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S.T.No.186/2016

Received on : 21.10.2016  
Registered on : 12.02.2016  
Decided on : 21.05.2019  
Duration : 02 Y 07 M 00 D

**IN THE COURT OF SPECIAL JUDGE & ADDITIONAL  
SESSIONS JUDGE, AKOLA.**  
( Presided over by A.S. Jadhav )

**Sessions Trial No.186/2016**  
[CNR-MHAK-01-002505-2016]

**Exh.No.**

**The State of Maharashtra,**  
Police Station Officer,  
Police Station, ATS, Mumbai  
Tq. & Dist. Mumbai.

.. **Complainant**

- **Versus-**

1] **Abdul Malik Abdul Razzaque,**  
Aged 24 years, Occu. Labour,  
R/o. Masjid Ward, Gadhiward, Pusad,  
Tq. Pusad, Distt. Yavatmal

2] **Shoeb Khan @ Ahmed**  
**s/o. Rehman Khan,**  
Aged 24 years, Occu. Labour,  
R/o. Balapur Akhada,  
Tq. Kalamnuri, Distt. Hingoli

3] **Salim Malik @ Hafeez Mujib-Ur-Rehman**  
**s/o. Mehboob Shaikh,**  
Aged 26 yrs., r/o. c/o. Shaikh Jaajed Hussain,  
Near Jama Jasjeed, Gadhiward, Pusad,  
Tq. Pusad, Distt. Yavatmal

.. **Accused**

**Charge Under section 16, 18 of Unlawful Activities (Prevention) Act,  
1967, section 4/25 of Arms Act and under section 307, 332, 333, 353,  
186 r/w. section 120-B of Indian Penal Code and section 135 of Bombay  
Police Act,**

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*Shri Sathiyathan, Ld. Special Prosecutor for State,  
Shri Dildarkhan, Ld. Advocate for Accused No.1,  
Shri Najib Shaikh, Ld. Advocate for accused No.2.,  
Shri Ali Raza Shahbaz Khan, Ld. Advocate for accused No.3.*  
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**J U D G M E N T**  
[Dated : 21.05.2019]

Accused stand tried for offence under section 16, 18 of

Unlawful Activities (Prevention) Act, 1967, section 4/25 of Arms Act and under section 307, 332, 333, 353, 186 r/w. section 120-B of Indian Penal Code and section 135 of Bombay Police Act, for having conspiracy to influence the Muslim Youth to joint terrorist organization and for the commission of terrorist act with a deadly weapon. It is further alleged that accused have committed the breach of prohibitory order promulgated under section 37 of the Bombay Police Act. Accused No.1 is further tried for an offence under section 4/25 Arms Act, for possessing arms without licence.

2. In short, the prosecution case is that on 25.09.2015 on the eve of festival of Bakri Eid, the police staff of State Reserve Police Force (S.R.P.F.), and local police from Pusad Police Station were posted outside Mohammadiya Masjid, Pusad for Bandobast. Then around 9.00 am when Muslim peoples were coming out from the Masjid after Eid Namaz, suddenly a youth came there along with one cotton bag. He took out knife from the bag and started shouting "Allah-O-Akbar". He attacked Police Constable Amol Badukale (PW11) by knife. He also attacked other two policemen Yogesh Dongarwar (PW12) and PC Sudarshan Aghav (PW15). He was moving knife in air and was shouting "तुमने गोहत्याबंदी कायदा लागु किया इसलीये मै तुमको जानसे मार दुंगा". The police team overpowered him. Police constable Amol sustained injury to his left arm, elbow joint, Police Constable Yogesh sustained injury near right ear and PC Sudarshan Aghav sustained injury. The injured police constables were sent to Malpani Hospital. Dr. Malpani (PW20) examined their injuries. In the mean time traffic police gave telephonic message to Pusad Police Station. Assailant was taken to Pusad Police Station. On being questioned, he disclosed his name Ab. Malik Ab. Sattar. Police Head Constable Gopal Waster (PW40) recorded station diary entry. API Shri Mundhe lodged FIR of the incident. Investigation was entrusted to API Shri Kshirsagar. He arrested accused. During personal search one Rampuri knife and one folding knife were recovered. Accused had also sustained injury to his head. He was sent to Government Hospital, for his medical examination. Spot was shown by Police Constable Sudarshan Aghav. Accordingly, spot panchanama was prepared. During house search of this

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accused one iron katta, six note books and some Urdu literature was found. The blood stained clothes of injured police constables were also seized by API Shri Kshirsagar.

3. SDPO Smt. Ashwini Patil (PW44) took further investigation under her control. She recorded statement of injured witnesses and collected the CCTV footage of the spot. One police constable was recording glimpse in the video camera. Therefore, video clip from handcam was taken and its soft copy was prepared. During interrogation of the accused No.1 it was revealed that he has created social group on his Whatapp under the name "Friends forever" and sent jehad provoking text messages and two audio clips on this group. SDPO Smt. Ashwini Patil, therefore, seized mobile phones of some members of this Whatsapp group. Specimen signatures of accused Abdul Malik were obtained. Prima facie it was found that he was indulged in unlawful activities. Therefore, section 15 and 16 of Unlawful Activities (Prevention) Act, were invoked. Further investigation was handed over to Anti-Terrorist Squad.

4. Addl. S.P. Shri Sunil Darekar (PW50) then took the investigation in his hand. The manuscript of audio clip was prepared. Accused was produced before Learned Magistrate, Nagpur, for recording his statement under section 164 of Cr.P.C., who was specifically designated for dealing with remand of cases filed by A.T.S. Accused No.1 disclosed that he was influenced by the speeches of Masood Azar, Zakir Naik and terrorist organization Jaish-e-Mohammad. He further disclosed that he downloaded website "Rang-O-Noor" in his mobile. He further disclosed that he was listening audio clip "Gajwai-E-Hind" when he was proceeding to the spot which prompt him to assault policemen.

5. It is the case of prosecution that accused No.1 disclosed in his statement recorded under section 164 of Cr.P.C. that he came in contact with accused No.2 on Facebook. Accused No.2 introduced him with accused No.3. It is alleged that accused No.2 and 3 encouraged him and other youth for "*Jehad*". It was found that accused No.3 Salim Malik is Pesh-e-Imam and he delivered hate and inflammatory speeches in various mosque. There was secret meeting between accused person and accused

No.2 and 3 encourage the youth to join jihad activities in Afghanistan. They prepared accused No.1 to join terrorism organization. When mail account, Facebook account and twitter account of accused No.1 Abdul Malik was checked it was found that he followed anti-social elements and profess jihadi thoughts. So accused No.2 Shoeb Khan and and accused No.3 Salim Malik were arrested and from their possession their mobile phones were seized. Anti-Terrorist Squad also seized some CDs and Urdu literature during house search of accused No.3. The voice samples of accused No.1 were obtained. Seized muddemal was sent for chemical analysis. Investigating Officer arrived to the conclusion that accused persons have hatched conspiracy to perform terrorist activities with intention to threaten the unity, integrity, security and soverity of the nation and to strike a terror amongst section of people. The sanction for prosecution of accused was obtained from State Government. The C.A. reports and various samples were collected and at the end of investigation, charge-sheet came to be filed before the Court of JMFC, Nagpur, who in turn after due compliance of section 207 of Cr.P.C. committed the case to the Court of Sessions for trial.

6. Accused have faced trial as under-trial prisoner. The charge vide Exh.04 for the aforesaid offences was framed read over and explained to them. Their separate pleas were also recorded. They pleaded not guilty and claimed to be tried. Their defence is that of total denial and false implication under the political pressure and religious hate.

7. Prosecution has examined in all 58 witnesses and placed reliance on voluminous documentary evidence. Accused did not examine any witness in their defence.

8. Having regard to the evidence emerges on record, following points arise for my determination. My findings with the reasons thereon are given as under :-

Sr.No.	POINTS	FINDINGS
1	Has prosecution prove that prior to 25.09.2015 accused persons in pursuance to the criminal conspiracy attempted to commit terrorist act and abated, enticed and facilitated	

Sr.No.	POINTS	FINDINGS
	the commission of the terrorist act and thereby committed an offence punishable under section 18 of the Unlawful Activities (Prevention) Act r/w. Section 120-B of IPC ?	No
2	Has it proved by prosecution that on 25.09.2015 about 9.15 am in front of Mohammadiya Masjid gate Pusad, in pursuance to the criminal conspiracy, accused No.1 voluntarily caused hurt to Police Constable Amol Manoharrao Badkula, P.C. Yogesh Madhukarrao Dongarwar and P.C. Sudarshan Aghav when they were discharging their duty as public servant and thereby committed an offence under section 332 r/w. 120-B of IPC ?	Yes, offence under section 332 of IPC only against accused No.1.
3	Has it proved by prosecution that on aforesaid date, time and place, in pursuance to the criminal conspiracy between the accused persons, accused No.1 voluntarily caused grievous hurt to Police Constable Amol Manoharrao Badkule, P.C. Yogesh Madhukarrao Dongarwar and P.C. Sudarshan Aghav when they were discharging their duty as public servant and thereby committed an offence punishable under section 333 r/w. 120-B of IPC ?	No
4	Has it proved by prosecution that on aforesaid date, time and place, in pursuance to the criminal conspiracy between the accused persons, accused No.1 provoked Police Constable Amol Manoharrao Badkule, P.C. Yogesh Madhukarrao Dongarwar and P.C. Sudarshan Aghav and others to commit offence of riot and thereby committed an offence punishable under section 153 r/w. 120-B of IPC ?	No
5	Has it proved by prosecution that on aforesaid date, time and place, in pursuance to the criminal conspiracy between the accused persons, accused No.1 used criminal force and assaulted Police Constable Amol Manoharrao Badkule, P.C. Yogesh Madhukarrao Dongarwar and P.C. Sudarshan Aghav and thereby deter them from discharging public duty and thereby committed an offence punishable under section 353 r/w. 120-B of IPC ?	Yes only offence under section 353 of IPC against accused No.1.

Sr.No.	POINTS	FINDINGS
6	Has it proved by prosecution that on aforesaid date, time and place, in pursuance to the criminal conspiracy between the accused persons, accused No.1 used criminal force and assaulted Police Constable Amol Manoharrao Badkule, P.C. Yogesh Madhukarrao Dongarwar and P.C. Sudarshan Aghav and thereby prevented them from discharging public function and thereby committed an offence punishable under section 186 r/w. 120-B of IPC ?	No
7	Has it proved by prosecution that on aforesaid date, time and place, in pursuance to the criminal conspiracy between the accused persons, accused No.1 attempted to commit the murder of Police Constable Amol Manoharrao Badkule, P.C. Yogesh Madhukarrao Dongarwar and P.C. Sudarshan Aghav and thereby committed an offence punishable under section 307 r/w. 120-B of IPC ?	No
8	Whether prosecution prove that accused No.2 and 3 abated the accused No.1 for the commission of offence of murder and terrorist act and thereby committed an offence punishable under section 109 of IPC ?	No
9	Has it proved by prosecution that on aforesaid date, time and place, in pursuance to the criminal conspiracy between the accused persons, they committed the terrorist act with intent threaten the unity, integrity, security and sovereignty of India and thereby committed an offence punishable under section 16 of UAP Act r/w. 120-B of IPC ?	No
10	Whether prosecution prove that accused No.1 to 3 disobeyed the prohibitory order promulgated by District Magistrate and thereby committed an offence punishable under section 135 of Bombay Police Act ?	No
11	Whether prosecution prove that accused No.1 was found carrying dangerous weapon like knife in violation to the notification under section 4 of Arms Act and thereby committed an offence punishable under section 25 of Arms Act ?	No
12	What offence if any is proved ?	Offence

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Sr.No.	POINTS	FINDINGS
		under section 324, 332, 353 of IPC proved against only accused No.1.
13.	What order ?	As per final order

### REASONS

#### As to points 1 to 12 :-

9. The prosecution, to establish the case, has examined total 58 witnesses. Out of them 20 witnesses are hidden witnesses. Keeping in view the object for maintaining identity and address of independent witness secret for which section 44 of the Unlawful Activities (Prevention) Act, has been enacted, it would be appropriate to avoid the mention of their names and address. Oath were administered to those witnesses in secret and the confidential record for the same has been maintained. Their evidence were recorded in such a fashion that they were able to see the accused persons during their evidence, but accused were not in position to see them.

10. Witnesses examined on behalf of the prosecution can be classified in 7 categories as follows :

#### (a) Eye witnesses of the incident of attack on police.

PW	Name of witness	Exh. No.	Role
PW11	P.C. Amol Badkule	Exh.123	Injured
PW12	P.C. Yogesh Dongarwar	Exh.125	Injured
PW15	P.C. Sudarshan Aghav		Injured
PW13	P. C. Ashish Bhagwan Kuthe	Exh.126	Eye witness
PW14	P.C. Prakash Dhage	Exh.127	Eye witness
PW24	P.C. Pravin Devasarkar	Exh.165	Eye witness
PW26	P.C. Anul Hatolkar	Exh.168	Eye witness
PW23	Hidden Witness No.13	Exh.165	Independent

witness

**(b) Registration of FIR.**

PW30	API Shri Mundhe	Exh.176	Informant/eye witness (Report Exh.177)
PW31	PSI Swapnali Dhrutraj	Exh.179	Registered FIR Exh.178
PW39	LPC Shalu Bhagat	Exh.219	Wireless operator took entry in logbook Exh.220
PW40	HC Gopal Washter	Exh.221	Station Diary officer took entry vide Exh.222 to Exh.227

**(c) Medical and Expert Evidence**

PW20	Dr. Amol Malpani	Exh.150	Examined PW11 Amol Badkule and PW12 Yogesh Dongarwar
PW21	Dr. Minal Bhelonde	Exh.157	Examined PW15 Sudarshan Aghav and accused No.1
PW45	Dattaram Angre	Exh.253	Nodal Officer of Idea Cellular
PW47	Vishal Krushnarao Kokadwar	Exh.263	Voice expert
PW48	Ajit Waghmare	Exh.272	Voice expert
PW58	Shri S.B. Kasar,	Exh.361	Handwriting expert

**(d) Seizure of mobile and literature**

PW1	Amol Gutte	Exh.66	Panch witness on blood stained clothes, knife, katta, Urdu literature.
PW3	(Hidden witness No.2)	Exh.94	Panch witness on seizure of mobile



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			from Tanvir
PW6	(Hidden witness No.5)	Exh.107	Panch witness on Seizure of mobile from Mudassar
PW7	(Hidden witness No.6)	Exh.112	Panch witness on seizure of Lava make mobile from accused No.3
PW8	(Hidden witness No.7)	Exh.115	Panch witness on house search of accused No.3
PW9	(Hidden witness No.8)	Exh.116-	Panch witness on house search of accused No.3
PW10	(Hidden Witness No.9)	Exh.121	CD and book verification panchanama
PW16	(Hidden Witness No.10)	Exh.140	Panch witness on arrest panchanama of accused No.2 Exh.118 and seizure of his mobile Exh.141.
PW22	(Hidden witness No.12)	Exh.164	HTC make mobile was seized from him.
PW49	Mohd. Mudassar	Exh.273	Owner of Micromax mobile

**(e) Electronic Evidence**

PW2	(Hidden witness No.1)	Exh.85	Panch witness on Checking the Gmail, Facebook, Twitter account of accused No.1
PW3	(Hidden witness No.2) panch	Exh.94	Print out of audio clip Exh.95
PW4	(Hidden witness No.3) panch	Exh.97	Website "rang-o-noor" was opened in his presence.

PW5	(Hidden witness No.4)	Exh.102	Voice sample of accused No.1
PW17	P.C. Abdul Sattar Sharmate	Exh.142	Prepared DVD of CCTV footage and DVD of video recording.
PW18	(Hidden Witness No.11)	Exh.146	Took CCTV footage in pen drive.
PW19	PC Satish Shinde	Exh.149	Eye witness when DVD were prepared on computer

**(f) Conspiracy and Terrorist Act:**

PW27	(Hidden Witness No.14)	Exh.171	Witnessed to show that accused No.1 recorded his own audio clip in his mobile .
PW28	(Hidden witness No.15)	Exh.172	He allegedly created e-mail ID and Facebook ID of accused and gave knife in question to accused No.1.
PW29	(Hidden Witness No.16)	Exh.173	Member of Whatsapp group "Friends forever"
PW32	(Hidden witness No.17)	Exh.181	Member of Whatsapp group "Friends forever"
PW33	(Hidden witness No.18)	Exh.182	He has attended the secret meeting of accused persons.
PW34	(Hidden witness No.19)	Exh.184	Employer of accused No.2
PW50	(Hidden witness No.20)	Exh.274	Accused No.2 and 3 encouraged him for Jehadi activities
PW55	JMFC Shri S.D.Chakkar	Exh.338	Recorded

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confessional statement of accused No.1

**(g) Carriers :**

PW35	Police Naik Nitin Ingole	Exh.191	Carried muddemal to FSL on 05.10.2015, 15.10.2015, 28.10.2015,
PW36	Police Naik Sunil Sirsat	Exh.204	Carried muddemal to FSL on 12.10.2015, 03.11.2015
PW37	Police Naik Murtuza Baig	Exh.212	Carried muddemal to FSL on 16.11.2015
PW38	ASI Sitaram Sagar	Exh.215	Brought muddemal from FSL to ATS office.
PW42	ASI Balaram Kadam	Exh.234	Incharge of Property Room
PW46	PSI Dagdu Konde	Exh.262	Brought muddemal from FSL and deposited to ATS malkhana.

**(h) Investigating Officers :**

PW41	API Gajendra Kshirsagar	Exh.229	Seizure of knife from accused No.1, spot panchanama, house search panchanama, of accused No.1
PW44	SDPO Smt. Ashwini Patil,	Exh.246	Seized CCTV, recorded statements of injured. Seized hard-disk of

			CCTV. Obtained specimen handwriting of Accused No.1.
PW51	API Tapan Kolhe	Exh.277	Seized mobile from PW49 Mohd. Mudassir and check the location of mobile of accused No.3
PW52	Sunil Kinge	Exh.280	Collected educational documents of accused No.1, took house search of accused No.3 and seized mobile from Mohd. Sadiq Mohd. Sajid
PW53	PI Manish Patil	Exh.295	Arrested accused No.2 and 3, seized mobile from accused No.2 and recorded statement. Verified G-mail and email account of accused No.3. verified CDs and DVDs .
PW54	Main I.O. ACP Shri Sunil Darekar	Exh.308	Took voice sample and blood sample of accused No.1. sent specimen signature of accused No.1 to handwriting expert.
PW57	ACP Shri Mahesh Sawai	Exh.356	Compliance of query made by handwriting expert.

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**(i) Sanction :**

PW43	Shri K.P.Bakshi, Addl. Chief Secretary	Exh.242	Accorded sanction for prosecution under UAP Act.
PW56	Shri K.B.Joshi, Director of prosecution	Exh.353	Take independent review of the proposal for sanction under UAP Act

The prosecution apart from the oral evidence has also relied upon following documentary evidence.

Sr.No.	Nature of document	Exh. No.
1	Seizure panchanama of knife from accused No.1 and cloths	Exh.67 and Exh.68
2	Spot panchanama	Exh.69
3	House search panchanama of accused No.1	Exh.70 Exh.71
4	Seizure of wearing clothes and weapon from accused	Exh.72
5	Seizure panchanama of uniform of police	Exh.73 and Exh.74
6	Query report	Exh.75
7	Panchanama of Hard disk and DVR of CCTV	Exh.76, Exh.77
8	Recovery of HTC make mobile from Ab. Sattar	Exh.78, Exh.79
9	Specimen handwriting panchanama of accused No.1	Exh.80
10	Print out of screen shots of Google, Facebook Twitter account, and what is my IP address of accused No.1	Exh.86, Exh.87/1 to Exh.87/7, Exh.88/1 to Exh.88/5, Exh.89/1 to Exh.89/8 and Exh.90
11	Print out of audio clip	Exh.95
12	Seizure panchanama of mobile from Tanvir	Exh.96
13	C.D. of website "rang-o-noor" panchanama	Exh.98
14	Seizure panchanama of voice sample, memory card and mobile handset.	Exh.104

15	Panchanama of seizure of Micromax mobile and two sim cards from Mudassar	Exh.108, Exh.109
16	Seizure Panchanama of Lava make mobile from accused No.3	Exh.114.
17	House search panchanama and seizure of 60 CD and 35 books in house search of accused No.3	Exh.116.
18	House search panchanama and seizure of 60 CD and 35 books in house search of accused No.3	Exh.116.
19	Verification of 60 CDs and 35 books in house search of accused No.3	Exh.122
20	Seizure panchanama of mobile of accused No.12	Exh.141
21	Seizure panchamama of DVD of CCTV footage	Exh.143
22	Seizure panchamama of DVD of video recording	Exh.144.
23	Seizure panchanama of hard-disk of CCTV footage	Exh.147
24	Seizure panchanama of DVD prepared by PW17 PC Sharmate	Exh.143, Exh.144
25	Seizure memo and panchanama of HTC make mobile bearing No. 988190900	Exh.78
26	Statement of PW33 (H.W.18) recorded under section 164 of Cr.P.C.	Exh.182
27	C.A.Report	Exh.1
28	Sanction Order	Exh.243
29	Customer application form of Rajjak Dadamiya submitted to Idea Cellular for mobile No. 9763452271	Exh.256, Exh.257
30	Customer application form of accused No.3 Salim Malik for mobile No. 9923064085	Exh.258 and Exh.259
31	CDR of mobile No. 9763452271	Exh.260
32	CDR of mobile No. 9923064085	Exh.261
33	Voice reports	Exh.264 to Exh.271
34	Confessional statement of accused No.1	Exh.339
35	Report of handwriting	Exh.262 and Exh.263

11. Before I proceed to discuss the evidence, it would be

appropriate to take in brief the glimpse of prosecution case.

12. Prosecution case is that during investigation by local police it was revealed that the attack on police was pre-planned and there is possibility of involvement of other accused persons. Prima facie it was found to investigating agency that this attack is nothing but the conspiracy against the State. Therefore, during the remand of the accused No.1, section 15, 16, and 18 of the Unlawful Activities (Prevention) Act, were added and the further investigation was taken in their hand by Anti-Terrorist Squad. Accordingly, on 01.10.2015 investigation came to be transferred from Pusad Police Station to Anti-Terrorist Squad and Unlawful Activities (Prevention) Act, came to be invoked. Aforesaid crime was re-numbered as Crime No. 13/2015 with Kala Chowki Police Station, Mumbai. During further investigation it was revealed that accused No.1 has created Whatsapp group by name "Friends forever" on his mobile and he has posted message to the members of the group. PW5 (HW3), PW22 (HW12), PW32 (HW17) are said to be the members of Whatsapp group "Friends forever". Investigating Officer has seized mobile of PW3, PW6, PW22 to verify message on Whatsapp group in presence of panch PW3.

13. It is further prosecution case that audio clip was prepared by accused No.1 in the field of one Abdul Rauf. In order to establish this fact, the prosecution has examined PW27 (HW14) who was working as labour in the field of Abdul Rauf. PW28 (HW15) is examined to show that this witness has helped accused Abdul Malik to open G-mail I.D. and Facebook account on his mobile. He is also examined to establish that the knife used in the offence was obtained by accused No.1 from this witness. However, he turned hostile.

14. Further prosecution case is that one audio clip was downloaded by accused in his mobile phone from website "www.rangonoor.com". Panch witness PW4 (HW3) deposed that this information was given by accused to the police in his presence and accordingly, this website was opened and the audio clip was downloaded. In order to verify voice containing in audio clip, police took voice sample of accused No.1. PW5 (HW4) is panch witness utilized for this purpose. According to him police

attached memory card to the voice recorder and recorded the voice sample. He further stated that one paper with some texts was given to the accused for reading and his voice sample was recorded and its CD was prepared.

15. During course of further investigation it was found that when accused No.1 Ab. Malik was in police custody, he wanted to make confession. Therefore, he was produced before the Learned JMFC, Nagpur, on 19.10.2015 and Learned Magistrate given time to think over till 21.10.2015 and remanded him to judicial custody. On 21.10.2015 he gave his confessional statement before PW55 Shri S.D.Chakkar, JMFC, Nagpur. In his confessional statement accused No.1 took the name of other two accused persons and one Sakib Ahmed and one another Hidden witness i.e. PW18 (HW13). It is the case of prosecution that all the accused were in contact with each other and they met at various places at various time for discussion. Accused No.3 is *Pesh-E-Emam* and he used to render sermon. It is alleged that he rendered hate speeches and in connivance of accused No.2 used to encourage Muslim youth to join terrorist organization.

16. There are two sets of evidence. First set of evidence is with regard to the attack on police staff by accused No.1 on 25.09.2015 when they were discharging *Bandobast* duty in front of Mohammadiya Masjid. In the second set of evidence, attempt has been made to establish that this attack was having link with the conspiracy hatched by accused persons and they were in contact of with each other. There was pre-meeting of mind between them. In so far as first set of evidence with regard to the attack on police persons, the prosecution has examined PW11 PC Amol Badukale, PW12 Yogesh Dongarwar and PW15 Sudarshan Aghav as injured witnesses. They sustained injuries when the assailant made assault. PW13 PC Ashish, PW14 PC Prakash, PW24 PC Pravin Devsarkar, are the eye witnesses of the incident. They were discharging their duty along with the injured witnesses in front of Mohammadiya Masjid. PW25 PC Rahul Katkar was also said to have present on the spot. He was operating Handicam camera of the police department and he has recorded videography of the incident in the video camera. In addition to



this the prosecution has relied on the evidence of PW23 (HW30) his identity has been protected. Though he has narrated some different story, but he stated that accused No.1 was holding knife in his hand and he was shouting “Allah-o-Akbar” and attack on police men. PW32 API Shri Mundhe attached to Pusad Police Station was maintaining law and order on the spot at the relevant time. He lodged report exh.177 and PW31 PSI Swapnali Dhurutraj has registered FIR Exh.178. PW39 LPC Smt. Shalu Bhagat was discharging her duty as wireless operator. On receiving information she took entry in the log-book vide Exh.220. PW40 Police Head Constable Gopal Waster was Station Diary Officer. He after receiving brief information of incident on telephonic message from PI Gaikwad, took entry in the station diary vide Exh.223. Initial investigation was carried out by API Shri Gajendra Kshirsagar. After the incident the injured police constables were sent to Malpani Hospital. Knife Article A-1 was seized from the possession of accused No.1 and entry to that effect was taken in the station diary vide Exh.224. Accused No.1 was arrested by API Shri Kshirsagar. His house search was taken and during his house search one Katta and some literature was recovered. During his interrogation it was revealed that knife used in the commission of the offence was obtained by him from PW28 (HW15). Further investigation was carried out by PW44 Ashwini Patil. She recorded statements of injured witnesses. CCTV cameras were installed nearby the spot of incident. Therefore, SDPO Smt. Ashwini Patil, obtained CCTV footage. Some events of the incident were captured in the video camera operated by PW 25 Rahul Katkar. Therefore, handcam was seized and the CD of the incident was prepared on computer. During the interrogation of the accused, it was revealed that he was listening “Jehadi” speeches, when he was proceeding towards spot of incident. It was also found that he has created the Whatsapp group by name “Friends forever” and one text message and two audio clip were shared by him with the members of this Whatsapp group.

17. Injured witnesses PW11 PC Amol Badukale and PW12 Yogesh Dongarwar were examined by PW20 Dr. Amol Malpani, whereas PW15 Sudarshan Aghav was sent for his examination to the Sub-District

Hospital, Pusad, where he was examined by Dr. Minal Bhelonde. Accused has also sustained injury to his head and he was also medically examined by Dr. Minal Bhelonde.

18. PW17 PC Abdul Sharmate was attached to the Pusad Police Station at the relevant time. On the next day of the incident he obtained CCTV footage of the spot of incident. CCTV camera was installed by private company at Shivaji Chowk area. In order to take the CCTV footage the employee of said private company PW18 (HW11) was called from Yavatmal to Pusad. He took the CCTV footage in his pendrive and handed over it to PW17 PC Ab. Sharmate. On the instructions of Investigating Officer Smt. Ashwini Patil, PC Ab. Sharmate prepared the DVD (Article-5) and it was seized under panchanama Exh.143 and Exh.145 for the purpose of investigation. In the same way CD of video shooting was prepared by PC Ab. Sharmate and the said CD Article-6 was seized under seizure panchanama Exh.144. Prosecution has examined PW19 PC Satish Shinde, in order to establish that the date from computer was copied in DVD in presence of this witness. PW18 (HW11) deposed that CCTV camera were installed by his company at Shivaji Chowk. According to him, on 30.09.2015 he has recovered Hard-Disk and DVR of CCTV camera and it was handed over by him to SDPO Ashwini Patil under seizure panchanama Exh.76.

19. Let us first see the evidence emerges on record pertaining to attack on police men by accused No.1 Abdul Malik.

**Evidence on the point of attack :**

20. Perused the evidence on record. PW11 PC Amol Badukale, PW12 Yogesh Dongarwar and PW15 Sudarshan Aghav are the police persons, whereas PW13 Ashish Kuthe, PW14 PC Prakash Dhage, PW24 Pravin Devsarkar, PW25 Rahul Katkar, PW26 Anup Hatolkar, PW30 API Mundhe are the police witnesses, who witnessed the incident. Prosecution has also relied on the evidence of independent witness PW23 (HW13). Except this independent witness, other witnesses are police witnesses. They have fully supported the prosecution case. They were discharging *Bandobast* duty. Accused all of a sudden came from left back side of PW11 PC Amol and when he turned back to see accused, before anyone could know what happened, accused No.1 assaulted PW11 PC Amol by knife and the pointed portion of the knife struck below his right ear. Accused was shouting “Allah-O-Akbar”. When PW12 PC Yogesh Dongarwar tried to save PW11 PC Amol, accused No.1 assaulted by knife on his left shoulder, elbow of right hand. When the police tried to overpower him, he moved knife in air and it was struck to PW15 Sudarshan Aghav. Accused then attempted to ran away from spot by putting knife in the bag and in that process, he fell on the ground. He was shouting “पोलीसवालोने गोहत्याबंदी कायदा लागु किया इसलीये मै तुमको जानसे मार दुंगा”. Aforesaid police witnesses have identified the knife (Article-A-1) during their evidence before the Court.

21. PW23 (HW13) is independent eye witness. He tried to give new turn to the prosecution story. He stated that 3 young boys armed with iron pipe had entered in to altercation with police men. However, he has categorically stated that accused No.1 was holding knife in his hand and he was shouting “Allah-O-Akbar”. He attack on police men and police caught him.

22. It is the prosecution case that mobile phones of few members of Whatsapp group “Friends forever” were seized and during the house search of accused persons, some CDs and literature was recovered. PW1 Amol Gutte, is examined to prove the seizure of two knives from the possession of accused No.1 and the seizure of six notes books and 7 Urdu books during his house search vide panchanama Exh.70. He is also

examined to prove the blood stained clothes of injured witnesses vide panchanama Exh.73 and Exh.74.

23. On analysis of evidence of all the injured and eye witnesses, the fact remains that accused No.1 has not disputed his presence on the spot. He took defence that there was heated argument between police staff and the people who were proceeding for Namaj and some Muslim youth entered into fighting with police. Police could not caught them and accused, who was proceeding from the spot, was caught by police. It is true that except PW23 (HW13), other witnesses are the police witnesses, but their testimony cannot be discarded merely because they are police persons, particularly when their presence on the spot was natural. They were discharging their duty on the spot. It could be gathered from their evidence that accused was having resentment against the police since they enforced ban on cow slaughtering. There is no presumption that police witnesses are liars. Their evidence has to be tested in the same manner as like other witnesses. Accused No.1 is not disputing the incident of assault on the police. His simple defence is that he is not responsible for this attack. According to him the Muslim youth who attacked the police ran away from the spot and he has been made scapegoat by police, is not sustainable.

24. Turning to the evidence of independent witness PW23 (HW13). This witness has established not only the presence of the accused on the spot but he has categorically stated that accused by holding knife in his hand was shouting “Allah-O-Akbar” and strike attack on the police men. There is no cross-examination to this witness on this material particular. Statement made by him in his exam-in-chief in respect of involvement of the accused in commission of offence went unchallenged. It appears that during his cross-examination he attempted to help the defence. He changed his version in cross-examination and stated that accused was holding nothing when he was caught by police.

25. If whole body of testimony of witnesses is rejected because he evidently speaking an untruth in some aspect, then administration of justice would come to a dead stop as held by Hon’ble Apex Court in Sucha Singh Vrs. State of Panjab, 2003 Cri.L.J., 3816; If from the

evidence of witness it is possible to separate grain from chaff then the evidence acceptable cannot be overlooked. This position has been elaborately stated by Hon'ble Apex Court in Gunnana Vrs. State of A.P. (2009) 16 SCC 59;

26. PW23 (HW13) further stated that before he entered into the witness box, his statement was read over and explained to him by the police. In my considered view only for this reason the statement made by him against accused in his exam-in-chief cannot be washed out. As laid down by Hon'ble Bombay High Court, in Gopal Vrs. State of Maharashtra, 2014 ALL MR 2390, meeting of witness with prosecutor in advance of recording evidence by itself will not be tutoring. It is not tutored if the witness is made aware of police statement and was told narrate the incident properly. Here in the present case, PW23 (HW13) has never stated that he was tutored by police before he entered into witness box. He simply stated that police read over and explained him the contents of his statement. It is pertinent to note that through the evidence of PW41 API Kshirsagar and panch witness Amol Gutte, the prosecution has proved the seizure panchanama Exh.67 of seizure of knife Article A-1. All the aforesaid witnesses have identified the weapon during their evidence .

27. Learned Advocate for accused invited my attention to the variations in the evidence of eye witnesses. It is submitted that PW15 Sudarshan Aghav stated that the assailant was middle age person. However, in cross-exam he candidly admitted that accused is a tall person. It is submitted that as per PW11 Amol Badukale, he was assaulted by sharp side of the weapon. However, there is no sharp object injury to him. It is further submitted injury sustained to PW12 Yogesh is a simple injury. Whereas other police witnesses stated that knife was fell on the ground when assailant attempted to run away from spot. However, according to PW15 Sudarshan Aghav knife was not fallen on the ground. It was further pointed out that PW13 PC Ashish Kute has given his wrong buckle number. Whereas the prosecution case is that his statement was recorded on the next day of the incident, but according to this witness his statement was recorded on the very same day of the incident. It was

then contended that PW12 Yogesh and PW14 Prakash Dhage made two inconsistent statements on record during their evidence. PW12 Yogesh Dongarwar claimed that he made attempt to restrain the accused by using his cane, but Pw14 Prakash Dhage negated this statement. It is further submitted that PW24 PC Pravin Devsarkar claimed to be eye witness of the incident. However, his statement is recorded by Investigating Officer after two days and no explanation has been offered for this delay in recording his statement. The most stress has been laid on the new facts stated by PW6 PC Anup Hatolkar in his evidence. According to him soon after accused was apprehended, knife was taken from his possession on the spot. Whereas the seizure panchanama shows that knife was seized from the accused when he was brought to the police station. It is further submitted that the statement of PW26 Anup Hatolkar contradicts the statement of other eye witnesses pertaining to the manner of attack, whereas the injured witnesses stated that accused all of sudden came from their back side and attacked on them. PW26 Anup Hatolkar made contradictory statement that attack was made by accused from front side. It is submitted that almost all witnesses are police witnesses and they are infirm witnesses and one infirm witness cannot corroborate the other witnesses.

28. In my considered opinion, on deeply scrutinizing the evidence of eye witnesses it goes to show that the oral evidence of all the police witnesses and independent eye witnesses is intact on the material particular of the attack. Some minor variations in their evidence are bound to be since the attack was made all of sudden and they saw the attack from different places. The prosecution has proved the seizure of knife from the possession of the accused during the evidence of panch witness PW1 Gutte and API Shri Kshirsagar. .

29. In the case of Rohtash Kumar Vrs. State of Haryana, 2013 ALL MR (Cri) 2620; dealing with the question whether evidence of police witnesses requires corroboration, Hon'ble Apex Court held that there can be no prohibition to the effect that a policeman cannot be a witness, or that his deposition cannot be relied upon. His evidence cannot be discarded on the ground that he belongs to police force or interested in the investigation

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or the prosecution agency. The evidence of police witness however must be strict scrutiny.

30. In another case *Bharwada Bhoginbhal Hirjibhai Vrs. State of Gjurat, 1983 AIR (SC) 753*; It was observed that over much importance cannot be given to the minor discrepancies particularly when the charge of rape brought by women.

31. Learned Special Prosecutor placed reliance on the case of *Gian Chand Vrs. Stae of Haryana, (2013) 14 Supreme Court Cases 420*; it was criminal case of section 15, 35, 50 & 54 of NDPS Act. It was held that prosecution case cannot be doubted only on the ground that all witnesses are police witnesses. The evidence of police witnesses cannot be doubted mere non-joining of independent witness, if their evidence is found cogent, convincing, creditworthy and reliable and if there seems to be no reason on record to falsely implicate the accused. It is pertinent to note that presumption of honesty applies as much as in favour of police personal as of the other person and it is not judicial appraoch to distrust and suspect them without good reason.

32. Learned advocate for the accused submitted that there are variation between medical and ocular evidence. He invited my attention towards the medical evidence. PW20 Dr. Malpani has examined injury of PW11 PC Amol Badkule and PW12 PC Yogesh Dongarwar, whereas PW21 Dr. Minal Bhelonde has examined injury sustained by PW15 PC Sudarshan. In so far as injury sustained by PW11 PC Amol, is concerned, it was pointed out that at one stage of his evidence he stated that pointed portion of knife struck to his body, whereas in his subsequent cross-examination he stated that accused made assault on him by sharp point of knife.

33. PW20 Dr. Malpani deposed that he noticed following injuries on the person of PW11 PC Amol :

Lacerated wound at right temparo parietal region (skull) 4 cm x 3 cm.

34. With the assistance of this variation in the medical evidence, it was submitted that since direct evidence is conflict with the medical evidence, accused is entitled for the benefit of doubt. PW20 Dr. Malpani has admitted during h is cross-exam that if incise injury is caused then it is



certain that it is caused by sharp edge weapon, if the sharp point of knife is forcibly used, then stab injury is possible. He further admitted that lacerated wound, contusion and abrasion may cause by hard and blunt object. However, he explained that it is not necessary for every injury by sharp point edge, it should be stab injury. The evidence on record shows that knife (Article A-1) was referred to him for his opinion and in query report Exh.153. He opined that injury sustained by injured witnesses is possible by said weapon. It is to be noted that the evidence of Dr. Malpani suggest that injured PW11 PC Amol was referred for CT Scan brain and it was found fracture at right temporo parietal bone with small contusion in brain. He admitted that he did not find incise or stab wound to PW11 PC Amol. According to him, though injury was up to bone but it was simple injury.

35. So far as injury sustained by PW12 PC Yogesh Dongarwar is concerned, PW20 Dr. Malpani noticed following injury :

(a) Wound on left shoulder of size 7 cm x 7 cm.

(b) Wound on right elbow posteriorly 8cm x 3 cm.

36. The injury to shoulder was muscle injury. Moreover, both injuries were not on the vital part of the body. PW20 Dr. Malpani admitted in his cross-examination that if injury is caused on the vital part of the body then only it is fatal injury. Two injuries sustained by PW12 PC Yogesh are possible by two different weapons. He further opined that contusion to the elbow was possible by fall on the ground. It was suggested to him during cross-examination that injury sustained by PC Yogesh may possible by sharp as well as hard and blunt object. It appears from the discharge card Exh.290 that PW12 PC Yogesh was admitted on 25.09.2015 and he was discharged on 29.09.2015.

37. Injuries sustained by PW15 PC Sudarshan Aghav, were examined by Dr. Minal Bhelonde, Medical Officer attached to Sub-District Hospital, Pusad. She noticed following injuries on his person :

[a] CLW on right index finger at base, bleeding was present. Size of injury 2 cm x 1 cm x 1 cm. The injury was not caused to vital part



of the body.

38. Dr. Bhelonde admitted that injury sustained by PW15 PC Sudarshan may be possible due to fall on ground and it may be self-inflicted injury. It is to be noted that the evidence emerges on record shows that incident took place all of sudden when the witnesses were unaware about the incident. Their evidence suggest that accused No.1 was furious when he started making assault on the police staff. When the assault made by the assailant all of a sudden by weapon on the unwary victim, then it is not accepted that such witness would disclose in detail the manner in which they were assaulted. Unless the evidence of eye witness is shaken by glaring infirmity, the evidence of eye witness must be prevail, unless medical evidence is fatal for prosecution. Injury caused to PC15 Sudarshan Aghav is simple in nature. This also finds support from his own statement that after the incident he immediately went to police station and he was not immediately referred to the hospital.

39. The prosecution case finds assurance from the injury sustained to the accused. The evidence surfaces on record shows that after the arrest of accused, he was produced before PW21 Dr. Minal Bhelonde and she noticed following injuries on his person.

- (a) CLW to right eyebrow size 1 cm x  $\frac{1}{4}$  cm x  $\frac{1}{4}$  cm
- (b) Contusion to left forearm on inner aspect of size 10 cm x 3 cm.
- (c) Superficial minimal abrasion on back side lower aspect red in colour. Size of injury 20 cm x 20 cm.

40. According to her, all these injuries were simple in nature, may be caused by hard object. In this context, the eye witnesses have categorically stated that accused No.1 first attack on PW11 PC Amol Badukale and after police persons tried to save PC Amol, accused also make assault on them. He was succeeded causing injury to PC Yogesh Dongarwar and PC Sudarshan Aghav. Thereafter he tried to ran away by putting knife in the bag and in this process he fell on the ground and he was apprehended by police. It was suggested to PW21 Dr. Minal Bhelonde that injury sustained by accused are possible by buttock of the rifle. However, no specific suggestion was given to the particular police witness that he beat accused by means of buttock of rifle. Dr. Minal

Bhelonde has categorically stated that these injuries may be caused by hard object. Therefore, the statement made on oath by police witnesses that accused sustained injury when he fell on ground in his attempt to ran away from the spot, is acceptable.

41. Considering the cogent and natural evidence on record coupled with medical evidence, it is clear that accused attack on police persons PW11 PC Amol, PW12 PC Yogesh and PW15 PC Sudarshan.

42. The delay in lodging FIR is also claimed to be one of the ground to discard the prosecution case. The incident in question took place around 9.15 am. The evidence of PW39 LPC Shalu Bhagat, suggest that she was discharging her duty as Wireless operator. She got information of incident and she took entry in the Log-book Exh.220 at 9.20 am. Then PW40 HC Gopal Waster was discharging duty as Station Diary Officer and around 9.15 am he received telephonic message from Traffic Inspector Shri Gaikwad that one unknown assailant has assaulted some police constables. He took entry vide Exh.222 to the Station Diary around 9.20 am. My attention is then invited to the evidence of PW30 API Shri Mundhe. He was present on the spot. His evidence suggest that he sent injured to the Government Hospital and took accused and PW15 PC Sudarshan Aghav to the police station. Accused was holding knife. He handed over accused to Day Officer Smt. Dhrutraj (PW31) and as per the direction of his superior officer, he proceeded on patrolling duty. He came back to the police station around 11.00 am. He lodged report of the incident vide Exh.177, at 11.45 am. Accordingly, PW31 PSI Swapnali Dhrutraj registered FIR vide Exh.178. Catching this thread of evidence, it was argued that the delay in FIR is after thought and is sufficient to raise doubt about the genuineness of the persecution case. The reliance is placed on the case of *Khemraj Agrawal Vrs. State of Maharashtra, 1995, Cr.L.J., 2271 Bom.H.C.*; In supra case, accused were prosecuted for an offence under section 306, 498-A, r/w. 34 of IPC. The deceased was died on 20.02.1987. Her relatives reached to the hospital in the same night. However, the FIR was lodged on the next morning. It was held that the FIR was not lodged belatedly, prima facie it was seen that it was fabricated.

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43. The next case relied upon by the defence is Thulia Kali Vrs. State of Tamil Nadu, AIR 1973, SC 501; Accused were prosecuted for an offence under section 302, 379 of IPC for theft and murder of the deceased. There was inordinate unexplained delay in lodging FIR. It was held that this delay in lodging FIR is creator of after thought. The facts in the present case are quite distinguishable. Accused was arrested immediately on the spot and he was taken to the police station by API Shri Mundhe.

44. In the present case accused was caught raid handed on the spot and brought to the police station. There is ample evidence on record that he attacked on police men when they were discharging their public duty. API Mundhe (PW30) has explained that soon after accused was produced in the police station, he was sent to monitor law and order of the Pusad city and after returning from the patrolling he immediately lodged the report. In my considered opinion, there is no unreasonable delay in lodging the FIR and therefore, it cannot be accepted that FIR is lodged belatedly.

45. Next question is whether attack made by the accused was murderous assault. In order to bring the case under the ambit of section 307 of Indian Penal Code, it must be shown that because of such intention or knowledge and under such circumstances that if by that act he caused death, he shall be guilty of murder. So the intention or knowledge to commit murder must exist. There can be no legal dispute that it is not essential that bodily injury, capable of causing death should have been inflicted. In the present case, intention of the accused cannot be inferred merely on the basis of the type of weapon used by him in the offence, but the manner of attack and the number of injuries caused to the victim is also relevant factor. It seems that the prosecution case is that the injured witnesses were not alert when accused Abdul Malik made sudden attack on them. During the evidence of PW20 Dr. Amol Malpani, it has come on record that the seized knife was 36.2 cm long having blade of length 23.3 cm, breadth 4 cm. It has also come on record that one side of the knife was sharp, whereas other side was edge like hacksaw blade. Had it been the intention of the accused to kill the policemen, he could have

easily pierce knife in the body of any of the police men. There is medical evidence on record that injuries sustained by PW11 PC Amol, PW12 PC Yogesh and PW15 PC Sudarshan Aghav are not grievous injuries. All these injuries are not caused to the vital part of the body. It is true that the injury sustained by PW11 PC Amol was on the right temporal parietal region. However, from the evidence on record it appears that accused has not purposefully selected these parts of the body for assault. He has shown his resentment against the Government decision over ban on cow slaughtering and took out his anger on police. I therefore find that the theory of attempt to murder is eliminated in the present case. It be profitable to take the help of case of M.P. Khachhchhar Vrs. State of Gujrat, AIR 1996 3236, In this case a laceration injury was caused to the head of the victim. It was held that merely because of injury caused on the head by the laceration can cause death, that itself is not justifying the charge under section 307 of IPC, the prosecution must prove intention of accused coupled with causing death thereof.

46. Clause-7 and Clause-8 of section 320 of IPC are relevant in the present case. The medical evidence shows that there is no fracture or dislocation of bone. Moreover, there is no evidence that the hurt caused to the victim was endanger to life and causing severe bodily pain to the victim during the space of twenty days. Therefore, on analyzing evidence on record, I arrived to the conclusion that the prosecution has proved that accused has voluntarily caused hurt to the victim witnesses PW11 PC Amol, PW12 PC Yogesh and PW15 PC Sudarshan by means of knife vide Article-A-1. Therefore, accused No.1 Ab. Malik is held guilty for offence under section 324 of IPC.

47. Now it is to be examined whether this attack on police men was the outcome of the conspiracy between the accused persons and whether the surrounding circumstances pointed involvement of accused persons in unlawful activities. In this connection, the entire edifice of the prosecution case is rest upon the confessional statement of accused No.1 recorded before the Learned Magistrate, because this was the first clue to the Investigating Officer to point out suspicion on accused for having conspiracy.

**Whether statement of accused is voluntary**

48. It is pertinent to note that the investigation in the present case was initially registered with the Pusad Police Station and thereafter transferred to the Anti-Terrorist Squad. The Government of Maharashtra in exercise of powers conferred to it by section 11 r/w. Section 18 of Cr.P.C., issued notification dated 29.08.2008 and designated the JMFC, Court No.6, Nagpur, as the remand Court for cases filed by A.T.S.

49. According to the prosecution, after the arrest of accused No.1 Ab. Malik by Pusad Police, he was initially produced before Learned JMFC, Pusad, sent in police custody. On 01.10.2015 investigation came to be transferred from Pusad Police Station to ATS and Unlawful Activities (Prevention) Act was invoked. Investigating Officer Shri Darekar (PW55) then produced the accused No.1 before learned JMFC Court No.6, Nagpur, and obtained police custody. On 19.10.2015 when accused No.1 was in custody of ATS, and application for recording his confessional statement was moved before the Learned JMFC, Nagpur. He has already spent 25 days of police custody and the Investigating Officer had moved an application before JMFC for grant of permission to reserve the police custody for further 5 days. Learned JMFC had given two days time for reflection and accordingly, his confessional statement was recorded on 21.10.2015.

50. The evidence brought on record shows that thereafter accused No.1 was never physically produced before the learned JMFC. Therefore, on 05.01.2016 accused sent retracted statement from Central Jail Nagpur and thereby he informed the Ld. JMFC that he was under threat and pressure of police when his confessional statement was recorded.

51. This confessional statement is the important piece of evidence for the prosecution, since this was the first clue to the Investigating Officer about alleged involvement of accused No.2 and accused No.3 in so called unlawful and terrorist activities.

52. So far as accused No.2 and accused No.3 are concerned, prosecution has relied on his confessional statement to show that accused No.1 came in contact with accused No.2 on Facebook. Accused No.2 had opened his Facebook account in fake name of Tariq Bin Ziyad. He

introduced accused No.1 with accused No.3. Then accused No.2 met with accused No.1 in one Vasant Nagar and request him for Jehadi thoughts. Accused No.3 is Pesh-e-Emam and he rendered sermon. He called accused No.1 at Masjid-E-Aqsa, where accused No.2 and accused No.3 provoked and encouraged accused No.1 for Jehadi thoughts.

53. Learned Special Prosecutor submitted that confessional statement retracted subsequently by accused can be used against him. He heavily relied on the landmark judgment of Kehar Singh Vrs. State (Delhi Admn.), 1988 AIR (SC) 1883; This case relates to a very unfortunate incident where the Prime Minister Smt. Indira Gandhi was assassinated by persons posted for her security at her residence. During investigation it was unravel that as result of “Operation Blue Star”, under which armed personal entered in the Golden Temple complex Amrutsar and clear it off the terrorist. The religious feelings of the accused were offended and their resentment led to commit the murder of Smt. Indira Gandhi. One of the accused had made confessional statement. Later on he retracted the confessional statement. The bullet recovered from the body was fired from the special revolver provided to the accused. In such circumstances, it was held that confessional statement retracted subsequently by the said accused, can be used by the Court against him to convict him.

54. In Ram Prakash Vrs. State of Panjab AIR 1959, (SC), it was held that retracted confessional statement of co-accused is admissible against other accused and the provision of Evidence Act do not prevent the Court from taking into consideration retracted confession against the confessing accused and his co-accused but corroboration is necessary.

55. In the case of State of Maharashtra Vrs. Anil @ Raju Namdeo Patil, 2006 (2) AIR Bom R 513 (DB); accused was charged for ransom and murder. Confessional statement of the accused was recorded by the Magistrate after following prescribed procedure and no police officer was present when confession was recorded. It was therefore held that confessional statement would be substantial piece of evidence.

56. In case of Hukma Vrs. State of Rajasthan, 1976 Cri.L.J., 1480 (Raj H.C.); it was held that retracted confessional statement can form legal conviction if the Court is satisfied that it is true and it has been

voluntarily made.

57. Learned advocate appearing for accused No.1 strenuously argued that there are various formidable reasons to gather that the confessional statement of accused No.1 was not voluntarily made. In the first place to the question made to the accused as to why he was making voluntary statement, to which he replied that since he has not given any answer and simply stated that he want to make voluntary statement. It was pointed out that accused was in police custody from 25.09.2015 till date of confessional statement i.e. 21.09.2015. During this period, he was brought before learned JMFC from time to time for extension of his police custody. Investigating Officer Shri Darekar (PW54) has explained that accused Abdul Malik has not expressed his intention and willingness to make confessional statement during 14.10.2015 to 18.10.2015 when he was taken at various places for the purpose of investigation. One another circumstance is that on 19.10.2015 when accused was brought before Learned JMFC, the application was moved by Investigating Officer for reserving right of police custody for further 5 days. According to advocate for accused No.1, all these circumstances shows that accused was threatened that further 5 days police custody will be demanded if he did not make confessional statement.

58. It was then pointed out that I.O. Shri Darekar (PW54) was present when accused was produced before learned JMFC on 19.10.2015 and on 21.10.2015. During cross-examination of Investigating Officer he admitted that he was present before JMFC on 21.10.2015 when confessional statement of accused Abdul Malik was recorded. However, in next breath he changed his version and stated that he was present before learned JMFC on 19.10.2015 when accused was produced first time for recording his confessional statement. During his cross-examination he admitted that at the time of extension of remand of the accused, he used to appear before learned JMFC. The record shows that on 21.10.2015 Investigating Officer moved an application for extension of remand (Exh.333). This is sufficient to believe that Investigating Officer was present before learned JMFC when his remand was extended. According to learned advocate for the defence, the presence of



Investigating Officer in the Court at the time of recording confessional statement of accused No.1, has washed out prosecution case that the confessional statement was voluntarily made by accused No.1.

59. As against this, learned Special Public Prosecutor, Shri Sathiyathan, submitted that if it be held that mere fact that mee for the reason that Investigating Officer was present in the Court for getting extension of remand and accused then no confession can possible held to be free from police influence, because it will be unreasonable to expect the presence than police officer to escort such under-trial prisoner. In support of this argument, learned Special Public Prosecutor placed his reliance on the case of Kurungala Laxman Vrs. State, 1964 Cr.L.J., 464, Orrisa High Court,. However, this judgment will not come to the assistance of prosecution for the reason that the facts therein are distinct. In this case, the accused who made confession was in MCR when he was produced before JMFC for confession statement and he escorted by police constable from jail to the Court, who was not connected with the investigation of the case. Moreover, in a question put to the accused by Magistrate, as to why he wanted to make confessional statement and accused like a typical khond had replied frankly that he has committed crime for the sake of land, he should not deny his guilt. In the case in hand, accused Abdul Mallik was directly produced before Magistrate for recording his confessional statement, when he was in police custody. Moreover, subsequently he has retracted his confessional statement. It is disclosed from the evidence of PW55 Shri Chakkar, who recorded confessional statement admitted that on 19.10.2015 said accused was produced in the Court by Investigating Officer PW54 Shri Darekar. It has come in his evidence that accused was produced before him on two occasion between 03.10.2015 to 19.10.2015. However, accused did not expressed his willingness to make a confessional statement during that period. It is further disclosed from the evidence of learned JMFC Shri Chakkar that after recording confessional statement of the said accused, he was never physically produced before him and thereafter accused sent retracted statement (Exh.349) from Jail on 05.01.2016. The record shows that neither Investigating Officer file his say on the said retracted



statement nor the Magistrate made any inquiry with accused to ensure whether accused No.1 want to retract the confessional statement and why he has sent application from jail for retracting his confessional statement.

60. It is pertinent to note that the confessional statement of accused Abdul Malik was recorded on 21.10.2015, whereas he sent his retracted statement on 05.01.2016 i.e. after 45 days. During this period, he was not produced before learned JMFC. It was then pointed out that to the question put to the accused by learned JMFC as to why did it occurred him to make confessional statement, accused replied that he is in police custody and he want to get free from it. Learned advocate for the accused pointed out that accused was not made aware or caution that if any confessional statement made by him that would be use in trial against him.

61. It was then submitted that the form of recording statement Exh.339 shows that accused Abdul Malik was in police custody when he was produced by Investigating Officer Shri Darekar (PW54) on 19.10.2015 for recording confessional statement. There is nothing on record to show that his advocate was present when Part-1 of confessional statement as per Criminal Manual was recorded. It further appears that after giving two days time for reflection to the accused, he was produced on 21.10.2015 for recording his confessional statement. In the confessional statement it is mentioned that accused was represented by advocate Shri G.B.Kale. However, neither any reference of the name of this advocate is reflected in remand papers, nor his Vakalatnama is available on record. Learned JMFC has admitted that no legal aid counsel was provided to the accused when his confessional statement was recorded. It was then pointed out that no question was put to the accused as to why he fell repentance.

62. On the basis of this piece of evidence, learned advocate for the accused submitted that the retracted confession is weak evidence and the surrounding circumstances are sufficient to infer that confessional statement has been recorded under duress. The help was sought to be taken of *Alok Nath Vrs.. State of Bangal, 2007 (1) Crimes, 321 S.C.*; wherein it has been laid down that a case where confession is made in

presence of Magistrate, conforming the requirement of section 164 of Cr.P.C., if it is retracted at later stage, the Court should probe deeper in the matter. The learned Magistrate should satisfy himself that confession was of voluntary in nature. It has to be appreciated that there can be times whether despite such procedural safe guards confessions are made for unknown reason and in fact made out of fear of police. In a case of retracted confessional, the Court should not ordinarily rely solely thereupon and would look for corroboration. Such corroboration should be conclusive in nature.

63. Learned Special Public Prosecutor, vehemently submitted that merely because accused has sent retracted confession subsequently will not lose the importance of confessional statement which made before Magistrate after following procedure of law. According to him, the retracted confessional statement sent by accused after the long gap of 45 days. This itself is sufficient to gather that it is after thought. To counter this argument, it was submitted by Ld. Advocate for accused No.1 that said accused was never produced before Magistrate after his confessional statement was recorded. Therefore, accused No.1 was constrained to send retracted confessional statement from jail. According to learned counsel appearing for the defence, the importance should be given as to whether confessional statement was voluntarily and the circumstances surrounding retracted statement are sufficient to gather that confession was made under the duress of the police. The reliance is placed on the case of *Parmanand Pengu Vrs. State of Assam, 2004 ALL MR, (Cri.) 3175, SC*; In the supra case, during the course of examination under section 313 of Cr.P.C., two accused had retracted from their confession as they were tutored by police. This defence was accepted by the Court.

64. In the case of *Babubhai Vrs. State of Gujrath, 2007 ALL MR (Cri.) 854*, accused was not provided legal aid at the time of recording confessional statement and the confessional statement was retracted by the accused. Therefore, conviction and sentence was set aside by the Hon'ble Apex Court.

65. In *Maroti Narayan Kalamkar Vrs. State of Maharashtra, 1997 ALL MR (Cri.) 559*; when the accused was produced before Special

Judicial Magistrate, he was brought in police custody. Special Judicial Magistrate admitted that armed police man was present and the rest of the police persons were standing at the quite distance from the Court room when confessional statement was recorded. It was held that possibility of accused being influenced by the police, cannot be overruled.

66. Having discussed the legal provisions with regard to the verification of the retracted statement and on scrutinizing the facts of the present case, I find no corroborative factum that lend on the truth of confession. The record shows that accused was not provided legal aid when his confessional statement was recorded. He was in police custody when he was produced before Magistrate for recording his confessional statement. Investigating Officer has admitted that he was present in the Court when confessional statement of accused was recorded. This fact is also admitted by learned JMFC, who recorded confessional statement. One of the circumstances that cannot lost sight is that on 19.10.2015 when accused was produced first time for recording his confessional statement, Investigating Officer moved an application before learned Magistrate and thereby reserved further police custody for 5 days. Therefore, hardly no doubt as regard the accused was under the nose of the police personal and therefore, if any statement under section 164 of Cr.P.C. is recorded in the above mentioned circumstances, it would be difficult to accept it to be voluntary and willful statement under section 164 of Cr.P.C.

67. In the case of *State (NCT of Delhi) Vrs. Navjyot Sandhu, 2005 ALL MR 2005 S.C.*; reference of Taylor's Treats and the law of Evidence Volume-1 was taken wherein it has been stated that before acted upon confession, Court must be satisfied that it was freely or voluntarily, the confession by hope of promise of adverse recover or enumerated or by force or by fear induced by violence or threatened of violence cannot constitute evidence against the maker of the confession. If any reasonable doubt is entertained by the Court that these ingredients are not satisfied, the Court eschew the confession from consideration.

68. It is pertinent to note that the statement on oath by Magistrate that accused made confessional statement, itself is not sufficient the first requirement for acting on confession is not under the matter the trial Court

needs to see whether there are any circumstances appearing on the record which may cause doubt on the voluntary nature of the confession. In order to assure all the truth of the confession, there must be corroboration from other evidence. In the present case a question put to accused No.1 by the Magistrate he explained that he is in police custody and he want to get free from police custody and this is reason for him to make confessional statement.

69. It would be relevant to reproduce the translated portion of confessional statement on material aspect.

*“I have downloaded Jihad Provoking thought from Nazia Net Café” ....“Kadarkhan who is residing in my locality has downloaded the speech of the head of “Jaish-e-Mohammad” in my mobile phone and it is asked to him for Jihad by listening this speech.” “I came in contact with Tariqbin Jihad on Facebook. He inspired me for Jihad activities. Later on I came to know that his real name is Shoeb @ Rehman. He introduced me with Ab. Rajik and told that he is also prepared for Jahad. Shoeb introduced him with Hafij Mujib. He called me in Aqsa Masjid. Shoeb and Ab. Rajik were present there and they told me that I should go to Afganistan for Jihad.”*

*“For the purpose of attack on police, I purchased knife from my friend Altaf.” On 14.09.2015 listen inflammatory speech of Mohd. Tufel and Bismilla Shiekh. He told that Muslim should unite against saffronisation, cow-slaughtering and Surya Namaskar.*

70. It is to be noted that neither Kadar Khan, Mohd. Tufel and Bismilla Sheikh arrayed as accused or cited as witnesses.

71. It appears from the confessional statement that accused No.1 simply stated that one Tariq Bin Ziad was his friend on Facebook and later on he came to know that his real name is Shoeb. In the cross-examination it has come on record that there are so many persons by name of Shoeb residing at Hingoli. Accused No.2 and 3 were not produced before accused No.1 for their identification.

72. In so far as purchasing of knife by accused for attack on police, Investigating Officer Manish Patil, (PW55) candidly admitted that no evidence was found to show that accused No.1 purchased knife from said PW28 (HW15). The prosecution has this witness, but he has denied that he gave knife to accused No.1. Considering all these surrounding circumstances, I find that the voluntariness of confessional is under

shadow of doubt. Considering the circumstances brought on record the retracted confessional statement, I find that the confessional statement Exh.339 was not voluntarily made by accused No.1.

**Evidence on the point of conspiracy :**

73. The prosecution case is that accused No.1 Abdul Malik came into contact with accused No.2 Shoeb Khan on Facebook and accused No.2 then introduced him with accused No.3. Thereafter there was secret meeting between accused persons at Masjid-E-Aqsa Pusad. Accused No.2 and 3 encouraged accused No.1 for Jehadi thought. Accused No.2 was previously arrested by Hyderabad police, when he was about to fly Afganistan to join terrorist organization ISIS.

74. In order to prove the conspiracy against the accused persons, the first witness examined by prosecution is PW27 (HW14). It is alleged that accused No.1 has recorded the phone audio clip in his mobile and it was then shared with the members of Whatsapp group "Friend forever", of which accused No.1 was admin. However, this witness turned hostile.

75. PW28 (HW15) is examined to show that he helped the accused No.1 to create his e-mail ID and Facebook account in his mobile and had supplied knife to him, which was used by the said accused in assault on police. This witness did not support the prosecution in any manner.

76. PW29 (HW16) is said to be the member of the Whatsapp group "Friends forever". He supported the prosecution case. According to him he was holding mobile No. 99210274547, and he was member of the social group "Friends forever" created by accused No.1, but he has not explained what kind of audio clip was sent by accused No.1.

77. PW30(HW17) is the another member Whatsapp group "Friends forever". As per his statement on oath, he holds mobile No. 9922663033. He admitted that accused No.1 was also member of said social group. However, he denied the prosecution case that accused No.1 was influenced him by the jehadi thoughts.

78. PW33(HW18) is the important witness for the prosecution to prove the alleged terrorist activities of accused persons. The prosecution case is that during the schooling of this witness at the instance of one

Salman Mojem he joined All India Muslim Student Organization and said Salman Mojem and Jehan and Farkan were delivering provoking speeches. It is further alleged that accused No.3 being Pesh-e-Emam used to come at Aqsa Masjid for the purpose of Namaj and used to take the said witness provoking things about the jihad and he had shown one video clip about the atrocities on Muslim on Myanmar. It is further prosecution case that in January 2013, this witness attend the function of Ijtema at Balapur Akhada and there was secret meeting between accused persons and it was told to this witness that accused No.3 and accused No.2 are in contact with Mujahidin people of Afganistan.

79. It is pertinent to note that though PW33 has admitted that he knows accused No.3, but he denied the prosecution in totality. The statement of this witness was recorded before Magistrate under section 164 of Cr.P.C. vide Exh.183. However, he explained that he was threatened by the police for making incriminating statement against accused. No other favourable material was collected during his cross-exam by the prosecution.

80. PW34 is admittedly the employer of accused No.2 Shoeb. He is contractor. His evidence is recorded to establish that the behaviour and conduct of the accused No.2 was suspicious and accused Shoeb Khan was using his laptop to visit the website of terrorist organization. He admitted that accused was using his laptop for the purpose of the work of his contractor firm. However, he denied that accused No.2 used to spent whole night in the office. He admitted that he got knowledge that this accused was arrested by Hyderabad police on the ground that he was attempted to Fly to Iraq for joining ISIS. From the evidence of this witness prosecution could not brought any material to establish that this accused was involved in unlawful activities and was having any connection with other accused persons. It is to be noted that to prove the aforesaid allegations, the Investigating Officer has not seized laptop of this witness. Therefore, the accusations against accused in this connection rendered meaningless.

81. The next witness examined by the prosecution is PW50 (HW20). He is resident of Umarched. The case of prosecution is that

accused No.3 being the *Pesh-e-Emam* used to visit Masjid at Umarkhed to render sermon and he advised the accused to resort armed jihad. However, this witness turned hostile. Nothing could be elicited from his cross-examination which would help the case of prosecution.

82. PW16 (HW10) is the panch witness on the arrest panchanama of accused No.2 Exh.118 and seizure of his mobile Exh.141. His arrest was made by PW53 PI Shri Manish Patil. The evidence of hidden witness PW16(HW19) and Investigating Officer PI Manish Patil, (PW53) suggested that on the arrest of the said accused, one black-red colour Nokia make mobile phone (Article-19) with battery was seized from his possession.

83. The evidence produced on record show that after seizure of the mobile phone from accused No.2, no further investigation was carried out to show that some incriminating posts were found in mobile or there was any call from the said mobile to other accused persons. Prosecution has not collected CDR of his mobile. Even PI Manish Patil (PW53) was not in position to disclose the mobile number. There is at all no evidence to show that sim card was purchased in the name of this accused.

84. To bring the Charge of conspiracy within the ambit of section 120-B of IPC, it is necessary to establish that there was agreement between parties for doing unlawful act. Such kind of evidence is totally missing in the present case. Therefore, mere seizure of the mobile of accused No.2 vide Article-19 will not help the prosecution to rope him in the offence of conspiracy. Same is the case with regard to the accused Salim Malik (accused No.3).

85. One of the essential ingredient of the offence of conspiracy is that each member is conspirator in conspiracy, meeting of mind of two or more persons for doing illegal act for act by illegal means is primary condition to constitute such offence. In order to prove the conspiracy, prosecution has relied on electronic evidence and the evidence of PW33 (HW18). Prosecution case is that this witness has attended two functions of All India Muslim Youth Organization and in the function held by said student organization inflammatory and provoking speeches were delivered by Rehan, Furkan and Salman Mojam. Prosecution case is further that



accused persons used to impress this witness provoking things about Jihad. Accused No.3 has shown some videos clips to this witness on atrocities against the Muslims in the Myanmar. It is further case of prosecution that in January-2013, PW33 has attended Ijtema at Balapur Akhada and at that time one secret meeting was held between he accused persons and they were talking about Jihad. In the said meeting it was informed to PW33 that accused No.2 who was in contact with Mujahidin, Afganisthan. They were preparing for passport for Afganisthan and when PW33 got doubt about his activities, he withdrawn himself and snapped relations with them. However, this witness was not supported the prosecution case in any manner. He only admitted that he knows accused No.3 since he was *Pesh-E-Imam*. It is to be noted that his statement under section 164 of Cr.P.C. was recorded before learned JMFC (PW55) vide Exh.183. According to the said witness, before recording his statement before Magistrate, he was repeatedly called in the police station and he was tutored. He was threatened by the police to implicate him in false case and therefore, he was scared. He was compelled to give a statement. In my considered opinion, this statement recorded under section 164 of Cr.P.C. before Magistrate Exh.183, would have been helpful to the prosecution had there been independent corroborative evidence to show the connection of the accused in the terrorist activities. Statement recorded under section 164 of Cr.P.C. is not substantive piece of evidence. The object of recording statement of witness under this section is two folds, to deter witness from changing their stories subsequently, and other to get other immunity from prosecution in regard to information given by witness under section 162 of Cr.P.C. It appears that this witness is examined to show that Mudassar and accused Shoeb have plan to go Afganisthan to join Mujahidin activities.

85. Learned advocate for accused No.2 has submitted accused No.2 has been implicated in this case because one criminal case is pending against him at Hyderabad alleging that he was planning to go Afganisthan to join Mujahidin. In my considered opinion, there should have been concrete evidence that all the accused persons have visited various places at various time in order to hatched conspiracy. No person



can be convicted mere on conjuncture and surmises. Mere statement of witness recorded before JMFC under section 164 Cr.P.C. without any corroborative evidence, cannot be the sole basis to convict the accused for offence of conspiracy. In my considered opinion, if the statement of PW33 recorded under section 164 of Cr.P.C. is eliminated from the record, then there is absolutely no evidence against accused persons to prove conspiracy or terrorist act against them.

87. PW45 Dattaram Angre, the Nodal Officer of Idea Cellular, has proved that accused No.3 had moved an customer application vide Exh.258 and exh.259 for getting card and accordingly, sim card No. 9923064085 was given to him. during his evidence he has produced on record CDR of this mobile number vide Exh.261. However, there is no evidence that accused No.3 has made contact with accused No.1 on this mobile number. Investigating Officer PW53 Police Inspector Manish Patil has candidly admitted that 35 note books and 60 CDs were found during house search of these accused. However, no offending material was found in any note book or CD. PW55 Investigating officer Tapan Kolhe, stated that during his investigating it was revealed that accused No.3 was using 5 mobile phones. However, only one cellphone bearing registered No. 9923064085 has been produced on record.

88. The house search of accused No.3 was carried out by PW52 API Shri Sunil Kinge. According to him, the house of accused No.3 was shown by one Abdul Wahab. He informed the police team that accused No.3 is tenant in the said house. He opened house with key having with him and 60 number of CDs and 35 books have been seized. CDs and books verification panchanama was prepared by PW52 Shri Sunil Kinge. He candidly admitted that no offending contents were found either in books or in CDs.

89. PW8 (HW7) and PW9 (HW8) have been utilized panch witness for the seizure of CDs and Urdu literature found in the house search of the accused vide panchanama Exh.166. However, they turned hostile. PW10 (HW9) is panch witness in whose presence the CD verification panchanama Exh.122 was prepared by PW52 API Kolhe. According to him, speeches of Zakir Naik was found in one CD and in

another CD the function of Salana Jalsa was captured. However, it has been brought on record that the speech of Zakir Naik are easily available on U-Tube. Moreover, Investigating Officer has admitted that the material recovered from the house search of accused No.3 was not offending. PW7 (HW6) has simply stated that one Lava make mobile phone was seized from the possession of accused No.3 vide panchanama Exh.114. However, he was not able to tell the sim card number of this mobile.

90. PW50 (HW20) is another important witness examined by the prosecution in order to prove the conspiracy and terrorist act at the hands of accused persons. However, he turned hostile. It was suggested to him that he was member of organization Shahine-E-Force and came in contact with SIMI. It was also suggested him that he witnessed the activities of SIMI. It was further suggested him that accused No.2 and accused No.3 provoked him to join training at Afganisthan and he refused their proposal. He denied all these suggestions. He admitted that he knows accused Shoeb as they were arrested at Sikandarabad. He denied that some Jehadi literature was found in the possession of accused Shoeb when he was arrested at Sikandarabad. He simply stated that he was arrested by Sikandarabad police and coincidentally accused Shoeb Khan was also arrested by police at the same time and this was the only occasion for him to know accused Shoeb Khan. During his cross-examination by accused No.3, it has come on record that during the prayer of Namaj accused used to tell good things about Islam. Therefore, evidence of this witness is not helpful to the prosecution.

91. Investigating Officer API Shri Kolhe, deposed that accused No.2 Shoeb was using three mobile phones. However, during cross-examination he admitted that he was not registered user of these mobile phones. Some books were seized from the possession of accused No.3. PW53 PI Manish Patil admitted that those books were not containing any offending material. He further admitted that neither any mobile nor sim card was seized from the possession of this accused. Even PW53 PI Manish Patil admitted that no evidence was found showing nexus of accused No.2 with the incident of attack on police by accused No.1. From the evidence of PW54 IO Shri Darekar, it reveals that on 22.10.2015 he

got information that accused No.2 was arrested by ATS Hyderabad and on this clue said accused was arrested in the present case. He further admitted that no incriminating evidence found showing that accused No.1 and accused No.2 were in contact with each other on phone.

**Whether the presence of accused No.1 at the time of assault is probable:**

92. Prosecution case is that incident was captured in CCTV installed nearby spot of incident and it was also captured in the video-camera. The prosecution has produced on record the DVD of CCTV footage vide Article-7. The case of prosecution is that CCTV cameras were installed nearby the spot of incident. PW18(HW11) is the employee of the said private company. He stated that he took CCTV footage in pen drive and handed over the pen drive to PW17 PC Abdul Sharate, who in turn prepared DVD of CCTV footage. PW25 PC Rahul Katkar was operating the video camera at the spot of incident. The prosecution case is that DVD of both CCTV footage and video camera was prepared by PW17 Ab. Sharmate and PW19 PC Satish Shinde was present when DVD were prepared.

93. Learned Special Prosecutor has fairly admitted that the incident could not captured either in CCTV footage or in video camera. Therefore unnecessary discussion related with this piece of evidence is shorn of.

94. Learned advocate for the accused submitted that incident could not capture either in CCTV footage or in video-camera. Therefore, evidence collected by the prosecution in the form of CCTV footage and video shooting is not helpful to prosecution case. Since the prosecution has established that accused has assaulted the police witnesses. The next question is whether this attack made by accused No.1 Ab. Malik is the result of criminal conspiracy between accused persons and whether the prosecution is able to prove that all the accused indulged in terrorist act.

95. Turning to the evidence of expert witnesses. It seems that PW45 Dattaram Angre is Nodal Officer of Idea Cellular. He was examined to prove the CDR of the mobile phone from the possession of accused and witnesses. It has come in his evidence that customer

application form was submitted by accused No.3 vide Exh.258 and Exh.259 and one Rajjak Dadamiya. This witness has produced CDR of mobile No. 9763452271 (Exh.260) and CRD of mobile No. 9923064085 (Exh.261). With the assistance of evidence of this witness, it was established that accused were using mobile NO. 9923064085 and another mobile No. 9763452271 was registered in the name of one Rajjak Dadamiya. He is not examined as witness in the present matter.

96. PW47 Vishal Kokadwar was serving as scientist at FSL Kalina Mumbai. He has examined DVR and Hard Disk sent by Anti-Terrorist Squad. According to him, one mobile with memory card was also sent. He examined audio clip contained in the said mobile. The report with regard to the Hard Disk is at Exh.268 and the report with regard to mobile and memory card is at exh.269 to Exh.271.

97. PW48 Ajit Waghmare is scientific officer attached to the Safe Authentication and Speaker Identification (SASI) Division of FSL, who deals with the voice examination. According to him on examination of one mobile and one memory card, some chatting was found in it. He examined one specimen sample and audio clip. He found that questioned vice sample and specimen voice sample was of the same person.

98. PW58 Sanjay Kasar, hand writing expert, to whom handwriting of accused No.1 was sent for his examination. The report submitted by him is at Exh.63.

99. PW2 (HW01) is panch witness. In his presence IP address, Facebook account, G-mail account and Twitter account of accused No.1 was said to have checked.

100. The next question is whether prosecution is able to prove that accused Abdul Malik was using mobile phone No. 9763452271 and whether this mobile number was used for circulating text messages and two audio clips on the Whatsapp group "Friends Forever". In this connection, prosecution has examined Nodal Officer of Idea Cellular Company PW45 Dattaram Angre. According to him, as per the record, accused No.1 is not registered owner of Mobile No. 9763452271. PW51 API Tapan Kolhe also admitted that this mobile was not registered in the name of accused No.1. This mobile phone has been seized from the

possession of Abdul Rahim Ab. Sattar. However, during the evidence PW3 (HW3) and PW29 (HW16) the prosecution has proved that accused was the admin of Whatsapp group "Friends Forever". They were also members of this group and audio clips were circulated by this accused on this Whatsapp group. Therefore, it can be gathered that though accused No.1 was not registered customer of this cellphone number, but he was using the said sim card. Same is the case with accused No.3. PW45 Dattaram Angre has produced on record the certified copy of the customer application form moved by accused Nok.3 vide Exh.258 and Exh.259 for getting the sim card. His evidence suggest that cellphone number 9923064085 was allotted to accused No.3. CDR Exh.261 shows that accused No.3 was using said mobile. However, CDR collected by Investigating Officer are not helpful to prove conspiracy by accused persons.

101. In order to prove that by circulating messages on Whatsapp group and by way of e-mail, Facebook and Twitter account, accused No.1 was indulged in terrorist activities. The prosecution has relied on the electronic evidence. PW2 (HW1) deposed that Facebook account, e-mail account of accused No.1 was opened in his presence and his Facebook ID and password were given by him to search these accounts. Screen shots of his IP address and its prints out were taken out. The screen shots were saved and its separate folder was prepared. Its print out was taken out. Exh. 87/1 to Exh.87/12 are the prints out of the Facebook post of accused No.1. Exh.88/1 to Exh.88/5 are the prints out of screen shots of google account, Exh.89/1 to Exh.89/8 are the prints out of screen shots of Twitter account, whereas Exh.90 is the print out of screen shot of What is my IP address.

102. Learned Special Prosecutor invited my attention towards the post and comments on Facebook vide Exh.87/4, wherein one boy is seen in front of tanker and accused posted his comment "I do something it is better than I say something". Similarly, at Facebook post vide Exh.87/10 some persons are holding flag and accused posted his comment ".ho rzme haq wo batil tu faolaad hai momin." Like in the Twitter account Exh.89/4 post against Indian Government is seen. With the help of this evidence it

was submitted that accused No.1 was following the international terrorist like Masood Azhar and Ossama Bin Laden and he was attracted in Jihad activities.

103. Learned advocate for the accused No.1 challenged this electronic evidence on the ground that under section 65-B (4) of Evidence act is not produced. The defence has raised objection during evidence of panch witness PW2, so as to read secondary evidence in absence of certificate under section 65-B (4) of Evidence act. However, this objection was overruled on the ground that PW2 was merely a panch witness, who says that in his presence Facebook, Google and Twitter account of accused No.1 was opened, since he was not having any control on the device of computer, the certificate under section 65-B of Evidence act is not expected from him. The evidence emerges on record shows that Investigating Officer Shri Darekar was present when Facebook, Google and Twitter account of accused No.1 was allegedly opened and the computer was operated by Police Constable Sanket Kolhe.

104. Learned advocate for accused No.1 submitted that there shall not be any quarrel to the legal provision that furnishing certificate under section 65-B(4) of Evidence Act is not mandatory when electronic evidence is produced by a party who is not in possession of a device, but according to him applicability of essential requirement of section 65-B (4) of Evidence act to furnish certificate as applicable with such electronic evidence as produced by a person who is in its possession to produce such certificate being in control of the said devise. In support of this contention reliance is placed on the case of Shafi Mohammad Vrs. State of Himachal Pradesh, 2018 Cri.L.J., 1714;

105. In the present case, prosecution has not recorded evidence of Police Constable Sanket Kolhe, who has allegedly operated the computer devise when Facebook, g-mail and Twitter account of accused was allegedly logged in.

106. Learned Special Prosecutor on the other side relied on the case of Priti Jain Vrs. Kunal Jain, AIR 2016, Raj. 153; it was matrimonial dispute. Husband sought to adduce video clipping recorded through pin-whole camera, to prove extra marital affairs of his wife. It was held that

clipping from pin-hole camera with Hard-disk and memory card was primary evidence. Therefore, same was admissible in evidence without compliance of section 65-B (4) of Evidence Act.

107. Learned advocate for the accused rightly argued that mere filing of prints out of screen shots is not sufficient. It was submitted that hard-disk or CD was not played during the evidence of panch witness and therefore the Facebook, Twitter and G-mail account of the accused has not been duly proved by the prosecution. PW2 (HW1) has admitted during his cross-examination that the editing of screen shots is possible by the app "Photo-shop". He further admitted that once the computer is hacked, the entire control of the computer device remains with the hacker.

108. Next evidence produced by the prosecution is by way of voice sample of accused No.1. since two audio clips were circulated by him on Whatsapp group "Friends Forever". In this connection PW7 (HW4) has been examined as eye witness when this audio clip was recorded by the accused. However, he turned hostile. The prosecution case is that this clip was collected from mobile of one Mudassar and Tanwirkhan. The mobile and memory card was sent for analysis to expert. The voice sample of accused was taken in presence of PW5 (HW3) and it was confirmed that the voice recorded in voice recorder is matched with the voice in audio clip. In this connection PW5 (HW4) stated that one typed paper with texts was given to the accused for reading and his voice was recorded in voice recorder. The contents of texts and audio clips were same. After recording the voice sample of the accused in voice recorder, its CD was prepared and memory card was seized. The contents of audio clip are proved at Exh.315.

109. PW47 Vishal Kokadwar is expert. He submitted his report with regard to the audio clip found in the HTC make mobile vide Exh.264. He also examined one DVD and Hard-disk sent to him by Investigating Officer and his report Exh.265. According to him, he received 4 mobile phones for his examination. Out of them the audio clip or mobile phone and memory card was extracted and its CD was prepared and this CD and memory card were sent to Safe Authentication and Speaker Identification (SASI) Division for voice examination. PW48 Ajit Waghmare is expert in



Authentic identification of voice. According to him, one questionnaire and one voice was sent to him and through spectro-auditory and spectrography analysis it was found the questioned and voice sample was of the same person.

110. The evidence of both these witnesses have been challenged on the ground that their report is silent as to which tests were carried out for sound analysis. They have admitted that several sounds samples were required. However, they were not in position how much sound sample is to be selected for this purpose. Report Exh.267 prepared by PW47 Shri Ajit Waghmare, shows that matching sounds are not mentioned in the report.

111. In my considered opinion, the evidence of expert is not helpful to the prosecution to prove terrorist act on the part of the accused. I have gone through the contents of the audio clip reflected in Exh.314. It appears that accused No.1 has exhibited his anger by violence against Government and some Hindu Organization for ban on cow slaughtering. No doubt he used the word "Jehad". But it was adventurous to jump to the conclusion that only for using word "Jehad" he should be brand as terrorist.

112. As per the dictionary the word "Jehad" literally means "Struggle". Jehad is an Arabic word which literally means striving or struggling. According to BBC the third meaning of Jehad is struggling to build a good society. Related word of Jehad is expedition, administration, movement, strive crusade. Therefore, merely accused used word "jehad", it would not proper to brand him as terrorist.

113. One another kind of evidence in the form of handwriting of accused No.1 is produced on record to connect him with terrorist activities. During his house search, first Investigating Officer Shri Kshirsagar has recovered some note books and registers in presence of panch PW1 Amol Gutte. PW44 SDPO Smt. Ashwini Patil took specimen handwriting of accused No.1. During the course of investigation, these books and handwriting sample were sent to handwriting expert PW58 Shri Sanjay Kasar. He examined the natural handwriting with the specimen handwriting by taking into consideration the general handwriting,



character like slant, line quality, alignment, pen pressure, rhythm, spacing, handwriting habits, the placement of lines, the manner of vertical strokes and arrived to the conclusion that specimen handwriting is matched with the natural handwriting. The handwriting report is at Exh.63.

114. The attempt was made to satisfy that one long book was in the name of student Rubia and another book was in the name of Ab. Wahab as admitted by panch witness. However, the prosecution had duly proved that this long book has been seized from the house search of the accused No.1 and it appears in his handwriting.

115. Relevant contentions of handwriting book vide Exh.383 to Exh.386 are as under :-

“शाम को दुकानपर आतीक भाई ने मेरे मोबाईल मे से मौलाना मसुद अजहर का बयाण लेके और कहा की आपुर हिंदुस्थानी यहा पर खुश है अपने घर पर जुलुम नही हो रहा है तो जेहाद आपुन क्यो करे ये सुनकर मुझसे रहा नही गया मैने कहा की, एक मुसलमान दुसरे मुसलमान का भाई है ऐसा नबी ने फरमाया है और नबी ने यह भी कहा है दुसरो के लिए वही पसंद करो जो अपने लिए पसंद करते हो इस इसाब से अगर हम अपने मुसलमान भाई वो के लिए नही लडेंगे तो कौन लडेंगा”

116. Whereas other contents vide Exh.369 to Exh.374 depicts that accused like Ossama Bin Laden and he hate America. However, for this reason it is not acceptable that accused is indulged in terrorist act.

117. No doubt, India is front runner facing the global terrorism. In order to prove the provisions under Unlawful Activities (Prevention) Act, it would be desirable to take help of following legal position Section 3 (o) “unlawful activity, in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise)-

(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or

(ii) which disclaims, questions, disrupts or it intended to

*disrupts the sovereignty and territorial integrity of India; or*  
*(iii) which causes or is intended to cause disaffection*  
*against India.*

Section 15 defines the term “Terrorist act” as follows :

*“Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security, economic security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country.”*

118. Section 18 prescribed punishment for conspiracy with regard to terrorist act. As such the severe punishment has been provided in the offence under section 16 and 18 of the UAP Act. As already referred above, the settled provision is that stricter is the punishment, the heavier is the burden of proof.

119. In order to attract section 15 of the Unlawful Activities (Prevention) Act, the act proved against the accused with intention to threaten or likely to threaten unity, integrity, security, economic security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India. Section 15 (b) is only relevant to the present case, which prescribed that act done by the accused should be overawe, to create terror by means of criminal force. The main objects is to overawe the government or disturb the harmony of the society or terrorize the people and the society and to disturb the tempo and peace and tranquility of the society to create fear. All terrorist activities does not merely arise by causing disturbing law and order and public order. The follower of the intended activities must be such that it transferred beyond the capacity of the ordinary law enforcement agency to tackle in the ordinary civil law. In a act of terrorism generally an attempt of terrorist would be to acquire or maintain power or control and causing force helplessness in the mind of people at which the order in section thereof. It is true that some time crime committed by terrorist would not criminal, would be overlapping to some extent, but it is not intention of the legislature that every criminal should be branded as terrorist. It cannot be forgotten that every terrorist may be criminal, but every criminal cannot be given label of terrorist.

120. In the present case, no doubt prosecution has proved that accused No.1 has attacked on police when they were discharging their duty to maintain law and order. However, it appears that this attack was of his anger against the ban on cow-slaughtering. Prosecution further failed to prove that accused No.2 and 3 have hatched conspiracy with accused No.1. In my considered opinion merely because some posts were made on Facebook, Twitter account by accused No.1 gratifying the act of Masood Azahar or Osamma Bin Laden and expressed his hate against America, would not fall under the terrorist act under section 15 of the Unlawful Activities (Prevention) Act.

**Evidence of Carriers :**

121. It is the prosecution case that Muddemal Property was deposited in the property room of ATS, Police Station Kala Chowki, Mumbai and it was time to time sent to FSL. PW35 PSI Nitin Ingole, PW36 Sunil Sirsat and PW37 Mirza Ansar Baig are the carriers, who took seized property to the FSL Kalina Mumbai at various time, whereas PW38 ASI Sitaram Sagar and PW36 Sunil Sirsat have brought property from FSL Kalina Mumbai to the ATS Police Station, Kala Chowki, Mumbai and deposited in the property room. PW42 ASI Balaram Kadam is the property incharge. He took necessary entries in the concern register when the property was being sent to the FSL and it was received back. The evidence of these prosecution witnesses is of formal nature. Therefore, unnecessary discussion relating thereto is shorn of.

**Evidence on Sanction :**

122. Since the provisions of Unlawful Activities (Prevention) Act, is invoked, sanction was sought from the State Government. In this context evidence of PW56 Kishor Joshi, the then Director of Prosecution, has been recorded vide Exh.353. The case papers were sent to him for his independent view. After going through the record, he forwarded recommendation to the Home Department, for prosecution of accused persons under the provisions of Unlawful Activities (Prevention) Act vide Exh.354.

123. PW43 K.P.Bakshi, the then Additional Secretary, Home Department, State of Maharashtra, has been examined as Sanctioning

Authority. He accorded sanction vide Exh.242.

**Sanction is not valid :**

124. Mr. Dildarkhan, learned advocate appearing for accused No.1 strenuously contended that accused deserves for acquittal for want of valid sanction within the provisions of section 45 (2) of Unlawful Activities (Prevention) Act, 1967. It is contended that sanction order Exh.243 is not proved. Moreover, the sanction order has not been passed by Competent Authority. Moreover, it is submitted that there is no compliance of Rule 3 and Rule 4 of Unlawful Activities (Prevention) (Recommendations and Sanction of prosecution) Rules 2008, wherein 7 days time limit has been fixed for forwarding recommendation by the competent authority to make report to the Central Government or the State Government, as the case may be and further 7 days time has been fixed for the State Government to award the sanction under section 45 (2) of the Act, from the date of receipt of recommendation. It is contended that in view of the mandate of section 45 of the Act, the sanction should have been awarded by Chief Secretary. Whereas herein the present case the officer who accord the sanction is the officer in the rank of Additional Chief Secretary.

125. Adverting to the facts of the present case. FIR registered on 25.09.2015. Accused No.1 was arrested on same day. During the course of remand, offence under section 16 of the Act have been added and proposal for sanction was sent by the then Investigating Officer to the Director of Prosecution. In turn, he took the independent review and after that sanction was accorded. Section 45 (2) of the Unlawful Activities (Prevention) Act, mandate that no court shall take cognizance of any offence under Chapter III, without previous sanction of the Central Government or the State Government as the case may be.

126. In order to prove the valid sanction, prosecution has relied on the evidence of PW43 Shri Kalyan Prasad Bakshi, the then Additional Chief Secretary (Home Department) State of Maharashtra, PW54 Investigating Officer Shri Darekar and PW56 Shri Kishor Joshi, the then Director of Prosecution, State of Maharashtra.

127. Turning to the challenge with regard to the time schedule. It

has come on record that PW56 Shri Kishor Joshi was discharging duty as Assistant Director of Prosecution and on 19.12.2015 he was on his official visit at Nagpur. He received the papers of the present crime from Investigating Officer for the purpose of his independent review of the offence. On the basis of confessional statement of accused No.1 and messages circulated by him on the Whatsapp group "Friends Forever", he came to the conclusion that there is prima facie evidence against accused persons for offence punishable under section 16 and 18 of the Unlawful Activities (Prevention) Act 1967. Therefore, he sent recommendations to the Home Department, vide Exh.354. During his cross-examination, it was tried to bring on record that since the offence under Unlawful Activities (Prevention) Act, is scheduled offence under National Investigating Agency Act, the Central Government was the competent authority to accord the sanction.

128. Reading terminology in sub-section (2) of section 45 of the Act, it is obvious that the delegation of powers vested to the State Government and it has to make independent review of the offence and make a recommendation within time framed. Investigating Officer Shri Darekar deposed that section 18 of Unlawful Activities (Prevention) Act, has been added on 21.10.2015. On 10.12.2015, he informed the learned JMFC about inclusion of section 109, 120-B of IPC and section 18 of the Unlawful Activities (Prevention) Act. On 16.12.2015 he sent proposal to the Chief Secretary, Home Department for sanction under section 45 of the said Act. On 05.01.2016 sanction was accorded by PW43 Shri K.P.Bakshi, Additional Chief Secretary.

129. PW43 Shri K.P.Bakshi deposed that he received recommendation on 16.12.2015. That on 19.12.2015 he sent proposal to the Director of Prosecution for his independent view. He received report from PW56 Shri Kishor Joshi on very same day and on 23.12.2015 he forwarded recommendation to the Hon'ble Home Minister for sanction. As per the evidence of PW43 Shri K.P.Bakshi, he received sanction from Home Minister on 31.12.2015 and then on 05.01.2016 he passed order to accord the sanction for prosecution.

130. In view of section 10 of Unlawful Activities (Prevention) Act,

which provides that the provision of Unlawful Activities (Prevention) Act with regard to the investigation shall not affect the power of State Government to investigate or prosecution any schedule offence or any other offence. The notification of Central Government dated 21.06.2007 makes it clear that these powers can be delegated. The State Government has also in pursuance to the Government Notification dated 26.05.2010 appointed Director of Prosecution as Competent Authority to recommend the State Government for prosecution.

131. Rule 3 of Unlawful Activities (Prevention) (Recommendations and Sanction of prosecution) Rules 2008, provides 7 working days from receipt of report from recommendation by Authority of evidence collected by Investigating Officer. Rule 4 Unlawful Activities (Prevention) (Recommendations and Sanction of prosecution) Rules 2008, contemplates that State Government shall take decision for prosecution within 7 working days after receipt of the recommendation of prosecution. Therefore, it is apparent that there is obviously delay in recommendation and sanction as required Rule 3 and 4 of the Unlawful Activities (Prevention) (Recommendations and Sanction of prosecution) Rules 2008.

132. Learned Special Prosecutor vehemently submitted that this delay in recommendation and sanction is not fatal to the prosecution. It is contended that provisions of section 45 of UAP Act, are mandatory in its characteristic. However, Rule 3 and 4 of Unlawful Activities (Prevention) (Recommendations and Sanction of prosecution) Rules 2008, cannot be so branded. In support of this contention reliance is placed on Mohd. Bilal Gulam Rasul Kagji Vrs. State of Maharashtra, Criminal Appeal No.1256/2012, decided on 19.12.2012, wherein it has been laid down that defect or irregularity in official compliance has no bar on the competency of sanction. It is observed that the term “shall” appear in the statute or “Rule” at the time can be interpreted as “should”. Procedural provisions even if it used “shall” may be construed as directory for no prejudice is caused. It has been held that provisions required statutorily furnished within prescribed time to be construed as directory. It is therefore, clear that in view of supra judgment on the specific point of time schedule for recommendation and sanction, this delay does not fatal to the prosecution.

133. The next challenge is basically to the competency of PW43 Shri K.P.Bakshi, for according sanction to the prosecution. As per the notification of Central Government dated 21.06.2007 an officer in the rank of Secretary of the State Government, incharge of Home Department is only competent to accord the sanction. As per PW43 Shri K.P.Bakshi, he was working as Additional Chief Secretary. He had forwarded proposal for prosecution to the Home Minister for its sanction. On receiving sanction from Home Minister, he passed the sanction order Exh.243. The sanction order given by Home Minister is not filed on record. Even there is no reference of the said sanction in the sanction order passed by PW43 Shri K.P.Bakshi. A feeble attempt was made to satisfy that Additional Chief Secretary is also empowered to accord sanction. Learned advocate appearing for the accused strenuously argued that PW43 Shri K.P.Bakshi was not competent to accord the sanction. According to him, when power is given to do certain thing on certain way, the thing must be done in that way along and other method are necessarily forbidden. In support of this proposition he relied on the case of Ramchandra Keshav Adke Vrs. Govind Chaware and others, (1973) SCC 512, reliance is also placed on the case of Pradip Pimparkhede Vrs. State of Maharashtra, reported in 2014 ALL MR (Cri.) 3064, Bom.H.C. In the supra case, accused was prosecuted for an offence under section 13 of the Prevention of Corruption Act. Accused was public servant and the appropriate authority to accord sanction was Chief Minister, whereas sanction was accorded by Deputy Secretary. The evidence emerges on record shows that the fact pertaining to the prosecution never placed before Chief Minister. Deputy Secretary received the approval from Law and Judiciary Department. He was not required to appoint or remove the prosecutor, but empowered to sign on behalf of the Government. It was held that sanction was not accorded in accordance with law.

134. Learned Special Prosecutor on the other side submitted that irregularity in passing order cannot be ground to acquit the accused. He relied on the case of State of M.P. Vrs. Jiyara, 2009 (15) SCC, 72;

135. In my considered opinion, offence under Unlawful Activities (Prevention) Act, is very serious offence. The act is self contained Code in



respect of the sanction to prosecute the accused and the procedure to laid down therein should be strictly followed for according the sanction. Law is settled that stricter is the punishment heavier is the burden. Needless to mention that officer in the rank of Additional Chief Secretary cannot be said to be the officer of rank of Chief Secretary. The same kind of legal question has been dealt by Hon'ble Apex Court in the case of Ajaib Singh Vrs. Gurbachan Singh, AIR 1965 S.C. 1619; wherein it has been laid down that Additional District Magistrate is subordinate to the District Magistrate. If any officer is appointed on the post of Additional District Magistrate, that itself does not confer all the power of District Magistrate to him. In my considered opinion, if this analogy is applied to the present case, then there is no doubt that the sanction is not accorded by the Competent Officer.

136. Learned advocate for the accused then invited my attention towards evidence of PW43 Shri K.P.Bakshi. Law is settled that sanctioning authority must apply his own independent mind for generate genuine satisfaction whether prosecution to be sanctioned or not. The sanctioning authority has candidly admitted that he has not scrutinized the document but the matter was discussed by him with his Senior Officer. He further admitted that he does not find any statement of independent witness indicating that the incident of attack by accused No.1 left impression of terror in the mind of people of Hindu and Muslim community. He further admitted that Prevention of Cruelty to Animal Act is enforced in the State of Maharashtra since 1967. He further admitted that the mobile allegedly used for sending offending Whatsapp message by accused No.1 was not registered in his name.

137. Learned Special Prosecutor submitted that it is not require that sanctioning authority should state in the order that he personally scrutinized the material and arrived at the required satisfaction. In support of this contention learned Special Prosecutor has relied on State of Maharashtra Vrs. Ishwar Kalapatri, 1996 (2) Mh.L.J., 263 S.C.;

138. There cannot be legal quarrel with this proposition. However, in the present case PW43 Shri K.P.Bakshi, has candidly admitted that he was not an officer in the rank of Secretary. He admitted that three



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Secretaries are working in the Administration side of the Home Department and Chief Secretary is senior most officer in the rank. Not only this he went to say that in the hierarchy after the Chief Secretary, there is post of Additional Chief Secretary. It is therefore, clear that post of Additional Secretary is not at par with the post of Chief Secretary. Therefore, in my considered opinion, the sanction is not accorded in accordance with law.

**Irregularities in Investigation :**

139. There are total 7 Investigating Officers in the present case, who conducted investigation at various stages of the investigation. PW41 API Gajendra Kshirsagar was attached to the Pusad Police Station. He arrested accused No.1 and seized knife from his possession. He also took house search of the said accused and recovered one Katta and note book and Urdu literature.

140. Further investigation was carried out by PW44 Ashwini Patil. She recorded statements of injured and eye witnesses, collected CCTV footage, seized handcam. She has also recorded statement of Abdul Rahim who was member of Whatsapp group "Friends Forever" and verified audio clip. She further obtained specimen signature of accused No.1.

141. On 01.10.2015 the investigation came to be transferred from Pusad Police Station to Anti-Terrorist Squad and Unlawful Activities (Prevention) Act, came to be invoked. Investigation was entrusted to ACP Shri Sunil Darekar. AS per section 43 of Unlawful Activities (Preservation) Act, in case other than Delhi, special police shall be and the cases of Metropletin area, no police officer below the rank of Deputy Superintendent of Police or Police Officer of equivalent rank shall investigate in to offence under this Act. Shri Sunil Darekar deligates his powers to his subordinates. PW51 API Tapan Kolhe, has recorded statements of one of the witness (PW49), who was member of "Friends forever" Whatsapp group. He seized Micromax make A-76 mobile phone from his possession vide Exh.108. The said witness has not dipsuted seizure of mobile form his possession. PW51 Tapan Kolhe has also collected information about the alleged secret meeting between accused

persons at Balapur Akhada. PW52 Sunil Kinge has collected school documents of accused No.1. He also took house search of accused No.3 and recovered 60 CDs and 35 books under panchanama Exh.285. He has recorded statements of Mohd. Sajid Mohd. Sadiq, one of members of "Friends forever" group. During his evidence it has come on record that one function was held at Nagina Masjid and this function was videographed by one Dnyaneshwar Jadhav and he seized Hard Disk from Dnyaneshwar Jadhav. He has also seized one mobile from Mohd. Sajid Mohd Sadiq, under panchanama Exh.289.

142. PW53 PI Manish Patil, has arrested accused No.2. he seized his Nokia 1208 mobile under panchanama Exh.141. He recorded statement of one Sakib Ahmed and he also arrested accused No.3 and seized his mobile. He has also recorded statement of PW49 and verified G-mail, E-mail, account of accused No.1 as well as book and CDs recovered during house search of accused No.1. The main Investigating Officer Sunil Darekar (PW54) has recorded statements of some witnesses and sent muddemal to FSL.

143. PW57 ACP Shri Manish Sawai, has been examined to bring on record that some queries made by handwriting expert with regard to the handwriting in note book and register were rectified by him. Handwriting expert was not ascertained which particular handwriting has to be examined by him from the note book and long book. He therefore, sent back the note book and register. In response to his letter, PW57 Shri Sawai, encircled particular portion of the note book and sent register and note book to hand writing expert through E.O.W.

144. Learned Special Prosecutor Shri Sathiyathan, submitted that there may be highly defective investigation in the case. However, justice cannot be made sterile on the technical ground and mere fact that Investigating Officer committed irregularities and illegality during the course of investigation could not cast doubt on the prosecution case. He further submitted that there may be minor discrepancies in the case and the Court is not supposed to give undue importance to the minor discrepancies which did not affect the core of the case of prosecution and over much importance cannot be given to such minor discrepancies. He

further submitted that where the charge can be substantiate from each and every evidence, it would be upon the Court to convict the accused even if the major portion of evidence is found to be defecated as residue is sufficient to prove the guilt of the accused. He submitted that maxim “*falsus in uno falsus in omibus*” is not applicable. The reliance is placed on the following authorities :

- (1) *Gunnana Pentata @ Pentada and ors Vrs. State of A.P. (2009) 16 SCC, 59;*
- (2) *Gyanchand & ors. Vrs. State of Haryana, (2013) 14 SCC 420;*
- (3) *Rohtash Kumar Vrs. State of Haryana, 2014 (4) SCC (Cri.) 238;*
- (4) *Bhardwada Bhoginbhai Hirjibhai Vrs. State of Gujrath, 1983 (3) SCC 217;*
- (5) *State of Rajasthan Vrs. Smt. Kalki & anrs., AIR 1981` SC 1390;*

145. Hon’ble Apex Court has discussed the effect of normal discrepancies and material discrepancies in evidence in a fashion that normal discrepancies in evidence which are due to nominal error of observation. Normal memories due to lapse of time due to mental dispossession such as shock and horror at the time of occurrence. Whereas material discrepancies are those which are not normal and not expected of normal person. While normal discrepancies do not corrode credibility of the parties else, material discrepancies do so.

146. In the present case, unfortunately Investigating Officer conducting the investigation did not pay appropriate attention to the mandatory provisions of Unlawful Activities (Prevention) Act, as to what part of investigation should have been done by him personally and what part of investigation could have been delegated to his subordinate officer.

147. Section 43 (c) of the Unlawful Activities (Prevention) Act, makes it clear that in a case other than cases where Delhi Special Police Establishment is constituted under Delhi Special Police Establishment act, or in the metropolitan areas of Mumbai, Kalkatta, Chennai and Ahamadabad and other notified metropolitan areas, the criminal case

under Chapter IV to VI of Unlawful Activities (Prevention) Act, shall investigate by the officer not below the rank of Deputy Superintendent of Police, or police officer of equivalent rank. As per this section the Investigating Officer may authorized any subordinate to him to arrest any person who has committed an offence punishable under this Act, or search any building conveyance or place. It is therefore, clear that the restricted powers of delegation of his authorities has been conferred to the Investigating Officer to delegate the power of arrest and seizure to subordinate officer if urgent arrest, search and seizure of accused is necessary, in respect of the arrest of the accused. Chapter IV of the Act prescribed punishment for various kinds of terrorist activities, whereas Chapter V deals with the forfeiture of the record of terrorism or any property intending to be used for terrorism. However, evidence emerges on record shows that the investigation in the present case has been carried out by three police officers, subordinate to Investigating Officer Shri Sunil Darekar after crime is transferred to ATS. As per PW51 API Tapan Kolhe, during the investigation it was revealed that accused has circulated audio clip and messages on his Whatsapp group "friends forever" created by him. In this connection he has interrogated Mohd. Mudassar. PW52 Sunil Kinge is another police officer in the rank of Assistant Police Inspector. In addition to house search of accused No.3, he recorded statements of 9 friends of accused No.1 as well as one another friend of accused No.3 Mohd. Sajid. The evidence emerges on record further shows that P.I. Shri Manish Patil, PW53 has arrested accused No.2 and accused No.3 and seized mobile phone from the possession of accused No.2. He has also recorded statement of witness Mudassar. It further appears that although PW51 API Tapan Kolhe, claims himself to be one of the Investigating Officer, still according to him, his statement was recorded by PW54 Shri Sunil Darekar. No written order of delegation of powers to PW51, API Shri Tapan Kolhe, PW52 Sunil Kinge is produced on record. Section 43 (C) does not confer the power to subordinate officer to record the statements of witnesses and such powers cannot be delegated to the subordinate officer. Although the order in respect of the delegation of the powers to PI Shri Manish Patil is placed on the record at the fag end of the

trial, no explanation has been offered as to why this order could not produce along with charge-sheet. Moreover, it is pertinent to note that this order is not produced on record by the Investigating Officer Shri Sunil Darekar, who was carried out and supervising the investigation. Interestingly, PW53 Manish Patil has stated that he has produced this order on record in consultation with learned Special Prosecutor. Therefore, there appears sufficient bearing in the submissions advanced by accused that this document has been produced during evidence of PW53 Manish Patil, to fill up lacuna of prosecution case.

148. Learned Special Prosecutor, submitted that main Investigating Officer committed irregularities during the course of investigation that would not and does not cast doubt on the prosecution case. There cannot be any legal quarrel about this proposition. However, the legal position is that in case of defective investigation, Court has to see circumspection in evaluating the evidence. It is to be examined whether there is any such lapses by which any benefit should be given to the accused.

149. The pivotal question is whether all the powers of investigation vested to the Investigating Officer under section 43 (c) of the Act, can be delegated by him to his subordinate and the answer to the question is in negative. Had it been the intention of the legislature to empower the Investigating Officer to delegate all the powers to his subordinate then restriction should have not been imposed under section 43 A of the Act. It can be said that the statute has granted the powers of investigation to the Investigation Officer “specifically designated” for the purpose. (underlined is emphasized). Un-deterred exercise of all powers of Investigating Officer by his subordinate under section 43 A of the Act, will amount to defeating the legislation purpose for the same. In a case of *Joint Active Airlines of Pilot Association (AIPAI) and others Vrs. Director of General of Civil Aviation, reported in 2011 (5) SCC, 435*; the Hon’ble Apex Court has declared that even senior officer cannot provide any guidelines or direction to act in a particular manner. The proposition of law treated in *Tailor Vrs. Tailor’s* case that if statute prescribed anything to be done in particular manner then it must be done in that manner alone and other modes or methods of doing that thing deemed to have been

prohibited, has been retified in series of judgments. There is no compliance of mandatory provision of section 43 B of Act. As per mandate of section 43 B of the Act, all the seized articles shall be forwarded without unnecessary delay to the officer in-charge of the nearest police station. Here in the present case, muddemal was not deposited in the nearest police station. Moreover, Investigating Officer has not obtained the permission of JMFC, when the voice sample of accused No.1 was obtained. The prosecution case is that one Kadarkhan has help accused in downloading speeches of terrorist Masud Azahar in his cellphone and this speech prompted him to attract towards Jihad. Neither Kadar Khan is arrayed as accused nor his statement was recorded by Investigating Officer. The important aspect of the matter is that as per confessional statement of accused No.1 he was listening speech of Masud Azahar when he was proceeding towards spot of incident along with knife. Accused was apprehended on spot raid-handed along with knife, but no mobile phone was seized from his possession. One another aspect of the matter is that during confessional statement of accused No.1, he disclosed that one Tufail, Kadarkhan and Mudassar delivered speeches on 14.09.2015 and he was impressed by their speeches and their speeches leads him to commit the offence. However, no investigation has been carried out in this direction.

**Conclusion :**

150. Considering over all evidence on record I am of the view that With the assistance of evidence of PW11, PW12, PW15, the prosecution has proved beyond doubt that accused No.1 has voluntarily assaulted and used criminal force to three police men i.e. PW11 Amol Badkule, PW12 Yogesh Dongarwar and PW15 Sudarshan Aghav and thereby caused hurt to them while they were discharging their duty as public servant. Needless to mention that injured police were maintaining Bandobast at the time of attack. Accused No.1 by making assault on them by knife, deter them from discharging their duty. When a public servant is assaulted while discharging his duty with intent to prevent or deter him from discharging his duty and voluntarily caused hurt to them, he is liable to be convicted for an offence punishable under section 324, 332 and 353 of IPC.

**Offence under section 153 of IPC, not proved.**

151. It is pertinent to note that although prosecution was able to establish that accused No.1 has assaulted on police men while they were discharging their public function. However, there is no iota of evidence to establish that this attack by the accused was likely to provoke the public in general for an offence of riot. The evidence emerges on record shows that the situation was turned to the normalcy within 10 minutes after the incident of assault.

The essential ingredients of offence are as follows :

- (1) The accused did an act which is illegal;
- (2) He caused the provocation to other by such act;
- (3) He did so malignantly or wantonly;
- (4) He did so with the intention that his provocation will cause the offence of rioting or knowing that it is likely to cause the offence of rioting.

I have therefore no hesitation to hold that the prosecution failed to prove an offence punishable under section 153 of IPC.

**Offence under section 186 of IPC is not attracted :**

152. Accused have charged for an offence under section 186 of IPC for obstructing the public servant in discharge of public function. In the present case, although prosecution has proved that accused No.1 voluntarily obstruct police men in discharge of their public duty. However, section 195 of cr.P.C. restrict the Court to take cognizance of offence under section 186 of IPC except upon the complaint in writing of the public servant concerned or other public servant to whom in his administration. Therefore, I am of the opinion that no offence is proved against accused under section 186 of IPC.

**Offence under section 4/25 of Arms Act not proved.**

153. Learned advocate for the accused No.1 challenged the connection of accused No.1 for offence under section 4/25 of Arms Act mainly on the ground hat no doubt accusation and possession of specified knife under section 4 of the Arms Act is prohibition and possession of arms is punishable under section 25 of the said Act. Moreover, section 27 of the Act, prescribed punishment for using any arms or ammunition in



contravention of section 5 of the Act. In view of section 4 of Arms Act and section 37 of Bombay Police Act, a notification in official Gazette is mandatory. Section 37 (4) of the Bombay Police Act conferred powers upon the Commissioner and District Magistrate of particular area to promulgate the notification prohibiting at any area or place carrying arms etc. which is capable of being used for causing physical violence. The essential requirement for passing such prohibitory order is that the prohibitory order must be in writing and shall sign either by Commissioner of Police or the District Magistrate of the area.

154. No doubt PW20 Dr. Malpani, who examined weapon and submitted his query report Exh.153, has given description of the knife as follows :

Total length 36.2 cm.,

Length of blade 23.1 cm.,

Length of knife 13.1 cm and breadth of blade 4 cm.

155. However, there is no compliance with the provisions of section 4 of the Arms Act. Section 4 of the Arm Act, says that the Central Government may, by notification in the Official Gazette, direct that this section shall apply to the area specified in the notification, and thereupon, no person shall acquire, have in his possession or carry in that area arms of such class or specification as specified in that notification, section 2 (e) of the act defines the term "arms" which term means and includes a sharp-edged weapon. The knife vide Article-1-A having sharp edge on one side and hacksaw blade like edge on another side is weapon of that kind. However, the prosecution did not lead any evidence that notification has been issued by the Central Government prohibiting any area where the offence was committed.

156. In a case of Vilas Patil Vrs. State of Maharashtra, 1996 Cr.L.J., 1854 Bom.H.C., it has been laid down that in this notification is received possessing or carrying of the arms is not prohibited. The same view has been taken in recently in the case of Sambhaji Gangalwar Vrs. State of Maharashtra, Criminal Appeal No. 944/2015, decided on 22.06.2017 by Hon'ble Aurangabad High Court bench of Hon'ble Bombay High Court. Therefore, I hold that offence under section 4/25 of



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Arms Act is not proved.

**Offence under section 135 of Bombay Police Act not proved**

157. In so far as prohibitory order under section 37 of Bombay Police act is concerned, Investigating Officer Shri Sunil Kinge has proved that he collected the copy of said order form Collectorate Office, Yavatmal. Copy of order is at Exh.283. However, the promulgation of the notification itself is not sufficient that provision under section 37(i) of the Bombay Police Act publicity of the promulgation of the notification. There should be evidence on record that the prohibitory order was not only promulgated, but was brought to the knowledge of the public at large by modes and communication like publish in news paper or made aware to the public at large by Munadi and announcement on loudspeaker or beating of drum etc. Reference can be taken of the case of Ashok Kamalkar Vrs.State of Maharashtra 1998 ALL MR 841;

158. In the instant case, evidence adduced by the prosecution in this regard does not show that said notification was promulgated as required under provisions of the Act and therefore, I have no hesitation to hold that prosecution failed to prove the offence under section 37 of Bombay Police Act.

159. The ultimate result is that the prosecution has prove an offence under section 324, 332, 353 of IPC against accused No.1 therefore, I answer points accordingly.

160. I take a pause here to hear the accused on the point of sentence.

Date: 21.05.2019

( A. S. Jadhav )  
Addl. Sessions Judge, Akola.

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161. Heard accused on the point of sentence. He prayed for clemency. According to him, he belongs to poor family having responsibility of his old aged mother and father.

162. Learned Special prosecutor submitted that accused dare to make attack on police while they were discharging their duty and

therefore, severe punishment should be awarded against accused.

163. Learned advocate for accused No.1 Mr. Dildarkhan submitted that if overall evidence is considered it would go to show that the act committed by the accused was nothing but his enrage against the policy of government. It is submitted that the act committed by the accused is the outfit of the outburst of resentment and sentiments of accused.

164. Accused No.1 expressed his repentance. He is young person of 24 years old. The record is silent about his criminal antecedent. He has faced the trial as under-trial prisoner and co-operated the Court and prosecution during the trial. Considering all these mitigating and aggravating factors, I find that following sentence would meet the ends of justice.

### **ORDER**

- (1) Accused No.1 Abdul Malik Abdul Razzaque is hereby convicted under section 235 (2) of Cr.P.C. for the offence punishable under section 324 of Indian Penal Code and sentenced to suffer simple imprisonment for 3 (three) years and to pay fine of Rs. 10,000/- (Rs. Ten thousand), in default to suffer further S.I. for 6 (six) months.
- (2) Accused No.1 Abdul Malik Abdul Razzaque is further convicted under section 235 (2) of Cr.P.C. for the offence punishable under section 332 of Indian Penal Code and sentenced to suffer simple imprisonment for 3 (three) years and to pay fine of Rs. 5,000/- (Rs. Five thousand), in default to suffer further S.I. for 6 (six) months.
- (3) Accused No.1 Abdul Malik Abdul Razzaque is further convicted for an offence under section 353 of Indian Penal Code and sentenced to suffer simple imprisonment for 2 (two) years and to pay fine of Rs. 5,000/- (Rs. Five thousand) in default to suffer further S.I. for 3 (three) months.
- (4) All substantive sentence shall run concurrently.
- (5) Accused No.1 was arrested on 25.09.2015 and since then he is in jail. He is entitled to set off under section 428 of Cr.P.C. for the period undergone by him.
- (6) Accused No.1 Abdul Malik Abdul Razzaque is acquitted of offence under section 16 of Unlawful Activities (Prevention) Act, 1967, read with section 120-B of IPC, section 18 of Unlawful Activities (Prevention) Act, 1967, read with section 120-B of IPC, 307 r/w. 120-B of IPC, section 333 r/w. 120-B of IPC, 153 r/w. Section 120-B of IPC, 186 r/w. Section 120-B of IPC, 109 of IPC, 120-B of IPC,

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He is also acquitted for an offence under section 135 of Bombay Police Act and under section 4/25 of Arms Act.

- (7) Accused No.2 Shoeb Khan @ Ahmed s/o. Rehman Khan and accused No.3 Salim Malik @ Hafeez Mujib-Ur-Rehman s/o. Mehboob Shaikh, are acquitted of offence under 16 of Unlawful Activities (Prevention) Act, 1967, read with section 120-B of IPC, section 18 of Unlawful Activities (Prevention) Act, 1967, read with section 120-B of IPC, 307 r/w. 120-B of IPC, 332 r/w. 120-B of IPC, section 333 r/w. 120-B of IPC, 153 r/w. Section 120-B of IPC, 353 r/w. 120-B of IPC, 186 r/w. Section 120-B of IPC, 109 of IPC and 120-B of IPC,
- They are further acquitted for an offence under section 135 of Bombay Police Act and under section 4/25 of Arms Act.
- (8) Accused No.2 and 3 be set at liberty, if they are not required in any other offence/case.
- (9) It is hereby directed that accused No.2 & 3 shall execute bond of Rs. 15,000/- each to appear before the appellate Court as and when such Court issue notice, as per the provision of section 437-A of the Cr.P.C.
- (10) Muddemal property i.e. seized mobile phones with sim cards, batteries, memory cards be returned to its owner on due verification, where as the seized note books and Urdu books, be returned to respective accused, after the period of appeal is over.
- (11) Hard-disk and compact disks be returned to ATS, Unit Akola, whereas the blood stained uniforms of injured be returned to them, and other property being worthless and useless, be destroyed, after the period of appeal is over,
- (12) Knife vide Article 1-A and Katta vide Article-4, be sent to District Magistrate, Akola, for disposal according to Law.
- (13) Copy of this judgment be sent to District Magistrate, Akola.
- (14) Copy of this judgment be provided to accused No.1 free of costs.

Date: 21.05.2019

( A. S. Jadhav )  
Special Judge,  
Designated under U.A.P. Act &  
Addl. Sessions Judge, Akola.

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Certificate.

*Certified that the contents of this PDF file are same word for word as per original order.*

*Name of the Steno : A.R.Raipure,  
Court's name : District Judge II & Addl. Sessions  
Judge, Akola.  
Date of decision : 21.05.2019  
Signed by P O on: 30.05.2019  
Uploaded on : 30.05.2019*