IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 98-99 OF 2009

Mohd. Arif @ Ashfaq … Appellant

Versus

State of NCT of Delhi … Respondent

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J U D G M E N T

V.S. SIRPURKAR, J.

1. The appellant (admittedly a Pakistani national) challenges his concurrent conviction by the trial Court and the High Court as also the death sentence awarded to him, in this appeal.

2. On 22.12.2000 at about 9 p.m. in the evening some intruders started indiscriminate firing and gunned down three army Jawans belonging to 7th Rajputana Rifles. This battalion was placed in Red Fort for its protection considering the importance of Red Fort in the history of India. There was a Quick Reaction Team of this battalion which returned the firing towards the intruders. However, no intruder was killed and the intruders were successful in escaping by scaling over the rear side boundary wall of the Red Fort. This attack rocked the whole nation generally and the city of

Delhi in particular as Red Fort is very significant in the history which was taken over by British Army way back in 1857 and was retrieved back to India on 15.8.1947. It is also significant to note that the Prime Minister addresses the nation from this very Red Fort on every 15th of August.

The three unfortunate soldiers who lost their lives in this attack were:-

(i) A civilian Sentry namely, Abdullah Thakur

(ii) Rifleman (Barber) Uma Shankar

(iii) Naik Ashok Kumar, who was injured and then succumbed to his injuries later on.

3. The Red Fort comes within the local jurisdiction of Police Station Kotwali. The Information was recorded by DD No.19A, Exhibit PW-15/B and Sub-Inspector (S.I.) Rajinder Singh (PW-137) rushed to the spot. SHO Roop Lal (PW-234) who was the Station House Officer of Kotwali police station also reached the spot and recorded the statement of one Capt. S.P. Patwardhan (PW-189) which was treated as the First Information Report. This First Information Report refers to two persons in dark clothing and armed with AK 56/47 rifles having entered the Red Fort from the direction of Saleem Garh Gate/Yamuna Bridge. It is further stated that first they fired at the civilian Sentry Abdullah Thakur, secondly they came across rifleman (barber) Uma Shankar near Rajputana Rifles MT

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lines and fired at him due to which he died on the spot. It is further mentioned that lastly the intruders ran into the room in the unit lines close to the office complex and fired shots at Naik Ashok Kumar who was seriously injured. The FIR further mentions that thereafter they ran towards ASI Museum complex and fired in the direction of police guard room located inside the Museum. At this stage, the quick reaction team started firing at them. However, they escaped into the wooded area close to the ring road. The FIR also mentions that some fired/unfired ammunition was recovered from the spot.

4. The investigation started on this basis. During the examination of the spot, one live cartridge Exhibit PW-115/38 and number of cartridge cases (Exhibit PW-115/1-37) and (Exhibit PW-189/32-71), three magazines (Exhibit PW-189/1-3) of assault rifles, one of which had 28 live cartridges (Exhibit PW-189/4-31) were found and handed over to the police vide memo Exhibit PW-189/C and Exhibit PW-115/A. The empties of the cartridges fired by the Quick Reaction Team through the self loading rifles were deposited with ammunition store of 7 Rajputana rifles and were handed over to the police later on vide memo Exhibit PW-131/C.

5. On the next day, i.e. on 23.12.2000, in the morning at about 8.10 a.m., the BBC news channel flashed the news that Lashkar-e-Toiba had claimed the responsibility for the shooting incident in question which was

entered in the daily diary. On the same morning one AK56 assault rifle (Exhibit PW-62/1) lying near Vijay Ghat on the back side of Lal Qila was found abandoned. There were seven cartridges in the magazine. They were taken into police possession vide memo Exhibit PW-62/F. On the same morning in early hours extensive search went on of the back side of the Red Fort. The police found a polythene bag containing some currency notes of different denominations and a piece of paper, a chit (Exhibit PW-183/B) on which a mobile No.9811278510 was mentioned. According to the prosecution, the intruders had escaped from that very spot by scaling down the rear side boundary wall of Red Fort using the pipe and further a small platform for landing from below the pipe. According to the prosecution, while jumping from the platform, the said polythene bag with cash and the paper slip fell out of the pocket of one of the intruders. The currency notes and the paper slip were seized vide memo Exhibit PW-183/A. It was on the basis of this cell phone number that the investigation agency started tracing the calls and collecting the details from which it transpired that between 7:40 p.m. and 7:42 p.m. on the night of the incident, two calls were made from this mobile number to telephone No.0194452918 which was the number of one BBC correspondent in Sri Nagar, Altaf Hussain (PW-39). It was also found that three calls were made from same mobile number to telephone number 0113355751 which number was found to be that of BBC correspondent in Delhi, Ayanjit Singh

(PW-41) between 9:25 p.m. and 9:33 p.m. The police found out that this mobile No.9811278510 was being used from two instruments whose IMEI number (identification number engraved on the mobile handset by the manufacturer) were obtained from mobile service provider ESSAR. These numbers were 445199440940240 and 449173405451240. The police could also find out that the person who had mobile connection card having No.9811278510 had another mobile cash card of ESSAR company with No.9811242154 and from this number large number of calls were found to have been made to telephone No.2720223 which was found to be the number of telephone installed at flat No.308A, DDA flats, Ghazipur, Delhi. This flat was registered in the name of one Farzana Farukhi. Similarly, number of calls were found to have been made from telephone No.2720223 to 9811242154. It was also found that number of calls were made from cell No. 9811242154 to telephone No.6315904 which was a landline number installed at House No.18-C, Gaffur Nagar, Okhala where a computer centre in the name of 'Knowledge Plus' was being run. The further investigation revealed that this said computer centre was being run by one Mohd. Arif @ Ashfaq (appellant herein) who was residing at the flat mentioned as flat No.308A, DDA Flats, Ghazipur where landline No.2720223 was installed. The police, therefore, could connect the said flat No.308A at Ghazipur and the computer Centre i.e. Knowledge Plus at Okhala and could also connect Mohd. Arif @ Ashfaq with these two

places. A surveillance was kept on these places for two days. During this period of surveillance, the computer centre had remained closed. On the basis of some secret information the premises at 308A, Ghazipur were raided on the night of 25-26.12.2000 and the appellant-accused Mohd. Arif @ Ashfaq was apprehended by the police while he was entering the flat. It was found during the investigation that Farzana Farukhi in whose name telephone No. 2720223 was registered was a divorcee sister-in-law of Mohd. Arif @ Ashfaq i.e. her sister was married to Mohd. Arif @ Ashfaq whose name was Rehmana Yusuf Farukhi. Mother of these two sisters, namely, Ms. Qamar Farukhi (DW-1), was also a resident of the same flat.

6. On his apprehension, Mohd. Arif @ Ashfaq (appellant) was cursorily searched by Inspector Ved Prakash (PW-173) during which one pistol (Exhibit PW-148/1) with six live rounds was found with him. They were sealed and taken into police custody. The appellant on his apprehension accepted his involvement in the incident inside the Lal Qila and gave further information to the policemen about the presence of his associate Abu Shamal @ Faizal as also the ammunitions at their hide out at House No.G-73 Batla House, Murari Road, Okhala, New Delhi.

7. He was immediately taken to that house by the raiding team which was headed by Inspector Mahesh Chandra Sharma (PW-229) and truly enough, in pursuance of the information given by him, the associate Abu

Shamal was found to be there. The police party did not approach the flat immediately as the house was found to be locked. However, at about 5.15 a.m. in the morning one person had gone inside the house and closed the door from inside. The police then asked him to open the door but instead of opening the door, he started firing from inside at the police party. The police party returned the firing with their fire arms and ultimately the person who was firing from inside died and was identified by appellant Mohd. Arif @ Ashfaq to be Abu Shamal @ Faisal. Substantial quantity of ammunition and arms was recovered from that flat being one AK-56 rifle (Exhibit PW-229/1), two hand grenades one of which was kept in Bandolier (Exhibit PW-229/5), two magazines (Exhibit PW-229/2-3) one of which had 30 live cartridges. Some material for cleaning arms kept in a pouch (Exhibit PW-229/6) and Khakhi Colour Uniform (Exhibit PW-229/8) were recovered and seized by the police vide seizure Memo (Exhibit PW-229/D & E). A separate case was registered under Sections 186, 353 and 307, IPC as also Sections 4 & 5 of the Explosive Substance Act and Sections 25, 27 of the Arms Act was registered at New Friends Colony in FIR No.630/2000. That case ended up in preparation of a closure report because the accused had already died in the encounter with the police. After the above encounter, the accused appellant was brought back to his flat where the search had already been conducted by policemen. During that search one Ration card which was ultimately found to be forged (Exhibit PW-164/A),

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one driving license in the name of Mohd. Arif @ Ashfaq (Exhibit PW-13/1), one cheque book of HDFC bank in the name of Mohd. Arif @ Ashfaq (appellant herein), one ATM card, one cheque book of the State Bank of India in the name of Rehmana Yusuf Farukhi, wife of accused appellant was found. The said rifle was also taken into custody. One pay-in slip of Standard Chartered bank (Exhibit PW-173/K) showing deposit of Rs.5 lakhs in the account of M/s. Nazir & Sons was found. The said firm belonged to other accused Nazir Ahmad Qasid. This amount was deposited by the appellant may be through Hawala from the high ups of the Lashkar-e-Toiba. Mohd. Arif @ Ashfaq (appellant herein) was then brought back and there S.I. Harender Singh (PW-194) arrested Mohd. Arif @ Ashfaq (appellant herein). He searched him again when one Motorola mobile handset was recovered from his possession. The number of that instrument was found to be 9811278510. Its IMEI number which fixed the identification number of the hand set engraved on the instrument was 445199440940240. The cell phone was thereafter taken in possession.

8. In his interrogation by S.I. Harender Singh (PW-194), accused made a discovery statement which is recorded as Exhibit 148/E about one assault rifle which was thrown near Vijay Ghat behind the Red Fort after the incident by one of the associates (this was already recovered by the police) and one AK-56 rifle and some ammunition behind the rear wall of

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Red Fort by his another associate. In pursuance of that, he was taken to the backside of Red Fort and from there on his pointing out one AK-56 rifle (Exhibit PW-125/1), two magazines (Exhibit PW-125/2-3) having live cartridges, one bandolier and four hand grenades were recovered in the presence of the ballistic experts S.K. Chadha (PW-125) and N.B. Bardhan (PW-202). The same was taken to the police station. The ballistic experts after defusing the hand grenades took the whole material in their possession vide Exhibit memo PW- 218/C. Another discovery statement (Exhibit PW-168/A) was made on 01.01.2001 through which he got recovered three hand grenades from the place near Jamia Millia Islamia University duly hidden. This spot was on the back side of his computer centre 'Knowledge Plus'. They were seized vide seizure memo Exhibit PW-168/B. A separate FIR was also recorded by FIR No.3/2001.

9. The prosecution case, as it revealed on the basis of the investigation which followed, appears to be that the accused-appellant was a Pakistani national and eventually joined a terrorist organization called Lashker-e-Toiba. The accused-appellant took extensive training by using sophisticated arms like AK-56 rifles and hand grenades and had illegally entered the Indian territory along with arms and ammunition in August, 1999 and camped himself at Srinagar in the company of other members of Lashker-e-Toiba who were similarly motivated by that Organization. The

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Organization had also decided to overawe India by their terrorist activities in different parts of India and to fulfill that object, the accused-appellant and his fellow terrorists had planned an attack on Army stationed inside Red Fort. According to the prosecution, the money required for this operation was collected by the accused-appellant through hawala channels, which was evident from the fact that during the investigation, he had led the police to one of the hawala dealers in Ballimaran area in Old Delhi. One Sher Zaman Afghani and Saherullah were the said hawala dealers, but they could not be apprehended. The police, however, recovered Rs.2 lakhs from the shop which was left open. From the information given by the accused-appellant, the police ultimately caught hold of 10 more persons, which included his Indian wife Rehmana Yusuf Farukhi. The other accused persons were Nazir Ahmad Qasid, his son Farooq Ahmad Qasid, Babbar Mohsin Baghwala, Matloob Alam, Sadakat Ali, Shahanshah Alam, Devender Singh, Rajeev Kumar Malhotra and Mool Chand Sharma. Excepting the accused-appellant, nobody is before us, as few of them were acquitted by the trial Court and others by the appellate Court. It is significant enough that there is no appeal against the acquittal by the High Court. There were number of other persons according to the prosecution who were the co-conspirator with the accused-appellant. However, they were not brought to book by the police. They were declared as proclaimed offenders. There is a separate charge-sheet filed

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against those proclaimed offenders also.

10. In order to establish an Indian identity for himself, the accused-appellant had married Rehmana Yusuf Farukhi who was also joined as an accused. According to the prosecution, she had full knowledge about the accused-appellant being a Pakistani national and his nefarious design of carrying out terrorist activities. Significantly enough, she had married only 14 days prior to the shoot-out incident i.e. on 8.12.2000. She was of course, paid substantial amounts from time to time by the accused-appellant prior to her marrying him and this amount was deposited in her bank account No. 5817 with the State Bank of India. The prosecution alleged that the accused-appellant was in touch with Rehmana Yusuf Farukhi even prior to the marriage. One other accused, Sadakat Ali was arrested for having given on rent his property in Gaffur Nagar to the accused-appellant for running a computer centre in the name of 'Knowledge Plus'. Sadakat Ali is said to have been fully aware of the design of the accused-appellant and he had knowingly joined hands with the accused-appellant and had not informed the police that he had let out his premises to the accused-appellant. Huge money used to be received by the accused-appellant which he used to deposit in the accounts of accused Farooq Ahmed Qasid and Nazir Ahmad Qasid in Standard Chartered Grindlays Bank's branch at Srinagar and after withdrawing

money so deposited, the same used to be distributed amongst their fellow terrorists for supporting the terrorist activities. According to the prosecution, huge amount of money was deposited by the accused-appellant in the two bank accounts of Nazir & Sons and Farooq Ahmed Qasid with Standard Chartered Grindlays Bank's branch at Connaught Place, New Delhi. The police was able to retrieve one deposit receipt showing deposit of five lakhs of rupees in November, 2000 in the account of Nazir & Sons. The said receipt was recovered from the flat of the accused-appellant after he was apprehended on the night of 25/26.12.2000.

11. Some other accused of Indian origin had also helped the accused-appellant, they being Devender Singh, Shahanshah Alam and Rajeev Kumar Malhotra. They got a forged learner's driving license No. 9091 (Exhibit PW-13/C) which was purported to have been issued by Delhi Transport Authority's office at Sarai Kale Khan, wherein a false residential address was shown as B-17, Jangpura. On that basis, the accused-appellant also got a permanent driving license (Exhibit PW-13/1) in his name from Ghaziabad Transport Authority. The accused-appellant, with the cooperation of these three accused persons, had submitted a photocopy of a ration card, again with the forged residential address as 102, Kaila Bhatta, Ghaziabad. This very driving license was then used by

the accused-appellant for opening a bank account with HDFC Bank in New Friends Colony, New Delhi, wherein he had shown his permanent address as 102, Kaila Bhatta, Ghaziabad and mailing address as 18, Gaffur Nagar, Okhla, New Delhi. Needless to mention that even these two were not his actual addresses. These were utilized by him for stashing the money that he received from the foreign countries. Accused Babar Mohsin provided shelter to the accused-appellant in his house in Delhi in February-March, 2000, so that the accused-appellant could prepare a base in Delhi for carrying out terrorist acts in Delhi. This Babar Mohsin had also accompanied the accused-appellant on his motorcycle to different parts of Delhi in order to show various places of importance to the accused-appellant, which could be targeted for a terrorist attack. The police was also able to retrieve a letter (Exhibit PW-10/C) addressed to Babar Mohsin, thanking him for the help extended by him to the accused-appellant during his visit to Delhi. This letter was written from Srinagar. This letter was seized by the police from the dickey of the motorcycle belonging to Babar Mohsin on 07.01.2001. One other accused Matloob Alam was having a ration shop in Okhla while accused Mool Chand Sharma was the area Inspector of Food & Supply Department. Both these accused persons had helped the accused-appellant in getting a ration card (Exhibit PW-164/A) which contained false information. Accused Matloob Alam was charged for distributing number of fake ration cards by taking bribe from the

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persons to whom the cards were issued. A separate FIR being FIR No. 65/2001 was registered against Matloob Alam at Police Station New Friends Colony, New Delhi. In fact, the ration card mentioned earlier was prepared by the accused Matloob Alam and the handwriting expert had given a clear opinion that the said ration card was in the hands of Matloob Alam himself. The prosecution, therefore, proceeded against 11 accused persons, in all, who were charge-sheeted on the ground that they had all conspired together to launch an attack on the Army establishment inside the Red Fort so as to pressurize the Government of India to yield to the demand of the militants for vacating Kashmir

12. The police got examined all the arms and ammunition from the ballistic expert N.B. Bardhan (PW-202), Senior Scientific Officer-I, CFSL, New Delhi. Needless to mention that the said witness had found that the cartridges of the gun had actually been fired from AK-56 rifles which was got recovered by the accused-appellant from the backside of Red Fort and Vijay Ghat. The weapons were found by the witness to be in working order. The hand grenades recovered at the instance of the accused-appellant from Jamia Milia Islamia University were also examined and found to be live ones and these were defined as “explosive substance”. The pistol and the cartridges recovered from the possession of the accused-appellant on his apprehension were also got examined by

another ballistic expert Shri K.C. Varshney (PW-211), who vide his report Exhibit PW-211/A, found the said pistol to be in working order and the cartridges to be live ones and being capable of being fired from the said pistol. The police also found that the eleven empties of fired cartridges from Self Loading Rifles (SLRs) of the Army men were actually fired from SLRs made by Ordinance Factory at Kirki, India and that they could not be loaded in either of the two Assault Rifles recovered by the police.

13. This was, in short, a conspiracy and after obtaining the necessary sanctions, the police filed a charge-sheet against 11 accused persons. All the cases were committed to the Court of Sessions and though they were registered as separate Sessions cases, they were clubbed by the trial Court and the case arising out of FIR No. 688/2000 was treated as the main case. We do not propose to load this judgment by quoting the charges framed against all the accused persons. Suffice it to say that they were charged for the offence punishable under Sections 121, 121A and 120-B IPC read with Section 302, IPC. The accused-appellant was individually charged for the offence punishable under Section 120-B, IPC on various counts as also for the offence punishable under Section 3 of the Arms Act read with Sections 25 and 27 of the Arms Act as also Sections 4 and 5 of the Explosive Substances Act. Lastly, the accused-appellant was

also charged for the offence punishable under Section 14 of the Foreigners Act for illegally entering into India without valid documents.

14. The prosecution examined as many as 235 witnesses and exhibited large number of documents. Accused Rehmana Yusuf Farukhi alone adduced evidence in defence and examined her own mother and tried to show that they did not know the accused-appellant was a militant and that the money in the bank account of Rehmana Yusuf Farukhi was her own money and not given by the accused-appellant.

15. The accused-appellant was convicted for the offence punishable under Sections120-B, 121 and 121-A, IPC, Sections 186/353/120-B, IPC, Section 120-B, IPC read with Section 302, IPC, Sections 468/471/474, IPC and also under Section 420 read with Section 120-B, IPC. The accused-appellant was also held guilty for the offence punishable under Section 25 of the Arms Act, Section 4 of the Explosive Substances Act and Section 14 of the Foreigners Act. We are not concerned with the convictions of accused Nazir Ahmad Qasid, Farooq Ahmed Qasid, Rehmana Yusuf Farukhi, Babar Mohsin, Sadakat Ali and Matloob Alam. Barring the above accused, all the other accused persons were acquitted by the trial Court. The accused-appellant was awarded death sentence for his convictions under Section 121, IPC as also under Section 302 read with Section 120-B, IPC. He was awarded rigorous imprisonment for 10 years for his

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conviction under Section 121-A, IPC. He was awarded sentence of life imprisonment for his conviction under Section 4 of the Explosive Substances Act, while on other counts, he was awarded rigorous imprisonment for 7 years for the conviction under Sections 468/471/474/420, IPC. He was awarded rigorous imprisonment for 3 years for his conviction under Section 25 of the Arms Act. He was awarded 2 years' rigorous imprisonment for his conviction under Section 353, IPC and 3 months' rigorous imprisonment for his conviction under Section 186, IPC. He was slapped with fines also with defaults stipulation. The sentences were, however, ordered to run concurrently. The other accused Rehmana Yusuf Farukhi, Babar Mohsin, Nazir Ahmad Qasid, Farooq Ahmed Qasid, Matloob Alam and Sadakat Ali were awarded various convictions; however, their appeal was allowed by the High Court. That leaves us only with the appeal filed by the present appellant. The High Court also confirmed the death sentence awarded by the trial Court to Mohd. Arif @ Ashfaq (accused-appellant). The State had also filed one appeal challenging the acquittal of accused Rehmana Yusuf Farukhi, Sadakat Ali and Babar Mohsin for the serious offence of hatching conspiracy with co-accused Mohd. Arif @ Ashfaq, Farooq Ahmed Qasid and Nazir Ahmad Qasid to wage war against the Government of India, so also an appeal was filed against the accused Farooq Ahmed Qasid and Nazir Ahmad Qasid for enhanced punishment of death penalty in place of the sentence

of life imprisonment awarded to them by the trial Court. The State, however, did not file any appeal against the four acquitted accused persons. The High Court, after examination in details, confirmed the conviction and the sentence only of the present appellant, while all the other appeals filed by other accused persons were allowed and they were acquitted. The appeals filed by the State for enhancement, as also against the acquittal of other accused persons from the other charges, were dismissed by the High Court. That is how, we are left with the appeal of Mohd. Arif @ Ashfaq, the present appellant herein.

16. The first contention raised by Ms. Kamini Jaiswal, learned counsel appearing on behalf of the respondent was that no such incident of outsiders going into the Red Fort and shooting ever happened. The learned counsel further argued that the said shooting was as a result of the brawl between the Army men themselves. In order to buttress her argument, the learned counsel further said that even the police was not permitted to enter the Red Fort initially and though an enquiry was held regarding the incident, the outcome of such enquiry has never been declared. The learned counsel attacked the evidence of Capt. S.P. Patwardhan (PW-189) on the ground that the report made by him which was registered as FIR on 22.12.2000 was itself suspicious, as it was clearly hearsay. The learned counsel further relied on the evidence of

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Head Constable Virender Kumar (PW-15) who was a duty officer at Kotwali Police Station and claimed that he received the information at about 9.25 pm which he had recorded as DD No. 19A. It was pointed out that the said DD Entry was handed over to S.I. Rajinder Singh (PW-137) and Constable Jitender Singh (PW-54) was directed to accompany him. It was also pointed out that SHO Roop Lal (PW-234) was informed about the incident and he handed over to S.I. Rajinder Singh (PW-137) the report at 11.30 pm and it was on that basis that the FIR No. 688/2000 was registered at about 12.20 am on 23.12.2000. The learned counsel then relied upon the report in the newspaper Hindustan Times in which it was stated that the police intelligence was not ruling out the possibility of shoot out being insiders' job. The learned counsel also referred to the evidence of Constable Jitender Singh (PW-54), Naik Suresh Kumar (PW-122), Major Manish Nagpal (PW-126), Mahesh Chand (PW-128), Retd. Subedar D.N. Singh (PW-131), Hawaldar Dalbir Singh (PW-134) and S.I. Rajinder Singh (PW-137), as also the evidence of Major D.K. Singh (PW-144). It was tried to be argued that there were *inter se* contradictions in the evidence of all the witnesses and the whole story of some intruders going into the Red Fort and shooting was nothing but a myth. It was also suggested by the learned counsel that there was serious dispute in the versions regarding the ammunition used by the intruders and ammunition used by the Army personnel. Fault was found with the timing of registration of FIR No.

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688/2000. The learned counsel also stated that the prosecution had not brought on record any register which is maintained for recording the entry of any vehicle in the Red Fort. The learned counsel further suggested a contradiction in the evidence of Hawaldar Dalbir Singh (PW-134) and the statement of Retd. Subedar D.N. Singh (PW-131) regarding as to who took the rifle from Hawaldar Dalbir Singh (PW-134), whether it was Major D.K. Singh (PW-144) or Major Manish Nagpal (PW-126). About the timings of various police officers reaching including that of SHO Roop Lal (PW-234), the learned counsel pointed out that there were some deficiencies.

17. Before we appreciate these features of the evidence and the contentions raised by the learned counsel for the defence, we must first clarify that this Court ordinarily does not go into the appreciation of evidence, particularly, where there are concurrent findings of facts. We have very closely examined both the judgments below and found that there is a thorough discussion as regards the evidence, oral as well as documentary, and it was only after a deep consideration of such evidence that the trial and the appellate Courts have come to the concurrent finding against the appellant. In order to see as to whether the acquittal of other accused persons can be linked to the verdict against the appellant, we have examined even the other evidence which did not necessarily relate to the criminal activities committed by the appellant. Inspite of the fact that

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there has been a concurrent verdict against this appellant, still we have examined the oral and documentary evidence not only relating to the appellant, but also to the other accused persons. As a result, we have come to the conclusion that the trial and the appellate Courts have fully considered the oral and documentary evidence for coming to the conclusions that they did. In view of the concurrent findings, the scope to interfere on the basis of some insignificant contradictions or some microscopic deficiencies would be extremely limited. All the same, this being a death sentence matter, we ourselves have examined the evidence.

18. From the clear evidence of Capt. S.P. Patwardhan (PW-189), Major Manish Nagpal (PW-126), Retd. Subedar D.N. Singh (PW-131), Hawaldar Dalbir Singh (PW-134) and Major D.K. Singh (PW-144), we are of the clear opinion that what took place on the said night on 22.12.2000 could not be just set aside as an internal brawl between the Army men themselves. The suggestion is absolutely wild. We find from the evidence that none of these witnesses who have been named above and who were the direct witnesses to the firing incident have been given this suggestion in their cross-examination that it was merely a brawl between the Army men. That apart, there are some circumstances which completely belie the theory of internal brawl. It would have to be remembered that a civilian Sentry Abdullah Thakur was the first to lose his life. There is nothing to suggest

that the said Sentry Abdullah Thakur or the second casualty Rifleman (Barber) Uma Shankar, as also Naik Ashok Kumar had developed any enmity with anybody in the battalion. Further, if this was a brawl between the Army men, there was no reason why Abdullah Thakur was shot at and killed. We also do not find any reason to suspect the version of Major Manish Nagpal (PW-126) who himself claimed to have fired six rounds in the direction of Ring Road after taking a self loading rifle from Hawaldar Dalbir Singh (PW-134). In fact, there is no contradiction in his version and the version of Hawaldar Dalbir Singh (PW-134). The version of Major Manish Nagpal (PW-126) is in fact corroborated by the evidence of Major D.K. Singh (PW-144) as also the evidence of Retd. Subedar D.N. Singh (PW-131). Even Major D.K. Singh (PW-144) had fired alongwith Major Manish Nagpal (PW-126) and they had fired, in all, 11 rounds, the empties of which were given by these two officers to Retd. Subedar D.N. Singh (PW-131). Ultimately, these empties were produced before the civil police officers and were taken into possession vide Exhibit PW-131/A. This version is also corroborated by Hawaldar Dalbir Singh (PW-134). We have carefully seen the evidence of all these witnesses mentioned above and found it trustworthy. It must be mentioned that at 9.23 pm, a call was made to the Police Control Room (PCR) by Major Manish Nagpal (PW-126) suggesting that some persons had run away after firing inside the Red Fort and that they had gone towards the Ring Road. This was proved

by the lady Constable Harvir Kaur, PCR (PW-77) and the concerned document is Exhibit PW-77/A which lends full support to the version and suggests that there was an incident of shooting in the Red Fort. DD Entry No. 19A dated 22.12.2000 made at Police Station Kotwali supports this version of lady Constable Harvir Kaur (PW-77), which suggests that she had flashed a wireless message about some persons having fled towards the Ring Road after resorting to firing inside the Red Fort. The evidence of Head Constable Virender Kumar (PW-15) is also there to prove the report in this regard vide Exhibit PW-15/B. It must be remembered that Police Control Room had received the calls of similar nature at 9.47 pm and two calls at 9.50 pm vide Exhibits PW-42/A, PW-95/A and PW-43/A, which support the version of the prosecution about the incident. The evidence of Constable Indu Bala, PCR (PW-43) about having received a telephone call from one Karan Mohan, the evidence of Col. A. Mohan (PW-51) that he was informed by the Commanding Officer, 7th Rajputana, Delhi that some civilians had entered Red Fort and the evidence of Constable Harvir Kaur, PCR (PW-77) that she received information from Major Manish Nagpal (PW-126) from telephone No. 3278234 about some persons having fled, as also the evidence of Head Constable Harbans, PCR (PW-95) that he had received a telephone call from Col. Mohan (PW-51) by telephone No. 5693227 stating that his Jawan posted at Red Fort was attacked, supports the version that there was incident of shoot out and it could not be merely

dismissed as an internal brawl. This is apart from the evidence of other police witnesses like SHO Roop Lal (PW-234) who had reached the spot almost immediately after receiving the wireless message and who confirmed the presence of S.I. Rajinder Singh (PW-137) and Capt. S.P. Patwardhan (PW-189) on the spot. The senior officers of the police had also reached the spot and their evidence only confirms the dastardly incident of shoot out. There is enormous documentary evidence in shape of DD Entry No. 9A (Exhibit PW-156/C), DD Entry No. 73 B, Exhibit PW-152/B, Exhibit PW-152/F and DD No. 22A, which confirms that such incident had happened. There is other piece of voluminous documentary evidence about seizure of blood sample (Exhibit PW-123/B), seizure from the spots (Exhibit PW-122/B), seizure of blood stained clothes (Exhibit PW-114/A), Exhibit PW-123/A, Exhibit PW-122/A, seizure of magazine, live cartridges and empties (Exhibit PW-189/C), Exhibit PW-115/A to 37 (37 empty cartridges), Exhibit PW-115/38 (1 live cartridge), seizure of rope and cap (Exhibit PW-183/D), seizure of various articles from Red Fort (Exhibit PW-196/A) and Exhibits PW-230/A & 230/B etc. to suggest that the incident as, suggested by prosecution, did take place. It is also to be seen that the post mortem was conducted on the three bodies by Shri K. L. Sharma (PW-187). This witness has opined that all the deceased had bullet injuries by sophisticated fire arms and the shots were filed at them from a distant range. It is significant that the doctor was not cross-

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examined to the effect that the injury could have been caused by any weapon which was available with the Army and not with the AK 56 rifles. We are, therefore, not at all impressed by the argument that such incident was nothing but a white wash given by Army to hide the incident of internal brawl. We must reject the whole argument as too ambitious. We, therefore, hold that the incident of shoot out did take place in which three persons lost their lives.

19. Ms. Jaiswal then argued that though the premises were thoroughly searched as claimed by Sub. Ashok Kumar (PW-115) he did not find a fired bullet. She relied on the evidence of Hawaldar Dalbir Singh (PW-134) who also claimed that the premises were being searched all through the night. Similarly, she referred to the evidence of S.I. Rajinder Singh (PW-137), Maj. D.K. Singh (PW-144), Capt. S.P. Patwardhan (PW-189), and S.I. Naresh Kumar (PW-217) and Inspector Hawa Singh (PW-228). According to her, all these witnesses had suggested that the search was going on practically all through the night and that Capt. Patwardhan (PW-189) had also ordered the search outside. The argument is clearly incorrect. Merely because all these witnesses have admitted that there was search going on for the whole night, it does not mean that the incident did not take place. We have already pointed out that number of incriminating articles were found, the most important of the same being the

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empties of the bullets fired by the intruders. It is very significant that the prosecution has been able to connect the bullets with the arms seized by them.

20. One of the two rifles was found near Vijay Ghat from the bushes while other has been recovered at the instance of appellant on 26th December, 2000. The prosecution has examined three witnesses who were the ballistic experts. They were N.B. Bardhan (PW-202), A.Dey (PW-206), K.C. Varshney (PW-211). N.B. Bardhan (PW-202) has specifically stated that both the rifles were used in the sense that they were fired. A. Dey (PW-206) had the occasion to inspect the rifle recovered from Batla House as Exhibit PW-206/B. The ballistic experts report was proved by N.B. Bardhan (PW-202) as Exhibit 202/A. He clearly opined that the empties found inside the Red Fort had been fired from the rifles (Exhibit PW-125/1) and (Exhibit PW-62/1). He clearly deposed that he examined 39 sealed parcels sent by SHO, Police Station Kotwali. Out of these parcels, according to the witness, parcel No.34 was containing AK 56 assault rifle so also parcel No.36 in same parcel, sub-parcel No.20 contained another assault rifle. He further confirmed in para (iii) of his opinion that these were 7.62 mm assault rifles and the cartridges contained in bearing mark C-1 in parcel No.3 which were marked as C-49, C-52,C-56,C-58, C-64, C-71 contained in parcel No.19 as also 21 7.62 mm

assault rifle cartridge cases marked as C-72,C-74,C-75 to C-80,C-82 to C-84 and C-86, C-89,C-91, C-94 to C-96, C-98, C-102, C-106 to C-108 contained in parcel No.19A had been fired from 7.62 mm AK assault rifle marked as W/1 which was recovered from back side of Lal Quila on the disclosure statement made by the appellant. He further opined in para (iv) of his opinion that the cartridge cases marked as C-2 contained in parcel No.4, thirty four fired 7.62 mm assault rifle cartridge cases marked as 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, as also sixteen 7.62 mm assault rifle cartridge cases marked as 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 contained in parcel no.19A were fired from 7.62 mm assault rifle AK-56 marked as W/2 rifle recovered from Vijay Ghat. The report of the ballistic experts was proved as Exhibit PW-202/C. He duly proved and identified the cartridges which were test fired in the laboratory. He also proved and identified the rifles examined by him and the magazines along with the other live cartridges found in the same. There was hardly any cross-examination worth the name of this witness and, therefore, it is clearly established that the cartridges cases found inside the Red Fort were fired from the two rifles which were found outside the Red Fort. This witness had also examined 11 empties of the self-loading rifles used by the army men firing towards intruders and had clearly opined that those empties could not have been loaded in AK-56

rifles examined by him. We must note that one of these rifles i.e. Exhibit PW-62/1 was recovered on the discovery made by the appellant. We shall come to the merits of that discovery in the latter part of our judgment. However, at this stage, it is sufficient to note that the prosecution had thoroughly proved the nexus between the cartridge cases which were found inside the Red Fort and the incident. This nexus is extremely important as while the guns were found outside the Red Fort the fire empties were found inside. This clearly suggests that the incident of firing took place inside the Red Fort while guns were abandoned by the intruders outside the Red Fort. This witness also examined the contents of parcel No.34, namely, one rifle two magazines, live cartridge, knife and a Bandolier. This was again an assault rifle of 7.62 mm which we have already considered earlier. However, along with the same, as per the discovery memorandum a bandolier (Exhibit PW-202/3) was also found. The contents of the Bandolier were in parcel No.35. It contained four hand grenades and four detonators they being Exhibit PW-50/1 to 4 and Exhibit PW-50/5 to 8. Very significantly four detonators had a slip affixed with the help of a tag and it was written in Urdu *Khabardar. Grenade firing ke liye tyrar he. Safety pin sirf hamle kye waqt nikale.*(beware grenade is ready for firing. Pin should be taken out only when it is to be thrown). The existence of these bandoliers and the grenades and their recovery goes a long way to prove that the theory propounded by the defence that the incident never

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took place inside the Red Fort at the instance of the intruders and it was an internal affair of the Army men inside has to be rejected. In order to complete the narration, we must also refer to the evidence of Shri A. Dey who had examined the rifle found at Batla House during the encounter in which one Abu Shamal was killed. That recovery is not seriously disputed by Ms. Jaiswal.

21. We have the evidence of Subedar Ashok Kumar (PW-115) about the recovery of 37 empties cartridges and one live cartridge from the Red Fort so also the evidence of Hawaldar Ramesh Kakre (PW-116) about the empty cartridges being found near sentry post where Abudullah Thakur was killed. One live cartridge also was recovered from there. He further deposed about the two empty cartridges found near M.T. Park where Uma Shankar was killed. He deposed that these empties were found near training store while seven empties were found near museum and the same was handed over to Subedar Ashok Kumar (PW-115). Similar is the evidence of S.P. Patwardhan (PW-189) about the place from where all this spent ammunition was recovered. SHO Roop Lal (PW-234) and Naik Suresh Kumar (PW-122) deposed about the places wherefrom the cartridge cases and the magazines were found from inside the Red Fort. All this supports the prosecution theory that the ghastly incident of firing did take place at the instance of some outsiders inside the Red Fort.

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22. This takes us to another contention of Ms. Jaiswal that in fact nothing was found behind the Red Fort on the night of 23.12.2000. The learned Solicitor General, Shri Subramanium placed a very heavy reliance on the recoveries made in the same night or early morning of next day i.e. 23.12.2000. The recoveries of that day are extremely important. Ms. Jaiswal invited our attention in this behalf to the evidence of S.I. Sanjay Kumar (PW-183) who claimed that in the morning of 23.12.2000 during the search of the backside of the wall of the Red Fort abutting to the ring road he found some currency worth Rs.1415/- and a slip contained in the polythene bag. It was a short slip on which a mobile number was written being 9811278510. According to witness S.I. Sanjay Kumar (PW-183), SHO Roop Lal (PW-234) was called at the place and it was SHO Roop Lal (PW-234) who pasted the telephone number slip on a separate paper. There was currency and both these articles were seized by the police. This polythene bag was a transparent bag. Besides the evidence of PW-183, SI Sanjay Kumar, we have the evidence of S.I. Naresh Kumar (PW-217) and SHO Roop Lal (PW-234). The amount was separately kept vide Exhibit 183/A while the slip was identified as Exhibit PW-183/C. We have seen the photographs of the polythene bag and the currency as also the slip which were also proved. Ms. Jaiswal attacked this recovery and the seizure thereof vehemently. According to her this was a figment of imagination by the investigating agency and there was no question of any

such recovery much less in the wee hours of 23.12.2000 at about 5-6 a.m. She pointed out that the two witnesses S.I. Sanjay Kumar (PW-183) and S.I. Naresh Kumar (PW-217) were clearly lying. We have examined the evidence of all the three witnesses particularly in this behalf and we find the evidence to be thoroughly reliable. Ms. Jaiswal could not bring to our notice any material in the cross examination of these witnesses so as to render the evidence uncreditworthy. Some efforts were also made by relying on the evidence of S.K.Chadha (PW-125) that though he was a member of the team, he reached the spot from where the recovery was made at 10 a.m. on 23.12.2000. We fail to follow the significance of this admission. It is not as if all the officers must remain at one and the same place if they are the members of a particular investigation team. It may be that S. K. Chadha might have reached the spot at 10 O'clock but that does not mean recovery team consisting of other members did not effect recovery of the polythene bag containing currency and the slip. Ms. Jaiswal also urged that the premises were being searched thoroughly with the help of dog squad and the search light and that it was not possible that the search team would miss to notice the polythene bag and the currency and the slip lying in it. The argument is only mentioned for being rejected. What the investigating team would be looking for are not the polythene bag and the small paper but the weapons and the men who handled those weapons. A small transparent polythene bag could have easily been

missed earlier or may not have attracted the attention of the investigating agency. We do not find anything to suspect the claim that the recovery was made at about 5-6 a.m. We must note that this was the longest night when the sun rise would also be late. Under such circumstances, in that dark night if the investigating team, after the microscopic search, took a few ours in recovering the small apparently insignificant polythene bag, it is not unnatural. They could not be expected to find polythene bag instantaneously or immediately. Much time must have been taken in first searching inside the Red Fort. Therefore, if the polythene bag was found at about 5-6 a.m. as per the claim of the prosecution agency, and not earlier, there is nothing uncreditworthy in the claim. We are, therefore, convinced that the polythene bag and the slip mentioning the cell phone number were actually found at the spot. Ms. Jaiswal tried to find some chinks in the armour by suggesting that S.I. Sanjay Kumar's statement was contrary to the statement of S.I. Naresh Kumar (PW-217). We do not find any discrepancy between the two statements. Ms. Jaiswal also referred to the evidence of Inspector Mohan Chand Sharma (PW-229) who stated that recovery was made by him at about 9 a.m. in the morning. What the witness meant was that it was he who came in the possession of the items at 9 a.m. There is nothing very significant in that assertion. The evidence of SHO Roop Lal (PW-234) was also referred to who claimed that after the polythene bag was produced before him which contained currency and

paper slip, he sealed currency in the same polythene with the help of cloth and sealed under parcel given Exhibit No.24. There is nothing to dis-believe this claim after all SHO Roop Lal (PW-234) was the senior most investigating officer and there is nothing insignificant if S.I. Sanjay Kumar (PW-183) finding the polythene bag handed over the same to SHO Roop Lal (PW-234). A specific step has been taken by S.I. Sanjay Kumar (PW-183) by getting the said bag photographed. We have seen the photographs also. It is true that no photograph was taken of the polythene bag containing currency note and the slip mentioning the telephone number. They appear to be in separate photographs and it is quite understandable as immediately after the finding of the polythene bag it must have been handled by S.I. Sanjay Kumar (PW-183). It is only after finding the slip and the telephone number mentioned thereon that by way of abundant caution the photographs were taken. Anxiety was to show the slip and the fact that there was a telephone number written on the slip. Ms. Jaiswal then argued that Hawa Singh (PW-228) had stated that he was told about the slip only in the evening though he joined the investigation at 10.30 a.m. We do not find anything substantial in this argument. Ms. Jaiswal further argued that there is contradiction in S.I. Sanjay Kumar (PW-183) and Inspector Mohan Chand Sharma's (PW-229) statement as to who had recovered the currency and slip and that there was material contradiction in the evidence of S.I. Sanjay Kumar (PW-183),

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S.K. Chadha (PW-125) and Inspector Mohan Chand Sharma (PW-229). Further, she tried to say that there was contradiction in the statement of S.I. Sanjay Kumar, SHO Roop Lal (PW-234) and S.I. Naresh Kumar (PW-217) on the question as to whether currency and slip was taken inside the Red Fort to be handed over to SHO Roop Lal (PW-234) or whether he was called on the spot of recovery. She also raised objections about the photographs that they were not taken in 'as is where is position'. We have already applied our mind to this aspect and we are of the clear opinion that the objections raised by the defence are absolutely insignificant. What is material is the polythene bag being found. The police could not have created this polythene bag containing currency and slip with a number mentioned on it. There was no question of any false evidence being created at that point of time which was hardly a few hours after the shootout. It is true that the photographs of the polythene bag are not and could be on 'as is where is basis'. We have already given the reason thereof. We have no doubts in our mind and we confirm the finding of the trial Court and the appellate Court that the said polythene bag containing the currency notes and the slip on which the cell phone number was mentioned, was actually found on the spot which spot was abutting the backside wall of the Red Fort. It has to be borne in mind that a major incident of shootout had occurred wherein three lives were lost. The attack was on the Red Fort which has emotional and historical importance in the

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Indian minds. Large investigation team was busy investigating the whole affair and, therefore, the police could not have produced out of the thin air a small polythene bag containing currency and the slip. The spot where it was found is well described and was on the escape route of the intruders. That wall from inside the Red Fort has hardly any height though it is of about 15 to 20 feet from the ground on the other side. We have seen the proved photograph which suggests that from that spot one can easily land on the extended pipe and from that pipe to the small platform and from there to the ground. The polythene bag was found near this spot. Therefore, we accept the finding by the trial Court and the appellate Court that this polythene bag must have slipped from a person who scaled down to the ground. At the beginning of the debate it was made out as if the said wall was insurmountable and that nobody could have jumped from the height of about 50-60 feet. Further on the close look at the evidence, the photographs the hollowness of the claim of the defence was writ large.

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23. There is one more significant circumstance to suggest that the polythene bag must have been found where it was claimed to have been found by the investigating agency i.e. the finding of AK-56 rifle from a nearby spot in the bushes. We will consider the merits of that discovery which was at the instance of the appellant in the latter part of our judgment. Suffice it to say at this stage that the polythene bag was found

in the reasonable proximity of the spot from where AK-56 rifle was recovered.

24. Barely within 4-5 hours of the finding out the chit and the currency notes, the investigating agency found one AK-56 rifle with seven live cartridges from a place near Vijay Ghat in the Ring Road behind the Red Fort. A DD entry to that effect vide Exhibit PW-81/A was made. There is evidence in the shape of Exhibit PW 78A proved by PW-78 Head Constable Narender Singh which is a Police Control Room Form. The prosecution also examined Head Constable Upender Singh (PW-89). The evidence of Head Constable Satbir Singh (PW-81) proves the information having been given to the PCR. There was a sketch of recovery *Naksha Mauka Baramadgi,* seizure of rifle, magazine and the live cartridges from Vijay Ghat is evidenced in Exhibit PW-62/B and also Exhibit 84/XIV. While dealing with the evidence of the ballistic expert we have already shown the connection between the empty cartridges and this rifle. This rifle was marked as W/1 in the ballistic experts report and was identified as Exhibit PW-125/1. There is nothing to belie this discovery which is well supported by the evidence of Head Constable Narender Singh (PW-78), Head Constable Satbir Singh (PW-81) and Head Constable Upender Singh (PW-89). In fact Head Constable Upender Singh was the one who had found the said rifle. Other relevant witness who corroborated this version is

Constable Ranbir Singh (PW-35) who had made the DD entry and had received the message from police Control Room. The other witnesses are SI Ram Chander (PW-62) who presided over the recovery and SHO Roop Lal (PW-234) who was also present at the time of recovery and saw the rifle. The other witnesses, namely, SI Sanjay Kumar (PW-183) and SI Naresh Kumar (PW-217) have provided the corroborating evidence to this recovery. The whole recovery is proved by the prosecution.

25. However, even before that the investigating agency started investigation about the cell number which was found written in the slip which was found in the morning at about 5-6 a.m. this cell number was to provide a ray of light to the investigating agency which had no clue whatsoever till then about the perpetrators of the crime. Ultimately, the investigating agency on the basis of that number being 9811278510 not only unearthed the conspiracy but also reached the main players including the present appellant.

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26. The investigation suggests that the said mobile number slip was assigned to Inspector Mohan Chand Sharma (PW-229). This was a mobile number on the basis of the cash card. At the relevant point of time, the cash card implied a SIM card, a SIM card loaded with prepaid value and such SIM card were readily available in the open market. There was no necessity of registering with the service provide for obtaining a mobile

connection through cash card. All that was required was activation by the service provider without which the cash card or the SIM card as the case may be could not be used.

27. It has come in the evidence that the active mobile phone has two components i.e. the mobile instrument and the SIM card. Every mobile instrument has a unique identification number, namely, Instrument Manufactured Equipment Identity, for short, IMEI number. Such SIM card could be provided by the service providers either with cash card or post paid card to the subscriber and once this SIM card is activated the number is generated which is commonly known as mobile number. The mobile service is operated through a main server computer called mobile switching centre which handles and records each and every movement of an active mobile phone like day and time of the call, duration of the call, calling and the called number, location of the subscriber during active call and the unique IMEI number of the instrument used by the subscriber during an active call. This mobile switching centre manages all this through various sub-systems or sub-stations and finally with the help of telephone towers. These towers are actually Base Trans-receiver Stations also known as BTS. Such BTS covers a set of cells each of them identified by a unique cell ID. A mobile continuously selects a cell and exchanges data and signaling traffic with the corresponding BTC.

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Therefore, through a cell ID the location of the active mobile instrument can be approximated.

28. As per the evidence of Inspector Mohan Chand Sharma (PW-229) he collected the call details of the said mobile number which was received in a computer installed in his office at Lodhi Road. He found that mobile phone number 9811278510 was constantly used from Zakir Nagar and at that time the IMEI number of the cell phone instrument used was 445199440940240. It was found that the said number was also used for making calls to Pakistan. However, from 11.12.2000, the IMEI number of the mobile phone No.9811278510 was changed to IMEI No.449173405451240. It transpired from the evidence that this IMEI number that the mobile phone number 9811278510 with the changed IMEI number had also made calls to landlines which were discovered to be belonging to BBC, Srinagar and BBC, Delhi. These calls were made almost immediately after the incident of shootout. This number was also used for making calls to Pakistan and pager number at Srinagar 01949696 and 0116315904. The latter number was found to be in the name of Mohd. Danish Khan at 18C, Gaffur Nagar i.e. the computer centre run by the accused appellant. It was also found that from this number calls were made to 0113969561 which was found to have been installed at the shop of one Sher Zaman who was allegedly an absconding accused and the

Hawala operator. The analysis of call details of 9811278510 suggested that the said mobile number was used in two mobile instruments having the aforementioned IMEI numbers. This was done in case of cell number 9811278510 with IMEI number 445199440940240 only between 26.10.200 to 14.11.2000 and recovered instrument having IMEI No.4491731405451240 between 11.12.2000 to 23.12.2000. While scanning earlier IMEI No.445199440940240, it was found that one other mobile number 9811242154 was found to have been used in the said instrument. This instrument used mobile number 9811242154 between 22.7.2000 to 8.11.2000. From this, Shri Subramanium, learned Solicitor General urged that there were two mobile numbers, namely, 9811278510 and 9811242154 which were used and the two IMEI numbers namely 445199440940240 and 449173405451240. A pattern showed the use of the third number which was 0116315904, the number of computer centre. Shri Subramanium learned Solicitor General submitted the following data for our perusal:-

"011-6315904- Computer Center

Found connected to Mobile No.9811278510:-

(1) 14.12.2000 at 125435 hrs

Found connected to Mobile No.9811242154:-

(1) 31.10.2000 at 211943 hrs

(2) 08.11.2000 at 082418 hrs

(3) 10.11.2000 at 144727 hrs

(4) 19.11.2000 at 163328 hrs

Found connected to Mobile No.9811242154 :-

(1) 09.09.2000 at 113619 hrs

(2) 08.09.2000 at 113753 hrs

(3) 02.10.2000 at 103130 hrs."

Learned Solicitor General provided the data regarding the telephone connection made by above number with the telephone connection of one Attruddin who was a proclaimed offender in Kashmir.

29. It is also apparent, as argued by the learned Solicitor General that number 9811242154 was constantly in touch with two numbers, namely, 0116315904 which was installed at 18C Gaffur Nagar computer centre and 011 2720223 installed in the name of Farzana, sister of Rehmana, the wife of accused at 308A, Janta Flats, Ghazipur. This number 9811242154 had thus a definite connection with mobile No.9811278510 and the two instruments bearing IMEI numbers mentioned earlier with each other. Therefore, these two points, namely, the computer centre and the flat at 308A, Janta Flat, Ghazipur were kept under observation. Relying on the evidence of Inspector Mohan Chand Sharma (PW-229), learned Solicitor General argued that calls made from No.9811242154 were between Zakir

Nagar and Ghazipur. It was found that the location of the phone used to be at Ghazipur when the calls were made to that number from Zakir Nagar and the location of phone used to be at Zakir nagar when the calls were made from Ghazipur. Significantly enough, the 'Knowledge Plus' computer centre remained closed for two days after the incident at Red Fort. The investigating agency came to know about the ownership of the 'Knowledge Plus' computer center and it was established that the accused Mohd. Arif @ Ashfaq who was a resident of Ghazipur, owned this centre. All this evidence by Inspector Mohan Chand Sharma (PW-229) went unchallenged. The other witness who had produced the whole record was Rajiv Pandit (PW-98) who proved the call record and the report to the queries made to him by the investigating officer. Exhibit PW-98/A is the information in respect of the mobile number 9811278510 which was active from 26.10.2000 to 23.12.2000. While Exhibit PW-198/D is the information stating that IMEI number 449173405451240 was used by mobile number 9811278510 and that IMEI number 445199440940240 was used by both mobile numbers, namely, 9811278510 and 9811242154. There is hardly any cross-examination of this witness Rajiv Pandit (PW-198) to dis-believe his version. All this goes to suggest the definite connection between two IMEI numbers and the two mobile numbers named above. It is needless to mention that this analysis painstakingly made by Inspector Mohan Chand Sharma (PW-229) led the investigating team to zero on the accused

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appellant in the night of 25.12.2000.

30. It has come in the evidence of SI Omwati (PW-68) that she was working as duty officer at police station special cell on 25.12.2000 and on that day at about 9.05 a.m. Inspector Mohan Chand Sharma (PW-229) had recorded his departure in connection with the case No.688 of 2000 along with some other staff. It has also come in the evidence that on 25.12.2000 at about 9.45 p.m. a DD entry was made at the police station special cell Ashok Vihar that Inspector Mohan Chand Sharma (PW-229) informed on telephone that a suspect by name of Ashfaq Ahmed was about to come at the house number 308A, DDA flats, Ghazipur and made a request to send some officers. There is another entry bearing a DD No.10 to the effect that Inspector Ved Prakash (PW-173) along with R.S. Bhasin (PW-168), SI Zile Singh (PW-148) , SI Upender Singh (PW-89), SI Manoj Dixit, WSI Jayshree and S.I. Omwati (PW-68), Constable Mahipal Singh and Head Constable Rameshwar (PW-166) having left the police special cell Ashok Vihar in pursuance of the message sent by Mohan Chand Sharma (PW-229). This has been proved in the evidence of Inspector Ved Prakash (PW-173). It has also come in the evidence of Mohan Chand Sharma (PW-229) that he along with his team was at Ghazipur on 25.12.2000 while SI Daya Sagar was deputed at the knowledge plus computer centre along with the staff. He was informed at about 9.40 p.m. on his mobile phone

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that Mohd. Arif @ Ashfaq was seen at Batla House and may have left for Ghazipur. He also informed ACP Rajbir about it. ACP Rajbir Singh, therefore, fixed 11 p.m. as the time for meeting him at the red light where he reached along with his staff. This has been corroborated by S.I. Omwati (PW-68) who speaks about DD entry No.10 recorded at special cell at about 10.15 to the effect that certain special officers had left under the supervision of ACP Rajbir Singh. As per the evidence of Inspector Mohan Chand Sharma (PW-229) that a raid was conducted by them at 11.15 p.m. at flat No.308A, Ghazipur and at that time three ladies were present. There it was decided that Ved Prakash would go inside the flat and the remaining staff would keep a watch from outside. This has been corroborated by Inspector Ved Prakash (PW-173). It was at about 12.45 a.m. that Mohd. Arif @ Ashfaq (appellant herein) came to the flat of Ghazipur and knocked at the gate where he was overpowered by the staff present. At that time one pistol 7.63 mouser and six live cartridges were recovered from his possession. He did not have any licence for this pistol. A memo of the seizure is Exhibit PW-148/B proved by sub-Inspector ZIle Singh (PW-148). The entry in the Malkhana register is 32/XI. Inspctor Ved Prakash prepared a rukka which is Exhibit (PW-173/A) and a DD entry bearing number 9A was made at 2.35 a.m. on 26.12.2000 at police station Kalyan Puri. A separate FIR number 419/2000 under Section 25, Arms Act was also registered at police station Kalyan Puri, Delhi. The FIR is to

be found vide Exhibit PW-136B. The time of occurrence shown in the first FIR is 12.45 a.m. on 26.12.2000. This pistol was identified by all the recovery witnesses and experts in the Court while its capability of being fired has been proved by Shri K.C. Varshney (PW-211) the FSL expert. The pistol is Exhibit PW-148/1. At the time of its recovery, the pistol had five cartridges in the magazines and one cartridge in the chamber of the pistol. All this has been deposed by SI Zile Singh (PW-148). It was this witness Zile Singh (PW-148) who identified appellant in the Court as also proved the recovery of the pistol from his possession. It was at this time after his apprehension that the accused disclosed that his associate Abu Shamal @ Faizal was staying at his hide out at G-73, First Floor, Batla House, Okhala. This has come in the evidence of Inspector Mohan Chand Sharma (PW-229). We have absolutely no reason to dis-believe this evidence of apprehension of the accused by the police team which is also supported by documentary evidence. We have also no doubt that the apprehension of the accused was possible only because of the scientific investigation done by PW-229, Inspector MC Sharma.

31. We now consider the argument of the appellant that on the basis of the recovery of the piece of paper having Mobile phone No. 9811278510, the police did not actually reach the appellant as was their claim. It was argued by Ms. Jaiswal, learned counsel appearing on behalf of the

appellant that Inspector S.K. Sand (PW-230) himself had claimed in his Examination-in-Chief that he had deputed someone to contact the mobile phone company ESSAR for the call details of the said mobile number on 13.2.2001 and obtained the same Vide Exhibit PW-198/B-1 to 3. On this basis, the learned counsel claimed that the details of the phone conversation on this number as also on other mobile number 9811242154 could not have been known nor could their connection with telephone number 2720223 at the house of the appellant in Ghazipur or telephone number 6315904 at the Computer Centre at Gaffur Nagar be established. In this behalf, it was claimed that this evidence is directly counter to the evidence of Inspector Mohan Chand Sharma (PW-229) who claimed the knowledge about interconnection between 23rd to 25th December, 2001. The learned Solicitor General, however, argued that the evidence of Inspector Mohan Chand Sharma (PW-229) could not be faulted as he claimed to have immediately collected all the call details of the said two mobile phone numbers from the computer installed in their office at Lodhi Road. It was on the basis of the information received in computer regarding mobile No. 9811278510 that he established its connection with mobile No. 9811242154 on the basis of IMEI number. The claim of Inspector Mohan Chand Sharma (PW-229) that he had collected the information from his computer earlier to 25.12.2010 was not controverted nor do we find any cross-examination to that effect. It is true that Inspector

S.K. Sand (PW-230), the Investigating Officer, had sought the information on 13.2.2001, but that does not mean that Inspector Mohan Chand Sharma (PW-229) did not have the information earlier. There was no other way otherwise to apprehend the appellant. It may be that the Investigating Officer decided to obtain the details in writing seeking official information from the original company and that is why his seeking that information on 13.2.2001 does not affect the prosecution case. In our view, the contention raised by the learned Solicitor General is correct and has to be accepted. It is to be noted that the defence has not refuted the claim of the prosecution that telephone No. 2720223 which was in the name of appellant's Sister-in-law Farzana Farukhi, was installed at Flat No. 308-A, Ghazipur, where he was residing alongwith his wife Rehmana Yusuf Farukhi and his mother-in-law Qamar Farukhi (examined as DW-1). It is also not the claim of the defence that telephone No. 6315904 was not installed at the computer centre 'Knowledge Plus' which the appellant was running alongwith other person Faizal Mohd. Khan (PW056). We, therefore, reject the argument of Ms. Jaiswal, learned counsel that on the basis of the chit, the investigating agency could not and did not reach the appellant on the night of 25.12.2000.

32. The other argument raised by Ms. Jaiswal is that in fact there was no evidence to show that the appellant in fact did have any mobile phone with

him when he was apprehended. Secondly, it was argued that it was not proved that the appellant ever owned a mobile phone at all. The learned counsel pointed out that when the appellant was apprehended, though he was searched, all that the raiding party recovered was a pistol and that there is no mention of the recovery of Motorola mobile phone bearing number 9811278510. The learned counsel was at pains to point out that it was during his second search after about six hours that the mobile phone was shown to have been recovered. This, according to the learned counsel, is nothing but a concoction. Ms. Jaiswal also pointed out that there was a substantial delay in formally arresting the appellant and also recovering other articles from his person.

33. We shall consider the second contention first. In this behalf, the learned Solicitor General relied on the evidence of Faizal Mohd. Khan (PW-56), who was also a tenant in the house of Nain Singh (PW-20). It has come in his evidence that the appellant was also residing as a tenant for some time before this incident took place. He has also pointed out that one Adam Malik (PW-31) used to reside in the house of Nain Singh (PW-20) and it was he who had brought the appellant with him in May, 2000 and got him one room in that house. As per the evidence of Faizal Mohd. Khan (PW-56), it was Azam Malik (PW-31) who had introduced him to the appellant. He was the one alongwith whom the appellant had then opened

a computer centre by the name of ‘Knowledge Plus’ at 18-C, Gaffur Nagar and for opening that centre, he had invested Rs.70,000/- while the appellant had invested 1,70,000/- for purchasing computer from one Khalid Bhai. This part of the evidence is also admitted by the appellant in his statement under Section 313 Cr.P.C. He, however, claimed in that statement that he had paid lesser amount. Faizal Mohd. Khan (PW-56) 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 that is how Danish Mohd. Khan had got installed a telephone in his own name at the ‘Knowledge Plus’ computer centre. The learned Solicitor General pointed out that this evidence has remained unchallenged. It is further argued that the evidence of Faizal Mohd. Khan (PW-56) establishes that the appellant had a mobile phone also. It is significant that admittedly, this witness was a partner of the appellant in the computer centre. The claim of this witness that the appellant had a mobile phone, was not even challenged during his examination. From this the learned Solicitor General argued and, in our opinion, rightly, that the appellant used to have a mobile phone with him. The learned Solicitor General further pointed out that this piece of evidence is then corroborated by the evidence of Aamir Irfan Mansoori (PW-37), who was also a tenant with the appellant in the house of Nain

Singh (PW-20). He had also deposed that the appellant used to have a mobile phone. The Solicitor General pointed out that there was no challenge to the evidence of Aamir Irfan Mansoori (PW-37), particularly, about his assertion that the appellant did have a mobile phone. From this, the learned Solicitor General argued that it is an established position that in the past, the appellant used to have a mobile phone. Similar is the evidence of Rashid Ali (PW-232), who was also a resident in the house of Nain Singh (PW-20). It is significant to note that this witness claimed that on 8.12.2000, he was taken by the appellant for an Iftar party in the evening. However, there the appellant got married to Rehmana on 8.12.2000 in the evening. This shows the proximity of the witness. He further deposed that the appellant had a mobile phone. Even this witness was not cross-examined regarding the availability of the mobile phone with the appellant. We have no reason to disbelieve the above three witnesses and, therefore, we hold that it was established by the prosecution that the appellant used to have a mobile phone.

34. Once this position is clear, then it has to be seen as to why the mobile phone was not taken in possession by the raiding party when they actually apprehended the appellant and whether at that time he had the mobile phone at all. The learned Solicitor General argued that the raiding party had gone to Flat No. 308-A, Ghazipur to nab a suspected terrorist.

This was on the basis of the information gathered by Inspector Mohan Chand Sharma (PW-229). The learned Solicitor General argued that the raiding party had to ensure that once they nabbed the terrorist, he should be disarmed first. This was necessary for the safety of the public at large and, therefore, when the raiding party found and nabbed the appellant, they first removed his fire arm and started digging further information about any other terrorist who was the partner of the appellant and, therefore, when the appellant disclosed about the other hide-out at G-73, Muradi Road, Batla House, in order to avoid any further loss of life and harm to the general public and also for preventing the said suspect from fleeing, the raiding party took the appellant to the Batla House almost immediately. The learned Solicitor General, therefore, argued that considering the seriousness of the situation and further considering the element of very little time at the disposal of the raiding party, the appellant was immediately taken to Batla House, where a full fledged encounter took place resulting in death of Abu Shamal, another terrorist as also in recovery of lethal weapons like an AK-47 rifle and hand grenades. The learned Solicitor General explained the so-called delay caused in recovery of the mobile phone from the appellant. He also argued that the expediency of the matter required stopping these terrorists from inflicting further harm to the innocent society and, therefore, investigating agency had to move with the break-neck speed which they actually did instead of wasting their time in

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writing the Panchnamas of discovery and recovery etc. The learned Solicitor General further argued that the very fact that there was an encounter in Batla House, the location of which was known only to the appellant, establishes the necessity for quick reaction on the part of the investigating agency. In our opinion, this explanation is quite satisfactory to reject the argument raised by learned defence counsel. We have, therefore, no hesitation to hold that after the appellant was apprehended on the night of 25.12.2000, the investigating agency recovered not only the pistol, but a mobile phone bearing number 9811278510 which was with the appellant.

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35. Ms. Jaiswal also argued that the investigating agency had seized only the mobile instrument bearing No.9811278510 but not the SIM card and that was an extremely suspicious circumstance. It is to be noted in this behalf that the instrument was seized in the morning of 26.12.2000. The analysis of the telephone calls shows that the above mentioned number did not work after 16.50 hours on 23.12.2000. Thus this number was inactive on 24th and 25th December. Ms. Jaiswal argued that the phone might have been sold or at least would have changed hands and did not directly connect the appellant with the call made to the BBC correspondent immediately after the attack. In this behalf, learned Solicitor General relied on the evidence of Rajiv Pandit (PW-198). He pointed out

that the record regarding the SIM No 0006680375 did not exist. Learned Solicitor General further argued that the letter dated 20.2.2001 of the police Exhibit PW-114/XV clearly showed that the said SIM was activated and an application in that behalf also made before the Court to un-seal the case property so as to examine whether the SIM card number was correctly noted in the seizure memo Exhibit PW-59/XIV or not. It has to be seen that the number of cash card and the one found on the SIM vide Exhibit PW-62/XIV were the same. The learned Solicitor General, therefore, argued that the SIM card found in the telephone was not activated and, therefore, there was no record available. However, according to the Solicitor General, it has been proved that the instrument number 4491713405451240 was on the cell phone recovered from the appellant. In that behalf, reliance was placed on the evidence of S.I. Harender Singh (PW-194), SI Zile Singh (PW-148) and Inspector Mohan Chand Sharma (PW-229). From this, according to the learned Solicitor General, the prosecution had established that but for the mobile number which was collected on the basis of the chit, it was not possible to apprehend the appellant at all. He further argued that the very same instrument which has been recovered from the appellant was used for calling BBC correspondent immediately after the attack and it was also argued that the location of the instrument at that time was in the vicinity of Red Fort. There is considerable force in the submission made by the

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learned Solicitor General. The depositions of the prosecution witnesses mentioned above, in our opinion, leave no doubt whatsoever in our minds that mobile number 9811278510 was used in the instrument having IMEI No.449173405451240 immediately after the attack.

36. This takes us to the telephonic conversation in which the two aforementioned cell phones with two IMEI numbers were used which create a complete link between the appellant and the crime. In this behalf the first witness is Altaf Hussain (PW-39) who was the BBC correspondent based in Srinagar and who claimed that sometimes the militant organizations used to give him information claiming responsibility of any terrorist acts. On 22.12.2000 he had received a call on his land line No.2452918. He deposed that the caller told him that the incident inside the Red Fort had been carried out by them and claimed in vernacular '*do daane daal diye hain'.* The caller also claimed himself to be belonging to Lashkar e Toiba. When he asked as to what it meant by *Do daane daal diye hain*, he was told by the caller that it was a Fidayeen attack and that they had attacked Army personnel. On this, the witness told the caller to contact Delhi BBC office and also gave the telephone number of BBC, Delhi to him. The wife of this witness Ms. Naznin Bandey (PW-40) also deposed that Mr. Altaf Hussain was her husband and the aforementioned telephone number 2452918 was in her name and the same was being

used by her husband also. This call was made almost immediately after the attack which took place at about 9.25 p.m. His further evidence is that one Ayanjit Singh (PW-41) was a BBC correspondent in Delhi. Ayanjit Singh (PW-41) was having a telephone number 011 3355751 on which he received a telephone call between 9-9:30 p.m. and someone claiming to be belonging to Lashkar-e-Toiba told him that they had attacked the Red Fort. When the witness asked as to from where he was speaking, the witness was told by the caller that he was calling from inside the Red Fort. He also told that they had killed two persons. The caller refused to identify himself. This call remained for 2-3 minutes. Shri Satish Jacob (PW-150) corroborated this version of Ayanjit Singh (PW-41) to the effect that on 22.12.2000 about 9 p.m. Ayanjit Singh who was a Desk Editor in the Delhi office had received relevant call and had informed his colleagues also. He also confirmed that Altaf Hussain (PW-39) was the BBC correspondent in Srinagar. These call records were searched by the investigating agency and were duly proved by the prosecution. It has already come in the earlier part of the judgment that it was on 13.2.2001 that request for supply of information regarding mobile number 9811278510 was made vide letter Exhibit PW-230/K. By another letter Exhibit PW-230/N dated 27.1.2001, General Manager, MTNL was requested to give details of the subscribers of the telephone No. 011 3355751 which was the number of BBC Delhi, telephone No. 2720223 belonging to Farzana Faruqui and installed at

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Ghazipur at the residence of appellant and telephone No.6315904 belonging to Danish Mohd. Khan which was fixed at computer centre. The prosecution proved that letter and the records through the witnesses. It has come in the evidence that on 14.2.2001, the call details of 9811278510 were furnished along with cell ID list by way of letter Exhibit PW-198/E and those call details were also duly proved vide Exhibit PW-198/B1-3. A further letter dated 20.2.2001 was proved by the prosecution to have been written to the General Manager, ESSAR cell phone for the information in respect of the aforesaid mobile instrument bearing IMEI No.445199440940240 and 44917340545120. In this letter, it was specifically asked as to against which mobile number the speed card No.0006680375 was activated. Rajiv Pandit (PW-198) deposed that the details were already furnished on 14.2.2001 in respect of 9811278510 while the speed card details of the No.0006680375 were not available in the records. The relevant documents are Exhibit PW-198/E in respect of cell No.9811242154. The evidence of Rajiv Pandit went almost unchallenged. His assertion that he, as a General Manager (Administration), of ESSAR Cell Phones had provided the relevant information of call details to Inspector Surender Sand in respect of mobile No.9811278510, has gone unchallenged. From his evidence, it stands proved that calls were made to BBC correspondent from cell No.9811278510 on 22.12.2000 at 9.27 p.m. and two calls were made to

BBC, Delhi No.3355751 at 9.50 p.m. He also established that when the call was made, the location of caller, as per mobile details, was at Kashmere Gate whereas from the second call, the location was Chandni Chowk. This evidence is also corroborated by the evidence of Mohan Chand Sharma (PW-229) who located the two IMEI numbers mentioned above and he also confirmed that as per the information collected by him two calls were made to BBC offices one in Srinagar and one in Delhi. There is absolutely nothing to dis-believe this version and, therefore, it is clear that telephone No.9811278510 was used on the relevant date on 22.12.2000 for claiming the responsibility of the attack in Red Fort. When call was made the IMEI number was 449173405451240. This situation almost clinches the issue.

37. The corroboration to the fact that a message was received by BBC Delhi telephonically regarding the attack on Red Fort on 22.12.2000 at about 9 O' Clock at night is to be found in the evidence of Satish Jacob (PW-150) who proved Exhibit PW-150/B. There is no cross examination of the witness on this aspect. The prosecution, therefore, is successful in establishing that the cell phone No.9811278510 was used for making the calls to Srinagar, BBC correspondent as also to the BBC correspondent in Delhi. In these calls, the caller who was handling that cell phone not only informed about the attack on the Red Fort but also owned the

responsibility of Lashkar-e-Toiba therein. These call details have been proved by Rajiv Pandit (PW-198) whose evidence we have already referred to earlier, vide Exhibit PW 198/B1 to B3. The *inter se* connection in between this cell phone and cell phone No.9811242154 is also clearly established by the witness Rajiv Pandit (PW-198) on the basis of IMEI number used in that cell phone. He had also established that these calls to the BBC were made from the vicinity of the Red Fort. While the call to Srinagar was made from Chandni Chowk, the second call was made from behind the Red Fort. It has already come in the earlier discussion that the information received from the analysis of the cell phone records particularly of cell No. 9811242154 along with its IMEI number came very handy to the investigating team for further establishing the connection in between the landline telephones which were at the computer centre owned by the appellant at Ghazipur which number was in the name of his sister-in-law Farzana Farukhi and where the appellant lived with his wife Rehmana Farukhi. Ms. Jaiswal took us thoroughly through the cross examination of this witness and pointed out that on the basis of Exhibit PW-198/DA, there were some contradictory entries in Exhibit PW-198/DA and the other data proved by the witness. We are not impressed by this argument firstly because there is nothing to show that this is an authenticated document and though Ms. Jaiswal claimed that this document was supplied to the accused by the prosecution, there is nothing to support such a claim. We,

have, therefore, no hesitation in rejecting Exhibit PW-198/DA. Ms. Jaiswal then pointed out that in Exhibit PW-198/E, there were certain discrepancies. The witness had actually explained those discrepancies by asserting "if the computer has reversed at some point, it may be due to technical fault". It is quite understandable that there could be some technical problems in the computer. We have gone through the whole cross examination very carefully but we do not find any reason to reject Exhibit PW-198/E. In our opinion, the insignificant irregularities brought in the cross examination would not call for rejection of the document and the evidence. We, therefore, accept that cell phone No.9811278510 was used at a very crucial point of time i.e. between 9 to 9.30 p.m. at night on the day when the attack took place at or about the same time on Red Fort wherein three innocent persons were killed. We also confirm the finding by the trial Court and the appellate Court that it was this mobile number which was found with the appellant when he was arrested. We have already held that the theory that this mobile number belonged to the prosecution and it was planted on the appellant is not only farfetched but totally un-believable. We have also explained the delay in recovery of this mobile number from the accused on the basis of its IMEI number. The other corroborating evidence connecting the two mobile numbers namely, 9811278510 and 9811242154 and the IMEI Nos.44519944090240 and 449173405451240 and their interconnection with phone No.011 3355751

of BBC, Delhi, 2452918 (BBC, Srinagar), 2720223 of Farzana Farukhi and phone No.6315904 at computer centre is to be found in the evidence of Rajiv Pandit (PW-198), Inspector Mohan Chand Sharma (PW-229) and Inspector S.K.Sand (PW-230). The attempt of the investigating agency in analyzing the call details of these two numbers succeeded in establishing the connection of these two numbers with the number of BBC correspondent at Srinagar, the number of BBC correspondent at Delhi, the number at Farzana Farukhi's residence and the number at the computer centre in the name of Danish Mohd. Khan. But for this careful and meticulous analysis which was of very high standards, it would not have been possible to apprehend the appellant and to de-code the intricate and complicated maze of the conspiracy. The timing of the calls made from this number to BBC Srinagar bearing number 0194452918 and BBC, Delhi bearing No.011 3355751 are significant. It will be seen that the calls made to Srinagar were at 7.41 p.m., 7.42 p.m. and 9.27 p.m. while the calls made to BBC, Delhi were at 9.25 p.m., 9.33 p.m. and again 9.33-45p.m. Again, while the calls to Srinagar were made from the front side of the Red Fort, the other calls were made from the back side of the Red Fort which establishes the presence of this mobile phone in close proximity to Red Fort when the calls were made. That is a very significant aspect.

38. All this evidence would leave no option for us except to accept the prosecution's contention that this cell phone No.9811278510 and the other phone No. 9811242154 as also the two IMEI numbers were extremely significant aspects.

39. The next circumstance which makes these mobile cell phones significant was the evidence of PW-229, Inspector Mohan Chand Sharma when he asserted that this mobile No.9811278510 was constantly used on 14.11.2000 from Zakir Nagar area. The witness claimed this on the basis of the cell ID. It is to be seen that when the said mobile was used its IMEI No. was 445199440940240 and the witness further asserted that during this period phone calls from this number were made to Pakistan. The witness explains that on 11.12.2000, the IMEI number was changed to 449173405451240 and a telephone call was made from this number to 0116315904 which is the landline number of computer centre run by the appellant. The making of the calls to Pakistan is extremely significant. This witness also explained in his evidence as to how on the basis of the cell ID and the call record of the two mobile cell phones, namely, 9811278510 and 9811242154 they zeroed on the location of the accused. This witness has explained that the earlier mentioned IMEI number 445199440940240 was also used in the second mobile number 9811242154. In his examination in chief, this witness has explained that

the calls were received and made from and to this number 9811242154 from Zakir Nagar and Ghazipur. He also asserted in his conclusion that the cell ID of mobile number 9811242154 was at Zakir Nagar when the calls were made to Ghazipur and the cell ID was at Ghazipur when the calls were received on Zakir Nagar. This he said on the basis of the computer installed in their office. The witness also explained that the call details of the telephone number 9811242154 was collected from the official computer and he also proved the document Exhibit PW-229 A which data pertained to the period 22.7.2000 to 19.11.2000. He also connected the two telephones by saying that the calls were made on 8.9.2000 at about 11.37.53 hours to pager No.1949696 from both these mobile cell phones. He then asserted about the user of cell phone number 9811278510 on the day when the attack took place. He also established the connection of landline No.2720223 at Ghazipur which stood in the name of Farzana Farukhi and another number 6315904 which was a landline number at Knowledge Plus Computer Centre run by the appellant. It was on the basis of the caller ID that the investigating team zeroed on these two points. We do not see any reason to dis-believe this witness. The calls to Pakistan from the concerned numbers is a very significant circumstance particularly because the appellant is admittedly a Pakistani national and was staying in India unauthorizedly.

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40. The witness also asserted on the basis of Exhibit PW-198/B1 to B3 that there were calls made on 20.12.2000 to 22.12.2000 in which calling number could not be recorded as the calls were made from Pakistan to India. He explained it that during those days clipping facility was not available in India with Pakistan. He explained clipping facility to be Calling Line Identification facility. He has further asserted that these calls from Pakistan were received on mobile number 9811278510 when that mobile number was at Jamia Nagar, New Friends Colony, Kashmere Gate and Chandni Chowk and he further asserted that on 22.12.2000 when the calls were received on 14.32 i.e. at 2.32 p.m. the position of the mobile was at Darya Ganj. He also further explained that when the call was made from this number 9811278510 on 22.12.2000 at 7.41 p.m. the location of this number could be inside the Red Fort. Similarly he asserted about the calls having been made from this number at 8.24 p.m. when this telephone was at Kashmere Gate i.e. towards the back of Red Fort. He also asserted about the calls having been made from this number to BBC, Delhi when the location of cell phone was behind the back of Red Fort. Similarly, he spoke about the call having been made to BBC, Srinagar on its landline number from the same position when the cell phone caller was behind the back of the Red Fort. He also further asserted that on the same day i.e. on 22.12.2000 the calls were received on this cell phone number when this cell phone number was at Jamia Nagar and that the cell phone remained

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in the same position at Jamia Nagar constantly. There is no reason for us to dis-believe this evidence which was collected so painstakingly. What is most significant in this evidence is that this very cell phone number was used to make the calls to and receive the calls from Pakistan.

41. The next significant circumstance is the evidence of Inspector J.S.Chauhan of BSF (PW-162). He was posted at Rajouri on 26.12.2000 and on that day a message was intercepted by BSF to the effect that a wanted militant in the shoot-out inside Red Fort case known as Ashfaq Ahmed was apprehended while other militant Abu Shamal was killed. According to this witness this message was being passed by LeT by a militant called Abu Sakar to a station in Khyber in Pakistan Occupied Kashmir. He proved the handwriting of one B.S. Virk DIG (West) and proved the document as Exhibit PW-162A. The other witness on this point is Constable Suresh Kumar, BSF Head Quarters Srinagar (PW-175). He was the one who intercepted the message on his wireless set to the effect that Delhi police had killed one militant Shamal Bhai and one more militant, namely, Abu Hamad Hazarvi whose real name was Ashfaq was apprehended. The message also suggested that militant Bilal Babar was successful in running away and was hiding in Delhi in his hide out. He asserted that he passed this message to the senior officers. In his cross examination, it has come that it was not a coded message and the same

was being conveyed in Urdu. A very funny suggestion has been given to this witness that it was a coded message meaning thereby the factum of message was admitted. In his cross examination at the instance of the appellant the witness asserted that the message was being passed from Srinagar though he was unable to locate the exact point of the wireless set from which it was being sent. There is hardly any cross examination. Significantly, there is a reference to one Abu Bilal in the said intercepted message. Very significantly, it has come in the evidence of Inspector Pratap Singh (PW-86) and the evidence of S.K.Sand (PW-230) that when the appellant was apprehended and his wallet was checked, a negative was recovered from the wallet which was said to be of Abu Bilal. In fact Inspector S.K. Sand (PW-230) got this negative developed into a photograph. He then asserted that the said Abu Shamal who was involved in the Red Fort shoot out case had died and an FIR No.9/2002 police station Special Cell was registered in this behalf. The said Abu Bilal was a proclaimed offender in FIR No.688 of 2000 Police Station Kotwali, Delhi and as per the evidence of Mohan Chand Sharma he was subsequently killed in an encounter. All this voluminous evidence would not only corroborate the prosecution version to show the significant role played by the appellant in handling both the cell phone numbers mentioned above. It is of no minor significance that on the apprehension of the appellant the news should reach Srinagar and from there to Pakistan Occupied Kashmir

by way of wireless messages not only about the involvement of the appellant but also about Abu Shamal who was killed in the encounter as also Abu Bilal who was a proclaimed offender and was then killed in another encounter.

42. There is also some material brought by the prosecution about the calls from these numbers to one Sher Zaman who is said to be a Hawala dealer. The investigating agency raided the house of Sher Zaman on 12.01.2001. This was on account of the information received by the investigating agency from the appellant. In that raid, a sum of Rs.1,11,100/- was found at the said house and certain other documents like diaries were also found which were seized under the seizure memo. Mohd. Idrish (PW-74) who was the President of Dila Ram Afgani Market, Ballimaran Delhi has proved the seizure. The fact that the calls were made from cell phone 9811278510 were made by Mohd. Arif @ Ashfaq, the appellant, to the telephone No.3969561 was established by Kashi Nath (PW-46) who was representative of MTNL. He proved that this number was installed by him in premises No.5123, Sharif Manjil and that was the office of Sher Zaman. This evidence was also corroborated by Om Prakash (PW-46). Very significantly, the documents seized at Sher Zaman's office included a Visa of Islamic Republic of Pakistan and an identity card of NIIT etc. The seizure memo is proved by R.K. Ajwani (PW-

83). He was, at the relevant time, working in the Directorate of Enforcement as the Chief Enforcement Officer and deposed that the appellant in his presence identified the photograph to be of Sher Zaman @ Shabbir and accepted that he used to deliver hawala money. The visa slip of Islamic Republic of Pakistan was proved and marked as Exhibit PW-83/P1 and NIIT card No.1235-00304 with a photograph of Sher Zaman was proved and marked as Exhibit PW-83/P2. There were some other documents proved by this witness. The cross examination of this witness is also lackluster. Therefore, this evidence is also extremely significant to support the role played by the appellant in the conspiracy.

43. Even at the cost of repetition, we may mention that immediately after the appellant was apprehended with a pistol and the live rounds he spilled the beans and gave information about his other associate Abu Shamal on the basis of which information the investigating team reached G-73, Batla House at about 3.15 a.m. This is deposed to by Inspector Mohan Chand Sharma. The house was locked. The investigating team lay there and waited and at about 5.10 a.m. a man resembling the description given by the appellant entered the house. The house was knocked at and the police disclosed their identity but the same was not opened and therefore, it had to be opened by the use of force. As per the evidence of Inspector Mohan Chand Sharma (PW-229) the firing started from inside and the

same was returned eventually leading to the death of Abu Shamal @ Faisal. It is very significant to note that from this house, one AK-56 rifle, two magazines, 32 live and 67 fired cartridges were recovered. Two live hand grenades, bullet proof jackets and khakhi uniform were also recovered. It is significant that there is virtually no cross examination on this aspect. The evidence of Inspector Mohan Chand Sharma (PW-229) suggests that immediately after his apprehension, the appellant had owned up the involvement in the Red Fort attack incident and that he showed his residence to recover the arms and ammunitions and also disclosed about his associate. There is absolutely no cross examination about the incident at G-73, Batla House, Muradi Road, Okhla which place the police party was led by and discovered by the appellant. There is nothing to challenge the finding of the weapons & ammunition which were recovered at the instance of and as a result of information given by the appellant. All this has gone unchallenged in cross examination of Inspector Mohan Chand Sharma (PW-229). All this is supported by documentary evidence like DD entry bearing No.20 at Police Station New Friends Colony which mentioned about the firing going in Gali N.8, Batla House. Ram Singh, ASI (PW-92) proved this entry. Similarly, the receipt of information is entered as DD entry No. 28A at the same police station on 26.12.2000 at 6.40 a.m. Lastly, on the same day there is another entry DD No.22A at the same police station on the basis of information by Inspector Mohan Chand

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Sharma and FIR No.630 of 2000 was also registered. The other significant witnesses are Constable Ranbir Singh (PW-177) and ASI Ran Singh (PW-92). We need not go into the contents of these entries excepting to suggest that the information given by the appellant about Abu Shamal is reflected therein. This brings us to a very important discovery statement made by the appellant as also to the seizure in pursuance of the said discovery statement.

44. The appellant was formally arrested after he was brought back at about 6.45 a.m. by S.I. Harender Singh (PW-194). It is at this time that the mobile phone No.9811278510 was recovered from his possession. The seizure has been proved by Zile Singh (PW-148) which is Exhibit PW-148/ D. This witness proved that after his formal arrest by S.I. Harender Singh in the search of appellant, Rs.1000 in cash and the mobile phone of Motorola make was recovered. He then made a disclosure statement vide Exhibit PW-148 E. This recovery of mobile phone was also corroborated by Inspector Mohan Chand Sharma (PW-229). It had IMEI number 449173405451240 on which calls were made from mobile phone 9811278510 and as per the call details this was the instrument used for mobile number 9811278510. We have already explained in the earlier part of the judgment that this evidence could not be rejected on the mere plea that the mobile number was not found or was not immediately taken in

possession by the investigating agency though they apprehended him on the night of 25.12.2000. We have also pointed out as to how it would have been disastrous to waste time in writing the *Panchnama* instead of immediately acting on the information given by the appellant. We, therefore, see nothing unnatural or unusual in the recovery of the mobile phone 9811278510. After all, the subsequent results which followed discovery statement by the appellant i.e. the knowledge about G-73, Batla House and the encounter of Abu Shamal and the finding of his fire weapon and the ammunition etc. do justify the quick action on the part of the investigating agency. We, therefore, cannot view with suspicion the formal arrest of the appellant and the recoveries effected thereafter or the seizure memos executed.

45. After his arrest in the evening of 25.12.2000, the appellant firstly disclosed about Abu Shamal @ Faizal. After the encounter of Abu Shamal @ Faizal, when his formal arrest was made, he made disclosures vide Exhibit PW-148/E. There is no cross-examination of S.I. Zile Singh (PW-148) about the factum of the appellant having made a disclosure. S.I. Harender Singh (PW-194) is another witness to speak about the Exhibit PW-148/E. It has been baldly suggested to S.I. Harender Singh (PW-194) that the appellant was tortured. The discovery statement which was made by the appellant is to the following effect:-

> "Abu Shaimal had thrown his AK-47 rifle, magazine and hand grenade into the shrubs near nullah behind the wall of Red Fort. Abu Shad had thrown his AK-47 rifle into the shrubs grown at Vijay Ghat. I can point out the places and get recovered the weapons."

Another witness examined on this issue was S.I. Satyajit Sarin (PW-218). He asserted in his examination-in-chief that the investigation team reached the Red Fort alongwith Mohd. Arif @ Ashfaq and the team was joined by Inspector Hawa Singh (PW-228). They requested two/three passersby to join the investigation, but they refused to join and, therefore, without wasting any further time, they reached the spot and there they found AK-56 Assault Rifle, two magazines tied to each other and a bandoleer of military green colour containing four hand grenades in four different packets. The site plan was prepared by Inspector Hawa Singh (PW-228) and the recovery of the arms and ammunition was made and the same were taken to P.S. Kotwali. The hand grenades were later on got defused. The chance finger prints were tried to be taken and photographs were taken.

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46. The witness also gave a complete description of the four detonators and a slip attached to the hand grenades. A complete description of the shells was given by this witness. He also identified the said rifles, magazines, knife and detonators, as also four hand grenades and the bandoleer in Court. The other witness to support this discovery and the

recoveries pursuant thereto is S.I. Amardeep Sehgal (PW-227). He also gave a complete story as deposed by the earlier witness. This evidence was further corroborated by the evidence of N.B. Bardhan, Sr. Scientific Officer in CFSL (PW-202), who was present at the time of recovery of hand grenades being a ballistic expert. Another witness is S.K. Chadha (PW-125). We have already discussed earlier the evidence of N.B. Bardhan about the nature of the rifles, one found at Batla House and the other recovered at the instance of the appellant from the Red Fort wall. He has also spoken about the nature of the hand grenades. This discovery was attacked vehemently by Ms. Kamini Jaiswal, learned counsel appearing on behalf of the appellant, in all the aspects. The learned counsel described this recovery as a farce and also asserted that this discovery could not be said to be a discovery at all in view of the fact that in all probability, the placement of the rifles, bandoleer etc. must have known to the police for the simple reason that the whole area was almost combed by number of police personnel for the whole night and even thereafter i.e. in the night of 22.12.2000 and the morning of 23.12.2000. We have seen the recovery *Panchnama* proved by the witnesses at Exhibit PW-227/A. It has to be borne in mind that both the rifles and the ammunition have not only been identified by the witnesses but it has also been proved by the prosecution as to how they were used and the fact that they were used actively in the sense that they were fired also. We have

already discussed the evidence of the Ballistic experts, which went on to corroborate the version by the prosecution. The learned counsel pointed out that this weapon was found near to the slip which was recovered on the night of 22.12.2000 itself. She also pointed out that weapon could not be said to be hidden. They were just lying in the bush and, therefore, it is just impossible to infer that they were not seen by the police. In short, the learned counsel suggested that this is a fake discovery and the police already knew about the AK-56 Assault Rifle, magazines and a bandoleer etc. She pointed out that one other witness, namely, Abhinender Jain (PW-28) was a part of the team in recovering the weapons allegedly at the instance of the appellant and he did not speak about the disclosure made by the appellant on 26.12.2000. We shall revert back to this discovery in particular and the law relating to Section 27, Evidence Act a little later.

47. Another discovery at the instance of the appellant was on 01.01.2001 vide Disclosure Statement (Exhibit 28/A). However, there is one more important discovery at the instance of the appellant, which is proved at Exhibit 168/A. It was made on 01.01.2001 and has been proved by R.S. Bhasin (PW-168) and S.I. Satyajit Sarin (PW-218). In this discovery, the appellant disclosed that out of the hand grenades which he had brought from Pakistan, three were hidden in the bushes inside boundary wall of Jamia Milia Islamia University, which spot is just behind

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the computer centre run by the appellant. Accordingly, this discovery statement was recorded by R.S. Bhasin (PW-168) and he organized a raiding team consisting of Inspector Hawa Singh (PW-228), Inspector Mohan Chand Sharma (PW-229) and five others, who were not examined by the prosecution. The team went to New Friends Colony at 2.25 pm and appraised SHO Gurmeet Singh (PW-213), who alongwith two others (not examined), joined the investigation. After taking the permission from Dr. Farukh and Dr. Mehtab, one Raghubir Singh (PW-209) was asked by the authorities to join the investigation. One Devender Kumar (PW-208) also joined the raiding party. Thereafter, at the instance of the appellant, three hand grenades were recovered kept concealed. A seizure memo was also executed vide Exhibit PW-168/B and a Rukka was also prepared, on the basis of which a new case was sought to be registered at P.S. New Friends Colony. One more disclosure statement was made vide Exhibit PW-168/D, where the appellant disclosed and agreed to recover more hand grenades and AK-56 rifle which was recovered from Safa Qudal, Sri Nagar. This version was supported by S.I. Satyajit Sarin (PW-218) as also S.I. Amardeep Sehgal (PW-227) and Inspector Hawa Singh (PW-228). There is nothing to disbelieve this discovery of hand grenades which hand grenades were ultimately identified and their potency was proved by N.B. Bardhan (PW-202). A feeble contention was raised by Ms. Jaiswal, learned counsel that this discovery of the hand grenades should

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not be believed because it is belated. She pointed out that the appellant was in the police custody right from the night of 25.12.2000 and the discovery statement was made and recorded on 1.1.2001. Insofar as the discovery of grenades is concerned, we must say that nothing much was argued. The significance of the grenades having been hidden right behind the computer centre near the compound wall of Jamia Milia Islamia University cannot be ignored. The appellant has no explanation as to why the three hand grenades were hidden right behind the computer centre.

48. The learned Solicitor General very forcefully argued with reference to various documents which supported this discovery and pointed out that immediately after the recovery of these hand grenades, they were seized properly and this recovery was supported by the independent evidence of Devender Jain (PW-208) and Raghubir Singh (PW-209). He also pointed out that there is nothing in the cross-examination of these two individual witnesses to dispute or doubt the recovery of the hand grenades at the instance of the appellant. It is to be noted that police could not have produced the foreign made hand grenades to be planted either at the Red Fort or at Jamia Milia Islamia University behind the computer centre. Insofar as the discovery of hand grenades at Jamia Milia Islamia University is concerned, we have no doubts about its genuineness and we accept the same. Merely because the appellant was in custody for 4-5 days and

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decided to disclose the information only on 01.01.2001, would not be a reason by itself to doubt the same or to have any suspicion on the same. In the case of this nature and magnitude and also considering the nature of the appellant who was a Pakistani national and was allegedly sent to do terrorist acts in India and as such a tough terrorist, was not expected to give easily the information unless he was thoroughly interrogated. Considering the peculiar nature of this case, we accept the discovery of grenades at the instance of the appellant. Same thing can be stated about the earlier discovery dated 26.12.2000 of the AK-56 Assault Rifle, magazines, bandoleer etc. The very fact that these weapons were proved to have been used would corroborate the discovery. If the general public refused to join the investigation to become *Panchas*, that cannot be viewed as a suspicious factum and on that basis, the investigative agency cannot be faulted. After all, what is to be seen is the genuineness and credibility of the discovery. The police officers, who were working day and night, had no reason to falsely implicate the appellant. They could not have produced AK-56 Rifles and the grenades of foreign make from thin air to plant it against the appellant. It has been held in ***Suresh Chandra Bahri v. State of Bihar*** **[1995 Suppl (1) SCC 80]** that even if the discovery statement is not recorded in writing but there is definite evidence to the effect of making such a discovery statement by the concerned investigating officer, it can still be held to be a good discovery. The question is of the credibility of the

evidence of the police officer before whom the discovery statements were made. If the evidence is found to be genuine and creditworthy, there is nothing wrong in accepting such a discovery statement. We do not see any reason to accept the argument that the police must have already known about the weapon. Considering the fact that this attack was on a dark night in the winters and the guns were thrown in the thick bushes then existing behind the Red Fort wall, it is quite possible that they were missed by the investigating agency. At any rate, the recovery of these guns from the spot near which the whole horrible drama took place and the appellant having knowledge about the same and further the proved use of these weapons and their fire-power, would persuade us to accept this discovery. Again, we cannot ignore the fact that the factum of discovery has been accepted by both the Courts below.

49. There are some other significant circumstances relied on by the prosecution to show that the appellant, who admittedly was a Pakistani national and had unauthorizedly entered India, wanted to establish his identity in India and for that purpose, he got prepared a fake and forged ration card and on that basis, applied for a driving license and also opened bank accounts. The only purpose in doing this was to establish that he was living in Delhi legitimately as an Indian national.

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50. On his arrest on 25.12.2000, a ration card was recovered and seized from the very house at 308A, DDA flats, Ghazipur, Delhi. This card bore the number 258754. This was in the name of Ashfaq Ahmed, S/o Akram Khanat, R/o F-12/12, Batla House, Okhla, New Delhi. S.R. Raghav, retired Food and Supply Officer, Delhi (PW-7) entered the witness box to suggest that this card was not issued by his department i.e. Circle 6, Okhla. Other witness is Ms. Anju Goel, UDC (PW-164), who deposed that the appellant's ration card did not bear her signature. She also pointed out that the signature appearing in Exhibit PW-164/A (ration card) was not her signature. There is no effective cross-examination of both these witnesses. Dharamvir Sharma, FSO, Circle 3, Bijwasan, Delhi (PW-165) also referred to the aforementioned ration card proved by Ms. Anju Goel (PW-164) and asserted that the signature and the handwriting on the said card was not that of Ms. Anju Goel. Manohar Lal, UDC, Department of Education (PW-172) deposed that the appellant's ration card was not issued from Circle 6 of the Ration office. Kushal Kumar (PW-174) deposed that he had made entry of ration card of the appellant in his register at his fair price shop. Ms. Sunita, LDC, Food & Supply Office, Circle 7 (PW-191) gave specimen of two rubber stamps and they did not tally with the rubber stamps on the ration card of the appellant. There is absolutely no cross-examination. There is a report proved by Yashpal Singh, Supply Inspector, Department of Food and Supply, Ghaziabad

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(PW-2), being Exhibit PW-2/A, to the effect that no ration card in the name of Mohd. Arif @ Ashfaq (appellant) was ever issued by their office. Thus, it is obvious that the appellant got prepared a fake ration card, where name of his wife was mentioned as Bano and residence as 102, Kela Bhatta, Ghaziabad, where he had never resided. This ration card, significantly enough, was recovered from his house at 308A, DDA flats, Ghazipur, Delhi. Yashpal Singh (PW-2) and Rajbir Singh, Area Rationing Officer, Food and Civil Supply Department, Ghaziabad (PW-3) proved that the ration card was in the name of Azad Khalid (PW-1) and there was no ration card in the name of Ashfaq Ahmed S/o Akram Khanat. Azad Khalid Siddique, Correspondent, Sahara TV (PW-1) himself stepped into the witness box and deposed that there was one ration card in his name and other in his father's name, which were issued at the address of 102, Kela Bhatti, Ghaziabad, which address was falsely given by the appellant because the appellant had never stayed at the said address. Thus, it is obvious that the ration card was fake and fabricated. The factual information on the ration card also does not tally at all.

51. The investigating agency, on 3.1.2001, seized certain important documents, they being a learner's license issued by Shaikh Sarai Authority bearing Exhibit No. PW-13/C, Form No. 2 of Ashfaq Ahmed for renewal of learner's license bearing Exhibit No. PW-13/D and a photocopy of the

ration card of Ashfaq Ahmed bearing Exhibit No. PW-13/E. The seizure memo is Exhibit PW-13/B. These documents have been proved by S.I. Rajinder Singh (PW-137). This was in order to do the verification of the driving license of the appellant. The witness suggests that he enquired from Ms. Mamta Sharma (PW-16), ARTO, who confirmed that the same was a genuine driving license having been issued by her office and hence, proceeded to seize the supporting documents. It is obvious that the said driving license was sought for on the basis of the ration card in the name of the appellant, which was obviously fake, as we have already shown above for the simple reason that the address given on this driving license was not the genuine address of the appellant, whereas it was in fact the address of Azad Khalid Siddique (PW-1) who had nothing to do with the appellant. In this driving license also, the address given by the appellant was B-17, Jangpura, Bhogal and it was issued by Sarai Kale Khan Authority. He obviously did not reside on this address which is clear from the evidence of Narayan Singh (PW-6). Thus, not only did the appellant got himself a fake and forged ration card, but on this basis, also got prepared a fake learning license, in which also, he gave a false residential address. All this was obviously with an idea to screen himself and to carry on his nefarious activities in the Indian cities. Nothing much has come in the cross-examinations of these witnesses. We have, therefore, no hesitation to hold that the appellant used a forged ration card and got a driving license

giving a false address.

52. The appellant, in order to legitimize his residence in Delhi, started a computer centre at House No.18C, Gaffur Nagar, Okhla. Danish Mohd. Khan (PW-44), Mohd. Khalid (PW-36), Faizal Mohd. Khan (PW-56), Shahvez Akhtar (PW-113) and Shahnawaz Ahmad (PW-163) are the witnesses on this aspect. Danish Mohd. Khan (PW-44) deposed that his cousin Faizal had opened a cyber cafe with the appellant and this was told to him in September, 2000. Previously both of them used to reside in the house of Nain Singh (PW-20). Since Faizal did not have an identity proof, he borrowed the identity card of this person and since the card was in his name, the phone connection in this computer centre was also in his name. He, undoubtedly, resiled from his statement before the police that he applied for a telephone connection in his name. However, there is no cross-examination of this witness about what was told to him by Faizal. In his cross-examination at the instance of the Public Prosecutor, he admitted that Faizal had asked him to help him in getting telephone connection. He also admitted that Faizal had told him that for getting an internet connection, a telephone was required. The telephone number of the computer centre was 6315904 which was in the name of this witness.

53. The other witness in this behalf is Faizal Mohd. Khan (PW-56) himself who deposed that he was residing in the house of one Nain Singh

(PW-20) at Okhla Village on a monthly rent of Rs.1,000/- and that he had a personal computer on which he used to practice. He further deposed that one Adam Malik (PW-31) also used to reside in the said house and it was he who brought the appellant with him in May, 2000. It was this Adam Malik (PW-31) who introduced him to the appellant and told him that the appellant is a resident of Jammu. He wanted to open a computer centre but was not having enough money and it was Adam Malik (PW-31) who informed the appellant that the witness wanted to open a computer centre and offered financial help. He managed Rs.70,000/- and the appellant put Rs.1,70,000/- and that is how the computer centre was opened. The witness stated that the twosome i.e. himself and the appellant employed one Shahvez Akhtar (PW-113) and Shahnawaz Ahmad (PW-163) as faculty members on the condition that they would get salary only when the computer centre starts earning profit. He then deposed that he used the ration card of Danish Mohd. Khan (PW-44) and a telephone connection was obtained in the name of Danish Mohd. Khan (PW-44) and was installed at the computer centre 'Knowledge Plus'. We have already referred to his assertion that the appellant had a mobile phone. In his cross-examination, nothing much has come about the contribution given by the appellant of Rs.1,70,000/-. He also asserted that it was the appellant who managed to take the premises of computer centre on lease. Shahvez Akhtar (PW-113) and Shahnawaz Ahmad (PW-163) have supported this.

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Adam Malik (PW-31) also confirmed that he was the one who arranged for the accommodation of the appellant in the house of Nain Singh (PW-20). To him, the appellant had told that he was a Kashmiri and doing the business of selling shawls. Nain Singh (PW-20) also supported the theory of the appellant contacting him through his earlier tenant Adam Malik (PW-31). To the same effect is the evidence of Aamir Irfan (PW-37) and Rashid Ali (PW-232). All this clearly goes on to show that the appellant was all the time making false representation, firstly, on his doing business of selling shawls, secondly, on carefully entering as a tenant in the house of Nain Singh (PW-20), thirdly, on defrauding Danish Mohd. Khan (PW-44) for opening a computer centre for which he contributed Rs.1,70,000/- and lastly, successfully getting a telephone installed at the computer centre. All this was nothing but a deliberate effort to find a firm foot hold on the Indian soil to carry out his nefarious design.

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54. We have also gone through the evidence of Gian Chand Goel (PW-21), which establishes the connection of the appellant with House No.G-73 Batala House, Murari Road, Okhala, New Delhi, where the encounter took place in which the appellant's companion Abu Shamal was killed. In his evidence, Gian Chand Goel (PW-21) specifically stated that he did not know anything about the appellant and that he had rented the house to Rashid Ali (PW-232) on 6.12.2000 i.e. barely 16 days earlier to the incident

at a monthly rent of Rs.1,500/-. He also deposed that on 7.12.2000, two other boys were brought by him and all the three started residing on the first floor of his house. He deposed that Rashid Ali (PW-232) who was a student of Jamia Milia Islamia University and the appellant were the tenants of Nain Singh (PW-20) and later on, they shifted into his house as tenants. He also referred to the encounter dated 26.12.2000, wherein Abu Shamal was killed, though he did not know the name of Abu Shamal.

55. Rashid Ali (PW-232) had a significant role to play in this whole affair. He asserted that he was a tenant of Nain Singh (PW-20) in 1998 while studying in Jamia Milia Islamia University in B.A. IInd Year. He was friendly with one Hamid Mansoori and Adam Malik (PW-31). He came to know the appellant who was residing in the house of Nain Singh (PW-20) as a tenant. He also confirmed that the appellant was having a mobile phone with him. On 8.12.2000, the appellant took him to Roza Iftar Party at Laxmi Nagar. Instead of the Iftar Party, the appellant got married to a lady on that day. Significantly enough, the appellant had already gone as a tenant to Gian Chand Goel (PW-21), however, it seems that still he was making out as if he was residing in PW-20 Nain Singh's house and in an important function like his marriage, he took Rashid Ali (PW-232) telling him that they were going for an Iftar Party in the month of Ramzan. All this suggests that the appellant was very particular about his own personal

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details and made various false representations to all those in whose contact he came. Needless to say that he used all these witnesses to his own benefit for carrying out his evil design in pursuance of the conspiracy.

56. This brings us to the evidence of Nain Singh (PW-20) and the fantastic theory that the defence gave about the role played by this witness. The said witness was examined to show that House No. 97-A, Okhla Village was in the name of his mother and while he stayed on the ground floor, his mother had rented out the first floor and the second floor. He asserted that Adam Malik (PW-31) was the tenant on the second floor and he had brought the appellant to his mother and his mother had rented out the room to him at the rent of Rs.1,200/- per month. He also asserted that he asked Adam Malik (PW-31) to get the house vacated, whereupon, the appellant vacated the house after about one and a half months. He was cross-examined in detail. It was brought out in his cross-examination that he did not have any documentary evidence regarding the appellant remaining in that house as a tenant. It was suggested to him that he was working as an Intelligence man in the Cabinet Secretariat. He was made to admit that he could not disclose the present official address or the places where he moved out of Delhi. He was made to say "I cannot say whether I am not disclosing these addresses as my identity in the public would be disclosed". He also refused to show his identity card in the open

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Court while it was shown to the Court. He was made to say “I cannot disclose whether I am working for RAW”. He then clarified that no fund was at his disposal for going out of Delhi, but he was paid for the Railway warrant or air ticket. Strangely enough, a suggestion was given to the witness to the effect that the appellant never took the aforesaid house from his mother on rent or that he was introduced by any of the other tenants of that house. All through in his cross-examination, it was tried to be suggested that the appellant never stayed in his house as a tenant. That is all the cross-examination of this witness. In his statement under Section 313 Cr.P.C., the appellant suggested that he used to work for X-Branch, RAW (Research & Analysis Wing) since 1997 and he had come to Kathmandu in June, 2000 to give some documents to one Sanjeev Gupta on a Pakistan Passport bearing No. 634417. He spoke that there was a party named Paktoonmili Party and RAW was supporting that party since last 30-35 years. He stated that one Sagir Khan was a member of that party and he was arrested by the police of Pakistan alongwith his younger brother and he received this news in Kathmandu and spoke to Sanjeev Gupta in this regard. He further claimed that his cousin had also advised him not to return to Pakistan for the time being and that Sanjeev Gupta advised him to go to India and he accompanied him upto Rauxol and from there, he (the appellant) came to India by train. He claimed that the address of Nain Singh (PW-20) was given to him by Sanjeev Gupta as

also his telephone number being 6834454. He then claimed that Nain Singh (PW-20) gave a room in his house for his stay and advised him not to tell his name and address to anyone and to describe himself as a resident of Jammu. He claimed that Nain Singh (PW-20) used to do business of money lending and the appellant used to help him in maintaining his accounts. He then claimed that Nain Singh (PW-20) helped him to open the computer centre. Thereafter, Nain Singh (PW-20) got some money through Sanjeev Gupta from Nepal. The amount was Rs.7 lakhs. However, Nain Singh (PW-20) did not disclose about receiving of that huge amount and whenever he was questioned about any amount, Nain Singh (PW-20) used to avoid such questions. He then claimed to have contacted his family members who asked him to speak to Sanjeev Gupta and after he spoke to Sanjeev Gupta, he came to know about Rs.6,50,000/- having been sent to Nain Singh (PW-20) by him. The appellant then claimed that Nain Singh (PW-20) got his account opened in HDFC Bank and also got a cheque book which was shown to him. It was at his instance that the appellant was asked to sit at the computer centre and his cheque book of the HDFC bank used to remain with Nain Singh (PW-20). According to the appellant, Nain Singh (PW-20) got only one cheque signed by him and whenever he needed money, he used to take it from Nain Singh (PW-20) in the sum of Rs.500/- to Rs.1,000/-. He then claimed that one Chaman Lal in Chandni Chowk and one Sardar Ji in

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Karol Bagh were also engaged in the business of money lending and the appellant used to collect money from them on behalf of Nain Singh (PW-20). He then went on to suggest that on the birthday party of his son, Nain Singh (PW-20) got him introduced to Inspector R.S. Bhasin (PW-168) and Inspector Ved Prakash (PW-173). However, he persisted in demanding money from Nain Singh (PW-20) on which Nain Singh (PW-20) used to get annoyed and because of that, he got the appellant involved falsely in this case. He claimed that on 25.12.2000, Nain Singh (PW-20) called him from his computer centre to his house on the plea that Inspector R.S. Bhasin (PW-168) and Inspector Ved Prakash (PW-173) had to take some information from him and he accordingly came to the said house. Thereafter, these two persons who were in plain clothes and had come to the house of the appellant in a white maruti zen car took him to a flat in Lodhi Colony, where both the Inspectors alongwith one Sikh Officer interrogated the appellant about his entire background and thereafter he was dropped to his house by the same persons. Nain Singh (PW-20) was not present at that time, but his wife informed him about the telephonic call received from his in-laws at Ghazipur regarding dinner in the evening. Thereafter, he took a bus and reached the house of his in-laws and asked them whether they had made a call which they denied to have made. He claimed to have finished his dinner by 10.00 pm when the police party raided the house. The appellant stated that the police party threatened

him that if he spoke much, he will be shot dead and his signatures were obtained on a blank paper. Then he was tortured and was constantly kept in the custody of Inspector R.S. Bhasin (PW-168), S.I. Murugan and Constable Jai Parkash. He then admitted to have put his signatures on the blank paper under the fear of torture to himself and his sister-in-law, mother-in-law and brother-in-law. He further said that he did not know any other accused excepting his wife Rehmana Yusuf Farukhi. He claimed that he was implicated in this case only because he is a Pakistani national.

57. All this would go to suggest that Nain Singh (PW-20) had a very vital part to play in his (appellant) being brought to India and being established there. Very strangely, all this long story runs completely counter to the cross-examination of Nain Singh (PW-20), as has already been pointed out. In his cross-examination, the whole effort on the part of the defence was to show that the appellant was never a tenant of Nain Singh (PW-20) and had never stayed at his place, whereas his defence was completely contrary to this theory wherein the appellant has claimed that he was intimately connected with Nain Singh (PW-20), inasmuch as, he used to look after his accounts and used to assist him for recovery of the amounts loaned by Nain Singh (PW-20) to various other people. The learned counsel did not even distantly suggest to PW-20 Nain Singh the long story stated by the appellant in his statement under Section 313 Cr.P.C. There

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is not even a hint about the role played by Sanjeev Gupta in Nepal or the amounts allegedly sent by Sanjeev Gupta to Nain Singh (PW-20) and Nain Singh (PW-20) having refused to part with the amount in favour of the appellant. There is nothing suggested to Nain Singh (PW-20) that the appellant was working for the X-Branch, RAW, much less since 1997, while he was in Pakistan. The learned defence counsel Ms. Jaiswal very vociferously argued that Nain Singh (PW-20) was actually working for an organization "RAW". She also pointed out that a clear cut suggestion was given about his RAW activities and his being a member of RAW, in his cross-examination. She also pointed out that there was some contradiction in the statement of Nain Singh (PW-20) and Adam Malik (PW-31) about letting out the house to the appellant. Much was made of the fact that Nain Singh (PW-20) refused to disclose his identity and shown the identity card only to the Court. From all this, the learned counsel tried to argue that Nain Singh (PW-20) was a RAW agent and was also involved in business of money lending. She also pointed out that though Nain Singh (PW-20) claimed that the accused had vacated the house, the evidence disclosed that the appellant stayed at Nain Singh's house till December. She also pointed to the contradictory statement made by Gian Chand Goel (PW-21). According to the learned counsel, while earlier the witness said that the house was let out to Rashid Ali (PW-232) on 6.12.2000 and the appellant used to meet him, later on in the same para,

he said that the appellant and Rashid Ali (PW-232) both, were his tenants. Then the said witness claimed in his further cross-examination that the appellant was his only tenant. From all this, the learned counsel urged that there was a very deep possibility of Nain Singh (PW-20) being a RAW agent and as such having given shelter to the appellant and that the appellant stayed throughout in Nain Singh's house only. Very significantly, this claim of the learned defence counsel goes completely counter to the cross-examination where the only suggestion given is that the appellant was never a tenant of Nain Singh (PW-20) and never stayed at his house.

58. The learned counsel also invited our attention to the evidence of Aamir Irfan (PW-37), Yunus Khan (PW-4) as also Ved Prakash (PW-173). We have considered all these contentions but we fail to follow the interesting defence raised by the appellant in his statement under Section 313 Cr.P.C. and complete contradictory stand taken while cross-examining Nain Singh (PW-20). We also find nothing in the long story woven by the appellant in his statement under Section 313 Cr.P.C. about his activities as a RAW agent and about his being sent to Nain Singh (PW-20) by Sanjeev Gupta from Nepal. We do find that there was reluctance on the part of Nain Singh (PW-20) to show his identity card which he only showed to the Court, but that does not, in any manner, help the defence case. Even if it is accepted that Nain Singh (PW-20) was working for RAW, it does not

give credence to the defence theory that it was Nain Singh (PW-20) who brought the appellant in India, arranged for his stay, took his services, arranged for his computer centre and then ultimately, falsely got him implicated. In the absence of any such suggestion having been made to Nain Singh (PW-20), the tall claims made by the defence cannot be accepted. We have considered the evidence of all these witnesses, namely, Nain Singh (PW-20), Adam Malik (PW-31), Aamir Irfan (PW-37), Yunus Khan (PW-4) and Ved Prakash (PW-173), but the same do not persuade us to accept the defence theory. It is obvious that the appellant was staying with Nain Singh (PW-20) for some time and then used to interact with the other tenants like Rashid Ali (PW-232) and Adam Malik (PW-31) and at that time, he claimed to be belonging to Jammu and claimed to be in the business of selling shawls. It is during that period alone that he got married to Rehmana Yusuf Farukhi barely a fortnight prior to the incident at the Red Fort. We, therefore, reject the argument of Ms. Kamini Jaiswal on this aspect.

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59. This takes us to the various bank transactions which throw much light. Prosecution had claimed that when the diary was recovered on the arrest of the appellant, the investigating agency found one telephone number belonging to Sher Zaman @ Shabbir who was found to be an Afghan national and according to the prosecution, he used to supply

Hawala money to the appellant. According to the prosecution, the appellant used to deposit the money so received in his own account with HDFC Bank, opened on the basis of fake documents. He also used to deposit this money in two bank accounts of Nazir Ahmad Qasid (original accused No. 3) and Farooq Ahmed Qasid (original accused No. 4). According to the prosecution, this money which the appellant used to deposit in the account of Nazir Ahmad Qasid (A-3) and Farooq Ahmed Qasid (A-4) was distributed to the other terrorists in Srinagar. Ms. Jaiswal, learned counsel appearing on behalf of the appellant, claimed that the prosecution had not been able to prove the link in between Sher Zaman @ Shabbir and the appellant. According to her, the claim of the prosecution that Rs.29,50,000/- was deposited in the accounts of M/s. Nazir & Sons, Farooq Ahmed Qasid (A-4) and Bilal Ahmad Kawa (A-18) was also not established. The learned counsel argued that the prosecution was able to barely prove deposit of Rs.5 lakhs, in the account of appellant but had failed to prove that the appellant had deposited Rs. 29,50,000/- in other accounts. According to the learned counsel, even this claim of the prosecution that was based on the evidence of handwriting expert, was not properly proved. The learned counsel also pointed out that while Nazir Ahmad Qasid (A-3) and Farooq Ahmed Qasid (A-4) were acquitted, the others including Sher Zaman @ Shabbir (A-13), Zahur Ahmad Qasid (A-17), Bilal Ahmad Kawa (A-18) or Athruddin @ Athar Ali (A-19) were never

brought to the trial as they were shown to be absconding. At this juncture, we cannot ignore the evidence of Kashi Nath (PW-46), an employee of MTNL (PW-46), who deposed that telephone number 3969561 was installed by him in premises No. 5123 which was the office of Sher Zaman @ Shabbir (A-13). Very significantly, this number was also found in the call details of the appellant having Mobile No. 9811278510. This version of Kashi Nath (PW-46) was corroborated by Om Prakash (PW-47). Again Idrish (PW-74) deposed that the cash of Rs.1,01,000/- was recovered from the shop/office of Sher Zaman @ Shabbir (A-13), which shop/office was raided pursuant to the statement of the appellant.

60. First, the fact that Sher Zaman @ Shabbir (A-13), Zahur Ahmad Qasid (A-17) and Bilal Ahmad Kawa (A-18) being absconding, does not and cannot in any manner establish the defence case to the effect that these persons were never concerned with Hawala money through the appellant or otherwise. As regards the Sher Zaman @ Shabbir (A-13), the investigating agency could not have reached the shop of Sher Zaman @ Shabbir (A-13) unless the claim of the investigating agency that they found his number in the diary is true. The fact of the matter is that the investigating agency did reach his shop as mentioned in the earlier part of this judgment. Therefore, it cannot be disputed that the appellant had some connection with Sher Zaman @ Shabbir (A-13) who was then

established to be an Afghan national and who remained absconding till date. The learned counsel for the defence also argued that Nazir Ahmad Qasid (A-3) and Farooq Ahmed Qasid (A-4) have been acquitted by the High Court and that there is no appeal by the State against their acquittal. That may be true, but that would be a separate subject. At least prima facie, that does not help the appellant at all. We will go through the reasons for acquittal, after we have considered the evidence regarding the bank transactions. We will consider this evidence now in details.

61. It has come in the evidence that the appellant opened an account on 13.9.2000 with HDFC Bank, New Friends Colony, New Delhi, where his address was given as 102, Kaila Bhatta, Ghaziabad. The other address was given as 18, Gaffur Nagar, Okhla, New Delhi. The document on the basis of which this account was opened was the driving license of the appellant. The first thing that comes to our mind is that both these addresses were false. While the appellant had never stayed at 102, Kaila Bhatta, Ghaziabad, his address 18, Gaffur Nagar, Okhla, New Delhi was totally incorrect. It has come by way of evidence of Sushil Malhotra (PW-210) that on the cash memo of the fees, the appellant wrote his address as 18, Gaffur Nagar, Okhla, New Delhi. In fact, the appellant had never resided on this address, the date of the cash memo being 28.3.2000. The prosecution had also examined Iqbal Hassan (PW-79) who had confirmed

that no such person has ever lived in this house, particularly, on the relevant dates. Insofar as his learning license is concerned, the appellant has given his address as B-17, Jangpura. On that basis, he got his learning license from Sarai Kale Khan Authority. He has never stayed in this address either. It has also come in the evidence of Inspector S.K. Sand (PW-230) that learner's license bearing address B-17, Jangpura was fake and he further asserted that the area of Jangpura never falls under the authority of RTO, Sarai Kale Khan. There is a report of the Motor licensing authority vide Exhibit PW-230/C that the learner's license was fake. All this was confirmed by Narayan Singh (PW-6), UDC, Sarai Kale Khan Authority and Ajit Singh Bajaj (PW-52). Insofar as driving license is concerned, there is evidence of Hazarul Hasan, RTO Office, Ghaziabad that this driving license was issued from Ghaziabad in favour of the appellant through Ms. Mamta Sharma (PW-16), ARTO vide Exhibit PW-13/A which is a copy of the driving license and Exhibit PW-22/C which is also a copy of the driving license. Significantly enough, for this, the address was shown to be 102, Kaila Bhatta, Ghaziabad. This was for reason that unless the appellant had shown himself a resident of Ghaziabad, he could not have got the driving license issued through Ghaziabad authority. Therefore, his address found on the driving license as 102, Kaila Bhatta, Ghaziabad was itself a false address. This address was on the basis of the ration card which was a fake ration card in the

name of appellant's wife Bano, who was allegedly residing at 102, Kaila Bhatta, Ghaziabad. All this was proved to be false by Azad Khalid (PW-1), Yashpal Singh, Supply Inspector, Department of Food and Supply, Ghaziabad (PW-2) and Rajbir Singh, Area Rationing Officer, Food and Civil Supply Department, Ghaziabad (PW-3). There is another ration card which he got prepared in which his wife's name was shown as Mrs. Bano alongwith children. The address of this ration card was shown to be F-12/12, Batla House, Okhla, New Delhi, where he never resided. Therefore, on the basis of his driving license, when he got his HDFC Bank account opened, it is obvious that he had given false information, much less regarding his residential address which was also mentioned on his driving license and which was not true.

62. The prosecution proved 9 cash deposit slips of Grindlays Bank, the total amount being Rs.29,50,000/-. According to the prosecution, these were in appellant's handwriting while depositors' name has been mentioned as Aslam, Salim Khan, R.K. Traders and Rashid. We have already discussed about the fake residential address given by the appellant while opening the account with HDFC Bank. The details of this account were proved by Sanjeev Srivastava (PW-22). He proved Exhibits PW-22/B, C and F. Exhibit PW-22/F is a copy of the account statement of Rehmana, the wife of the accused which suggests that from 15.9.2000

onwards upto 14.12.2000, on various dates, amounts like Rs.10,000/-, Rs.40,000/-, Rs.50,000/-, Rs.1,50,000/-, Rs.2,00,000/- etc. were deposited in cash. The total amount deposited was Rs.5,53,500/-. There is absolutely no explanation by the appellant about the source from which these amounts came. Corroborating evidence to the evidence of Sanjeev Srivastava (PW-22) is in the shape of Rishi Nanda (PW-23) and Inspector Ved Prakash (PW-173). Ved Prakash (PW-173) had found the ration card in the name of the appellant, his driving license, cheque book of HDFC Bank in his name, Passport of Rehmana (wife of the appellant), a cheque book of State Bank of India, a digital diary and a personal diary and some other documents. From these, Ved Prakash (PW-173) found that there were three accounts, namely, in Standard Chartered Bank, Connaught Place, New Delhi in the names of M/s. Nazir & Sons, Farooq Ahmed Qasid (A-4) and Bilal Ahmad Kawa (A-18) which had account numbers 32263962, 28552609 and 32181669 respectively. He also detected account number 0891000024322 in HDFC Bank which was opened with the help of the driving license. Another witness S.I. Harender Singh (PW-194) had prepared the memo of house search. P.R. Sharma (PW-9), who was from State Bank of India, deposed that account no. 5817 was belonging to Rehmana Yusuf Farukhi in which amounts of Rs.50,000/-, Rs.1,50,000/-, Rs.52,500/- and Rs.30,000/- were deposited. He proved the relevant deposit slips also. Another witness O.P. Singh (PW-64)

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corroborated the evidence of P.R. Sharma (PW-9). The most important link with the HDFC account as also with the deposit slips of Standard Chartered Grindlays Bank came to light. Dr. M.A. Ali (PW-216), SSO, CFSL, CBI, New Delhi, on the basis of his report, deposed that the account opening form of HDFC Bank of the appellant, 9 deposit slips of Standard Chartered Grindlays Bank as also deposit slips of the State Bank of India account of Rehmana Yusuf Farukhi bore the handwriting of the appellant. This clinches the issue about the account opened in HDFC Bank. It is to be noted that there were three accounts in Standard Chartered Grindlays Bank in the name of M/s. Nazir & Sons, Farooq Ahmed Qasid (A-4) and Bilal Ahmad Kawa (A-18) which had account numbers 32263962, 28552609 and 32181669 respectively. The investigating agency collected the documents from Standard Chartered Grindlays Bank including 9 cash deposit receipts as also documents regarding the account numbers 32263962, 28552609 and 32181669. 9 cash deposit slips are purportedly in the name of Aslam, Salim Khan, R.K. Traders and Rashid and all these have been proved to be in the handwriting of the appellant. We have already discussed about the account of HDFC Bank which was opened on the basis of the driving license having a false address. We have also referred to the bank documents in respect of Rehmana Yusuf Farukhi and the amounts having been deposited in her account and also the pay-in (deposit) slips in respect of her accounts. It must be noted that at least

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one document out of these being questioned document No. 30B has been proved to be in the handwriting of the appellant which has been proved by the expert evidence of Dr. M.A. Ali (PW-216). We have already referred to the evidence of Ved Prakash (PW-173) and S.I. Harender Singh (PW-194) about the amounts belonging to the appellant and about the amounts paid by the appellant to the tune of Rs.29,50,000/- in the accounts of M/s. Nazir & Sons, Farooq Ahmed Qasid (A-4) and Bilal Ahmad Kawa (A-18), account numbers of which have already been mentioned above and the fact that 9 deposit slips were in the handwriting of the appellant. It has come in the evidence of Subhash Gupta (PW-27) that he had handed over photocopy of the account opening forms of the three accounts mentioned above, in which Rs.29,50,000/- were deposited by the appellant, to Inspector Ved Prakash (PW-173). We then have the evidence of B.A. Vani, Branch Manager, Standard Chartered Grindlays Bank, Srinagar, who claimed that three bank accounts mentioned above were opened during his tenure and in his branch belonging to M/s. Nazir & Sons, Farooq Ahmed Qasid (A-4) and Bilal Ahmad Kawa (A-18). He pointed out that the amounts which were deposited in these accounts (by the appellant) were further distributed by 40 original cheques by various persons. He referred to 3 cheques of Farooq Ahmed Qasid (A-4), 29 cheques of M/s. Nazir & Sons and 8 cheques of Bilal Ahmad Kawa (A-18). There is evidence of Kazi Shams, SHO, Sadar, Srinagar (PW-99) who had recovered the

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cheque book of M/s. Nazir & Sons at the instance of Nazir Ahmad Qasid (A-3) and Farooq Ahmed Qasid (A-4). We also have the evidence of Mohd. Riaz Ahmed, PA to DM, Badgam, J&K. He deposed that there was a detention order passed against Nazir Ahmad Qasid (A-3) and Farooq Ahmed Qasid (A-4). In the detention order, it was stated that both these accused persons were connected with a foreign mercenary named Abbu Bilal and they agreed to receive the fund from 'LeT' outfit in separate account opened at ANZ Grindlays Bank, Srinagar and had also received the first installment of Rs.3 lakhs in the account of Bilal Ahmad Kawa (A-18), which money was withdrawn by him. The evidence of Hawa Singh (PW-228) is to the effect that he had received 40 cheques of the above mentioned accounts, which evidence was corroborated by S.I. Amardeep Sehgal (PW-227) and S.I. Himmat Ram (PW-45). It was Inspector Pratap Singh (PW-86) who had found the account numbers of M/s. Nazir & Sons, Farooq Ahmed Qasid (A-4) and Bilal Ahmad Kawa (A-18) from the diary seized from the appellant. Further, the evidence of Sanjeev Srivastava, Manager, HDFC Bank (PW-22) went on to establish that it was the appellant who had opened the bank account in the New Friends Colony Branch of the HDFC Bank on the basis of his driving license, in which an amount of Rs.6 lakhs was deposited. This evidence was corroborated by Rishi Nanda (PW-23). P.R. Sharma (PW-9), Manager-SBI, Ghazipur spoke about the amounts received in the bank account of Rehmana Yusuf

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Farukhi. This evidence was corroborated by O.P. Singh, Manager-SBI, Ghazipur (PW-64). It has already been mentioned that as per the evidence of Dr. M.A. Ali (PW-216), the account opening form of HDFC Bank, New Friends Colony Branch and 9 deposit slips of Standard Chartered Grindlays Bank, Connaught Place, New Delhi as also the deposit slip of State Bank of India account of Rehmana Yusuf Farukhi bore the handwriting of the appellant. The report is Exhibit PW-216/A at page Nos. 1-11.

63. The argument of Ms. Jaiswal, learned counsel appearing on behalf of the appellant, that Nazir Ahmad Qasid (A-3) and Farooq Ahmed Qasid (A-4) have already been acquitted, is of no consequence. We may point out that there is absolutely no explanation by the appellant either by way of cross-examination of the witnesses or by way of his statement under Section 313 Cr.P.C. as to where all these amounts had come from and why did he deposit huge amounts in the three accounts mentioned above. Rs.29,50,000/- is not an ordinary sum. Also, there is no evidence that in his account in HDFC Bank, the appellant has Rs.6 lakhs. Further very sizeable amount is shown to have been paid to Rehmana Yusuf Farukhi in her account in the State Bank of India. How did the appellant receive all these amounts and from where, are questions that remain unanswered in the absence of any explanation and more particularly because the

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appellant had no ostensible means of livelihood. It would have to be held that the appellant was dealing with huge sums of money and he has no explanation therefor. This is certainly to be viewed as an incriminating circumstance against the appellant. The silence on this issue is only telling of his nefarious design. It is obvious that the appellant was a very important wheel in the whole machinery which was working against the sovereignty of this country. All this was supported with the fact that 9 deposit slips, the bank forms for opening the accounts, the slip through which amount was deposited in the account of Rehmana Yusuf Farukhi, were all proved to be in the handwriting of the appellant. We have absolutely no reason to reject the evidence of handwriting expert. All this suggests that the appellant was weaving his web of terrorist activities by taking recourse to falsehood one after the other including his residential address and also creating false documents.

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64. Ms. Jaiswal, learned defence counsel argued that merely on the basis of the evidence of the hand writing expert, no definite conclusion could be drawn that it was the appellant who deposited all this money into the three accounts of Nazir Sons, Bilal Ahmad Kawa and Faruk Ahmad Qasid. She also urged that accused Nos. 3 and 4 were acquitted by the Court. We have already clarified earlier that the acquittal of Qasid would be of no consequence for the simple reason that they may have been

given the benefit of doubt regarding their knowledge about the said amounts being deposited in their accounts or for that matter their dispatch for the terrorist activities. Some more evidence would have been necessary for that purpose. It is undoubtedly true that there should have been an appeal against their acquittal. However, that does not absolve the appellant completely since he had to explain as to where he was receiving money from for putting in the accounts of Qasid. This circumstance of the appellant in failing to explain the huge amount and its source would be of immense importance and would go a long way to show that the accused was receiving huge amounts from undisclosed sources.

65. A very lame explanation has been given about the amounts in the account of Rehmana. It was suggested that the monies were gifts from relatives on account of her marriage. Her mother DW-1 also tried to suggest the same. The explanation is absolutely false for the simple reason that there is no proof about such a plea. Everything about this marriage is suspicious. It is only on 8.12.2000 that the accused claims to have got married to Rehmana. It was under mysterious circumstances and in a secret manner that the accused got married to Rehmana. Dr. M.A. Ali (DW-216) has been examined by the prosecution as the hand writing expert who examined two pay-in-slips, namely, Exhibits PW-173/F and PW-173/G. The other documents which were given for examination

were Q 29, Q30, Q30B, Q 30C, Q 31 and Q32 which are Exhibit PW 9/C to F. Out of these, some of the documents were seized from the bank vide seizure memo Exhibit PW 9/A. Document Nos.Mark Q 30 and 30 A and Mark 30B have been proved to be particularly filled in the hand writing of Mohd. Arif @ Ashfaq and partly in hand writing of Rehmana. This suggests the amount of Rs.15,000/- has been deposited in the account of Rehmana on 21.11.2000. Similarly, document marked Q-6, Q-6A and Q-6B were also proved to be in the hand writing of the appellant and partly in hand writing of Rehmana. Accused has no explanation to offer. There can be no dispute that the accused had been depositing huge amount into the account of Rehmana. Considering the dates on which the deposits were made, the argument of the learned counsel that she received small amounts by way of gifts for her marriage which had never taken place till then, has to fall to ground. Again, accused Rehmana was acquitted as the prosecution was not able to prove that she had been a party to the conspiracy or knew about the conspiracy. That however, cannot absolve the appellant. The reluctance on the part of the prosecution to file appeal against her acquittal can also not help the accused. It is strange that a person who is not even an Indian National and is a citizen of Pakistan got into touch with this lady and got married to her on 8.12.2000 and before that he should be depositing huge amounts into the accounts of Rehmana. This becomes all the more strange that Rehmana had no reasonable

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explanation for receiving these amounts. We, therefore, view this circumstance as an incriminating circumstance. We entirely agree with the High Court as well as the trial Court for the inferences drawn in respect of these deposits made by the accused.

66. Ms. Jaiswal then severely criticized the finding of the Courts below accepting the disclosures made by the appellant and the discoveries made pursuant thereto. The main discovery which the learned counsel assailed was the statement in pursuance of which the whereabouts of Abu Shamal were made known to the investigating agency. The learned counsel urged that no disclosure statement was recorded immediately after the apprehension of the accused. She, therefore, urged that it could not have been held by the Courts below that the information regarding the Batla house and Abu Shamal being a terrorist in hiding on that address proceeded from the appellant or that he had the knowledge thereof. The learned counsel basically rests her contention on the fact that before accepting the fact that the accused gave some information in pursuance of which some discoveries were made, the investigating agency must record a statement and in the absence of such a statement, discovery cannot be attributed to the accused. Our attention was drawn to the evidence of PW-229 who deposed that a statement was recorded immediately on the apprehension of the appellant. The date mentioned on Exhibit PW 148 E is

26.12.2000. According to the learned counsel if the accused was apprehended on the early night of 25.12.2000 then the date on Exhibit PW 148 E could not have been 26.12.2000. The counsel further says that therefore the Batla house encounter was prior to recording of the disclosure statement of the accused. The contention is not correct. It will be seen that immediately after the apprehension the appellant was not formally arrested, though he was in the custody of the investigating team. The learned counsel pointed out that the witness's statement was that the accused was "arrested" and his disclosure statement was recorded. PW-229 had undoubtedly stated so. There is other evidence on record that his statement was recorded. It is indeed in that statement which is recorded that he disclosed about his involvement in the Red Fort shoot out, the role of Abu Shamal and about an AK-56 rifle. The witness went on to state further that the accused disclosed that his associate Abu Shamal was staying in the hide out at house No. G-73, first floor, Batla House, Okhla. He also disclosed that he was having weapons and grenades and he also disclosed that Abu Shamal is a trained militant of LeT and member of suicide squad. Indeed, had this information not been disclosed immediately after his apprehension, there was no question of the investigating agency coming to know about the whereabouts of Abu Shamal. Indeed, in pursuance of this information given the investigating team did go to the aforementioned address and an encounter did take

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place wherein Abu Shamal was killed and large amount of ammunition and arms were found at that place. The learned counsel urged that in the absence of any "*recorded statement*" immediately after his apprehension, such discovery should not be attributed to the appellant. For the sake of argument, we will assume that no statement was recorded prior to Batla House incident. The learned counsel secondly urged that if admittedly the accused appellant was formally arrested on the next day i.e. on 26th, then it would be axiomatic that he was not in the custody of the police and, therefore, all that evidence should be rendered as inadmissible.

67. It is indeed true that for normally proving any such information and attributing the same to the accused the said accused must be in the custody of the prosecution and then when he discloses or offers to disclose any information, his statement is recorded by the investigating agency for lending credibility to the factum of disclosure as also exactitude. In pursuance of such information, the investigating agency proceeds and obtains the material facts and thereafter executes a Panchnama to that effect. We have already referred to this question in the earlier part of our judgment that it was indeed a very tense situation requiring extreme diligence on the part of the investigating agency whereby the investigating agency could not afford to waste a single minute and was required to act immediately on the receipt of the information from the appellant. This was

all the more necessary because the investigating agency were dealing with an extremely dangerous terrorist causing serious danger to the safety of the society. We do not see anything wrong in this approach on the part of the investigating agency. The only question is whether the investigating agency discovered something in pursuance of the information given by the accused. The events which followed do show that it is only in pursuance of, and as a result of the information given by the accused that the investigating agency zeroed on the given address only to find a dreaded terrorist like Abu Shamal holed up in that address with huge ammunition and the fire arms. If that was so, then the question is as to whether we can reject this discovery evidence merely because, as per the claim of defence, a formal statement was not recorded and further merely because a formal arrest was not made of the accused.

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68. Firstly speaking about the formal arrest for the accused being in custody of the investigating agency he need not have been formally arrested. It is enough if he was in custody of the investigating agency meaning thereby his movements were under the control of the investigating agency. A formal arrest is not necessary and the fact that the accused was in effective custody of the investigating agency is enough. It has been amply proved that the accused was apprehended, searched and taken into custody. In that search the investigating agency recovered a

pistol from him along with live cartridges, which articles were taken in possession of the investigating agency. This itself signifies that immediately after he was apprehended, the accused was in effective custody of the investigating agency.

69. Now coming to the second argument of failure to record the information, it must be held that it is not always necessary. What is really important is the credibility of the evidence of the investigating agency about getting information/statement regarding the information from the accused. If the evidence of the investigating officer is found to be credible then even in the absence of a recorded statement, the evidence can be accepted and it could be held that it was the accused who provided the information on the basis of which a subsequent discovery was made. The question is that of credibility and not the formality of recording the statement. The essence of the proof of a discovery under Section 27, Evidence Act is only that it should be credibly proved that the discovery made was a relevant and material discovery which proceeded in pursuance of the information supplied by the accused in the custody. How the prosecution proved it, is to be judged by the Court but if the Court finds the fact of such information having been given by the accused in custody is credible and acceptable even in the absence of the recorded statement and in pursuance of that information some material discovery has been

effected then the aspect of discovery will not suffer from any vice and can be acted upon. Immediately after the apprehension of the appellant he spilled the information. In pursuance of that information the investigating agency acted with expediency and speed which in the circumstances then prevailing was extremely necessary nay compulsory. Any investigating agency in such sensational matter was expected not to waste its time in writing down the Panchnama and memorandum. Instead they had to be on a damage control mode. They had a duty to safeguard the interests of the society also. Therefore, if the investigating agency acted immediately without wasting its time in writing memoranda of the information given by the accused, no fault could be found. Ultimately, this timely and quick action yielded results and indeed a dreaded terrorist was found holed up in the address supplied by the appellant-accused with sizeable ammunition and fire arms. We do not, therefore, find any thing wrong with the discovery even if it is assumed that the information was not "*recorded*" and hold that immediately after his apprehension, the accused did give the information which was known to him alone in pursuance of which a very material discovery was made. The learned Solicitor General relied on a reported decision in ***Suresh Chandra Bahri v. State of Bihar [Cited supra*]. In that case, no discovery statement was recorded by the investigating officer PW -59 Rajeshwar Singh of the information supplied by the accused to him. Further, no public witness was examined by the

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prosecution to support the theory that such an information was given by the accused to him in pursuance of which some material discovery was made. This Court, however, in spite of these two alleged defects, accepted the evidence of discovery against the accused on the basis of the evidence of Rajeshwar Singh PW-59. The Court mentions:

> "*It is true that no disclosure statement of Gurbachan Singh who is said to have given information about the dumping of the dead body under the hillock of Khad gaddha dumping gfdound was recorded but there is positive statement of Rajeshwar Singh, PW 59, Station House Officer of Chutia Police Station who deposed that during the course of investigation Gurbachan Singh Led hhim to Khad Gaddha hillock along with an Inspector Rangnath Singh and on pointing out the place by Gurbachan Singh he got that place unearthed by labourers where a piece of blanket, pieces of saree and rassi were found which were seized as per seizure memo Ext.5. He further deposed that he had taken two witnesses along with him to the place where these articles were found. Rajeshwar Singh PW 59 was cross-examined with regard to the identity of the witness Nand Kishore who is said to be present at the time of recovery and seizure of the articles as well as with regard to the identity of the articles seized vide paragraphs 18, 21 and 22 of his deposition but it may be pointed out that no cross-examination was directed with regard to the disclosure statement made by the appellant Gurbachan Singh or on the point that he led the police party and others to the hillock where on hi pointing out, the place as unearthed where the aforesaid articles were found and seized. It is true that no public witness was examined by the prosecution in this behalf but the evidence of Rajeshwar Singh PW59 does not suffer from any doubt or infirmity with regard to the seizure of these articles at the instance of the appellant Gurbachan Singh which on TI Parade were*

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> *found to be the articles used in wrapping the dead body of Urshia."*

The court then stated in paragraph 71 that *the two essential requirements of application of Section 27 of Evidence Act are that (1) the person giving information was accused of any offence; and (2) he must also be in police custody.* The Court then went on to hold that the provisions of Section 27 of the Evidence Act are based on the view that if the fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information is true and consequently the said information can safely be allowed to be given in evidence because if such an information is further fortified and confirmed by the discovery of articles or the instrument of crime and which leads to the belief that the information about the confession made as to the articles of crime cannot be false. This is precisely what has happened in the present case. Indeed, the appellant was accused of an offence and he was also in the police custody. We have already explained the ramifications of the term "*being in custody*". This judgment was then followed in ***Vikram Singh & Ors v. State of Punjab [*****2010 (3) SCC 56]** when again the Court reiterated that there was no need of a formal arrest for the applicability of Section 27. The Court therein took the stock of the case law on the subject and quoted from the decision of ***State of U.P. v. Deoman Upadhyaya*** **[AIR 1960 SC**

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1125] regarding the principles involved in Sections 24 to 30, Evidence Act and more particularly Sections 25, 26 and 27 of the Evidence Act. The Court ultimately held in case of ***Deoman Upadhyay (cited supra)*** that the expression '*accused of any offence'* in Section 27 as in Section 25 is also descriptive of the person concerned i.e. against a person who is accused of an offence. Section 27 renders provable certain statements made by him while he was in the custody of a police officer. Section 27 is founded on the principle that even though the evidence relating to the confessional or other statements made by a person while he is in the custody of the police officer, is tainted and, therefore, inadmissible if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and, therefore, declared provable insofar as it distinctly relates to the fact thereby discovered. The Court also pointed out the distinction between Sections 27 and 26, Evidence Act in para 40 of the judgment of ***Vikaram Singh (cited supra).*** The Court came to the conclusion that the principle that Section 27 would be provable only after the formal arrest under Section 46 (1) of the Code could not be accepted. It may be mentioned here that even in the decision in ***State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru [*****2005 (11) SCC 600**] relying on the celebrated decision of ***Pulukuri Kottaya v. King Emperor*** **[AIR 1947 PC 67]**, the Court held "*we are of the view that* ***Pulukuri Kottaya (cited supra)*** *case is an authority for the proposition that 'discovery of fact'*

cannot be equated to the object produced or found. It is more than that. The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place". This is precisely what has happened in this case. It is only because of the discovery made by the appellant that Abu Shamal with the arms and ammunition was found at the address disclosed by the appellant.

70. Ms. Kamini Jaiswal, learned counsel appearing for the appellant also severely attacked the discovery made and recorded on the morning of 26.12.2000. By that discovery, the appellant had given the information about the whole plot, with which we are not concerned, but in addition to that, he had showed his readiness to point out the AK-56 rifle which was thrown immediately after the attack, behind the Red Fort. In pursuance of that, the appellant proceeded alongwith the investigating party and then from the spot that he had shown, AK-56 rifle was actually found. Even a bandolier was found containing hand grenades. The learned counsel argued that this was a farcical discovery and could not be attributed to the appellant, as in fact, immediately after the attack on 22.12.2000, the police party had covered the whole area not only during the darkness of the night on 22.12.2000, but also in the following morning. She pointed out that sniffer dogs were also used at that time for searching the suspected

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terrorists either hiding out or leaving any trace. From this, the learned counsel argued that it is impossible that the investigating agency could not have seen the said rifle and it was impossible that such an important article like AK-56 rifle and bandolier would go unnoticed by the investigating agency. She, therefore pointed out that this was nothing but a poor attempt on the part of the investigating agency to plant the rifle and to attribute the knowledge of that rifle falsely to the appellant. In the earlier part of the judgment, we have already discussed the evidence regarding this discovery where we have referred to the evidence of Inspector Hawa Singh (PW-228), S.I. Satyajit Sarin (PW-218) and SHO Roop Lal (PW-234), who all supported the discovery. This discovery was recorded vide Exhibit PW-148/E. S.I. Satyajit Sarin (PW-218) corroborated the evidence of Inspector Hawa Singh (PW-228) and prepared a seizure memo (Exhibit PW-218). S.I. Amardeep Sehgal (PW-227) also corroborated the version given by Inspector Hawa Singh (PW-228) and S.I. Satyajit Sarin (PW-218). Two other witnesses, namely, S.K. Chadha (PW-125) and N.B. Bardhan (PW-202) were also present who inspected the AK-56 rifle found at the instance of the appellant. The learned counsel pointed out that if the sniffer dogs were taken there for searching, it would be impossible that the investigating agency would not find the AK-56 rifle which was lying quite near to the spot from where the chit and the currency notes were picked up by the investigating agency. In the first place, there is definite evidence on

record that the sniffer dogs were not taken to the spot from where the polythene packet containing chit and currency notes was recovered. Inspector Hawa Singh (PW-228) is the witness who specifically spoke about the dog squad not having been taken to that spot. We are not impressed by this argument that the investigating agency had already seen the said rifle but had chosen to plant it against the appellant. Even the evidence of SHO Roop Lal (PW-234) is to the effect that dog squad was not taken to the back of the Red Fort. SHO Roop Lal (PW-234) also stated that the Sunday Bazar was also not allowed to be held on 22.12.2000. We have no reason to discard this evidence. That apart, we do not see any reason why the investigating agency would plant the aforementioned AK-56 rifle, bandolier and hand grenades therein, without any rhyme or reason. True, they were interested in the investigation, but that does not mean that they were out to falsely implicate the appellant. This is apart from the fact that police officers could not have procured a foreign made AK-56 rifle and the foreign made grenades on their own to be foisted against the appellant. No such cross-examination appears to have been done on those police officers. It is also difficult to accept the argument that anybody could have found the rifle which was lying in the thick bushes. There is evidence on record that the backside of the Red Fort had substantially thick bushes. Once the police officers had found the chit and the currency notes which gave them a definite direction to proceed in their

investigation, it was not likely that the police officers would visit that spot again and that is what had happened. We are also of the opinion that this discovery was fully proved, in that, the appellant had given the information that it was Abu Shamal @ Faisal who had thrown that rifle in his bid to escape from the spot where the bloody drama was performed, resulting in death of three persons. Even earlier to this discovery, Abu Shamal @ Faisal was eliminated in encounter and he was found with substantial quantity of firearm and ammunition. We, therefore, see no reason to accept the defence contention that this discovery was a fake discovery.

71. Insofar as third discovery was concerned, it was of the hand grenades, which the appellant discovered on 1.1.2001. The learned counsel did not even attempt to say that there was anything unnatural with this recovery except that the appellant was all through in the custody and could have been treated roughly for effecting this discovery of the grenades. There is nothing to support this version. Thus, the discovery statements attributed to the appellant and the material discovered in pursuance thereof would fully show the truth that the appellant was involved in the whole affair. The discovery of hand grenades behind the computer centre near Jamia Millia Islamia University was very significant. So also the discovery of the shop of Sher Zaman @ Shabbir (A-13), the Hawala dealer, as also the documents discovered therefrom, show the

involvement of the appellant in the whole affair. In this behalf, we fully endorse the finding of the High Court. About these discoveries, one another complaint by the learned defence counsel was that no public witnesses were associated. In fact, there is ample evidence on record to suggest that though the investigating agency made the effort, nobody came forward. This was all the more so, particularly in case of the recovery of pistol from the appellant as also the discoveries vide Exhibit PW-148/E.

72. We have seen the evidence as also the so-called explanations given by the appellant in his statement under Section 313 Cr.P.C. We are of the clear opinion that the detailed statement which he gave at the end of the examination was a myth and remained totally unsubstantiated. We have also considered the defence evidence of Ms. Qamar Farukhi (DW-1) and we are of the clear opinion that even that evidence has no legs to stand. Ms. Qamar Farukhi (DW-1) spoke about the marriage of her daughter Rehmana Yusuf Farukhi to the appellant. She deposed that the appellant had expressed his desire to marry Rehmana after reading the matrimonial advertisement. She asserted that her relatives contributed for the marriage and she had continued giving her money to Rehmana. There is nothing much in her cross-examination either. She admitted that moneys were paid into the account of Rehmana. She admitted that it was told to

the appellant that Rehmana was suffering from Spinal Cord problem and was not fit for consummation of marriage. It is really strange that inspite of this, the appellant should have got married to Rehmana. Very strangely, the lady completely denied that she even knew that the appellant was a resident of Pakistan. Much importance, therefore, cannot be given to this defence witness. The High Court has held proved the following circumstances against the appellant:-

> "(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 armymen 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 Ghazipur, 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.

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(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."

73. In addition to these circumstances, there is another circumstance that a message was intercepted by the BSF while Exhibit PW 162/A and proved by PW-162 Inspector J.S. Chauhan dated 26.12.2000 wherein there was a specific reference to the accused. Still another circumstance would be that the accused had no ostensible means of livelihood and yet he deposited Rs.29,50,000/- in three accounts, namely, Standard Chartered Grindlays Bank, Connaught Place (known as ANZ Grindlays Bank) bearing account No.32263962 of M/s. Nazir & Sons, Standard Chartered Grindlays Bank bearing account No.28552609 of Bilal Ahmad Kawa and Standard Chartered Bank bearing account No.32181669 of Farooq Ahmed Qasid and also deposited some amounts in the account of

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Rehmana Yusuf Faruqi and he had no explanation of these huge amounts, their source or their distribution. Lastly, the appellant gave a fanciful and a completely false explanation about his entering in India and his being a member of RAW and thereby, his having interacted with Nain Singh (PW-20).

74. We are in complete agreement with the findings regarding the incriminating circumstances as recorded by the High Court. On the basis of the aforementioned circumstances, the High Court came to the conclusion that the appellant was responsible for the incident of shooting inside the Lal Quila (Red Fort) on the night of 22.12.2000, which resulted in the death of three soldiers of Army. It has also been held by the High Court that this was a result of well planned conspiracy between the appellant and some other militants including 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. The High Court has also deduced that it was at the instance of the appellant that the police could reach that spot. The High Court has further come to the conclusion that it was in a systematic manner that the appellant came to India illegally and collected highly sophisticated arms and ammunition meant for mass destruction. The High Court further held that he chose to select the Red Fort for an assault alongwith his other associates, the Red Fort being a

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place of national importance for India. The High Court has also recorded a finding that the chosen attack was on the Army Camp which was stationed there to protect this monument of national importance. The High Court has, therefore, deduced that it was an act of waging war against the Government of India. It is further held that the associates, with whom the appellant had entered into conspiracy, had attacked the Army Camp, which suggests that there was a conspiracy to wage war against the Government of India, particularly, because in that attack, sophisticated arms like AK-47 and AK-56 rifles and hand grenades were used. The High Court also took note that this aspect regarding waging war was not even argued by the learned counsel appearing for defence. It is on this basis that the appellant was held guilty for the offences punishable under Sections 120-B, 121-A, 121, IPC, Section 120-B read with Section 302, IPC and Sections 468/471/474, IPC and also the offences under Sections 186/353/120-B, IPC. He was also held guilty for the offence under Section 14 of the Foreigners Act, since it was proved that the appellant, a foreigner, had entered the territory of India without obtaining the necessary permissions and clearance. Similarly, the appellant was also held guilty for the offences under the Arms Act as well as the Explosive Substances Act on account of his being found with a pistol and live cartridges.

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75. The law on the circumstantial evidence is, by now, settled. In ***Sharad Birdhichand Sarda Vs. State of Maharashtra [1984 (4) SCC 116]***, this Court drew out the following test for relying upon the circumstantial evidence:-

> "(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> (2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
>
> (3) The circumstances should be of a conclusive nature and tendency.
>
> (4) They should exclude every possible hypothesis except the one to be proved, and
>
> (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

The principle of this judgment was thereafter followed in number of decisions, they being ***Tanviben Pankaj Kumar Divetia Vs. State of Gujarat [1997 (7) SCC 156], State (NCT of Delhi) Vs. Navjot Sandhu @ Afsan Guru [2005 (11) SCC 600], Vikram Singh & Ors. Vs. State of Punjab [2010 (3) SCC 56], Aftab Ahmad Anasari Vs. State of Uttaranchal [2010 (2) SCC 583]*** etc. It is to be noted that in the last

mentioned decision of ***Aftab Ahmad Anasari Vs. State of Uttaranchal (cited supra)***, the observation made is to the following effect:-

> "In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact must be proved individually and only thereafter the Court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts, by itself/themselves, is/are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution case succeeds in a case of circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever extravagant and fanciful it might be. There must be a chain of evidence so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. Where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court………." *(Emphasis supplied).*

The Court further went on to hold that in applying this principle, distinction must be made between the facts called primary or basic, on the one hand, and the inference of facts to be drawn from them, on the other. The Court further mentioned that:-

> "in drawing these inferences or presumptions, the Court must have regard to the common course of natural events, and to human conduct and their relations to the facts of the particular case."

To the similar effect are the observations made in ***Vikram Singh & Ors. Vs. State of Punjab (cited supra)***.

76. There can be no dispute that in a case entirely dependent on the circumstantial evidence, the responsibility of the prosecution is more as compared to the case where the ocular testimony or the direct evidence, as the case may be, is available. The Court, before relying on the circumstantial evidence and convicting the accused thereby has to satisfy itself completely that there is no other inference consistent with the innocence of the accused possible nor is there any plausible explanation. The Court must, therefore, make up its mind about the inferences to be drawn from each proved circumstance and should also consider the cumulative effect thereof. In doing this, the Court has to satisfy its conscience that it is not proceeding on the imaginary inferences or its prejudices and that there could be no other inference possible excepting the guilt on the part of the accused. We respectfully agree with the principles drawn in the above mentioned cases and hold that the prosecution was successful in establishing the above mentioned circumstances against the appellant, individually, as well as, cumulatively. There indeed cannot be a universal test applicable commonly to all the situations for reaching an inference that the accused is guilty on the basis of the proved circumstances against him nor could there be any

quantitative test made applicable. At times, there may be only a few circumstances available to reach a conclusion of the guilt on the part of the accused and at times, even if there are large numbers of circumstances proved, they may not be enough to reach the conclusion of guilt on the part of the accused. It is the quality of each individual circumstance that is material and that would essentially depend upon the quality of evidence. Fanciful imagination in such cases has no place. Clear and irrefutable logic would be an essential factor in arriving at the verdict of guilt on the basis of the proved circumstances. In our opinion, the present case is such, as would pass all the tests so far devised by this Court in the realm of criminal jurisprudence.

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77. However, we must, at this stage, take note of the argument raised by the learned counsel for the defence that the appellant has suffered a prejudice on account of his being a Pakistani national. The learned counsel contended that on account of his foreign nationality and in particular that of Pakistan, the whole investigating agency as well as the Courts below have viewed his role with jaundiced eyes. The learned counsel pointed out that all the other accused who were acquitted did not have foreign nationality. We must immediately note that the criticism is entirely misplaced, both against the investigating agency and the Courts below. The investigation in this case was both scientific and fair

investigation. This was one of the most difficult cases to be investigated as there could have been no clue available to the investigating agency. The small thread which became available to the investigating agency was the chit found alongwith some Indian currency at the back of the Red Fort wall in a polythene packet. We must pay compliments to the Investigating Officer S.K. Sand (PW-230) as also to all the other associated with the investigation for being objective and methodical in their approach. It has to be borne in mind that not a single incidence of ill-treatment to the appellant was reported or proved. Again, the timely recording of the D.D. Entries, scientific investigation using the computer, the depth of investigation and the ability of the investigating agency to reach the very basis of each aspect lend complete credibility to the fairness of the investigation. We, therefore, reject this argument insofar as the investigating agency is concerned. Similar is the role played by the trial and the appellate Courts. It could not be distantly imagined that the Courts below bore any prejudice. The trial held before the trial Judge was the epitome of fairness, where every opportunity was given to the accused persons and more particularly, to the present appellant. Similarly, the High Court was also very fair in giving all the possible latitude, in giving patient hearing to this accused (appellant). The records of the trial and the appellate Courts truly justify these inferences. We, therefore, reject this argument of the learned defence counsel.

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78. It was then argued that there could be no conviction for the conspiracy in the absence of conviction of any other accused for that purpose. The argument is *per se* incorrect. It is true that out of the original 22 accused persons, ultimately upto this level, it is only the present appellant who stands convicted. We must, however, point out that as many as 8 accused persons against whom the investigating agency filed a chargesheet are found to be absconding. The Investigating Officer had collected ample material during the investigation against these 8 accused persons who were (1) Sabir @ Sabarulla @ Afgani (A-12), Sher Zaman Afgani S/o Mohd. Raza (A-13), Abu Haider (A-14), Abu Shukher (A-15), Abu Saad (A-16), Zahur Ahmad Qasid S/o Gulam Mohd. Qasid (A-17), Bilal Ahmad Kawa S/o Ali Mohd. Kawa (A-18) and Athruddin @ Athar Ali @ Salim @ Abdulla S/o Ahmuddin (A-19). Besides these absconding accused persons, 3 others were Abu Bilal (A-20), Abu Shamal (A-21) and Abu Suffian (A-22). All these three persons were already dead when the chargesheet was filed against them. The charge of conspiracy was against all the accused persons. The conspiracy also included the dead accused Abu Shamal who was found to be hiding and who was later killed in exchange of fire with the police. The whereabouts of Abu Shamal were known only due to the discovery statement by the appellant, in which a very clear role was attributed to Abu Shamal, who was also a part of the team having entered the Red Fort and having taken part in the firing and

killing of three soldiers. It has also come in the evidence that the other accused who was absconding in the present case, namely, Abu Bilal (A-20), was killed in exchange of fire with police in 2002 near Humayun's Tomb. It is to be remembered that the negative of the photograph of Abu Bilal (A-20) was seized at the time of arrest of the appellant, from his wallet. Indeed, the act of firing at the Army was not by a single person. The learned Solicitor General, therefore, rightly submitted that the case of the prosecution that there was a conspiracy to attack the Red Fort and kill innocent persons, was not affected even if the other accused persons who were alleged to have facilitated and helped the appellant, were acquitted. The question of a single person being convicted for an offence of conspiracy was considered in ***Bimbadhar Pradhan Vs. The State of Orissa [AIR 1956 SC 469]***. Paragraph 14 thereof is relevant for us, which is as follows:-

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> "14. Another contention raised on behalf of the appellant was that the other accused having been acquitted by the trial court, the appellant should not have been convicted because the evidence against all of them was the same. There would have been a great deal of force in this argument, not as a question of principle but as a matter of prudence if we were satisfied that the acquittal of the other four accused persons was entirely correct. In this connection the observations of this Court in the case of Dalip Singh v. State of Punjab [1954] (1) SCR 145, and of the Federal Court in Kapildeo Singh v. The King [1949] F.C.R. 834, are relevant. It is not essential that more than one person should be convicted of the offence of criminal conspiracy. It is enough if the court is in a position to find that two or more persons were actually concerned in the

> criminal conspiracy. If the courts below had come to the distinct finding that the evidence led on behalf of the prosecution was unreliable, then certainly no conviction could have been based on such evidence and all the accused would have been equally entitled to acquittal. But that is not the position in this case as we read the judgments of the courts below."

The learned Solicitor General also relied on the decision in ***State of Himachal Pradesh Vs. Krishna Lal Pradhan [1987 (2) SCC 17]*** and cited the observations to the effect that the offence of criminal conspiracy consists in a meeting of minds of two or more persons for agreeing to do or causing to be done an illegal act by illegal means, and the performance of an act in terms thereof. It is further observed:-

> "If pursuant to the criminal conspiracy the conspirators commit several offences, then all of them will be liable for the offences even if some of them had not actively participated in the commission of the offences."

The learned Solicitor General further relied on the decision in ***State through Superintendent of Police, CBI/SIT Vs. Nalini & Ors. [1999 (5) SCC 253]***, wherein in **paragraph 662**, the following observations were made:-

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> "In reaching the stage of meeting of minds, two or more persons share information about doing an illegal act or a legal act by illegal means. This is the first stage where each is said to have knowledge of a plan for committing an illegal act or a legal act by illegal means. Among those sharing the information some or all may performance intention to do an illegal act or a legal act by illegal means. Those who do form the requisite intention would be parties to the agreement and

would be conspirators but those who drop out cannot be roped in as collaborators on the basis of mere knowledge unless they commit acts or omissions from which a guilty common intention can be inferred. It is not necessary that all the conspirators should participate from inception to the end of the conspiracy; some may join the conspiracy after the time when such intention was first entertained by any one of them and some others may quit from the conspiracy. All of them cannot but be treated as conspirators. Where in pursuance of the agreement the conspirators commit offences individually or adopt illegal means to do a legal act which has a nexus to the object of conspiracy, all of them will be liable for such offences even if some of them have not actively participated in the commission of those offences."

Again in ***Firozuddin Basheeruddin & Ors. Vs. State of Kerala [2001 (7) SCC 596]***, while stating the principles of conspiracy, the Court observed as follows:-

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

Regarding admissibility of evidence, loosened standards prevail in a conspiracy trial. Contrary to the usual rule, in conspiracy prosecutions a declaration by one

conspirator, made in furtherance of a conspiracy and during its pendency, is admissible against each co-conspirator. Despite the unreliability of hearsay evidence, it is admissible in conspiracy prosecutions. Explaining this rule, Judge Hand said:

> "Such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of crime. When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime'. what one does pursuant to their common purpose, all do, and as declarations may be such acts, they are competent against all (Van Riper v. United States 13 F.2d 961, 967, (2d Cir. 1926)."

Thus conspirators are liable on an agency theory for statements of co-conspirators, just as they are for the overt acts and crimes committed by their confreres."

Our attention was also invited to the observations made in ***Yashpal Mittal Vs. State of Punjab [1977 (4) SCC 540]*** **at page 543**. The observations are to the following effect:-

> "The offence of criminal conspiracy under Section 120A is a distinct offence introduced for the first time in 1913 in Chapter VA of the Penal Code. The very agreement, concert or league is the ingredient of the offence. It is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There must be unity of object or purpose but there may be plurality of means sometimes even unknown to one another, amongst the conspiratOrs. In achieving the goal several offences, may be committed by some of the conspirators even unknown to the others. The only relevant factor is that all means adopted and illegal acts

done must be and purported to be in furtherance of the object of the conspiracy even though there may be sometimes misfire or over-shooting by some of the conspirators. Even if some steps are resorted to by one or two of the conspirators without the knowledge of the others it will not affect the culpability of those others when they are associated with the object of the conspiracy. The significance of criminal conspiracy under Section 120A is brought out pithily by this Court in Major B. G. Darsay v. The State of Bombay: 1961 CriLJ 828 . thus:

> The gist of the offences is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to dc a single illegal act. It may comprise the commission of a number of acts. under Section 43 of the Indian Penal Code, an act would be illegal if it is an offence or if it is prohibited by law. Under the first charge the accused are charged with have conspired to do three categories of illegal acts and the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the '- offence of conspiracy has been committed. They ate all guilty of the offence of conspiracy to do illegal acts, though for individual offences all of them may not be liable.

We are in respectful agreement with the above observations with regard to the offence of criminal conspiracy.

The main object of the criminal conspiracy in the first charge is undoubtedly cheating by personation. The other means adopted, inter alia, are preparation or causing to be prepared spurious passports; forging or causing to be forged entries and endorsements in that connection; and use of or causing to be used forged passports as genuine in order to facilitate travel of persons abroad. The final object of the conspiracy in the first charge being the offence of cheating by personation and we find, the other offence described therein are steps, albeit, offences themselves, in aid of the ultimate crime. The charge does not connote plurality of objects of the

conspiracy. That the appellant himself is not charged with the ultimate offence, which is the object of the criminal conspiracy, is beside the point in a charge under Section 120B IPC as long as he is a party to the conspiracy with the end in view. Whether the charges will be ultimately established against the accused is a completely different matter within the domain of the trial court."

The learned Solicitor General also invited our attention to the decision rendered in ***Ajay Agarwal Vs. Union of India & Ors. [1993 (3) SCC 609]***, wherein the following observations were made in paragraphs 8 and 24:-

"8. …… In Chapter VA, conspiracy was brought on statute by the Amendment Act, 1913 (8 of 1913). Section 120-A of the I.P.C. defines 'conspiracy' to mean that when two or more persons agree to do, or cause to be done an illegal act, or an act which is not illegal by illegal means, such an agreement is designated as "criminal conspiracy. No agreement except an agreement to commit an offence shall amount to a criminal conspiracy, unless some act besides the agreement is done by one or more parties to such agreement in furtherance thereof. Section 120-B of the I.P.C. prescribes punishment for criminal conspiracy. It is not necessary that each conspirator must know all the details of the scheme nor be a participant at every stage. It is necessary that they should agree for design or object of the conspiracy. Conspiracy is conceived as having three elements: (1) agreement (2) between two or more persons by whom the agreement is effected; and (3) a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aim is to be accomplished. It is immaterial whether this is found in the ultimate objects. The common law definition of 'criminal conspiracy' was stated first by Lord Denman in Jones' case (1832 B & AD 345) that an indictment for conspiracy must "charge a conspiracy to do an unlawful

act by unlawful means" and was elaborated by Willies, J. on behalf of the Judges while referring the question to the House of Lords in Mulcahy v. Reg (1868) L.R. 3 H.L. 306 and the House of Lords in unanimous decision reiterated in Quinn v. Leathem 1901 AC 495 as under:

> ‘A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum,* capable of being enforced, if lawful, punishable of for a criminal object or for the use of criminal means. (emphasis supplied)’

24. A conspiracy thus, is a continuing offence and continues to subsist and committed wherever one of the conspirators does an act or series of acts. So long as its performance continues, it is a continuing offence till it is executed or rescinded or frustrated by choice or necessity. A crime is complete as soon as the agreement is made, but it is not a thing of the moment. It does not end with the making of the agreement. It will continue so long as there are two or more parties to it intending to carry into effect the design. Its continuance is a threat to the society against which it was aimed at and would be dealt with as soon as that jurisdiction can properly claim the power to do so. The conspiracy designed or agreed abroad will have the same effect as in India, when part of the acts, pursuant to the agreement are agreed to be finalized or done, attempted or even frustrated and vice versa.”

Further in ***Nazir Khan & Ors. Vs. State of Delhi [2003 (8) SCC 461]***, the Court observed as under:-

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"16. In Halsbury's Laws of England (vide 4th Ed. Vol. 11, page 44, page 58), the English Law as to conspiracy has been stated thus:

> "Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indication offence at common law, the punishment for which is imprisonment or fine or both in the discretion of the Court.
>
> The essence of the offence of conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however, it may be. The actus rues in a conspiracy is the agreement to execute the illegal conduct, not the execution of it. It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose. It is not, however, necessary that each conspirator should have been in communication with every other."

17. There is no difference between the mode of proof of the offence of conspiracy and that of any other offence, it can be established by direct or circumstantial evidence. (See: Bhagwan Swarup Lal Bishan Lal etc.etc. v. State of Maharashtra AIR 1965 SC 682

18. Privacy and secrecy are more characteristics of a conspiracy, than of a loud discussion in an elevated place open to public view. Direct evidence in proof of a conspiracy is seldom available, offence of conspiracy can be proved by either direct or circumstantial

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evidence. It is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object, which the objectors set before themselves as the object of conspiracy, and about the manner in which the object of conspiracy is to be carried out, all this is necessarily a matter of inference.

19. The provisions of Section 120A and 120B, IPC have brought the law of conspiracy in India in line with the English Law by making the overt act unessential when the conspiracy is to commit any punishable offence. The English Law on this matter is well settled. Russell on crime (12 Ed.Vol. I, p.202) may be usefully noted-

"The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties, agreement is essential. More knowledge, or even discussion, of the plan is not, per se, enough."

Glanville Williams in the "Criminal Law" (Second Ed. P. 382) states-

"The question arose in an Iowa case, but it was discussed in terms of conspiracy rather than of accessoryship. D, who had a grievance against P, told E that if he would whip P someone would pay his fine. E replied that he did not want anyone to pay his fine, that he had a grievance of his own against P and that he would whip him at the first opportunity. E whipped P. D was acquitted of conspiracy because there was no agreement for 'concert of action', no agreement to 'co-operate'."

The learned Solicitor General also referred to the summing up by Coleridge, J. in ***R. Vs. Murphy (ER)*** **at page 508**.

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79. Ultimately, the learned Solicitor General relied on the celebrated decision in ***State (NCT of Delhi) Vs. Navjot Sandhu [2005 (11) SCC 600]***. On this basis, it was urged by the learned Solicitor General that the circumstances which were found to have been established beyond doubt, led only to one conclusion that the appellant was responsible for the incident of shooting inside the Red Fort on the night of 22.12.2000, in which three Army soldiers were killed. This was nothing but a well planned conspiracy and the responsibility of this ghastly incident was taken up by Lashkar-e-Toiba. This was undoubtedly a conspiracy, well planned, alongwith some other militants including the deceased accused Abu Shamal who was also killed in the exchange of fire with the police. For this conspiracy, the appellant illegally entered India and he was receiving huge amounts of money to make it possible for himself to execute his design. It is for this purpose that he falsely created and forged number of documents. The whole idea was to legitimize his stay in India for which he got prepared a false ration card, a false license and also opened bank accounts with the false addresses. He had taken adequate care to conceal his real identity. He described himself as a trader and a resident of Jammu, which was also a patent falsehood. He went on to the extent of getting married allegedly on the basis of an advertisement. He also spent huge amounts without there being any source of money and deposited lakhs of rupees in some other bank accounts. It may be that those

persons, in whose accounts he deposited money, might have been acquitted getting benefit of doubt regarding their complicity, but the fact remains that the appellant had no explanation to offer. Similarly, barely 14 days prior to the incident, he got married to Rehmana Yusuf Farukhi, another accused who was acquitted. It may be that Rehmana Yusuf Farukhi also did not have any idea and, therefore, was granted the benefit of doubt; however, that does not, in any manner, dilute the nefarious plans on the part of the appellant. He collected highly sophisticated arms and ammunition and some arms were proved to have been used in the attack on the Red Fort. The attack on the soldiers staying in the Army Camp at Red Fort was nothing but a war waged against the Government of India. It was clear that there were more than one person. Therefore, it was nothing but a well planned conspiracy, in which apart from the appellant, some others were also involved.

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80. The learned Solicitor General then urged that the appellant was rightly convicted for the offences punishable under Sections 120-B, 121-A, 121, IPC, Section 120-B read with Section 302, IPC, Sections 468/471/474, IPC, Sections 186/353/120-B, IPC and Section 14 of the Foreigners Act.

81. There was no argument addressed before us to the effect that there was no conspiracy. The only argument advanced was that the appellant

alone could not have been convicted for the conspiracy, since all the other accused were acquitted. We have already stated the principles which have emerged from various decisions of this Court. Once the prosecution proves that there was a meeting of minds between two persons to commit a crime, there would be an emergence of conspiracy. The fact that barely within minutes of the attack, the BBC correspondents in Srinagar and Delhi were informed, proves that the attack was not a brainchild of a single person. The information reached to BBC correspondent at Srinagar and Delhi sufficiently proves that there was a definite plan and a conspiracy. Again the role of other militants was very clear from the wireless message intercepted at the instance of BSF. Unless there was a planning and participation of more than one persons, all this could never have happened. For the execution of the nefarious plans, the militants (more than one in number) entered under the guise of watching *Son et Lumiere* show and while doing so, they smuggled arms inside the Red Fort. It is after the show taking the advantage of the darkness, they started shooting, in which they first killed the Sentry and then the other two persons who were the soldiers and then taking further advantage of the darkness, they scaled over the wall and fled. All this had to be a pre-planned attack for which the militants must have made a proper reconnaissance, must have also found out the placements of Army barracks and the escape route from the backside of the Red Fort. It was not a stray attack of some

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desperados, which was undoubtedly an extremely well-planned attempt to overawe the Government of India and also to wage war against the Government of India. It has already been held in ***Kehar Singh Vs. State (Delhi Admn.) [AIR 1988 SC 1883]*** that the evidence as to the transmission of thoughts sharing the unlawful design would be sufficient for establishing the conspiracy. Again there must have been some act in pursuance of the agreement. The offence under Section 121 of conspiring to wage a war is proved to the hilt against the appellant, for which he has been rightly held guilty for the offence punishable under Sections 121 and 121-A, IPC. The appellant is also rightly held guilty for the offence punishable under Section 120-B, IPC read with Section 302, IPC. In the aforementioned decision of Navjot Singh Sandhu it has been held by this Court:

> "Thus the conspirator, even though he may not have indulged in the actual criminal operations to execute the conspiracy, becomes liable for the punishment prescribed under Section 302, IPC. Either death sentence or imprisonment for life is the punishment prescribed under Section 302, IPC."

In this view, we agree with the verdict of the trial Court as well as the High Court.

82. No other point was argued before us at the instance of the defence. That leaves us with the question of punishment. The trial Court awarded

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the death sentence to the appellant Mohd. Arif @ Ashfaq for the offence under Section 121 IPC for waging war against the Government of India. Similarly, he was awarded death sentence for the offence under Section 120B read with Section 302, IPC for committing murder of Naik Ashok Kumar, Uma Shankar and Abdullah Thakur inside the Red Fort on 22.12.2000. For the purpose of the sentences, the other convictions being of minor nature are not relevant. On a reference having been made to it, the High Court ultimately confirmed the death sentence. The High court also concurred with the finding of the trial Court that this was a rarest of the rare case. The High Court has observed that the counsel appearing for him did not highlight any mitigating circumstance justifying the conversion of death sentence to life imprisonment perhaps because the learned counsel was conscious of the futility of the submission. The High Court specifically found that accused had hatched a conspiracy to attack the Indian Army stationed inside the national monument for protecting it from any invasion by the terrorists and had executed also that conspiracy with the help of his other associate militants and in that process they had killed three army Jawans and more could also have lost their lives but for the immediate retaliation by the members of the Quick Reaction Team of the Army. In that view, the High Court concurred with the finding of this being a rarest of the rare case. The question is whether we should give the same verdict in respect of the death sentence.

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83. This was, in our opinion, a unique case where Red Fort, a place of paramount importance for every Indian heart was attacked where three Indian soldiers lost their lives. This is a place with glorious history, a place of great honour for every Indian, a place with which every Indian is attached emotionally, and a place from where our first Prime Minister delivered his speech on 15th August, 1947, the day when India broke the shackles of foreign rule and became a free country. It has since then been a tradition that every Hon'ble Prime Minister of this country delivers an address to the nation on every 15th August to commemorate that great event. This Fort was visualized and constructed by Mughal Emperor Shahjahan who is known as "Shahjahan the builder". It took nine years for its completion. It was here that Shahjahan ascended the Throne on 18th April, 1648 amidst recitation of sacred Aayates of Holy Quran and mantras from Hindu scriptures. The great historical monument thereafter saw the rule of number of Mughal Emperors including Aurangzeb. It also saw its most unfortunate capture by Nadir Shah. It was in 1837, the last Mughal Emperor Bahadurshah Zafar II took over the Throne. It must be remembered that it was during the empire of Bahadurshah Zafar II that the first war of Independence was fought. The Red Fort became the ultimate goal during that war of Independence which broke out in the month of May, 1857. The Fort breathed free air for a brief period. But ultimately in the month of September, 1857, it was captured by the British. Red Fort is not

just one of the several magnificent monuments that were built by the Mughal emperors during their reign for nearly three centuries. It is not just another place which people from within and outside the country visit to have a glimpse of the massive walls on which the Fort stands or the exquisite workmanship it displays. It is not simply a tourist destination in the capital that draws thousands every year to peep and revel into the glory of the times by gone. Its importance lies in the fact that it has for centuries symbolised the seat of power in this country. It has symbolised the supremacy of the Mughal and the British empires just as it symbolises after independence the sovereignty of the world's largest democratic republic. It is a national symbol that evokes the feelings of nationalism amongst the countrymen and reminds them of the sacrifices that the freedom fighters made for the liberation of this country from foreign rule. No wonder even after the fall of the fort to the British forces in the first war of independence in 1857 and the shifting of the seat of power from the Red Fort to the Calcutta and later to New Delhi, Pt. Jawahar Lal Nehru after his historic "Tryst with Destiny" speech unfurled the tricolor from the ramparts of the Red Fort on 15th August 1947. That singular event symbolised the end of the British rule in this country and the birth of an independent India. An event that is relived and re-acted every succeeding year since 1947, when every incumbent Prime Minister addresses the nation from atop this great and historic Fort reminding the countrymen of the importance of

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freedom, the need for its preservation and the values of constitutional democracy that guarantees the freedoms so very fundamental to the preservation of the unity and integrity of this country. An attack on a symbol that is so deeply entrenched in the national psyche was, therefore, nothing but an attack on the very essence of the hard earned freedom and liberty so very dear to the people of this country. An attack on a symbol like Red Fort was an assault on the nation's will and resolve to preserve its integrity and sovereignty at all costs. It was a challenge not only to the Army battalions stationed inside the monument but the entire nation. It was a challenge to the very fabric of a secular constitutional democracy this country has adopted and every thing that is good and dear to our countrymen. It was a blatant, brazenfaced and audacious act aimed to over awe the Government of India. It was meant to show that the enemy could with impunity reach and destroy the very vitals of an institution so dear to our fellow countrymen for what it signified for them. It is not for no reason that whosoever comes to Delhi has a yearning to visit the Red Fort. It is for these reasons that this place has become a place of honour for Indians. No one can ever forget the glorious moments when the Indians irrespective of their religions fought their first war of Independence and shed their blood. It was, therefore, but natural for the foreigner enemies to plan an attack on the army specially kept to guard this great monument. This was not only an attack on Red Fort or the army stationed therein, this

was an arrogant assault on the self respect of this great nation. It was a well thought out insult offered to question the sovereignty of this great nation by foreign nationals. Therefore, this case becomes a rarest of rare case. This was nothing but an undeclared war by some foreign mercenaries like the present appellant and his other partner in conspiracy Abu Shamal and some others who either got killed or escaped. In conspiring to bring about such kind of attack and then carrying out their nefarious activities in systematic manner to make an attack possible was nothing but an attempt to question the sovereignty of India. Therefore, even without any reference to any other case law, we held this case to be the rarest of rare case. Similar sentiment was expressed by this Court in ***State v. Navjot Singh Sandhu*** **[2005 (11) SCC 600]**. The Court expressed its anguish in the following words.

> "In the instant case, there can be no doubt that the most appropriate punishment is death sentence. That is what has been awarded by the trial Court and the High Court. The present case, which has no parallel in the history of Indian Republic, presents us in crystal clear terms, a spectacle of rarest of rare cases. The very idea of attacking and overpowering a sovereign democratic institution by using powerful arms and explosives and imperiling the safety of a multitude of peoples' representatives, constitutional functionaries and officials of Government of India and engaging into a combat with security forces is a terrorist act of gravest severity. It is a classic example of rarest of rare cases. This question of attack on the army and the killing of three soldiers sent shock waves of indignation throughout the country.

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> We have no doubt that the collective conscience of the society can be satisfied by capital punishment alone."

We agree with the sentiments expressed in ***Navjot Singh Sandhu's case (cited supra):***

> "The challenge to the unity, integrity and sovereignty of India by these acts of terrorists and conspirators, can only be compensated by giving the maximum punishment to the person who is proved to be the conspirator in this treacherous act."

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84. A conspiracy to attack the Indian Army unit stationed in Red Fort and the consequent un-provoked attack cannot be described excepting as waging war against India and there can be no question of compromising on this issue. The trial Court has relied on number of other cases including the case of ***Navjot Singh Sandhu (cited supra)*** as also the case of ***State of Tamil Nadu v. Nalini*** **[AIR 1999 SC 2640]**. We do not want to burden the judgment by quoting from all these cases. However, we must point out that in ***Machhi Singh v. State of Punjab's case*** **[1983 (3) SCC 470]** a principle was culled out that when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, same can be awarded. The fourth test includes the crime of enormous proportion.

For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community or locality are committed. Applying both the tests here we feel that this is a case where the conscience of the community would get shocked and it would definitely expect the death penalty for the appellant. Three persons who had nothing to do with the conspirators were killed in this case. Therefore, even ***Machhi Singh's case (cited supra)*** would aptly apply. Even in ***Bachan Singh v. State of Punjab*** **[AIR 1980 SC 898]** case, this Court referred to the penal statutes of States in USA framed after ***Furman v. Georgia*** **(1972) 33 L Ed 2d 346: 408 US 238)** in general and Clause 2(a),(b), (c) and (d) of the Indian Penal Code (Amendment) Bill duly passed in 1978 by Rajya Sabha. Following aggravating circumstances were suggested by the Court in that case as aggravating circumstances:-

> "(a) If the murder has been committed after previous planning and involves extreme brutality; or
>
> (b) if the murder involves exceptional depravity; or
>
> (c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed-
>
> (i) while such member or public servant was on duty; or
>
> (ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such

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member or public servant, as the case may be, or had ceased to be such member of public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under S.43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under S.37 and S.129 of the said Code."

The Court then observed that there could be no objection to the acceptance of these indicators. The Court, however, preferred not to fetter the judicial conscience by attempting to make an exhausting enumeration one way or the other. The circumstance at "(c)" would be fully covering the present case since the three soldiers who lost their lives were the members of the armed forces and Abdullah one of them was actually doing his Sentry duty though there is no evidence available about as to what duty the other two were doing. But there is no reason to hold that their murder was in any manner prompted by any provocation or action on their part. This would be an additional circumstance according to us which would justify the death sentence. During the whole debate the learned defence counsel did not attempt to bring any mitigating circumstance. In fact, this is a unique case where there is one most aggravating circumstance that it was a direct attack on the unity, integrity and sovereignty of India by foreigners. Thus, it was an attack on Mother India. This is apart from the fact that as many as three persons had lost their lives. The conspirators

had no place in India. Appellant was a foreign national and had entered India without any authorization or even justification. This is apart from the fact that the appellant built up a conspiracy by practicing deceit and committing various other offences in furtherance of the conspiracy to wage war against India as also to commit murders by launching an unprovoked attack on the soldiers of Indian Army. We, therefore, have no doubts that death sentence was the only sentence in the peculiar circumstance of this case. We, therefore, confirm the judgment of the trial Court and the High Court convicting the accused and awarding death sentence for the offences under Section 302, IPC. We also confirm all the other sentences on all other counts and dismiss these appeals.

…………………………J.

[V.S. Sirpurkar]

…………………………J.

[T.S. Thakur]

August 10, 2011;

New Delhi.

SUPREME COURT OF INDIA
JUDGMENT