IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 975 of 2007

With

CRIMINAL APPEAL No. 976 of 2007

With

CRIMINAL APPEAL No. 977 of 2007

With

CRIMINAL APPEAL No. 978 of 2007

With

CRIMINAL APPEAL No. 979 of 2007

With

CRIMINAL APPEAL No. 980 of 2007

With

CRIMINAL APPEAL No. 981 of 2007

With

CRIMINAL APPEAL No. 984 of 2007

With

CRIMINAL APPEAL No. 985 of 2007

With

CRIMINAL APPEAL No. 986 of 2007

With

CRIMINAL APPEAL No. 1049 of 2007

With

CRIMINAL APPEAL No. 1188 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA

HONOURABLE MR.JUSTICE J.C.UPADHYAYA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MOHD.PERVEZ ABDUL KAYUUM SHAIKH & ORS- Appellants

Versus

STATE OF GUJARAT & 1 - Opponents

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Appearance :
MR SM VATSA with MS NITYA RAMAKRISHNAN, MR BM GUPTA, MS BENAZIR HAKIM & MR LR PATHAN for Appellants
MR JM PANCHAL SPECIAL PUBLIC PROSECUTOR with MR KJ PANCHAL for Opponent No.1 State
MR YN RAVANI for Opponent : 2

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA
and
HONOURABLE MR.JUSTICE J.C.UPADHYAYA

Date :29/08/2011

CAV JUDGMENT

(Per : MR.JUSTICE D.H.WAGHELA)

1. All these appeals are preferred from the judgment dated 25.6.2007 of learned Special Judge (POTA) at Ahmedabad in Special POTA Case No.10 of 2003. Out of total 19 persons accused in the criminal case, 4 have been absconding and trial of 3 accused persons had been separated upon the provisions of the Prevention of Terrorism Act, 2002 ("POTA", for short) being questioned in another forum. The remaining 12 accused persons who were tried have been convicted for various offences under the POTA, IPC and the Arms Act and sentenced to various terms of imprisonment ranging from 5 years to life with varying amounts of fine. With the record of case running into more than 10,000 pages, learned Special Judge has delivered an elaborate judgment running into 751 pages. During the course of trial, prosecution examined 122 witnesses and produced and proved 209 documents, besides 252 other documents which were exhibited and formed part of the record. The accused persons, appellants herein, examined eight witnesses and two witnesses were examined as court witnesses. For the sake of convenience, prosecution witnesses are referred herein as "**PW**", defence witnesses are described as "**DW**" and court witnesses are mentioned as "**CW**" ; and the accused persons, appellants herein, are described herein as under:

Sr. Name of the accused Described Appeal

No. as No.

1 MOHMED ASGAR ALI A-1 986/07

2 MOHMED ABDUL RAUF A-2 984/07

3 MOHMED SHAFIUDDIN A-3 985/07

4 KALIM AHMED @

KALIM MULLA A-4 977/07

5 ANAS MACHISWALA A-5 980/07

6 MOHMED YUNUS SARESHWALA A-6 981/07

7 REHAN PUNTHAWALA A-7 978/07

8 MOHMED RIYAZ A-8 979/07

9 MOHMED PARVEZ SHAIKH A-9 975/07

10 PARVEZ KHAN PATHAN A-10 1049/07

11 MOHMED FARUQ A-11 1188/07

12 SHAH NAVAZ GANDHI A-12 976/07

2. Broad contours of the case are that, on 11.3.2003, one Shri Jagdish Tiwari, Viswa Hindu Parishad (VHP) leader of Ahmedabad, was fired at around 9.15 p.m. at his medical shop. His complaint was registered at Bapunagar Police Station as FIR I-C.R.No.101 of 2003 for the offences punishable under sections 307, 34 of IPC and section 25 (1) (a) (b) of the Arms Act. In another incident, Shri Haren Pandya, Ex-Home Minister of the Government of Gujarat, was shot at and found in his car near Law Garden, Ahmedabad in the early

hours of 26.3.2003. Pursuant thereto, FIR bearing I-C.R.No.272 of 2003 was registered at Ellisbridge Police Station on the same day and initial investigation for two days remained with that police station. With the consent accorded by the Government of Gujarat vide Notification dated 26.3.2003 and with the consent of the Government of India vide Cabinet Secretary's Notification dated 28.3.2003, the case was transferred to the Central Bureau of Investigation (CBI) and then the case was re-registered by CBI on 28.3.2003. The investigating officer came to Ahmedabad by flight and started the investigation on the same date. Then the earlier case of attempt on the life of Shri Jagdish Tiwari was also transferred to CBI by Notification dated 28.4.2003 of the State Government and Notification dated 29.5.2003 of the Central Government. Thereafter, these two separate cases registered by the local police stations were treated as part of the same conspiracy to strike terror amongst a section of people and one chargesheet was filed for the criminal case which came to be registered as Special POTA Case No.10 of 2003. As a larger conspiracy to strike terror was alleged, provisions of POTA were invoked in the first case on 11.6.2003 and in the second case of murder of Shri Pandya on 2.6.2003. The cases were made over to Special Court on 8.9.2003. The Court framed charges (Ex.57) on 11.12.2003 against 15 accused persons for the offences punishable under sections 120-B, 302, 307, 201 read with section 120-B of IPC, sections 25 (1-B)(a) and 27(1) and section 5 of the Arms Act and under section 3 (1), 3 (2), 3 (3), 3 (4) and 4 of the POTA. The accused persons pleaded not guilty. The charges under POTA were required to be dropped against A-15, A-16 and A-17 at the instance of the Central POTA Review Committee and further proceeding against them had to be stayed pursuant to an order of the Supreme Court in Criminal Appeal No.1113 of 2005 in the case of Mohmad Hussain Abdul Rehman Shaikh v. Union of India.

3. After noting the prosecution case and submissions of learned counsel appearing on both sides, the trial Court identified the following issues for its determination:

"*(1) Whether the prosecution proves beyond reasonable doubt hatching of conspiracy of killing Hindu leader by the accused alongwith the absconding accused in the aftermath of Godhra riots to strike terror in a section of people, viz. Hindus and thereby committed offence under section 3 (1) of POTA and section 120-B of IPC?*

(2) Whether the prosecution proves beyond reasonable doubt that an attempt to the life of Shri Jagdish Tiwari by the accused on dt.11.3.2003 at Tilak Medical Store, Bapunagar, Ahmedabad was in pursuance of the said criminal conspiracy with an intention to kill him so as to strike terror and thus committed an offence under section 307 read with section 120-B of IPC and/or under section 3 (3) of POTA?

(3) Whether the prosecution proves beyond reasonable doubt that in pursuance of the said criminal conspiracy, A-1 Asgar Ali committed culpable homicide amounting to murder of Shri Haren Pandya on dt.26.3.2003 at Law Garden, Ahmedabad for he being the political leader of Hindus and thereby they all committed offence under section 302 read with section 120-B of IPC and/or offence under section 3 (1) read with section 3 (3) of POTA?

(4) Whether the prosecution proves beyond reasonable doubt that the accused carried, possessed and used the arms and ammunitions for committing the aforementioned acts in pursuance of the criminal conspiracy and thereby committed offences under the Arms Act?

(5) Whether the prosecution proves beyond reasonable doubt the possession of unauthorized arms in the notified area and thereby committed the offence under section 4 of POTA?"

4. After elaborate analysis and discussion of the evidence, it is concluded in the impugned judgment that prosecution succeeded in proving the attack with fire arm on Shri Jagdish Tiwari (PW 39) on 11.3.2003 and in identifying A-1 and A-3 as the persons who, pretending to be customers, had opened fire at him.

4.1 As for the second case of murder of Shri Pandya, the trial Court, relying upon corroboration by Shri Snehal (CW.1) Ex. 876, believed the version of sole eye witness, namely, Anilram Yadram Patel (PW 55) Ex.386; and after elaborate examination of other evidence, opinion of experts, discovery and recovery of weapons, mobile phone records, internet communication excerpts, confessions and deposition of the investigating officer (I.O.), came to the conclusion that the offences as aforesaid were committed by the accused persons. The conclusions of the trial Court are recorded in the following terms:

"*32. From the entire discussion held hereinabove, this evidence can be summed up briefly as follows:*

1. To avenge the atrocities perpetrated on the Muslims in the aftermath of the Godhra incident where hundreds of them lost their lives, livelihood as well as valuables, religious leaders of Muslim community used the

aroused feelings of youth of this community to retaliate against the Hindus.

2. *The incident of burning of coach in Sabarmati Express at Godhra Railway Station on dt.27.02.2002 resulted into large scale rioting in the State and an atmosphere of vertical divide between the two communities could be witnessed. Simultaneously, blasts in AMTS buses in the routes where dominantly Hindus travelled gave rise to the feeling of emboldening. As that conspiracy got over with the commission of the blast and tried separately, the same is not dealt with in this decision. This had happened with the blessings of absconding accused Mufti Sufiyan, a cleric at Lal Masjid and his close associates, some of whom were the straunch (Sic) followers of this cleric.*

3. *It was since perceived that this fundamentalist movement for avenging atrocities and creating terror would necessitate proper training in arms and ammunitions as well as in other fields, the same had been planned by instigating and persuading the youth from Gujarat and Hyderabad which had been masterminded by Mufti Sufiyan (A-13) with the defamed criminal Rasulkhan Party (A-18) who made Hyderabad his base and later on chose to go away to the neighbouring country, Pakistan.*

4. *It had been repeatedly inculcated into the minds of those who were imparted the training that the target was to avenge the atrocities on Muslims in Gujarat and they needed to be in touch with those at Pakistan and there (Sic) targets were Hindu leaders, some of the police officers and organizations and structure of economic importance.*

5. *A noted criminal of Hyderabad Asgar Ali (A-1) after his training at Pakistan was assigned the task of traveling to Gujarat for this very purpose who*

remained in constant touch with those who chose to plan the minutest details in respect of the said criminal conspiracy.

6. *This man (A-1) when brought to Ahmedabad, he was shifted to different places of hideouts, ostensibly on the ground of discomfort and other issues possibly to see that his identity would not get disclosed anywhere.*

7. *All those who have been charged and against whom the proof has come before the Court have not necessarily participated at each stage of hatching the conspiracy and thereafter, executing the same but different roles had been assigned to each of them and those who were the kingpins were Mufti Sufiyan, Rasulkhan Party and Sohailkhan who all have succeeded in absconding to the neighbouring country and the red-corner notices issued against each of them coupled with the non-bailable warrants remain unexecuted till the date.*

8. *Others who lent a major support to the execution of the said conspiracy were Mulla Kaleem @ Karimi and Anas Machiswala whose strong fundamentalist beliefs of Islam drove them to execute the said task with meticulous exactitudness (Sic).*

9. *the leaders of VHP and BJP were named as targets with an intention to create terror amongst a section of Hindu people who would naturally become apprehensive on elimination of their leaders one by one. None of the accused had any personal vengeance towards either of these victims and they were motivated by ill intentions of spreading terror in a particular section of society.*

10. *It was virtually kept secret from many of the co-accused even as to from where this target was being decided, but the same aspect was being disclosed to some of them by Sohailkhan, who acted in connivance with Mufti Sufiyan.*

11. The logistic support had been extended all along by most of these persons, firstly when Shri Jagdish Tiwari (PW.39) was the target and thereafter, when the name of Shri Haren Pandya was disclosed and each conspirator/ co-accused performed his assigned role with amazing perfection.

12. Meticulous and elaborate planning in pursuance of the said conspiracy gets reflected clearly in chronological stages which can be broadly summarized in carrying out the reccee (reconnaissance) of the targets, collection of the arms and ammunitions, introduction of assailants with the victims in clandestine manner, providing assailants with two wheelers, ensuring that they were stolen vehicles, changing the number plates of the said vehicles, providing mobile phones to the accused for remaining in touch with one another and frequent change of SIM cards, for safeguard of the assailants, use of three BSNL SIM cards during the commission of murder only, care taken of changing cloths worn at the time of incident, collecting weapons and ammunitions back on completion of the task and their careful hiding, leaving the stolen vehicles at public places and joining "Jammat" on hearing arrest of some of the co-accused and entries in fake names at guest houses, hotels and Muslim Musafirkhana and arrest of many other accused while attempting to leave in suspicious condition which voluminously and collectively prove complicity and intention of the accused.

13. Employment of scientific tools during investigation to prove handwritings of accused at hotel and guest house registers through the handwriting experts, opinion of ballistic expert in matching of crime bullets and test fired bullets as well as matching of firearm with the bullets recovered from the body of the injured and the deceased, report of CFSL and FSL by the biological and Serological Department, testimonies of CFSL

Experts and record maintained by them are strong corroborative evidences proved by the prosecution.

It is sad to conclude that to push the frontiers of 'Jihad' in the country pretended victimhood has been made a convenient cover to unleash manufactured rage, with the aim of pointing the criminals as victims."

5. It may be pertinent to note at this stage that there was also registered a POTA case against some of the accused for bomb blasts on 29.05.2002 in AMTS (local public transport) buses, which was known as "tiffin bomb case", and which was tried as POTA Case No.7 and 8 of 2003 in which A-6, A-7, A-8, A-9 and A-12 were acquitted by the POTA Court and no acquittal appeals were filed by the State; whereas A-4 and A-5 were convicted in that case and their conviction was not only upheld but this Court had enhanced in appeal the sentence of imprisonment from ten years to life. Other POTA cases for conspiracy without any overt act were also registered and tried as POTA Cases No. 12 of 2003, 2 of 2004 and 2 of 2005 in which A-4 to A-12 herein were again convicted. Investigation in all these cases really and effectively progressed only after A-6, A-7, A-8 and A-9 were arrested on 3.4.2003 from a public place on a secret information. During custodial interrogation of A-6, A-7, A-8 and A-9 after their arrest on 3.4.2003 and recoveries and discoveries being made at their instance, confessions of all the 12 accused persons were recorded under section 32 of POTA between 4.6.2003 to 24.6.2003. These dates are material insofar as, as noted earlier, POTA was applied in the case of murder of Shri Pandya on 2.6.2003 and in the case of attempt on life of Shri Jagdish Tiwari on 21.6.2003. The confessions were subsequently retracted by all the appellants herein.

6. By now, out of the 12 appellants, A-3 and A-12 have already undergone their sentence and A-2, convicted only for the offence under section 3(3) of POTA, has been released on bail by order of the Supreme Court after undergoing nearly 5 years of imprisonment. A-4 and A-5 sentenced to life

imprisonment are also undergoing life imprisonment upon conviction in the tiffin bomb case. The remaining accused persons viz. A-1, A-6, A-7, A-8, A-9, A-10 and A-11 are undergoing life imprisonment pursuant to the present case only , since nearly 8 years, without any parol or furlough, with restraint orders of the State Government under section 268 of Cr.P.C. Under such circumstances, it was submitted by learned counsel, on behalf of the appellants that, without prejudice to their contentions, if the appeals were partly allowed on merits so as to set aside conviction for the offence under section 302 of IPC and the sentences were reduced accordingly, the appellants would not and do not insist upon acquittals or decision on merits regarding convictions for the other offences. Learned counsel for the respondents have expressed no objection to acceptance of that submission made on behalf of the appellants, with the assertion that the impugned judgment was required to be confirmed in toto.

7. The impugned judgment has been assailed by learned counsel for the appellants, mainly on the following grounds:

(a) that the conclusions drawn by the trial Court in the impugned judgment are perverse, irrational and illegal;

(b) that the investigation has been skewed, blinkered and so inept as to amount to dereliction of duty on the part of the investigating agency;

(c) that material witnesses have not been allowed to depose before the Court and real facts of the case have not been brought before the Court;

(d) that the theory of conspiracy to commit serious offences with a view to striking terror has been based only on confessions which were illegally recorded and subsequently retracted;

(e) that the sole eye witness, PW.55, in Shri Haren Pandya murder case could not have been relied upon in view of inherent contradictions in his deposition and its inconsistency with the ballistic and medical evidence;

(f) that the fire arm injuries indicated by *post-mortem* report on the body of Shri Haren Pandya could not have been inflicted by firing five shots from the small opening of glass of the closed door of Maruti car in which body of the deceased was found;

8. Relevant and important evidence on record, to the extent it is necessary for appreciating the rival arguments, may now be examined. The sole eye witness in the second case of murder of Shri Haren Pandya, applies his thumb impression for signature and he is described in the impugned judgment as "rustic". He, namely, Anil Y.Patel, aged 39, was examined as PW.55 at Ex.386. He, *inter alia*, deposed that he was doing his business from a handcart near Law Garden and to save it from being taken away by the Municipal Corporation, he kept his cart (larry) in the compound of "Chitty Bang" owned by Nanubhai (CW.1) and slept with it on the night of 25.3.2003. When he woke up in the morning of 26.3.2003 and washed his face, he came to the gate of Chitty Bang and found one Kanaiyalal, who was attending his few customers for selling snack. After his customers left, Kanaiyalal came face to face with the witness who remained inside the gate. At that time, the witness saw a white Maruti car coming from Gajjar Hall Square on his left and it was parked where the witness used to keep his cart. He deposed that that car belonged to the deceased and he was alone inside. While the deceased was rolling up the glass of window of his car, a boyish person came from the

same direction and fired 4 or 5 shots from the gap which was still open while the deceased was rolling up the glass. He deposed that Shri Pandya fell on his back and his legs went up. He shouted “what are you doing” and “Kanaiya flee, Kanaiya flee”. Thereupon, Kanaiyalal fled with his larry and the assailant fled back towards Gajjar Hall Square. One Ramesh, who used to clean the area with his broom, came running to the witness to ask what had happened. According to the witness, the assailant might be aged between 25 and 30 and his height might be around 5ft. 6 inches, his face was neither dark nor fair and he was dishevelled while his hair were combed on both sides with a pleat in the middle. He was lean, having a long moustache and deep-set eyes. His cheeks were curving inside and his chin and neck were long. He was wearing a coffee-colour shirt and upper part of his body was seen by the witness. Then the witness sat in the compound of Chitty Bang for half an hour and then went towards the other gate of Thakorbhai Desai Hall which opened towards Gajjar Hall Square. There one Shukla Chacha was sitting in his rikshaw. The witness told him that Shri Haren Pandya has been killed and asked him to call police to whom he can talk or he may be accompanied to a police post. But Shukla Chacha replied that he had seen the house of Nanubhai (CW.1) and they were going there. Then they went to CW.1's house and he told Nanubhai that Shri Haren Pandya was killed by 4 or 5 shots at the place where he was keeping his larry. Nanubhai asked them to take tea which was ready and told them that he would be reaching Law Garden. When the witness returned to Law Garden, police had already arrived as also many other people. Then Shri Haren Pandya was shifted to V.S.Hospital by carrying him in a jeep. At around 2.00 – 2.30 in the afternoon some policemen from Ellisbridge Police Station and someone in plain dress had come to ask questions. On the third day from the incident, he was brought by CBI officers to Law Garden and he had shown where he was standing and where the Maruti car was parked. A map was prepared on that basis and the witness had put his thumb impression thereon.

After about one-and-half months thereof, he was called for identification parade and he had caught A-1, after taking a round around him.

8.1 During his cross-examination, PW.55, i*nter alia*, deposed that there were two cars already parked when he was talking to Kanaiyalal and one of them was Shri Haren Pandya's car. He deposed that when he had returned to Law Garden on that day, he had seen the body of Shri Haren Pandya being taken away in the police jeep in a reclining position. He categorically deposed that when he had come to the gate and was talking to Kanaiya in the morning, no car had come and one or two cars were already parked there. He had stated before the CBI that he had asked Shukla Chacha to call Nanubhai as he wanted to tell him that Shri Haren Pandya was shot. He confirmed that Shri Pandya had bent over on the front seat itself. He deposed that he had seen the front windscreen of the car of Shri Pandya as it had come in front of him and had not seen the glasses of the sides. He conceded that a police post was there just behind Law Garden, but he did not go there as he was scared. Nanubhai also did not propose to go to the police station with him. When contradicted with his statement before CBI about the legs of Shri Haren Pandya going up upon being shot, he deposed that knees of Shri Pandya had come up. When asked whether he could see the knees below the steering wheel, he replied that he could see his clothes after he fell. He deposed by himself that he and his brother alternatively stayed at home and at the Chitty Bang near their larry. He admitted that in the premises of Thakorebhai Desai Hall in which Chitty Bang was situated, there was a regular watchman and though he used to keep the keys of Chitty Bang, he was not paid any wages and he did not know the address of its owner Nanubhai (CW.1). In reply to the specific question as to whether the car of the deceased came for parking in front of him, he replied that the car was parked at about 20 to 30 degrees from where he was standing and the car had not come near the gate of Chitty

Bang. He conceded that after returning to Law Garden, he was at Chitty Bang in the afternoon between 1.00 p.m. and 2.30 p.m.and police was also there, but when the police was questioning him at 2.30 p.m., the Maruti car was not at its place. He deposed that he could clearly see the face of Shri Haren Pandya from the windscreen and then, when asked about bleeding from his neck, he stated that he had not seen the face of Shri Pandya at all and had seen only the portion of his chest and knees. When confronted with the photograph of the car, showing opening of the glass, he confirmed that glass was in the same state of being nearly closed and categorically stated that the assailant fired at Shri Pandya from outside the car. He deposed that he never went to the driver's side of the car and only saw Shri Pandya from the front windscreen and went away to the cross-road after having seen that Shri Pandya was wearing white kurta with red lining in it. He also stated that he had not seen kurta of the deceased becoming red with blood. He also categorically deposed that he had seen that Shri Pandya had died and he had told the same thing to Shukla Chacha. He was also categorical in deposing that he had walked away from the spot after witnessing the scene of offience and chosen to sit on the other side of the compound. He stated that Shri Haren Pandya had a heavy body and height of about 6 ft. He stated to have seen the face of the assailant as he was standing at the gate which is above the ground level by one-and-half feet. He stated that he had known Shri Pandya and had joined a rally which had marched to his house about 8-10 years ago. He denied that the CBI and the police had shown him any sketch of the assailant made on the basis of his description given by him. He further stated that after 4-5 days of the incident, he had gone away to his village in U.P. and returned after about 20 days. He denied the suggestions to the effect that he had not seen the offence at all and he was evasive in his replies when questioned in the cross-examination about identification of A-1 at the time of test identification parade. It was noted by the Court recording the deposition that the witness had taken about 3-4 minutes in the court in identifying A-1. He

categorically denied that Nanubhai had made any phone calls while he had gone to his place and conceded that Nanubhai had come to Chitty Bang at 02.30 p.m. He denied that Nanubhai was asked to provide a witness, but he conceded that on the date of the incident, he had not stayed over for the night and kept his larry closed for next 3-4 days. He also conceded that police had afterwards called Kanaiya and his employer by sending a car and he had also called the sweeper who had come running to him immediately after the incident. He deposed that he could not read even figures and he could not tell the time by looking at a watch. He conceded that the larry stationed at Law Garden was the source of his livelihood and maintenance of his family. He also conceded that he continued to do his business by keeping his larry at the same spot, but he denied that he was under threat of removal of his larry if he did not depose according to the instructions of police. He stated that his larry was taken away at least twice afterwards and if the police or officers of Municipal Corporation were to remove or take away the larries from that area, they would not spare anyone. Remarkably, the time of the offence was revealed by the witness only in reply to a leading question in his cross-examination by saying that it was true that he had stated that Shri Pandya's car had arrived at around 7.30 a.m. And there was nothing in his deposition to suggest that Shukla Chacha even asked or that he told him how the offence was committed. Nor is it deposed that the witness went near the car to peep into the car to identify the occupant or check whether he was still alive.

9. Some corroboration to the above sole eye-witness is sought from the witness called by the Court as CW.1 (Ex.876), who is Snehal @ Nanubhai Edenwala, running the business of children's amusement park called “Chitty Bang” in the compound of Thakorbhai Desai Hall. According to his deposition, both his security guards were on leave on 26.3.2003. Anil (PW.55) was keeping his larries at his place since 4 years and slept thereat. Anil and

Yogesh Shukla had visited his home between 9.15 to 9.30 a.m. on 26.3.2003 and Anil had told him that somebody had killed Shri Haren Pandya in his car by firing bullets at him. Then he made a call to his friend Shri Mukesh Dave who happened to be an office-bearer of All Gujarat Transport Association and also a friend of Shri Haren Pandya. Then he called one Shri Hiten Vasant who was also a common friend. Then Anil and Shukla had taken tea prepared by his wife and after 30-45 minutes of stay, Anil and Shukla had left. Thereafter he received a call from the police department at 2.00 p.m. whereupon he went to his place of business. He deposed that he found Police Inspector shri Shaikh as well as many other policemen in plain dress and uniform. According to him, Police Inspector Shri Shaikh did not record his statement then, but CBI had recorded his statement at his office after 4 days. He, however, also deposed that one person in plain clothes had recorded his statement, but had not taken his signature thereon. In his cross-examination, CW.1 admitted that he was B.Com, LL.B and running the amusement park worth about 30 lakh rupees; and because a few friends whom he had called were more resourceful, he had not himself informed the police about the incident. He could not recollect before the Court that in his statement before the CBI, he had stated that Anil had told him that when he was sitting on the bench, he had also seen one man running away.

9.1 Pursuant to the above deposition, towards the fag-end of the trial, learned Advocate for A-4 to A-9 and A-12 had made an application dated 8.2.2007 (Ex.878) praying to call for the statement of CW.1 allegedly recorded on 26.3.2003. And, that application was rejected by the order below it with the observation as under:

"*As rightly pointed out in the application moved today by the Ld. Advocate for the defence, the Court Witness No.1 Snehal did mention the recordance of his statement on the date of incident by an officer whom he believed was from Crime Branch because of his plain clothes. However, the Court shall also have to look at the evidence of the prosecution and even in principle agreeing to the submissions of Ld. Advocate for the defence that utterances of the I.O. cannot be taken as decisive in the matter as the probative value of the entire evidence shall have to be regarded by the Court at the time of finally concluding all these points raised before the Court, but at the same time with specific questioning also, when there is specific denial on the part of both the I.Os, PW.101 and PW.120 that no such statement having been recorded by any officer of theirs and Crime Branch not being involved in investigating into the matter, the Court is of the opinion that the request to institute an inquiry on the point is not warranted and on cumulative reading of the evidence, if the Court comes to the conclusion of requirement of drawing of adverse inference due to deliberate attempt on the part of the prosecuting agency suppressing any material coming before the Court, the same can be held at an appropriate juncture, but with specific denial on the part of the senior and experienced officers of police and CBI also coming on record, the powers u/s.166 of Cr.P.C. need not be caused to be exercised and hence, this application deserves to be rejected.*"

It may be noted in the above context that PW.101 (Ex.607), Shri Yusuf Shaikh, Police Inspector, had categorically deposed beforehand on 28.7.2006 that he had recorded statement of Nanubhai (CW.1) on 26.3.2003.

9.2 CW.2 (Ex.880), Javed Siraj, DSP, CBI, deposed that it was on 30.3.2003 that Snehal's statement was recorded by him between 1.00 to 2.00 p.m. Investigating Officer Shri Gupta had particularly asked him to record statement of CW.1. He was not given any material or statement of CW.1 recorded

previously and he was told by Shri Gupta that since his shop was near the place of incident, he should go and talk to him. He admitted that Nanubhai had told him in his statement that "*Anil ne bataya Haren Pandya ko goli lagi hai aur woh car mei ulta hoke pade hai"*. According to PW.4 (Ex.159), panchnama (Ex.160) of the car was made at 2.30 p.m. on 26.3.2003 and a mobile phone in vibration and working mode alongwith a key-chain with two keys were found below the seat adjoining the driving seat of the Maruti car. It was also measured and noted that the distance between front-wheel of the car and steel railing of the compound of Thakorbhai Desai Hall was 7 ft. 10 inches. The crime scene visit report of the Mobile Forensic Science Laboratory (Ex.774), *inter alia*, stated that 7 officers of F.S.L., including a photographer, reached the scene of offence at 13.20 on 26.3.2003 and had thoroughly examined the crime scene. On examination of the car, reddish brown stains were observed on the co-driver seat of the car. Preliminary chemical tests of that reddish brown stain revealed the presence of blood. The scratch marks and impact marks on the car were examined thoroughly. Reddish brown stains were also observed on the key of that car which was found on the floor of the car near the co-driver seat. Primary chemical test of that reddish brown stain revealed the presence of blood. The inner and outer sides of that car were chemically tested at few places for the presence of residues of fired ammunition; but presence of residues of fired ammunition could not be detected. Bullet, cartridges, cartridge cases, fired ammunition, fire arms or their parts were not found in the car or near the surrounding open place.

9.3 Radheshyam (PW.85), Ex.509, Police Constable, was patrolling in Navrangpura Police Station area with Police Inspector Shri R.B.Chauhan on 26.3.2003. Upon receiving a message from the control-room to go to Law Garden as something had happened there, they reached the spot and found that there were 5-7 persons near the Maruti car of Shri Pandya and a person

was lying in the car. When 5-6 policemen dragged out the deceased, he recognized him as Shri Harenbhai Pandya. They rushed him to V.S.Hospital in the vehicle used by them for patrolling. He deposed that glass of the driver's side window of the Maruti car was open to the extent of 8 inches. Then he deposed that it was open by about 4 inches and then confirmed that it was as open as appearing in the photograph of the car (Mark 101/D/193/3). He had found the body in the car in such position that the head and the shoulder had slided on to the seat adjacent to the driver's seat; and the legs were slightly pulled up from the knees. Upon being asked about bleeding from the body, he deposed that there was blood on the neck which had trickled from right to left. He further stated that while transferring the body from the car to their jeep, he had not received any blood spot on his hands or clothes; and Shri Pandya was made to sit on the front seat of the jeep, but nowhere had any blood dropped from the body. He also deposed that till Shri Pandya was placed in the stretcher at the hospital, there were sports shoes on his legs. He confirmed that the car was in the same position as shown in the aforesaid photograph and its glasses having sunfilm, one could not look inside.

10. The P.M.Report (Ex.177) described the position of and injuries on the body of the deceased as under:

> "EXTERNAL EXAMINATION:
>
> > "*Dead body is covered with black woolen blanket, white coloured bedsheet, violet x light green x pink coloured vertical lining bedsheet. On removing of coverings, the deceased having following clothings,*
> >
> > *(1)Light maroon x white coloured vertical lining, full sleeved Kurta. (a) One tear is present on front of Kurta, just right lateral to button plate in between first and second buttons*

region (nearer to second button), of size about 3.2 x 2 cm, (b) About 0.8 cm diameter, one, circular, hole with blackening on its surrounding area is present on front of Kurta, in between second and third buttons site, about 1 cm right to button plate and about 1 cm above 3rd button plane. (c) Two, circular, tears, each about 0.8 cm diameter are present on front of Kurta on right nipple area, about 2 cm apart from each other with blackening and blood on its surrounding area. (d) Two about 0.6 cm diameter, circular, hole is present on right sleeve of Kurta, near wrist cuff, near each margin of cuff at button plate. Half of one button is missing. Blackening is seen on back side of cuff surrounding hole. (e) One circular hole, about 0.5 cm diameter is present. On back of right sleeve, abut 3 cm above wrist cuff and about 5 cm away from button plate. Kurta is found cut on front of its entire length at its mid. Dry blood and clots are present on front aspect of kurta on either sides, at midplane, over collar region. Dry blood spots seen at various places on both sleeves and on back of kurta.

(2)White coloured lengha. About 0.9 cm diameter, one, circular hole with blackening is present on lengha on right side on back, about

3 cm right to midline at scrotal area.

IDENTIFIED BODY

Dry blood spots are present at various parts of lengha. Blackening seen on front of right leg region of lengha at its mid. Blackening is present on back of lengha at right knee region. Blood stains seen on back of upper part of lengha. Few spots of dry blood are present on other parts also. Urine and semiral stains are present on front of lengha.

(3)White coloured underwear of "DORA" trade mark. About 0.8 cm diameter, one circular hole is seen on right side of underwear on its lower part on front with blood stains on area corresponding to scrotum.

(4)White coloured handkerchief.

(5) Present on right wrist.

(6)Ornament: One white coloured metal ring with open ends is present in right middle finger.

(10) Condition of body –

Well built and well nourished dead body at room temperature.

(11) Rigor Mortis

- Rigor mortis developed in muscles of entire body.

(12) Extent and signs of decomposition: presence of Post Mortem lividity on buttocks, loins back and things or any other part. Whether bullae present and the nature of their contained fluid. Condition of the cuticle.

Post mortem lividity found on back of the body, faint and fixed.

(13) Features: Whether natural or swollen, state of eyes, position of tongue, nature of fluid (if any) oozing from mouth, nostrils or ears.

Eyes close.

Mouth close.

Tongue within Oral cavity.

cotton plug present in both nostril.

Surgical dressing are present on right chest below nipple, right side of neck just above right clavicle, and on dorsum of right hand. Dry blood stains are present on front of neck region and front of right chest.

(14) Condition of skin: Marks of blood, etc. in suspected drowing the presence or absence of cutisanserina to be noted.

(15) Injuries to external genitals, indication of purging.

As described in column No.17.

(16) Position of limbs – Especially of arms and of fingers in suspected sence or absence of sand or earth within the nails or on the skin or hands and feet.

Nothing Significant.

(17) Surface wounds and injuries*:* Their natural position, diamensions (measured) and directions to be accurately stated their probable age and causes to be noted

(1) About 0.8 cm diamater, punch red contused lacerated entry wound with inverted edges is present on lower part of front of neck on right side, about 1 cm above and 2 cm right to medial end of right clavicle. Blackening is seen on skin surrounding the wound.

(2) About 0.8 cm diameter, puch red contused lacerated entry would with inverted edges is present on front of right chest, about 1.2 cm right to mid plane over right 2nd intercostal space.

(3) About 0.8 cm diameter, punch red contused lacerated entry wound with inverted edges is present on front of right chest, 5 cm below and 1 cm left to right nipple.

(4) About 0.8 cm diameter, punch red contused lacerated entry wound with inverted edges is present front of right chest, 0.5 cm below and 3 cm right to above mentioned external injury No.(3).

(5) About 0.8 cm diameter, punch red contused lacerated entry wound with inverted edges is present on back of right hand, 2 cm proximal to junction of index and middle fingers. Blackening of skin is seen surrounding the wound.

(6) Lacerated wound with everted margin is present on front of right forearm at above junction of upper 2/3 to lower 1/3rd going obliquely downward to medially, 2 cm x 1 cm

(7) 0.5 cm diameter, circular, punch lacerated wound with inverted margins present on lower part of left scrotum, 1 cm left midplane (scrotal raphe) covered with clot.

(8) 0.4 cm x 0.4 cm, red coloured, abrasion present on mid of lateral aspect of midphalynx of right middle finger.

X-rays examination is done of skull, neck, chest, abdomen with KUB and Pelvis with thigh bones, right hand and right forearm.

(18) Other injuries discovered by external examination or palpation such as fractures etc.

Nothing significant.

Can you say definitely that the injuries shown against Serial No.17 and 18 are ante-mortem injuries?

Yes, antemortem in nature.

III. EXTERNAL EXAMINATION:

(19) Head-

(I) Injuries under the scalp and their nature:

No injury found.

(II) Skull-Vault and basedescribed fractures, their sites, dimensions, directions etc.

No fracture found

(III) Brain: The appearance of its covering, size, weight and general condition of the organ itself and any abnormality found in its examination to be carefully noted.

Dura matter intact.

Brain Oedematous and pale.

(20) Thorax-

(a) Walls, ribs,Cartilages

(b) Pleura

(c) Larynx, Trachea and bronchi

(d) Right Lung with weight

(e) Left lung with weight

(f) Pericardium

(g) Heart and weight

(h) Large vessels

(I) Additional remarks

- Thorasic Cavity, contains about 2.2 litre blood and clots.

- Abdominal cavity contains about 200 ml blood and clots.

(1) External injury No.1 has entered chest cavity penetrating skin, subcutaneous tissue, chest muscles above clavicle and has passed through and through opical right of right lung and pleura, supramediastinal space in front of trachea, and upper lobe of left lung and pleura, and is found lodge in lateral aspect of left chest wall muscles after coming out of 4^{th} inter-costal space of left chest on its lateral. Tissues adjacent to bullet track are ecchymosed. Track is directed downward, left laterally and to backward. Bullet is collected and numbered one.

(2) External injury No.2 has penetrated chest cavity from skin, subcutaneus tissue, chest muscles, fracturing sternum and right 3^{rd} rib and has passed through and through heart (from right anterolateral to left posterolateral) in ventricles, left lung and is found lodged in muscles of left lateral of chest after coming out of 5^{th} intercostal space. All tissues adjacent to bullet track are

ecchymosed. Bullet track is directed downward. Bullet is collected and numbered two.

(3) *External injury No.3 has penetrated chest wall through skin, subcutaneus tisue, muscles of chest, 4th intercostal space, fracturing 4th rib and has passed through right lung and has entered left side of thorax behind heart and major vessels on back of heart and found free in blood clots at diaphragm in left thoracic cavity. Tissues adjacent to bullet track are ecchymosed and track directed backward laterally and slightly downward. Bullet is collected and numbered third.*

(4) *External injury No.(4) has entered chest wall through skin, subcrataneus tissue, chest wall muscles, 4th intercostal space, fracturing 5th rib of right side and has pass through and through right lung, behind heart and major vessels on back of heart and found free in left chest cavity mixed within clots at diaphragm. Tissue adjacent to bullet track are ecchymosed. Track is directed backward, laterally and slightly downward. Bullet is collected and numbered fourth.*

(5) *External injury No.(7) has passed through skin, subcutaneus tissue, muscles, left testis and has entered abdominal cavity through pelvis from left lateral of urinary bladder. Bullet has found peforated coils of small intestine, ascending colon and has passed behind liver through posterior aspect of right abdominal wall from 10th intercostal space and is found lodged in chest muscles on back of right chest at 4th-5th ribs region. Vessels and other tissues coming in plane of bullet are lacerated and ecchymosed. Track of bullet is directed upward, slightly right and backward. Bullet is collected and numbered 5th.*

(6) *External injuries No.(5) & (6) are found communicating with each other. Fracture of 2nd right metacarpal bone is present.*

- All viscera from thorax and abdominal cavity are X-rayed and chest and abdomen body cavity are X-rayed to detect any fragment and bullet if present.

... ...

... ...(23) Opinion as to the cause or probable cause of death.

Firearm injuries."

Sd/- 26.3.2003

- *All bullets are made of white metal, sealed, labelled and handed over to the Police Officer on duty.*
- *Blood is collected and preserved in glass bottle, sealed, labelled and handed over to the Police Officer on duty. Blood is about 50 cc.*
- *Clothes and ornament are recovered from dead body, sealed and labelled in Pack, handed over to the Police Officer on duty.*

Sd/- 26.3.2003"

11. Dr.Pratik R.Patel, Professor and Head, Forensic Medicine Department, V.S.Hospital (Ex.176), *inter alia*, deposed that, out of six entry wounds on the body of Shri Pandya, five bullets were there; one bullet might have gone out of the body or there might be re-entry of the bullet. He admitted that he had not mentioned the estimated time of death in the P.M.Note, but in his statement given to CBI, he had mentioned that 5 to 6 hours prior to performance of *post-mortem* , the death might have occurred. He opined that: "*...if hand is reflexly kept in front of face or neck region on right side that back of hand if facing the opposite side of the victim, bullet may re-enter from the external injury No.1 of column No.17"*. He also opined that: *"It cannot be said whether it was re-entry or the first entry".* In reply to the question: "*What would be the parameter to judge whether external injury No.1 is in fact an original entry or re-entry?* he admitted that blackening was seen on skin surrounding injury No.1, which was on the neck. He admitted that shape of injury No.6 was not mentioned. Referring to X-ray plates, he opined that due to poor quality of X-ray, it would

be difficult for him to say as to which plate shows injury No.1 in it. Referring to X-ray No.8, he admitted that he could not see any fracture in the wrist. Referring to injury No.6, he admitted that the lacerated wound was going obliquely downward, and it meant that it was going from near the elbow towards the wrist. He, however, insisted that injury No.5 was communicating with external injury No.6. As for injury No.1, he opined that: "*....the weapon could be on front, right and above of the external injury. It should be three dimensional as right side at upper level above the external injury No.1 and in front of the external injury No.1. Upper left pointing downward track is mentioned which is going downward to the left and back as the track of the injury has been shown to be going downward, backward and to the left."* The following questions and answers were crucial:

"*160 Q What is your view with regard to the injury No.7 ?*

A In this case, track of the bullet was directed upward, slightly right and backward. It depends on the position of a person, whether standing, sitting or inclining. In this, weapon should be on front, slightly left at the level below the scrotum.

164 Q With regard to the Injury No.7, irrespective of the position of the victim, sitting or standing, the assailant will have to be in front left and beneath?

A Yes."

The above part of the deposition of an expert in Forensic Medicine was put to critical examination by learned counsel for the appellants to submit that injury No.1 could not have been caused by re-entry of a bullet and injury No.5 and 6

could not have communicated with each other. It was also submitted that injury No.7 was not only improbable but impossible to be caused if the victim was sitting in the driving seat of the car and the assailant was firing from outside through the slight opening of glass of the window of the car.

11.1 Dr.M.Narayan Reddy, Professor and Head of the Department of Forensic Medicine, Osmania Medical College, Hyderabad, was examined as DW.6 (Ex.848). He was M.D.in Forensic Medicine and doing his LL.M at the time of deposing. According to his opinion, with the help of the given photograph, the opening of the window on driver's side was coming roughly to 3 inches, i.e. 7.5 cms and 2 inches on the front border. Keeping that in view, he tried to find out whether the injuries on the deceased were feasible in the given situation. He opined that injury No.1 and 2 were possible. Injury No.3 and 4 were at a lower level, 5 cms below the nipple on the skin, whereas the entry wound inside the chest wall were at the 4th space corresponding to the nipple area. So, those injuries went upward to enter into the chest area and then they crossed to the left side of the chest behind the heart and fell in the chest cavity. So, in his opinion, injury No.3 and 4 were not possible in the situation. Injury No.7 was possible only when the barrel of the gun muzzle was directing to the lower border of the scrotum and the back bone was in one direction, then only it was possible because it was lodged near the right shoulder blade behind the 4th and 5th ribs. So, the barrel of the gun, lower border of the scrotum and the back bone had to be in one line to cause that injury. It was possible in two situations, viz. (i) if the victim stood at a higher plane, the assailant stood below him and fired in the upward direction directing towards the scrotum; or (ii) if the victim lay down on his back on a cot or a table with his legs apart and assailant standing on the left leg side had fired. He clearly deposed that injury No.7 was not possible in any other position. He also opined that injury No.5 had no exit wound. Without fracturing the base of the 2nd and 3rd metacarpel bone and carpel bone of the wrist joint, lower ends of the forearm bones, it cannot communicate with injury No.6. So, the bullet which had caused injury

No.5 must be available at the scene of offence. Injury No.6 is on the front of the right forearm directed above, downwards and right to left. It was suspected that the holes in the sleeve of the shirt had blackening, hence it could be a separate bullet wound, which bullet must have been present at the scene of offence, according to his opinion. He stated that a computerized picture of the closed window was taken and enlarged marks of the glass frame came to about 12 cms and the opening was slightly less than 2 cms. So, it was less than 1/6th of the total width of the closed frame. When actual width of Maruti 800 glass was measured, it was 44 cms, 1/6th of which coming to a little more than 7 cms. He further opined that through that opening of the glass, only the barrel of a gun could enter. He did not agree that injury No.6 was an exit wound. He was specifically asked questions in cross-examination, as under:

> "*56. Q Do you agree that when an injured involuntarily fell, the left side leg came up and the left leg was raised more than the right leg and bullet hit left testis, passed from left to right and on the back side?*
>
> *A No. I do not agree. In my opinion, it would completely hide the scrotum in between the thighs."*

Upon a question being lastly put to him by the Court, he replied:

> "*67. On being inquired as to the injury No.7 is possible inside the car, I would say that if a person inside the front seat of the car lies on his back or has fallen down on his back, if the buttock comes near to the right edge of the driver's seat and legs apart, then it is possible. So the door must be open and legs must come out and thighs must project out then only it is possible to straight way strike the scrotum."*

12. During the course of trial, learned Special Judge (POTA) appears to have called the Maruti car (Article No.15 – belonging to the deceased) in the premises of the City Civil and Sessions Court and carried out its inspection in the presence of prosecution and defence. As no memorandum of the aforesaid inspection was prepared and it was so divulged before the appellants on 07.2.2007, learned Advocate for A.4 - A.9 and A.12 made an application (Ex.877) on 08.2.2007 praying to eschew all record of that inspection and the arguments based thereon. It was, *inter alia*, contended in the application that matters of medical evidence had to be put to the relevant witness while he is in the witness box and the Court cannot explore possibilities not put to them; that the doctor conducting the *post-mortem* had categorically stated that he had not even noted the tracks of injury Nos.5 and 6; that no text had been put to DW-6 on any of the facts to contradict him; that until PW.8 had come into witness-box, there was no material brought forth by the prosecution with regard to the position of body; that inspection of the car unaccompanied by written memorandum was unacceptable and hence the inspection done on 25.1.2007 and any arguments based thereon could not be taken on record. Learned Special Judge (POTA) rejected that application with the observations, *inter alia*, as under:

> "*.....As per the case of the prosecution, the murder of Mr.Haren Pandya, Ex-Home Minister, Gujarat took place allegedly inside Mruti Car parked at Law Garden opposite Thakorbhai Desai Hall. Different witnesses of the prosecution have spoken of different openings of the window glass of the impugned vehicle from where, according to the prosecution, firing had taken place with the firearm resulting into death of the victim. The evidence of defence witnesses also have been led so as to deal with the evidence of prosecution, oral as well as documentary, which includes the photographs submitted alongwith the papers of chargesheet".*
>
> "*For appreciating the submissions of both the sides and the ones being made by Ld.Advocate Mr.Gupta more effectively, the Court deemed it necessary to*

inspect this Maruti Car seized by the prosecution being the case property No.15 (muddamal) and on giving sufficient notice to both the sides for the said inspection of Maruti 800 Car, in presence of Ld. Sp.P.Ps. and the Ld. Advocates for defence as well as CBI officers, the Court had inspected on 25.01.2007 the said motor car in the Court compound of City Civil Court and both the sides had assisted the Court to understand their respective stands. Although Ld. Advocate Ms.Nitya Ramakrishnan had completed their final submissions on every point, in view of this inspection, the Court had deemed it just to avail an opportunity to both the sides to further address the Court on this inspection, if they chose to so to do it and Ld. Advocate Mr.Verma and LA Mr.Vatsa, LA assisting Ld. Sr.Advocate Ms.Nitya Ramakrishnan to argue on the subject after consulting her and they accordingly made a request to adjourn the matter for her submissions and Ld. Sp.P.P. had made his submissions in respect of the same".

" *Over and above other detailed submissions, Ld. Sp.P.P. has submitted that Section 310 of Cr.P.C. would not apply in the instant case as it is not the local place of occurrence for this car being the case property No.15 and therefore, no question arises of recordance of memorandum....".*

" *.....It needs to be noted down that in stricto senso, this was not a spot inspection that the Court had undertaken where the Court is duty bound to record a memorandum of relevant fact observed at such spot inspection without unnecessary delay under the law, but it was an inspection of case property seized during investigation (muddamal article) inside which the alleged offence has taken place and therefore, even if not going by the letter but by spirit of Section 310 of Cr.P.C., if it is construed to be article vital for appreciating submissions of both sides on evidence that has come on record, what all the Court had to note down was that it had inspected the vehicle to understand different possibilities put forth before it and its feasibility and the Court had noted down the fact of this inspection in the Rojkam of dt.*

25.01.2007, which is held by the Apex Court as a mirror of the Court functioning on criminal side....."

12.1 Apart from the controversies about ballistic evidence, the discrepancies in respect of the bullets recovered from the body of the deceased and the bullets examined by the ballistic expert could be summarized in the form of following table:

Bullet No.	Description of colour in PM report	Description of colour by PW.8 in Court	Description of deformation in PM report	Description of deformation of PW.8 in Court	Description of deformat-ion by PW.75 in work-sheet
BC/1	White metal	Grayish	Nil	Deformed	Base/defor-med
BC/2	White metal	Grayish	Tip deformed	Deformed	Tip deformed
BC/3	White metal	Grayish	Nil	Deformed	Tip intact/ Base deformed
BC/4	White metal	Grayish	Tip deformed	Deformed	Tip intact/ Base deformed
BC/5	White metal	Grayish	Nil	Slightly deformed	Sometimes deformed/ sometimes not

12.2 Shri Ashok Raj Arora (PW.75), Ex.440, Senior Scientific Officer (Ballistics) to the Government of India, had deposed that three holes on the front side and three holes on the right sleeve near the cuff were observed on kurta and one hole was observed on pant with corresponding hole on underwear; and all could have been caused by passage of .32 bullets fired from close range and gun shot residue was detected on the margins of all the holes.

12.3 The father of the deceased had made an application (Ex.855) dated 15.12.2006 making the grievance that Mr.Nilesh Bhatt, P.A.to the deceased was not called before the Court to unearth the truth. The application, *inter alia*, stated: *"It is a matter of surprising shock that CBI officers could not search out my son's wallet and important diary he used to carry with him & the shoes he used to wear are missing. ....."* That application was rejected by a detailed order, after hearing learned counsel, with the observations, *inter alia*, as under:

> "*.....His examination u/s. 311 of Cr.P.C also may not serve any purpose as allegations or averments need the basis of facts for the court of law to act upon at any stage.....*
>
> "*Two of the defence experts have voiced a different possibility with regard to the injuries found on the person of deceased supporting the defence theory and statement of P.A. to late Shri Haren Pandya directed to be brought on the record at the instance of defence does not lead anywhere on the issue however, evidence shall have to be appreciated as a whole at an appropriate stage but for the present, nothing is with the Court to invoke powers u/s. 319 or u/s. 173 (8) of Code of Criminal Procedure".*

An earlier application of the father of the deceased (Exh.856) dt.21.11.2006 insisting upon inclusion of his name in the list of witnesses was also rejected by order dated 27.11.2006 on the ground that third party had no *locus standi* in a criminal trial. And yet another application (Exh.898) dtd.26.3.2007

annexing a press report printed in Asian Age dtd.27.3.2003 was also rejected. It was argued for the appellants, on the basis of the above record, that the investigating agency had not followed the clues offered in the press report and had not investigated on any alternative theory which could have solved the mystery of murder of Mr.Haren Pandya.

12.4 It may be pertinent to make a passing reference to confessional statement of A-1 at this stage, even as the probative value of confessional statements is discussed in detail hereafter. In his confessional statement (Exh.253), which was subsequently retracted, A-1 is supposed to have stated, *inter alia*, that when Mr.Haren Pandya had opened the bottle for drinking water, after parking the car, he approached the car and fired five bullets on him from the window of which glass was slightly open. Then, while returning as a pillion rider to Yunus (A-6), he asked Yunus as to how many bullets were fired by him and Yunus replied that he had fired four bullets. Then he told him that he had fired five bullets and not four; and from near a bridge on his way he had informed Sohail (A-14) on his mobile phone that the job was done. In the confession of Yunus (A-6 – Ex.233), it was, *inter alia*, confirmed that on their way, after his having heard firing of four or five bullets, A-1 had asked him as to how many bullets he had fired; he had told him that he thought four bullets were fired, whereupon A-1 had told him that he thought that he had fired five bullets.

12.5 The prosecution found corroboration to the above self-incriminating evidence from the call record of mobile phones supposed to have been held by the main accused persons and there is evidence that a call was recorded at 7:33 a.m. on 26.3.2003 at the tower catering to the area of 3 sq. kms. which included Law Garden area. That call was from the mobile phone supposed to have been held by A-1 on that date to A-14; and such other previous and subsequent communication among the accused persons has been presented as evidence of co-ordination and conspiracy.

12.6 The dress worn at the time of his death by Shri Pandya, being Muddamal Article No.19, was examined by this Court during the course of arguments and in presence of learned counsel on both sides. It was undisputably found that there were 3 holes on the right hand sleeve above the cuff in the kurta of Shri Pandya and it had white and light or faded brown vertical stripes. There were wide and large smudges of blood on the left shoulder and right sleeve indicating profuse bleeding and bloodstains on the back of the kurta. And the bottom part of left leg of the pajama (pants) had a large bloodstain indicating bleeding from injury No.7.

13. Dealing with the above evidence, learned special Judge (POTA) observed that it was simply not possible not to accept the version of solitary eye witness, as "*His testimony, when scrutinized thoroughly and critically with dispassionate judicial scrutiny at a touchstone of all the possibilities suggested by the defence, it is still found to have passed the test of being truthful, dependable and more than convincing*." In the opinion of the Court, CW.1 corroborated in a major way the deposition of PW.55. Although some contradictions were found in his deposition, in the opinion of the Court, he had sufficiently and satisfactorily answered the questions put to him at the request of the defence. As for the choice of the prosecution not to examine wife of Shri Haren Pandya, Kanaiyalal and Yogesh Shukla, the Court observed: "

> " *.....It is not feasible to endorse the submission of defence that by not allowing these witnesses to come before the Court, the prosecution has failed in its duty in bringing the truth before the Court as it is absolutely the choice of the prosecution whether it chooses to adduce the evidence of a particular fact through one witness or more than one as Section 134 of Evidence Act makes it abundantly clear that no particular number of witnesses shall in any case be required for the proof of any fact....."*

The Court further observed:

> " *.....It, of course, apparently looks strange that in the area of Law Garden where many morning walkers come daily and where at a little distance away the school and college with morning hours are also situated on the main road which is the road going to Paldi on one side and Mithakhali on the side, for the incident of morning at 7.30 a.m., not before 10.30 a.m. the police could come to know about the occurrence. This fact is also so much harped upon and twisted by the defence so as to argue that Shri Haren Pandya was killed elsewhere and his body was brought at law Garden and that is the reason why his dead body had skipped the notice of people and it was PW.55 who noticed him (his body) at around 9.30 a.m".*
>
> " *This defence on close probe holds no ground at all. It must be firmly held in terms that this theory has no basis as the prosecution has succeeded in discharging its burden of proving that the incident has taken place at Law Garden and nowhere else. Even otherwise, it is a matter of common sense that if a person with the stature of Shri Haren Pandya is to be killed by any person away from the public place, the assailant or killer certainly would not be so unintelligent or duffer so as to bring his body to the Law Garden in his own car, which would be otherwise familiar to the people in that area particularly when the fact of his going for a morning walk at Law Garden was known to many so as to create evidence against himself. It is hopelessly absurd to suggest such a theory. If the killing has taken place in secrecy, the body would be thrown or hidden at an obscure place somewhere away from public eyes and would not be brought in the mid of the town. The only valid purpose for examination of Smt.Jagruti Pandya could have served was to have averted such absurd theory to come before the Court for dealing with the same. Furthermore, the pattern of injury on the person of Shri Pandya is a classical example of closed place murder which of course shall be discussed at an appropriate stage...."*

Discussing the evidence further, the Court observed:

" *.....The Court must also remember the fact that the glasses of back seats of Maruti Car were rolled up and that of co-driver's seat was only 2 inches down and a considerable part of driver's seat glasses was rolled up which are all dark glasses. Even on the window shield, the whole strip (Patto) is of dark glass. Considering the situation of the vehicle, which was having its front towards the wall of Thakorebhai Desai Hall, if somebody was lying on the seat, it would not be possible for the passers by to notice anything unusual nor would it make feasible for anybody to see this lying position of the person. .....Again with the parking of vehicles being very common around Law Garden by the morning walkers, it is not at all strange for anyone not to peep inside the vehicle without there being any trace of unusual thing outside the vehicle and in absence of any intimation of such occurrence. .....The Court simply cannot disregard and/or discard their testimonies only because it is difficult to digest the fact that in a gross incident like the present one, the police was not immediately contacted by the eye witness. .....On appreciating evidence with the strictest yardstick, the Court is of the opinion that the deposition of both these witnesses need be held to be truthful, dependable and cogent and the same cannot be permitted to be attacked as concocted, unpalatable and contrary to other evidence of prosecution. .....Moreover, it was only at the time of hearing of final submissions that the Court has chosen to examine CW.1 who had been dropped by the prosecution and whose statement had been recorded soon after the incident in question by the prosecuting agency. He not only corroborated the version of PW.55, but threw light on many other aspects making the deposition of PW.55 more comprehensive."*

13.1 Referring to the deposition of Radheshyam (PW.85), the Court observed:

"*.....He is specific that opening of glass on driver's side was about 7.5 to 8 inches almost of the measurement of a palm. He of course, on verifying the photograph (Mark-D/101-193/3) (Exh.617) for the window glass on driver's side, ratified that position of window. .....The door when was opened from towards the driver side, he found head and shoulder of Shri Haren Pandya*

lying on the co-driver's seat and his legs were little up from the knee. .....Deposition of this witness would be vital as he has detailed the manner in which the body was found inside the vehicle and removed from the car. He also is firm on the point that sports shoes were on till removed to V.S.Hospital on stretcher. And, as they are not found by Investigating Officer thereafter, this gave rise to a serious contention that this is done for suppressing some vital facts, although, it appears to be an attractive contention at a first blush, it does not hold ground in fact. This surely cannot be a deliberate act of Investigating Officer who himself was keen to unreveal (Sic) the mystery of murder and in a huge crowd at hospital, if shoes get lost, it cannot be attributed to Investigating officer by imputing ill intention....."

13.2 Referring to PW.4, a panch witness to the scene of offence panchnama, it is noted in the impugned judgment that the Panch had identified muddamal article No.16, i.e. mobile phone and other articles. Incoming, outgoing and missed calls were not noted down when the mobile phone was seized. There was no blood found on the driver's seat, but on the co-driver's seat he found blood and at no other place blood could be found. The scene of offence was preserved by Police Inspector Shri Chauhan and within three hours of Shri Haren Pandya's removal to the hospital, panchnama was drawn.

13.3 The deposition of DW.6 was dealt with by the Court with the following observations:

"*.....He was unable to give any instance in 50 cases where he appeared as defence witness and having given any adverse opinion disfavouring the accused. .....Believing that PW.55, PW.85 and PW.101 have ratified the photograph shown to them, but the same cannot be equated with the written document, the contents of which would be unequivocal inasmuch as it is a matter of interpretation of photograph and the same cannot be falling under Section 94 of Evidence Act. On the contrary, opening from the photograph is required to be interpreted and since it is a matter of visual assessment, the same shall depend on capacity of interpretation of an individual. None of*

these witnesses has challenged on their individual assessment with specific suggestion of this opening of window being only 3 inches and not 6 to 8 inches as deposed by each of them and there is a scope of oral depositions and the said scope cannot be excluded either on mere ratification of photograph or on the commentaries relied upon of Phipson or on the basis of provisions of Section 94 of the Evidence Act."

13.4 Referring to deposition of PW.20, the Court observed:

"*CMO Dr.Kuldeep Joshi (PW.20), Ex.224, deposed about the injury on neck and pulse was not palpable and blood pressure was not recordable at 11.00 a.m. He saw injury on the right side of base of neck and clothes of the patient were blood stained, though blood was not flowing from any part of the body. He had started cardiopulmonary resuscitation and continued the same for nearly an hour and at 12 noon, in concurrence and advice of experts, Mr.Haren Pandya was declared dead. Recording of body temperature necessary to assess the time of death was not done, but the doctor replied that things which were more important had to be given priority than certain basic things. Though the estimated time of occurrence of death was not mentioned in the P.M.Report, it was deposed by Dr.P.R.Patel (Ex.176) to be approximately 5-6 hours prior to the post-mortem. Photograph and videograph was not done of the post-mortem examination as there was no such practice"*.

It is noted in the impugned judgment that: "Had there been photography and videography of the clothes and injuries as well as of the process of post-mortem, that would have saved lot of time of the Court as that would have precluded giving rise to many issues which are required to be answered only because of non-availability of either photographs or viedograph."

13.5 Dealing with the arguments of the defence based on seven bullet-wounds and recovery of only five bullets, absence of blood-stains in the car,

perpendicular strike of the bullets and the scrotum wound with the bullet travelling upwards, the Court quoted, after referring to many judgments, the words of the I.O. (PW.120) that: *".....What must have happened as it appears is that after hitting by first four injuries, Mr.Haren Pandya would have had involuntarily fallen on the seat adjacent to the driver's seat. When fallen on the left side, his legs automatically would come up and the moment his leg had come up, left leg must have come up more than the right and in this imbalance between the right leg and left leg, the bullet has hit the left testis first, which is passing left to right and goes on the back side. When a man falls, his whole body for a moment would go up and because of gravitation, it would come down and that is the way, it can be explained and he was, therefore, satisfied that the P.M.Report is consistent with other evidence."* As for injury No.7, the Court observed: "*....With the direction taken by the bullet, even if the right lower limb comes up slightly because of the jerk of falling body on the opposite side, then also, scrotal area would become exposed towards the window and it is possible that the bullet may enter the lower part of the left scrotum area. The entry point of the bullet is significant, the direction of the bullet inside the body is not something which can follow the set formula as it can strike bone or any thick tissue and can change the direction any number of times."*

Differing from the opinion of Dr.Reddy (DW.6), the Court observed:

> *".....There is no scientific basis which Dr.Reddy could point out for stating that the injury could be possible only in two positions and not in any third position. He may be an expert in the field, the Court cannot be oblivious that his opinion is bound to be loapsided keeping in view the interest of one side only. His leg little apart and involuntary fall is the position seen by PW.55 who had seen his legs coming up when he saw him from the distance of 7-8 feet from inside the railing between Pepsi and Vadilal Ice-cream Parlour on his way of Shuklachacha before leaving for Mr.Snehal Adenwala's residence and this corroborates this finding....."*

13.6 As for the alleged impossibility of injury No.5 communicating with injury No.6, the Court observed that it was quite possible that the bullet can pass between 2nd and 3rd metacarpal shafts without damaging the same and can go downward through muscle of palm carpel tunnel and exit through the lower 3rd of forearm without damaging the bones. The Court relied upon inverted edge of injury No.5 and everted edges of injury No.6 and opinion of PW.8 that they were communicating with each other. The Court rested its discussion on the issue with the following observations:

> ‘‘*Even otherwise, there appears to be a meticulous checking of the car as can be seen from the evidence of witnesses, panchnama drawn and since all the glasses were rolled up to a large extent and all the doors being closed, there was no possibility of bullet going anywhere except the car itself. If it had fallen down, the investigating officer could not have missed the same.....”*

13.7 As for the absence of bloodstains, the Court again relied upon opinion of the investigating officer Dr.Gupta, who had done his MBBS before joining the police force, that with all the tracks of bullets being above to downward and due to gravity, blood would go down. Bullet would have tendency to create track alongwith and create vacuum suction effect which would suck blood inside instead of oozing the same out and therefore, according to him, these tracks of blood being from above to downward, the blood did not come out profusely. The Court concluded that the clothes could act as bandage and clothes also have tendency to obstruct the blood. The nature of injuries suggested that there was impossibility of pool of blood coming out. Again relying upon opinion of PW.8 that *“.....in case of internal hemorrhage, there would not be much blood at the spot and out of seven bullets, six were internal wounds of the firearm where minimum or less blood is possible outside”,* the Court concluded that: “....*it was wrong to suggest that there was complete absence of blood inside the car so as to doubt the very occurrence inside the vehicle”*. The Court went on to observe: *“.....The clothes soaked with blood which acted as bandage and the fact remains that the injuries No.1 and 2 had stopped pumping and functioning of the*

heart although all the shots have been fired consecutively within no time. The scrotum even if is rich in supply of blood, these being the veins, the blood may not reach there because of stopping of heart earlier in point of time. All these are found to be sufficient explanation alongwith deposition of PW.8 and that of PW.120 on the issue and therefore, it can be held that the contention raised by the defence is not in consonance with the record proved by the prosecution..... "Substantive evidence of PW.55 and PW.85 shall have to be remembered at this stage as PW.55 when peeped into the vehicle from the wind shield of the car from between the gap of Vadilal Parlour and Pepsi parlour, he saw blood on the neck as well as on the clothes of the deceased. Likewise, PW.85 also saw the blood going right to left on the neck as if it had stopped sometime before." ".....There are many questions asked to Dr.Pratik Patel (PW.8) in his cross-examination and he did not find any such sign of scuffling on the clothes of the deceased. It is also very unusual for the assailant in the planned murder to give a shot at scrotum. It is only in the case of some rivalry on account of sexual offence that this is possible. Again, it is incredible to believe that the person who would have been killed elsewhere would be brought to the Law Garden as discussed hereinbefore so as to attract the notice of people in the area, particularly when, according to the defence, usually there are many morning walkers visiting Law Garden. "

Dealing with the aspect of the injuries listed in the *post-mortem* note to be circular and of uniform width suggesting that the bullets had struck the body perpendicularly, the Court concluded that it was not necessary that every shot described as circular would have struck the body perpendicularly. However, it found it to be necessary to mention that had photograph been taken, that would have clearly reflected the angle and other vital details.

13.8 As for the issues raised about blackening of the clothes and distance of the weapon, based on the opinion of DW-6, the Court observed:

> "*.....He also said that firing is within the range of powder grain and the Court is in agreement with the say of PW.8 who is an official witness and whose evidence need to carry much weightage than that of DW.6 who had no*

occasion to see the dead body nor any articles connected with the crime nor even the vehicle and there is an element of unfairness in the manner in which he came to give the deposition by projecting it as an official visit, although technically it can be said so, in fact, story told is a twisted truth. The witness who had not bothered to intimate his own authority of the defence having approached him and his having never seen the dead body or other articles, should not carry any weightage as his evidence would go in the realm of hypothesis. His expertise in this field even if is accepted, his deposition is solely based on theory which cannot be equated with the expert having seen the body and worked on the same."

13.9 Discussing injury No.1, 2, 3 and 4, the Court observed:

"*As far as injuries No.1 and 2 are concerned, it is sufficiently explained by PW.8 as to why there is no corresponding hole on the kurta. It could have missed the kurta, if it is not the place where it should have for being a little above clavicle. According to the defence witness, injuries No.1 and 2 are easily possible which are both directed downward, left laterally and to backward and to posterior respectively.*

"*A dispute is raised with regard to the injuries No.3 and 4 that there are at a lower level, 5 cms. below the nipple on the skin whereas, the entry wounds inside the chest wall are at the 4th space corresponding to the nipple area and so these injuries go upward to enter into the chest area and then they cross to the left side of the chest behind the heart and fallen in the chest cavity. The post-mortem report describes the track of these injuries backward laterally and slightly downward. If a victim is sitting straight without moving, all the injuries should be going downward into the chest, but here as the victim started falling on the left side after the injuries No.1 and 2, injuries No.3 and 4 have gone upward into the chest and this on the contrary explains and tallies with the explanation of Dr.Reddy (DW.6) as the track would have to be upward to enter into the chest area. Since the victim was falling down on the left side on being hit by the bullets and the assailant as per the proof that has come on record was standing on the right side and slightly in front with the*

barrel pointed straight or little downward, at that point of time injuries No.3 and 4 in the manner described in the post-mortem note would be very much possible. This on the contrary would prove the prosecution's case of injury in a close space car. "

The Court opined that: ".....A*ll injuries were so caused on the right side and are so close to each other going gradually down and it is quite possible that if the hand was raised to protect himself, the bullet entered through injury No.5 and exited through injury No.6 and the very same bullet re-entered into his body. PW.8 was specific about the re-entry being the external injury No.1. The material produced by Ld.Sp.P.P. shows that the blackening is also possible in the re-entry but PW.8 has not been sure whether blackening at injury No.1 was on account of GSR or dried blood as no chemical test of skin had been carried out and therefore, blackening surrounding injury No.1 may not be as a result of GSR. "*

13.10 As for the expert opinion of DW.6 that opening of the window was roughly 3 inches and 2 inches on the front side border from which the butt portion of the weapon could not have entered inside the car, the Court relied upon PW.85 (Mr.Radhe Shyam) and PW.101 (Mr.Shaikh) to note that opening of the window glass of the car was of "palm length", which was 6 to 10 inches. However, believing it for a moment that opening of the window was 3 to 3-1/2 inches, the butt could certainly go inside and the person having lean and thin frame, his hand could also go inside and it was not found difficult that the entire hand with the weapon could go inside, according to the impugned judgment.

The Court concluded that:

"*.....Considering the pattern of injuries on the person of the deceased, there appears to be a gradual fall and all the injuries are on the side which is reflective of a peculiar nature of injuries having happened to the man who was*

stuck in a close space of a car and was unable to do anything when attacked. With the blackening on the clothes as well as on the wounds on the person of the deceased, range as per the defence expert also could be from 6 inches to 12 inches for the blackening to appear and the manner in which the deceased was found inside the car where shoulder was in between the two seats and the head slightly in the front resting on the seat of co-driver close to the gap between the two seats and right leg was little above the left leg which was above the floor, the distance when the shots were given could not have been more than 1 ft. from the window of the vehicle. It is a clear version emerging from the eye witness that the man had shot him standing right near the door of driver's seat hardly leaving any chance for the driver to come out or resist and thus, the less opening even is acceptable, that would not in any manner affect the prosecution's case."

"*.....It is standard Scot & Webley .32 bore weapon weighing 3 tons (sic) made in England with copper jacketed bullet. With the opening of 4 to 3-1/2 inches also, it is not difficult for the entire hand to go inside the said opening and with the opening of 6 inches and for that matter even 8 inches, it is extremely easy for the assailant to shoot at any part of the body even at the point blank range, but with 3 to 3-1/2 inches also sharp shooter having a training and thin body frame can easily shoot not only from keeping just barrel inside, but also by taking his hand inside and firing of these five shots would not take more than 5 to 7 seconds."*

"*.....Again, for absence of GSR inside the car,the Court must remember that at the time of taking out the body of Shri Pandya, many persons were involved, it is difficult to uphold the say of defence, with other voluminous evidence and circumstances under which sample for GSR was drawn, absence thereof can brush aside all other positive evidence".*

"*.....Again on absence of water bottle inside the car, it is not the version of PW.55, an eye witness, but that of Asgar Ali and for whatever reason he had stated that fact, Court shall have to look at version of PW.55 of assailant having left no time for the victim as he had fired no sooner did he arrive to*

park his vehicle at his usual place before his morning walk. Other details of that time given by A-1 tallies with this testimony as recce was already done and before Mr.Pandya arrived at the place, A-1 was at Law Garden with A-6 and he had only a few seconds to complete his task as the moment he would have stepped out of the car, this firing would have attracted the crowd immediately and going by earlier day's experience (of dt. 25.03.2003 as to be discussed later in this judgment) he would not have wanted to take that chance of missing this target."

"*.....And, suffice to conclude that all these contentions are the result of absence of videography and photography of the post-mortem as that provided an open field for other experts to rush to the cause of defence and though none of these has in any manner weakened the case of prosecution, but unfortunately it provided for vociferous propaganda to seek favour for the accused in extra legal ways as well and while concluding this aspect, the Court is not "branching off into its own resources on the point diverging from the same" but, as required by the Apex Court, it is basing its conclusion on evidence and while so doing, it has no business to disregard the science and basic scientific principles".*

13.11 As for the anomalies in matching of bullets and use of the weapon, the Court observed:

"*.....In the aspect of deformation of tip where Post Mortem Note describes only two of the bullet tips having been deformed BC2 & BC4 and the work-sheet of PW.75 points out tip deformed of only BC2, the rest are having the base deformed, a major issue is raised on this aspect by the defence. On a detailed discussion, it has also been argued that PW.75 did not find the firing pin damaged on dt.05.05.2003 when he first examined the weapon. The shape of firing pin is a class characteristics and this man could not explain convincingly the reason for his having examined the same once again and for examination of the damaged firing pin, no report of matching could ever be given and with PW.75 stating that he found dissimilarity in firing pin marks as between test and the crime cartridge cases, drawing diagram (Exh.453), he*

could not have written that they were similar. In absence of the firing pin, if the same is tampered and since the area is very small, according to the defence, it is bound to render identification possible. Breech face mark, if available and sufficient, can lead to identification. From the detailed answers given by PW.75, it has been urged to this Court that the man can hardly be termed as an expert and therefore, his evidence should be discarded completely."

"*Dr.Jitendrakumar Sinha (DW.8), a Ph.D in Forensic Medicine and claims to have examined more than 5000 firearm cases .....Although, he agreed that in 95% of the cases, firing pin marks alone permit identification of the firearm, but in the event of any tampering of firing pin, the expert would examine breech face mark which shall have to be compared with the test fired cartridges to conform the opinion that the cartridges are fired from the said firearm. He also agreed to the suggestion that breech face alone is sufficient to conform the opinion, if after firing test cartridges there are found to be repetitive breech face marks."*

"*.....More often than not, the experts are not even called as witnesses as their opinions are admissible u/s.293 of the Cr.P.C. whereas, the defence witnesses who have charged the professional fees are bound to have personal interests in seeing that the opinion given on charging the professional fees is upheld and helps the case of their clients. It is a human tendency to curry favour and to side with the person who has engaged him professionally and had invited him to speak on the subject as an expert particularly to controvert the version set out by prosecution witnesses....."*

"*.....It undoubtedly proved the fact that all the five bullets of .32 bore sent to the CFSL had been recovered from the body of the deceased and the death of Shri Haren Pandya was on account of firearm injuries as these injuries led to hemorrhage. If PW.8 – Dr.Pratik Ravjibhai Patel had described the same made of white metal and as per the ballistic expert, these bullets cannot be said to be of white metal, a limited knowledge on the part of PW.8 - Dr.Pratik Patel or other doctors performing post-mortem on ballistics cannot fail to*

prove the fact of these bullets had been recovered from the body of the deceased during post-mortem."

13.12 Mr.Ashok Raj Arora (PW.75) having faltered in his opinion as ballistic expert, the Court observed:

"*Certain basic principles of ballistics shall have to be proved through the ballistic expert. It is a fact that the person who has been examined by the prosecution to be an expert in the field of the ballistics was found to be having the basic flow (sic) in language and therefore, communicating his reasonings to the Court and giving valid and scientific reasons for every test that has been conducted was found virtually difficult by him. It is also further found that the man had faltered on many issues which are otherwise said to be basic to the field of ballistics. These shortcomings resulted into a very detailed cross-examination of this witness and various question-marks have been paused from these answers, essentially on this count. He may have been working in the field of ballistics for past 20 years and must have examined various articles in thousands of cases, what is essential for a scientific expert is to clearly communicate the procedures followed and the scientific basis on which his reasonings are based for arriving at conclusion for which again, the communication skill is equally important. It is also essential that the basis on which these tests are carried out and the fundamental principles of ballistics must be placed before the Court with conceptual clarity. Apart from his having subjective satisfaction of the result and conclusions, the expert must have adequate material and requisite expertise with him to substantiate his reasonings before the Court of Law."*

"*With this, evidence of PW.75 needs to be adverted to further. It is a fact that in the instant case when the expert first examined the revolver (Exh.16) he*

did not realize the fact that the firing pin of the said weapon was tampered. When once again called after the cartridge cases discovered at the instance of accused Maniyari (A-17) were sent for the laboratory testing, the witness realized the need for the said weapon and when sent once again, he has opined the same to have been tampered."

"*.....Even brushing aside entire evidence on ballistics as mentioned hereinabove, the Court is of the firm opinion that following Supreme Court's verdict [in case of Mastram (supra)] will not even require the said firearm to be sent to the ballistic expert as PW.8 is specific about these injuries caused by the bullets having resulted into the death of a person and that itself would be sufficient as per this decision. And again, the version of the eye witness (PW.55) is not such which fundamentally cannot agree to the fundamentals of Forensic Medicine and therefore, it would not be possible to accept the say of the defence that as the two are completely contrary, the version of eye witness should be discarded by the Court.*

Providing a strong and also missing links at many places to this chain of events are the confessional statements of accused which are permissible to be recorded as POTA is applied."

14. In view of the aforesaid evidence on record, the conclusions drawn by the trial Court were challenged as perverse, irrational and illegal and since the trial Court has, in the impugned judgment, found support from confessions of the accused persons, their admissibility, reliability and probative value will have to be examined before re-appreciating the evidence as a whole for arriving at the final conclusion as to culpability of the accused persons, as far as murder of Mr.Haren Pandya is concerned.

14.1 However, as far as the evidence referred to and discussed hereinabove is concerned, it is difficult to endorse the conclusions drawn by the trial Court, for the following reasons:

(a) The sole eye witness (PW.55) has contradicted himself in his own cross-examination by changing his version in material particulars. Firstly, he deposed that he saw Shri Pandya's car drive upto its parking place and that the assailant walked upto the car and shot him. Then, in cross-examination, he said that some cars were already present when he was talking to Kanaiya and one of those cars was the car of Mr.Pandya. He confirmed that position by again saying that no car had come when he was talking to Kanaiya. After moving away from the car, he just sat for half-an-hour and then straightway told Shukla Chacha that Shri Pandya had been killed. He deposed that he had seen the assailant and stated his features and height, whereas he had not seen the face of Shri Pandya inside the car. While his stand-point was admittedly 20 to 30 degrees from the car of Shri Pandya, and the distance was approximately 16 to 18 feet by all accounts, he could not have seen anything inside the car from the tinted glasses on the left side of the car, but he deposed that he saw from the front windscreen that Shri Pandya was wearing white kurta with red lining in it. He also categorically deposed that he had seen that Shri Pandya had died. Thus, without ever claiming to have even peeped through the opening of the glass on the driver side of the car or having stood in front of the front windscreen, he sought to describe the killing of the victim with such precision as if the victim had collapsed on his left side in front of him. Not only that he had admittedly not seen the face of Shri Pandya, even his presence at the gate at sharp 7:30 a.m., as claimed by him, was doubtful, and his subsequent behaviour of neither running away nor calling anyone nor going nearer the car was unnatural behaviour of an eye witness.

(b) After sitting for half-an-hour on the other side of the Hall, in a state of shock, he stated to have straightway informed Shukla Chacha to call Nanubhai and Shukla Chacha himself also did not care to go near the car to see if Shri Pandya was there. Again, Shukla Chacha taking him

to the place of Nanubhai, which was within 3 kms, could not have taken more than half-an-hour despite traffic, traffic signals or traffic police. That would have made his entry at Nanubhai's place at around 9.00 a.m. By such calculation of time, if PW.55 met CW.1 at 9.30 a.m., the time of offence will have to be around 8.30 a.m. and not 7.30 a.m. as claimed by PW.55 and accepted by the prosecution. Even after taking tea and staying at Nanubhai's place for 45 minutes, he would have returned to the place of offence by 10:30 a.m., but he claimed to have returned at 11.00 a.m. when the police was removing Shri Pandya to hospital. However, again his claim of having seen Shri Pandya being taken away to the hospital in a reclining position is contradicted by specific evidence of PW.85 (Exh.509), who was categorical about Shri Pandya having been carried in sitting position on the front seat of the jeep. While CW.1 sought to corroborate the testimony of PW.55, the initial statement of CW.1 recorded on the same day was not produced. Even his statement recorded later by CW.2 (Exh.880) revealed that PW.55 had told him that when he (PW.55) was sitting on the bench, he had seen one man running away. Such oral testimony of PW.55 and identification by him of A-1 with apparent hesitation could not inspire such confidence as to draw a firm conclusion about the veracity of his version. Coupled with omission to examine the other witnesses, namely Kanaiya and Ramesh, the sweeper, who were deposed to be in the immediate vicinity at the time of the incident and complete absence of investigation into availability of other witnesses such as regular morning walkers, created a cloud of doubt around the manner and timing of firing at Mr.Pandya. It was, in that context, vehemently and rightly argued for the appellants, without any satisfactory explanation from the prosecution, that all the persons who had seen Mr.Pandya immediately before and after his laying in the car were kept away from the witness box to protect the fragile testimony of PW.55 and to ensure that the

timing of the incident emerging from statement of PW.55, recorded by CBI after three days, remained intact at 7.30 a.m. to tally with the timing of the call supposed to have been made by A-1 from Law Garden area at 7.33 a.m. It may be noted here that the prosecution and the impugned judgment has heavily relied upon the mobile phone record of the phone supposed to have been held by A-1 on 25th and 26th of March 2003 to conclude that none of the few alleged active participants in the offence having residence in the Law Garden area, it was strong incriminating circumstance corroborating with other evidence; although the mobile phone attributed to A-1 had disappeared from muddamal and the mobile phones attributed to A-6, A-7, A-8 and A-9 did not show their location and had no significant activity on 25th and 26th of March, 2003.

(c) Remarkably, all the prosecution witnesses concerned had to confirm that opening of the glass on driver's side of Mr.Pandya's car was just as it appeared in the photograph (Exh.617). The opening of glass having been scientifically measured to be hardly 3 inches and PW.55 having confirmed that Mr.Pandya was fired upon from outside the car, the version of the sole eye witness was practically improbablised by medical evidence and FSL reports which clearly indicated that at least injury No.7 was impossible to be caused from the height and angle of the weapon attributed to the assailant while the victim would be seated in the driver's seat or even while he was sliding onto the adjoining seat, within seconds of the first fatal shot. The order in which the shots were fired is not indicated by any evidence or opinion on record, and hence could only be a matter of surmise.

(d) Even as PW.55 claimed to have at least seen the clothes of Shri Pandya, his description of the colour of stripes of kurta turned out to be incorrect. While his first narrative of the incident was before Nanubhai (CW.1), he

appeared to have failed to mention time of the killing, description of the assailant or presence of Kanaiya and Ramesh, the sweeper, at the place of the incident. Unfortunately, CW.1's first statement made on 26.3.2003 which could have thrown some light on what information he had received from PW.55, was not brought on record by the prosecution. Even as the I.O. had deposed (PW.120 Exh.728) that a sketch (Exh.620) of the assailant was prepared with the help of PW.55, he denied any knowledge of such sketch and that sketch was found and held by the trial Court to be not at all matching with the face and features of A-1. While the statement of PW.55 was stated by him to have been recorded at 2.00 p.m., the I.O. (Exh.101) deposed that it was recorded around 6.00 p.m.; which means that PW.55 remained at the spot till late evening as a person interested in assisting the investigation. However, the mobile forensic team did not take notice of his presence or take his help. The initial rough map of the site (Exh.615) drawn by PW.101 at 2.00 p.m. has no reference to the eye witness. That belied PW.101's claim that around 2.00 p.m. he had enquired whether anyone had seen anything and had chanced upon PW.55 as an eye witness. On the one hand P.I. Shri Shaikh (PW..101) was supposed to be investigating at 2.00 p.m. on 26.3.2003 at the scene of offence and, on the other hand, the same officer was present at the *post-mortem* at 2.15 p.m. Another map prepared by CBI on 29.3.2003 (Exh.387) was stated by PW.120 to have been drawn by pencil and signatures and thumb impressions of supposed eye witnesses were taken on it. Then, it was stated to have been finalized by a sketch pen; and in the note below that map, name of A-1 was mentioned and then scored off to show the place of the assailant with the date of 26.3.2003, although the identity of the assailant was not known to anyone till early April, 2003. The I.O. of CBI Dr.Gupta (PW.120) however, deposed that the note below the map was added 'at the time of charge'. He also clearly admitted that in the

statement before him PW.55 had not stated that he had seen the boy coming and firing and cried “Bhago Bhago” or that a boyish person had come from the same direction as the car of Shri Pandya had come and he had fired four or five shots while Shri Pandya was rolling up the glass. He also deposed that he did not record statements of any of the persons who had reached the scene of offence on 26.3.2003 even before the complainant.

All these factors put into serious doubt the veracity of the version of PW.55 and therefore, he could hardly be relied upon as a reliable eye witness to the incident of firing upon Shri Pandya. Even the investigating agencies do not seem to have initially treated him as an eye witness. His remaining available for the initial 4 to 5 days without running his business and then going away to his native place far away for nearly a month further strengthens the doubt about the investigating agency having put him to the use of an eye witness to the exclusion of other possible witnesses who could have thrown some light on the timing of Shri Pandya's movement on 26.3.2003, place and manner and motive of killing him and on the position of his body in the car; and better explained the gun-shot wounds. It may be pertinent to note here that exact time of firing upon Shri Pandya was crucial for the prosecution to link A-1 with the incident by virtue of the call supposed to have been made by him from Law Garden area at 7:33 a.m. and any evidence indicating arrival of Shri Pandya's car at only 15 minutes before or after 7:30 a.m. of 26.3.2003 would have completely overturned the case of the prosecution. PW.1 who stated to have made many calls to Shri Pandya in the morning of 26.3.2003 was not examined for timing of his calls and the FIR lodged by him (Exh.167) mentioned the time of offence to be 10.30 a.m., time of lodging the FIR to be 11.30 a.m., and it was stated therein that Shri Pandya had died during treatment at the hospital, while the doctors at the hospital had declared him dead at 12.00 noon.

15. The number of bullet injuries as recorded in the *post-mortem* report, three holes on the right-hand sleeve of kurta of Shri Pandya and description of injury No.5 and 6 clearly indicated that injury No.5 and 6 could not have been communicating in absence of track having been mentioned in the *post-mortem* report. There were no fractures and there was no track in the palm or wrist, but there was separate blackening at the wrist and corresponding blackening on the kurta's sleeve. In fact, the examining doctor (PW.19) had made a sketch showing a horizontal injury on the wrist which would rule out the possibility of injury No.6 being an exit wound. Again, the same bullet which caused injury No.5 between the junction of index and middle fingers, even if communicated with injury No.6 on front of forearm, could hardly have re-entered the body to cause injury No.1 at lower part of front neck with the track passing through opical right of right lung and pleura in lateral aspect of left chest wall muscles. Such downward track of injury No.1, if it were a re-entry wound after the bullet having exited from the forearm, would have required a unique position of right hand for which there would be no space in closed setting of a small car. That would lead to the inference that injury No.1, 5 and 6 were caused by different bullets of which two were never traced. Not only that, firing of two more bullets, total seven bullets, would require another weapon, and arguably another assailant, and it would falsify the whole case of the prosecution that only five bullets were fired as indicated by all the supporting evidence. The careful and meticulous mention of only five gunshots throughout the relevant evidence for the prosecution and even in the retracted confessions of A-1 and A-6 made the whole prosecution case a possibly well-orchestrated concoction of a story away from the whole truth of the matter. The discussion of ocular, ballistic and medical evidence and the ham-handed rejection of the expert's opinion as discussed in para 13 hereinabove, only strengthened the argument for the appellants that the conclusions drawn by the trial Court were perverse and illogical.

16. The mystery of the murder is deepened by the facts, borne out from the record, that no blood was found in Shri Pandya's car except a negligible spot on the seat near the driver's seat even as his clothes bore tell-tale signs of profuse bleeding from injuries on the neck and forearm; and mobile phone and keys lying on the floor of the car below that seat had stains of blood. No proper map of the scene of offence was made, position of the eye-witnesses was not ascertained and shown (Exh.615) and assessment of visibility from the position of the sole eye-witness at around 7.30 a.m. was not made. After recovering within hours the mobile phone of Mr.Pandya from the scene of offence, no effort was made to investigate into recent calling from and to that phone even to find out the time since Mr.Pandya had ceased to answer or open SMS messages. On the contrary, I.O.Mr.Gupta (PW.120, Exh.728) admitted that when he received the mobile phone (Article 16) from Ellisbridge Police Station, it was not in a sealed condition, and as he did not find "*any significant*" calls, he did not even prepare a memo of such calls. No finger-prints were stated to have been lifted either from the car or from the weapon recovered afterwards. The shoes worn by Mr.Pandya on the fateful day could have provided some clue as to whether he had already walked in the garden. They were mysteriously missing from the hospital and it could not be known whether it had bloodstains on them. Although Mufti Sufian and Sohailkhan (absconding accused, who are not parties herein) were all through the investigation found or projected as masterminds or kingpins and co-ordinators who inspired, financed and supervised alleged terrorist acts, were not arrested and the trail of their mobile phones went cold immediately before the other accused were arrested from a public place pursuant to some secret information. Towards the end of investigation, red-corner notices and warrants under section 70 of Cr.P.C. were issued and it was stated before the Court that they were suspected to have sneaked into Pakistan. On the other hand, as for the appellants herein, no evidence with regard to anyone of them going to Pakistan via Bangladesh or Dubai was unearthed in spite of some

indication in their emails that they were in touch with someone outside India and clear admission of taking training in Pakistan in some of the confessional statements supposed to have been made by them.

17. Since the prosecution has heavily relied upon confession of the appellants as substantive evidence providing the missing links in the prosecution case and as conclusive evidence of hatching and execution of criminal conspiracy within the larger conspiracy to strike terror, it would be necessary to deal with that part of evidence; particularly where it relates to the offence of murder. It has to be noted at the outset that confessions were recorded under the provisions of Section 32 of POTA after it being applied on 02.06.2003 in the case of murder of Shri Pandya. Before the confessions were recorded all the accused persons, except A-9 and A-11, were already in prolonged custody of the police for nearly two months or more. The time taken in taking down the statements and number of pages of hand-written confessions of each accused, recorded by the same officer, may be tabulated as under:

Accused	Date of Confession	Time taken From	To	No. of Pages	After hours of record-ing as under	Hours of prelimi-nary pro-duction
A-7	06.06.03	17.00	23.25	19	03.25	48
A-9	07.06.03	04.00	16.50	20	12.50	60
A-6	07.06.03	17.00	23.15	13	06.15	72
A-8	07.06.03	12.00	04.00 (Midnight 08.06.03)	12	04.00	78
A-11	15.06.03	14.00	18.45	12	04.45	47

A-10 16.06.03 15.00 18.30 13 03.30 70

A-2 20.06.03 15.00 15.15 08 00.15 46

A-3 20.06.03 18.00 20.20 09 02.20 48

A-1 21.06.03 12.00 15.00 12 03.00 65

A-12 22.06.03 11.00 13.15 06 02.15 19

A-5 23.06.03 15.00 17.40 10 02.40 24

A-4 24.06.03 12.00 13.40 10 01.40 44

17.1 The Superintendent of Police (CBI) (PW.21 - Exh.226) who recorded all the statements in Hindi, *inter alia*, deposed that he had strictly instructed the guard not to allow any person from CBI or otherwise to meet or talk to the accused during reflection time. He had physically inspected the body of the accused for any mark of physical violence and satisfied himself about voluntariness and then recorded the confessional statements of each accused in the same language as spoken by him and obtained his signatures on each page of the statement after reading it over to him; and put each confessional statement in sealed envelope and directed the CBI officer to further comply with the provisions of law. From the time the accused were produced before him till the time of their production before Judicial Magistrate, they were kept at CBI office at Gandhinagar but during reflection time they were not kept in lock-up, even as a guard was kept outside the place where the accused were kept during reflection period. And, none was allowed to talk or meet the accused during reflection time and there was no question of accused having any legal advise during that period. He deposed that as and when he got time to record the confessional statement, he had called the accused. He asserted that none else entered or exited and there was no interruption of any kind

during recording of the confessions. When asked about difference in duration of recording of each statement with reference to pages thereof, he replied that recording depended upon speed of narration, speed of reducing it into writing, time of day or night during which it was recorded and such other factors. He denied that back to back recording of statements indicated pre-fabrication of record or of confessional statements. He could not remember any accused to have asked for even a glass of water during recording of statement in the month of June and asserted that not asking for glass of water had nothing to do with genuinely free and voluntary atmosphere. He admitted that Hindi was never his medium during education. He admitted that his basic educational qualification was Commerce Graduate and Cost Accountant, and he had never recorded any confessional statements under TADA. He denied that the confessional statements were not recorded on a mechanical device as they were not voluntary. The following question, note of the Court and answer of the witness need to be reproduced:

‘‘*Q: Are you aware as to how in Hindi language the word “Abhiyukt” can be written?*

Note: At this juncture, the Court has pointed out to the LA for the defence that time and again this word has appeared in the confessional statement of the accused which has been exhibited and yet, since he has insisted on asking this question, the witness has been asked to reply the same.

A: In the word “Abhiyukt” the words “a”, “bh”, “u”, “k” & “t” of Hindi language will be used”.

17.2 Contents of the confessional statements generally are narration of minute details of meetings of the accused persons and talks of taking revenge for the atrocities committed on Muslims during riots of the year 2002 and expression in clear and similar terms of the object of killing some Hindu leaders for spreading terror among Hindus. Ramarkably, A-4, A-5, A-6, A-8 and A-12 have also narrated the details of the tiffin bomb case although that was not the charge pursuant to which they were being interrogated. And A-6, A-8 and A-12 have in fact been acquitted in that case. As for selection of Shri Pandya for killing, it is stated to be the absconding accused A-14 (Sohel) who dropped his name and a few of the accused reiterated that as Shri Pandya had played an active part during riots and in demolishing a masjid at Paldi he was a fit target for taking revenge and striking terror. A-9 was specific in his statement (Exh.232) that on 25.3.2003 he had gone to Law Garden with A-1 and Shri Pandya had come there around 7.30 a.m. When A-1 aproached him near parking area, Shri Pandya had come out and A-1 dropped the idea of killing him as people in the garden were watching him. On 26.3.2003, he reached near H.A.College and saw Yunus (A-6) on a black motorcycle near Thakorebhai Hall and saw A-1 standing at the corner. At around 7.30 a.m., he saw the car and Shri Pandya as glass of the car was half-open. He specifically stated that A-1 fired on Shri Pandya four or five bullets from revolver held by him and at that time half of the glass on the driver-side was open. A-1 has stated in his statement (Exh.253), *inter alia*, that as Rasulkhan (A-18) (an absconding accused) wanted to strike terror in Gujarat he was being sent to Gujarat for that purpose. He thought that after staging a big event he may be called to Pakistan forever and then he could live in peace, away from the cases pending against him. After describing in detail the attempt on the life of Shri Tiwari and the places of his stay in Ahmedabad, he stated that on 25.3.2003 he gave up the idea of firing at Shri Pandya. On 26.3.2003, he went to the house of A-14 in coffee-colour shirt and upon a sign from Yunus, collected a loaded revolver from the toilet of Jaliwali Masjid and went to Law

Garden as pillion rider to Yunus (A-6). As Shri Pandya opened a bottle for drinking water after parking his car, he fired five bullets from the opening of the glass. Then he went to Yunus and boarded his motorcycle. On his way he asked Yunus how many bullets were fired by him and when Yunus told four, he told him, not four but five bullets were fired. He stayed at Royal Apartment for three days thereafter and then, after staying at somebody's shop, he was given a bicycle to go to Kanodar village. He went there and on the next evening he was brought back to Ahmedabad in a Maruti car by A-13.

17.3 Important parts of the above statements, related to the murder of Shri Pandya, without mention of any particular time, were inconsistent with the deposition of the eye-witness insofar as the accused concerned stated that the glass of the window of Shri Pandya's car was already half-open and he was shot when he was opening a water-bottle which was nowhere mentioned or found during investigation. Kanodar village was stated to be about 140 kms. away from Ahmedabad and it was practically impossible to reach there on a bicycle in 12 to 18 hours. Moreover, the dialogue regarding number of bullets fired by him is so apparently artificial and unnatural that it appears to have been calculated to buttress the prosecution case in its most controversial aspect. The confessions simply did not mention or explain the gunshot wound on the scrotum of Shri Pandya. The confessions were of course retracted at an early opportunity before the POTA Court, orally and in writing (Exh. 9 to 17), though not before learned Magistrate during confirmation proceeding. There was no material whatsoever to substantiate that Shri Pandya had, in fact or in perception of the victims of riots, played a leading role in the riots or caused in any way demolition of any masjid. Therfore, the object and intent of taking revenge and striking terror through his murder was provided with no basis except the dialogues narrated in the confessional statements.

17.4 Learned counsel Mr.B.M.Gupta, appearing for A-1, A-2 and A-3, pointed out that the SP, CBI (PW.21 – Exh.226) had clearly admitted in his Answer

No.113 that the confessional statements of A-1, A-2 and A-3 were recorded in the case of attack on Shri Jagdish Tiwari and not in Shri Haren Pandya murder case. I.O. Shri Gupta (PW.120 – Exh.728) had also admitted in his cross-examination that no confessional statement of A-1, A-2 and A-3 was taken while they were in his custody pursuant to the case of murder of Shri Haren Pandya. It was also pointed out by learned counsel Mr.Gupta that, as admitted by I.O. (PW.120 – Exh.728), in all the applications made for police custody of the accused after 01.6.2003 and application of POTA, he had never filed any affidavit stating reasons for the request for police custody, which amounted to violation of mandatory provisions of Sec.49 (2) of POTA. In fact, the remand report (Exh.754) dated 12.6.2003 for A-1, A-2 and A-3 clearly mentioned only the case of attempt of murder on Shri Jagdish Tiwari and conspiracy. But thereafter, their confessions were recorded in which admissions of involvement in the case of murder of Shri Haren Pandya were obtained, according to the submission. It was also submitted that the accused persons were nowhere shown to have been told or advised that they would be free of police custody after recording and confirmation of their confessional statements; and hence, under the fear of further police custody, the accused persons who were already in police custody for inordinately long period could not be expected to make any complaint before learned Judicial Magistrate.

17.5 In the impugned judgment, it is recorded that S.P., CBI had no reason to fabricate any confessional statement and had not only done all that was required under the law but also safeguarded the interest of the accused. Although he had "*not explicitly asked the accused of their right to meet the lawyers, but that cannot take away the truthfulness of the confessional statement*". The Court relied upon *State of Maharashtra v. Bharat Chhaganlal Raghani* to hold that the Apex Court had not found any requirement of opening by the Magistrate of the sealed envelope containing confession and to read out the same to the accused, and as the sealed envelopes were sent directly to the POTA Court, no prejudice was caused. The subsequent retraction and

complaints by some of the accused about torture, threats and forcible extraction of confessions were brushed aside by the Court as after-thought or under legal advice. Accordingly, the confessional statement of A-1 was found by the Court to have been given voluntarily and it was further found to be truthful as there was "*sufficient general corroboration available to the same*."

18. Even as the narration of events in the confessional statements of each accused with minute details of names, addresses, ten-digit phone numbers and dates read with the deposition of the recording officer (PW.21 Exh.226) do not inspire sufficient confidence about voluntariness and veracity of the statements, the issue of their admissibility and reliability was taken more on the legal plain. And, the most elaborate recent judgment in the Parliament attack case ***[State (NCT of Delhi) v. Navjot Sandhu etc. - (2005) 11 SCC 600]*** was discussed at the bar. Relevant observations made by the Apex Court therein may be extracted hereunder before considering the evidentiary value of the confessional statements:

> "*22. In Usmanbhai's case [(1988) 2 SCC 271] it was said;*
>
> > *"Before dealing with the contentions advanced, it is well to remember that the legislation is limited in its scope and effect. The Act is an extreme measure to be resorted to when the police cannot tackle the situation under the ordinary penal law. The intendment is to provide special machinery to combat the growing menace of terrorism in different parts of the country. Since, however, the Act is a drastic measure, it should not ordinarily be resorted to unless the Government's law enforcing machinery fails."*
>
> "*27. .....While Sections 17 to 23 deal with admissions, the law as to confessions is embodied in Sections 24 to 30 of the Evidence Act. Section 25 bars proof of a confession made to a police officer. Section 26 goes a step further and prohibits proof of confession made by any person while he is in the custody of a police officer, unless it be made*

in the immediate presence of a Magistrate. Section 24 lays down the obvious rule that a confession made under any inducement, threat or promise becomes irrelevant in a criminal proceeding. Such inducement, threat or promise need not be proved to the hilt. If it appears to the court that the making of the confession was caused by any inducement, threat or promise proceeding from a person in authority, the confession is liable to be excluded from evidence. The expression 'appears' connotes that the Court need not go to the extent of holding that the threat etc. has in fact been proved. If the facts and circumstances emerging from the evidence adduced make it reasonably probable that the confession could be the result of threat, inducement or pressure, the court will refrain from acting on such confession, even if it be a confession made to a Magistrate or a person other than a police officer".

"*29. Confessions are considered highly reliable because no rational person would make admission against his interest unless prompted by his conscience to tell the truth. "Deliberate and voluntary confessions of guilt, if clearly proved are among the most effectual proofs in law". (vide Taylor's Treatise on the Law of Evidence Vol. I). However, before acting upon a confession the court must be satisfied that it was freely and voluntarily made. A confession by hope or promise of advantage, reward or immunity or by force or by fear induced by violence or threats of violence cannot constitute evidence against the maker of confession. The confession should have been made with full knowledge of the nature and consequences of the confession. If any reasonable doubt is entertained by the court that these ingredients are not satisfied, the court should eschew the confession from consideration. So also the authority recording the confession - be it a Magistrate or some other statutory functionary at the pre-trial stage, must address himself to the issue whether the accused has come forward to make the confession in an atmosphere free from fear, duress or hope of some advantage or reward induced by the persons in authority. Recognizing the stark*

reality of the accused being enveloped in a state of fear and panic, anxiety and despair while in police custody, the Indian Evidence Act has excluded the admissibility of a confession made to the police officer".

"*32. As to what should be the legal approach of the Court called upon to convict a person primarily in the light of the confession or a retracted confession has been succinctly summarized in Bharat v. State of U.P. (1971 (3) SCC 950). Hidayatullah, C.J., speaking for a three-Judge Bench observed thus :*

> *"7. Confessions can be acted upon if the court is satisfied that they are voluntary and that they are true. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged in the context of the entire prosecution case. <u>The confession must fit into the proved facts and not run counter to them</u>. When the voluntary character of the confession and its truth are accepted, it is safe to rely on it. Indeed a confession, if it is voluntary and true and not made under any inducement or threat or promise, is the most patent piece of evidence against the maker. Retracted confession, however, stands on a slightly different footing. As the Privy Council once stated, in India it is the rule to find a confession and to find it retracted later. A court may take into account the retracted confession, but it must look for the reasons for the making of the confession as well as for its retraction, and must weigh the two to determine whether the retraction affects the voluntary nature of the confession or not. If the court is satisfied that it was retracted because of an after-thought or advice, the retraction may not weigh with the court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its user. All the same, the courts do not act upon the retracted confession without finding assurance from some*

other sources as to the guilt of the accused. Therefore, it can be stated that a true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires the general assurance that the retraction was an after-thought and that the earlier statement was true.....".

"*34. Dealing with retracted confession, a four-Judge Bench of this Court speaking through Subba Rao, J, in Pyare Lal v. State of Assam (AIR 1957 SC 216), clarified the legal position thus :*

"A retracted confession may form the legal basis of a conviction if the court is satisfied that it was true and was voluntarily made. But it has been held that a court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only rule of prudence. It cannot even be laid down as an inflexible rule of practice or prudence that under no circumstances such a conviction can be made without corroboration, for a court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars."

"*36. Then we have the case of Shankaria v. State of Rajasthan (1978 (3) SCC 435) decided by a three-Judge Bench. Sarkaria, J, noted the twin tests to be applied to evaluate a confession: (1) whether the confession was perfectly voluntary and (2) if so, whether it is true and trustworthy. The learned Judge pointed out that if the first test is not satisfied the question of applying the second test does not arise.....*"

"*37. ....*

"*18. Having thus reached a finding as to the voluntary nature of a confession, the truth of the confession should then be tested by the court. The fact that the confession has been made voluntarily, free from threat and inducement, can be regarded as presumptive evidence of its truth. Still, there may be circumstances to indicate that the confession cannot be true wholly or partly in which case it loses much of its evidentiary value".*

"*19. In order to be assured of the truth of confession, this Court, in a series of decisions, has evolved a rule of prudence that the court should look to corroboration from other evidence. However, there need not be corroboration in respect of each and every material particular."*

"*39. The crucial expression used in Section 30 is "the Court may take into consideration such confession" (emphasis supplied). These words imply that the confession of a co- accused cannot be elevated to the status of substantive evidence which can form the basis of conviction of the co-accused. The import of this expression was succinctly explained by the Privy Council in Bhuboni Sahu v. King (AIR 1949 PC 257) in the following words:*

> *"The Court may take the confession into consideration and thereby, no doubt, makes its evidence on which the Court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence".*
>
> *(emphasis supplied)*

‘‘*40. After referring to these decisions, a Constitution Bench of this Court in Haricharan Kurmi v. State of Bihar (1964 (6) SCR 623) further clarified the legal position thus :*

".....In dealing with a case against an accused person, the Court cannot start with the confession of co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence."

(emphasis supplied)

‘‘*45. Reference is to be made to a recent decision of this Court in Jameel Ahmed and Anr. v. State of Rajasthan [2003 (9) SCC 673], a case arising under TADA. After a survey of the earlier cases on the subject, this Court observed:*

"(i) If the confessional statement is properly recorded satisfying the mandatory provisions of Section 15 of TADA Act and the rules made thereunder and if the same is found by the Court as having been made voluntarily and truthfully then the said confession is sufficient to base conviction of the maker of the confession."

This proposition is unexceptionable. The next proposition, however, presents some difficulty. The learned Judges added:

‘‘(ii) Whether such confession requires corroboration or not, is a matter for the Court considering such confession on facts of each case....."

‘‘*47. While we agree with the proposition that the nature of corroboration required both in regard to the use of confession against the maker and*

the co- accused is general in nature, our remarks made earlier in relation to the confession against the maker would equally apply to proposition No. (iii) in so far as it permits the Court in an appropriate case to base the conviction on the confession of the co-accused without even general corroboration. We would only add that we do not visualize any such appropriate case for the simple reason that the assurance of the truth of confession is inextricably mixed up with the process of seeking corroboration from the rest of the prosecution evidence. We have expressed our dissent to this limited extent. In the normal course, a reference to the larger Bench on this issue would be proper. But there is no need in this case to apply or not to apply the legal position clarified in proposition No. (iii) for the simple reason that the trial court as well as the High Court did look for corroboration from the circumstantial evidence relating to various facts narrated in the confessional statement. Perhaps, the view expressed by us would only pave the way for a fresh look by a larger Bench, should the occasion arise in future."

"*49. .....Our attention has been drawn to the provisions of Cr.P.C. and POTA providing for a joint trial in which the accused could be tried not only for the offences under POTA but also for the offences under IPC. We find no difficulty in accepting the proposition that there could be a joint trial and the expression "the trial of such person" may encompass a trial in which the accused who made the confession is tried jointly with the other accused. From that, does it follow that the confession made by one accused is equally admissible against others, in the absence of specific words? The answer, in our view, should be in the negative. On a plain reading of Section 32(1), the confession made by an accused before a police officer shall be admissible against the maker of the confession in the course of his trial. It may be a joint trial along with some other accused; but, we cannot stretch the language of the section so as to bring the confession of the co- accused within the fold of admissibility....."*

"*55. The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law, as said by the eminent American jurist Schaefer. We may recall as well the apt remarks of Krishna Iyer, J. in Nandini Satpathy v. P.L. Dani [(1978) 2 SCC 424] (para 29) :*

"The first obligation of the criminal justice system is to secure justice by seeking and substantiating truth through proof. Of course, the means must be as good as the ends and the dignity of the individual and the freedom of the human person cannot be sacrificed by resort to improper means, however worthy the ends. Therefore, 'third degree' has to be outlawed and indeed has been. We have to draw up clear lines between the whirlpool and the rock where the safety of society and the worth of the human person may co-exist in peace."

"*59 ..... In this scenario, we have serious doubts whether it would be safe to concede the power of recording confessions to the police officers to be used in evidence against the accused making the confession and the co-accused".*

"*157. The lofty purpose behind the mandate that the maker of confession shall be sent to judicial custody by the CJM before whom he is produced is to provide an atmosphere in which he would feel free to make a complaint against the police, if he so wishes. The feeling that he will be free from the shackles of police custody after production in the Court will minimize, if not remove, the fear psychosis by which he may be gripped. The various safeguards enshrined in Section 32 are meant to be strictly observed as they relate to personal liberty of an individual....."*

(emphasis supplied)

"*158. The breach of any one of these requirements would have a vital bearing on the admissibility and evidentiary value of the confession recorded under Section 32(1) and may even inflict a fatal blow on such confession. We have another set of procedural safeguards laid down in Section 52 of POTA which are modelled on the guidelines envisaged by D.K. Basu.....*"

"*160. In the same Judgment, we find lucid exposition of the width and content of Article 22(1). Krishna Iyer, J. observed-*

"The spirit and sense of Article 22(1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near-custodial interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a legal practitioner of his choice."

Article 22(1) was viewed to be complementary to Article 20(3). It was observed-

"we think that Article 20(3) and Article 22(1) may, in a way, be telescoped by making it prudent for the police to permit the advocate of the accused, if there be one to be present at the time he is examined".

"*164. In our considered view, the violation of procedural safeguards under Section 52 does not stand on the same footing as the violation of the*

requirements of sub-sections (2) to (5) of Section 32. As already observed, sub-sections (2) to (5) of Section 32 have an integral and inseparable connection with the confession recorded under Section 32(1). They are designed to be checks against involuntary confessions and to provide an immediate remedy to the person making the confession to air his grievance before a judicial authority. These safeguards are, so to say, woven into the fabric of Section 32 itself and their observance is so vital that the breach thereof will normally result in eschewing the confession from consideration, subject to what we have said about the judicial custody. The prescriptions under Section 52, especially those affording an opportunity to have the presence of the legal practitioner, are no doubt supplemental safeguards as they will promote the guarantee against self-incrimination even at the stage of interrogation; but these requirements laid down in Section 52 cannot be projected into Section 32 so as to read all of them as constituting a code of safeguards of the same magnitude. To hold that the violation of each one of the safeguards envisaged by Section 52 would lead to automatic invalidation of confession would not be in consonance with the inherent nature and scheme of the respective provisions. However, we would like to make it clear that the denial of the safeguards under sub-sections (2) to (4) of Section 52 will be one of the relevant factors that would weigh with the Court to act upon or discard the confession. To this extent they play a role vis-a-vis the confessions recorded under Section 32, but they are not as clinching as the provisions contained in sub-sections (2) to (5) of Section 32."

(emphasis supplied)

"*180. The more important violation of the procedural safeguards lies in the breach of sub-section (2) read with sub-section (4) of Section 52. It is an undisputed fact that the appellants were not apprised of the right to consult a legal practitioner either at the time they were initially arrested or after the POTA was brought into picture. We may recall that the*

POTA offences were added on 19th December and as a consequence thereof, investigation was taken up by PW80- an Asst. Commissioner of Police, who is competent to investigate the POTA offences. But, he failed to inform the persons under arrest of their right to consult a legal practitioner, nor did he afford any facility to them to contact the legal practitioner. The opportunity of meeting a legal practitioner during the course of interrogation within closed doors of police station will not arise unless a person in custody is informed of his right and a reasonable facility of establishing contact with a lawyer is offered to him....."

"*181. The importance of the provision to afford the assistance of counsel even at the stage of custodial interrogation need not be gainsaid. The requirement is in keeping with the Miranda ruling and the philosophy underlying Articles 21, 20(3) and 22(1). This right cannot be allowed to be circumvented by subtle ingenuities or innovative police strategies. The access to a lawyer at the stage of interrogation serves as a sort of counterweight to the intimidating atmosphere that surrounds the detenu and gives him certain amount of guidance as to his rights and the obligations of the police....."*

"*182. .... It cannot be said that the violation of these obligations under sub-sections (2) and (4) have no relation and impact on the confession. It is too much to expect that a person in custody in connection with POTA offences is supposed to know the fasciculus of the provisions of POTA regarding the confessions and the procedural safeguards available to him. The presumption should be otherwise. The lawyer's presence and advice, apart from providing psychological support to the arrestee, would help him understand the implications of making a confessional statement before the Police Officer and also enable him to become aware of other rights such as the right to remain in judicial custody after being produced before the Magistrate. The very fact that he will not be under the fetters of police custody after he is produced before the CJM*

pursuant to Section 32(4) would make him feel free to represent to the CJM about the police conduct or the treatment meted out to him. The haunting fear of again landing himself into police custody soon after appearance before the CJM, would be an inhibiting factor against speaking anything adverse to the police. That is the reason why the judicial custody provision has been introduced in sub-section (5) of Section 32. The same objective seems to be at the back of sub-section (3) of Section 164 of Cr.P.C., though the situation contemplated therein is somewhat different."

(emphasis supplied)

"*185. All these lapses and violations of procedural safeguards guaranteed in the statute itself impel us to hold that it is not safe to act on the alleged confessional statement of Afzal and place reliance on this item of evidence on which the prosecution places heavy reliance."*

"*243. As far as the first contention of Mr. Gopal Subramanium is concerned, we have already rejected his argument that on the principle of 'theory of agency', the conspirators will be liable for the substantive offences committed pursuant to the conspiracy. When once the application of the theory of agency is negatived, there is no scope to hold that the appellant, in spite of not having done any act or thing by using the weapons and substances set out in sub- section(1)(a), he, as a conspirator, can be brought within the sweep and ambit of sub-sections (1) and (2). The wording of clause (a) of Section 3(1) is clear that it applies to those who do any acts or things by using explosive substances etc., with the intention referred to in clause (a), but not to the conspirators who remained in the background."*

"*248. We are also not impressed by the finding of the High Court that "by reason of the words 'or thing' occurring in Section 3(1) (as a part of the clause 'does any act or thing' by using bombs, dynamite or other explosive substances or firearms, etc."), the definition of a terrorist act*

need not be restricted to a physical act of using explosives etc. The High Court observed that the actions of Afzal in procuring explosives and chemicals and "participating in the preparation of explosives would be action amounting to doing of a thing using explosives", cannot be supported on any principle of interpretation. Moreover, it rests on a finding that the accused Afzal and Shaukat participated in the preparation of explosives for which there is no evidentiary support. Even their confession (which is now eschewed from consideration) does not say that."

"*302. ..... The procedural safeguards incorporated in Sections 50(2), 50(3) and 50(4) are violated in this case also. True, Shaukat was sent to judicial custody after his statement was recorded by the Magistrate. But in the absence of legal advice and the opportunity to interact with the lawyer, there is reason to think that he would not have been aware of the statutory mandate under Section 32(5) and therefore the lurking fear of going back to police custody could have been present in his mind."*

(emphasis supplied)

"*303. The learned ACMM did not apprise him of the fact that he would no longer be in police custody. There is also nothing to show that the confessional statement was read over to him or at least a gist of it has been made known to him."*

"*320. .....The important missing link is that there was no occasion on which Shaukat ever contacted any of the deceased terrorists on phone. Shaukat was not shown to be moving with the deceased terrorists at any time excepting that he used to go with Afzal to the Boys' hostel where Mohammed was staying initially and he once accompanied Afzal*

and Mohammed to the mobile phone shop. He did not accompany Afzal at the time of purchases of chemicals etc. used for preparation of explosives and motor car used by terrorists to go to Parliament House. In the absence of any evidence as regards the identity of satellite phone numbers, the Court cannot presume that the calls were received from a militant leader who is said to be the kingpin behind the operations....."

"*339. In the result, we dismiss the appeal filed by Mohd. Afzal and the death sentence imposed upon him is hereby confirmed. The appeal of Shaukat is allowed partly. He stands convicted under Section 123 IPC and sentenced to undergo RI for 10 years and to pay a fine of Rs. 25,000/- and in default of payment of fine he shall suffer RI for a further period of one year. His conviction on other charges is hereby set aside. The appeals filed by the State against the acquittal of S.A.R. Gilani and Afsan Guru are hereby dismissed."*

18.1 The above relevant observations in Parliament attack case may have to be read keeping in the background the relevant observations in ***PUCL v. Union of India [(2004) 9 SCC 580]*** and keeping in the foreground the following observations recently made by the Apex Court in ***Arup Bhuyan v. State of Assam [(2011) 3 SCC 377]***.

In ***PUCL*** case, the Apex Court observed:

"*64. .....It is a settled position that if a confession was forcibly extracted, it is a nullity in law. Non-inclusion of this obvious and settled principle does not make the section invalid (See Kartar Singh case Page 678, paras 248-49 of SCC). Judicial wisdom will surely prevail over irregularity, if any, in the process of recording confessional statement. Therefore, we are satisfied that the safeguards provided by the Act under the law are adequate in the given circumstances and we don't think it is necessary to look more into this matter. Consequently, we uphold the validity of Section 32."*

In ***Arup Bhuyan v. State of Assam***, the Apex Court observed:

> "*4. Confession is a very weak kind of evidence. As is well known, the widespread and rampant practice in the police in India is to use third-degree methods for extracting confessions from the alleged accused. Hence, the courts have to be cautious in accepting confessions made to the police by the alleged accused.*
>
> "*5. Unfortunately, the police in our country are not trained in scientific investigation (as is the police in western countries) nor are they provided the technical equipments for scientific investigation, hence to obtain a conviction they often rely on the easy short cut of procuring a confession under torture.*
>
> "*6. Torture is such a terrible thing that when a person is under torture he will confess to almost any crime. Even Joan of Arc confessed to being a witch under torture. Hence, where the prosecution case mainly rests on the confessional statement made to the police by the alleged accused, in the absence of corroborative material, the courts must be hesitant before they accept such extra-judicial confessional statements.*
>
> "*7. In the instant case, the prosecution case mainly relies on the alleged confessional statement of the appellant made before the Superintendent of Police, which is an extra-judicial confession and there is absence of corroborative material. Therefore, we are of the opinion that it will not be safe to convict the accused on the basis of alleged confessional statement.*"

18.2 Bare reading of the provisions of section 32 of POTA indicate the mandatory and all important safeguards for making a confessional statement before a police officer admissible in the trial for an offence under that Act. The mandatory requirement contained in section 32 (3) of POTA is that confessions shall be recorded in an atmosphere free from threat and sub-section (5) mandates that the Chief Judicial Magistrate, before whom the person has to be produced within 48 hours, has to send the person to judicial custody. As elaborately discussed and held in the ***Parliament attack case***

(supra), the confession has to fit into the proved facts and not run counter to them and various safeguards enshrined in Sec.32 are meant to be strictly observed as they relate to personal liberty of an individual. Their observance is so vital that the breach thereof will normally result in eschewing the confession from consideration. It is also observed that it is too much to expect that a person in custody in connection with POTA offences is supposed to know the *fasciculus* of the provisions of POTA regarding the confessions and the procedural safeguards available to him. The presumption should be otherwise. The lawyer's presence and advice, apart from providing psychological support to the arrestee, would help him understand the implications of making a confessional statement before the Police Officer and also enable him to become aware of other rights such as the right to remain in judicial custody after being produced before the Magistrate. The haunting fear of again landing himself into police custody soon after appearance before the CJM, would be an inhibiting factor against speaking anything adverse to the police. In the instant case, admitted absence of legal aid during the period of prolonged confinement while the confessions were being recorded and presumption of ignorance about the prospect of being released after production before Chief Judicial Magistrate tend to make the subsequent retraction genuine and reduce probative value of the confessional statements, some of the important parts of the confessional statements, getting no corroboration from any other evidence and certain incriminating parts being not even investigated made consideration of the confessional statements more difficult. It is also relevant to note that the confessional statements were recorded by the SP, CBI (PW.21 – Exh.226) at odd hours and it had taken different duration ranging from 15 minutes to 12 hours and 50 minutes, without any interruption and without any accused person demanding even a glass of water as deposed by PW.21. Even the tone and tenor of the language of confessional statements were also cited by learned counsel for the appellants as the evidence of statements having been dictated or prepared by someone

else because the accused persons hailing from Hyderabad and Ahmedabad could not be using the same words and diction for the same expression.

19. Learned counsel Mr.Y.N.Ravani, appearing for CBI, and learned Sp. P.P. Mr.J.M.Panchal, addressed elaborate arguments with written notes to defend the impugned judgment. It was submitted that the sole eye witness (PW.55) was a truthful, trustworthy and uninterested witness whose testimony could not be disregarded on account of his being rustic in his deposition or in view of the medical and ballistic evidence. It was submitted that his presence at the spot on 26.3.2003 was quite natural and he had deposed about the event of firing and features of the assailant with clarity and certainty. He had also immediately narrated the incident to Shuklachacha and CW.1. He had also identified A-1 during test identification parade as well as before the trial Court. He had also demonstrated before the Court, the position of the deceased inside the car, and his deposition corroborated injuries No.1, 2, 3 and 4 of which track was going downward and right to left. It was argued that injury No.7 which had a track going upward and left to right was also explained by the witness by deposing that the legs of the deceased had come up while being shot. They relied upon judgment of the Apex Court in ***State of Himachal Pradesh v. Mastram [AIR 2004 SC 5056]*** to submit that in case of conflict between ocular version and medical evidence, the ocular evidence of the eye witness has to be preferred. Similar view is expressed by the Apex Court in ***Sunil Dattatraya Vaskar v. State of Mahatrashtra [AIR 2009 SC 210].***

19.1 As for the ballistic evidence, it was submitted for the respondent that custody of bullets was proved from the stage of recovery by the doctor till their receipt by the expert. Thus, the bullets were found by the ballistic expert to be matching with the revolver recovered at the instance of A-1 (Exh.444) and blood present on the bullets recovered from the body of the deceased and blood present on his clothes was of the same group (Ex.458). The *post-mortem* doctor had also identified the bullets in the Court as the same which

were recovered during *post-mortem* (Exh.176). On the one hand, the ballistic expert (PW.75) had opined that the bullets were fired from single standard weapon having 7/7 land and groove with right hand side twist, it was further opined that the crime bullets were fired from the revolver sent by CBI, as per the work-sheet (Exh.452). It was only when third opinion was sought after recovery of four empty cartridge cases that the expert asked for the revolver and he found tampering in the shape of firing pin impression on the percussion cap. He had not checked the firing pin on the earlier occasion as he was not required to opine on crime cartridge cases.

19.2 As for recovery and discovery of the weapons, A-1 had disclosed the fact of concealment of the revolver used in killing of Shri Haren Pandya in the flat at Shahpur before PW.110 (Exh.656); and discovery of revolver and pistol from the flat under section 27 of the Evidence Act in presence of PW.13 (Panchnama Ex.196) had connected A-1 to the crime.

19.3 It was further submitted that the appellants were in possession of mobile phones and were in constant touch with each other before, during and after commission of the crime through their mobile or land-line phones, as depicted in the call detail records, in order to execute the conspiracy. As mobile phone No.9825491421 was used by A-1, his location at 7.33 a.m. on 26.3.2003 in the area near Law Garden and A-14 providing three new BSNL SIMs to A-7, A-8 and A-9 on 25.3.2003 and their location on 25.3.2003 and 26.3.2003 near Law Garden were strong corroborative evidence of the presence of some of the accused in the Law Garden area. The printouts of email sent by A-1, A-2 and A-18 revealed that they were operating in furtherance of a common object as also presence of some of them in Udaipur and Ahmedabad; even as the

text of email messages did not reveal any specific plan of committing any particular crime.

19.4 The evidence regarding A.10 purchasing a motorcycle from PW.54 and giving it to A-1 in the first week of February 2003 and thereafter handing over of that bike to PW.45 while fleeing from Ahmedabad on 4.4.2003 and thereafter PW.45 parking the same in the parking of Kalupur Railway Station, proved the provision of logistical support for commission of crime pursuant to a common object and conspiracy. It has also come in evidence that fake number plates were prepared by A-7 and A-8 from PW.52 and were used after commission of crime.

19.5 It was submitted that it was proved beyond reasonable doubt that A-1 had reached Udaipur on 31.12.2002 and returned to Hyderabad due to paucity of fund; and again he had returned to Udaipur on 20.01.2003. On 25/26.01.2003, he was brought to Ahmedabad by A-11, A-14 and PW.49 and his stay at various places in Ahmedabad was proved by cogent evidence. Thereafter he had left for Mumbai on 07.4.2003, which showed his attempt to escape after commission of the crime.

19.6 Learned counsel relied upon the following judgments of the Apex Court and two unreported Division Bench judgments of this Court, in support of the submission that the confessions of the appellants were required to be relied upon in aid of the corroborative pieces of substantive evidence. It was vehemently argued that high ranking officers of an independent investigating agency like CBI had no reason and could not be presumed to have manipulated or pressurized the accused to make confessional statements which were recorded and confirmed in compliance with all the statutory requirements. It was emphasized that the appellants had not retracted the confessional statements at the first available opportunity when they were produced with their statements in sealed cover before learned Chief

Metropolitan Magistrate. Retraction of the confessions after more than one month was rightly regarded as an after-thought on legal advice. The appellants had given different reasons for retraction when they retracted them orally, in writing and during recording of their statements under section 313 of Cr.P.C. It was also pointed out that the appellants were represented by lawyers at the time of their production in Court for police custody remand. It was submitted that A-1, a native of Andhra Pradesh, had no legitimate business or reason to be in Ahmedabad except for executing the conspiracy. The evidence of A-1, A-4, A-5 and A-12, absconding from Ahmedabad after commission of the crime, indicated their guilty mind. It was also submitted that the Central POTA Review Committee had come to the conclusion that provisions of POTA were duly attracted against the appellants. Thus, there was overwhelming material in the form of oral, documentary, circumstantial and scientific evidence against each of the appellants so as to uphold their conviction and sentence, according to the submission.

20 Learned counsel for the respondent relied upon judgment of the Apex Court in ***Devender Pal Singh v. State of NCT of Delhi [(2002) 5 SCC 234]*** for the proposition that confessional statement of the accused can be relied upon for the purpose of conviction and no further corroboration is necessary, if it relates to the accused himself. However, as a matter of prudence the court may look for some corroboration if confession is to be used against a co-accused though that will be again within the sphere of appraisal of evidence. A mere statement that requisite procedures and safeguards were not observed or that statement was recorded under duress of coercion, is really of no consequence. Such a stand can be taken in every case by the accused after having given the confessional statement. It could not be shown as to why the officials would falsely implicate the accused. There is a statutory presumption under section 114 of the Evidence Act that judicial and official acts have been regularly performed. The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not a judicial

approach to distrust and suspect him without good grounds therefor. Merely because the report was sent directly to the Designated Court, it does not become a suspicious circumstance. Rather, it adds to the authenticity of the document. The purpose of the confessional statement being sent to the court by producing the accused for confirmation of the statement is to ensure that interpolation or manipulation is ruled out at a later date. Whenever an accused challenges that his confessional statement is not voluntary, the initial burden is on the prosecution for it has to prove that all requirements under section 15 of the TADA Act and Rule 15 of the Rules have been complied with. Once this is done, the prosecution discharges its burden and then it is for the accused to show and satisfy the court that the confessional statement was not made voluntarily. No proof can be expected in all cases as to how the mind of the accused worked in a particular situation. If the facts and circumstances surrounding the making of a confession appeared to cast a doubt on the voluntariness of the confession, the court may refuse to act upon the confession, even if it is admissible in evidence. The question whether a confession is voluntary or not is always a question of fact.

20.1 ***State of Maharashtra v. Bharat Chaganlal Raghani [AIR 2002 SC 409]*** was relied upon for the proposition that Rule 15 of the TADA Rules does not oblige the Magistrate either to open the envelope containing the confessional statement recorded by the police officer or to satisfy himself regarding the voluntary nature of the confession.

20.2 ***Abdul Vahab Abdul Majid Shaikh v. State of Gujarat etc. [(2007) 9 SCC 293]*** was relied upon to point out that the appellants therein had no case that the procedure in recording confessional statement was in any way violated. Merely because the confession was retracted, it may not be presumed that the same was not voluntary. On consideration of confessional statement, which was amply corroborated by other items of evidence, the Court had no hesitation in accepting the same as truthful and voluntary.

20.3 ***Mohmed Amin v. CBI [AIR 2008 SC (Supp) 938]*** was relied upon for the following observations:

> "*51. If the confessions of the appellants are scrutinized in the light of the above enumerated factors, it becomes clear that the allegations made by them regarding coercion, threat, torture, etc. after more than one year of recording of confessions are after-thought and products of ingenuity of their advocates. The statements made by them under Section 313, Cr.P.C. were also the result of after thought because no tangible reason has been put forward by the defense as to why the appellant Nos.A-4 to A-8 did not retract from their confessions when they were produced before the Magistrate at Ahmedabad and thereafter despite the fact that they had access to legal assistance in more than one way. Therefore, we hold that the trial Court did not commit any error by relying upon the confessions of appellant Nos.A-4 to A-8 and A-10 and we do not find any valid ground to discard the confessions of appellant Nos.A-4 to A-8 and A-10.*

20.4 In ***Mohd. Ayub Dar v. State of Jammu & Kashmir [(2010) 9 SCC 312]***, a case under TADA, Moulvi Farooq was found in a pool of blood after three identified persons had gone inside his room and sound of firing was heard and then the three assailants had fled. After reference to several judgments on confessions, the Apex Court observed:

> "*64. All these cases suggest that the only test which the court has to apply is whether the confession was voluntary and free of coercion, threat or inducement and whether sufficient caution is taken by the police officer who recorded the confession. Once the confession pases that test, it can become the basis of the conviction. We are completely convinced that the confession in this case was free from all the aforementioned defects and was voluntary."*

20.5 Judgment in ***Sheo Shankar Singh v. State of Jharkhand [(2011) 3 SCC 654***] was relied upon for the following passage:

"*59. In light of the above the failure on the part of the investigating officer in sending the bloodstained clothes to the FSL and the empty cartridges to the ballistic expert would not be sufficient to reject the version given by the eye-witnesses. That is especially so when a reference to the ballistic expert would not have had much relevance since the weapon from which the bullets were fired had not been recovered from the accused and was not, therefore, available for comparison by the expert.*"

20.6 ***Paramjit Singh @ Mithu Singh v. State of Punjab [(2009) 1 SCC (Cri) 299]*** was relied upon for the proposition that even a defect, if any, found in investigation, however, serious, has no direct bearing on the competence or the procedure relating to the cognizance or the trial. A defect or procedural irregularity, if any, in investigation itself cannot vitiate and nullify the trial based on such erroneous investigation.

20.7 ***Main Pal v. State of Haryana [2004 (2) G.L.H.651]*** was relied upon to submit that:

"*11. .....If the eye-witnesses' version, even though of the relatives, is found to be truthful and credible after deep scrutiny, the opinionative evidence of the doctor cannot wipe out the effect of eye-witnesses' evidence. The opinion of the doctor cannot have any binding force and cannot be said to be the last word on what he deposes or meant for implicit acceptance. On the other hand, his evidence is liable to be shifted, analysed and tested, in the same manner as that of any other witness, keeping in view only the fact that he has some experience and training in the nature of the functions discharged by him.*"

20.8 Relying upon ***Sidhartha Vashisht @ (Manu Sharma) v. State (NCT of Delhi) [(2010) 6 SCC 1]***, it was submitted that the evidence of telephone calls was admissible as evidence of the accused being in touch with each other

which resulted in destruction of evidence and harbouring of the accused. “Evidence of phone calls is also relevant and admissible piece of evidence”.

20.9 Recent decision of the Supreme Court in ***Sunil Dattatraya Vaskar v. State of Maharashtra [(2008) 16 SCC 554*** was heavily relied upon to submit that where the eye-witness account was found to be credible and trustworthy, the medical opinion suggesting an alternative possibility was not accepted to be conclusive. When injuries to all the persons, including the deceased, were held to be on account of firing from a height, it was held that the High Court had correctly accepted the prosecution version of the incident resulting in the death of Janu Patil.

20.10 ***State of Himachal Pradesh v. Mast Ram [AIR 2004 SC 5056]*** was relied upon for the view taken by the Supreme Court where injury No.2 on the body of the deceased was not explained. According to the doctor, the injury could not have been caused if the injured had not raised his arm while walking. The High Court was of the view that prosecution witnesses who were accompanying the deceased at the relevant time had never stated that the deceased had at any point of time raised his arm while walking or on being challenged by the accused. The Supreme Court observed:

> ‘‘8..... *It is but quite natural that the deceased when challenged would have reacted by raising his hands either in defence or in accepting the challenge and in the process he would have sustained injury No.2, as described. The reaction of the deceased in raising his hands, in such circumstances, would be in tune and in consonance with the natural human behaviour in ordinary circumstances. There is not set of rule that one must react in a particular way. The natural reaction of man is unpredictable. Every one reacts in his own way. Such natural human behaviour is difficult to be proved by credible evidence. It has to be appreciated in the context of given facts and circumstances of each case*.”

20.11 In ***Union of India v. Moksh Builders [AIR 1977 SC 409],*** the Apex Court observed that an admission by a party is substantive evidence of the fact admitted, and admissions duly proved are admissible evidence irrespective of whether that party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions.

20.12 In the Division Bench decisions of this Court in Criminal Confirmation Case No.2 of 2006 and in Criminal Appeal No.1148 of 2006, the confessional statements have been relied upon for conviction and retraction of a confessional statement is disregarded in the facts of those cases.

21. The other judgments discussed at the bar may be briefly referred to as under:

(a) In ***Abdul Saiyeed v. State of Madhya Pradesh [(2010) 10 SCC 259]*****,** the Apex Court held:

> "*35. Where the eye-witnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive...*"
>
> "*39. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-a-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved. "*

(b) In ***Awadesh v. State of M.P. [AIR 1988 SC 1158],*** the Apex Court observed:

"*10. These injuries could not be caused in the manner and from the place where assailants were alleged to be present at the time of firing the gun shots, and the same are inconsistent with the testimony of the eye witnesses and the site plan. We do not think it necessary to discuss it in detail as the trial court has discussed this question at length and we agree with those findings. According to the testimony of Rajendra Singh and Chhotey Bhaiya PWs, when the deceased got gun shot injuries, he was at a higher level at the well whereas the assailants fired the shots from Bari, which was at lower level by one foot from the road and the well was higher than the road by two or two and a half feet. In this view if shots were fired from Bari, at the deceased who was drinking water in a sitting posture, the injuries in all likelihood would have been from lower part to upper part but Dr. Jain deposed that direction of the injuries caused by bullets was from upper part to lower part and the bullet was antero-posteriorly. In the opinion of the doctor, the person who caused injuries to the deceased was at higher level than the deceased. This is wholly inconsistent with the testimony of eye-witnesses. Though medical expert's opinion is not always final and binding, but in the instant case it corroborates other circumstances which indicate that the eyewitnesses had not seen the actual occurrence."*

(c) In ***Nallapati Sivaiah v. Sub-Divisional Officer, Guntur [(2007) 15 SCC 465]*** it was concluded that it was unsafe to record conviction on the basis of dying declaration in cases where suspicion is raised as regards the correctness of the dying declaration. In such cases, the Court may have to look for some corroborative evidence by treating the dying declaration only as a piece of evidence. Accordingly, the appellant was granted the benefit of doubt.

(d) In ***Ugar Ahir v. State of Bihar [AIR 1965 SC 277] ,*** the trial Court and the High Court had concurrently found that

the prosecution witnesses were partisans and had actually taken part in the incident and having disbelieved their complete version of the way in which the incident had taken place, but a case was reconstructed for the prosecution which was different from that with which it had come to the Court. The Apex Court observed that:

"6. The maxim "falsus in uno, falsus in omnibus" is neither a sound rule of law nor a rule of practice.....It is the duty of the Court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest."

(e) ***Devilal v. State of Rajasthan [AIR 1971 SC 1444]*** was relied upon for the proposition that:

" 12. ....A new prosecution case could not be reconstructed in the manner suggested in the judgment of the High Court.

13. The counsel for the appellants was correct in raising the principal contention in the fore-front that the accused did never know that this was the prosecution case. It would rightly be said that if the bedrock of the prosecution case that Brijlal and Nathu came armed with guns to throw a challenge to Motaram and his sons could not prove as a fact, the whole prosecution case would fall like a pack of cards. In criminal trials it is of prime importance for the accused to know as to what the exact prosecution case is. If the pivot of the prosecution case is not accepted, a new prosecution case cannot be made to imperil defence.....Therefore, when those two persons are found both by the Sessions Court and the High Court not to have been present, the whole prosecution case changes colour and becomes unworthy of belief."

(f) ***Kartar Singh v. State of Punjab [(1994) 3 SCC 569]*** was relied upon for the proposition that the person who is ingenuously and undefiledly communicating or associating with any person or class of persons who

is engaged in assisting in any manner terrorists or disruptionists could be shown to have actual knowledge or reason to believe that the person or class of persons with whom he is charged to have communicated or associated is engaged in assisting in any manner the terrorists and disruptionists.

(g) In ***Baldev Singh v. State of Punjab [AIR 2009 SC (Suppl) 1629]***, it is held:

"9. It is now, however, well settled that a conspiracy ordinarily is hatched in secrecy. The Court for the purpose of arriving at a finding as to whether the said offence has been committed or not may take into consideration the circumstantial evidence. While however doing so, it must be borne in mind that meeting of the mind is essential; mere knowledge or discussion would not be."

(h) In ***Ram Narain v. State of Punjab [AIR 1975 SC 1727],*** it is held:

"*14. Where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistic expert, this is a most fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case. .....It is obvious that where the direct evidence is not supported by the expert evidence, then the evidence is wanting in the most material part of the prosecution case and it would be difficult to convict the accused on the basis of such evidence. While appreciating the evidence of the witnesses, the High Court does not appear to have considered this important aspect, but readily accepted the prosecution case without noticing that the evidence of the eye witnesses in the Court was a belated attempt to improve their testimony and bring the same in line with the Doctor's evidence with a view to support an incorrect case."*

22. As discussed earlier in para 14 and 15, the material evidence on record could not support the conclusions drawn in the impugned judgment as far as killing of Mr.Haren Pandya by A-1 was concerned. In the facts of the present case, the medical and ballistic evidence could, by no stretch, square with the ocular evidence which is found to be very weak and fragile. In fact, by the inherent contradictions and improbabilities contained in the version presented by the so-called sole eye-witness, his very status and presence as an eye-witness to the incident of firing upon Mr.Haren Pandya have to be seriously doubted. And the medical and ballistic evidence having made the ocular version utterly improbable and injury No.7 having completely ruled out the possibility of firing upon Mr.Haren Pandya from the small opening of the window of his car, the ocular evidence has to be discarded as untrustworthy and unbelievable. It is unfortunate that the investigating officer has hazarded his own guess in respect of injury No.7 and it is accepted and adapted in the impugned judgment, preferring it over the expert's opinion to the contrary. Similar is the case with injury No.5, 6 and 1 wherein the total number of bullets fired by the assailant is believed and accepted to be restricted to five only because there was no possibility of any bullet going anywhere except the car itself and such additional bullets could not have escaped the meticulous checking of the car. The circumstances enumerated in para 16 herein further strengthen reasonable doubt about the proof of firing upon Shri Haren Pandya by A-1 in the manner in which the prosecution has projected its case. No support could be lent to the weak and doubtful substantive evidence by the confessional statement of A-1 insofar as reliability of that piece of evidence is shaken both by its lack of veracity and voluntariness. The prosecution case is further weakened, as far as the murder of Shri Haren Pandya is concerned, by the fact that the bullets recovered from his body may or may not be the same bullets which were examined by the ballistic expert in view of the discrepancies found in their description by the *post-mortem* doctor and the ballistic expert. The opinion of the ballistic expert (PW.75) has been already

discredited and practically discarded in the impugned judgment (See para 13.12). Assuming that the confessional statements of the accused persons have any evidentiary value, it is found to be unsafe to rely upon them as far as the facts stated therein are not corroborated by other independent evidence. Under such circumstances, one set of weak and doubtful evidence of the sole eye-witness and the ballistic expert could not find corroboration and support from other weaker pieces of evidence in the form of confessional statements. In fact, the investigation clearly appears to have been so botched up and misdirected that the confessional statements recorded during police remand, before any police officer, could not be safely relied for convicting any of the appellants for commission of, abetment or conspiracy to commit, murder.

23. In view of the concession made for the appellants, as recorded in para 6 herein, and in view of the voluminous record and number of controversies about each piece of important evidence, it was found to be unnecessary to deal with and discuss each and every argument addressed by learned counsel on both sides. However, it is clarified that we are unable to endorse the general conclusions drawn in para 32 of the impugned judgment, as reproduced in para-4 herein. It may be pertinent to note here that A-6, A-7, A-8 and A-9, only after whose arrest in April 2003 various POTA cases sprang up, were acquitted in the first tiffin bomb case and no appeal was filed from their acquittal. What clearly stands out from the record of the present case is that the investigation in the case of murder of Shri Haren Pandya has all throughout been botched up and blinkered and has left a lot to be desired. The investigating officers concerned ought to be held accountable for their inaptitude resulting into injustice, huge harassment of many persons concerned and enormous waste of public resources and public time of the Courts.

24. For the reasons stated hereinabove, the charge for the offence punishable under section 302 of the Indian Penal Code is held to have not been proved

beyond reasonable doubt and hence the conviction for the offence punishable under section 120-B read with section 302 of the IPC and the charge for the offence under section 3[1], punishable under section 3[2][a] of the POTA could not survive in respect of any of the appellants and upon being acquitted of those charges, the orders of sentence based on those charges are set aside and to that extent, the appeals are partly allowed. In view of the concession recorded in para 6 herein, the continuous incarceration of the appellants concerned for more than 8 years, all the appellants except A.1 having no criminal background and having regard to the age and role attributed to the other appellants, the following orders and directions are issued:

[A] In Criminal Appeal No. 986 of 2007, the conviction of the appellant – Mohd. Asgarali S/o. Mohd. Wajirbhai [original accused No. 1] for the offences punishable under section 307 read with section 120-B of the Indian Penal Code and section 4 read with section 3[2] [b] of the POTA and section 25[1-B][a] and section 27[1] of the Arms Act is confirmed and maintained. The sentence awarded to him by the trial Court in impugned judgment and order dated 25th June, 2007 for these offences is also maintained and upheld. Since he is not separately sentenced for the offence punishable u/s.3[2][b] of POTA by the trial Court, he shall also undergo R.I. for seven years and pay fine of Rs.7,000/- and in default of payment of fine, he shall undergo R.I. for eight months. All the sentences of imprisonment shall run concurrently and he shall be entitled to the benefit of set-off.

[B] In Criminal Appeal No. 984 of 2007, the conviction of the appellant – Mohd. Rauf Kedar [original Accused No. 2] for the offence punishable under section 3[3] of the POTA is confirmed and maintained. Maintaining the order of fine awarded by the trial Court, the sentence of RI for 7 years is modified and reduced to the period already undergone

by him in jail. Since his sentence came to be suspended and he was released on bail pending this appeal by the order of Hon'ble the Apex Court, he shall not be required to surrender to jail, provided he has already paid the fine awarded by the trial Court. He shall be permitted to pay the amount of fine within 15 days, if it is not already paid.

[C] In Criminal Appeal No. 985 of 2007, the conviction of the appellant – Mohmed Shafiuddin [original accused No. 3] for the offences punishable under section 307 read with section 120-B of the IPC is maintained and upheld. As he has already undergone the punishment awarded to him, the appeal does not survive for any consequential order.

[D] In Criminal Appeal Nos. 977, 978, 979, 975, 1049 and 1188 of 2007 of appellants, namely Kalim Ahmed alias Kalim Mulla, Rehman Punthawala, Mohmed Riyaz, Mohmed Parvez Shaikh, Parvezkhan Pathan and Mohmed Faruq respectively [original accused no. 4 and accused nos. 7 to 11], their conviction for the offence punishable under section 3[3] of the POTA is maintained and confirmed and the period already undergone by them in jail by now shall be their sentence of imprisonment with fine of Rs.5,000/- each, and in default of payment of fine, they shall undergo RI for 6 months. The benefit given by the trial Court under section 427 of the Cr. P.C., to appellant – Kalim Ahmed @ Kalim Mulla [original accused no. 4] is not interfered with.

[E] In Criminal Appeal Nos. 980 and 981 of 2007 of appellants Anas Machiswala and Mohmed Yunus Sareshwala [original accused nos. 5 and 6], their conviction recorded by the trial Court for the offences punishable under section 4 of the POTA and section 25[1-B][a] of The Arms Act and sentence awarded to them thereunder is confirmed and

maintained. Their sentences of imprisonment shall run concurrently and shall be entitled to the benefit of set-off. The benefit given by the trial Court under section 427 of the Cr. P.C., to appellant Anas Machiswala [original accused no. 5] is not interfered with.

[F] In Criminal Appeal No. 976 of 2007, conviction recorded by the trial Court of the appellant Shah Navaz Gandhi [original accused No. 12] for the offence punishable under section 3[3] of the POTA is maintained and upheld. As he has already undergone the sentence awarded by the trial Court, the appeal does not survive for any consequential order.

(D.H.Waghela, J.)

(J.C.Upadhyaya, J.)

(KMG Thilake)