of the police. In their absence the police recovered over one lac of rupees from his shop which had been left open. Pursuant to the information given by accused Mohd. Arif @ Ashfaq about his associates in that conspiracy the police caught hold of ten more persons, including his wife Rehmana Yusuf Farukhi. The other nine accused persons were Nazir Ahmad Qasid, Farooq Ahmad Qasid, both of whom are father and son, Babar Mohsin Baghwala, Matloob Alam (appellant in Crl. Appeal No. 907 of 2005), Sadakat Ali, Shahanshah Alam, Devender Singh, Rajeev Kumar Malhotra and Mool Chand Sharma. Besides these persons Mohd. Arif had named many other persons who were also associated with him and involved in the conspiracy to wage war against the Government of India and the Lal Quila shootout but the police could not apprehend them and had got them declared as proclaimed offenders. However, a separate charge-sheet was filed against those proclaimed offenders also. Accused Rehmana Yusuf Farooqui, the wife of accused Mohd. Arif @ Ashfaq was arrested on the allegations that knowing fully well that Mohd. Arif @ Ashfaq was a Pakistani national and had come to India for carrying out terrorist activities married him only a few days before the shooting incident on 8th December, 2000 in order to provide him shelter and for that she had been paid lacs of rupees also by Mohd. Arif @ Ashfaq prior to her marrying him and that amount had been deposited by him in her bank account no. 5817 with State Bank of India. It was also alleged that both were in touch with each other on phone even prior to their marriage. Accused Sadakat Ali was arrested for his having given on rent his property in Gaffur Nagar to accused Mohd. Arif @ Ashfaq for running a computer centre by the name of Knowledge Plus. Sadakat Ali also allegedly was fully aware of the designs of accused Mohd. Arif @ Ashfaq for being in Delhi and despite that he had joined hands with Mohd. Arif @ Ashfaq and had also failed to inform the police that he had let out his premises to a foreigner. Lacs of rupees which used to be received in India from abroad through Hawala channel for being utilised for terrorist activities in India by the militants used to be deposited by accused Mohd. Arif @ Ashfaq in the bank accounts of accused Farooq Ahmad Qasid and Nazir Ahmad Qasid maintained by them in Standard Chartered Grindlays Bank's

branch at Sri Nagar and after withdrawing the money so deposited in their bank accounts by Mohd. Arif @ Ashfaq they were distributing the same amongst their fellow militants for spreading terrorism in India so that the Government of India could be forced to surrender the India occupied territory of Kashmir. Just a few days before the shoot-out inside Lal Quila lacs of rupees were deposited by accused Mohd. Arif @ Ashfaq in the month of November, 2000 in the two bank accounts of Nazir & Sons and Farooq Ahmad Qasid with Standard Chartered Grindlays" branch at Connaught Place, New Delhi. One deposit receipt showing deposit of five lacs of rupees in November, 2000 in the account of Nazir & Sons was, as noticed already, recovered from the flat of Mohd. Arif @ Ashfaq after he had been apprehended on the night of 25/26.12.2000 Therefore, this father-son duo was also arrested in the Lal Quila shoot-out case.

11. Accused Devender Singh, Shahanshah Alam, Rajeev Kumar Malhotra had all allegedly helped accused Mohd. Arif @ Ashfaq in getting a forged learner's driving license no. 9091(Ex.PW-13/C) purporting to have been issued by the Delhi Transport Authority's office at Sarai Kale Khan and showing his residential address as B-17, Jangpura where Mohd. Arif had never stayed. Then after sometime a permanent driving license(Ex.PW-13/1) was also got issued by them in his name from Ghaziabad Transport Authority on the basis of the said learner's license despite their knowing the object for which Mohd. Arif @ Ashfaq was in Delhi and also about his being a member of a militant organisation. Along with the application for license these people had submitted a photocopy of a ration card which showed residential address of Mohd. Arif @ Ashfaq as 102, Kaila Bhatta, Ghaziabad where also he had never lived. In that manner, according to the prosecution, Mohd. Arif got the license from Ghaziabad Transport Authority by cheating by these accused persons. That permanent driving license was then used by accused Mohd. Arif for opening a bank account with HDFC Bank in New Friends Colony, New Delhi and in the account opening form he had shown his permanent address as 102, Kaila Bhatta, Ghaziabad and mailing address as 18, Gaffur Nagar, Okhla, New Delhi which was also not his actual address. In that account he used to deposit hawala money received from his bosses abroad to be used for terrorist activities in India. Accused Babar Mohsin was accused of providing shelter to Mohd. Arif @ Ashfaq in his house in Delhi sometime in February-March, 2000 so that he could prepare a base in Delhi for carrying out terrorist acts in Delhi and it was also alleged against him that during the said period of Arif's stay in Delhi Babar Mohsin had gone along with Mohd. Arif @ Ashfaq on his motor-cycle to different parts of Delhi in order to show various places of importance to Mohd. Arif @ Ashfaq which could be made a target of a terrorist attack. Thereafter Mohd. Arif @ Ashfaq had gone back to Sri Nagar and from there he wrote a letter Ex.PW-10/C to Babar Mohsin Baghwala thanking him for the help extended by him during his visit to Delhi. After Mohd. Arif had claimed in his disclosure to the police regarding Babar Mohsin also being his associate in terrorist activities the police had arrested him also and pursuant to the disclosure statement made by Babar Mohsin he had got

recovered the above referred letter Ex.PW-10/C from the dicky of his motorcycle 07/01/01 which was seized by the police vide memo Ex.PW-10/D. Accused Matloob Alam was having a ration shop in Okhla and accused Mool Chand Sharma was the area inspector of Food & Supply Department and they had helped accused Mohd. Arif @ Ashfaq in getting a forged ration(Ex.PW-164/A) card for him despite knowing that he belonged to a militant organisation and had come to Delhi to carry out terrorist activities. During the investigation it had also transpired that accused Matloob Alam had, in fact, been indulging in the activity of getting forged ration card made for the innocent people coming in his contact and he also used to charge money from those persons for giving them ration cards. Many ration cards were seized by the police during investigation which the card holders claimed to have been given to them by Matloob Alam after taking money from them as a bribe to be paid to the officials of ration department. Accordingly, a separate FIR against Matloob Alam (being FIR No. 65/2001) was registered at New Friends Colony police station under Sections 420/468/471/474/34 IPC. During further investigation it was found out that the ration card(Ex.PW-164/A) recovered from the flat of accused Mohd. Arif @ Ashfaq had been prepared by accused Matloob Alam himself. The handwriting expert(PW-216) had compared the specimen handwriting of Matloob Alam with the handwriting on the ration card Ex.PW-164/A and found both to be of same person. Similarly some of the other rations cards seized by the police from different persons were found to be forged ones having the handwriting of Matloob Alam and the card holders claimed that accused Matloob Alam had got them those ration cards after taking money from them. The prosecution case, thus, against the eleven accused persons who were charge-sheeted was that they had all joined together to launch an attack on the Army establishment inside the Lal Quila so that the Government of India could be pressurised to yield to the demand of the the militants for vacating Kashmir and giving its exclusive control to the muslims.

12. During the investigation the police got examined from the ballistic expert, PW-202 N.B.Bardhan, Senior Scientific Officer-I, CFSL, New Delhi the arms and ammunition which had been recovered at the instance of accused Mohd. Arif @ Ashfaq from behind the Lal Quila as also the AK-56 rifle recovered from Vijay Ghat. The fired cartridge cases which were recovered by the armymen from the place of occurrence on the night of incident itself were also sent to CFSL where after examination the ballistic expert PW-202 N.B.Bardhan had found that those cartridges had been fired from the 7.62 mm AK-56 rifles got recovered by accused Mohd. Arif @ Ashfaq from the backside of Lal Quila and the one recovered from Vijay Ghat and also that both the AK-56 rifles were "Fire-Arms" as defined in the Arms Act and were also in working order. PW-202 had also opined that the magazines of 7.62 mm assault rifles, which had also been seized by the police from the back side of Lal Quila were also in working order and could be loaded into a standard 7.62 mm assault rifle. The hand grenades which had been recovered from Jamia Milia area were got diffused with the permission of

the Court from the experts in that field and then their remnants were also examined by a ballistic expert and it was opined that the components of the diffused/dismantled hand grenades were live ones and the hand grenades were, Therefore, "explosive substance" as defined in the Explosive Substances Act, 1908. The pistol and the cartridges which were recovered from the possession of accused Mohd. Arif @ Ashfaq at the time of his apprehension by the police were examined by another ballistic expert, PW-211 Shri K.C.Varshney, who gave his report Ex. PW-211/A that the said 30"/7.63 mm calibre pistol was in working order and the cartridges which were also of 30"/7.63 mm were live ones and could be fired through 30"/7.63 mm calibre fire-arm. The eleven empties of fired cartridges from SLR rifles of the Armymen which they had fired in retaliation at the time of the incident of shooting inside Lal Quila were also sent to CFSL and the ballistic expert PW-202 had opined that those empties had been fired from SLRs(Self Loading Rifles) made by Ordinance Factory at Kirki, India and also that those cartridges could not be loaded in either of the two 7.62 mm(AK-56) Assault Rifles examined by him.

13. On the completion of the investigation in respect of the different FIRs registered at different police stations, all of which came to be registered during the course of investigation of the incident of shooting inside the Lal Quila, necessary sanctions for the offences under the Arms Act, Explosive Substances Act and u/s 196 Cr.P.C. for some offences under the Indian Penal Code were obtained in respect of some of the a persons and then separate challans were filed in the concerned Courts. In due course all the cases were committed to the Court of Sessions and even though they were registered as separate Sessions cases the same were finally clubbed by the trial Court and the case arising out of FIR No. 688/2000 was treated as the main case in which case alone charges were framed in respect of all the challans and evidence was also recorded in that case only.

14. The learned trial Court framed the following common charge against all the eleven charge-sheeted accused persons:

Accused (1) Mohd. Arif @ Ashfaq @ Abu Hamad s/o Mohd. Akram (2) Rehmana Yusuf Farooqui d/o Nawab Mohammed Yusuf Farooqui (3) Nazir Ahmad Qasid s/o Ghulam Ahmad Qasid (4) Farooq Ahmad Qasid s/o Nazir Ahmad Qasid (5) Babar Mohsin Baghwala s/o Jaleel Ahmad (6) Devender Singh s/o Bhawani Singh (7) Shehenshah Alam s/o Late Anwar Hussain (8) Rajiv Kumar Malhotra s/o Kishan Chand (9) Matloob Alam s/o Mehboob Alam (10) Mool Chand Sharma s/o Har Chand (11) Sadakat Ali s/o Abdul Ali stand charged as under:

That you all Along with your co-accused persons Sabir @ Saharullah, Sher Jaman, Abu Haider, Abu Shakur, Abu Saad, Bilal Ahmad Qawa, Jahoor Ahmad Qasid, Atharuddin @ Athar (now proclaimed offenders) are the members of Lashker-e-Toiba, a militant organization which carries out the disruptive activities and between or about December 99 to 22.12.2000 you all have hatched a criminal conspiracy and collected arms, ammunitions and explosive substances

with a view to commit murder of all those persons, who had come in your way with intent to wage war against the Government of India and to over-awe the Government of India by the use of arms, ammunitions and explosive substances collected by you and have procured driving license, on the basis of forged documents and forged ration cards, cheque book, ATM card of HDFC Bank, cash deposit receipts, photo-album of (alleged) alleged marriage with Rehmana Faruki and mobile phone and opened accounts in different banks and received Hawala money and have also taken shelter at different places and also acquainted with the topography of Delhi to execute conspiracy and in the execution of the said conspiracy had used lethal weapons while committing the crime and mohd. Ashfaq @ Arif also got recovered the weapons which were in his possession and also got recovered three hand grenades from Jamia Milia University Complex and also got recovered AK-57 (AK-56) rifle, two magazines, 32 live cartridges, two live hand grenades and khaki uniforms from house No. D-73 (G-73), Murati Road, Batla House whereas co-accused Abu Samal had taken shelter in the said house and also got recovered Rs.1,11,000/- from the houses of your co-accused received through Hawala transaction from to be used to execute the conspiracy and with a view to enter Lal Quila unlawfully and used lethal weapons and caused the death of Uma Shankar, Abdullah Thakur and Ashok Kumar, all public servants on duty who had resisted the entry and thereby committed an offence punishable u/s 120B IPC within the cognizance of this Court.

15. The learned trial Court framed the following separate charges also against accused Md.Ashfaq @ Mohd. Arif, Nazir Ahmad Qasid and Farooq Ahmad Qasid:

That between or about December 1999 to 22.12.2000 at Pakistan, Jammu and Kashmir and within India particularly in Delhi, you all conspired jointly and severally to wage war against the Govt. of India or conspired to over-awe the Govt. Of Delhi by using criminal force such as the use of AK-56 and AK-47 rifles, hand grenades and cartridges and with a view to cause explosion of the grenades and for that purpose you collected arms, ammunition and explosive substances which were recovered from your possession and on your pointing out and thereby you committed an offence punishable u/s 121-A IPC within the cognizance of this Court.

That you all in furtherance of conspiracy as mentioned in the above charge waged war between on or about December 1999 to 22.12.2000 against the Government of India by the use of AK-56 and AK-47 rifles, hand grenades and cartridges and intentionally committed murder of public servants namely Uma Shanker, Abdullah Thakur and Ashok Kumar with a view to over-awe the Government of India and thereby committed an offence punishable u/s 121 IPC within the cognizance of this Court.

16. Accused Mohd. Arif @ Ashfaq was charged individually also for other offences and those charges are also being re-produced hereunder:

That on 22.12.2000 at about 9.05 PM at Red Fort, within the jurisdiction of P.S.Kotwali, you conspired with your co-accused Abu Haider, Abu Bilal, Abu Saad, Abu Shuker and Abu Shamal (all proclaimed offenders) to commit the murder and intentionally caused the death of Abdullah Thakur, Uma Shanker and Ashok Kumar (now deceased) and thereby committed an offence punishable u/s 302 read with Section 120-B IPC, within the cognizance of this Court.

Secondly, on the aforesaid date, time and place, you conspired along with your co-accused Abu Haider, Abu Bilal, Abu Saad, Abu Shuker and Abu Shamal (all proclaimed offenders) and voluntarily obstructed the public servants namely Abdullah Thakur, Uma Shanker and Ashok Kumar (now deceased) in discharge of their duties as public servants and thereby committed an offence punishable u/s 186 read with Section 120-B IPC, within the cognizance of this Court.

Thirdly, on the aforesaid date, time and place, you conspired with your co-accused Abu Haider, Abu Bilal, Abu Saad, Abu Shuker and Abu Shamal (all proclaimed offenders) and assaulted and used criminal force against Abdullah Thakur, Uma Shanker and Ashok Kumar (now deceased) in the execution of their duties as such public servants or with intent to prevent or deter them from discharging of their duties as such public servants and thereby committed an offence punishable u/s 353 read with Section 120-B IPC, within the cognizance of this Court.

Fourthly, that in between 22.12.2000 to 26.12.2000 you were found in possession while entering in house no. 308A, DDA Flats, Gazhipur, Delhi, within the jurisdiction of P.S.Kalyanpuri one pistol of 7.63 mm bore having engraved upon it 51010255-636 and six live cartridges of 7.63 mm bore (having five cartridges in the magazine and one in chamber) without any requisite license and in contravention of provisions of Section 3 of the Arms Act and thereby committed an offence punishable u/s 25/27 of the Arms Act, within the cognizance of this Court.

Fifthly, in between 22.12.2000 and 1.1.2001 at Jamia Milia University, between staff quarters and boundary wall, within the jurisdiction of PS New Friends Colony, you were unlawfully and maliciously found in possession of three hand grenades of green ARGES which were individually or in combination are explosive substances and you kept the same to cause explosion or conspired to cause explosion in Delhi of a nature likely to endanger life or to cause serious injury to property and thereby committed an offence punishable u/s 4/5 of the Explosive Substances Act, within the cognizance of this Court.

Sixthly, that on or before 22.12.2000 you being the citizen of Pakistan have entered into India unlawfully without any valid document I.e. Passport, permit or permission and thereby committed an offence punishable u/s 14 of the Foreigners Act, within the cognizance of this Court.

17. Against accused Nazir Ahmad Qasid, Farooq Ahmad Qasid, Babar Mohsin Baghwala, Rehmana Yusuf Farooqui and Sadakat Ali charges u/s 216 read with

Section 120-B IPC for harbouring accused Mohd. Arif @ Ashfaq were also framed. Accused Sadakat Ali was additionally charged u/s 188 IPC and Section 14 of the Foreigners Act also. In respect of the allegations of preparation of forged driving license and ration card in the name of accused Mohd. Arif @ Ashfaq this accused along with accused Devender Singh, Shahanshah Alam, Rajeev Kumar Malhotra, Matloob Alam and Mool Chand Sharma were charged under Sections 420/468/471/474/120-B IPC also. Accused Matloob Alam was individually charged under Sections 420/468/474 IPC also for procuring forged ration cards in the names of different persons other than accused Mohd. Arif @ Ashfaq also for which separate FIR No. 65/01 had been registered.

18. Since all the accused persons had pleaded not guilty to the afore-said charges framed against them the prosecution was called upon by the trial Court to adduce its evidence in support of its case. The prosecution then examined as many as 235 witnesses and had also exhibited a large number of documents during the course of prosecution evidence. After the prosecution evidence was over the trial Court recorded statements of all the accused persons and all of them pleaded false implication.

19. Only accused Rehmana Yusuf Farooqi had chosen to adduce evidence in defense and she examined her own mother as the sole defense witness to show that they did not know that accused Mohd. Arif @ Ashfaq was a militant and that the money in the bank account of Rehmana was their own money and not given to them by Mohd. Arif.

20. Upon an analysis of the entire evidence adduced by the prosecution and the voluminous documentary evidence the learned trial passed a judgment running into 373 pages on 24-10-2005 whereby he held seven out of the eleven accused persons guilty as under:

(A) Appellant-accused Mohd. Arif @ Ashfaq was convicted under Sections 120-B, 121 and 121-A IPC, 186/353/120-B IPC, 120-B read with 302 IPC, 468/471/474 IPC and also u/s 420 read with Section 120-B IPC. He was also held guilty u/s 25 of the Arms Act, Section 4 of the Explosive Substances Act and Section 14 of the Foreigners Act.

(B) Appellants-accused Nazir Ahmed Qasid and Farooq Ahmed Qasid were convicted u/s 120-B IPC, 121 IPC and 121-A IPC.

(C) Appellants-accused Rehmana Yusuf Farooqi and Babar Mohsin were convicted under Sections 118/216 IPC.

(D) Appellant-accused Sadakat Ali was convicted under Sections 118/216/188 IPC.

(E) Appellant-accused Matloob Alam was convicted under Sections 420/468 IPC.

21. Accused Mool Chand Sharma, Rajeev Malhotra, Shahanshah Alam and Devender Singh were, however, acquitted of all the charges.

22. Vide order dated 31-10-2005 the learned trial Court awarded the following sentences to the seven convicted accused persons:

(A) Death sentence was awarded to accused Mohd. Arif @ Ashfaq @ Abu Hamad for his convictions under Sections 121 IPC as well as u/s 302 read with Section 120-B IPC. He was also awarded rigorous imprisonment for ten years for his conviction u/s 121-A IPC. For his conviction u/s 4 of the Explosives Substances Act he was awarded life imprisonment. For his convictions under Sections 468/471/474/420 IPC the trial Court awarded him rigorous imprisonment for seven years on each count. u/s 14 of the Foreigners Act he was awarded rigorous imprisonment for five years and three years u/s 25 of the Arms Act. For the conviction u/s 353 IPC he was awarded rigorous imprisonment for two years and rigorous imprisonment for three months was awarded for his conviction u/s 186 IPC. Different amounts of fine with default stipulation were also imposed on this accused. Substantive sentences of imprisonment were ordered to run concurrently.

(B) Accused Nazir Ahmed Qasid and Farooq Ahmed Qasid were both awarded life imprisonment, on each count for their convictions u/s 121 IPC and u/s 120-B IPC and in addition fines were also imposed on them with a default stipulation. They were also awarded rigorous imprisonment for ten years u/s 121-A IPC along with fine for their conviction u/s 121-A IPC. Substantive sentences of imprisonment were ordered to run concurrently.

(C) Accused Rehmana Yusuf Farooqui and Babar Mohsin Bhagwala were awarded rigorous imprisonment for seven years and fine of Rs.10,000/-, with default stipulation, on each count for their convictions under Sections 118/216 IPC. Substantive sentences of imprisonment were ordered to run concurrently.

(D) Accused Matloob Alam was sentenced to rigorous imprisonment for seven years on each count for his convictions under Sections 468/420 IPC and in addition fine of Rs. 10,000/- on each count was also imposed. Substantive sentences of imprisonment were ordered to run concurrently.

(E) Accused Sadakat Ali was awarded rigorous imprisonment for seven years on each count for his convictions under Sections 118/216 IPC. u/s 14 of the Foreigners Act he was awarded rigorous imprisonment for five years and for his conviction u/s 188 IPC he was awarded six months" rigorous imprisonment. Different amounts of fines were also imposed on him in addition to the said sentences of imprisonment. Substantive sentences of imprisonment were ordered to run concurrently.

23. Since death sentence awarded to accused Mohd. Arif @ Ashfaq @ Abu Hamad required confirmation by the High Court a reference was made by the trial Court to this Court as per the provisions of Section 366 of the Code of Criminal Procedure, 1973. The seven convicted accused persons filed appeals challenging their convictions and sentences awarded to them. The State has also filed one appeal challenging the acquittal of accused Rehmana Yusuf Farooqui,

Sadakat Ali and Babar Mohsin Baghwala for the serious offence of hatching conspiracy with co-accused Mohd. Arif @ Ashfaq, Farooq Ahmad Qasid and Nazir Ahmad Qasid to wage war against the Government of India and another appeal for giving death penalty to accused Farooq Ahmad Qasid and Nazir Ahmad Qasid also in place of the sentence of life imprisonment awarded to them by the trial Court for the offences for which their co-accused Mohd. Arif @ Ashfaq had been awarded death penalty. The State has, however, not filed any appeal in respect of four accused persons who were acquitted of all the charges, namely, Devender Singh, Shahanshah Alam, Mool Chand Sharma and Rajiv Kumar Malhotra.

24. We now proceed to examine the prosecution evidence and to make an independent analysis of the same taking into consideration the submissions made on behalf of the convicted accused persons by the counsel representing them and also the submissions made on behalf of the State by its Standing Counsel.

25. As has been noticed already, the learned trial court had framed one charge u/s 120-B IPC against all the eleven accused persons on the allegations that they were all members of a militant organization by the name of Lashkar-e-Toiba and all of them along with other militants belonging to the same organization (who were proclaimed offenders) had hatched a criminal conspiracy sometime between December 1999 and 22nd December, 2000 to wage war against the Government of India by the use of arms, ammunition and explosive substances and also to kill anyone putting obstacles in the achievement of their said objective and it was with that object in view that the army area inside the Lal Quila was invaded and three jawans on duty there were killed. However, the learned trial court after the conclusion of the trial and analysing the evidence adduced by the prosecution came to the conclusion that only accused Mohd. Arif @ Ashfaq (who is now appellant in criminal appeal no. 927/2005), Nazir Ahmad Quasid and Farooq Ahmad Quasid (who are now appellants in criminal appeal no. 944-45/2005) had hatched a conspiracy along with their associates, some of whom were proclaimed offenders and some had already died, to wage war against the Government of India and to commit murders of all those who would be resisting the achievement of their said object, and accordingly convicted all three of them u/s 121 IPC as well as under Sections 121-A/120B IPC.

26. As far as the prosecution case that there was an incident of firing inside the Lal Quila on the night of 22nd December, 2000 and in that incident three Army Jawans of 7 Raj Rifles had lost their lives is concerned, the learned Counsel appearing on behalf of appellant-accused Mohd. Arif @ Ashfaq, Nazir Ahmad Quasid and Farooq Ahmad Quasid, all of whom have been found guilty of waging war against the Government of India, did not dispute the same. That fact is even otherwise duly established from the evidence of various witnesses examined by the prosecution who have deposed about firing incident inside the Lal Quila on the night of 22nd December, 2000. Those witnesses are PW-126 Major Manish Nagpal, PW-128 Ex. Hawaldar Mahesh Chand, PW-131 Subedar D.N. Singh and

PW-134 Hawaldar Dalbir Singh. PW-126 Major Manish Nagpal deposed about the incident as under:

On 22.12.2000 I was posted at Red Fort with 7th Raj Rifle as Captain. On that day some militant had entered Red Fort and they were firing inside the Red Fort. It was about 9.05 pm. I took a self loading rifle from Ha Dalbir Singh and fired at the militants. I fired six rounds in the direction of ring road from where fire was coming. I returned the empty cases to Hav. Dalbir Singh. I made a telephonic call from telephone no. 3278234 to PCR no. 100. I informed the police that firing has taken place inside Red Fort from ring road side.

27. PW-131 Subedar(Retd.) D.N.Singh also deposed about the firing incident inside the Lal Quila as under:

On 22.12.2000 I was working as JCO in 7th Raj Rifle posted at Red Fort. I was in charge of magazine .On that day Major D.K. Singh and Capt. Nagpal were also posted there at Red Fort. On 22.12.2000 at about 9.00 pm militants had attacked at Red Fort and in the attack by the militants, three jawans had lost their lives. Major D.K. Singh took ammunicions from me for returning the fire. Capt. Nagpal had taken ammunicions and rifle from Cot. Hawladar Dalbir Singh. They had fired them and thereafter deposited the empty cartridges with me. In all 11 empties were given to me, five by Maj. D.K.Singh and six by Capt. Nagpal. I kept them separate. In this regard, i had given a detailed report which is signed by Quarter Master Major Deep Singh and said report is Ex. PW-131/A.... I produced the empty cartridges to the police officer on 18-8-2001...and were taken into possession vide memo Ex. PW-131/C.

28. The testimony of PW-134 Hawaldar Dalbir Singh is as under:

On 22.12.2000 I was posted in 7th Raj. Rifle as Hawaldar Quarter Guard where I was got commander In Red Fort. At about 9.05 PM, I heard gun shot report. I alerted the guard. After a short while Major D.K.Singh and Cap. Manish Nagpal reached the Quarter Guard. Both of them took rifles and ammunicions from me. They rushed in the directions from where gun shot was heard and returned the fire. In the morning, they had returned the weapon along with empty cases as throughout the night, they remained busy in searching. Major D.K.Singh deposited five empties and Cap. Nagpal deposited six empties. They also returned the remaining live cartridges. I do not know where they deposited the empties cartridges/cases.

29. PW-144 Maj. D.K.Singh's chief-examination was as under:

On 22.12.2000, I was posted with 7th Raj Rifle and my duty was at Red Fort. At about 9.05 PM, I heard the sounds of gun shot. I went to the spot and found one person of our unit lying on the ground in injured condition. I went to my Quarter Guard and took one SLR and ammunition. Capt. Manish Nagpal and other members of the unit numbering 20/30 were also with me. We went to the direction from where, the gun shot was heard. I returned the fire in the direction

from where the gun shot was heard. I fired five rounds and thereafter I deposited the SLR as well as the five empties with the magazine .The empties and ammunition were given to Mr. D.N.Singh.

30. PW-189 is Major S.P.Patwardhan. He was Captain on the day of the incident. It was on his statement Ex. PW-189/A that the FIR of the shooting incident had been registered at Kotwali police station. His testimony in regard to the firing incident inside the Lal Quila is as under:

On 22.12.2000 I was posted as adjutant 7th Raj. Rifle ,Red Fort, Delhi. I was residing inside the Red Fort. On that day, at around 9.00 pm, I was at my residence when I heard sound of firing. The sound of firing was coming from the direction of MT park. Near my residence there is Officer's Mess. MT park is at some distance from my residence.

On hearing the sound of firing, I immediately rushed in the direction of firing. At the spot I was told that two persons in black dress had come from the direction of Saleemgarh Gate. The two persons were carrying AK assault rifle and when they came across civilians Sentry Abdullah Thakur, they opened firing on him and killed him on the spot. The rifles were AK-56 or AK-47. Thereafter these two persons came in the direction of MT park and came across rifle man (barber) namely Uma Shanker. They opened fire and killed him on the spot. Thereafter these two persons came towards to the unit lines, inside the Red Fort. There inside a room Naik Ashok Kumar was sitting and was fired upon by these two persons and he got injured. Thereafter these two persons crossed over to ASI Area and fired upon armed guard of Delhi Police, at Mumtaz Mahal Museum. By that time, quick reaction team of 7th Raj. Rifle was ready and fired upon these two persons. Quick reaction team comprised of Major Nagpal, Major Devender Singh, and some jawans. Quick reaction team fired in the direction of Mumtaz Mahal Museum but their fire was constraint due to the presence of guards and servant quarters. Thereafter, these two persons probably scaled the rear wall of Red Fort and escaped. We could not find them.

31. Besides the aforesaid five witnesses the prosecution had examined some other army men also who were present inside the Lal Quila at the time of the incident and they had deposed about whatever they had done after the firing had taken place and the terrorists had escaped. PW-109 Capt. Man Singh(Retd.) claimed that on 23-12-2000 he was a Subedar in 7 Rajputana Rifle which was stationed in Lal Quila. He had collected the dead body of the deceased Naik Ashok Kumar, who had died on account of fire injury in the Lal Quila, from the Subzi Mandi mortuary and the dead body was handed over to the relatives of the deceased. PW-110 Subedar Satya Vijay Singh had deposed that on 22-12-2000 he had taken the injured Ashok Kumar to hospital as he had sustained injuries on account of bullet fire at Lal Quila. Two other jawans Abdullah Thakur and Uma Shankar were also injured in Lal Quila. PW-115 Subedar Ashok Kumar and PW-116 Hawaldar Ramesh were also posted at Lal Quila on the date of the incident and they have deposed about recovery of live and fired cartridges from

the place of incident on 22-12-2000. PW-121 Major (Dr.)Shashank was also posted at Lal Quila as Medical Officer on the date of incident. He claimed that when he reached the place of occurrence he saw dead bodies of Abdullah Thakur and Uma Shankar having bullet injuries lying there and on examination he had found both of them dead. PW-122 Naik Suresh was also from 7 Rajputana Rifles and posted at Lal Quila on the date of incident. He claimed to have found the deceased Naik Ashok Kumar lying in injured condition at the place of occurrence having bullet injuries. He also claimed to have taken Ashok Kumar to Army Hospital. PW-128 Mahesh Chand was a Hawaldar on the date of incident and was posted at the Lal Quila. He also claimed to have reached the spot on hearing the sound of firing and his having seen Abdullah Thakur and Uma Shankar lying dead. To none of these witnesses who have spoken about the firing incident inside the Lal Quila it was suggested in cross-examination on behalf of any of the accused persons that no such incident of firing had taken place as had been claimed by them. PW-187 Dr. K.L.Sharma, who had conducted post-mortem examination on the dead bodies of the three deceased Abdullah Thakur, Ashok Kumar and Uma Shankar, has proved his reports which were exhibited as Ex. PW-187/A, Ex. PW-187/B and Ex. PW-187/C. This witness had on post-mortem examination of the dead bodies of the three deceased found that all of them had died as a result of fire-arm injuries and that the fire-arm used was rifled and was a powerful and sophisticated one. None of the accused persons had cross-examined this witness.

32. However, in the cross-examination of PW-234 Inspector Roop Lal, who was the Additional SHO of Kotwali police station, it was put to him on behalf of accused Mohd. Arif @ Ashfaq that it was not a case of attack in the army camp inside the Lal Quila by any terrorists but, in fact, army jawans posted there had themselves resorted to firing amongst themselves after consuming liquor. This witness categorically had refuted that suggestion. Learned Counsel for the appellant - accused Mohd. Arif @ Ashfaq had submitted before us that this is evident from the fact that the army authorities had not even allowed the police to come inside the Lal Quila for a couple of days after the incident. Learned Counsel also submitted that it was stated by PW-189 Major S.P.Patwardhan in his chief-examination itself that immediately after the incident the entry points at the Lal Quila had been closed and because of that the arrival of the police had also been delayed. Mr. Tufail's contention was that if actually it was an incident of firing by some terrorists then the Army officials would not have closed the entry points and the local police would not have been stopped from reaching the place of occurrence immediately. That Army officials wanted to hush up the incident is also evident from the fact that before the arrival of the police PW-189 Major Patwardhan had removed from the place of occurrence the fired cartridge cases and which fact was also stated by PW-189 S.P.Patwardhan in his chief-examination itself.

33. We may straightaway reject the aforesaid argument of Mr. Tufail that the incident of firing inside the Lal Quila could be a handiwork of some of the

colleagues of the deceased persons. As observed already, to none of the army witnesses who were present inside the Lal Quila at the time of shooting incident it was suggested that the army jawans themselves had fired at each other during a drunken brawl. So, the suggestion put to PW-234 Inspector Roop Lal to that effect has no value. There is also no evidence to show that the Army authorities had not allowed the local police to enter the Lal Quila immediately after the incident. A suggestion was put to PW-189 Major S.P. Patwardhan, on whose complaint the case about the shooting incident inside the Lal Quila had been registered, that the civil police was not permitted by the Army authorities to investigate the matter for two days and that, in fact, the police was informed about the incident after two days. The witness denied those suggestions. There is no doubt that PW-189 had claimed that immediately after the occurrence he had ordered the gates to be closed and for that reason it took some time for the police to reach the place of occurrence. However, from this statement of PW-189 Major Patwardhan it cannot be inferred at all that he intentionally wanted to avoid the arrival of the police at the place of occurrence because of the fact that the firing had not been resorted to by any outsider but it was some insider's job. PW-51 Col. A.Mohan was those days posted as Col. General Staff, Head Quarter, Delhi Area in Delhi Cantt. He had deposed that on 22-12-2000 he had received an information from Commanding Officer, 7 Rajputana Rifles, Lal Quila that some civilian had entered Lal Quila and had started firing and then he had informed Police Control Room. In his cross-examination also it was sought to be elicited that he had ordered sealing of the Lal Quila. However, he denied having given any such direction to the Commanding Officer and at the same time he also clarified that the Lal Quila was sealed as per the standard operating procedure by the Commanding Officer. So, if as a precautionary measure as a result of invasion of the Army camp by some intruders Major Patwardhan had ordered immediate closure of the entry gates it could be only to ensure that in that situation of panic no further untoward incident takes place. PW-137 Sub-Inspector Rajinder Singh was, as noticed already, entrusted the DD No. 19-A regarding the intimation received at Kotwali police station about the firing incident inside the Lal Quila and immediately he had rushed to the spot. He has deposed that on reaching the place of occurrence he had come to know that some persons had entered inside the Lal Quila and had resorted to firing and caused injuries to some persons out of whom two had already died and one had been removed to the hospital in injured condition. In cross-examination on behalf of accused Mohd. Arif @ Ashfaq it was asked from him as to how he had entered inside the Lal Quila and his answer was that he was allowed to enter on production of his identity card. However, no suggestion was put to him that the army officials had not permitted the police to enter Lal Quila. PW-160 constable Parduman Kumar, PW-183 Sub-Inspector Sanjay Kumar, PW-229 Inspector Mohan Chand Sharma and PW-234 Inspector Roop Lal had all claimed to have reached the place of incident within no time. They were also put suggestions in cross-examination that they were not, in fact, allowed entry inside the Lal Quila by the Army authority on 22-12-2000 and all of them had denied those

suggestions. We have no reason whatsoever to disbelieve the evidence of Major Patwardhan as also of these police witnesses to the effect that immediately after the occurrence police had rushed to the spot.

34. The fact that police had been permitted by the army authorities to enter inside the Lal Quila immediately after the incident and to conduct necessary investigation gets strengthened from the fact that FIR in respect of the shooting incident had been registered at Kotwali police station at 11.30 p.m. on the night of incident itself on the basis of statement Ex. PW-189/A of Major S.P. Patwardhan. The FIR at the local police station could not have been registered on 22-12-2000 if actually the police officials had not been allowed to enter Lal Quila. Regarding the registration of FIR No. 688/2000, Ex. PW-15/E, the submission of learned Counsel for the appellant - accused Mohd. Arif was that the same was, in fact, not recorded at the time mentioned in it but, in fact, it was actually recorded quite belatedly which is evident from the fact that PW-189 S.P. Patwardhan on whose statement the FIR was finally recorded has admitted in his cross-examination that copy of the FIR was received by him on 24-12-2000 through Sipahi Anil Kumar. Learned Counsel also submitted that if actually FIR had been recorded on the day of incident itself on the complaint of Major S.P. Patwardhan the FIR would have been having his signature at Serial no. 14 but the FIR does not bear his signatures. All these facts, according to the learned Counsel, show that the FIR was, in fact, not registered on 22-12-2000 and was ante-timed and in order to hush up the firing incident involving army people only the army authorities and the police officials after due deliberations had decided to convert it into a case of terrorist attack and to frame innocent persons. On the point of ante-timing of the FIR and absence of signature of the complainant on the FIR Mr. Tufail also placed reliance on two judgments reported as State of Maharashtra Vs. Ahmed Gulam Nabi Shaikh and others, and Ashok Nivruti Desai and Others Vs. State of Maharashtra, . We, however, do not find any substance in these submissions of the learned Counsel for appellant - accused Mohd. Arif @ Ashfaq. It is not the case of PW-189 S.P. Patwardhan that copy of the FIR No. 688 was not supplied to him by the police despite demand and so just because he has stated in cross-examination that the copy of the FIR was handed over to one sipahi Anil on 24-12-2000 it cannot be said that before that date the FIR had not been registered. The prosecution had placed on record carbon copy of the FIR bearing the initials of the area Magistrate in token of his having received the same in Court on 23-12-2000. That totally rules out the possibility of FIR being recorded after 23-12-2000. There was no delay in registration of the FIR. And signature of the first informant(PW-189) was there on his statement Ex. PW-189/A on the basis of which formal FIR was recorded at the police station. So there was no non-compliance of Section 154 Cr.P.C. also. The judgments cited by the learned Counsel do not advance his arguments. In the case of Delhi High Court it was found that there was a delay in registration of FIR and in the case of Bombay High Court the investigating officer had not taken signature of the injured complainant on his statement which was converted into

an FIR. In the present case neither there was any delay in the recording of the FIR at the police station nor is it a case where formal FIR was recorded on the basis of statement having no signature of the informant.

35. As per the prosecution case the scene of occurrence was inspected by the police officials including police photographer and ballistic experts and they had noticed bullet marks on the walls, furniture etc. at different place inside Lal Quila. In this regard we may refer to the relevant portion of the examination-in-chief of police photographer PW-160 Praduman Kumar who had also reached the spot immediately after the occurrence and had photographed the scene of occurrence. He deposed as under:

On 22.12.2000, I was posted at photo section, North District, PP ISBT, Kashmere Gate. On 22.12.2000 at about 10 PM, I was summoned to Red Fort. There Addl. SHO, Kotwali PS met me. I went inside Red Fort and the Addl. SHO told me that a terrorists attack had taken place there and I was asked to take photographs. I took photographs inside Red Fort.... There were foot marks, chappal, empties of fired cartridges and blood, bullet marks on the wall. I started taking photographs from supply depot and took photographs from supply depot gate.... Photograph EX. PW 160/4 is also of training centre showing bullet mark on the wall.... Photograph Ex. PW160/6 is of training centre showing bullet marks.... Photo Ex. PW160/9 is also of training store showing bullet marks and blood marks on the wall.... Photo Ex. PW160/13 is of training store wall showing bullet marks.... Photo Ex. 160/17 shows chair with bullet marks....

36. PW-202 N.B.Bardhan is one of the experts from CFSL who had also inspected the scene of crime on 23/12/2000. He had deposed that when the expert team had visited Lal Quila on 23/12/2000 they had examined different places inside Lal Qila and had observed bullet hit marks on the walls of the site of incident and also on the body of the military vehicle. PW-122 Naik Suresh who was also present at the scene of occurrence and had after the incident inspected the scene of crime had also noticed bullet marks at different places on a wall which he had shown to the police officials. He had also deposed about the police having seized from the spot one rack, a plastic chair which were also having bullet marks, vide memo Ex. PW-122/B. On this aspect of the matter the evidence of PWs 122, 160 and 202 was not challenged in cross-examination. These witnesses had also deposed that the dead bodies of the two deceased jawans were lying at different places and the third jawan who had also been injured in the incident was lying in injured condition at different place. So, the fact that bullet marks were noticed at different places inside Lal Quila and the bodies of the two deceased jawans were lying at different places and the third injured jawan was also lying at different place also rules out the possibility of the incident being a result of some fight amongst the jawans posted there. If as a result of some rivalry amongst some of the jawans including the three deceased some fight had taken place there would not have been seen bullet marks at different places.

So, we do not find anything on record from which it could be inferred that the

incident inside the Army Camp at the Lal Quila could be as a result of soldiers fighting amongst themselves after consuming liquor. We are also of the view that if actually that had happened we see no reason as to why army authorities would be hesitant to disown that and would concoct such a big story by involving the army officers at the highest level and the entire police force. And why should have the police obliged the army men in the concoction of such a story?

37. Having rejected the argument that the incident of firing inside the Lal Quila was an insider's job we now proceed further to find out from the evidence adduced by the prosecution as to whether appellant - accused Mohd. Arif @ Ashfaq, his wife Rehmana Yusuf Farooqui, Farooq Ahmad Quasid, Nazir Ahmad Quasid, Sadakat Ali and Babar Mohsin Baghwala were responsible for the incident inside the Lal Quila which took the lives of three soldiers of the Indian Army on the night of 22nd December, 2000. Undisputedly there is no witness who claims to have seen the faces of the persons who had intruded inside the Army establishment of 7 Rajputana Rifles stationed inside the Lal Quila. The evidence adduced by the prosecution is that of some of the army men posted inside the Lal Quila on the date of incident whose testimonies are to the effect that somebody had fired indiscriminately inside the army occupied portion of the Lal Quila and when the army men fired back towards the intruders they escaped from there by scaling over the rear wall of the Quila towards Ring Road side. Their depositions are also to the effect that because of that firing by the intruders two jawans had got injured and died at the spot itself while another one died of firearm injuries in the Army Hospital where he was rushed immediately. The prosecution had sought to establish that the incident of firing inside the Lal Quila on the night of 22nd December, 2000 was the job of some militants belonging to a banned militant organisation by the name of Lashkar-e-Toiba whose mission was to spread terror in India in order to liberate India occupied Kashmir since Muslims living there were being tortured and killed by the Indian Security Forces. The case projected before the trial Court was that the eleven charge-sheeted accused persons were also the members of that militant organisation and all of them had conspired with each other and some other militants of the same organisation to wage war against the Government of India and it was pursuant to that conspiracy that some militants had intruded into the army Unit inside the Lal Quila armed with highly sophisticated arms and ammunition and had resorted to indiscriminate firing thereby killing three soldiers. The learned trial Court, vide his impugned judgment had come to the conclusion in para no. 426 that:

All these factors unmistakably point to the fact that accused Md. Arif @ Ashfaq was not only part of conspiracy to wage war against Government of India but also actually participated in the firing incident inside Red Fort, in which three army jawans Naik Ashok Kumar, Uma Shankar and Abdullah Thakur were killed.

The learned trial Court had also returned the findings in para no. 430 of the impugned judgment in respect of accused Farooq Ahmad Quasid and Nazir Ahmad Quasid to the effect that:

Then the only conclusion that can be drawn is that they(the trial Court was referring to accused Farooq Ahmad Quasid and Nazir Ahmad Quasid) were in close contact with Md. Arif @ Ashfaq and were party to the conspiracy hatched at the instance of Lashkar-e-Toiba to wage war against the Government of India and to commit other acts of violence and forgery. By receiving such a huge amount of money and distributing the same to different militants in collusion with Md. Arif @ Ashfaq, they have actively abetted the waging of war against the Government of India. The circumstances suggest that they had also an active role in sending accused Md. Arif @ Ashfaq to Delhi.

38. These conclusions had been arrived at by the learned trial Court on the basis of circumstantial evidence brought on record by the prosecution. We will now examine those circumstances and the evidence adduced to establish the same in respect of each of the three accused Mohd. Arif @ Ashfaq, Farooq Ahmad Quasid and Nazir Ahmad Quasid who already stand convicted for the offence of waging war against the Government of India and killing three jawans and also in respect of appellants-accused Rehmana Yusuf Farooqui, Sadakat Ali and Babar Mohsin Baghwala whose conviction the State is now seeking even u/s 120-B IPC for which offence also they were tried Along with other eight co-accused but were acquitted by the trial Court.

39. As per the prosecution case appellant-accused Mohd. Arif @ Ashfaq (appellant in Crl Appeal No. 927 of 2005) was the first person to be arrested in connection with the incident of firing inside the Lal Quila. We shall now notice here the prosecution case as to how appellant-accused Mohd. Arif @ Ashfaq came to be arrested. As per the prosecution case, on the morning of 23rd December BBC news channel gave the news on television that Lashkar-e-Toiba had claimed the responsibility for the incident inside the Lal Quila. We have already noticed that immediately after the shooting incident somebody had called up two BBC correspondents (PWs 39 & 41) for claiming the responsibility for the said incident as a loyalist of the militant organisation Lashkar-e-Toiba. On the same morning the police officials while making search of the area around Lal Quila found a piece of paper, Ex. PW-183/B, lying outside Lal Quila near its rear side boundary wall towards the Ring Road. On that piece of paper one mobile phone no. 9811278510 was written. The prosecution case is that the intruders had escaped from the place of occurrence by scaling over the rear side boundary wall of the Lal Quila for which purpose a rope was used which was also recovered by the police and while jumping down that piece of paper must had fallen down from the pocket of one of the intruders. The police officials thought that the mobile number written on the piece of paper recovered from the back side of the Lal Quila might take them towards right direction for solving the crime. So, on checking from the concerned mobile phone service provider(ESSAR) the investigating officer found that whosoever had used phone number 9811278510 was also having another mobile connection with the 9811242154 and had been making calls from these numbers to a telephone installed at DDA Flat No. 308-A, Gazipur, Delhi and also to a telephone installed at premises no. 18-C, Gaffur

Nagar, Okhla where a computer centre by the name of "Knowledge Plus" was being run. That computer centre was found to be of one Mohd. Arif @ Ashfaq. From the call details of the said mobile number it also transpired that calls were made to one correspondent of British Broadcasting Corporation(BBC) in Sri Nagar(PW-39) and one to another BBC correspondent based in Delhi(PW-41) immediately after the incident of shooting inside the Lal Quila and some calls had been made to telephone no. 94452918 a couple of hours before the incident also. It appears that the militants wanted to gain international publicity that way. The prosecution case is that the BBC correspondent based in Sri Nagar was one Altaf Hussain(PW-39) and the BBC correspondent based in Delhi was PW-41 Ayanjeet Sain and both of them had claimed that on the night of 22-12-2000 they had received telephone calls from someone claiming to be from Lashkar-e-Toiba that they had attacked the Lal Quila and had killed two persons. PW-39 claimed that he had contacted the police headquarters in Delhi after receiving that call. All these circumstances gave rise to the suspicion against the person living at Flat No. 308-A, Gazipur and the owner of "Knowledge Plus" computer centre at 18-C, Gaffur Nagar, Okhla. The police then kept premises no. 308-A, Gazipur and 18-C, Gaffur Nagar under surveillance for a couple of days. During that period the computer centre by the name of Knowledge Plus had remained closed. As per the further prosecution case, a raid was then conducted at the afore-said DDA flat no. 308-A in Gazipur on the night of 25/26-12-2000 and during that raid one person by the name of Mohd. Arif @ Ashfaq was apprehended while he was entering the flat. It is that Mohd. Arif @ Ashfaq who is one of the appellants now before this Court and it is he who stands sentenced to death by the trial Court.

40. Learned Counsel for accused Mohd. Arif @ Ashfaq had, however, submitted before us that no doubt Mohd. Arif @ Ashfaq was arrested from his flat no. 308-A, Gazipur on the night of 25/26-12-2000 but the prosecution story regarding arrest of this accused as a result of recovery of one paper slip having mobile telephone no. 9811278510 written on it from the back side of Lal Quila is totally false and had been cooked up only to show that the police had reached up to this accused as a result of telephone calls having been found to have been made from the aforesaid mobile number to and the other number 9811242154 the telephones installed at his residence and at his computer centre while the fact is that this accused was arrested and falsely implicated in this case at the instance of PW-20 Nain Singh, who was employed with Research and Analysis Wing(RAW) of the Government of India and was also doing some illegal money business in which Mohd Arif @ Ashfaq was helping him. It was also submitted that Nain Singh knew PWs Insp. R.S.Bhasin and Insp. Ved Parkash who had also some money dealings with Nain Singh. When Mohd. Arif @ Ashfaq demanded his share of money from Nain Singh he got annoyed and in connivance with Insp. R.S.Bhasin and Inspector . Ved Parkash got him implicated falsely in the present case. In this regard the learned Counsel drew our attention to the following statement made by accused Mohd. Arif @ Ashfaq u/s 313 Cr.P.C.:

I used to work for "X"-branch, RAW since 1997. In the last days of June 2000, I

had come to Kathmandu to give some documents to Sanjeev Gupta and I had reached there from Pakistan by a PIA flight on my passport no. 634417. In Pakistan, there is political party by the name of Paktoonmili party and RAW is supporting that party for the last 30-35 years. Shri Sagir Khan was a member of that party and he was arrested by the police of Pakistan along with my younger brother. I received this news in Kathmandu and I spoke to Sanjiv Gupta in this regard. My cousin had also advised me not to return to Pakistan for time being. Thereafter, Sh. Sanjeev Gupta advised me to go to India and accompanied me up to Raxol and from there I came to India by train. He gave me the address of Nain Singh and telephoned Nain Singh on 6834454 for accommodate me. Thereafter, Nain Singh gave me a room in his house for my stay. He advised me not to tell my real name and address to any one and to disclose myself as a resident of Jammu. Nain Singh used to do the business of money lending and I used to help in maintaining his accounts. After about one and a half month I asked Nain Singh to get me some job as my money had already run out. Thereafter, he got me opened the computer centre. Thereafter, Nain Singh got sent to me some money through Sanjeev Gupta and the amount was around seven lacs, but Nain Singh did not disclose about receiving this huge amount and whenever I used to question him, he used to avoid my question. Thereafter, I contacted my family members and they asked to speak to Sanjeev Gupta and I spoke to Sanjeev Gupta, who told me about sending Rs. Six lacs fifty thousand/ Seven lacs to Nain Singh. Thereafter, on the asking of Sanjeev Gupta, Nain Singh got my bank account opened in HDFC Bank and also collected cheque book and it was shown to me by him. Thereafter, I was also interested in the business of Cable networking but Nain Singh asked me to sit on the computer centre. My cheque book used to remain with Nain Singh and he got only one cheque signed by me. Whenever I needed money I used to take it from Nain Singh in the sum of Rs. 500/- to Rs. 1000/-. One Chaman Lal in Chandni Chowk and one Sardar ji in Karol Bagh are also engaged in the business of money lending and I used to collect money from them on behalf of Nain Singh. On the birthday party of his son Nain Singh got me introduced to Ins. R.S. Bhasin and Ins. Ved Parkash. Thereafter, when I persisted in demanding my money from Nain Singh, Nain Singh used to get annoyed and ultimately got me involved falsely in this case. Nain Singh took advantage of my personal circumstances as I could not go back to my home in Pakistan. On 25.12.2000 Nain Singh called me from computer centre to his house on the plea that Ins. R.S. Bhasin and Ins. Ved Parkash had to some information from me and I accordingly came to his house. Thereafter those two persons who were in plain clothes and had come to my house in a white maruti zen car took me to a flat in Lodhi Colony where both the Inspector along with one Sikh officer present. There I was interrogated by me about my entire back ground. There after I was dropped at the house of Nain Singh by the same person. Nain Singh was not present at his house but his wife informed me about the telephonic call received from my in-laws at Gazipur regarding dinner in the evening. I tried to make a call to my in-laws but could not get through. Thereafter I took a bus and reached the house of my in-laws. I asked my in-law

whether they had made a call to which they replied in negatives. I had reached there at about 8 to 8.30 pm and had finished our dinner at 10.00 pm, when the police party raided the house and were initially taken by us as dacoits as they had entered the house by jumping the walls. The police party threatened us that if we spoke much, we would be shot dead. Thereafter my brother-in-law and myself were brought by the police to Lodhi Colony. In the Lodhi Colony my signatures were obtained on blank papers. Initially I was not willing to sign blank papers on account of this policemen present there abused me and when I retorted I was tortured so much that my legs, mouth, noses started bleedings....

41. As far as the prosecution case is concerned evidence has been adduced to show as to how Mohd. Arif @ Ashfaq came to be arrested for his involvement in the incident of shooting inside the Lal Quila. In this regard the relevant portions of the evidence of PWs-183, 229 and 234 are being reproduced here. PW-183 SI Sanjay Kumar deposed as under:

On 22.12.2000 I was posted as in charge PP Red Fort. In the night, I was present in the police post. At about 9.45 pm, Addl. SHO Ins. Roop Lal gave a message directing me to reach inside Red Fort in front of CO office. I reached there alone. There Inspector . Roop Lal, SI Rajinder and adjutant of Raj Rifle Sh.Patvardhan was present. Other army officers, police officers were also present. There Sh.Patvardhan after consulting his senior officials, handed over a written complaint to Inspector Roop Lal and the said hand written complaint is marked as mark A. IO made his endorsement Ex.PW-15/D thereupon and handed over the same to SI Rajinder Singh for getting a case registered in the police station. Inspector .Roop Lal inspected the scene of crime at the instance of Sh.Patvardhan. Inspector .Roop Lal prepared a site plan accordingly....

Thereafter, we were sent at the rear side of the Red Fort in different groups for search. Outside the Red Fort, just below the rear wall, a chit was found along with some Indian currency notes. On the chit a mobile telephone no. was written and the number was 9811278510. The Indian currency notes comprise 10 notes of Rs.100/-each, 8 notes of Rs.50/- each, one note of Rs.10/- and one of Rs.5/- and the total currency is amounting to Rs.1415/-. Thereafter, Inspector .Roop Lal was called to the place where these things were found. I handed over the slip and the notes to him. Inspector .Roop Lal was accompanied by SI Naresh and other staff. Inspector .Roop Lal pasted a chit on which the telephone No. was written on a separate paper. The currency notes were converted into a parcel and were sealed with the seal of RL. From that place earth control sample was also lifted. The same was also sealed with the seal of FL. The currency notes, chit with telephone no. and earth control sample were taken into police possession vide no. Ex.PW-183/A. I can identify the chit of telephone No. as well as currency notes if shown to me....

At this stage the slip of telephone no. fixed on a white paper on which I had put my signature is seen by me and it is the same which was recovered by me and now Ex.PW-183/B. It was fixed on a white paper which also bears my signature

at point A and now is Ex.PW-193/C....

PW-229 Inspector . Mohan Chand Sharma deposed as under:

On 22.12.00 I was posted in Special Cell, Lodhi Colony as Inspector. On that day, I was present in my office. At about 10.20 p.m. I received instructions from my seniors to reach Red Fort. I along with my staff reached Red Fort at about 10.45 p.m. Inside the Red Fort seniors officials including Commissioner of Police and senior Army Officers were present. There I came to know that terrorists belonging to Lashkar-e-Toiba had shot dead three army personnel's with assault rifles and there after escaped.

Statement of Capt. SP. Patwardhan was recorded and there after the case registered. I along with other staff examined the area through which the terrorists were reported to have escaped. But nothing was visible on account of darkness. On the next day at 9.00 a.m. I Along with staff again started the search inside the Red Fort. At the rear of the Red Fort just below the back wall of Red Fort from where the terrorists had jumped a slip with telephone no. 9811278510 and a polythene bag containing currency notes amounting to Rs. 1415/- was found.

By that time the investigation of the case had been transferred to Special Cell, Northern Range. I have seen the slip on which the telephone no. 9811278510 is written in blue ink is the same which was recovered from the behind of Red Fort wall from where the terrorists had escaped. The said slip is Ex. PW-183/B. ACP Rajbir was instructed to carry out the invest. in respect of said telephone no. 9811278510. He had assigned this job to me....

On 11.12.00 its IMEI was changed to 449173405451240. On 14.12.00 a telephone call was made at 12.54.35 at telephone number 0116315904. Said call was made from Connaught place cell ID. Some calls were made to pager no. 01949696 at Sri Nagar. During this period some calls were also received on this mobile no. from some shop and STD booths.

On 22.12.00 three calls were made from the said mobile no. to BBC Sri Nagar and BBC, Delhi at about 21.27.30, 21.33.14 and 21.33.45 hours.

...The telephone no. 9811278510 was used on the day of commission of this crime and calls were made to BBC, Sri Nagar and BBC, Delhi. One most used landline number was 2720223 which stands in the name of Farzana Farukhi R/o 308-A, DDA Flats, Gazi Pur. After getting the print out we found another number 6315904. This telephone no. is installed at Knowledge Plus Computer centre at 18-C, Gaffur Nagar, Okhla. This was the only telephone number except PCO from which the call was made to telephone no. 9811278510 on 14.12.00 at 12.54.35 hours. After getting the telephone no. at 308A, DDA Flats, Gazi Pur and of Knowledge Plus computer centre Gaffur Nagar we confined the investigation to these two points. Secret surveillance was maintained at the two points. Knowledge Plus computer centre remains shut for two days after the incident

inside the Red Fort. On secret enquiries it was revealed that Knowledge Plus belongs to one Md. Arif, residing at Gazi Pur....

PW-234 Inspector Roop Lal deposed as under:

On 22.12.2000, I was posted as Addl. SHO, PS Kotwali. SHO, Kotwali Inspector . Ashok Saxena was on leave and I was officiating as SHO, Kotwali. At 9.25 pm, I was in patrolling and I received a wireless message that firing was going on inside Red Fort and I was directed to reach the spot. Immediately I went inside Red Fort in my official vehicle. The driver of the official vehicle and my wireless operator were also with me. When I reached inside Red Fort in front of office of Commanding Officer SI Rajender Singh, one constable whose name I do not remember and Capt. S.P.Patvardhan were present there. SI Rajender Singh had reached the spot in pursuance of DD No. 19A. The SI Rajender Singh handed over DD entry No. 19A to me for further action. Capt. S.P.Patvardhan gave me a statement. The copy of the DD entry is Ex. PW-15/B. The statement of Capt. S.P.Patvardhan is Ex. PW 189/A and he signed at point A. I carried out cursory examination of the place of occurrence. I also went to M.I. room and other places inside Red Fort. In the MI room dead bodies of Abdullah Thakur and Uma Shankar were lying. I also came to know that one injured Ashok Kumar had been removed to Army Hospital. I thereafter made endorsement on the statement of Capt. S.P.Patvardhan and it was dictated by me to SI Ashok Kumar. My endorsement is Ex. PW 15/D and I had signed the same at point A. I sent the rukka to PS through SI Rajender Singh for registration of the case....

...SI Sanjay Kumar also produced before me a polythene containing Indian currency notes worth Rs.1415/-. The notes consisted of ten notes of Rs.100/- each, eight currency notes of Rs.50/- one note of Rs.10/- and one note of Rs.5/- There was also a paper slip on which telephone No. 9811278510 was written. I pasted the paper chit on a paper, and signed the same. I have seen the paper chit/slip and the same is Ex.PW-183/B.... SI Sanjay Kumar informed me that this polythene containing the currency notes and telephone slip was found behind the rear wall of the Red Fort....

42. PW-173 Inspector Ved Parkash is one of the police officials who was a member of the raiding party which had gone to flat no. 308-A, Gazipur, Delhi. His deposition regarding the apprehension of appellant - accused Mohd. Arif @ Ashfaq from the said flat is reproduced as under:

On 25.12.2000 I was posted in special cell Lodhi Colony, Delhi. At about 9.45 pm Inspector .Mohan Chand Sharma informed me on telephone that an accused by the name of Ashfaq Ahmad involved in Red Fort shoot-out was about to come at house No. 308-A, DDA Janta Flat, Gazipur, Delhi. I conveyed this information to ACP Rajbir Singh. He directed me to constitute a raiding party. I constituted a raiding party consisting of Inspector . Ram Swarup Bhasin, SI Zile Singh, SI Upender, SI Manoj Dixit, W/SI Jai Shree, W/SI Omwati, Ct. Mahipal Singh and other staff including myself....

At about 11.15 pm, we reached house No. 308-A, DDA Flats, Gazipur, Delhi. When we were proceeding towards Gazipur, Inspector .Mohan Chand Sharma met us on the way and he was also joined in the raiding party along with his staff. We had reached there in govt. vehicles consisting of a gypsy and a private car. On reaching the aforesaid house No. 308A, we knocked the doors of many other residents, but nobody had opened. No public person was available at the spot. At around 11.15 pm, we raided the aforesaid house, but Ashfaq was not there. However, three ladies were present in the aforesaid house. We laid a trap at the aforesaid house, as the accused was expected to come there. At about 12.45 am, Ashfaq today present in court, came to the aforesaid house and knocked at the gate and he was overpowered by us. He was wearing kurtay-payjama. On carrying out a search of his person, a pistol was recovered from the right side dub of his payjama. The pistol was checked and five cartridges were found. Magazine and one cartridge was in the chamber of the pistol. A sketch of the pistol as well as the cartridge was prepared by me and same is already Ex. PW-148/A and is witnessed by SI Zile Singh. The pistol and cartridges were put in a pullinda and were sealed with the seal of VP. Form CFSL was also filled up and the said parcel was taken into possession vide Ex. PW-148/B....

43. PW-229 is Inspector Mohan Chand Sharma. He was also a member of the raiding team which had apprehended appellant - accused Mohd. Arif @ Ashfaq from his flat in Gazipur. Regarding the raid conducted at flat no. 308-A, Gazipur the deposition of this witness is reproduced as under:

...On 25.12.00 surveillance was maintained at the two addresses to locate Md. Arif. I Along with my team was at Gazi pur on 25.12.00. SI Daya Sagar was deputed at "Knowledge Plus", along with staff. At about 9.40 p.m. SI Daya Sagar informed me on mobile phone that Md.Arif owner of "Knowledge Plus" was seen at Batla house and may have left for Gazi pur. I informed ACP Rajbir Singh about this. He instructed me that no raid was to be conducted before he reached the spot.

He fixed 11.00 p.m. as the time for meeting me at Gazi pur Red Light. At about 11.00 p.m he reached there with his staff at the said point. I briefed him and also showed him flat no. 308A, DDA Flat, Gazi pur. At about 11.15 p.m., we conducted raid in the aforesaid flat. When we entered the house three ladies were present inside the flat but Md. Arif was not there. the three ladies including wife of Md. Arif and her mother but I do not remember about the third lady. Thereafter, it was decided that Inspector . Ved Prakash Along with his staff would sit inside the flat and remaining staff stay out at a far distance from the flat. At about 12.45 a.m. I came to know that Inspector . Ved Prakash had apprehended Md. Arif. I also came to know that 7.63 mm pistol was recovered from him. I Along with staff rushed to the aforesaid flat. A Motorola set was recovered from Md. Arif....

44. The next police official regarding the arrest of appellant - accused Mohd. Arif @ Ashfaq is PW-148 SI Zile Singh. The relevant portion of his evidence in this

regard is also reproduced hereunder:

On 25.12.2000 I was posted in Special Cell Lodhi Colony, Ins.Ved Prakash, Ins.R.S.Bhasin, Ins.Mohan Chand Sharma, SI Hardyabhushan, SI Manoj Dixit, SI Manoj Kumar, SI Upender Kumar, SI Sharad Kohli, W/SI Om wati, W/SI Sri Devi and myself along with Ct.Mahipal, Ct.Rameshwar and other staff under supervision of ACP Rajbir Singh, along with govt vehicle bearing No.DL-ICF-0503, gypsy , DL-ICF-7973 Maruti Car and other private vehicles along with Govt. Asla left the office at about 10.15 PM for proceedings to House No. 308-A, DDA Flat Ghazipur. There was a secret information that one of the accused wanted in Red Fort shoot out case was hiding at the aforesaid house, whose name was disclosed to me as Md.Arif @ Ashfaq, resident of Pakistan. It was also informed that that if the aforesaid house was raided, the aforementioned person could be apprehended.

The police party reached the aforesaid house at about 11.15 PM. On account of night, no public person was available at the aforesaid place. The house/Flat No. 308-A was pointed out by the informer and it was brought opened by Ins.Ved Prakash. Three ladies were present at the flat. The aforesaid person namely Ashfaq was not at the flat at that time. We continued to wait for him. At about 12.45 AM, a youth tried to enter the aforesaid flat. On the signal of the secret informer, the aforesaid person was apprehended and he is now present in the court. He is accused Md.Arif @ Ashfaq. He was wearing kurta payjama. A cursory search of accused Ashfaq was carried out by Ins.Ved Prakash. On the night dub of the payjama one pistol having a bore of 7.63 was recovered. Said pistol was unloaded and on checking its magazine, it was found to contain five live cartridge. One live cartridge was inside the chamber of the pistol....

45. PW-194 SI Harinder Singh deposed as under:

On 26.12.2000 I was posted in Special Cell, Lodhi Colony. At 12.55 am in the intervening night of 25/26/12/00 I received information that I have been summoned by Inspector .Ved Prakash at house No. 308-A, DDA Flats, Gazipur. I reached there. When I reached there, Inspector . Ved Prakash, Ct.Rameshwar, WSI Omvati were present as the remaining officials had already left. Inspector .Ved Prakash informed me that Ashfaq, accused present in the court was apprehended and he was already taken away from the spot by the police officials. He informed me that a pistol has been recovered from him. Inspector .Ved Prakash handed over to me a sealed parcel of pistol and cartridges recovery memo, sketch of the pistol and cartridges, FSL form and a copy of the rukka. Rukka was sent in my presence and Ct.Rameshwar was leaving with the same when I reached there.

Thereafter, Ct.Rameshwar returned to the spot and handed over to me a copy of the FIR and original rukka. The investigation was handed over to me. I recorded the statement of Ct.Rameshwar. At about 6.45 am SI Zile Singh, Ct.Mahipal and team led by Inspector . R.S.Bhasin returned to the aforesaid house Along with

accused Ashfaq present in the court. After handing over accused Ashfaq to me, the police team led by Inspector .R.S.Bhasin left the spot. However, SI Zile Singh and Ct. Mahipal stayed with us. I interrogated the accused Ashfaq about the recovery from him. I arrested the accused in this case and prepared arrest memo Ex. PW-148/D, body inspection memo Ex. PW-194/B, personal search memo Ex. PW148/C. In the personal search of the accused a mobile phone of motorola company with card of ESSAR company was recovered. The card was bearing no.0006680375. I questioned Asfaq about the mobile no. and he told his mobile No. 9811278510. Apart from this Rs.1000/- were also recovered from his front pocket. The mobile was recovered from his front pocket. The mobile was recovered from the right side pocket of kurta....

I further interrogated the accused in the presence of SI Zile Singh and I recorded his detailed disclosure statement which is Ex. PW 148/E and is signed by me at point B. In the meanwhile Inspector .Hawa Singh also reached the spot Along with his team, who was investigating Red Fort shoot-out case. I told Inspector .Ved Prakash about the disclosure made by accused and handed over to him a copy of the disclosure statement of the accused....

46. From the evidence of aforesaid police witnesses it becomes clear that appellant-accused came to be arrested as a result of recovery of one piece of paper from the back side of Lal Quila in the morning of 23-12-2000 on which mobile telephone number 9811278510 was written and that telephone number had taken the policemen up to accused Mohd. Arif @ Ashfaq. This accused has claimed that the manner of his arrest as sought to be projected by the prosecution through the aforesaid witnesses was in fact a complete farce and everything was stage managed. As noticed already, during his statement u/s 313 Cr.P.C. Mohd. Arif @ Ashfaq had come out with a version that his arrest from his house was as a result of some conspiracy between two of the police officers who became the investigating officers of this case, namely, Inspector . R.S.Bhasin(PW-168) and Inspector . Ved Parkash(PW-173) and one Nain Singh(PW-20) who, according to this accused, was working during those days in one of the Intelligence Wings of the Government of India(RAW) and was dealing with some illegal money transactions in which these two police officers of Special Cell were also involved. We are, however, unable to accept this argument also of learned Counsel for appellant - accused Mohd. Arif @ Ashfaq. It does appear to us that PW-20 Nain Singh, in whose house accused Mohd. Arif @ Ashfaq had lived for sometime before this incident, was employed in some Intelligence Wing of the Government of India and it could even be RAW. In his evidence he avoided disclosing his exact nature of employment status saying that he could not disclose that although he stated that he was employed in the Cabinet Secretariat. It is also quite possible that because of his association with PW-20 Nain Singh Mohd. Arif @ Ashfaq could also come in contact with police officials including Inspector . R.S.Bhasin and Inspector . Ved Prakash, as is being claimed by him since we can also accept that while working for some Intelligence Department PW-20 Nain Singh could be knowing officials of Special Cell/Anti-Terrorism Cell of

the police departments. We do not consider this claim of accused Mohd. Arif @ Ashfaq to be so improbable to be rejected, as was the contention of the learned State counsel Ms. Mukta Gupta. However, even if Mohd. Arif @ Ashfaq knew these police officers through PW-20 Nain Singh that can not be said to be a sufficient reason to conclude that they had got him falsely implicated in this case. No material whatsoever had been brought on record by this accused either by adducing some evidence in defense or even during the cross-examination of PW-20 Nain Singh, Inspector . R.S.Bhasin(PW- 168) and Inspector . Ved Parkash(PW-173) from which it could be said that whatever Mohd. Arif @ Ashfaq was claiming to be the reason for his being implicated in this case could be true. To none of these three witnesses it was put in cross-examination that they had got Mohd. Arif @ Ashfaq implicated in this case because of his demanding money from Nain Singh or his being aware of their illegally carried on money business.

47. Mr. Tufail had then contended that the prosecution story that the police had reached up to Mohd. Arif @ Ashfaq as a result of recovery of a piece of paper having telephone no. 9811278510 written on it behind the Lal Quila should not be believed also for the reason that the investigating officer PW-230 Inspector . S.K.Sand himself had claimed in his chief-examination that he had deputed someone to contact the mobile phone company Essar for the call details of the said phone number on 16-02-01 and then call details Ex. PW-198/B-1 to 3 and PW-229/A were obtained. That showed that before that date the police could not have known that calls had been made from 9811278510 and 9811242154 to landline telephone number 2720223 at the house of Mohd. Arif @ Ashfaq in Gazipur and to telephone no. 6315904 at his Computer Centre at Gaffur Nagar as claimed by PW-229 Inspector . Mohan Chand Sharma. And if actually some paper slip had been found on 23-12-2000 from behind Lal Quila the police would have made enquiries same day and would have arrested Mohd. Arif @ Ashfaq also same day if he was suspected of being involved in the shooting incident inside Lal Quila. There is no doubt that PW-230 has claimed that he had got moved an application with Essar Mobile Phone Company on 16-2-01 to get the call details of phone no. 9811278510 and later on in respect of phone no. 9811242154 but that does not show that before that date the police could not have any details about the calls made from phone nos. 9811278510 and 9811242154. Since PW-229 had claimed that he had found out that calls from number 9811278510 and 9811242154 had been made at the landline telephone numbers at the house of accused Mohd. Arif and his Computer Centre "Knowledge Plus" it should have been elicited from him in his cross-examination as to how he came to know those facts. However, his cross-examination was not done in that direction. So, we cannot now be expected to guess as to how PW-229 came to know about all that. He has claimed so and his statement has remained uncontroverted. PW-230 had taken over the investigation at a late stage after the incident. At that time he must have decided to obtain all the details in writing as by that time it had become quite certain that Mohd. Arif @ Ashfaq was involved in the incident. Mohd. Arif @ Ashfaq has not claimed that

telephone with the number 272033 in the name of his sister-in-law(wife's sister) Farzana Farukhi was not installed at flat no. 308-A, Gazipur where he was residing Along with his wife co-accused Rehmana Yusuf Farukhi and his mother-in-law(who has been examined as DW-1)and that telephone with the number 6315904 was also not installed at his Computer Centre "Knowledge Plus". So, we have no reason to disbelieve the statement of PW-229 Inspector . Mohan Chand Sharma that before 25/26-12-2000, when Mohd. Arif @ Ashfaq was apprehended, it had been found out that calls had been exchanged between mobile phone numbers 9811278510 and 9811242154 to the telephones installed at the residence of accused Mohd. Arif @ Ashfaq and also at his Computer Centre "Knowledge Plus".

48. It was also submitted by Mr. Tufail that evidence of various witnesses to the recovery of the paper slip having the mobile number 9811278510 written on it was not consistent on the point of time of its recovery and all of them had given different time of its recovery on 23/12/2000. There is no doubt that there is some difference in the time given by the witnesses regarding the recovery of the paper slip but considering the fact that they were deposing in Court after a long time from the date of incident that much inconsistency was natural and the prosecution case cannot be thrown overboard for that reason. Mr. Tufail had then contended that in any case the mere circumstance that Mohd. Arif @ Ashfaq was apprehended on the night of 25/26-12-2000 from his flat pursuant to the recovery of paper slip having mobile number 9811278510 written on it is not sufficient to show that this accused was involved in the incident inside Lal Quila on 22-12-2000. Ms. Mukta Gupta, learned Counsel for the State, however, submitted that this is not the only circumstance against accused Mohd. Arif @ Ashfaq and there were many other circumstances established by the prosecution from which it was clear that he was definitely involved in the incident along with other co-accused persons against whom also there was more than sufficient circumstantial evidence adduced by the prosecution. It was contended that it is not a case where an innocent person has been prosecuted, as had been sought to be projected on behalf of appellant - accused Mohd. Arif @ Ashfaq. Ms. Gupta submitted that this accused was not straightaway arrested in this case but only after the suspicion of his involvement had been substantiated with the recovery of a pistol and some live cartridges from his cursory search conducted by the police officials immediately after his apprehension. Learned Counsel submitted that recovery of a pistol with live ammunition from this accused was another incriminating circumstance against him because if he was an innocent person having nothing to do with terrorism there was no occasion for his carrying unlicensed pistol and cartridges.

49. On the point of recovery of one pistol and some live cartridges from the possession of appellant - accused Mohd. Arif @ Ashfaq at the time of his apprehension the prosecution has relied upon the evidence of PWs 148, 166 and 173. The relevant portions of these prosecution witnesses, except PW-166, have already been reproduced by us in the earlier part of the judgment while

considering the prosecution case regarding the arrest of this accused. PW-148 SI Zile Singh had categorically deposed that one 7.63 mm pistol having five live cartridges in its magazine was recovered from accused Mohd. Arif @ Ashfaq at the time of his apprehension. Similarly, PW-173 Inspector . Ved Prakash, who was also one of the members of the raiding team had deposed about the recovery of pistol and five live cartridges from the possession of this accused. PW-166 HC Rameshwar Dayal deposed as under regarding the apprehension of accused Mohd. Arif @ Ashfaq and recovery of pistol and cartridges from his possession:

On 25.12.2000 I was posted in Special Cell, Lodhi Colony. On 25.12.2000 at 10.15 PM I Sp.Ved Prakash, Inspector .R.S.Bhasin Inspector .Mool Chand Sharma, SI Lalit Mohan, SI Hridya Bhushan, SI Sanjay Dutt, SI Manoj Dixit, SI Zile Singh, SI Opender Singh, SI Sharad Kohli and WSI Om Vati, WSI, Jai Shree, Ct.Mahipal and myself and other staff, under the supervision of ACP Rajvir Singh armed with ammunition issued from the Mall Khana in govt. vehicle as well as private vehicle left for house No. 308A, DDA Janta flat, Ghazipur.

We reached there at about 11.15 PM. Inspector . Ved Prakash made nakabandi of the area around the house. At about 12.45 am the accd. Md. Asfaq present in the court came from the roadside and started going towards the said house. Inspector . Ved Prakash and SI Zile Singh chased him and apprehended him before entering the aforesaid house. Inspector .Ved Prakash carried out the search of the accused and a pistol was recovered from the right side of dub of his pazama. The pistol are was checked and inside its magazine there were five live rounds and one round was in the chamber of the pistol.... Inspector . Ved Prakash prepared sketch of the pistol and cartridges and the same is Ex.PW-148/A. The pistol and cartridges with magazine were sealed in a parcel with the seal of VP....

50. The recovery of the pistol, Ex. PW-148/1 and cartridges, Ex.PW-148/2-6 and Ex. PW-148/7(which was test fired in CFSL) has been challenged by learned Counsel for appellant - accused Mohd. Arif @ Ashfaq primarily on the ground that despite the fact that the police team had gone to the flat of this accused with some prior information and after keeping his house under surveillance for two days no independent person had been associated at the time of raid and, Therefore, according to Mr. Tufail, based on the evidence of interested police witnesses only the prosecution story of recovery of pistol and cartridges from the possession of Mohd. Arif @ Ashfaq should not be accepted. In support of this submission learned Counsel also placed reliance on one judgment of Hon''ble Supreme Court in Narsi v. State of Haryana 1998 (2) JCC 301 (SC) and one judgment of this Court in Mohd. Javed v. State 84 (2000) DLT 244 . We have gone through both these decisions and find that in the facts and circumstances of these two cases recoveries of some incriminating articles from the accused were disbelieved because of the recoveries having not been witnessed by any independent person. In the judgment of Hon''ble Supreme Court the reason

given for non-joining of independent witness at the time of search of the accused was found to be a lame excuse while the recovery in the case decided by this Court was doubted by a learned Single Judge of this Court on the ground that no serious effort had been made by the investigating officer to associate any independent witness with the raiding party which had organized a nakabandi to apprehend two persons who as per the secret information were supposed to be coming to Delhi along with poppy straw powder. In the present case PW-148 SI Zile Singh, who was one of the members of the raiding team had stated in his chief-examination itself that when they had reached flat no. 308-A, Gazipur no public person was available since it was midnight. It was a month of December and non-availability of any person on the road in the middle of night cannot be said to be unbelievable at all. PW-173 Inspector . Ved Prakash when asked in cross-examination as to whether he had tried to associate any independent witness in the raid claimed that he had asked some local residents to join the proceedings but nobody was willing to join. PW-166 HC Rameshwar Dayal was also asked a similar question in his cross-examination on behalf of Mohd. Arif @ Ashfaq and his reply was also that the investigating officer had tried to join some independent witnesses but none was ready to join. It appears that since already these three police witnesses had claimed that no independent witness was willing to join the raid proceedings no such question was asked from the fourth witness on this part of the prosecution story, PW-229 Inspector . Mohan Chand Sharma. We have no reasons to disbelieve any of these police witnesses regarding their claim that they had made efforts to associate public witnesses at the time of raid at the house of accused Mohd. Arif @ Ashfaq but none had agreed. We can also understand the reasons for unwillingness of the public persons to associate themselves with the investigation of a crime involving hard-core criminals and terrorists. These days people do avoid getting involved in criminal cases as witnesses for which police cannot be blamed. In this regard we may make a useful reference to the following observations made by the Hon'ble Supreme Court in Krishna Mochi and Others Vs. State of Bihar, regarding the reluctance of the public persons to associate themselves with the investigation of serious crimes:

It is a matter of common experience that in recent times there has been a sharp decline of ethical values in public life even in developed countries much less a developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by the courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power.

We, Therefore, reject the challenge to the recovery of pistol along with cartridges from the possession of accused Mohd. Arif @ Ashfaq because of non-joining of public witnesses. Learned Counsel for this appellant had also pointed out that the

number of the pistol as mentioned in the seizure memo and the one mentioned in the ballistic expert's report do not tally which shows that some other weapon was recovered and the expert examined some other weapon. We do find that only the first digit of the pistol number mentioned in the expert's report is different from the first digit of the number mentioned in the seizure memo. Rest of the digits tally with the ones mentioned in the seizure memo. That error could be an inadvertent mistake by the writer and it cannot be accepted that the expert had not examined the pistol which was recovered from accused Mohd. Arif @ Ashfaq. The prosecution had also examined one ballistic expert PW-211 Shri K.C.Varshney from FSL. He had examined the said pistol and cartridges recovered from Mohd. Arif @ Ashfaq and on examination he had given his report Ex. PW-211/A to the effect that the 30"/7.63 mm pistol was a fire-arm as defined under the Arms Act and was in working condition and also that the six cartridges recovered from Mohd. Arif @ Ashfaq out of which he had test fired one live cartridge were "ammunition" as defined under the Arms Act. He deposed accordingly in Court also. He was not cross-examined at all on any aspect of his statement. This was also one of the circumstances relied upon by the prosecution to establish that appellant - accused Mohd. Arif @ Ashfaq was involved in the shoot out inside the Lal Quila and in our view this circumstance also stands established beyond any doubt. We will now proceed further to examine the other circumstances relied upon by the prosecution to find out if the chain of circumstances from which it could be said that appellant -accused Mohd. Arif @ Ashfaq was responsible for the incident along with his other associate militants is complete or not.

51. As noticed already, immediately after his apprehension appellant - accused Mohd. Arif @ Ashfaq had disclosed to the policemen about his another hideout at G-73, Batla House, Muradi Road, Okhla, New Delhi and also about the presence of his associate there as well as the availability of arms and ammunition in that house. PW-21 Gian Chand Goel is the owner of that house and he has claimed that accused Ashfaq had shifted to his house as a tenant after he had vacated the house of Nain Singh(PW-20). This part of the statement of the witness was not challenged in cross-examination and so it becomes clear that it is not a case where accused Mohd. Arif @ Ashfaq had nothing to do with house No. G-73. The police had gone to that house along with Mohd. Arif @ Ashfaq where, as has been noticed already, an encounter had taken place between the policemen and the occupant of that house who had got killed in that encounter and, as per the prosecution case, he was identified by accused Mohd. Arif @ Ashfaq as one Abu Shamal @ Faizal. From that house the police had recovered one AK-56 rifle as well as some cartridges and hand grenades. To establish this circumstance relied upon by the prosecution against Mohd. Arif @ Ashfaq the prosecution is relying upon the evidence of PW-229 Inspector . Mohan Chand Sharma. We have already referred to his evidence which related to the arrest of Mohd. Arif @ Ashfaq. Now we reproduce here that part of his examination-in-chief where he had deposed regarding the encounter at G-73, Batla House. His statement in this regard reads

as under:

...In the intervening night of 25/26-12-00 accused Md. Arif was arrested from DDA flats, Gazipur. The accused was arrested and his disclosure was recorded wherein he disclosed about the involvement in the Red Fort shoot-out case. (objected to). The accused Md. Arif also disclosed that his associate Abu Shyamal @ Faizal was staying at his hide-out at house no. G-73, First Floor, Batla House, Okhla. He also disclosed that he was having weapons and grenades. He also disclosed that Abu Shyamal is a trained militant of Lakhkar-e-Toiba and a member of suicide Squadd. (objected to).

On the said intervening night of 25/26.12.00 a raiding party was organized consisting of APC Rajbir Singh, SI Hridy Bhushan, SI Lalit Mohan, ASI Sushil Kumar, HC Anil Tygi, myself and other staff. The accused was also with the raiding party.

We started from Gazipur at 2.15 a.m. and reached G-73, Batla House at about 3.15 a.m. Accused Md. Arif present in court pointed out the aforesaid house. (objected to). The aforesaid house was locked. The accused disclosed that Abu Shyamal must be somewhere near and may come soon. We laid trap on the house. Rest of the raiding party retreated to a safe position near primary school. At about 5.10 a.m., ASI Jai Kishan informed that a man answering the description given by Md. Arif had entered the house. By the time, we went to the house the said person had entered the house and bolted it from inside. The member of the police party took positions. We knocked at the door and introduced ourselves as police officials but the door was not opened. We broke the door open and as we entered the house firing started from inside the house. We shouted that we were from the police and called upon the person firing at us to surrender but he did not stop. Thereafter police party also fired in retaliation. It continued for about 20 minutes. A bullet hit my jacket and one bullet hit the jacket of the ACP. The jackets were bullet-proof. When the firing ceased from inside the room we found one person lying in injured condition. One AK-56 rifle was lying by its side. 2 hand-grenades were also lying near him. Md. Arif was in the custody of Inspector . R.S.Bhasin at a safe distance and he was called to the aforesaid house. There Md. Arif identified the injured, who by that time had expired, as Abu Shyamal @ Faizal. (objected to).

SHO police station New Friends Colony also reached the spot. I handed over a rukka to SHO-New Friends Colony for getting a case registered. Case was registered. Rukka is Ex. PW-229/B which is signed by me at point 'A'. (objected to). One AK 56 rifle, one magazine and two hand-grenades were recovered. In the spare magazine there were 30 live cartridges .One bandoleer was also recovered and out of the two hand-grenades one was inside the pocket of the bandoleer. The material for cleaning rifle was also recovered from the spot. One khaki uniform was also recovered. Fired cases fired by the dead militant as well as by the police party, which were lying on the spot, were recovered. The fired cases of the cartridges fired by the ACP was also handed over to the IO, which

were three in numbers. The bullet-proof jackets worn by myself and the ACP were also handed over to the IO of PS-New Friends Colony.

From the aforesaid house, fired cases of AK 56 rifles were recovered which were used by Abu Shyamal and were of the same type as were recovered from the Red Fort.(objected to).

I have seen photographed Mark 229/D which is of Abu Shyamal who had died at G-73, Batla House, Okhla. This photograph was taken in the mortuary. I can identify the case property if shown to me....

This witness then had identified the recovered AK-56 rifle as well as the fired cartridge cases, magazines, bullet proof jackets etc. which had been recovered from the house of the deceased militant. The AK-56 rifle identified by this witness is Ex. PW-229/1 and the two magazines are Ex. PW-229/2&3. The bandoleer is Ex. PW-229/5, the pouch containing the weapon cleaning material is Ex. PW-229/6. This witness claimed that all these things had been seized vide memo Ex. PW-229/D. The seized khaki uniform was identified by this witness and the same is Ex. PW-229/8 which according to this witness had been seized vide memo Ex. PW-229/E. This witness also identified 29 live cartridges recovered from the house of the deceased Abu Shamal as Ex. PW-229/10-1 to 10-29. He had also identified the fired cartridge cases as Ex. PW-229/14-1 to 3 and Ex. PW-229/15-1 to 67 and he claimed the same to have been seized vide memo Ex. PW-229/F.

52. PW-229 was cross-examined very briefly and that too only on behalf of accused Mohd. Arif @ Ashfaq. We think it appropriate to re-produce his entire cross-examination which runs into only a few lines:

It is correct that Ex. PW-183/B, the telephone slip, does not bear my signature. I did not put my signature on any document in FIR No. 688/00. I had collected the unsigned call details from "Hutch" company. It is correct that I had not signed an authenticated call details collected by me from my official computer at Special Cell, Lodhi Colony. I am not the IO of the FIR no. 630/00, PS - New Friends Colony. I had only sent the rukka for registration of the case. I do not know if the case has been closed as untraced.

From this cross-examination of PW-229 it is clear that his statement to the effect that immediately after his apprehension appellant - accused Mohd. Arif @ Ashfaq had disclosed that he was involved in the incident inside the Lal Quila on 22-12-2000 and that he could get recovered arms and ammunition and also get apprehended his associate remained unchallenged and consequently stood admitted by the accused persons. It also stood admitted because of no cross-examination of this witness that at G-73, Batla House, Muradi Road, Okhla, New Delhi, where Mohd. Arif @ Ashfaq had taken the police team, an encounter had taken place with the occupant of that house and he was killed in that encounter when the police had fired upon him in retaliation and further that from that house one AK-56 rifle and ammunition, as noticed already, were recovered. So,

this recovery of AK-56 rifle and ammunition including hand grenades at the instance of appellant -accused Mohd. Arif @ Ashfaq stood duly established by the prosecution.

53. The prosecution is also relying upon the evidence of recovery of one AK-56 rifle, one bandoleer having four hand grenades in it pursuant to the disclosure statement made by appellant - accused Mohd. Arif @ Ashfaq, Ex. PW-148/E which were lying under the bushes on the back side of Lal Quila. Regarding the making of disclosure statement Ex. PW-148/E the prosecution is relying upon the evidence of PW-148 SI Zile Singh and PW-194 SI Harinder Singh. As noticed already, SI Harinder Singh had been entrusted the case regarding the recovery of pistol from accused Mohd. Arif @ Ashfaq at the time of his apprehension and when Mohd. Arif @ Ashfaq was brought back to his house in Gazipur from G-73, Batla House where his militant associate Abu Shamal was killed in an encounter, he had interrogated Mohd. Arif @ Ashfaq and then this accused had made a disclosure statement Ex. PW-148/E wherein he had while confessing his involvement in the incident of shooting inside Lal Quila had disclosed that he could get recovered one AK-56 rifle and some ammunition from the back side of Lal Quila. PW-148 and 194 have both deposed about the making of disclosure statement Ex. PW-148/E by Mohd. Arif @ Ashfaq. The cross-examination of PW-148 SI Zile Singh was mainly confined to his statement regarding recovery of one mobile phone which according to the prosecution case was having the number 9811278510 which, as noticed already, had taken the police officials up to Mohd. Arif @ Ashfaq. That part of the prosecution case we will deal a little later when we would consider the circumstance of recovery of mobile phone from this accused having this number. The statement of this witness regarding making of the disclosure statement Ex. PW-148/E was, however, not challenged in cross-examination although in the cross-examination of PW-194 SI Harinder Singh it was suggested to him that Mohd. Arif had not made any disclosure statement and that entire proceedings including the disclosure statement were recorded at the police station and were got signed from Mohd. Arif there but this witness denied that suggestion. The plea taken by this accused in the cross-examination of PW-194 that he was tortured and then forced to sign the disclosure statement Ex. PW-148/E cannot be accepted as it appears to be an afterthought. As noticed already, no such suggestion was put to PW-148 who was examined first and it appears that later on this accused decided to take this plea in the cross-examination of PW-194. We see no reason as to why the police officials would torture this accused and get signed from him a statement of admission of his involvement in the shooting incident nor any motive was suggested to these two police witnesses for their claiming falsely regarding the making of disclosure statement by Mohd. Arif @ Ashfaq voluntarily. It was also argued by the learned Counsel for Mohd. Arif @ Ashfaq that the disclosure statement Ex. PW-148/E should not be accepted since it was written in Hindi and not in Urdu, the language which only this accused knew. In support of this submission he also cited one judgment of Supreme Court in Mohd. Ayub Dar and Anr. v. State of

NCT of Delhi 2000 SCC 1368 and one of Madhya Pradesh High Court in Ramaswamy v. State of MP 2005 (3) LRC 342. There is no substance in this contention also and these two judgments relied upon by the learned Counsel are also of no help to the appellant Mohd. Arif @ Ashfaq since it is not the case of this accused that he did not know Hindi at all or that he had asked the investigating officer to record his statement in Urdu nor was it put to the witness who had recorded the same that he wrote it in Hindi despite protest by the accused.

54. Now we come to the evidence of the prosecution in respect of the recovery of AK-56 rifle and some ammunition pursuant to the aforesaid disclosure statement Ex.PW-148/E of accused Mohd. Arif @ Ashfaq from the backside of Lal Quila. PW-218 SI Satyajit Sarin is one of the witnesses examined by the prosecution to prove this recovery pursuant to the disclosure statement of Mohd. Arif @ Ashfaq. He had also claimed that accused Mohd. Arif @ Ashfaq had made disclosure statement Ex. PW-148/E wherein he had offered to point out the place near the Red Fort wall where AK-56 assault rifle, magazines, hand grenades etc. had been hidden in the shrubs. Regarding the actual recovery of these things from behind the Lal Quila his examination-in-chief is as under:

...In pursuance of the same, we along with the accused Md. Arif @ Ashfaq Ahmad had reached the said place behind Red Fort. While on route from Gazipur to Red Fort, Inspector . Hawa Singh requested two/three passersby at Mayur Vihar, Phase-II, Bus Stand and the bus stand near Raj Ghat to join the investigation, but all of them after learning about the involvement of the militants in this case, refused to join in the investigation. Without wasting any further time, we had reached the said spot behind Red Fort. SI Abhinender Jain was sent by Ins. Hawa Singh to go to PS Kotwali and summon BDS and CFSL team to the spot. There at the said place Ins. Hawa Singh checked the shrubberies through me and SI Amardeep Sehgal and we found one AK 56 Assault Rifle, two magazines tied to each other with the help of a medicated tape and a bandoleer of military green colour. On checking the pockets of the bandoleer carefully we found four hand grenades kept therein in four different pockets. We kept it intact and again in the meanwhile before CFSL and BDS team could arrive, Ins. Hawa Singh prepared the site plan of place of recovery, and the memo of pointing out was prepared later on to this effect. The team of CFSL led by SSO-I Sh. A.Dey reached the spot and they photographed the place of recovery from various angles and distances. Under their supervision, the recovered arms and ammunitions were taken to PS Kotwali, wherein the room of the Addl. SHO, the four hand grenades were got defused by the BDS and an exercise was made by the CFSL expert to find and develop chance finger prints if any on the arms and ammunitions recovered. They also took photographs. After the examination by the CFSL expert, the defused hand grenades i.e. the four shells and the four detonators were packed. The four detonators had a slip affixed with the help of a tag on which it was written in Urdu "KHABARDAR GRENADE FIRING KE LIYE BILKUL TYAR HAI SAFETY PIN SIRF GRENADE FEKTE

WAKAT NIKALE"(BEWARE, GRENADE IS READY FOR FIRING.PIN SHOULD BE TAKEN OUT ONLY WHEN IT IS TO BE THROWN)

On three of the four recovered shells was written AGREES SPL HGR. 84 Green Agrees HE 005-8-94 on the one remaining shell was written green Agrees Spl. HGr 84 1 C 009 12 92. On this last shell, the CFSL team had affixed a cello tape. The four recovered detonators were kept in 4 plastic dibbies with the help of cotton the packing was provided and the four dibbies containing the detonators were tied together in a bunch with the help of cello tape likewise, the four recovered shell were kept in four plastic dibbies and packing was provided with the help of cotton. These four dibbies containing the shells were also tied together with the help of cello tape. The two bunches as above were kept in a corrugated box and packing was provided with the help of newspaper and cotton. This box was tied with a plastic Inspector and kept in a cloth pulanda sealed with the seal of HS by the IO. The recovered AK-56 Assault Rifle was subjected to measurement after preparing the sketch. The sketch bears my signatures and the same is Ex. PW-218/A and bears my signatures at point "A". On measurement, the barrel length was found to be 22.5 cm. The body length was found to be 42.5 cm. The butt was found to be measuring 9.5 cm. And the total length was found out to be 65 cm. From the magazines, the live cartridges were taken out whereas 30 live cartridges were found loaded in one magazine, two live cartridges were loaded in the other magazine. Sketch of one of the two magazines and one of 32 recovered cartridges was prepared on one paper. On measurement, the outer side of the magazine was found to be 23.2 cm. whereas the inner curve was measuring 16.5 cm. The cartridges was found to be 5.5 cm. out of 32 recovered cartridges on the base of 28 cartridges, 71 66 was written and on the remaining 4, 31 95 was written. All the recovered 32 cartridges were alive and were of same bore. IO had prepared the sketch of one magazine and of one cartridge as both the magazines were of the same shape and all cartridges of the same shape and measurement. The said sketch is Ex PW-218/B which bears my signatures at point "A". The recovered cartridges were kept in two polythene packets and the two packets containing the cartridges were kept in clothe pulanda and sealed with the seal of HS.

The recovered bandoleer was found to be containing 20 packets. One packet in the front and two in the rear side opened and closed with the help of Zips. The remaining pockets were provided with stitch buttons to close it. A pocket knife was also recovered from the front middle pocket of the bandoleer. Two padded slings were provided in the said bandoleer for hanging it on the shoulder and two belts were provided in it for tying it around the waist. On the recovered AK-56 assault rifle, 11 1959 was written and below it something was found to have been erased by filing as it appeared(objected to). The recovered AK-56 rifle, the two magazines, the pulandas containing the 32 live cartridges, pocket knife and the bandoleer were kept in a corrugated box which was tied with the help of plastic sutli and then kept in a cloth pulanda which was sealed with the seal of HS by the IO. All the recovered articles as mentioned above were taken into

possession after filing up the CFSL form, vide recovery memo Ex. PW-218/C, which bears my signatures at point "A". Seal after use was handed over to me. Amar Deep Sehgal SI was also present at the time of recovery and he also signed at point "B". Accused Mohd. Arif also signed at point "C" in my presence. The memo was prepared by the IO. He had given the dictation to me and I scribed the same which was signed by the IO also. I can identify the articles if shown to me.

At this stage, two sealed parcel sealed with the court seal are produced in the court and the same are opened. The Assault Rifle AK-56 is Ex. PW-125/A, two magazine PW-125/2&3, 32 live cartridges are Ex. PW-125/4 to 35, knife PW-125/36, 4 detonators are Ex. PW-50/1 to 4 and 4 hand grenades shell Ex. PW-50/5 to 8 and a bandoleer is Ex. PW-218/1. I have seen all the recovered articles and these are the same which were recovered in my presence on the pointing out of accused Mohd. Arif. The seal of HS after use was given to me.

Thus, the above recoveries of arms and ammunition were effected by the police at the instance and pointing out of accused Mohd. Arif present in court from behind the Red Fort....

55. The other police official examined by the prosecution to prove the recoveries from behind the Lal Quila at the instance of Mohd. Arif @ Ashfaq is PW-227 SI Amardeep Sehgal. He was one of the police officials who had joined the investigation after the apprehension of Mohd. Arif @ Ashfaq. He also deposed that in the disclosure statement made by accused Mohd. Arif @ Ashfaq he had disclosed that arms and ammunition used in the Red Fort shoot out had been concealed behind Red Fort wall near ganda nullah in the bushes and that he could get the same recovered by pointing out that place. Regarding the actual recovery from that place pursuant to the information so given by Mohd. Arif @ Ashfaq his examination-in-chief was as under:

...Thereafter, Inspector . Hawa Singh, myself and other police staff Along with accused Mohd. Arif left flat no. 308/A, DDA Flats, Gazipur for the place behind Red Fort. At Mayur Vihar bus stand Phase II as well as at Rajghat Bus stand, Inspector . Hawa Singh requested some passerby to join the investigation but all refused on hearing the name of terrorist. At about 10 a.m. without wasting further time the police party reached place behind the Red Fort Along with the team. Inspector . Hawa Singh asked SHO Kotwali to send for the CRFSL team and BDS, to be sent at the place behind Red Fort. Accused Mohd. Arif voluntarily led the police party to the place where Abu Shyamal had concealed Arms and Ammunition and hand grenades after the Red Fort shoot out. SI Satyajit Sarin and myself on the direction of Inspector . Hawa Singh removed some bushes and found one AK-56 rifle, two magazines and one bandoleer. When the bandoleer was checked 4 hand grenades were found in the four front pockets of the bandoleer. Bandoleer was kept at the same place and a visual site plan of the place of recovery was prepared which is in my handwriting. The site plan was also signed by Inspector . Hawa Singh. The same is Ex. PW-227/A. It was not

signed by me.

BD Squad and CFSL team reached the spot, i.e. behind the Red Fort near the rear wall. A member of the CFSL team took photographs from different distances and angles. These photographs were taken on the direction of Sh. A.Dey, Sr. Scientific Officer. As per his directions one AK-56 rifle, bandoleer and two magazines were brought to police station Kotwali. While sitting in the officer of Addl. SHO the CFSL team and various BD Squad examined the AK-56 rifle, bandoleer and two magazines in which one contained 30 live cartridges and other contained 2(two) live cartridges. Both the magazines were tied together with a tape. One in straight position while the other in reverse position. They also examined one kitchen knife which was recovered from one of the pockets of the bandoleer. Four hand grenades were also examined which were also recovered from the pockets of bandoleer. The bomb disposal squad diffused all the four hand grenades under the supervision of SI Virender Singh. The four detonators were having a slip attached with precautions to the effect that the hand grenade was ready for use and safety pin is to be removed at the time of use. It was recorded in "Urdu". On the three hand grenades "Agrees -SPL-HGR-84-GREEN Agrees -HE005-8-94" was recorded. On the fourth hand grenade "Agrees -SPL-HGR-84-GREEN Agrees -ICT-009-12-92" was recorded. On the fourth shell the finger print expert had affixed a tape. All the four hand grenades and four detonators were packed in separate containers and each container was packed with the help of cotton. All the eight containers were tied with the help of transparent tape. A pack of four containers and four detonators and four shells were again tied with the help of transparent tape under slip containing "Shell and detonators were affixed on both the packages. Both the packings were kept in corrugated box and packed with the help of cotton and newspaper. Corrugated box was tied with the help of plastic string and with the help of cotton a pulanda was made and sealed with the seal of "HS".

Sketch of AK-56 was prepared. On measurement, the length of barrel was found to be 22.5 cms. And the length of the body was 42.5 cms. And the length of the butt was 9.5 cm. Total length was 65 cms. On one side of the rifle within circle 11,1959 was written. It was found that some written material was found to be scratched below the same. On the other side of the rifle two white medicated tapes were found to be affixed. Out of the two recovered magazines, sketch of one magazine and out of 32 live cartridges, sketch of one live cartridge was prepared on one paper. On measurement, the inner length of magazine was found to be 16.5 cms. and the length of the round was 5.5 cms. the outer length of the magazine was 23.2 cms. Out of the 32 rounds, the bottom of 28 live cartridges, within circle, 75066 and on the bottom of four cartridges within circle 31075 was engraved.

Bandoleer was of military green colour containing twenty pockets. Two back pockets and one front middle pocket are found to be opened with the help of Zip and the other pockets were containing stitch button. In order to carry the

bandoleer on the shoulder there are two padded strings and two belts were found to be there. 32 live cartridges were packed in two plastic envelopes with the help of cloth, pulanda was made and sealed with the seal of "HS".

Recovered rifle, two magazines, bandoleer, kitchen knife and the sealed parcel of 32 live cartridges were kept in a corrugated box, tied with the help of plastic string and a pulanda was made with the help of cloth and was sealed with the seal of "HS". All the above articles were taken into police possession vide memo Ex. PW-218/C, which bears my signature at point "B". Form CFSL was also filled and the sample seal of "HS" was affixed on the form. Seal was handed over to SI Satyajit Sarin after use. The seizure memo was written by SI Satyajit Sarin on the direction of Inspector . Hawa Singh and it bears my signatures at point "B" as witness. Case property was deposited in malkhana, PS-Kotwali. I can identify the case property. I have seen sketch of rifle and the same is Ex. PW-218/A and the same was prepared by me on the direction of Inspector . Hawa Singh. I have seen the sketch of magazine and cartridge which was prepared at the PS-Kotwali and the same is Ex. PW-218/B. It was also prepared by me.

(At this stage case property is produced in the court and the same is opened). Rifle AK-56 is Ex. PW-125/A, the two magazines are Ex. PW-125/2 & 3, thirty two live cartridges are Ex. PW-125/4 to 35, kitchen knife is Ex. PW-125/36, four detonators are Ex. PW-50/1 to 4, and the four hand grenades shell are Ex. PW-50/5 to 8, and a bandoleer is Ex. PW-118/1. I have seen all the recovered articles and these are the same which are recovered in my presence on the pointing out of the accused Md. Arif, who is present in the court today....

56. It is also the case of the prosecution that since recovery of hand grenades etc. was to be effected pursuant to the aforesaid disclosure statement of Mohd. Arif @ Ashfaq the police had as a precautionary measure taken the assistance of officials of Bomb Disposal Squad(BDS) also as well as some ballistic experts. PW-202 Shri N.B.Bardhan, Sr. Scientific Officer in CFSL is also a witness to the aforesaid recoveries. He had been associated in the investigation on 23-12-2000 and after deposing about the recovery of one 7.62 mm assault rifle from a place near Vijay Ghat he had deposed about the recoveries from behind the Lal Quila and the relevant part of his examination-in-chief is as under:

...Again on 26.12.2000 as per telephonic message received in the office from Delhi Police regarding detection of more arms, ammunitions and hand grenades from the area of outside Red Fort, a CFSL team consisting of Sh. S.K.Chadha, myself and other officials as mentioned in the report, visited the outside area of eastern side of the Red Fort boundary wall.

On examination of the scene, one 7.62 mm AK-56 Assault Rifle without magazine, two magazines and one bandoleer was found lying amidst of bush plants adjacent to outside boundary wall of eastern side boundary wall. The spot was photographed by the expert. IO was instructed to shift the exhibits to PS Kotwali carefully for development of chance prints if any on the exhibits, which

were subsequently examined by the Finger Print Expert. On further examination of bandoleer, it was found to contain four hand grenades, one kitchen knife. The two magazines also found to contain thirty two (32) 7.62 mm live cartridges of Assault Rifle. IO was instructed to forward these exhibits to laboratory for further examination after proper defusion of the hand grenades by the competent authority. The sign inspection report prepared by me is Ex. PW-202/B, which is signed by me at point A....

57. PW-125 S.K.Chadha is also the expert from CFSL. He was also summoned to the place of aforesaid recoveries from behind Lal Quila and he has deposed about those recoveries. The relevant part of his examination-in-chief in that regard is as under:

...On 26.12.2000, a message was received in the CFSL that a A.K. 56 rifle, two magazine, one bandolier were lying outside the Red Fort, in the bushy plants at the eastern side of the Red Fort. On that day, ballistic expert Sh. A. Dey and Sh. N.B. Vardhan were also with me. These items were taken to PS Kotwali, where finger prints were developed....

(At this stage a sealed parcel sealed with the seal of CFSL is produced in the court and the same is opened. From therein one rifle A.K. 56 is taken out and is shown to the witness and is correctly identified by him, which is Ex.PW-125/1, two magazines are Ex.PW-125/2 and PW-125/3 and 32 live cartridges, which were found inside the magazines are Ex.PW-125/4 to PW-125/35, knife is Ex.Pw-125/36.

At this stage another sealed parcel with some illegible seal impression and with some seals of Distt. & Session Judge, Delhi is opened, four plastic jars are taken out, out of which four empty of hand-grenades are taken out, which are identify by the witness and one empty bears the signature of the witness. These empty are Ex.PW-50/5 to 8. From the same parcel, four jars are also taken out, which contained mechanical detonators, which are Ex.PW-50/1 to 4....

58. The learned Counsel for appellant - accused Mohd. Arif @ Ashfaq challenged these recoveries also, which the prosecution has sought to establish through the evidence of PWs 218, 227, 125 and 202, mainly on the ground that no public witness was associated when the police team had gone to the back side of Lal Quila to recover arms and ammunition pursuant to the alleged disclosure statement of Mohd. Arif @ Ashfaq. We have already rejected similar argument advanced in respect of the recovery of the pistol from Mohd. Arif @ Ashfaq by observing that the police officials could not associate public persons in the investigation because none had come forward. When the police team had gone to the back side of Lal Quila at that time also efforts were made to associate public witnesses but none had agreed. This has been deposed by PW-218 and we have no reason to disbelieve him. We have already observed that these days people do hesitate in joining police investigations against dreaded criminals and terrorists. So, we are not inclined to accept the submission of learned Counsel for

accused Mohd. Arif @ Ashfaq that the recoveries of AK-56 rifle and the ammunition from the back side of Lal Quila at the instance of accused Mohd. Arif @ Ashfaq should also be disbelieved because of non-joining of public persons at the time of those recoveries. It is significant to note that the recoveries have been deposed to even by the two officials from CFSL also and both of them under no circumstances can be said to be not independent witnesses or in any way interested in falsely deposing about those recoveries. An argument was raised that these recoveries were in fact not actually made from behind the Lal Quila but were actually recovered from G-73, Batla House after the so-called encounter and then shown on papers to have been recovered from the backside of Lal Quila. No such suggestion, however, was given to PW-229 Inspector . Mohan Chand Sharma, who claims to have brought this accused to Lal Quila on 26/12/2000 after he had disclosed about the concealment of arm and ammunition there, that in fact he had picked up the rifle and ammunition from G-73 and showed it to have been recovered from the backside of Lal Quila. This kind of a contention instead of helping accused Mohd. Arif @ Ashfaq goes against him inasmuch as at least with this argument it becomes clear that it is not being disputed that there was an encounter at G-73, Muradi Road or at least that recovery of arms and ammunition were recovered from there where also Mohd. Arif @ Ashfaq only had taken the police. As noticed already, PW-229 was not at all cross-examined on the material parts of his examination-in-chief which implicated Mohd. Arif @ Ashfaq. So, even if this accused claims that AK-56 Rifle etc., which is being claimed by the prosecution to have been recovered from the backside of Lal Quila, were actually recovered from G-73 he does not get benefitted in any way by taking this kind of a plea because the fact remains that that recoveries were pursuant to his information and later on it was found by the ballistic expert that the fired cartridge cases recovered from the place of occurrence were in fact fired from the two AK-56 Rifles, one of which was recovered from Vijay Ghat and the other one got recovered by this accused. Learned Counsel also had submitted that the police witnesses who had searched the scene of crime on the night of incident itself did not find any arms and ammunition and even next morning only some currency notes and a paper slip of mobile phone number were found despite the fact that services of sniffer dogs were also taken and so the so-called recoveries on 26/12/2000 become doubtful for this reason also. This submission is also equally devoid of force like the earlier ones. If the sniffer dogs had not succeeded in locating the rifle etc. that would not show that actually the same were not lying there. so, this circumstance also stood established beyond any doubt.

59. As per the prosecution case, on 23-12-2000 one AK-56 rifle had been found lying near the gate of Vijay Ghat which is on the Ring Road on the back side of Lal Quila. The witnesses in respect of that recovery are PW-89 HC Upender Singh, PW-62 SI Ram Chander, PW-234 Inspector Roop Lal, PW-78 HC Narender Singh, PW-81 HC Satbir Singh, PW-35 Ct. Rambir Singh as well as the experts from CFSL, namely, PW-125 S.K.Chadha and PW-202 N.B.Bardhan. PW-89 HC

Upender Singh deposed as under:

On 23.12.00 I was posted at Sugar 61, PCR van with base behind Red Fort. I was in charge of the PCR van. At about 10.30 a.m. a Delhi Home Guard Jawan came to me and informed that a stengun was lying in the bushes near Vijay Ghat. I went there and found an AK-47 rifle lying below the Vijay Ghat boundary wall on the western side. I immediately informed my control room. On the information received by local police Addl. SHO P.S. Kotwali, ICBP Yamuna Pusta and other staff reached the spot. I can identify the rifle if shown to me. At this stage a sealed parcel sealed with the court seal is produced in the court and the same is opened. I identify the rifle Ex. PW-62/1, magazine Ex. PW-62/2 and the cartridges which were in the magazine are Ex. PW-62/3 are the same which were recovered from Vijay Ghat....

60. The examination-in-chief of PW-62 SI Ram Chander is as under:

In the month of Dec."00 I was posted at police post Yamuna Pusta P.S. Kotwali. On 23.12.00 I was on patrolling duty alone for prevention and detention of crime in the ilaka Yamuna Pusta. At that time I was near Vijay Ghat when at about 10.30 to 10.45 a.m. I was informed on wireless set that one riffle AK-47 is lying in Vijay Ghat. Thereupon I reached main gate Vijay Ghat. There on the southern side of main gate of Vijay Ghat one AK-56 riffle was lying below the wall. After a short while Addl. SHO Kotwali also reached the spot. I told him about the riffle. He immediately flashed messages to crime team, dog squad, CFSL, photographer and videographer. Many senior officials also reached the spot. SI N.K.Sharma of crime team also reached the spot. Photographer Ct. Satbir Singh also reached there. I do not know the name of the official of dog squad who reached the spot. Sh. A. Day of CFSL reached the spot along with his team. Photograph of the riffle was taken. Finger prints were there on the riffle and they were lifted. Dog squad also tried to find out some clues but could not find any. Photographs of the spot were also taken as well as the riffle. A sketch of the rifle was also prepared on a large sized paper. Magazine of the rifle was taken out in which seven live cartridges were found. A sketch of the magazine as well as of the round was prepared. I signed the sketch, riffle, magazine and round which was taken on the same sheet and bear my signatures at point A and the same be now Ex. PW-62/A.

Thereafter, riffle, magazine and the rounds were sealed into separate parcels with the help of clothes and all three parcels were sealed with the seal of RL. Thereafter, all three parcels were put into a cardboard box. The cardboard box was also sealed with the seal of RL. A separate seizure memo of these articles were prepared and was signed by me at point A. Memo is Ex. PW-62/B. I can identify the riffle, magazine and cartridges. At this stage a sealed parcel sealed with the seal of CFSL be produced in the court and the same is opened out of which one riffle AK-56, magazine and seven live cartridges are produced in the Court. The same are shown to the witness who has correctly identified the same. Riffle is Ex. PW-62/1, Magazine is 62/2 and the seven cartridges are Ex. PW-62/3

to 9.

61. PW-234 Inspector Roop Lal, who was the Additional SHO of Kotwali police station those days and had also reached Vijay Ghat on receiving the information about the find of rifle from there, has deposed about that recovery as under:

... At about 10.30 am on 23.12.2000, I received a wireless message as a rifle was lying near Vijay Ghat. I Along with the staff reached Vijay Ghat. At the place where rifle was lying SI Ramchanger of PP-Yamuna Pusta was already present there. On his pointing out I saw AK56 rifle with a sling lying over there. I summoned CFSI team through a special messenger. Crime team, dog squad and finger print expert who were already present at Red Fort was also directed to reach there. CFSL expert took photographs of rifle from different angles. Finger print expert lifted chance prints from the rifle. The dog had taken smell from the spot and could reach only near T-point and thereafter it lost the track. With the help of sling the rifle was lifted and its magazine was taken out. On checking the magazine it was found to contain seven rounds. Out of the seven rounds, six were of the same mark and one was of different mark. One the six cartridges 81-71 was written while on the seventh cartridge 81-78 was written. I prepared a sketch of rifle through SI Naresh Kumar. On the same paper sketch of magazines and one cartridge was also got prepared through SI Naresh Kumar. The sketch is Ex. PW 62/A. I also got a site plan of the place of recovery of rifle prepared through SI Naresh Kumar and the site plan is Ex.PW 234/H and signed by me at point A. The rifle, magazine and the seven cartridges were sealed into different parcel with the seal of RI and was given Ex. No. 20, 21 and 22 respectively. These were taken into possession vide seizure memo Ex.PW62/B bears my signature at point B. SI Ramchander had signed at point A. I can identify the rifle, magazine and cartridges. (At this stage sealed parcel with the seal of the court is ordered to be opened).

I have seen the rifle AK-56 is the same and the same is Ex.PW 62/1 and the magazine Ex. PW-62/2 where the seven cartridges recovered from the said magazine are Ex. PW62/3 to 9.

62. PW-78 HC Narender Singh deposed as under:

On 23.12.00 I was posted in PCR as wireless operator. I received a message from a PCR vehicle Sugar Six 1, conveyed by HC Upender, 1368 PCR. At 10.35 a.m. message was received to the effect that a home guard has conveyed the information that a stand gun was lying behind the Red Fort adjoining the road near the hedge. I filled up the PCR form. I have brought the original form. I record the information in the PCR form and thereafter conveyed the same to the North District, Control Room. A photo copy of the PCR form is Ex. PW-78/A and bears my signature at point A(Original form seen and returned).

This witness was not cross-examined on behalf of any of the accused persons.

63. PW-81 HC Satbir Singh deposed as under:

On 23.12.00 I was on duty as wireless operator in P.S. Kotwali from 8 a.m. to 8 p.m. At 10.30 a.m. I received a wireless message on my wireless set that AK-47 rifle was lying at Vijay Ghat. At 10.32 a.m. I also received any another information of the backside of the Red Ford at Vijay Ghat a rifle AK-47 was lying there. Said gun was covered. Some official of DESU had passed on this information to Delhi Home Guard Sepoy and the same had informed to the PCR. Both the calls were received from PCR. I recorded both the calls in the law book. I had informed on wireless set to police force to Yamuna Pusta and the official received my call and passed the information to SI Ramchander or to Addl. SHO Kotwali. I had brought the log book containing both the aforesaid entries. The copy of the same is Ex. PW-81/A & B. (The original log book contained the said entry in my hand seen and returned).

This witness was also not cross-examined on behalf of any of the accused persons.

64. PW-35 Ct. Rambir Singh deposed as under:

In the month of Dec. 2000 I was posted at PS Kotwali at PP Jamna Pusta. On 23.12.2000 I was working as DD writer at PP Jamna Pusta and my duty hours were from 8 a.m. to 8 p.m. On 23.12.2000 at about 10.30 a.m. N.50, Control Room had informed to wireless set that in Vijay Ghat, a AK 47 was lying. It was also relayed that the message was from the PCR. I immediately informed SI Ram Chander and Addl. SHO Kotwali Sh. Roop Lal on wireless.

65. PWs 125 and 202, the two experts from CFSL, have also deposed about the aforesaid recovery of assault rifle Ex. PW-62/1, magazine Ex. PW-62/2 and cartridges Ex. PW-62/3 to 9 from Vijay Ghat. These recoveries were not challenged in the cross-examination of any of the aforesaid witnesses and, Therefore, the same stood established and so non-examination of the Home Guard who had first of all seen the rifle lying at Vijay Ghat, as claimed by PW-89, is immaterial and this recovery cannot be doubted for this reason, as was contended by Mr. Tufail regarding this recovery. The prosecution is relying upon these recoveries against accused Mohd. Arif @ Ashfaq because when on 26-12-2000 he had made the disclosure statement Ex. PW-148/E he had claimed that after committing the crime inside the Lal Quila his associate had thrown his assault rifle the shrubs at Vijay Ghat and he could point out that place. In this regard, the argument of Mr. R.M.Tufail, learned Counsel for appellant-accused Mohd. Arif @ Ashfaq was that since the police had already recovered the rifle from Vijay Ghat on 23rd December, 2000 the prosecution cannot rely upon that recovery. There is no doubt that the recovery of one AK-56 rifle from Vijay Ghat by the police was not pursuant to the disclosure statement of accused Mohd. Arif @ Ashfaq since it had already been recovered before his arrest. However, the fact that Mohd. Arif @ Ashfaq had the knowledge about the throwing of the rifle in the shrubs at Vijay Ghat and which, in fact, had been found there can be used as an incriminating circumstance by the prosecution. In this regard we may make a useful reference to the views of the Hon'ble Supreme Court expressed in

the Parliament attack case State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, wherein also admissibility of evidence of some recovery made before the making of a disclosure statement by an accused had come up for consideration. In para no. 13 of its judgment the Hon"ble Supreme Court dealt with this point as under:

13. The interpretation of Section 27 of the Evidence Act has loomed large in the course of arguments. The controversy centered round two aspects:

(i) Whether the discovery of fact referred to in Section 27 should be confined only to the discovery of a material object and the knowledge of the accused in relation thereto or the discovery could be in respect of his mental state or knowledge in relation to certain things - concrete or non-concrete.

(ii) Whether it is necessary that the discovery of fact should be by the person making the disclosure or directly at his instance? The subsequent event of discovery by police with the aid of information furnished by the accused - whether can be put against him u/s 27?

These issues have arisen especially in the context of the disclosure statement (Ex. PW-66/13) of Gilani to the police. According to the prosecution, the information furnished by Gilani on certain aspects, for instance, that the particular cell phones belonged to the other accused - Afzal and Shaukat, that the Christian colony room was arranged by Shaukat in order to accommodate the slain terrorist Mohammad, that police uniforms and explosives "were arranged" and that the names of the five deceased terrorists were so and so are relevant u/s 27 of the Evidence Act as they were confirmed to be true by subsequent investigation and they reveal the awareness and knowledge of Gilani in regard to all these facts, even though no material objects were recovered directly at his instance.

The arguments of the learned Counsel for the State run as follows:

The expression "discovery of fact" should be read with the definition of "fact" as contained in Section 3 of the Evidence Act which defines the "fact" as "meaning and including anything, state of things or relation of things, capable of being perceived by the senses and also includes any mental condition of which any person is conscious". Thus, the definition comprehends both physical things as well as mental facts. Therefore, Section 27 can admit of discovery of a plain mental fact concerning the informant - accused. In that sense, Section 27 will apply whenever there is discovery (not in the narrower sense of recovery of a material object) as long as the discovery amounts to be confirmatory in character guaranteeing the truth of the information given - the only limitation being that the police officer should not have had access to those facts earlier.

The application of the Section is not contingent on the recovery of a physical object. Section 27 embodies the doctrine of Confirmation by subsequent events. The fact investigated and found by the police consequent to the information

disclosed by the accused amounts to confirmation of that piece of information. Only that piece of information, which is distinctly supported by confirmation, is rendered relevant and admissible u/s 27.

The physical object might have already been recovered, but the investigating agency may not have any clue as to the "state of things" that surrounded that physical object. In such an event, if upon the disclosure made such state of things or facts within his knowledge in relation to a physical object are discovered, then also, it can be said to be discovery of fact within the meaning of Section 27.

...

In the present case when the rifle Ex. PW-62/1 was found from Vijay Ghat the police had no idea that the same had anything to do with the shooting incident inside the Lal Quila nor anyone in connection with that incident had been arrested by that time. The use of that rifle in the shooting incident, as per the prosecution case, could be suspected only after it was disclosed by Mohd. Arif @ Ashfaq after his arrest that the rifle had been thrown by one of his associates in the shrubs near Vijay Ghat. In order to confirm whether that rifle was actually used in the shooting incident or not it was sent to CFSL so that the ballistic expert could give a report after examining that rifle as well as the fired assault rifle cartridge cases which had been seized from the place of occurrence as to whether those cartridge cases had been fired through the said rifle or not. The prosecution case is that the ballistic expert (PW-202 N.B.Bardhan) did find on examination that some of the assault rifle fired cartridge cases sent to him for examination had been fired from the said AK-56 rifle Ex. PW-62/1. (We shall shortly go to the evidence of recovered cartridge cases also and the ballistic expert's evidence in detail). Therefore, the prosecution can definitely utilise the information given by accused Mohd. Arif @ Ashfaq in his disclosure statement Ex. PW-148/E regarding the throwing of the assault rifle in the bushes near Vijay Ghat despite the fact that the police had already recovered the rifle from that place on 23-12-2000 as an incriminating circumstance against him.

66. Now we proceed further to examine as to how the recovery of one AK-56 rifle Ex. PW-125/1 from the back side of Lal Quila pursuant to the information given by appellant - accused Mohd. Arif @ Ashfaq and the other AK-56 rifle Ex. PW-62/1 recovered from Vijay Ghat implicates him in the incident of shooting inside the Lal Quila. The prosecution case is that the AK-56 rifle Ex. PW-125/1 got recovered by Mohd. Arif @ Ashfaq from the back side of Lal Quila and the one recovered from Vijay Ghat, Ex. PW-62/1, were sent to CFSL where the same were examined by PW-202 Shri N.B.Bardhan, Sr. Scientific Officer (Ballistics)-cum-Assistant Chemical Examiner, and on examining them he had opined that both these rifles were fire-arms and were in working condition. As noticed already, immediately after the shooting incident when the army men had conducted search of the place of incident they had found many fired cartridge cases and the same were handed over to the police. The witnesses regarding recovery of

Assault Rifle fired cartridge cases from the place of shooting are PWs 115,116 and 189, all of whom are Armymen posted those days at Lal Quila in the 7 Rajputana Rifles Unit. PW-115 Subedar Ashok Kumar deposed that on 23.12.00 he was posted at Red Fort, Delhi. On 22.12.00 a shoot out took place inside Red Fort in which two jawans of Raj. Rifle and one civilian sentry died. On 23.12.00 he Along with HC Ramesh Khakra(PW-116) on the direction of senior officer searched Red Fort and during the search they found 37 empty cartridges and one live cartridge which he handed over to Addl. SHO, Kotwali Inspector . Roop Lal who seized the same vide Ex.PW-115/A and these were sealed in a parcel with the seal of RL. The PW-115 was shown the said cartridge cases and he had correctly identified them. PW-116 Hawaldar Ramesh Kakre also deposed about the recovery of these fired cartridge cases and corroborated the evidence of PW-115. He deposed that from the sentry post supply gate where first shoot out took place four empty cartridges and one live cartridge was recovered. Thereafter from MT park twenty empties were found. Thereafter from near training store six empties were found. From near museum seven empties were found. In all they found 37 empties and one live cartridge which were handed over to Subedar Ashok Kumar(PW-115). They reported the matter to the C.O. and thereafter these empties and live cartridge were handed over to Addl. SHO at about 2.30 pm. The SHO sealed the live cartridge and the empties separately and seized the same vide Ex.PW-115/A.

67. The relevant part of the examination-in-chief of PW-189 S.P.Patwardhan regarding the lifting of fired cartridge cases by the armymen from the place of occurrence is as under:

Police was informed at around 9.25 pm by Capt. Nagpal. At that time when the police arrived our search party was searching the Red Fort premises. During the search three magazines of AK assault rifle, 28 live rounds were recovered. Apart from these, 40 fired cases were also recovered. After searching the spot I had ordered the gates to be closed on telephone. For this reason it took some time for the police to reach the spot. I had ordered the search of the Red Fort. Addl. SHO Inspector .Roop Lal reached the spot Along with other police staff.... I also showed him the place of incident, location of dead body and the location where the fired cases were lying and recovered. The magazines, live cartridges and fired cases were handed over to the police. The three magazines were of the same type and live cartridges and fired cases were of the same type. Inspector .Roop Lal prepared a sketch of one magazine, one live cartridge and one fired case in my presence and the same is Ex. PW-189/B. The three magazines, 28 live cartridge and 40 fired cases were taken into possession by the police and were sealed in the separate parcel with the seal of RL and were seized vide recovery memo Ex. PW-189/C. It bears my signature at point A. I can identify the same if shown to me. (At this stage a sealed parcel with the seal of CFSL is produced in the court and opened). Three magazines are taken out from the same and are shown to the witness. The three magazines have been correctly identified and are Ex. PW-189/1 to 3. The live cartridges were

recovered from somewhere near the rear wall of Red Fort. I had signed the seizure memo after going through the same. After going through the recovery memo Ex. PW-189/C I say that rounds were live in a magazine.

(At this stage, another sealed parcel sealed with the seal of CFSL is produced in the court and opened). there from 22 live cartridges and 6 fired cases are taken out. The same was shown to the witness and it has been correctly identified by him. The six fired rounds were live at the time of recovery. The live cartridges are Ex. PW-189/4 to 25. The fired cases are Ex. PW-189/26 to 31.

(At this stage another sealed parcel with the seal of CFSL is produced in the court and the same is opened). Forty fired cases are taken out. The same are shown to the witness and have been correctly identified by him. The same are Ex. PW-189/32 to 71. The fired cases were collected from different places like MT park....

68. PW-234 Inspector . Roop Lal has also deposed that when he had reached the place of incident on the night of 23-12-2000 Subedar Ashok Kumar had given him one live cartridge Ex. PW-115/38 and 36 fired cartridge cases Ex. PW-115/1 to 36 which he had sealed in two separate parcels which were given the numbers 18-A and 19-A and he had seized them vide memo Ex. PW-115/A. He also deposed that Major S.P.Patwardhan had also handed over to him three magazines and in one of them there were 28 live cartridges. Cap. Patwardhan also gave him 40 fired cartridge cases and since the magazines were of same type he had prepared sketch of one magazine, sketch of the live cartridge and sketch of one fired case and the same was Ex. PW-189/B. He further deposed that the three magazines were sealed in one parcel which were given the number 17 by him and 28 live cartridges were sealed in another parcel which was given the number as 18 and the 40 fired cases were sealed in a third parcel which was numbered as 19. All the parcels were sealed with the seal of RM and were taken into possession vide memo Ex. PW-189/C. PW-234 Inspector . Roop Lal had also deposed that after reaching the place of occurrence he had inspected the scene of crime and during that inspection he had lifted, amongst many other things, two empties which were sealed by him with the seal of RL and seized the same vide seizure memo Ex. PW-128/A. He then on being shown the magazine and cartridges identified the same in Court.

69. PW-122 Naik Suresh, who was posted at Red Fort on the day of the incident, had deposed that he had shown 8 places to the police where there were bullet marks and those bullet marks were on the wall where the deceased Ashok was shot at in the training hall and from one of those places which had the bullet marks one portion of a fired bullet was taken out and was taken into possession by the police and its parcel was given the number as 7G. He had also deposed about other recoveries effected from the place of incident which according to him had been seized by the police, including the bullet(numbered as 7G) vide memo Ex. PW-122/B.

70. As far as the recovery of Assault Rifle fired cartridge cases from the place of occurrence is concerned it was suggested to PWs 115 and 116 in cross-examination on behalf of accused Mohd. Arif @ Ashfaq that those cartridge cases were actually not recovered from the spot but were taken from Army's firing range where firing practice used to be done by armymen. The witnesses denied that suggestion. We have no reason to disbelieve these two witnesses of recovery. In this regard we may point out that to PW-144 Major D.K.Singh, whose evidence we have already referred to, was also suggested in cross-examination that assault rifle fired cartridge cases, recovery of which from the place of incident is being relied upon by the prosecution, were not actually fired there but were fired through the rifles of the Army. The answer of the witness was that their Unit had only SLRs(Self Loading Rifles). Thereafter the witness was not cross-examined further on this aspect. Earlier in his chief-examination he had claimed that he had fired five rounds upon upon the intruders from his SLR and then he had deposited back the SLR and the empties. So, we are not inclined to accept that the fired cartridge cases of Assault Rifles which the prosecution is claiming to have been lifted from the spot by armymen after the intruders had escaped were in fact not lifted from the spot and were planted as a case property of this case after collecting the same from army's firing range. The aforesaid recovered AK-56 rifle Ex.PW-125/1 and the assault rifle fired cartridge cases seized from the place of occurrence by the armymen were sent to CFSL. The AK-56 Rifle Ex.62/1 recovered from Vijay Ghat and seized vide memo Ex.PW-62/B was also sent to CFSL where these arms and ammunition were examined by PW-202 N.B.Bardhan, and on examination he gave his report Ex. PW-202/A to the effect that the assault rifle fired cartridge cases examined by him had been fired from the aforesaid rifles Ex. PW-125/1 and Ex.PW-62/1 which he had during examination marked for identification purpose as W-1 and W-2 respectively. During his evidence in Court also he confirmed that. The relevant part of his examination-in-chief with our clarificatory observations as to the articles examined by the expert given in bracketed portions in respect of the two AK-56 rifles Ex. PW-125/1 and Ex.PW-62/1 and assault rifle fired cartridge cases recovered from the scene of occurrence and which this expert found to have been fired from these two Assault Rifles, is as under:

I am working as Senior Scientific Officer, Grade-I (Ballistic), CFSL, CBI, Delhi. On 24.01.2001, 39 sealed parcels were received in connection with case FIR no. 688/00 dated 22.12.2000 from SHO PS Kotwali through messenger. These parcels were assigned to me for examination.

39 sealed parcels bear mark No. 1 to 6, 7-A to 7-H, 8 to 17, 18, 18-A, 19,19-A, 23 to 27, 29, 31, 32, 34, 35 and 36. The parcel no. 36 contained exhibit no. 20, 21, 22 in sealed condition. The seals on the parcels were intact and tallying with the specimen seal of the case.

Description of the articles contained in each parcel is given below:

1. Parcel No. 3(Exhibit No. 3) : It contained one 7.62 mm Assault Rifle fired

cartridge case. (Marked C/1 by me.)

2. Parcel No. 4 (Exhibit No. 4): It contained one 7.62 mm Assault Rifle fired cartridge case. (Marked C/2 by me.)

(These are the two cartridge cases which the investigating officer PW-234 Inspector . Roop Lal claimed to have lifted from the scene of occurrence on 22/12/2000 vide seizure memo Ex.PW-128/A wherein he had numbered the two parcels of these two empties as Ex.-3 & Ex.-4).

...

9. Parcel No. 7G(Exhibit-No. 7G): It contained the following items:

(i) One 7.62 mm fired bullet of Assault rifle

(Marked BC/1 by me)(this bullet piece was removed from a wall of Lal Quila by the investigating officer on being pointed out by PW-122 Naik Suresh and seized vide memo Ex.PW-122/B and its packet was numbered as Ex.7-G).

...

12. Parcel No. 17(exhibit no. 17) : It contained three empty magazines of 7.63 mm Assault Rifle(Marked M-1 to M-3 by me)

13. Parcel No. 18(exhibit no. 18) : It contained twenty eight(28) 7.62 mm Assault Rifle cartridges (Marked C/3 to C/30 by me.)

All having intact percussion cap.(these parcel nos. 17 & 18 are in respect of the three magazines and fired cartridge cases recovered from the place of occurrence by army men and handed over to the investigating officer by PW-189 S.P.Patwardhan vide memo Ex.PW-189-C wherein he had described the packets as Ex.17 & 18)

14. Parcel No. 18A(Exhibit No. 18A) : It contained one 7.62mm Assault Rifle cartridge(marked C/31 by me) having its intact percussion cap.(this cartridge was also recovered from the spot during search by PW-115 Subedar Ashok Kumar and PW-116 Hawaldar Ramesh of 7 Raj Rifles and handed over to the investigating officer PW-234 vide memo Ex.PW-115/A who gave its parcel no. as 18-A).

15. Parcel No. 19 (Exhibit no. 19): It contained Forty(40) 7.62 mm Assault Rifle fired cartridge cases(marked C/32 to C/71 by me)(these cartridge cases were lifted from a pot by army men and handed over by PW-189 S.P.Patwardhan to the investigating officer PW-234 who then seized the same vide memo Ex.PW-189/C and gave this parcel the number Ex.19)

16. Parcel No. 19A(Exhibit No. 19A) : It contained thirty seven(37) 7.62 mm

Assault Rifle fired cartridge cases (Marked C/72 to C/108 by me)(these are also the cartridge cases lifted by army men(PWs 115 & 116) from different the places

inside Lal Quila of and handed over to the PW-234 vide memo Ex.PW-115A who numbered its parcel as 19-A).

17. Parcel No. 34(Exhibit no. 34) : It contained the following items:

(i) One small cloth cover sealed parcel having Five (5) seals of "HS" containing thirty two (32) 7.62 mm Assault Rifle Cartridges (Marked C/109 to C/140 by me) all having Intact percussion cap.

(ii) One 7.62 mm(AK-56) Assault Rifle (Marked W/1 by me) without its magazine bearing Serial no. R5781.

(iii) Two empty magazines of 7.62 mm Assault Rifle (Marked M-4 to M-5 by me)

(iv) One folding type kitchen knife (Marked K/1 by me)

(v) One pouch.(Bandoleer)

18. Parcel No. 35 : It contained the following (Exhibit No. 35) items:

(i) Four body of Agrees -Spl-HGR-84 Hand Grenades (marked H-1 to H-4 be me) Without their detonator set.

(ii) Four detonator sets attached with lever (Marked D-1 to D-4 by me) of Agrees Hand Grenade.

(all these things in parcel nos. 34 & 35 were recovered from the backside of Lal Quila pursuant to the disclosure statement of accused Mohd. Arif@ Ashfaq and had been seized by the investigating officer PW-228 vide memo Ex.PW-218/C).

19. Parcel No. 36 (Marked in the Laboratory):

(Exhibit no. 20, 21 & 22)

This parcel was marked No. 36 in the laboratory and contained three sub-parcels/ exhibits marked as Exhibit No. 20, 21 and 22.

(i) Sub-parcel/Exhibit No. 20 : It contained one 7.62 mm (AK-56) Assault Rifle (Marked W/2 by me) without its Magazine bearing Serial no. M16341.

(ii) Sub-Parcel/Exhibit No. 21 : It contained one empty magazine of 7.62 mm Assault Rifle (marked M-6 by me)

(iii) Sub-Parcel/Exhibit No. 22 : It contained seven 7.62 mm Assault Rifle Cartridges (marked C/141 to C/147 by me) All having intact percussion cap. (these things were recovered from Vijay Ghat and taken into police possession vide memo Ex.PW-62/B)

I had given a note in my report as to from where these parcels were routed and were subsequently received in Ballistic Division.

After examination of all the parcels and on the basis of physical examination, Chemical analysis, test firing and microscopic examination, the stereo and

comparison, microscopes, carried in the laboratory with scientific aid, I had given the following results of my examination:

RESULT OF EXAMINATION:

(i) The 7.62 mm (AK-56) Assault Rifle marked (W/1) contained in parcel no. 34(and 7.62 mm (AK-56) Assault Rifle marked (W/2) contained in parcel no. 36 in Sub-parcel no. 20 are fire arms as defined in Arms Act and are in working order and had been fired through. The time of their last firing, however, could not be ascertained. (these are the rifles recovered from the backside of Lal Quila and Vijay Ghat)

(ii) 28 (twenty eight) 7.62 mm Assault Rifle cartridges marked C-3 to C-30 contained in parcel no. 18, the 7.62 mm Assault Rifle cartridge mark C-31 containing parcel no. 18-A, thirtytwo(32) 7.62 mm Assault Rifle cartridge marked C-109 to C-140 contained in parcel no. 34, and seven 7.62 mm Assault Rifle cartridges marked C-141 to C-147 contained in parcel no. 36 in sub-parcel no. 22 are ammunition as defined under Arms Act were live ones.

(iii) The 7.62 mm Assault Rifle cartridge case mark C-1 contained in parcel no. 3, the six 7.62 mm Assault Rifle cartridges cases marked C-49, C-52, C-56, C-58, C-64 and C-71 contained in parcel no. 19 and the twenty one (21) 7.62 mm Assault Rifle cartridges cases, marked C-72, C-74, C-75 to C-80, C-82 to C-84, C-86, C-89, C-91, C-94 to C-96, C-98, C-102, C-106 to C-108 contained in parcel No. 19-A have been fired from the 7.62 mm AK Assault Rifle marked W/1(this rifle was recovered from the backside of Lal Quila pursuant to the disclosure statement of accused Mohd. Arif @ Ashfaq) contained in parcel no. 34.

(iv) The 7.62 mm Assault Rifle Cartridge cases marked C-2 contained in parcel no. 4, thirty four (34) 7.62 mm Assault Rifle cartridges cases marked C-32 to C-48, C-50, C-51, C-53 to C-55, C-57, C-59 to C-63 and C-65 to C-70 contained in parcel no. 19 and Sixteen 7.62 mm Assault Rifle cartridge cases marked C-73, C-77, C-81, C-85, C-87, C-88, C-90, C-92, C-93, C-97, C-99, C-100, C-101, C-103 to C-105 also contained in parcel no. 19-A have been fired from the 7.62 mm Assault Rifle AK-56 marked W/2(this is the rifle recovered from Vijay Ghat) contained in parcel no. 36 in Sub-parcel no. 20.

(v) The 7.62 mm fired bullet of assault rifle marked BC/1 contained in parcel no. 7-G has been fired from 7.62 mm Assault Rifle marked W/1 contained in parcel no. 34.

(vi) The contents of parcel no. 35 are components of four defused/dismantled standard Agrees Hand Grenade are live ones. The hand grenades are explosive substances as defined in Explosive Substance Act.(these are the components of hand grenades which were recovered from the backside of Lal Quila on 26/12/2000 and which had been dismantled by the ballistic expert on the same day).

(vii) No fired bullet/portion of fired bullet could be detected from the contents of

parcel no. 7-A to H.

(viii) The three magazines of 7.62 mm Assault Rifle marked M-1 to M-3 contained in parcel no. 17 and two magazines of 7.62 mm Assault Rifle marked M-4 and M-5 contained in parcel no. 34 and one magazine 7.62 mm Assault Rifle marked M-6 contained in parcel no. 36 in Sub-parcel 21 are in working order and can be loaded into standard 7.62 mm Assault Rifle.

I had given the above opinion after examination of all the above mentioned parcels and my opinion vide CFSL Report no.CFSL-2001/F-51 dated 12.3.2001 is Ex. PW-202/A and is signed by me at point A.

Twenty eight(28) live cartridges marked C-2 to C-30 contained in parcel no. 18 could be loaded in Assault Rifle mark W/1 and W/2 and can be fired from the said rifle....

I had examined the parcel no. 37 which contained Eleven 7.62 mm Self Loading Rifle fired cartridge cases (marked C/1 to C/11 by me) and not parcel no. 35 as stated earlier. My report is Ex. PW-202/C and it bears my signatures at point A.

I can identify the case property examined by me. (At this stage a sealed parcel duly sealed with the court seal is opened and a small plastic container is taken out, from which a fired cartridge case is taken out and the same is Ex. PW-128/1.

Another sealed parcel duly sealed with the court seal is opened and a small plastic container is taken out from which a fired cartridge case is taken out and the same is Ex. PW-128/3, and it bears my marking also.

At this stage another sealed parcel no. 7G sealed with the court seal is ordered to be opened and a small plastic container is taken out and one fired bullet is taken out and the same is Ex. PW-122/1.

At this stage another sealed parcel duly sealed with the court seal is opened and three magazines are taken out and these magazine are Ex. PW-189/1 to 3 are the same which I had examined and these magazines are of 7.62 mm Assault Rifle.

Parcel no. 7-G contained one fired bullet of Assault Rifle which is Ex. PW-122/1 and lump of grey colour, which I have examined also is Ex. PW-202/1.

At this stage parcel no. 18 is duly sealed with the court seal is opened and it contained 22 live cartridges and six fired cartridge. These six cartridges were fired by me during test in the laboratory. The live cartridge are Ex. PW-199/4 to 25 and the fired cartridges are Ex.PW-189/26 to 31. (objected to) volun. I had consumed six cartridges during test in the laboratory.

At this stage parcel no. 18-A duly sealed with the court seal is opened and it contained one cartridge of Assault Rifle of 7.62 mm and same is Ex. PW-202/2, is the same which I have examined. One live cartridge Ex. PW-202/2 is a small envelope which does not have any description, but it was taken out from 18-A.

However, the cartridge bears the signature of the witness.

At this stage another sealed parcel duly sealed with the court seal is opened and it contained 40 fired cartridge cases and these are Ex. PW-189/32 to 71 are the same which I had examined.

At this stage another sealed parcel duly sealed with the court seal is opened and it contained 37 fired cartridges cases which are Ex. PW-115/1 to 37 are the same, which I had examined.

At this stage, parcel no. 34 sealed with court seal is produced in the court and is opened and it contained rifle, two magazine, live cartridges, knife and bandoleer. I have seen the assault rifle 7.62 mm and the same is Ex. PW-125/1 and two magazines are Ex. PW-125/2 and 3 and the live cartridges 32 in number of assault rifle 7.62 mm are Ex. PW-125/4 to 35, kitchen knife Ex. PW-125/36, bandoleer is Ex. PW-202/3 are the same which I had examined.

At this stage parcel no. 35 sealed with court seal is produced in the court and the seal is opened and 8 containers are taken out and it contained 4 hand grenades and 4 detonators. Hand grenades are Ex. PW-50/1 to 4 and the detonators are Ex. PW-50/5 to 8 are the same which I had examined.

At this stage, parcel no. 36 sealed with court seal and the same is opened and this parcel no. was given by me in the laboratory. It contains three exhibits of parcel no. 20, 21 & 22. The parcel is opened. I have seen assault rifle and the same is Ex. PW-62/1. I have seen magazine of the said rifle and the same is Ex. PW-62/2. I have also seen the 7 live cartridges and the 6 have it has bearing no. 81 to 71 at its dates whereas the 7th has no. 81 and 78. These were Ex. PW-62/3 to 9 are the same which I had examined.

I had given my detailed report and opinion after examination of the all above articles and my report is Ex. PW-202/A....

The cross-examination of this expert could not bring on record anything which could throw any doubt on the veracity of this witness or the prosecution case in general. He had also examined the eleven empties of Self Loading Rifles used by the army men while firing towards the intruders and his opinion was that the same could not be loaded in AK-56 Rifles examined by him. So, it also cannot be accepted that the Assault Rifle cartridge case lifted from the spot could be of the Rifles used by the army men at the time of the incident, as was also the submission of the learned Counsel for appellant-accused Mohd. Arif @ Ashfaq. It thus stands established that the cartridges, empty cases of which were found at the place of occurrence, had been fired from the AK-56 Rifle got recovered by appellant-accused Mohd. Arif @ Ashfaq from behind the Lal Quila and also from the AK-56 Rifle recovered from Vijay Ghat about which also this accused was fully aware of.

71. The next circumstance relied upon by the prosecution against accused Mohd. Arif @ Ashfaq is the recovery of one mobile phone from his possession when he

was apprehended. The prosecution case is that the mobile phone Ex.PW-194/C recovered from the possession of Mohd. Arif @ Ashfaq was having number 9811278510 which was the number written on the piece of paper which had been recovered from behind Lal Quila on 23-12-2000. It was that telephone number which had led the police to the house of accused Mohd. Arif @ Ashfaq after it had transpired from the call details of this number that calls had been made from this number to the landline telephones installed at the flat of this accused and also at his "Knowledge Plus" computer centre in Gafur Nagar. The police had also come to know that immediately after the shooting incident inside the Lal Quila calls had been made from the said mobile number to the correspondents of BBC in Sri Nagar and Delhi. The importance of this mobile number 9811278510 was that the caller who had called the BBC correspondents PW-39 Altaf Hussain and PW-41 Ayanjeet Sen had informed them about the shooting incident inside the Lal Quila and had claimed himself to be a member of Lashkar-e-Toiba and also that in the firing incident two persons had been killed by them(do dane dal diye hain). PW-39 Altaf Hussain has deposed that:

I am a B.B.C. Correspondent based in Sri Nagar. I cover whole of the Kashmir. Whenever a violent incident takes place I received information from all sources including police. Sometimes the militants organization also give information claiming responsibility for the incident. I have two land line telephone one in my name and the other in the name of my wife Smt. Naznin. Telephone No. 2452918 is in the name of my wife while telephone No. 2477756 is in my name. it is not necessary for me to identify the caller all the time but if the caller repeatedly make the calls then he can be identified.

In December, 2000 I received a call on the date of the incident in question. The call was received after the incident. Responsibility was claimed for the instant incident on the telephone. The information was received on telephone No. 2452918. The caller told me that the incident inside the Red Fort has been carried out by them and further claimed that "DO Daane Dal Diyen Hain". The caller claimed himself to be from Lashkar-e-Toiba. The telephone number from which the caller telephoned me was not recorded at my residence as the telephone was not fixed in caller ID kit.(Identification Kit). By "Do Dane Dal Diye" I thought that two grenades have been thrown inside Lal Qilla. Thereafter, when I enquired from the caller as to what does it mean he told me that it was a Fidayeen attack by two persons who were Fidayeen. Here Fidayeen means a person who is ready to lay down his life. The caller also told me that they had attacked the army personnel. Thereafter, I told them to contact Delhi BBC office as the incident had not taken place within my Beat. I had thereafter given him Delhi Telephone Number of BBC. Since the incident had not happened in my beat I did not convey to BBC directly.

Similarly, PW-41 Awanjeet Sen deposed as under:

I am working with BBC based in Delhi. My office is in Aifacs Building, Rafi Marg. On 22.12.00 I was in my office and my duty hours were from 9.30 a.m. to 9

p.m. On that day telephone No. 3355751 was installed in our office. In between 9 to 9.30 p.m. I received a telephonic call from someone claiming to be speaking from Lashkar-e-Toiba. He told me that they had attacked (Dhawa Bol Diya) at Ref Fort. I asked the called as to from where he was speaking and he told me that he was speaking from inside the Red Fort. He further told that they had killed two persons. I asked him if he could name himself but he replied in the negative. He thereafter spoke to my seniors and fellow journalists. Thereafter, I had telephoned the police head quarters or Sub-Inspector(Press) at the police head quarters and checked about the incident but by that time they had no information. On that day there was no called identification kit fixed in our office with the aforesaid telephone no.

72. Learned Counsel for appellant - accused Mohd. Arif @ Ashfaq very strongly contended that even though PWs 39 and 41 had claimed that someone had called them up on the night of the incident and had owned the responsibility of the shooting incident inside Lal Quila and the prosecution claims to have found out during the investigation that the calls to these two BBC correspondents had been made from mobile no. 9811278510 but as far as appellant - accused Mohd. Arif @ Ashfaq is concerned it cannot be said to have been established that he was the caller who had called the two BBC correspondents and had claimed to be responsible for the shooting incident inside the Lal Quila. Learned Counsel also submitted that the prosecution has miserably failed to establish that Mohd. Arif @ Ashfaq had any mobile telephone having the number 9811278510. Learned Counsel submitted that even though the prosecution story is that after Mohd. Arif @ Ashfaq had been apprehended from his flat one mobile phone of Motorola make, Ex. PW-194/C was also recovered from his possession and the number of that mobile phone was 9811278510 but the evidence adduced to establish that recovery from Mohd. Arif @ Ashfaq was of highly doubtful nature and could not have been relied upon at all and even this Court should totally ignore that evidence.

73. The prosecution witness regarding the recovery of mobile phone Ex. PW-194/C from Mohd. Arif @ Ashfaq is PW-194 Sub-Inspector . Harinder Singh. This witness had reached the flat of Mohd. Arif @ Ashfaq on being informed by PW-173 Inspector . Ved Prakash about the apprehension of Mohd. Arif @ Ashfaq. According to this witness when he reached there he was handed over a sealed parcel by Inspector . Ved Prakash containing the pistol and cartridges recovered from Mohd. Arif @ Ashfaq along with the seizure memo, sketch of the pistol and cartridges. This witness further claimed that at that time Mohd. Arif @ Ashfaq was not present there. However, in cross-examination he clarified that when he had reached there the other members of the police party were taking accused Mohd. Arif @ Ashfaq for further investigation. He had further deposed that at about 6.45 a.m. SI Zile Singh(PW-148) and Inspector . R.S.Bhasin(PW-168) came there along with accused Ashfaq and then accused Ashfaq was handed over to him(PW-194). This witness further claimed that he then arrested this accused and prepared arrest memo Ex. PW-148/D. He also conducted the

personal search of Mohd. Arif @ Ashfaq and the personal search memo was Ex. PW-148/C. During the personal search of this accused a mobile phone of Motorola company(Ex. PW-194/C) having the card of Essar Company was recovered. That card was bearing no. 0006680375 and number of that telephone was 9811278510. PW-148 SI Zile Singh has also deposed that when SI Harinder Singh(PW-194) had reached the flat at Gazipur and had formally arrested accused Mohd. Arif @ Ashfaq one Motorola mobile phone was recovered from the possession of this accused when he was searched by SI Harinder Singh and that phone was taken into police possession vide memo Ex. PW-148/C. PW-229 Inspector . Mohan Chand Sharma has also claimed in his examination-in-chief that one Motorola mobile phone Ex. PW-194/C having IMEI No. 449173405451240 was recovered from accused Mohd. Arif and at that time its telephone no. was 9811278510.

74. Mr. R.M.Tufail, learned Counsel for appellant - accused Mohd. Arif @ Ashfaq argued that this recovery of Motorola mobile phone having no. 9811278510 from Mohd. Arif @ Ashfaq cannot be accepted at all since admittedly when immediately after he was apprehended by Inspector . Ved Prakash(PW-173) only one pistol was recovered from his possession and not the mobile phone. Learned Counsel further submitted that as per the evidence of PW-194 SI Harinder Singh who claims to have recovered mobile phone from the possession of this accused it is clear that when this witness had reached the house of accused Mohd. Arif @ Ashfaq this accused was not present there and then in cross-examination he had changed his version and claimed that when he had reached there the other police officials were taking away this accused for further investigation. He further claimed that accused Mohd. Arif @ Ashfaq was brought there by Inspector . R.S.Bhasin and SI Zile Singh at about 6.45 a.m. which shows that this accused was in police custody for about six hours during which period he was taken somewhere. In this regard learned Counsel drew our attention to that part of the cross-examination of PW-148 SI Zile Singh where he had claimed that after the apprehension of Mohd. Arif @ Ashfaq he was taken to Okhla by the police team which included Inspector . Mohan Chand, Inspector . R.S.Bhasin and himself and when they had reached Okhla Inspector . R.S.Bhasin and Inspector . Mohan Chand had taken Mohd. Arif for further investigation. Learned Counsel submitted that in these circumstances it can be safely concluded that no recovery of mobile phone was effected at all from the possession of accused Mohd. Arif @ Ashfaq and only on papers the police officials had shown that recovery in order to falsely implicate him in this case.

75. There is no doubt that when appellant - accused Mohd. Arif @ Ashfaq was initially apprehended by Inspector . Ved Prakash(PW-173) he had recovered one pistol and six live cartridges from the possession of this accused. PW-173 had claimed that at that time only a cursory search of this accused was taken. There is also no doubt that after his apprehension accused Mohd. Arif @ Ashfaq was taken by the policemen to Okhla. The prosecution case is that after this accused had been apprehended he had disclosed about the hideout of his associate Abu

Shamal @ Fazal at house no. G-73, Batla House, Okhla and immediately some of the members of the police team along with accused Mohd. Arif @ Ashfaq had rushed to Okhla. There an encounter took place between the policemen and the occupant of that house no. G-73, who according to the prosecution case was one of the associates of Mohd. Arif @ Ashfaq in the shooting incident inside the Lal Quila, and in that encounter that Abu Shamal was killed. We will deal with that aspect of the prosecution story in detail a little later when we come to consider as to how that incident is also being pressed into service by the prosecution to establish the involvement of Mohd. Arif @ Ashfaq as well as that of the killed terrorist Abu Shamal @ Fazal in the incident in question. Now coming back to the submission of Mr. Tufail that since admittedly no mobile phone had been recovered from accused Mohd. Arif @ Ashfaq at the time of his apprehension by Inspector . Ved Prakash the so called recovery of the Motorola mobile phone having the number 9811278510 from Mohd. Arif @ Ashfaq during his alleged second search after six hours is nothing but a concoction by the investigating agency we feel that a mountain is being sought to be made of a mole. As noticed already the police had gone to flat no. 308-A to nab a suspected terrorist. Since the policemen knew that the person whom they were going to apprehend could be a terrorist it was but natural for them to ensure immediately after apprehending the suspect that he was not armed with any fire-arm and if at all he was having one to ensure that the same was immediately taken away from his possession so that the same was not used by the suspect for firing at the police team. In the present case, immediately after apprehending accused Mohd. Arif @ Ashfaq the police found on his cursory search that he was having in his possession a fire-arm and so immediately the same was taken into police possession. In these circumstances, if at that time the police officer who had recovered the pistol from the possession of Mohd. Arif @ Ashfaq did not bother to take into possession each and every item which this accused might be having in his possession at that time it cannot be said that this accused was not having any mobile phone with him at that time. In these circumstances, the submission of learned Counsel for appellant Mohd. Arif @ Ashfaq cannot be accepted that the prosecution case regarding the said recovery of mobile phone is a concocted story written on papers only while, in fact, there was no such recovery.

76. In this regard we may also make a reference to the evidence of PW-232 Rashid Ali. He was living in the house of PW-20 Nain Singh where for some time accused Mohd. Arif @ Ashfaq had also stayed. He has deposed that on 8-12-2000 accused Mohd. Arif had got married to a lady and on that day this accused had taken him to a roza after party at Laxmi Nagar. This accused had admitted in his statement u/s 313 Cr.P.C. that he had married his co-accused Rehmana on 8-12-2000. That shows that this witness was quite close to this accused as otherwise he would not have attended the marriage of Mohd. Arif @ Ashfaq. This witness had also deposed that accused Mohd. Arif @ Ashfaq had a mobile phone. This witness was not cross-examined at all on behalf of any of the eleven accused persons and, Therefore, his statement that accused Mohd. Arif @

Ashfaq had a mobile phone stood admitted by the accused. We may also refer to the evidence of another witness in this regard and he is PW-56 Fazal Mohd. He was also occupying some portion of the house of PW-20 Nain Singh in whose house, as per the prosecution case, appellant - accused Mohd. Arif @ Ashfaq was also residing as a tenant for some time before this incident took place. He has deposed that one Adam Malik also used to reside in the house of Nain Singh and that Adam Malik had brought accused Mohd. Arif @ Ashfaq with him in May, 2000 and Adam Malik had got him one room in that house on rent. PW-56 further deposed that Adam Malik had introduced him to Ashfaq. He then deposed that he along with accused Mohd. Ashfaq had thereafter opened a computer centre by the name of "Knowledge Plus" at 18-C, Gafur Nagar and for opening that computer centre he had invested Rs. 70,000/- while accused Ashfaq had invested Rs. 1,70,000/- for purchasing computers from one Khalid Bhai. (This is admitted even by Mohd. Arif in his statement u/s 313 Cr.P.C.). He further deposed that they needed a telephone for their computer centre but since they did not have ration card he(PW-56) spoke to his cousin Danish Mohd. Khan and requested him to get one telephone installed at their computer centre with the help of his identity card and then that Danish Mohd. Khan had got installed a telephone in his own name at the "Knowledge Plus" computer centre. This part of statement has remained unchallenged in cross-examination of PW-56. The number of telephone so got installed by Danish Mohd. Khan at the computer centre was 6315904. It was also deposed by him that Ashfaq had a mobile telephone also. Accused Mohd. Arif @ Ashfaq had admitted during his statement u/s 313 Cr.P.C. that this witness was his partner in the computer centre. In his cross-examination on behalf of Mohd. Arif @ Ashfaq it was asked from him as to whether he had used the mobile phone of Ashfaq to which his answer was that he had not used the mobile phone of Ashfaq before they got landline connection at the computer centre. However, no suggestion was given to him that Mohd. Arif @ Ashfaq never had any mobile phone with him and that his statement to the effect that Ashfaq had a mobile phone was incorrect. It, thus, stood admitted by accused Mohd. Arif @ Ashfaq that he had a mobile phone. PW-37 Aamir Irfan, who was also a tenant in the house of PW-20 with Mohd. Arif @ Ashfaq, had also claimed that Mohd. Arif @ Ashfaq was having a mobile phone. In his cross-examination also this statement was not refuted.

77. It is also the prosecution case that accused Mohd. Arif @ Ashfaq had been changing his mobile phone instruments and that fact came to be known to the police when the call details of mobile phone no. 9811278510 were checked up. It transpired that the IMEI numbers of the two mobile hand sets used by this accused were 449173405451240 and 445199440940240. He had been using mobile number 9811278510 from both these instruments. The investigating agency had also collected the details of the telephone calls made through these two hand sets and at that time it had also transpired that Mohd. Arif @ Ashfaq had another mobile number also and the same was 9811242154. That was also a cash card number of ESSAR. The call details in respect of the said mobile number

had also been collected by the investigating officer from Hutchinson ESSAR Telecom Ltd. in respect of the period from September, 2000 to November, 2000 and those details were given in the form a computerised print out running into nine pages and collectively were marked as Ex. PW-198/E during the evidence of PW-198 Rajiv Pandit, who was the then General Manager of ESSAR Company. A perusal of the call details in respect of mobile phone number 9811242154 shows that a large number of calls had been made to this number from landline telephone number 2720223, which number, as noticed already, was the residential telephone number of the accused Mohd. Arif @ Ashfaq at 308-A, DDA flats, Gazipur, New Delhi. PW-229 Inspector . Mohan Chand Sharma had also deposed that after getting the call details of the numbers 9811278510 and 9811242154 it had also transpired that on 14/12/2000 one call had been made from the landline number 6315904(which was the number of telephone installed at Mohd. Arif's computer centre) to mobile number. That part of his statement had also remained unchallenged in cross-examination. Now, if Mohd. Arif @ Ashfaq did not have mobile phones having the numbers 9811278510 and 9811242154, as is being claimed by the prosecution, he could have come forward and given the telephone number of his mobile phone. However, he has not done that and, Therefore, it can be safely concluded that he did have mobile telephones with the numbers 9811278510 and 9811242154.

78. Learned Counsel for accused Mohd. Arif @ Ashfaq had also submitted before us that mobile number 9811242154, in fact, was not that of Mohd. Arif @ Ashfaq but it was of the police and that was evident from the fact that from this telephone some calls had been made to the telephone number of the investigating officer Inspector Surender Kumar Sand(PW-230) whose number was 7244532 and some calls had been made from the said number of Inspector Sand to mobile number 9811242154 (which also the prosecution is claiming to be that of Mohd. Arif) and calls had been made to this mobile number from the landline telephone number of the Special Cell of Delhi Police also, which was investigating the crime, and whose number was 7232639. In this regard Mr. Tufail drew our attention to a three-page computerised print out Ex. PW-198/DA in respect of mobile number 9811242154 pertaining to the period from 1-10-2000 to 30-11-2000 issued by ESSAR company. This document was confronted to PW-198 Rajiv Pandit from ESSAR company in his cross-examination on behalf of accused Mohd. Arif @ Ashfaq and then the witness had stated that this print out appeared to be of his Company. Mr. Tufail had submitted that since PW-98 did not claim that Ex. PW-198/DA had not been issued from his office from where the similar type of print outs in respect of mobile phone numbers 9811278510 and 9811242154 placed on record by the prosecution had been issued it should be accepted that this document relied upon by the accused was a genuine one and reflected the correct details in respect of mobile number 9811242154. Mr. Tufail also drew our attention to some of the entries in this document Ex. PW-198/DA showing calls having been made from mobile number 9811242154 to 0117244532 and vice-versa and also from 7232639 to

9811242154. Then our attention was drawn to the cross-examination of the investigating officer PW-230 Inspector Surender Kumar Sand wherein he had admitted that telephone number 7232639 was of the Special Cell office at Ashok Vihar. The submission of Mr. Tufail was that the exchange of calls between the mobile number 9811242154 and the above mentioned two landline numbers of the police totally falsifies the prosecution case that accused Mohd. Arif @ Ashfaq was using mobile phone numbers 9811278510 and 9811242154 since if these two cash card numbers had been taken by him from the mobile company ESSAR then there would have been no calls from mobile number 9811242154 to the telephone of the Special Cell of the Delhi Police as reflected in Ex. PW-198/DA. Mr. Tufail contended that the entire prosecution case was built on the recovery of a paper slip having mobile phone number 9811278510 written on it which it claimed to be of appellant - accused Mohd. Arif @ Ashfaq and since from the document Ex. PW-198/DA it has become evident that this number did not belong to this accused the entire prosecution case has to crumble down since its very foundation gets demolished.

79. We are, however, not impressed at all with this submission also of the learned Counsel for appellant Mohd. Arif @ Ashfaq. The document Ex.PW-198/DA strongly relied upon by this accused simply shows that some calls had been made to mobile number 9811242154 from telephone number 7232639, which the investigating officer admits to be the number of Special Cell, in October and November, 2000. However, this fact does not show that mobile number 9811242154 could not be that of Mohd. Arif @ Ashfaq and was of the police. We have already observed that the plea of this accused that because of his having stayed in the house of PW-20 Nain Singh, who was working for some Intelligence Wing of the Government of India he had come in contact with some policemen including two of the investigating officers of this case who were from Special Cell of Delhi Police was quite probable. Now, since it is his own case that he had acquaintance with the Special Cell's officers it is also possible that his known people in police might be calling him on phone. It in fact appears to us that this accused must have taken some advantage of his acquaintance with the policemen and intelligence officials and under the shelter of that acquaintance he must have been carrying out the nefarious activities with the hope that he would never get caught. That, however, proved wrong. We are, Therefore, of the view that the document Ex.PW-198/DA in fact goes against accused Mohd. Arif @ Ashfaq instead of helping him in any manner.

80. As noticed already, the investigating agency had found out that immediately after the shooting incident inside Lal Quila somebody had called up BBC correspondents based at Sri Nagar and Delhi and had claimed the responsibility of the shooting incident. Those calls were made to the two BBC correspondents at their landline telephone numbers and the enquires had revealed that those calls to both the BBC correspondents (PWs 39 and 41) had been made from one mobile number and that number was 9811278510. The prosecution case is that the mobile phone instrument which was recovered from the possession of

appellant - accused Mohd. Arif @ Ashfaq was at the time of his apprehension having that telephone number i.e. 9811278510 from which calls had been made to the BBC correspondent. The call details in that regard were obtained in writing during the course of further investigation by PW-230 Inspector . Surender Kumar Sand. The call details in respect of mobile phone number 9811278510 were given by PW-198 to the police and those details are Ex. PW-198/B-1 - 3. PW-198 had deposed that this mobile number was active from 26-10-2000 to 23-12-2000. A perusal of the computerised print outs of the call details in respect of mobile phone no. 9811278510 does show that on the night of 22-12-2000 one call had been made from this number to landline number 0113355751 at 9.25 p.m. which is the telephone number of BBC correspondent PW-41 Ayanjit Sen installed at his office at Rafi Marg, New Delhi and another call was made from the same mobile number to landline number 0194452918 which was the telephone number of PW-39 Altaf Hussain's wife at their residence in Sri Nagar. PW-39 Altaf Hussain, as noticed already, was also a BBC correspondent based in Sri Nagar. We have no reason whatsoever to disbelieve these two BBC correspondents, whose testimony we have already re-produced, when they say that on 22-12-2000 they had received telephone calls on their phones from someone who had refused to disclose his identity but had owned up the responsibility for the shooting incident inside the Lal Quila and that the caller had claimed himself to be a member of Lashkar-e-Toiba. PW-41 had also claimed that after receiving the afore-said call he had telephoned the police headquarters. Nothing beneficial to accused Mohd. Arif @ Ashfaq could be elicited from these BBC correspondents in their cross-examination. So, we also accept that immediately after the shooting incident these two correspondents had received telephone calls from someone who had owned up the responsibility for that incident. Those telephone calls were found to have been made from mobile phone number 9811278510. Since, we have already accepted the prosecution evidence regarding recovery of one mobile phone from appellant-accused Mohd. Arif @ Ashfaq with the telephone number as 9811278510 it has also now to be held that it was this accused only who had telephoned the two BBC correspondents and had claimed that he was responsible for the shooting inside Lal Quila as also for the death of the army jawans.

81. The next circumstance relied upon is the recovery of some more ammunition meant for mass destruction at the instance of appellant-accused Mohd. Arif @ Ashfaq. The prosecution case is that while in police custody this accused had also made a disclosure about the hideouts of his associate militants as well as about the concealment of hand grenades at some place around the Jamia Milia University Complex behind his computer centre Knowledge Plus in Okhla and then at his instance and pointing out the police had recovered three hand grenades from that place. The police witness to that recovery is PW-168 Inspector . R.S.Bhasin. As per the prosecution case this time two bold persons who were not policemen had gathered the courage to offer their services to act as panch witnesses when the police team led by accused Mohd. Arif @ Ashfaq

had gone to the place from where hand grenades were to be recovered. Those witnesses are PW-208 Devender Singh and PW-209 Raghubir Singh. Let us see what what these recovery witnesses have deposed. PW-168 is Inspector .R.S.Bhasin, Special Cell North, Lodhi Road, Delhi. He deposed as under:

On 27.12.2000 I was posted as Inspector, Special Cell, Lodhi Road, Delhi. On that day, I joined the investigation of FIR No. 688/00 PS Kotwali....

On 1.1.2001 I joined the investigation of this case again with Inspector .Hawa Singh. Accused Ashfaq had disclosed during police remand that three hand-grenades out of the hand-grenades brought by him from Pakistan, were concealed by him in the bushes of Jamia Milia, inside the boundary wall behind his knowledge computer centre. He also disclosed that he could get the same recovered. The disclosure was recorded and the same is Ex.PW-168/A, which I had signed at point A and the accused had signed at point B.

Thereupon, I organized a raiding party consisting of Inspector .Hawa Singh, Inspector .Mohan Chand, SI Upender Singh, SI Lalit Mohan, SI Hardyabuhshan, SI Armurgan and other staff under the supervision of ACP Rajbir Singh and accused Md.Ashfaq. We left Lodhi Road Special Cell office at about 1.15 pm, in govt. and private vehicles along with the accused today present in the court and other staff. The departure entry was made on my direction in DD register at Serial No. 12 by Duty Officer. A copy of the same is mark A. Entries raiding party reached police station New Friends Colony at 2.25 pm. There SHO Gurmeet Singh and ACP Rajesh Dev (ACP Operation South Distt.) were present and the information was discussed with them. Both of them directed SI Mukesh Walia, in charge of police post Jamia Nagar to join the raiding party. Raiding party proceeded from PS New Friends Colony at 2.45 pm for the spot. I made the departure entry through SI Manoj Dixit in PS New Friends Colony at Serial No. 9 and the DD entry was signed by me. Photocopy of the same is mark B. From there, we went to the Administrative office of Jamia Milia Islamia. There Dr.Farukh, Security advisor to the Vice-Chancellor met us. Dr.Mehtab, Professor of the University also met us. After disclosing the purpose of the raiding party, they were requested to join the proceedings. But due to administrative reason, they refused to join the proceedings. However, they directed Sh.Raghubir Singh, Security Guard to join the raiding party. There we also requested 7/8 public persons to join the raiding party. One Sh.Devender Jain R/o Kailash Nagar, Gandhi Nagar, Delhi volunteered to join the raiding party.

At 3.30 PM, entire raiding party with the accused as well as two public persons reached the spot disclosed to by Ashfaq. He pointed out bushes near the boundary wall near the staff quarter. He took out three hand-grenades wrapped in a baniyan after digging the earth near the bushes. All the three grenades were HG-84. Two of them were bearing a tag and something in red ink was recorded in Urdu on the tag. All the three hand-grenades were wrapped in cotton and were put in separate jars and the jars were given Serial no. 1, 2 and 3. Baniyan

was also put in jar no. 3. All the three jars were wrapped in clothes and were converted into three separate parcels. Thereafter the parcels were sealed with the seal of ZSS. Form CFSL was also filled up and the seal after use was handed over to SI Mukesh Walia. The three parcels were seized vide seizure memo Ex. PW-168/B which was prepared by me. I also obtained the signatures of the witnesses as well as of the accused on the seizure memo. The accused had signed at point A. I prepared a rukka Ex. PW-168/C and is signed by me at point A and handed over the same to Ct. Vijay Singh for getting a case registered in PS New Friends Colony. He got the case registered and thereafter returned to the spot along with original rukka and the copy of the FIR.... Subsequently, SI Sunder Lal obtained orders from the court for destruction of the aforesaid hand-grenades. Thereafter SI Girish Jain took the hand-grenades to Maneshar Grenade Range NSG Smalkhan for destruction, got the same destroyed under the supervision of Major NSG Bomb Disposal Unit and brought back the remnants and certificate in this respect is Ex. PW-85/C. Same were deposited by me in the malkhana.

82. PW-208 is Devender Kumar. He has deposed as under:

On 01.01.2001 I was passing through Jamia Milia University for some personal work and at about 3.15 PM, I saw a crowd collected near the University Gate. Out of curiosity I also went there. At the spot, I came to know that the police had brought a terrorist involved in Red Fort Shoot Out case there.

On 1.1.01 police met me at about 3 p.m. Accused Mohd. Arif was also with the police party. The police party along with accused and myself and Raghubir Singh Security office of Jamia Millia Islamia went to the back side of the University near the boundary wall. We went on foot along with the accused in front of staff quarter near the boundary wall. At the spot, trace was lying and the bushes were also grown up. There the accused went to the spot near the bushes removed the earth and took out a cloth i.e. old banian. When the cloth was checked it was found to contained three hand grenades. On two of the grenades 84 was written. On the first grenade apart from 84 some other numbers were also written. On the second grenade apart from 84 some numbers were also written and one pin was also fixed and with the pin a tag was attached. On the tag, something was written in Urdu in red ink. On the third grenade 84 was written, some number was also written and a pin was also fixed and a tag was also attached on which something was printed in Urdu in red ink. All the three grenades were wrapped into three separate parcel. Thereafter all the three grenades were put into separate plastic containers. In the third parcel the old banian was also put. All the three plastic container were sealed separately with a white cloth and the same were sealed with the seal of ZSS. A form was also filled up. After use, seal was handed over to SI Mukesh Walia. All the three parcels were taken into possession vide Ex. PW-168/B and the said memo bears my signatures at point "B". I can identify the case property if shown to me. At this stage, a sealed parcel sealed with court seal is produced in the court and is opened. Remnants of

grenades are shown to the witness but he unable to identify the same.

83. PW-209 is Raghbir Singh. He has deposed as under:

Police had come to the Jamia Milia University and they had spoken to the Registrar. After speaking to the Registrar, they came out of the office, I accompanied the policemen to the place of occurrence by passing through the Main Campus and nearby the staff quarters. Accused Ashfaq today present in the court was also with the policemen. The vehicle was stopped a little before the staff quarters. Thereafter we walked on foot on an open ground in which there are bushes. Accused Ashfaq led us to the bushes by walking in front of the police party. From amongst the bushes, from a pit, accused Ashfaq took out a bundle of cloth. The cloth used was a Sando baniyan. In the baniyan three hand grenades were wrapped. After opening the bundle, three hand grenade were examined and on all the three hand grenades word 84 was written. In red ink warnings were recorded in Urdu language on all three hand grenades. Again said warning was recorded only on one hand grenade. Safety pin and tag was attached in the hand grenade. The hand grenades were sealed separately by the police party in three jars. After packing in the jar the clothe was kept in one of the jars and they were sealed with the seal of ZSS. The three sealed parcels were seized by the police vide Ex. PW-168/B which bears my signature at point C.

Before joining the security services in Jamia Milia University, I had worked with Army. After destruction, the hand grenades change its shape and it is not possible to identify its remnants.

84. In the cross-examination of these three witnesses except for putting them the suggestion that nothing had been got recovered by accused Mohd. Arif @ Ashfaq, which of course the witness denied, there was no useful cross-examination on this part of the prosecution case. This recovery has been deposed by two totally independent witnesses who had no reason to depose falsely against this accused nor any motive was attributed to them in cross-examination for their deposing against this accused falsely. We have thus no hesitation in accepting the evidence of these three witnesses also as also the prosecution case that the police had recovered three hand grenades on 01/01/2001 pursuant to the disclosure statement Ex.PW-168/A of accused Mohd. Arif @ Ashfaq. Learned Counsel Mohd. Arif @ Ashfaq had also contended that the recovered hand grenades were not produced in Court and so their recovery is not established. The prosecution case is that the recovered hand grenades were got destroyed after taking permission from the concerned Court. That was a safety measure taken to avoid those hand grenades exploding. It was not even suggested to the recovery witnesses that the articles which they claimed to be hand grenades were actually not hand grenades. Even to the expert who had examined the remnants of those hand grenades and had found them to be remnants of hand grenades and "explosive substance" it was not suggested in his cross-examination that his opinion was not correct. So, non-production of the live hand grenades in Court cannot make that recovery doubtful. Regarding the

destruction of the live hand grenades there is evidence of PW-85 SI Girish Jain who had taken the parcels of five hand grenades, three of which were seized in FIR No. 3/01, P.S. New Friends Colony and which were recovered from the Jamia Milia area and the other two were seized in FIR No. 630/2000, P.S. New Friends Colony and which were recovered from house no. G-73, Batla House where encounter with the deceased militant Abu Shamal had taken place, to NSG, Samalkha, Haryana where in his presence Maj. Shukla(PW-193) destroyed those hand grenades and remnants thereof were handed over to PW-85. PW-50 SI Varinder Singh is an expert in the Bomb Disposal Squad. He was the expert who had defused the hand grenades which had been recovered from behind the Lal Quila and had separated their detonators. He had deposed about that in Court also and in his cross-examination it was not challenged that he had not defused four hand grenades on 26-12-2000 at Kotwali police station as claimed by him.

85. We now proceed further to couple of other circumstances relied upon by the prosecution for securing the conviction of appellant - accused Mohd. Arif @ Ashfaq. The next circumstance relied upon by the prosecution against him is that he is a Pakistan national and that he had entered the Indian territory without obtaining necessary visa. In this regard Mr. R.M.Tufail, learned Counsel for appellant - accused Mohd. Arif @ Ashfaq had submitted that he was not disputing the fact that this accused is a Pakistan national and he had not obtained any visa before entering this country. On this aspect of the matter our attention was drawn by the learned State counsel to the statement of appellant - accused Mohd. Arif @ Ashfaq recorded u/s 313 Cr.P.C. which we have already reproduced which shows that this accused himself had categorically admitted that he had come to India from Pakistan via Kathmandu. He did not claim that he had obtained requisite visa from the Indian Government before entering into Indian territory. This circumstance relied upon against appellant-accused Mohd. Arif @ Ashfaq, thus, stood established from the admission of this accused himself.

86. Other circumstance relied upon by the prosecution against appellant - accused Mohd. Arif @ Ashfaq is that after illegally coming to India he had been representing to various persons coming in his contact in Delhi that he belonged to Jammu and was doing the business of shawls while, in fact, he neither belonged to Jammu nor was he doing any business. To establish this the prosecution has examined PW-20 Nain Singh (about whom there is a reference made by this accused himself also in his statement u/s 313 Cr.P.C.), PW-31 Azam Malik and PW-37 Amir Irfan Masovar. PW-20 Nain Singh is the witness in whose house in Okhla village appellant - accused Mohd. Arif @ Ashfaq had lived as a tenant for some time. This accused has himself also admitted that he had stayed in the house of this witness for some time. PW-20 Nain Singh has claimed in his examination-in-chief that Ashfaq had told him that he was a resident of Jammu. In his cross-examination this statement of his was not challenged. PW-31 Azam Malik claimed to have introduced accused Mohd. Arif @ Ashfaq to PW-20 Nain Singh and on his request Nain Singh had let out one room in his house to Ashfaq. This witness himself was also a tenant of Nain Singh. This witness also deposed

that accused Ashfaq had told him that he was a Kashmiri and was doing the business of shawls and in cross-examination on behalf of accused Mohd. Arif @ Ashfaq this statement was not challenged. PW-37 Amir Irfan was also a tenant of PW-20 Nain Singh. He has also deposed that accused Ashfaq had also come to stay in the house of Nain Singh and that Ashfaq had told him that he was a resident of Kashmir and was doing the business of shawls. In his cross-examination also it was not challenged that Ashfaq had never claimed himself to be a Kashmiri doing business of shawls. As noticed already, in his statement u/s 313 Cr.P.C. appellant - accused Mohd. Arif @ Ashfaq had claimed that, in fact, he was working for RAW(Intelligence Wing of the Government of India) and PW-20 Nain Singh was also a RAW official and was indulging in some money lending and he(accused) used to collect money for him and when he had demanded money from Nain Singh he had got annoyed and got him implicated in this case in connivance with Inspector . R.S.Bhasin(PW-168) and Inspector . Ved Prakash(PW-173) both of whom were known to Nain Singh. The cross-examination of PWs 20,31 and 37 was accordingly done to establish that accused Mohd. Arif @ Ashfaq was not a tenant of Nain Singh but, in fact, he was staying in his house to assist him in his illegal money lending business. Since there was no cross-examination of these witnesses on their statements to the effect that accused Ashfaq had told them that he was a Kashmiri and was doing business of shawls the same stood admitted by this accused. The prosecution is claiming that this accused was in fact getting money through illegal sources like hawala and had been keeping that money in his bank and also with some individuals.

In this regard prosecution has relied upon the evidence of the investigating officer PW-230 Surinder Kumar Sand, one Sub-Inspector Om Parkash who has been examined as PW-103 and one public witness PW-74 Mohd. Idris. PW-103 SI Om Prakash deposed that on 12.01.2001 he was posted in PS Chandni Chowk. At about 2.00 pm, Inspector . Surender Sand had come to the Police Station with accused Ashfaq. From there, Ashfaq took the police to 5123, Sharif Manzil, Bali Maran at the shop of one Sher Jaman. He had disclosed that Sher Jaman used to call him there and pay him hawala money. The Pradhan of the market Sh. Idrish and Aziz were also joined in the proceedings. Inside the shop of Sher Jaman, there was an almirah, its lock was broken open and it was checked. From the almirah Rs. One lac, one thousand and one hundred were recovered and the same were seized by the police vide memo Ex.PW-74/A. PW-230 S.K. Sand has also deposed about that recovery. Their evidence is corroborated by independent witness PW-73 who was the President of the Association of the market Ballimaran. In the cross-examination of these witnesses nothing could be elicited which could make this recovery doubtful. This recovery of cash money at the instance of Mohd. Arif @ Ashfaq also strengthens the prosecution case that this accused was getting money from illegal sources and the same could be meant only for some illegal purposes. We, Therefore, hold that actually accused Mohd. Arif @ Ashfaq was not doing any lawful business and huge amount of money he had collected from unlawful sources since he himself has not come out with any

details of his income from any lawful source. He has not even produced books of account of his Computer Centre. Thus, this circumstance relied upon by the prosecution also stood duly established.

87. The last circumstance relied upon by the prosecution was that accused Mohd. Arif @ Ashfaq had forged one ration card Ex.PW-164/A which was recovered from his flat at the time of his apprehension on 25/26-12-2000 and one learner driving license in his own name. He had also prepared one photocopy of a ration card, other than Ex.PW-164/A, in his own name for getting a driving license from Ghaziabad Transport Authority. We have found from the trial Court record that this accused had not disputed that the ration card Ex.PW-164/A which was recovered from his flat in Ghazipur and the learner driving license Ex.PW-13/C were his. The prosecution case is that the residential address shown in the ration card Ex.PW-164/A was the address where Mohd. Arif @ Ashfaq had never resided. He had himself admitted that fact. In the said ration card he had also given wrong name of the name of his wife. This ration card which was recovered from the flat of this accused showed that it had been issued from one of the offices of Food & Supply Department of Delhi Government but when the officials of that office(Circle No. 6 in Okhla) were contacted during investigation they denied that that ration card Ex. PW-164/A had been issued from their office. Those witnesses are PW-164 Anju Goel, PW-165 Dharamvir Sharma and PW-172 Manohar Lal. Their evidence had remained unchallenged on behalf of Mohd. Arif @ Ashfaq in their cross-examination. It is also the prosecution case that this accused had forged a learner's driving license, Ex.PW-13/C, purporting to have been issued from the transport authority at Sarai Kale Khan, New Delhi. PW-6 is the official from that Authority and he had deposed that the learner license no. 9091(Ex.PW-13/C) was not issued from that office. This accused on the basis of his learner driving license got permanent driving license from Ghaziabad Transport Authority and Along with application for license photocopy of document, Ex.PW-13/E, purporting to be of a ration card in the name of Mohd. Ashfaq had been given. That was also a false document prepared only for that purpose. PWs 2 and 3 are the officials from Ration Department at Ghaziabad and both of them claimed that no such ration card was issued from their office. Their evidence had remained unchallenged in cross-examination on behalf of accused Mohd. Arif. He has admitted that license Ex.PW-13/A was got issued by him from Ghaziabad. So, he only could have submitted the photocopy of a document purporting to be his ration card showing his address in Ghaziabad where he never resided. The prosecution had also examined owners/occupants of the houses addresses of which were shown in his ration card Ex.PW-164/A as well as in his driving licenses and all of them had deposed in Court that Mohd. Arif @ Ashfaq had never stayed at those addresses. Those witnesses are PWs 1,52,65 and 79. In fact, accused Mohd. Arif @ Ashfaq himself also admitted in his statement u/s 313 Cr.P.C. that he had never stayed at the addresses mentioned in his ration card and the two driving licenses as well as in the document purporting to be photocopy of another ration card of his. He, however, claimed

that he had not submitted that photocopy but that plea cannot be accepted. That document could have been submitted by him only. Thus, the prosecution case that Mohd. Arif @ Ashfaq had with him forged ration card Ex.PW-164/A, forged learner driving license Ex.PW-13/C and photocopy, Ex.PW-13/E, of a ration card in his name, which was also a false document, stood established. In fact, during the course of arguments learned Counsel for this accused Mohd. Arif @ Ashfaq did not seriously challenge the prosecution case in respect of the offence of forgery as also the findings of the trial Court holding him guilty for this offence. Therefore, it also stood established that this accused Mohd. Arif @ Ashfaq had intentionally been not disclosing his correct addresses to different authorities and all this was done by him to avoid being detected as a militant having come to India illegally through a prohibited route to carry out terrorist activities.

88. We have now finished our analysis and appreciation of the evidence of various prosecution witnesses whose evidence only was referred to during the course of arguments by the learned Counsel for the State. We have also dealt with all the criticism of that evidence put forth by Mr. Tufail, learned Counsel for appellant Mohd. Arif @ Ashfaq and having rejected the entire criticism in respect of each of the circumstances relied upon by the prosecution we have now reached the stage of summarizing our conclusions based on our independent analysis of the prosecution evidence in respect of appellant-accused Mohd. Arif @ Ashfaq. From the evidence of various witnesses examined by the prosecution which we have already narrated, discussed and analysed the following circumstances can be said to have been established beyond any shadow of doubt:

(a) On the night of 22-12-2000 there was an incident of firing inside the Lal Quila when some intruders had managed to enter that area of Lal Quila where the Unit of 7 Rajputana Rifles of Indian Army was stationed.

(b) In that incident of shooting the intruders had fired indiscriminately from their AK-56 rifles as a result of which three army jawans received fire-arm injuries and lost their lives.

(c) The death of three army jawans was homicidal.

(d) Immediately after the quick reaction team of the army fired back upon the intruders as a result of which the intruders escaped from the place of occurrence by scaling over the rear side boundary wall of Lal Quila towards the Ring Road side and when the place of occurrence was searched by the army men many assault rifle fired cartridge cases were recovered from the place of occurrence.

(e) Immediately after the intruders who had resorted to firing inside the army camp had escaped from there calls were made by someone on the telephones of two BBC Correspondents one of whom was stationed at Sri Nagar and the other one was stationed at Delhi office of BBC and the caller had informed them about the shooting incident inside the Lal Quila and had also claimed the responsibility of that incident and that that was the job of Lashkar-E-Toiba, which the prosecution claims to be a banned militant organization indulging in acts of

terrorism in our country.

(f) On the morning of 23-12-2000 one AK-56 rifle was recovered from a place near Vijay Ghat on the Ring Road behind the Lal Quila.

(g) On 23-12-2000 when the policemen conducted search around the Lal Quila in the hope of getting some clue about the culprits they found one piece of paper lying outside the Lal Quila near the rear side boundary wall towards Ring Road side and on that piece of paper one mobile phone number 9811278510 was written.

(h) The mobile phone number 9811278510 was used for making calls to the two BBC correspondents (PWs 39 and 41) immediately after the shooting incident inside Lal Quila and the caller had claimed the responsibility for that incident and had informed them that the incident was the job of Lashkar-e-Toiba.

(i) The aforesaid mobile phone number found written on a piece of paper lying behind the Lal Quila had led the police up to flat no. 308-A Gazipur, New Delhi where accused Mohd. Arif @ Ashfaq was found to be living and when on being suspected of being involved in the shooting incident he was apprehended on the night of 25/26-12-2000 one pistol and some live cartridges were recovered from his possession for which he did not have any license.

(j) At the time of his arrest in case FIR No. 688/2000 one mobile phone having the number 9811278510 was recovered from his possession and it was the same mobile number from which calls had been made to the two BBC correspondents for informing them about the incident and Lashkar-e-Toiba being responsible for that incident.

(k) Immediately after his apprehension accused Mohd. Arif @ Ashfaq admitted his involvement in the shooting incident inside Lal Quila and also disclosed to the police about his another hide-out at G-73, Batla House, Muradi Road, Okhla, New Delhi and pursuant to his disclosure the police had gone to that hide-out where the occupant of that house started firing upon the police team and when the police team returned the firing that person, who was later on identified by accused Mohd. Arif @ Ashfaq to be one Abu Shamal @ Faizal, died because of the firing resorted to by the policemen. From house no. G-73, where the encounter had taken place, one AK-56 rifle and some live cartridges and hand grenades were recovered.

(l) Accused Mohd. Arif @ Ashfaq while in police custody had also disclosed to the police that one assault rifle had been thrown near Vijay Ghat after the incident. The police had already recovered one AK-56 rifle from Vijay Ghat on the morning of 23-12-2000. Accused Mohd. Arif @ Ashfaq had thus the knowledge about the availability of that AK-56 rifle at Vijay Ghat.

(m) Accused Mohd. ARif @ Ashfaq had also got recovered one AK-56 rifle and some ammunition from behind the Lal Quila on 26-12-2000.

(n) Accused Mohd. Arif @ Ashfaq had also got recovered three hand grenades from some place behind his computer centre in Okhla on 1-1-2001 pursuant to his another disclosure statement made by him while in police custody.

(o) When the assault rifle fired cartridge cases which were recovered from the place of occurrence by the armymen after the intruders had escaped from there were examined by the ballistic expert along with the AK-56 rifle which was recovered at the instance of accused Mohd. Arif @ Ashfaq from behind the Lal Quila on 26-12-2000 and the AK-56 rifle which was recovered from Vijay Ghat on 23-12-2000 it was found by the ballistic expert(PW-202) that some of the assault rifle fired cartridge cases had been fired from the rifle recovered from behind Red Fort and some had been fired from the other rifle which was recovered from Vijay Ghat.

(p) Appellant - accused Mohd. Arif @ Ashfaq was a Pakistan national and had entered the Indian territory illegally.

(q) After making illegal entry into India appellant - accused Mohd. Arif @ Ashfaq had been representing to the people coming in his contact during his stays at different places that he was a resident of Jammu and was doing the business of shawls while, in fact, he had no such business and he had been collecting money through hawala channels.

(r) Accused Mohd. Arif @ Ashfaq had obtained a forged ration card Ex. PW-164/A wherein not only his house number mentioned was not his correct address but even the name of his wife shown therein was not Rehmana Yusuf Faukhi. He had also forged his learner driving license Ex. PW-13/C as well as one document Ex. PW-13/E purporting to be a photocopy of another ration card in his name with his residential address of Ghaziabad where he admittedly never resided and he submitted that document with a the Ghaziabad Transport Authority for obtaining permanent driving license. In the learner driving license also he had shown his residential addresses where he had never actually resided. All that he did was to conceal his real identity as a militant having entered the Indian territory with the object of spreading terror with the help of his other associate militants whom unfortunately the police could not apprehend and some expired before they could be tried.

89. The aforesaid circumstances which have been found to have been established beyond any shadow of doubt lead to only one conclusion to the effect that appellant-accused Mohd. Arif @ Ashfaq was responsible for the incident of shooting inside Lal Quila on the night of 22nd December, 2000 and that the shooting incident resulting in the death of three army soldiers was as a result of well planned conspiracy between this accused and some other militants. The deceased Abu Shamal @ Faizal who was killed in an encounter with the police at house no. G-73, Batla House, Muradi Road, Okhla, New Delhi, where the police had reached pursuant to the information supplied by Mohd. Arif @ Ashfaq also was a party to the conspiracy. The manner in which accused Mohd. Arif @ Ashfaq

came to India and collected highly sophisticated arms and ammunition meant for mass destruction and the place chosen by him and his associates in the conspiracy, namely, Lal Quila, which undisputedly is a place of national importance for every Indian and which fact was not disputed by any of the counsel appearing in these matters and also considering the fact that even inside the Lal Quila the place of attack chosen was the army camp where the army men were stationed to protect this monument of national importance it is more than apparent that the intention of the appellant - accused Mohd. Arif @ Ashfaq and his associates in that attack which claimed the lives of three soldiers was to wage war against the Government of India. Except that object of the conspiracy we cannot conceive of any other object for which army camp inside the Lal Quila was attacked by the intruders who were armed with AK-56 rifles and hand grenades which would have caused extensive damage to the national monument and human lives if the same had been exploded. In fact, even the learned Counsel for appellant - accused Mohd. Arif @ Ashfaq did not argue that the offence of waging war would not be made out even if the entire prosecution case is accepted as put forth. We have, Therefore, no hesitation in upholding the findings of the learned trial Court holding the appellant - accused Mohd. Arif @ Ashfaq guilty for the offences punishable under Sections 120-B, 121-A, 121 IPC, Sections 120-B read with 302 IPC and Sections 468/471/474 IPC and also under Sections 186/353/120-B IPC. Since appellant - accused Mohd. Arif @ Ashfaq himself had also admitted that he had entered the Indian territory without having obtained requisite permission from the concerned authorities his conviction u/s 14 of the Foreigners Act is also liable to be sustained. We also do not find any infirmity in the conviction of accused Mohd. Arif @ Ashfaq for the offences under the Arms Act as well as the Explosive Substances Act since we have accepted the prosecution evidence regarding the recovery of pistol and live cartridges from his possession at the time of his apprehension and also the recovery of hand grenades at his instance from the area of Jamia Milia Islamia University.

90. We shall now take up the prosecution case against appellants-accused Farooq Ahmad Qasid and Nazir Ahmad Qasid (appellants in Crl. Appeal No. 944-45/2005) who have also been convicted along with appellant - accused Mohd. Arif @ Ashfaq for the offences punishable under Sections 120-B IPC, 121 IPC and 121-A IPC. Shri Aman Lekhi, Learned Senior counsel for these two appellants had submitted that the only evidence against them relied upon by the prosecution was that in their bank accounts with Standard Chartered Grindlays Bank opened in this bank's Sri Nagar branch lacs of rupees had been deposited in cash by appellant - accused Mohd. Arif @ Ashfaq at the said bank's branch in Connaught Place, New Delhi and these two accused had immediately thereafter withdrawn that money. It was also submitted by Mr. Lekhi that the prosecution has failed to establish that the accounts which it claimed to be of these two accused persons in Standard Chartered Grindlays Bank were, in fact, their accounts since the account opening forms and other related documents which a bank gets executed from a customer at the time of opening of a new bank

account have not been produced and in the absence of those documents the learned trial Court could not have reached to the conclusion that bank account numbers 32263962 in the name of M/s. Nazir Sons and account number 32181669 in the name of Farooq Ahmad Quasid were their accounts. Learned Counsel also submitted that both these accused have denied in their statements u/s 313 Cr.P.C. that these two accounts in which according to the prosecution lacs of rupees had been deposited by Mohd. Arif @ Ashfaq belonged to them. Mr. Lekhi further submitted that even if it is accepted that these two bank accounts were of Farooq Ahmad Quasid and Nazir Ahmad Quasid and also that Mohd. Arif @ Ashfaq had deposited lacs of rupees in those two accounts in cash and that amount was withdrawn also by these two accused persons from the Sri Nagar branch of the bank that would still not be a sufficient piece of circumstantial evidence to show that accused Farooq Ahmad Quasid and Nazir Ahmad Quasid were a party to any conspiracy with accused Mohd. Arif @ Ashfaq to wage war against the Government of India and/or to commit murders of innocent people and that the money so deposited by Mohd. Arif @ Ashfaq in the bank accounts of these two accused persons after being withdrawn by them had been utilized for funding terrorist activities of militants belonging to the banned militant organization Lashkar-e-Toiba. It was also contended that there is no evidence whatsoever adduced by the prosecution from which it could be inferred that accused Nazir Ahmad Quasid and Farooq Ahmad Quasid were in any way providing finances to the militants in Kashmir or anywhere else in India. Learned senior counsel also argued that the prosecution is also relying upon the circumstance that accused Mohd. Arif @ Ashfaq was also having one mobile number 9810263721 and from that number he had made some call to telephone number 436188 which was of accused Mohd. Nazir Ahmad Quasid and Farooq Ahmad Quasid. It was contended that these accused were not disputing that the telephone number 436188 was installed at the house of Nazir Ahmad Quasid but the prosecution has failed to establish that mobile phone no. 9810263721 belonged to accused Mohd. Arif @ Ashfaq and in any case even if that was so the only inference which can be drawn on the basis of evidence adduced by the prosecution is that Mohd. Arif @ Ashfaq knew Farooq Ahmad Quasid and Nazir Ahmad Quasid and nothing more and as far as making of telephone call by Mohd. Arif @ Ashfaq to the said telephone number of Nazir Ahmad Quasid is concerned that call shown in the call details record produced by the prosecution had been made many months before the shooting incident inside Lal Quila and from that single call it could not be concluded under any circumstances that accused Nazir Ahmad Quasid and Farooq Ahmad Quasid knew that Mohd. Arif @ Ashfaq was a militant having entered the Indian territory illegally with the object of spreading terror and to wage war against the Government of India.

91. Learned State counsel admitted that the only circumstantial evidence being relied upon by the prosecution against appellants - accused Farooq Ahmad Quasid and Nazir Ahmad Quasid was the deposit of lacs of rupees by Mohd. Arif @ Ashfaq in their bank accounts with Standard Chartered Grindlays Bank and the

withdrawal of that money immediately after the deposits at Sri Nagar by these two accused persons. Learned Counsel, however, contended that since there is no evidence adduced by Mohd. Arif @ Ashfaq to show that he was doing any business from which he could earn lacs of rupees and accused Farooq Ahmad Quasid and Nazir Ahmad Quasid had also not come out with any Explanation as to on what account lacs of rupees had been deposited in their bank accounts by Mohd. Arif @ Ashfaq the only inference which can be legitimately drawn in these circumstances is that the money deposited by Mohd. Arif @ Ashfaq in the bank accounts of Farooq Ahmad Quasid and Nazir Ahmad Quasid had been received by him through illegal channels like Hawala for the purposes of carrying out terrorist activities in India and that Farooq Ahmad Quasid and Nazir Ahmad Quasid were a party to that activity and sitting at Sri Nagar they were funding the terrorists. It was also contended that it can also be safely inferred and had been rightly inferred even by the learned trial Court that these three accused persons were hands in glove with each other and they were responsible for the shooting incident inside the Lal Quila on the night of 22-12-2000. Learned State counsel thus submitted that not only the appeals filed by appellants-accused Farooq Ahmad Quasid and Nazir Ahmad Quasid deserve to be rejected but even the sentence awarded to them also deserves to be enhanced from life imprisonment to death sentence as had been awarded to their co-conspirator appellant - accused Mohd. Arif @ Ashfaq by the trial Court.

92. We have carefully and very minutely examined the evidence adduced against this father-son duo and we also find that the prosecution has not even produced the bank documents relating to bank account number 32263962 in the name of M/s. Nazir Sons and account number 32181669 in the name of accused Farooq Ahmad Quasid and since accused Farooq Ahmad Quasid and Nazir Ahmad Quasid have both disowned these two bank accounts in Standard Chartered Grindlays Bank it cannot be said that the prosecution has discharged its burden of proving this fact beyond reasonable doubt. The learned trial Court has held that since these two accused have denied that these two accounts were theirs they had taken a false plea and that was a circumstance which showed their guilt. We are, however, unable to subscribe to this conclusion of the learned trial Judge. If the two accused had claimed that the two bank accounts which the prosecution was claiming to be theirs then that could not be taken to be a circumstance against them in the absence of documentary evidence to that effect having been produced by the prosecution. The prosecution had in fact withheld that evidence without any cogent reason. It has been claimed that those documents had been seized by the Srinagar police in some other case against these two accused. It is thus clear that the documentary evidence, which was the best evidence, was available and could have been easily produced also. Its non-production can only lead to the inference being drawn against the prosecution that even those documents would not have proved that the two bank accounts in question were of these two appellants-accused. In fact, we are also of the view that even if it is accepted that those two accounts, in which Mohd. Arif had deposited money,

were of Nazir Ahmad Qasid and Farooq Ahmad Qasid still that would not establish the allegation against them that they were a part of the conspiracy with accused Mohd. Arif @ Ashfaq to wage war against the Government of India or to attack the army camp inside the Lal Quila or that the money deposited in these accounts in November, 2000 allegedly by Mohd. Arif @ Ashfaq was the money received by him through Hawala channels and had been used by Farooq Ahmad Qasid and Nazir Ahmad Qasid for terrorist activities. It was for the prosecution to have adduced some positive evidence to establish its case against these two accused persons but except for producing on record copies of the two accounts of these two accused persons with Standard Chartered Grindlays Bank and the deposit slips showing deposit of money in those accounts by Mohd. Arif @ Ashfaq, which of course is established by the evidence of handwriting expert examined by the prosecution, there is no other evidence to link accused Farooq Ahmad Qasid and Nazir Ahmad Qasid with the incident of shooting inside Lal Quila or their being the financiers of the terrorists. Therefore, these two appellants-accused persons deserve to be acquitted of all the charges by allowing their appeals and there is no question of their being awarded death sentence as was being prayed for by the State in its appeal and the same is liable to be dismissed.

93. The State has also filed an appeal for convicting accused Rehmana Yusuf Farooqui, who is the wife of appellant-accused Mohd. Arif @ Ashfaq, for the offence u/s 120-B IPC for which she was tried but was acquitted by the trial Court. Learned State counsel has submitted that the circumstance which implicates accused Rehmana Yusuf Farooqui for the offence of conspiracy is that Mohd. Arif @ Ashfaq had deposited a sum of Rs. 2.80 lacs in the bank account of Rehmana Yusuf Farooqui with State Bank of India for which deposit she has not come out with any plausible Explanation as to how she could have that much money in her bank account when admittedly she was not doing anything for her livelihood before her marriage with Mohd. Arif @ Ashfaq and even after her marriage with him. Learned Counsel submitted that in the absence of any Explanation in that regard the only inference which could be drawn is that she had taken that much money from her husband as a consideration for giving him shelter in her house by performing marriage with him knowing fully well that he was a Pakistan national having come to India illegally. It was also submitted by Ms. Mukta Gupta that when the police had raided her house on the night of 25/26-12-2000 to apprehend Mohd. Arif @ Ashfaq a forged ration card Ex. PW-164/A and driving license in the name of her husband Mohd. Arif @ Ashfaq were recovered by the police. In that ration card the address of flat no. 308-A, Gazipur, where both of them were staying, was not shown but some other address was written where they had never stayed and in the driving license of Mohd. Arif also the address which he had given was of a house where he had never stayed. So that license was also a forged one. The prosecution has examined the owners/occupants of those houses addresses of which had been got written in the ration card as well as in the driving license of Mohd. Arif @

Ashfaq. As per the prosecution case, since accused Rehmana Yusuf Farooqui never objected to the preparation of a ration card and driving license in the name of her husband having wrong addresses it becomes clear that she was fully aware that Mohd. Arif @ Ashfaq was not a genuine person and the whole purpose of his marrying her was to have a shelter in Delhi and to avoid being suspected of being a foreigner having come to India illegally and to spread terrorism. Ms. Mukta Gupta submitted that in these circumstances it could also be inferred that she knew about the plan of her husband to attack the army camp inside Lal Quila.

94. On the other hand, the submission of learned Counsel for appellant - accused Rehmana Yusuf Farooqui was that she was under no obligation to give any Explanation about the money in her bank account and it was for the prosecution to adduce positive evidence to show that the money in her account had anything to do with the illegal activities of Mohd. Arif @ Ashfaq which according to the prosecution he was indulging in. In any case, she had claimed that the money in her bank account was her own money given to her before her marriage by her relatives. It was also contended that the mere fact that one ration card was recovered from her house which the prosecution is claiming to be forged one it cannot be inferred that she had the knowledge about any illegal activity being done by her husband and particularly about the involvement of her husband in the shooting incident inside the Lal Quila. Learned Counsel submitted that not only the appeal filed by the State against accused Rehmana Yusuf Farooqui is liable to be dismissed but she deserves to be acquitted even for the charge for which she has been convicted by the trial Court and her appeal against her conviction deserves to be allowed.

95. The only evidence against Rehmana Yusuf Farokhi is the deposit of Rs. 2.80 lacs in her bank account with State Bank of India, Gazipur, which according to the prosecution was deposited by accused Mohd. Arif @ Ashfaq before even marrying her and exchange of telephone calls between the two before the solemnization of their marriage on 8-12-2000. Appellant - accused Rehmana Yusuf Farooqui has admitted that that much amount was deposited in her bank account but she has claimed that it was her own money. She has also admitted that Mohd. Arif @ Ashfaq had come forward to marry her in response to the matrimonial advertisement given by her in newspaper and also that before their marriage during the courtship period also Mohd. Arif @ Ashfaq had been talking to her on phone. She had examined her mother Qamar Farooqui as a defense witness and she had deposed that Mohd. Arif had expressed his desire to marry Rehmana after reading the matrimonial advertisement in the newspaper and that she had agreed for the marriage between the two since he had not raised any demands. She had further deposed that she had saved some money for the marriage of her daughter and her relatives had also contributed for her marriage and that money was put in bank by Rehmana in Installments. The prosecution is alleging that the amount of Rs.2.80 lacs was deposited in Rehmana's account in four Installments. In cross-examination by the public prosecutor DW-1 denied the suggestion that Mohd. Arif had told her that he was involved in terrorist

activities and wanted to set up a base in Delhi. She was asked if Mohd. Arif had paid any money to her or her daughter before the nikah to which she replied that he had not paid any money to them before the marriage. She, however, admitted the suggestion that in the account of Rehmana with State Bank of India money was deposited in four Installments. The case of the prosecution is that the money so deposited on those four occasions was deposited by Mohd. Arif @ Ashfaq before his marriage with Rehmana. However, no suggestion was put to DW-1 that that money was paid to her daughter by accused Mohd. Arif @ Ashfaq and also that it was paid as an incentive to her to marry him so that he could have shelter in their house after getting married to Rehmana. Therefore, it cannot be accepted that prosecution has succeeded in establishing its case that Mohd. Arif @ Ashfaq had given lacs of rupees to Rehmana Yusuf Farooqui and she had accepted the same knowing that he was a terrorist. In fact, a suggestion was put to DW-1 that her daughter and son had enquired about Mohd. Arif and they had come to know that he was a good boy. DW-1 accepted that suggestion to be correct. This suggestion put to DW-1 by the public prosecutor falsifies its case that Rehmana had got married to Mohd. Arif @ Ashfaq knowing that he was a terrorist. And just because one ration card Ex. PW-164/A and one driving license in the name of Mohd. Arif @ Ashfaq had been recovered from the flat where Mohd. Arif and Rehmana were living after their marriage it cannot be said that she was aware that her husband had got a forged ration card or that he had obtained driving license giving an incorrect residential address and in any event the recovery of forged ration card and the driving license having the residential address where Mohd. Arif never stayed is not sufficient to draw an inference that Rehmana Yusuf Farooqui really knew as to what her husband was up to and what were his designs and intention behind marrying her. In this regard we may make a useful reference to the decision of the Hon''ble Supreme Court in Parliament Attack case which is reported as State (N.C.T. of Delhi) Vs. Navjot Sandhu @ Afsan Guru, . In that case also two of the accused were husband and wife. After the attack on the parliament house there was a telephonic conversation between the husband and wife and that call had been intercepted by the police. On the basis of that conversation which was taped the Hon''ble Supreme Court had come to the conclusion that from that conversation it appeared that the accused wife was scared and also that an inference could be drawn that her husband and another co-accused had done something wrong which had attracted police surveillance but from that circumstance alone no inference could be drawn that the wife was having knowledge of the plan of her husband to attack the Parliament before the incident. The accused wife had been convicted u/s 123 IPC by the trial Court for not informing the police about the plan of her husband and its associates to attack the parliament despite having knowledge about that plan. However, in appeal filed by her a Division Bench of this Court had set aside her conviction and acquitted her of the charge u/s 123 IPC and the Hon''ble Supreme Court affirmed her acquittal when the State filed an appeal there. In the present case, there is no sufficient evidence adduced by the prosecution from which it could be concluded that she was a party to any conspiracy to launch an attack

inside the Lal Quila or that she had even some idea about the intentions of her husband to commit that kind of a crime. We are, Therefore, of the view that the prosecution could not be said to have established that accused Rehmana Yusuf Farooqui had married accused Mohd. Arif @ Ashfaq in order to provide a shelter to him in Delhi so that he could go ahead with his terrorist activities without being suspected because of his living with Rehmana Yusuf Farooqui, her mother, her sister and brother in their house in Gazipur from where Mohd. Arif was arrested. So, she was not rightly convicted by the learned trial Court and there being no evidence whatsoever adduced by the prosecution from which it could be inferred that she was either a party to the conspiracy to attack the army camp inside Lal Quila or that she had some knowledge about that plan she cannot be convicted for the offence u/s 120-B IPC for which the learned trial Court has acquitted her. The appeal filed by the State seeking her conviction u/s 120-B IPC is, Therefore, liable to be dismissed and the appeal filed by Rehmana Yusuf Farooqui deserves to be allowed.

96. The State has also filed an appeal against accused Sadakat Ali for his conviction u/s 120-B IPC for which he was acquitted by the trial Court. This accused has on the other hand filed his appeal seeking his total acquittal. The prosecution case against him, as is appearing in the trial Court record and as was told to us by Ms. Gupta Gupta also during the course of arguments, is that he knew fully about the illegal designs of Mohd. Arif @ Ashfaq and still gave his premises to him on rent to run a computer centre by the name of Knowledge Plus, which even Mohd. Arif @ Ashfaq admits that it belonged to him and one of the prosecution witnesses, PW-56 Mohd. Faisal, as has been noted already, also had claimed that he was a partner of Mohd. Arif in that computer centre. Learned trial Court had though tried him on the allegations that he was also a member of Lashkar-e-Toiba and was a conspirator with all other ten accused persons to wage war against the Government of India and to kill the army men, however, the trial court finally did not find any evidence in support of the charge of said conspiracy. Learned State counsel submitted that there were frequent telephone calls made to each other by Sadakat Ali and Mohd. Arif @ Ashfaq which is quite unusual in the case of a simple landlord-tenant relationship and that is also a circumstance which suggests that Sadakat Ali was also a party to the conspiracy for launching attack on the Army Camp inside Lal Quila. The allegations against him were also that he had not informed the police before letting out his property to a foreigner. The stand taken by Sadakat Ali was that he had let out his premises to PW-56 Faizal, who admittedly was a partner of accused Mohd. Arif @ Ashfaq, in the computer centre by the name of "Knowledge Plus", and not to accused Mohd. Arif @ Ashfaq. It was also his plea that he had in any case been prosecuted for the offence of not informing the police before letting out his premises to a foreigner and Therefore, he could not be prosecuted again. He has denied having any knowledge about Mohd. Arif @ Ashfaq being a terrorist and his plans to attack the army camp inside Lal Quila. Against this accused prosecution has also relied upon the evidence of one Mohd. Ahmad, PW-225, who had

claimed that he knew Sadakat Ali and also that one of his friends had informed him that Sadakat Ali was a builder but was assisting terrorists and he had helped a terrorist in escaping after accepting four lacs of rupees from that terrorist. He also claimed to have informed about that to the Home Minister vide his complaint Ex.PW-57/A in March, 2001. Learned Counsel for Sadakat Ali had argued that there was no evidence against him for any of the offences with which he was charged and not even for the charge for which he was finally convicted. It was contended that just because this accused had let out his premises to Mohd. Arif @ Ashfaq, although he had denied that also, that circumstance by itself could not be made the basis of his conviction as had been done by the trial Court and based on that solitary circumstance the State is now wanting to get him convicted even for the offence u/s 120-B IPC which effort of the State cannot succeed in the absence of any other evidence. It was also submitted that if mere short-term association with Mohd. Arif @ Ashfaq was to be sufficient to conclude that his acquaintances must be aware of his illegal activities or that he was an illegal entrant into the territory of India then all his acquaintances including those who have been made prosecution witnesses like PW-20 Nain Singh, who had also let out his house to Mohd. Arif and being a RAW official could not be expected to be unaware of the fact that Mohd. Arif @ Ashfaq was not a genuine person, PW-65 Mohd. Faisal who was partner of Mohd. Arif in Knowledge Plus computer centre as well as PW-21 Gian Chand Goyal who had also let out his house number G-73, Batla House, Muradi Road, Okhla (where an encounter had taken place between police and one militant Abu Shamal) and such like other acquaintances of this accused examined by the prosecution should also have been made accused and convicted at least for the offence for which Sadakat Ali has been convicted but none of them was prosecuted and Therefore, the investigating agency had discriminated against Sadakat Ali by choosing him only as an accused. Regarding PW-225 it was submitted that his evidence is worthless since he did not have any personal knowledge regarding the illegal activities of Sadakat Ali and the person who gave information to him about this accused having not been examined evidence of PW-225 becomes hearsay evidence and totally inadmissible.

97. We find substance in the aforesaid submissions of the learned Counsel for Sadakat Ali and no merit in the arguments advanced by the learned State counsel. The only evidence highlighted before us by the learned State counsel against Sadakat Ali was exchange of some telephone calls between him and accused Mohd. Arif @ Ashfaq. In our view, since the prosecution itself is claiming that Sadakat Ali and Mohd. Arif @ Ashfaq were landlord and tenant exchange of telephone calls between them cannot be a circumstance from which the only inference that could be drawn is that Sadakat Ali knew about the real identity of Mohd. Arif @ Ashfaq and his plan to attack Lal Quila. The relationship of landlord and tenant has in any case been been disputed by Sadakat Ali as well as Mohd. Arif @ Ashfaq and except for statements of some witnesses that Mohd. Arif @ Ashfaq had opened a computer centre in the premises of Sadakat Ali from which

evidence alone the relationship of landlord and tenant between these two accused could not be inferred, there is no other evidence to establish the same. We are also of the view that if it is accepted that Sadakat Ali had, in fact, let out his premises to Mohd. Arif @ Ashfaq and there was an exchange of telephone calls between the two quite frequently that would not be sufficient to establish the very serious allegation that Sadakat Ali was a party to the conspiracy hatched by his co-accused Mohd. Arif @ Ashfaq and other militants to launch an attack inside Lal Quila. If merely on the basis of someone letting out his premises to someone who turns out to be a terrorist was considered to be sufficient to infer the knowledge on the part of the landlord about his tenant being a terrorist then the investigating agency in the present case should have prosecuted the owners of all the properties wherever Mohd. Arif @ Ashfaq had stayed. PW-20 Nain Singh and PW-21 Gian Chand in whose houses admittedly Mohd. Arif @ Ashfaq had stayed should also have then been prosecuted like Sadakat Ali. PW-20 Nain Singh, who appears to have been working with some intelligence wing of the Government definitely could not be exonerated and made a prosecution witness since being employed in the intelligence department it could not be expected that he would not be knowing that the person to whom his house had been let out was a foreigner having gained illegal entry into India. PW-56 Faizal who had been partner of Mohd. Arif @ Ashfaq could also be expected to be knowing about the real identity of Mohd. Arif @ Ashfaq if that knowledge could be attributed to Sadakat Ali but the prosecution did not make him also an accused in this case. Above all, the prosecution did not prosecute even PW-225 who himself had claimed that he knew that Sadakat Ali was a terrorist. In any case, we feel that merely because of Sadakat Ali having let out his property to Mohd. Arif @ Ashfaq it could not be said that he was a party to the conspiracy for the attack inside Lal Quila. As far as the evidence of PW-225 is concerned the same is definitely hearsay since he claims that some friend of his had told him that Sadakat Ali was assisting terrorists and that friend has not been examined. No weight can be attached to this kind of evidence and there is no Explanation forthcoming for the non-examination of the so-called friend of PW-225 who knew about the activities of Sadakat Ali. Therefore, the appeal filed by Sadakat Ali against his conviction also deserves to be allowed and the State appeal for securing his conviction for the offence of conspiracy is liable to be dismissed.

98. Coming now to the case of appellant - accused Babar Mohsin Baghwala we find from the impugned judgment that he has been convicted for his having provided shelter to co-accused Mohd. Arif @ Ashfaq during his visit to Delhi many months before the present incident of shooting inside Lal Quila. Although he had also been charged for the offence u/s 120-B IPC for conspiring with the other charge-sheeted ten accused persons and some proclaimed offenders to wage war against the Government of India but he was acquitted of that charge.

99. As against appellant-accused Babar Mohsin Baghwala the only evidence against him which was pressed into service by the prosecution during the trial as

well as during the course of hearing of these appeals by the learned State counsel was the recovery of one letter from the dicky of motor-cycle of this accused. That letter, according to the prosecution, was written by accused Mohd. Arif @ Ashfaq to Babar Mohsin Baghwala from Sri Nagar thanking him for the help rendered to him (Mohd. Arif) during his stay in Delhi sometime in February - March, 2000. The letter Ex. PW-10/C does not in any way help the prosecution case. Learned State counsel had admitted before us that this letter Ex. PW-10/C is dated 14th March, 2000 and in that letter there is no reference whatsoever to any plan of the militants to attack the army camp inside Lal Quila or that Mohd. Arif @ Ashfaq had claimed in this letter that Babar Mohsin Baghwala had taken him around on his motor-cycle to different parts of the city to shortlist the places of importance which could be made a target for terrorist attacks. Learned State counsel has submitted that it was for accused Babar Mohsin Baghwala to have come out with an Explanation as to how he knew accused Mohd. Arif @ Ashfaq and what kind of help he had rendered to Mohd. Arif during his stay in Delhi for which he had written to him this thanks giving letter and in the absence of any Explanation having been given by him the only inference which can be drawn is that both these accused were terrorists and Babar Mohsin Baghwala had shown different places in Delhi to Mohd. Arif @ Ashfaq for being made targets of terrorist attacks. However, we do not find any substance in this submission. There is no evidence, in fact, to the effect that Babar Mohsin Baghwala had shown different places to Mohd. Arif @ Ashfaq in Delhi. The prosecution is claiming so and the learned trial Court has also based its conclusion in respect of this accused on the basis of the confessional statement recorded by the police when this accused Babar Mohsin Baghwala was in police custody. That confessional statement was not admissible in evidence for any purpose whatsoever since there was no recovery of any incriminating material pursuant thereto. This accused had, thus, been held guilty by the learned trial Court on inadmissible material and on surmises. Therefore, his conviction also cannot be sustained and consequently the appeal filed by him also deserves to be allowed.

100. Now we take up the case of appellant - accused Matloob Alam. The prosecution case is that Matloob Alam was running a ration shop in Delhi and the allegations against him were that he used to forge ration cards and give them to different persons after taking money from them and he had forged 32 ration cards for different persons and one ration card Ex.PW-164/A he had forged in conspiracy with the acquitted accused Mool Chand Sharma, who was employed in the Food & Supply Department, for appellant - accused Mohd. Arif @ Ashfaq despite knowing the fact that this accused was a terrorist and he required a ration card to conceal his real identity as a terrorist. Mool Chand Sharma has, however, been acquitted. Matloob Alam has been convicted for forging three rations cards, Ex.PW-164/A in the name of Mohd. Arif @ Ashfaq, Ex.PW-203/A in the name of PW-203 Babu Ram Joshi and Ex.PW-205/B in the name of father of PW-151 Azmat Ali Khan. In respect of the conviction of accused Matloob Alam it was submitted by the learned Counsel for the State that ration card Ex. PW-164/

A which was seized from the house of accused Mohd. Arif @ Ashfaq was found to be forged since the officials of the ration department who had been examined by the prosecution, namely, PW-164 Anju Goel, PW-165 Dharamvir Sharma and PW-172 Manohar Lal all of whom were at the relevant time posted in the office of Food & Supply Department, Circle No. 6 in Okhla and all three of them had claimed that the ration card Ex. PW-164/A had not been issued from their office. It was also submitted that when the specimen handwriting of Matloob Alam was got compared with the writing on the said ration card by a handwriting expert as also with the handwriting on other ration cards of different persons it was confirmed that Matloob Alam had filled in the ration card Ex. PW-164/A. PWs 151 and 203 had claimed that they had approached Matloob Alam for preparation of their ration cards and after taking money from them he had handed over to them their ration cards. Those two ration cards were also found to have not been issued from Ration Department, as stated by PWs 164 and 165, and, Therefore, he was the actual forger of these three ration cards and accordingly had been rightly convicted by the trial Court.

101. The submission of learned Counsel for appellant - accused Matloob Alam, on the other hand, was that he had been convicted without any admissible evidence against him by the trial Court by relying upon the disclosure statements of the accused as also that of his co-accused Mohd. Arif @ Ashfaq wherein he had claimed that he had got the ration card prepared from Matloob Alam by paying him money. It was also contended that Matloob Alam had also been convicted for forging ration cards of other persons also after taking money from them and in that way he had also cheated them but that conviction was also without any sufficient admissible evidence having been adduced by the prosecution. Learned Counsel submitted that evidence of PW-165 Dharamvir Sharma who was the Food Supply Officer and who has disowned his signature on the ration card Ex. PW-164/A and the evidence of handwriting expert PW-216 should not be accepted since in cross-examination PW-165 had admitted that during investigation he was never shown the original ration card Ex. PW-164/A and he had been shown only its photostat copy and original card he had seen only in Court for the first time. It was also pointed out that even the investigating officer PW-230 Inspector . S.K. Sand had also admitted in cross-examination that only photocopy of the ration card Ex. PW-164/A had been shown to PW-165 Dharamvir Sharma. Similarly, the clerk PW-164 Anju Goel had also stated that no ration card had been shown to her by the police when her specimen initials were taken and PW-230 also admitted that fact. So, according to the counsel, since these witnesses had not even been shown the original card during investigation how the investigating officer could send Ex. PW-164/A to the handwriting expert along with the specimen signatures/initials of these two officials of the ration department for comparison. It was also submitted that the handwriting expert had not been given the documents seized from the ration department where PW-165 was posted and if those documents, having admitted signatures of these witnesses had been sent to the handwriting expert and compared with the

questioned signatures on the said ration card it would have been found out that ration card Ex. PW-164/A was, in fact, signed by PWs-164 and 165 and was a genuine document and not forged by Matloob Alam. Learned Counsel further submitted that even though specimen signature of PW-165 had been taken during investigation by the police but those specimen signatures were disguised signatures having been intentionally obtained from him by the police so that the same did not tally with the questioned signature on the ration card. The submission was that in normal course, a public servant working in a department, like the ration department, signs many documents every day and every signature is likely to be different from the other one and at that time the official signs quite casually but when specimen signatures are taken by the police anybody would be conscious and would not sign in the manner in which he or she signs routinely on the official documents and, Therefore, the police should have sent official records of the ration department which had the admitted signatures of PW-165. Regarding the other two forged ration cards it was submitted that the evidence of PWs 151 and 203 does not inspire confidence and there are many infirmities in their evidence and that even though the prosecution had got examined from the handwriting expert(PW-205 Shri Ami Lal Daksh) their ration cards and he had after comparing the handwriting and initials etc. appearing in those ration cards with the specimen handwriting of Matloob Alam had not found out that the entries and signatures in those two ration cards Ex. PW-203/A and Ex. PW-205/B were of accused Matloob Alam. Finally, learned Counsel contended that the punishment imposed on Matloob Alam was, in any case, quite harsh and deserves to be reduced in the event of this Court also finding him guilty.

102. As far as forgery of ration card Ex.PW-164/A in the name of Mohd. Ashfaq by Matloob Alam is concerned the prosecution is relying upon the evidence of handwriting expert PW- 216 Shri M.A.Ali. He claims to have examined the signatures on the ration card Ex.PW-164/A and compared the same with the specimen signatures of PWs 164 and 165 and found the same to be not tallying with each other. The defense of this accused is that ration card was in fact issued from the ration office and was signed by FSO PW-165 Dharamvir Sharma and his clerk PW-164 Anju Goel. PWs-164 and 165, as noticed already, have both claimed that this ration card does not bear their signatures. In cross-examination these witnesses had admitted that they were not shown the original ration card Ex.PW-164/A during investigation. PW-165 in fact had categorically stated that he was seeing this ration card for the first time in Court only and the investigating officer had also admitted that during investigation he had not shown original ration card to PW-165. There is no Explanation forthcoming as to why the original ration card Ex.PW-164/A was not shown to these officials of Ration Department during investigation and why the original card which was never shown to them was sent to CFSL. We are, Therefore, in agreement with the submission of the learned Counsel for Matloob Alam that in these circumstances this accused deserves to be given the benefit of doubt in respect of the allegation that he had forged ration card Ex.PW-164/A even though it

might not have been issued from Circle No. 6 of the Food & Supply Department where PWs 164 and 165 were posted during the relevant period. Matloob Alam is also alleged to have forged ration cards Ex.PW-203/A and Ex.PW-205/B and for this allegation evidence of PW-151 Azmat Imam Khan and PW-203 B.R.Joshi has been relied upon by the prosecution as well as by the trial Court. PW-151 had deposed that ration card was in the name of his father but he himself had got it made through the owner of one local ration shop in Okhla whose name he did not remember. That he stated on 20/01/2004 when his examination-in-chief had commenced. That day he did not name accused Matloob Alam nor he identified this accused. His examination-in-chief was got deferred by the prosecutor. On the adjourned date on 12/04/2004, however, this witness named Maloob Alam and also identified him to be the person from whom he got prepared ration card Ex.PW-205/B. However, in cross-examination PW-151 stated that this ration card was got made by his father through one mullahji who used to sell chicken and also that he had not named Matloob Alam before the police when his statement was recorded. In these circumstances, no implicit reliance can be placed on the evidence of PW-151 and particularly when father of this witness himself has not been examined. As far as PW-203 Babu Ram Joshi is concerned his evidence also cannot be said to be reliable and sufficient to implicate Matloob Alam for the forgery of his ration card Ex.PW-203/A. In chief-examination he claimed that ration card Ex.PW-203/A was given to him by accused Matloob Alam, whose name the witness stated as Mehboob Alam. In cross-examination this witness admitted that ration card Ex.PW-203/A was neither having his signature nor his photo had been pasted on it but it had simply been stapled and also that he did not know if his own name was mentioned in his ration card or not. He also stated that when he was interrogated by the police this ration card was not seized and further that he had never drawn ration through this ration card. From the cross-examination of this witness it really becomes doubtful if ration card Ex.PW-203/A was the card of this witness. If actually it was his ration card it would have been having his signature and also his photo pasted on it and signed by the Food & Supply Officer. He did not even know if his name was mentioned in the said ration card or not. It was not even seized by the investigating officer when this witness was interrogated. So, we are of the view that even in respect of these two ration cards Ex.PW-203/A and Ex.PW-205/B prosecution case against accused Matloob Alam cannot be said to have been established beyond reasonable doubt benefit for which has to go to him. His appeal also, thus deserves to be allowed.

103. After having reached the aforesaid conclusions on a totally independent analysis of the entire evidence relied upon by the prosecution in respect of appellants - accused Rehmana Yusuf Farooqui, Farooq Ahmad Quasid, Nazir Ahmad Quasid, Sadakat Ali and Babar Mohsin Baghwala, we became anxious to find out as to how these six accused persons had been found guilty by the learned trial Judge when despite our digging deep into the prosecution evidence we could not find sufficient evidence against anyone of these six accused

persons. We then found from the judgment of the learned trial Court that most of his findings against these accused persons were based on their confessional statements made in police custody and on surmises and by putting the burden on their shoulders to prove their innocence. It appears that the learned trial Judge while delivering the judgment had before him some judgments where confessional statements of the accused persons had been found to be admissible but those judgments were rendered in cases where the police had invoked the provisions of TADA and POTA whereunder confessional statements made by the accused persons even before the police are admissible. In the present case, however, the police had not pressed into service either TADA or POTA against any of the accused and so the confessional statements which had not led to recovery of any incriminating material against the accused persons could not have been relied upon by the learned trial Court.

104. Having come to the conclusion that the prosecution has been able to establish all the allegations against appellant-accused Mohd. Arif @ Ashfaq @ Abu Hamad only and not against any of the other six convicted accused persons the only question which now remains to be considered is whether the death sentence awarded to Mohd. Arif @ Ashfaq @ Abu Hamad was justified or not. In this respect, we may state that the learned Counsel for this accused did not highlight any mitigating circumstances justifying the conversion of death sentence to life imprisonment. Perhaps the learned Counsel was conscious of the futility of the submission for awarding life sentence to Mohd. Arif @ Ashfaq @ Abu Hamad. Considering the fact that this accused had hatched a conspiracy to attack the Indian Army stationed inside the national monument for protecting it from any invasion by the terrorists and had executed also that conspiracy with the help of his other associate militants and in that process they had killed three army jawans and more could also have lost their lives but for immediate retaliation by the members of the Quick Reaction Team of the Army this can definitely be said to be a case falling in the category of "rarest of rare" cases where the extreme penalty of death only would serve the ends of justice. In case death sentence is not awarded to these kind of terrorists who have no value for human life and they are not bothered even for their own lives while indulging in these kind of terrorist activities the conscience of the entire community would be shocked. The death sentence is the only appropriate punishment which appellant - accused Mohd. Arif @ Ashfaq deserves and has been rightly sentenced to death by the learned trial Court and we have no hesitation in affirming that sentence.

105. In the result, we maintain the conviction of appellant-accused Mohd. Arif @ Ashfaq @ Abu Hamad in respect of all the offences of which he has been convicted by the trial Court as well as the sentences awarded to him including the death sentence and Death Sentence Reference No. 2 of 2005 stands answered accordingly. Criminal Appeal No. 927 of 2005 of appellant Mohd. Arif @ Ashfaq @ Abu Hamad is dismissed.

Criminal Appeal No. 891 of 2005 of appellant -accused Sadakat Ali, Criminal

Appeal No. 892 of 2005 of appellant - accused Rehmana Yusuf Farukhi, Criminal Appeal No. 944-45 of 2005 of appellants - accused Farooq Ahmad Qasid and Nazir Ahmad Qasid , Criminal Appeal No. 946 of 2005 of appellant - accused Babar Mohsin Baghwala and Criminal Appeal No. 907 of 2005 of appellant - accused Matloob Alam are allowed and the judgment dated 24-10-2005 and the order of sentence dated 31-10-2005 passed by the learned trial Court convicting these six accused persons is set aside and consequently all these six appellants-accused stand acquitted of all the charges. Criminal Appeal No. 273 of 2006 filed by the State for giving death sentence to appellants Nazir Ahmad Qasid and Nazir Ahmad Qasid and Criminal Appeal No. 504 of 2006 filed by the State for convicting appellants - accused Rehmana Yusuf Farukhi, Sadakat Ali and Babar Mohsin Baghwala for the offence of conspiracy are dismissed. In case these six appellants - accused who have been acquitted now are in custody, they shall be released from jail forthwith, if not required to be detained in connection with any other case.