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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

THURSDAY, THE 27TH DAY OF JANUARY 2022 / 7TH MAGHA, 1943

CRL.A NO. 1699 OF 2011

AGAINST THE JUDGMENT IN SC 2/2010 OF SPECIAL COURT FOR TRIAL OF NIA CASES,ERNAKULAM

APPELLANTS:

1 THADIYANTEVIDA NAZEER @ UMMER HAJI @ HAJI,SIDHIQUE, NASER
AGED 35 YEARS, S/O. ABDUL MAJEED, "BAITHUL HILAL", THAYYIL, NEERCHAL, KANNUR DISTRICT, KERALA.

2 SHAFAS, S/O.SHAMSUDHEEN, AGED 27 YEARS
"SHAFNAS",THAYYIL,POUND VALAPP,KANNUR,KERALA.

BY ADVS.
SURESH BABU THOMAS(S-1369) for A1
SRI.K.K.DHEERENDRAKRISHNAN
SRI.S.RAJEEV
SRI.V.VINAY

RESPONDENTS:

*STATE OF KERALA, REPRESENTED BY THE NATIONAL INVESTIGATION AGENCY, NEWDELHI REPRESENTED BY ITS PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM KOCHI 682031 (*CORRECTED AS 'NATIONAL INVESTIGATION AGENCY, NEW DELHI REP BY ITS DIRECTORPER' AS PER ORDER DATED 04/01/2012 IN CRL.M.A. 11122/11.)

BY ADVS.
MANU S., ASG OF INDIA
SRI.M.AJAY SPL. P.P FOR NIA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06.01.2022, ALONG WITH CRL.A.1914/2011, THE COURT ON 27.01.2022 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

THURSDAY, THE 27TH DAY OF JANUARY 2022 / 7TH MAGHA, 1943

CRL.A NO. 1914 OF 2011

AGAINST THE JUDGMENT IN SC 2/2010 OF SPECIAL COURT FOR TRIAL OF NIA CASES,ERNAKULAM

APPELLANT/S:

THE SUPERINTENDENT OF POLICE
NATIONAL INVESTIGATION AGENCY, 4TH FLOOR, SPLENDOR FORUM,, DISTRICT CENTRE, JASOLA, NEW DELHI, PIN - 110025, AND HAVING IT FIELD OFFICE AT BEGUMPET, HYDERABAD, ANDHRA PRADESH, PIN - 500016.

BY ADV SRI.M.AJAY, SPL. P.P FOR NIA

RESPONDENTS:

1 ABDUL HALIM @ HALIM
S/O USMAN,SAKEENAS, THAZHAKATH HOUSE, VAZHAKKATHERU , KANNUR, NOW RESIDING AT SAFIYABAG, THANA,, KANNOOKARA, KANNUR DISTRICT, PIN - 670012.

2 ABUBACKER YUSUF @YUSUF CHETTIPADY
S/O.ABUBACKER, NALAGATHU HOUSE, NEDUVA VILLAGE,, THIRURANGADI TEHSIL, MALAPPURAM, PIN - 676316.

3 THE STATE OF KERALA
(REPRESENTED BY ITS PUBLIC PROSECUTOR),, HIGH COURT OF KERALA, ERNAKULAM, PIN - 682018.

BY ADVS.
P.C NOUSHAD, P. K ABDUL RAHIMAN
P.K.ABDURAHIMAN (POOLACKAL KARATCHALI)
P.C.NOUSHAD
PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06.01.2022, ALONG WITH CRL.A.1699/2011, THE COURT ON 27.01.2022 DELIVERED THE FOLLOWING:

CR

K.VINOD CHANDRAN & ZIYAD RAHMAN, JJ.

Crl.Appeal Nos.1699 & 1914 of 2011

Dated this the 27th January 2022

JUDGMENT

Vinod Chandran, J.

If it is permissible in law to obtain evidence from the accused person by compulsion, why tread the hard path of laborious investigation and prolonged examination of other men, materials and documents? It has been well said that an abolition of this privilege would be an incentive for those in charge of enforcement of law "to sit comfortably in the shade rubbing red pepper into a poor devil's eyes rather than go about in the sun hunting up evidence". (Stephen, History of Criminal Law, p. 442).

State of Bombay v. Kathi Kalu Oghad [1962 SCR (3) 10]

Confessions may have an element of truth in it but it fails to persuade the Judges, in travelling the distance between 'may be true' and 'must be true'; the whole of which distance, as has been held in *Sarwan Singh v. State of Punjab [1957] 1 SCR 953],* must be covered by *'legal, reliable and unimpeachable evidence'.*

2. Inexplicable violence as a retaliatory measure against establishments of State, based on religion and community, often questions the secular credentials of a society; particularly of this State which proudly proclaims itself to be the most literate in all of the Country. The reverberations of the two Marad incidents; which remain a blot on the secular fabric of the State, is projected as the motive of the twin blasts which rocked Kozhikode city on the lazy noon of 03.03.2006, a Friday.

3. Accused 1 to 9 were alleged to have conspired, planned and executed the twin blasts, for reason of bail having been denied to the accused in the second Marad incident, in which 136 of the 142 accused remained imprisoned, as under trials, for about four and a half years. A2 and A8 were absconding when the case went for trial, of whom A2 has now been arrested. A6 died and A7 was declared an approver, who gave evidence as PW1. A5 was not charge-sheeted. This left A1, A3, A4 and A9 to face trial in the two crimes registered, which were clubbed together while filing the final report and a

consolidated charge levelled on the twin blasts. In the impugned judgment the above four accused are shown as one to four, but we refer to the accused from the array in the final report, since invariably the participation of the various accused are spoken of from that array.

4. On 03.03.2006 there were two bomb blasts in Kozhikode Town, in quick succession between 12.30 p.m and 01.00 p.m, at two locations inside the KSRTC and the Mofussil Bus Stands. Crime No.80 and 81 of 2006 were registered respectively at the Kasba and Nadakkavu Police Stations, which were then taken over by the CBCID and later by the National Investigation Agency [NIA]. PW1 to PW58 were examined, through whom Exts.P1 to P98 were marked. MO1 and MO2 series material objects collected from the scene of occurrence were marked by the prosecution. The defence marked Exts.D1 to D26 and also examined DW1 to DW3.

5. The Special Court for NIA Cases, Kerala, Ernakulam found A1 & A4 guilty of the offences under S.16(1) & 18 of the Unlawful Activities Prevention Act, 1967 [UAPA] and they were convicted and sentenced with

imprisonment for life and fine of Rs.50,000/- with default sentence of imprisonment for one year, under each of the above provisions. They were also sentenced to three years imprisonment under S.124(A) IPC together with a fine of Rs.10,000/- with default sentence of three months and a further sentence of two years under S.153(A) IPC. A1 was further sentenced to imprisonment for life and fine of Rs.50,000/-, with a default sentence of one year under S.4(b) of Explosive Substances Act, 1884. The first of the above two appeals is by A1 & A4 and the other by the NIA against the acquittal of A3 & A9, which appeals were heard together.

I. *The Arguments :*

6. Sri.Suresh Babu Thomas, learned Counsel, appeared for A1 and argued that A1 was not identified by any one at the scene of occurrence and not even by the approver (A7), who was examined as PW1. The only evidence before Court was that of the approver and the lack of identification demolishes the prosecution case. There were four persons in the dock and each should have been identified separately by pointing them out from the dock;

by their position, dress or stand-out features. In the absence of such identification, the dictum in *Vylali Gireesan v. State of Kerala [2016 KHC 204]* applies squarely. The disclosure statements from Exts.P17 to P24 are the confessions alleged to be made by A1, of the crime itself, which are inadmissible in evidence and by no stretch of imagination can be termed as a confession under S.27 of the Evidence Act. It is pointed out that even according to the prosecution the motive was retaliation against the denial of bail to the accused in the second Marad incident, which occurred on 02.05.2003. The purchase of gelatin sticks established, was in the year 2002, long before that. There is also ample evidence that the gelatin sticks are perishable and if not put to use immediately, will be rendered useless. There is not even a scrap of evidence to find A1 guilty of the offence. The case has been set up by the prosecution merely on surmises and conjectures, which the Trial Court swallowed without further ado and throwing to the winds the fundamental principles of criminal jurisprudence. It is pointed out that the charge under the Explosive

Substances Act could not have been levelled, since S.7 of the Act provides a consent of the District Magistrate, from the year 2001 onwards; which has not been obtained.

7. Sri.S.Rajeev, learned Counsel, appearing for A4 adopted the arguments of A1. The charge was specifically read to indicate the motive, which did not exist at the time of the alleged purchase of gelatin sticks. As far as A4 is concerned, PW1, the approver does not identify him from dock nor has he been alleged with any overt acts. It is pointed out that based on the confession statements, nothing was discovered and there was no concealment spoken of by the accused. *Shinoj V. State of Kerala [2019 (8) KHC 862]* is relied upon to argue that facts known to the police, even before information supplied of the accused, under S.27 are inadmissible. Here, there was no concealment of any material object and what was pointed out as per disclosure statements are locations wherein the accused are alleged to have prepared, conspired and executed the crime which is totally inadmissible in evidence. The spot where the explosion occurred is admitted by onlookers and victims,

including police personnel, which renders the disclosure statements valueless. There is nothing linking the respective accused to the actual crime; and the confessions alleged to have been made to police officers ought not to have been permitted to be led in evidence, nor could be relied on for convicting the accused. The investigating agency has carried out no investigation and has put words into the mouth of the accused, recorded them as disclosure statements, which is the only basis of the conviction. The conduct of the Court below is seriously assailed for having not considered the objections raised by the defence, in the course of chief-examination regarding the admissibility of the confessions; which are quite a few in number. Reliance is placed on *In Re: To Issue General Guidelines Regarding Inadequacies and Deficiencies in Criminal Trials v. State of A.P and ors.* *[(2021) 10 SCC 598].* It is pointed out that the learned Judge did not, even in the final judgment, consider the objections. As far as the approver's evidence is concerned, the learned Counsel relied on *Sarwan Singh [supra] , Dagdu v. State of*

Maharashtra [(1977) 3 SCC 68] and Somasundaram v. The State [(2020) 7 SCC 722]. It is asserted that PW1 was planted as an accused, to coerce him into being an approver, and he was earlier questioned by the State Police; with nothing elicited.

8. Smt.Sonia Mathur, learned Senior Counsel appearing for the NIA, argued for sustaining the judgment insofar as the conviction against A1 & A4. In the appeal filed by the NIA, a reversal of the acquittal of A3 & A8 was urged. The learned Senior Counsel would first emphasise on the credibility of PW1 as also the corroboration of his testimony on material particulars. As per binding precedents, not every statement of the approver, but only the absolutely essential and material aspects of his testimony requires corroboration, for accepting such evidence. On corroboration, it is specifically pointed out that PW4 & PW46, the reporters of the Calicut Times; spoke of the call received from PW1. PWs 29, PW31 & PW34, officials of the BSNL, by their testimony corroborated the factum of the call made to the Calicut Times Newspaper; from the number of a booth

belonging to PW12. PW1 also spoke of having seen two plastic bags with A1, when he reached, on summons, at the Mosque. PW6 to PW8 & PW13 corroborated PW1's statement by deposing that the bombs were found in black plastic covers. PW47, the Forensic Expert, spoke of remnants of black plastic found in the materials collected from the site of explosion; further corroboration.

9. The prior conduct of A1 has been fairly established by PW24 to PW26, who procured gelatin for A1. PW24 though spoke of one Ismail having approached him for gelatin sticks, clearly identified A1, as the person accompanying Ismail. It is clarified by the learned Senior Counsel that the discrepancy pointed out by the defence, insofar as the procurement of gelatin sticks proved by PW24 to PW26, having been in the year 2002, long before the alleged motive projected by the prosecution; is irrelevant. It is the categoric submission of the learned Senior Counsel that the prosecution never had a case that the very same gelatin sticks were used in the explosion, which is the subject matter of the offence alleged. PW24 to PW26 were brought

before Court only to establish that A1 was a person having access to such explosive substances. We pause here, to notice that in the written submissions placed before us after close of arguments, it is asserted that the gelatin sticks purchased were used in the subject explosion and that the durability or effectiveness of gelatin, after a period, was never put to the scientific experts examined by the prosecution. We will deal with this contradiction in terms, later, in the judgment.

10. As for A4, he is clearly identified by PW18, who is the witness to the point out memo. Reference is also made to the fact of purchase of plastic pot as spoken of by A1, relevant under S.8 of the Act. The learned Senior Counsel would argue that if the disclosure statements are not admissible under S.27 of the Evidence Act; even then those are relevant facts under S.8, as conduct of the accused. The learned Counsel would take us to paragraph 142 of the trial Court judgment and the judgment cited therein to canvass that position. The learned Senior Counsel relies also on ***Prakash Chand v. State [(1979) 3 SCC 90]***, ***State [NCT of Delhi] v. Navjot***

Sandhu [2005 (11) SCC 600] **and** ***A.N.Venkatesh v. State of Karnataka [(2005) 7 SCC 714]***. **It is asserted that there is nothing brought out by the accused to doubt the credibility of the approver, who was examined as PW1. There is also corroboration in material particulars, which definitely would vary from case to case. In the present case, the corroboration pointed out is sufficient to inspire the confidence of the Court so as to convict the accused. The learned Senior Counsel relied on a number of decisions, to persuade this Court to accept the evidence of the approver/accomplice as credible and trustworthy and to bring the evidence of disclosures under Section 27, or otherwise, relevant under Section 8 of the Evidence Act.**

11. As for the appeal against acquittal, the Trial Court has erred in the clear acquittal handed down to A3 and the benefit of doubt conferred on A9. PW22 has identified A3 and so has PW15. PW54 is the Investigating Officer, who arrested A3 and there is sufficient corroboration from PW32, another Police Officer, who had arrested A3 in connection with another case. It is

pursuant to the disclosure made by A3 that the site of the experimental blasts, came to the notice of the Investigating Agency as pointed out by A3 itself; again relevant under S 27 or otherwise under S.8 of the Act. A3 also pointed out the place where, he had taken classes for others and demonstrated the preparation of a bomb; specifically in the room where A2 was staying. PW1 speaks of A9 and his involvement in the placing of the bomb at one of the locations. There was no valid reason for A3 & A9 to be acquitted.

12. Sri.Arjun Ambalapatta, learned Prosecutor for NIA, specifically pointed out that the discovery of the phone booth, from which the call was made, was only after the arrest of PW1. In fact the informal response from the BSNL as received by PW53 is the one produced as Ext.P41 by PW34. The said document shows only STD and ISD calls and not local calls. The call details with respect to the calls made to the Calicut Times, revealed the phone number, which clearly corroborates the version of PW1 with respect to the call made by him to the office of the Newspaper. These call details were revealed only from

Exts.P30 & P31 issued in 2010.

13. The learned Counsel for A1 & A4, in reply, pointed out that there is no address proof of the subscribers of the telephone number from which the calls to the Collectorate or Calicut Times were made. Learned Counsel, Sri.P.C.Noushad appearing for A3 & A9 pointed out that there is no evidence regarding the conspiracy. As far as the application of S.27, there is no fact much less a material object discovered from the places pointed out by the accused, which could be connected to the crime. The experimental explosions have not been established nor is there anything discovered from the site of the alleged experiments or the room pointed out in KL Arcade much less at the residence of A2, A3 and A8. The identification made of the accused is only at the time of pointing out memos, which does not connect them to the crime. As far as A9 is concerned, he was arrested on 12.01.2004, when he was in the custody of the Police in another crime and was never even taken into custody for interrogation. It is submitted that the NIA had merely planted A9, which is evident from the manner in

which Ext.P58 was filed before Court, adding him as an accused, only to coerce him into becoming an approver. When the said attempt failed, the NIA made another accused, A7, the approver.

II. *The Trial Court Judgment:*

14. The Trial Court raised six relevant issues for consideration:

i. Whether the accused entered into a conspiracy to plant and explode bombs in the two locations,

ii. Whether in furtherance, A1 procured explosive substances to manufacture bombs,

iii. Whether A1 transported the bombs to Kozhikode and despatched two separate teams to plant the same,

iv. Whether the bombs were planted in the two locations,

v. Whether the bombs so planted exploded, thus creating communal disharmony and enmity between communities and

vi. Whether it comes under the definition of a Terrorist Act as defined in the UAP Act.

15. The Trial Court noticed the requirement of corroboration and found the approver's testimony as credit worthy and reliable. The first element of corroboration was found in the Section 164 statement made by PW1 before the Magistrate. The fact that the coin box from which PW1 made the telephone call to Calicut Times and the pointing out of the two locations where the accused had assembled before and after the explosion as also the receipt of call by PW4 was emphasised. The various disclosures made by A1, the failure of the defence to cross examine PW1 on his statement that A1 told him that the plastic covers contained bombs, intended to be planted at the two bus stands, made the evidence of the approver reliable, held the Court below. The evidence of PW58 on the pointing out memo was found to be significant; which conduct of the accused disclosed, being relevant as conduct influenced by the fact in issue. A1's pointing out the Cannannore Plastic House and the identification made by PW23 was specifically noticed. The evidence of PW24 to PW26 and the identification made by PW49, son of PW24, at the time

of pointing out memo, according to the trial court offered further corroboration. The evidence of PW24 to PW26 proved beyond doubt that A1 had access to gelatin sticks. A4 also independently led the I.O to the locations where the accused converged before and after the explosions. A4 then pointed out the location of the booth from which a call was made to the Collectorate.

16. As far as A3 and A9 are concerned, it was found that there was no proof of their involvement. A3 had pointed out the room in which A2 resided, where allegedly the bombs were manufactured and the location (a beach); where experimental explosions were carried out. Since there was nothing discovered from the room and the beach, there was nothing incriminating in so far as A3 is concerned, was the finding. As far as A9 is concerned, it was held that but for the 'trained' (sic) version of PW1, the co-accused, there was nothing incriminating revealed on investigation. A9 was not even taken into custody and there is no information supplied by him, which led to the discovery of any relevant fact. But for the bland statement of A9's presence, before and after the planting

of the bomb, nothing has been brought out in evidence.

III. *The Prosecution Case :*

17. The prosecution case in short is that A1 to A4, A6, A8 and A9 together conspired to carry out explosions, in retaliation of denial of bail to the accused, in the second Marad case. A1 purchased gelatin sticks to that end in 2004 and along with A2 and A3 conducted experimental explosions at Maidanappally Beach in Kannur and A2 also carried out a demonstration of bomb making, after a religious class, in A2's residence. Later A1 made two bombs and kept the same in a room in which A2 was residing. On 03.03.2006 A1 summoned PW1 (A7), who on reaching Markaz Masjid saw A1 along with A2, A4, A6, A8 and A9 standing under the staircase of the Masjid. There were two plastic covers, which A1 said were bombs to be planted at the KSRTC and the Mofussil Bus Stands. A1 also instructed that the factum of the bombs being placed in the Bus Stands should be informed to the office of the Calicut Times Newspaper and the Collectorate. A1, A4 and A9 proceeded to the KSRTC Bus Stand with one of the bombs and A2, A6 and A8 to the Mofussil Bus Stand with the

other. PW1 then went to an STD Booth from where a call was placed to the office of Calicut Times. A4 after planting the bomb, went to an STD Booth and placed a call to the Collectorate.

18. On being informed of the threatening calls, the Police swung into action to evacuate both the Bus Stands, on the directions of the Assistant Commissioner (AC). The bomb in the KSRTC Stand exploded before the Police reached and in the Mofussil Stand, while they were searching for it. Minor injuries were caused to a porter at the Mofussil Bus Stand and a policeman. The six persons who placed the bombs, later went to Pattalam Mosque and from there disbursed. These are the circumstances which were attempted to be proved by the prosecution, for which strong reliance was placed on the disclosure memos, the point out memos and the identification of the accused at the time the alleged disclosures were pointed out. The prosecution also placed heavy reliance on the call details of the specific calls made to the office of Calicut Times and the Collectorate. The sheet anchor of the prosecution case is the evidence

of the approver PW1, whose testimony is said to be corroborated on material aspects by the disclosures, the discoveries, the resultant identification and the call details. But before we go into that, we have to trace the path the investigation took, right from the time the two telephone calls were received at the Collectorate and the Calicut Times.

IV. *The Prequel, the Blast and The Investigation:*

19. PW2 is the Camp Clerk of the District Collector who attended an incoming call in the Collector's personal phone, with number 2371400, at around 12.00 noon. The Collector was not in the office and hence, he attended the phone. On picking up the telephone, he was informed that a bomb was placed at the KSRTC Bus Stand and it will burst in a few minutes. He was told, that 'you can do whatever you want'. When an attempt was made to get the details of the caller, the phone was disconnected. While PW2 was attempting to inform the ADM (PW3) on the intercom, again a phone came with the very same message. It was the same person who called both times and immediately the matter was informed

to the ADM on the intercom. PW3 affirmed the information passed on to him by PW2. PW3 immediately informed the AC, Kozhikode North,(PW27). PW3 was later informed that a bomb blast occurred at the KSRTC Bus Stand and he immediately proceeded to the spot. On reaching the spot he was informed that another bomb blast occurred at the Mofussil Bus Stand, where too he visited.

20. PW4, at the relevant time, was working as a reporter at Calicut Times. At around 12.30 p.m on 03.03.2006, she attended the call which came in the phone number 2700834 of Calicut Times. On picking the telephone, the first query was whether it was the newspaper office, which she affirmed. The caller then stated that bombs were placed at the KSRTC and Mofussil Bus Stands and within five minutes it would explode. When the caller was queried as to who he was, it was responded that he was the person who placed the bombs. He also cautioned her that the information should not be taken as a joke and they are very serious and it was a continuation of the Marad incident. We cannot but notice that the narration of what the caller told PW4, according

to her, is far more than that stated by PW1. We shall deal with it later, when we look at the proof proffered of the telephone calls.

21. After the phone was disconnected, PW4 informed her superiors, who in turn asked her to inform the Special Branch. PW4 called the Special Branch and also the Control Room of the Police. The Newspaper also deputed another reporter, Bijush to cover the incident. Later, Bijush informed her of the bomb blast at both the locations. Her 164 statement was marked as Ext.P8 and the news reported was marked as Ext.P9. Ext.P9 is a report of the same day; since the Calicut Times is an evening newspaper. In the news report, Marad incident was not referred to, which according to PW4 was to avoid any adverse consequences; quite justified. What was reported was the bomb blast being a continuation of other recent incidents. The discrepancy of the caller, having spoken of the blast occurring in half an hour, as against PW4's deposition that it would occur in five minutes, was explained by her as occasioned due to the anxiety on receiving such a call, which according to her, was her

first experience; again justified. PW4 also said that the report was prepared in association with the Editor-in-charge, PW46, and Bijush. PW46 corroborated all the material details spoken on by PW4. He also marked the news which appeared on 04.03.2006, in Calicut Times, as Ext.P60. He spoke of having later received other threatening calls in their office, for reason of Calicut Times having 'celebrated' the incident. PW46 marked Ext.P59, by which the NIA seized the copies of the extracts of Calicut Times dated 03.03.2006 (Ext.P9) and 04.03.2006 (Ext.P60). In Ext.P60 the highlighted news specifically spoke of the investigation being centred around the telephone booth in Mavoor Road; which we will deal with, when looking at the proof of calls.

22. The FIRs were registered *suo motu* by the Police Officers who first reached the blast sites. PW35, the Circle Inspector of Nadakkavu Police Station, on being directed by PW27, rushed to the KSRTC Bus Stand. Near the Bus Stand, in front of the neighbouring Sagar Hotel, he heard the sound of a blast. The area was covered with smoke and dust and the glass window panes of

the Sagar Hotel cracked on impact and fell down. The people gathered were removed and a scene guard was put in place. Later, on being informed of another bomb planted in the Mofussil Bus Stand, the Kasaba Sub Inspector (PW38) and party were directed to proceed there. PW35, then returned to the Police Station and registered Crime No.81 of 2006 as per the Explosives Substances Act, which was marked as Ext.P44. He returned to the blast site, prepared the scene mahazar (Ext.P11), collected the remnants of the explosion; which were later sent to Court. He also made a request for the call details of phone number 2371400 of the Collectorate.

23. PW38 was the Principal Sub Inspector, of the Kasaba Police Station, who was on patrol duty and rushed to the KSRTC Bus Stand on being informed of the bomb blast. Reaching the spot, he saw PW35, on whose directions he proceeded to the Mofussil Bus Stand, where another bomb was suspected to have been planted. At the Mofussil Stand, he used the public address system in the jeep, to request the people gathered there to move out. The police party also physically urged the people to go

out of the Bus Stand and ensured the vehicles also were taken out. While the police party, along with the porters at the Bus Stand, were searching for the bombs, they detected a plastic carry bag on the drainage on the south-eastern portion of the Stand. The information was immediately passed on to PW35 and request was made for the Dog Squad and Bomb Squad. At about 1.05 p.m, the cover exploded and the entire area was covered with smoke and other remnants of the explosion. One of the policemen (PW37) was injured in the explosion and so was a porter (PW13). PW38 put in a scene guard and proceeded to the Police Station, where he registered Crime No.80 of 2006, the FIR of which is marked as Ext.P47. Both the witnesses speak of the investigation having been taken over by the Dy.S.P. (PW53).

24. PW53, at the relevant time, was the Assistant Police Commissioner, DCRB, Kozhikode City. He was put in charge of investigation of the two crimes, registered respectively at Nadakkavu and Kasaba Police Stations, which he undertook from 03.03.2006 to 07.06.2006. PW53 got the scene of crime inspected by an

FSL Expert and also carried out investigation with respect to the calls received at the Collectorate and at the Calicut Times by examining the STD Booths in and around the Bus Stand. The material objects collected from the scene of occurrence were forwarded to the Court. He made arrangements to get the sketch prepared of both the locations. An informal reply was received from BSNL, regarding the calls; but not authenticated. On 07.06.2006, the case was transferred to the Crime Branch and PW54 took over the investigation. PW54 was in charge of the investigation between 13.06.2006 and 17.12.2009. The Crime Branch re-numbered the earlier crimes as CBCID Crimes 183 and 184 of 2006. The first arrest made was of A3, on 22.07.2009. A3 was in the custody of PW32, the I.O of the Ernakulam Collectorate Blast Case. According to PW32, when A3 was questioned he admitted to have been involved in the Kozhikode Bus Stand twin blast case, which was informed to PW54. The evidence of PW32 regarding the confession made by A3, of course is not admissible in evidence.

25. PW54, after the arrest of A3, filed a report

dated 23.07.2009, before Court, arraigning A1 to A5 as the accused in the case. A6 and A7 were included in the array of accused on 28.07.2009 and A8 on 06.08.2009. A3 is said to have made Ext.P27 disclosures on the basis of which Ext.P74 report dated 09.12.2009 was made before Court including the provisions of UAP Act. Exts.P63 & P64, point out memos of A3, were also marked. From the disclosure made by A3, Room No.4 in the first floor of K.L.Arcade earlier occupied by A2, Mydanappally beach, Kannur and the residence of A2 are said to have been discovered. We will deal with the disclosures and its efficacy a little later on and continue here with mundane details of investigation.

26. PW45 the S.P, NIA took over the investigation from the CBCID in December 2009 and then PW58 was the Chief Investigating Officer from 19.02.2010. PW57 issued Ext.P40 letter to the BSNL requesting for particulars of seven telephone numbers. It was PW45 who arrayed A9 as per Ext.P58 report dated 12.01.2010. A1 and A4 were arrested on 24.02.2010. They were in judicial custody at Bangalore, in another blast case; having been

arrested by Meghalaya Police on the India-Bangladesh border. A1 was taken into police custody on 01.03.2010 for a period of ten days. On 02.03.2010 A1 is said to have made Ext.P17 Disclosure Memo and the location of such disclosures were pointed out by, Ext.P18 dated 02.03.2010 and Ext.P19 dated 03.03.2010. Later, on 05.03.2010, he made Ext.P20 disclosure of purchase of gelatin sticks, which location was pointed out by Ext.P21 memo dated 06.03.2010. A4 was taken into police custody on 09.03.2010, who made disclosures as per Ext.P23 dated 10.03.2010 and pointed out the same by Ext.P24 of even date. PW57, picked up A7 (PW1), for interrogation on his arrival at Nedumbassery Airport on 19.03.2010. He also made disclosures as per Ext.P7 dated 24.03.2010 and Ext.P25 dated 24.03.2010. It is these disclosures that the prosecution relies on to corroborate the testimony of A7, who later turned approver and was examined as PW1.

V. *The Preparation:*

27. Before we look at the approvers evidence, we would first go into the preparation made by the accused, as alleged by the prosecution; in which the approver had

no role. A1 is said to have purchased gelatin sticks from PW24 as per his disclosure statement at Ext.P20 dated 05.03.2010. The disclosure statement is to the effect that he can identify the house of PW24, where, along with Ismail (CW60), he obtained gelatin sticks/detonators during the year 2004 and out of the same; 50 in number, some gelatin sticks were used for preparation of bombs at Kannur, for explosion in the year 2006 at Kozhikode. The point out memo dated 06.03.2010 is produced as Ext.P21, which contains a recital that A1 pointed out the sitting room, where he obtained 50 gelatin sticks/detonators in the year 2004. Pausing here for a moment, the learned Senior Counsel for the prosecution categorically stated that it was never their case that the gelatin sticks purchased from PW24 was used in the explosion at Kozhikode. We cannot but notice that, the disclosure statement recorded by the NIA and the point out memo are to the contrary.

28. In this context, we have to notice that PW53, the I.O who first carried out the investigation, deposed on motive; that the blasts were engineered by the

organization called National Democratic Front (NDF) to tarnish the image of the United Democratic Front (UDF) Government, which was in office. His statement recorded by the NIA, that the suspicion was against NDF, a Muslim Fundamentalist Organization, which had strange (sic - or is it strained? … is our doubt, not very relevant though) relationship with both the UDF and CPI(M) was not what he intended to say. He said that the statement made by him was regarding 'both the Government and the CPI(M)'. From his deposition it is clear that the Government at the time of the blast was led by the UDF and on 18.05.2006, the LDF (Left Democratic Front) came to power. PW58, the I.O of the NIA, asserted in cross-examination (page 188) that in 2002, the 5/6 gelatin sticks purchased from PW26 was used in the explosion by A1 as revealed in investigation. Again, in page 192, of the very same cross-examination, it was stated that the gelatin sticks and detonators were purchased from PW24. Further deposition was that, again six gelatin sticks were purchased in 2002 which was used in Kozhikode bomb blast as revealed in his investigation. The case of the

prosecution, as revealed from the deposition of the IO, is that the gelatin sticks purchased from PW24 was used in the Kozhikode blasts. It is not, as argued by the learned Senior Counsel for the prosecution, that PWs.24 to 26 merely established the access A1 had to gelatin sticks.

29. Be that as it may, now we would examine the disclosure memos of purchase of gelatin sticks juxtaposed with the evidence of PWs.24 to 26. The disclosure memo speaks of 50 gelatin sticks purchased from PW24, which was received on hand, in the sitting room of the house of PW24, in the year 2004. The evidence of PWs.24 to 26 is that 5-6 gelatin sticks were purchased in the year 2002 and not 2004. PW24 spoke of having close acquaintance with one Ismail (CW60), who was never examined before Court. Ismail is said to have approached PW24, for gelatin sticks for the purpose of breaking rocks in his well. PW24, was carrying on a crusher unit, whose Supervisor, PW25, was entrusted with the task of getting the gelatin sticks. PW24 identified A1 from the dock as the person standing second; whom he affirmed as having

accompanied Ismail in the year 2002, when Ismail came for gelatin sticks. On the identification, in chief-examination itself he stated that he was not present when the point out memo, Ext.P21 was prepared at the time of search made in his house, on 03.06.2010. He categorically stated that afterwards, he was summoned to the office of NIA, where he was shown the photograph of A1. While expressing our strong reservation regarding the identification made at the time of point out memo; to have any relevance in connecting the accused with the crime, it has to be stated on the facts here, that the identification of A1 by PW24, before Court, is put to peril by the statement made by PW24 of having been shown the photograph of A1, by the NIA.

30. The evidence of PW25 & PW26, the Supervisor of PW24 and the supplier of gelatin sticks respectively has also to be looked into. PW25 had acquaintance with Ismail and admitted to have been the Supervisor of PW24's crusher unit. He spoke of PW24 having approached him with two persons, of whom one was Ismail, who wanted gelatin sticks to blast the rocks in his well. PW25 approached

PW26, who had a quarry, from whom 6 to 7 gelatin sticks were purchased. He took the gelatin sticks to the crusher unit of PW24, where he could not find Ismail or the other person. While he was proceeding to PW24's house, he saw Ismail and the other person standing near the 'Vilangu School' and he handed over the sticks to Ismail. He does not remember who the person accompanying Ismail was and does not identify A1. PW26 also affirmed PW25 having purchased 5 to 6 gelatin sticks from him. As we noticed, PW24 to PW26 stated the purchase to be in 2002, quite contrary to the disclosure statement of the purchase having been in 2004. The disclosure statement is also to the effect that the gelatin sticks were handed over to A1 in the sitting room of PW24; which is belied by the evidence of PW25, who deposed the sticks having been handed to Ismail on the road leading to PW24's house. Pertinently, the disclosure is of purchase of 50 sticks while the witnesses speak only of 5 to 6 gelatin sticks. The I.O., PW58, attempted to cover up in cross-examination, by saying that earlier 50 sticks were purchased and later 5 to 6; which were used in the

Kozhikode blast. But two such purchases are not spoken of by the witnesses.

31. The defence had the contention that the purchase was long before the Marad incident itself and the motive as specifically spoken of in the charge-sheet is not established by PW24 to PW26, who were involved in the purchase. We need not dwell upon motive, since obviously the call received in Calicut Times spoke of the continuation of the Marad incident, as spoken of to PW4. The investigation floundered insofar as not establishing the source of the materials used for explosion. Exts.P20 & P21, in so far as they record the gelatin sticks having been used in the explosion is in the nature of confession of the crime itself, to the Police, while in their custody, which is inadmissible under S25 & S26 of the Evidence Act. The purchase taken independently is not established to be by A1 and Ismail (PW60) was not examined before Court.

32. The further preparation alleged is of two experimental blasts carried out by A1 & A3 and the bombs kept in the room of A2; both of which, according to the

prosecution, was first spoken of by A3. A3 was acquitted by the trial court and we discuss this evidence in the context of the appeal against acquittal. The culpability of A1 was also found on the ground of disclosure of the room of A2; which discovery had already been made through A3. A3 was arrested by PW54 on 22.07.2009 and was later taken to police custody. As per Ext.P27 mahazar dated 29.07.2009, A3 pointed out Room No. 4 on the first floor of one 'K L Arcade' where A2 was residing. On seeing the room locked, PW21 the owner was summoned, who opened the lock. PW54 also searched the room which did not yield any incriminating material. Again A3 was taken into police custody and by Ext.P64 mahazar dated 25.08.2009, he pointed out a spot in Mydanappally Beach, Kannur, where himself and A1 carried out experimental explosions twice, using pipe bomb. Later, A3 also pointed out the house of A2, where he carried out a demonstration of bomb making, as per Ext.P63 mahazar dated 25.08.2009. Nothing tangible, regarding the information supplied was received from both the locations. PW54 also deposes that he carried out a search of the houses of all the accused; A1

to A8, who were then arrayed as accused, but obtained nothing incriminating from any of these places. There is absolutely no evidence produced on the preparation and what is proffered fails to impress us. The application of Section 27 & Section 8 we would deal with later.

VI. *Precedents on the approver's testimony:*

33. A.Deivendran v. State of T.N [1997(11) SCC 720] and a number of other decisions were placed before us to bring home the object behind S.306 Cr.PC. It is trite that the dominant object, is to ensure that offenders in heinous and grave offences do not go unpunished and when there is insufficient evidence, one among the many accused may be granted pardon, so that the others be punished appropriately. It is also trite that there is no rule that the approver must make inculpatory statements to be considered an accomplice and a reliable witness.

34. Sarwan Singh [supra] dealt with a conviction under S.302 based on the approver's evidence. It was held that though an accomplice is a competent witness under the Evidence Act, his participation makes his evidence

tainted, unless the same is corroborated on material particulars. It was also held that such corroboration need not be on all the material particulars, covering the entire prosecution story. But all the same, it would not be safe to act upon corroboration of minor particulars or incidental details. The Hon'ble Supreme Court also laid down a double test, insofar as first determining whether the approver/accomplice is a reliable witness and then examining the question of sufficient corroboration. Such tests were specified deeming the evidence of the approver to be weak and tainted. Therein, the approver was found to be not reliable and his evidence, at least against one of the accused persons, wholly discrepant.

35. In *Piara Singh v. State of Punjab [1969(1)SCC 375]* the challenge was insofar as one of the co-accused having been acquitted, which was contended as sufficient to demolish the approver's evidence as such. The Hon'ble Supreme Court found that the High Court acquitted one of the accused for reason of no legal corroboration of evidence against that accused being available. This, it was held was quite different from

saying that the approver's evidence against that accused was false. Their Lordships referred to *Sarwan Singh [supra]* and reiterated the double test to be applied in appreciation of the approver's evidence, i.e, the assessment of reliability, and credibility of the witness and then sufficient corroboration, which again was held to be not essential to cover the entire prosecution case.

36. *Shankar v. State of Kerala [1994(4) SCC 478]* reiterated the above principle and held that independent corroboration, need not be of such a high quality which would justify a conviction on that material itself. But, the requirement for corroboration was emphasized, which only would commend the Court to accept the story of the accomplice and satisfy itself that it is reasonably safe to act upon such evidence. As has been held in *Ravinder Singh v. State of Haryana [1975 (3) SCC 742]* *'certain clinching features of involvement disclosed by an approver appertaining directly to an accused, if reliable, by the touch stone of other independent credible evidence would give the need and assurance for acceptance of his testimony on which a conviction may be*

***based' (sic)*. The approver is an accomplice to crime, who was termed to be *a most unworthy friend*, who bargained for his immunity and hence his worthiness and credibility should be proved in Court.**

37. *Dagdu & Ors. v. State of Maharashtra* [*(1977) 3 SCC 68]*, *Sitaram Sao v. State of Jharkhand* [*(2007) 12 SCC 630]* and *Mrinal Das v. State of Tripura* [*(2011) 9 SCC 479]* are decisions which considered the interplay of S.133 and 114(b) of the Evidence Act which provisions are extracted here under:

> **114.Court may presume existence of certain facts:**
> **xxx**
> **(b) That an accomplice is unworthy or credit, unless he is corroborated in material particulars;**
> **S.133:Accomplice:- An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.**

38. *Dagdu [supra]* considered an eerie case; where five small girls, an year old infant and four women were murdered, allegedly to satiate a deity in the hope

that a treasure trove, believed to be hidden in the property, would be delivered to the perpetrators of the crime. There were two approvers in the case, one of whom was found a worthless witness, whose entire story was incredible and abounded in contradictions of the grievous kind. His evidence was rejected on the finding that he had mixed a ton of falsehood with an ounce of truth. The other witness, having tarred himself with the same brush as the accused and having confessed to a leading role in the commission of first four murders, was found to be a reliable witness. Applying the second of the twin tests, their Lordships looked for corroboration from an independent source; despite finding that there were gross improvements made from the earlier version, making his evidence suspect and uninspiring. There was no corroboration found from the evidence of other witnesses, for reason of which the second approver's evidence was also rejected *in toto*. Considering the above extracted provisions of the Evidence Act it was held so in Paragraph 21:

21. There is no antithesis between Section 133 and

Illustration (b) to Section 114 of the Evidence Act, because the illustration only says that the Court "may" presume a certain state of affairs. It does not seek to raise a conclusive and irrebuttable presumption. Reading the two together the position which emerges is that though an accomplice is a competent witness and though a conviction may lawfully rest upon his uncorroborated testimony, yet the Court is entitled to presume and may indeed be justified in presuming in the generality of cases that no reliance can be placed on the evidence of an accomplice unless that evidence is corroborated in material particulars, by which is meant that there has to be some independent evidence tending to incriminate the particular accused in the commission of the crime. It is hazardous, as a matter of prudence, to proceed upon the evidence of a self-confessed criminal, who, insofar as an approver is concerned, has to testify in terms of the pardon tendered to him. The risk involved in convicting an accused on the testimony of an accomplice, unless it is corroborated in material particulars, is so real and potent that what during the early development of law was felt to be a matter of prudence has been elevated by judicial experience into a requirement or rule of law. All the same, it is necessary to understand that what has hardened into a rule of law is not that the conviction is illegal if it proceeds upon the uncorroborated testimony of an accomplice but that the rule of corroboration must be present to the mind of the Judge and that corroboration may be dispensed with only if the peculiar circumstances of a case make it safe to dispense with it.

[*underlining by us for emphasis*]

39. *Sitaram Sao* [supra] referred to various decisions of the Hon'ble Supreme Court and specifically noticed *Jnanendra Nath Ghosh v. State of W.B*

(MANU/SC/0055/1959) wherein an approver was termed as *a self confessed traitor*. It was held so in Paragraph 15:

> *26. Section 133 of the Evidence Act expressly provides that an accomplice is a competent witness and the conviction is not illegal merely because it proceeds on an uncorroborated testimony of an accomplice. In other words, this section renders admissible such uncorroborated testimony. But this section has to be read along with Section 114 Illustration (b). The latter section empowers the court to presume the existence of certain facts and the illustration elucidates what the court may presume and makes clear by means of examples as to what facts the court shall have regard to in considering whether or not maxims illustrated apply to a given case. Illustration (b) in express terms says that an accomplice is unworthy of credit unless he is corroborated in material particulars. The statute permits the conviction of an accused on the basis of uncorroborated testimony of an accomplice but the rule of prudence embodied in Illustration (b) to Section 114 of the Evidence Act strikes a note of warning cautioning the court that an accomplice does not generally deserve to be believed unless corroborated in material particulars. In other words, the rule is that the necessity of corroboration is a matter of prudence except when it is safe to dispense with such corroboration must be clearly present in the mind of the Judge. (See Suresh Chandra Bahri v. State of Bihar (1995) Supp (1) SCC 80.)*
>
> [*underlining by us for emphasis*]

40. Encapsulating the dicta in the various decisions regarding the satisfaction to be arrived at

with respect to approver's evidence *Sitaram Sao*(supra) held; first, there need not be an independent confirmation of every detail of the crime, secondly, the corroboration as available from independent evidence must not only make it safe to believe the witness's story, but must also in some way reasonably connect or tend to connect the accused with the crime, by confirming in some material particular, the testimony of the accomplice, thirdly, the corroboration is to come from an independent source and necessarily not from another approver and fourthly, the corroboration need not be direct evidence but could also be circumstantial evidence. *Mrinal Das [supra]* also reiterated the above principles based on S.133 and 114(b).

41. *Somasundaram* [supra] culled out the principles in the various decisions in para 65 as follows:

> ***"The combined result of Sections 133 read with illustration (b) to Section 114 of Evidence Act is that the Courts have evolved, as a Rule of prudence, the requirement that it would be unsafe to convict an Accused solely based on uncorroborated testimony of an accomplice. The corroboration must be in relation to the material particulars of the***

testimony of an accomplice. It is clear that an accomplice would be familiar with the general outline of the crime as he would be one who has participated in the same and therefore, indeed, be familiar with the matter in general terms. The connecting link between a particular Accused and the crime, is where corroboration of the testimony of an accomplice would assume crucial significance. The evidence of an accomplice must point to the involvement of a particular Accused. It would, no doubt, be sufficient, if his testimony in conjunction with other relevant evidence unmistakably makes out the case for convicting an Accused."

42. An approver, is termed as *a most unworthy friend, a self-confessed criminal and traitor*, by his very conduct of involving in a crime and then cheating on his friend/s. An approver thus is of questionable character and assumes a dubious persona, who exudes mistrust. It is hence, by the above precedents it was held that, though not absolutely necessary, it is always prudent to look for corroboration of the approver's testimony, before entering a conviction; not on all material aspects of the prosecution case, but at least so much as to inspire the confidence of the Court to accept that evidence, which fundamentally is *'weak'* and *'tainted'*. The Hon'ble Supreme Court also mandated the

twin test of examining first, the credibility of the approver and then the aspect of corroboration, at least on some material particulars; which need not be of the highest quality and could also include circumstantial evidence. Though a rule of prudence, the Apex Court held that judicial experience has now hardened the rule into a requirement of law.

VII. *The Approvers Evidence:*

43. The narration of PW1, the approver before Court, begins with his acquaintance with A2, A6 and A8 who were not standing trial and hence not before Court. Two of them were absconding and A6 died in an encounter at Kashmir as spoken of by PW58, the last of the I.Os, who filed charge sheet. PW1 also claimed that he was acquainted with A1 who was introduced to him by a neighbour, Abdul Rahim, who also was killed in an encounter at Kashmir. He was introduced to A1 in a nearby Mosque, by the end of 2005 and later he saw A1, two or three times when he went to a religious class at Parappanangadi. PW1 saw A4 last on 03.03.2006. On the previous day, A1 called PW1, over the telephone and

instructed him to collect the phone numbers of the Collectorate, Calicut Times and the SP's office from the internet. A1 also instructed PW1 to ask A9 to call A1, which request he passed on to A9. PW1 did not bother to look up the phone numbers and on the next day when A1 called, he told him that the said numbers can be obtained from any book stall.

44. When A1 called him on the crucial day, he was attending a computer class at one Logic Software Solutions and the time was around 10.30 a.m. PW1 asked A1 to come to Markaz Masjid at Kozhikode and when he reached there, he saw six persons, A1, A2, A4, A6, A8 and A9. He was acquainted with A1 and A9 and the other four were introduced to him by A9. PW1 saw two black plastic/polythene covers, which A1 said were bombs, he made and brought from Kannur, which are to be placed at the Mofussil and KSRTC Bus Stands Kozhikode. A1 also said that the measure was in retaliation to the denial of bail to the accused Muslims in the Marad case. The six persons were divided into two groups, one comprising of A1, A4 and A9 and the other comprising of A2, A6 and A8. PW1

was asked to inform Calicut Times about the bombs and when both the groups left with the bags, he proceeded to the Booth in Gulf Bazar, which was about 500 meters from Markaz Masjid. The time was around 12.30 and he used the coin box in the Booth to call the Calicut Times Newspaper office. A lady attended the phone and he told her that: *'We have placed two bombs at the Kozhikode Mofussil Bus stop and KSRTC Bus Stand, which will explode within five minutes'*. He also told her that this was in protest of the Marad incident. PW1 put down the phone without listening to the response of the lady on the other side. PW1 then went to Pattalam Mosque which was around 300 meters from the Booth as instructed by A1, who was also standing outside. PW1 left, informing A1 that he had to attend a Spoken English class in the Stadium building. When he reached the Spoken English class he heard that there were two explosions in the two locations at Kozhikode.

45. Later in 2008, he left for Gulf in search of a job and came back only in 2010 when he was arrested from the Nedumbassery Airport. He was taken to the guest house

at Kozhikode and later produced before Court. He gave Ext.P1 application for permission to be made approver and also gave his statement before the Addl. Judicial First Class Magistrate, Ernakulam dated 31.03.2010, Ext.P2. On 02.09.2010 again an application was submitted before the Sessions Court as Ext.P3 to turn approver. As instructed by the I.O, when he was in police custody he agreed to point out the places he went to at Kozhikode on the day of the blasts; pursuant to which he said that he had gone to Markaz Masjid, Coin Box Booth, Pattalam Mosque and the locations of the Computer Class as also Spoken English Class. The disclosure memo was marked as Ext.P7 which was objected to by the defence. The objection was noticed by the Trial Court but the consideration was deferred.

VIII. *The Consideration of Objections:*

46. Here we have to notice that the learned Judge had at every point when objections were raised regarding the marking of disclosure memos as also the point out memos, noted it, but consideration was deferred after marking the documents. The objections were also on account of the disclosures being clearly in the nature of

a confession and not leading to any discovery of facts or material objects. The conduct of the Court below is assailed relying on *[2021] 10 SCC 598],* wherein the Hon'ble Supreme Court directed that the objections be considered either, when it is raised or at least after the deposition of the particular witness is concluded. The said directions were issued on 20.04.2021, and it is clear, on a reading of the decision that till then the procedure was regulated by *Bipin Shantilal Panchal v. State Of Gujarat [(2001) 3 SCC 1].* Therein the practice of not proceeding with the evidence, on an objection being raised regarding the admissibility of any material in evidence, was termed 'archaic'. Directions were issued to mark the objected document tentatively and consider the objection, in the final judgment and eschew from placing any reliance on that document, if the objection is upheld. The trial in the instant case was when the earlier decision was holding the field and the trial Judge cannot be faulted for having marked the documents tentatively and deferred the consideration to a later stage. However, it was incumbent upon the Court to

consider it in the final judgment; which unfortunately has not been done. Our consideration of the objections, we would place along with the findings on disclosures under Section 27.

IX. *The Credibility of the Approver:*

47. As per the decision in ***Sarwan Singh***, [supra] there are two tests to be satisfied before accepting an approver's evidence. One, the test of reliability of the approver and then the test of corroboration at least in some material particulars. PW1, as is noticed, does not speak of any long-standing relationship with any of the accused. As far as A1 is concerned, he was introduced by a neighbour, by the end of year 2005, after which PW1 had met him two or three times. It is very unlikely that such a casual acquaintance, would be summoned when a seditious act of explosion in a public place is planned. The deposition of PW1 is that, on the basis of the casual acquaintance with A1, he was requested to take out the phone numbers of the Collectorate, Calicut Times, and the SP's Office. He was on the next day, summoned to the Markaz Masjid, where A1 had directed PW1 to make a phone

call to Calicut Times informing the factum of the bombs placed at two locations. There were six persons who had converged at the Masjid, to plant the bombs in the two bus stations. A4 is alleged to have made the call to the Collectorate and it is not perceivable as to why PW1 was involved, in making a call to the Calicut Times, especially when he did not have a strong bond with any of the accused. When, one of the alleged perpetrators is projected as having made the call to the Collectorate and there were five others involved in planting the bombs; who later converged in a nearby Mosque, why PW1, a casual acquaintance was involved, vexes us to no end. The involvement of PW1, just to make a call makes his very role suspect and unbelievable. Nor is there anything brought out in the investigation as to PW1 having any connection with fundamentalist organisations or a part in the conspiracy alleged by the prosecution. There is nothing shown from PW1's antecedents which would make him a willing partner of the seditious act.

48. Further, in the cross for A3, PW1 had stated that he was questioned by PW58, about two weeks after the

blast occurred. However, he was released, since on detailed investigation, even according to PW1, he had no role in the crime committed. He also spoke of the police having examined the telephone call details of some of the booths and PW1 having been shown to the people who manned such phone booths. PW1 also admits that he was taken to PW4, the reporter of Calicut Times, who did not recognise his voice; as of the person who conveyed the information of planting of bombs. As pointed out by the defence there was a thorough investigation surrounding the phone calls; centred around the nearby telephone booths. PW53 also stated in cross-examination that he had received the call details of the phone numbers of the Collectorate and the Calicut Times, informally from the BSNL, immediately after the incident. The argument of the prosecution is that the said document produced as P41 did not show the incoming local calls. First of all the said document was never confronted to PW53. Moreover, the document D-9 dated 29.01.2010, send to the NIA, was admitted to have been issued by PW34, Divisional Engineer of BSNL. He also says that that it was the covering letter by which the

incoming calls of the specified telephone numbers, were supplied, which details, he asserts, were given earlier to the police, as distinguished from NIA. There is no question put to him regarding the incoming call details supplied having not contained the local call details. It is thus very clear that what was given to the NIA was earlier supplied to the local police, which contained the details of the incoming calls. An investigation in the near by phone booths was carried out, PW1 was questioned and he was also confronted, to the Booth attenders and the recipient of the call, PW4, without anything elicited. This makes the evidence of PW1 further suspect.

49. More pertinently according to PW1, he called Calicut Times and when a lady answered the telephone, he spoke of the bombs planted in the Mofussil and KSRTC bus stands, which would explode within five minutes and also spoke of such action being in protest of the Marad incident. He categorically says he did not listen to what the lady spoke over the telephone and disconnected the phone. PW4's evidence however speaks of the caller having first asked her whether it is the newspaper office. On

her responding in the affirmative, the caller is stated to have said that two bombs were placed in the KSRTC and Mofussil stands and that they would explode in five minutes. PW4 goes on to say that she queried as to who was calling, which was responded by the caller asserting that it was the person who placed the bomb. According to PW4, the caller also asked her not to take it as a joke, that it was very serious and a continuation of the Marad incident. The version of PW1 only speaks of, he having conveyed the factum of the bombs planted, the time within which it would explode and the protest being part of the Marad incident, after which he abruptly disconnected the telephone; quite contrary to the deposition of PW4. In cross-examination PW1 further admitted that in his S.164 statement he did not speak of the Marad incident in his call to the Calicut Times; which is an improvement in Court.

50. It is also interesting to notice the facts pursuant to the arrest of PW1(A7) as spoken of by the Trial Court in Paragraph 5 of the impugned judgment. PW1 was arrested on 19.03.2010 and produced before Court on

20.03.2010; on which day itself he filed Crl.A.No.437/2010 disclosing his intention to be an approver. The Crl.M.P was posted to 23.02.2010 and PW1 remanded to judicial custody, subsequent to which, by order dated 22.03.2010, PW1 was given to the custody of NIA for three days. The disclosures made by PW1 was when the NIA took him under their custody, before which itself he had expressed his desire to turn approver. The disclosures made, except that with respect to the phone calls were already known to the investigating agency, through the disclosures made by A1 and A4. It was after PW1 was again produced before Court, that the NIA made an application for recording the statement of the accused under S.164 Cr.PC. PW1 filed another application expressing his willingness to turn approver which was allowed by order dated 02.09.2010. We cannot, but find, based on the discrepant notes in the testimony of PW1 and the attendant circumstances of turning approver, that PW1 is not a reliable witness and his role in the crime is very suspect and cannot be believed, especially since he was earlier questioned and also confronted to the

attenders in the phone booths of the locality, as also PW4, the latter of whom failed to recognize his voice.

X. *Section 27 and Section 8 of the Evidence Act:*

51. Before we look for corroboration we would first look at the precedents regarding Section 27 and Section 8; under either of which reliance is placed by the prosecution, based on the disclosures and the pointing out memos. In considering Section 27 of the Evidence Act, we have to first notice ***Pulukuri Kottaya v. Emperor [AIR 1947 PC 67]***, where the disclosure was held to be of the concealment of some object and not the object itself. The object recovered from the place of concealment has to be connected to the crime to pin the guilt of the accused, who was also instrumental in making the recovery by supplying the information.

52. The admissible evidence under Section 27 shall not speak of the crime itself; because if it does, then that portion would offend Sections 25 and 26. ***Athappa Goundan v. Emperor [MANU/TN/0455/1937]*** held that any information under S.27, which serve to connect the object

discovered with the crime/offence charged was admissible. Their Lordships were of the opinion that when pursuant to information supplied by an accused, the property stolen from the victim, say of murder, is discovered, then it can be made relevant by evidence *aliunde* or by the statement of the accused itself. The finding was that there was no warrant to garble the statement of the accused, '*to make it innocuous to the accused and in that process causing it to be irrelevant and consequently inadmissible in evidence'(sic).*

53. *T*he Calcutta High Court in *Naresh Chandra Das v. Emperor [1942 AIR (Cal) 593]*, more specifically one of the learned Judges in the Division Bench, struck a discordant note to hold that only so much of the statement which evinces some or any connection with the crime alone is admissible. It was held :

> ***'If evidence is needed to make the fact discovered relevant it is for the prosecution to supply that evidence, and for this purpose the confessional statement to the police cannot be utilised because of the provisions of Sections 25 and 26, Evidence Act. If any part of the statement is of some consequence in order to serve the purpose of connecting the fact discovered with the offence and not as cause of the discovery it is difficult to see***

> ***why it is observed that there is no warrant for saying that that part of the statement is not admissible in evidence. Sections 2S and 26 clearly warrant this prohibition. If the prosecution cannot bring in any evidence aliunde connecting the fact discovered with the offence, the prosecution may have to fail. From this it does not necessarily follow that the statement of the accused shall have to prevent this disaster. Section 27, Evidence Act, does not say that so much of the information as is necessary to make the fact discovered relevant shall also be proved."***
>
> **[*underlining by us for emphasis*]**

This view has been approved by the Privy Council in *Pulukuri Kottaya* *[supra]*.

54. *State of U.P v. Deoman Upadhyaya [(1961) 1 SCR 14]* considered the question whether S.27 offends Article 14 of the Constitution of India, since the persons in custody of the Police are indiscriminately classified; as against persons not in custody. Negating the question, it was held that *"S.27 is founded on the principle that even though the evidence relating to confessional or other statements made by a person whilst he is in the custody of a Police Officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is therefore declared*

provable insofar as it relates to the fact thereby discovered"(sic). ***Kathi Kalu Oghad*****(supra) held that the provisions under S.27 of the Evidence Act do not offend Article 20(3) of the Constitution of India, unless compulsion has been employed in obtaining the information. One of the questions raised was whether the furnishing of specimen handwriting, impression of fingers, palm or foot, by an accused person can be held to be furnishing evidence against himself. It was held that the evidence proffered does not by itself tend to incriminate the accused person and it incriminates him, only if on comparison with other handwritings or impressions, the identity between the two are established. Considering an identical challenge against Section 27, it was held :**

> ***"Section 27 provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of the information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. It cannot be disputed that by giving such information the accused furnishes evidence and therefore is a "witness" during the investigation. Unless however he is "compelled" to give the information he cannot***

be said to be "compelled" to be a witness; and so Article 20(3) is not infringed. Compulsion is not however inherent in the receipt of information from an accused person in the custody of a police officer."

55. Further elucidation of Section 27 as also Section 8 of the Evidence Act is available in *Navjot Sandhu @ Afsan Guru* [supra]. Tracing the history of case law, *Pulukuri Kottaya* [supra] was described as a *locus classicus,* which set at rest much of the controversy centring around the interpretation of Section 27. The first requirement is that the I.O should depose that he discovered a fact in consequence of the information received from an accused person in police custody; which fact was not in the knowledge of the police officer. The information or disclosure should necessarily be free from any element of compulsion. The next component is that, only so much of the information as relating distinctly to the fact thereby discovered can be proved and nothing more. The Section explicitly clarifies that confession is not taboo, but the confessional part which is admissible is only such information or part of it, which relates distinctly to the facts discovered, by means of the

information furnished. The rationale behind the provision was held to be that, if a fact is actually discovered in consequence of the information supplied, it offers some guarantee that the information is true and can, therefore, be safely allowed to be admitted in evidence as an incriminating circumstance against the accused.

56. Referring to ***Pulukuri Kottaya*** [supra] it was noticed that the Privy Council rejected the contention that the fact discovered is the physical object produced and that any and every information which relates distinctly to that object can be proved. If the information given by the accused, that the weapon recovered was used by him in the commission of the murder, is made admissible, then the two preceding sections on confessions made to the police or by persons in police custody, would have little relevance. The observations in ***Pulukuri Kottaya*** (supra) was to the effect that, when an accused person confesses that he has hidden a knife in the roof of his house, the discovery is not of the knife, but the fact of concealment of a knife in the house of the informant, which is only within his

knowledge and is validated by the recovery effected. It was also cautioned that if the information further is to the effect that the knife was used to stab the victim, then those words are inadmissible. The following extract was made from page 71 of *Pulukuri Kottaya* (supra) as a very important observation:

> *"122. The approach of the Privy Council in the light of the above exposition of law can best be understood by referring to the statement made by one of the accused to the police officer. It reads thus: (AIR p. 71, para 13)*
>
> > *"… About 14 days ago, I, Kottaya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Beddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya, Kottaya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulukuri Kottaya."*
>
> *The Privy Council held that: (AIR p. 71, para 14)*
>
> > *"14. The whole of that statement except the passage 'I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come' is inadmissible."*
>
> *(emphasis supplied)*

There is another important observation at para 11 which needs to be noticed. The Privy Council explained the probative force of the information made admissible under Section 27 in the following words: (AIR p. 71)

"Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law."

57. Retracing their discussion to an earlier period their Lordships referred to *Ganu Chandra Kashid v. Emperor AIR 1932 Bom. 286* which was authored by Sir John Beaumont who gave the opinion of the Privy Council in *Pulikuri Kottayya* [supra], and made the following extract:

"The fact discovered within the meaning of that section must I think be some concrete fact to which the information directly relates, and in this case, such fact is the production of certain property which had been concealed."

This is also the view taken by Shadi Lal, C.J. who expressed the opinion of the majority in *Sukhan v. Emperor AIR 1929 Lah. 344,* wherein the learned Judge held that the phrase "fact discovered" refers to a material and not to a mental fact in the following words :

"The fact discovered may be the stolen property, the instrument of the crime, the corpse of the person murdered or any other material thing; or it may be a

material thing in relation to the place or the locality where it is found."

58. Their Lordships, in *Navjot Sandhu* [supra] then held that the controversy in *Pulukuri Kottaya* [supra] related to the extent of information that becomes admissible under Section 27 and the meaning and import of the expression 'discovery of fact' was not considered. Their Lordships held so in paragraph 125:

125. We are of the view that Kottaya case—is an authority for the proposition that "discovery of fact" cannot be equated to the object produced or found. It is more than that. The discovery of fact arises by reason of the fact that the information given by the accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place.

59. After referring to various precedents following the decision in *Pulukuri Kottaya* (supra), *H.P.Administration v. Om Prakash [(1972) 1 SCC 249]* was specifically referred to. Therein, the accused had pointed out a dagger from under a stone and the person (PW11) from whom he had purchased that dagger. It was held that the former was admissible under Section 27, but the latter inadmissible. A fact discovered within the

meaning of Section 27 must refer to a material fact, to which the information directly relates. If a dagger was concealed under a stone and it is discovered on the information supplied by the accused, definitely it falls under Section 27. But, if the person from whom such dagger was purchased is pointed out, it does not fall under Section 27. *Sukhan* [supra] was approvingly referred to in *Om Prakash* [supra]. While the concealment of a knife, which the police was not aware of, is discovered by the information supplied, then the information of concealment is reliable. But if a witness from whom the knife is purchased is pointed out, it cannot be said to be discovered, if nothing is found or recovered from him as a consequence of the information furnished by the accused. The information which discloses the identity of the witness will not be admissible under Section 27. It was held so:

> ***"14. In the Full Bench Judgment of Seven Judges in Sukhan v. Crown which was approved by the Privy Council in Pulukuri Kotayya case, Shadi Lal, C.J., as he then was speaking for the majority pointed out that the expression "fact" as defined by Section 3 of the Evidence Act includes not only the physical fact which can be perceived by the senses***

but also the psychological fact or mental condition of which any person is conscious and that it is in the former sense that the word used by the Legislature refers to a material and not to a mental fact. It is clear therefore that what should be discovered is the material fact and the information that is admissible is that which has caused that discovery so as to connect the information and the fact with each other as the "cause and effect". That information which does not distinctly connect with the fact discovered or that portion of the information which merely explains the material thing discovered is not admissible under Section 27 and cannot be proved. As explained by this Court as well as by the Privy Council, normally Section 27 is brought into operation where a person in police custody produces from some place of concealment some object said to be connected with the crime of which the informant is the accused. The concealment of the fact which is not known to the police is what is discovered by the information and lends assurance that the information was true. No witness with whom some material fact, such as the weapon of murder, stolen property or other incriminating article is not hidden, sold or kept and which is unknown to the Police can be said to be discovered as a consequence of the information furnished by the accused. These examples however are only by way of illustration and are not exhaustive. What makes the information leading to the discovery of the witness admissible is the discovery from him of the thing sold to him or hidden or kept with him which the police did not know until the information was furnished to them by the accused. A witness cannot be said to be discovered if nothing is to be found or recovered from him as a consequence of the information furnished by the accused and the information which disclosed the identity of the witness will not be admissible. But even apart from the admissibility of the information under Section

27, the evidence of the Investigating Officer and the panchas that the accused had taken them to PW 11 and pointed him out and as corroborated by PW 11 himself would be admissible under Section 8 of the Evidence Act as conduct of the accused."

[underlining by us for emphasis]

60. In ***Navjot Sandhu*** [supra] though an argument was raised that ***Sukhan*** [supra] was not correctly decided, their Lordships refused to deviate from the view taken by a co-ordinate Bench in ***Om Prakash***(supra). ***Mohammed Inayathulla v. State of Maharashtra [1976 (1) SCC 128]*** and ***State of Maharashtra v. Damu [2000 (6) SCC 269]*** were also discussed to find that 'discovery of fact' would not comprehend a pure and simple mental fact or state of mind relating to a physical object, dissociated from the recovery of a physical object. In ***Inayathulla*** (supra) the information was regarding the deposit of chemical drums in the Musafirkhana. The accused led the police to the place of deposit from where the drums were recovered, which information supplied was found admissible under Section 27. In ***Damu's case*** (supra), the disclosure was to the effect that the dead body was carried by the 3rd accused and the 2nd accused, in the latter's motorcycle

and thrown in a canal. The dead body was recovered from the site, but not pursuant to the disclosure made. The High Court found the statement to be inadmissible. However, on A3 pointing out the spot, a broken piece of glass was recovered, lying on the ground, which correctly fitted into the broken tail-lamp of the motorcycle recovered from the house of A2. Hence despite the dead body being recovered, antecedent to the information, the information stood established. The succinct statement of law in *Inayathulla* (supra) was extracted as below:

> ***"The last but the most important condition is that only 'so much of the information' as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word 'distinctly' means 'directly', 'indubitably', 'strictly', 'unmistakably'. The word has been advisedly used to limit and define the scope of the provable information. The phrase 'distinctly relates to the fact thereby discovered' is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement***

which may be indirectly or remotely related to the fact discovered."

[*underlining by us for emphasis*]

Bodhraj v. State of J&K [(2002) 8 SCC 45] **was also referred to and the following extract made:**

> **"*The words 'so much of such information' as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate.*"**

61. The above precedents clearly indicate that for a confession to be admissible under Section 27, the information supplied should lead to the discovery of a fact; leading to the production or recovery of a tangible object, not in the knowledge of the police and only so much of the information that distinctly relates to the fact discovered is admissible and shall be proved. '*When in consequence of information furnished by the accused, a fact is discovered, then the discovery of that fact supplies a guarantee of the truth of the information which may amount to a confession. The confession in so far as it is confirmed by the discovery should be deemed*

to be true.' (sic-Naresh Chandra Das [supra]). And the prosecution is required to bring in evidence aliunde, connecting the fact discovered with the offence.

62. *Om Prakash* [supra] provides a bridge between Section 27 and Section 8 of the Evidence Act. As has been held in *Om Prakash* [supra] if a person is pointed out as the one from whom the weapon of offence was purchased, then it is not admissible under section 27, but could be taken as conduct under Section 8, provided the pointing out is proved and the said person confirms the purchase. *Prakash Chand v. State (Delhi Administration)* [*1979 (3) SCC 90]* was a trap case, where the immediate conduct of the accused, after the trap was sprung was held to be relevant. The silence of the accused, on being queried as to whether he had taken a bribe and the fact of his having kept the file with the bribe, under the table, were held to be relevant conduct under Section 8, influenced by the fact in issue or the relevant fact. In *A.N Venkatesh v. State of Karnataka [(2005) 7 SCC 714]* it was held so:

"9. By virtue of Section 8 of the Evidence Act,

the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in Prakash Chand v. State (Delhi Admn.). Even if we hold that the disclosure statement made by the accused-appellants (Exts. P-15 and P-16) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8. The evidence of the investigating officer and PWs 1, 2, 7 and PW 4 the spot mahazar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under Section 8 as the conduct of the accused. Presence of A-1 and A-2 at a place where ransom demand was to be fulfilled and their action of fleeing on spotting the police party is a relevant circumstance and are admissible under Section 8 of the Evidence Act."

63. Even under Section 8 the conduct is relevant only if it influences or is influenced by any fact in issue or relevant fact. Acts, the proof of which reasonably tends to an inference that they were intended either in preparation of a crime or in its execution; becomes relevant, coupled with other evidence as to the actual commission of the crime. The conduct should be

such as to have a direct bearing on the crime, the causation, or should be the natural consequence of that crime, the effect. If there is no independent evidence of the crime, a recovery under Section 27 or a conduct under Section 8 cannot by itself or solely result in a conviction. In the present case we are examining the evidence proffered by the prosecution, of the disclosures and the discoveries or the conduct, only for the purpose of corroboration. If corroboration is available then the evidence of the approver is sufficient to sustain the conviction, if it also qualifies the test of credibility.

XII. *Corroboration of PW1, from Testimonies and Disclosures:*

64. The prosecution has listed out, in their written submission, the specific statements of the approver in his testimony and the corroboration offered by the prosecution through the evidence led before Court. At the outset we are of the opinion that the Section 164 statement of PW1; especially in the teeth of our finding on the credibility of the approver, does not offer any

corroboration. As held in ***Sitaram Sao*** (supra) the evidence of one approver cannot corroborate that of another approver. There is hence, no propriety in finding corroboration to an approver's testimony, from his own 164 statement. PW1's testimony, insofar as it is relevant to the incident, according to us, is first, on his acquaintance with the accused, the preparation made at the Markaz Masjid, the bombs taken by the two groups who assembled at the Markaz Masjid and the resultant explosions. On the aspect of corroboration, the prosecution relies on (i) the evidence of PW10, the Partner of Logistics Solutions where PW1 was a student, (ii) the presence of a black polythene bag spoken of by PWs.6 to 8, 13 and 47, (iii) the evidence of the various witnesses establishing the explosion having occurred in the two bus stands, (iv) the phone calls to the Calicut Times, (v) the apprehension of PW1 from the Nedumbassery Airport coupled with the various disclosures made. The prosecution also asserts that the evidence of PW1 to the effect that Nazeer told him that the plastic bags contain bombs, which were made at Kannur and brought to be

planted at the two bus stands was never challenged in cross-examination. Immediately we have to notice that the approver has been found by us to be unreliable and the statement, even if not challenged has to be examined in the context of the available corroboration. We also found PW1 to be not a close associate of the accused and only a casual acquaintance; throwing suspicion on his very involvement.

65. That, there was an explosion of indigenous bombs in Kozhikkode and the locations where it occurred is a fact known to the police and the general public. The evidence of the onlookers to that end, does not in any manner corroborate the testimony of the approver, since the explosions were a matter of public knowledge. The fact that the approver studied in PW10's institute is of no moment; having no relation to the cause or the effect of the fact in issue; which is the blast having engineered by the accused. The disclosures are examined, in the sequence of the dates when it were made, to assess their efficacy and ascertain whether, in fact they offer corroboration to the testimony of PW1. Ext.P17,

disclosure memo of A1 dated 02.03.2010, records five disclosures; (i) A1, A2, A4 and A6 to A9 having converged at Markaz Masjid before the bomb blast, (ii) A1, A4 and A9 having proceeded to the KSRTC Bus Stand to plant one bomb, (iii) A2, A6 & A8 having proceeded to the Mofussil Bus Stand to plant another bomb, (iv) the bombs having been made in the room of A2, at KL Arcade and (v) a plastic pot, used in making the bomb, having been purchased from one 'Cannannore Plastic House'. Ext.P18 & P19 pointing out memos point out the locations with reference to which the above disclosures were made.

66. All the disclosures recorded, contain a confession regarding the involvement in the crime, ie: the bomb blast, which is inadmissible under Sections 25 & 26; whether it be for the purposes of Section 27 or Section 8. When that is eschewed, the disclosures boil down to the fact of the accused having gone to the locations; from where nothing has been discovered nor can it be said to be a conduct having any relation to the cause or effect of the explosion. Markaz Masjid or the Pattalam Mosque was not discovered by the Police on the

information supplied by the accused nor was any material object recovered from the locations having any connection with the crime. The conduct of the accused in having gone to the masjid or the mosque, by itself has no relevance since it does not lead to an inference of the blast, being a consequence of that act or that act being influenced by the crime.

67. Just as the location of the bombs were common knowledge, the room in KL Arcade, was known to the police from the disclosure of A3. More importantly, as has been held, nothing turns on the disclosure of the room, which as in the case of the other locations, led to no discovery of fact. The conduct also cannot be said to have a bearing on the crime, if the inadmissible portion of the confession, regarding the making of the bombs used for the explosion, is eschewed. The room in which A2 stayed was under the ownership of PW21, which when pointed out was occupied by another. The identification made of A1 by PW21, is merely of having seen him with with A2 & A8. The room was searched by the Police as revealed from Ext.P19, which yielded nothing to connect

the accused with the crime. The search was also unnecessary since earlier the room was searched by Ext.P27 Mahazar when A3 pointed out the same. A3 was acquitted and the trial Court found the disclosure leading to the room of A2 and the location of experimental explosions to be not incriminating. If these disclosures do not incriminate A3, the subsequent disclosure of A1 as to the room of A2 cannot incriminate A1. These facts are also not spoken of by the approver.

68. Similarly, PW23 is the owner of Cannanore Plastic House, who failed to identify A1. The prosecution would have us believe that the disclosure of A1 was to the effect that a plastic pot was purchased from PW23, and an identical one in the shop of PW23 was pointed out by A1. That the explosive materials contained plastic is evident but that alone would not connect the same with the plastic pot alleged to have been purchased from PW23. The case of the prosecution was that the plastic found was of the black plastic cover in which the bomb was kept at the locations. Exts. P86 & P87 reports of State FSL shows only polythene pieces and torn pieces of polythene

and plastic covers, in the remnants collected from the explosion site. Exts P61 & 62 reports of Central FSL indicates presence of irregular plastic sheet like material and torn pieces of polythene and plastic covers, in the remnants. There is no indication of remnants of a plastic pot having been collected from the scene of occurrence, either in the mahazar nor in the FSL report. Further there was no attempt to test whether any particle in the remnants was similar to the material used in the sample pot, pointed out by A1 at Cannanore Plastic House. The sample pot was not even seized for such examination. The disclosures are inadmissible for their reference to the crime proper and when that is eschewed, the exercise of pointing out led to no fact being discovered, which could connect the accused to the crime. A1 purchased a pot, but there is no evidence that it has been used in making the bombs; but for the alleged statement recorded in the disclosure memo, which is inadmissible under Sections 25 & 26 of the Evidence Act. The lower Court's finding that A1 was identified by PW23, is the identification when A1 was brought to his shop at the

time he pointed it out to the NIA and not in relation to the purchase, allegedly disclosed by A1. The purchase of a pot by A1 was not spoken of by PW23 and an identification prior to the pointing out, is totally absent.

69. The disclosure memo of A4, Ext.P23, is dated 10.03.2010. The disclosures are again of one Markaz Masjid, location of the bomb planted in KSRTC Bus Stand, the STD booth from where A4 called the Collectorate and the Pattalam Mosque, where the six converged after planting the bombs. Ext.P23 pointing out memo of even date is also marked. The disclosure memo of A7 (PW1) is marked as Ext.P7 dated 24.03.2010 and the pointing out memo of even date, marked as Ext.P25. Again the Markaz Masjid and the Pattalam Mosque are pointed out along with the Institutes where A7 (PW1) was attending Computer classes and Spoken English classes. We reiterate that though the factum of A7 (PW1) having attended a computer class at the relevant time is established beyond doubt; it is not material since it offers no connection to the crime. It is an irrelevant fact, neither having relation

to causation or effect.

70. Another disclosure of A7 (PW1) is with respect to the booth from which the call was made to the office of Calicut Times. Except the disclosure of the telephone booths, made by A4 & A7 (PW1), the other disclosures suffer from the very same infirmity of the disclosures of A1 and are also subsequent to the disclosures of A1 of the same locales. The call details and the identification of the booths are to be separately dealt with. The disclosures regarding the spots where the bombs were placed offends Section 25 & 26 of Evidence Act. The disclosures do not lead to any discovery of fact as relatable to a material object and there is no conduct brought out which has any relevance to the facts in issue, having a direct bearing on it, the cause or the effect. The disclosure of A4 & A7 (PW1) being subsequent to that of A1; even if they led to a fact or has any bearing, cannot be relevant either under section 27 or under Section 8 of the Evidence Act. Further the identification at the time of point out memos can only be in relation to a relevant fact discovered under Section

27 or in relation to a conduct under Section 8. When the portion of the disclosure that offends Section 25 & 26 are eschewed then the disclosures lead to no discovery of fact having a connection with the crime and the conduct too has no bearing.

XIII. *The Threat Calls:*

71. A4 made the call to the Collectorate. The telephone number of which is '2371400'. PW11 at the relevant time was carrying on an STD booth, which was started in the year 2003 in one 'Seema Tower', wherein he was carrying on a toy shop by name 'Sky Boy'. He stopped the STD booth in the year 2009. The booth had a coin box of the 'Reliance' having number '3942906', which was said to have been subscribed in his name; for which there is no evidence. PW29, the Commercial Officer of BSNL, produced the details of six numbers as per Ext.P28. Phone number '2371400' belongs to the District Collector, as seen from Ext.P28. The other telephone numbers are not relevant to the call made by A4. PW31 produced the call details of five numbers, one of which was that of the District Collector. Ext.P30 is the computer print out of

the incoming calls and Ext.P31, that of outgoing calls. Ext.P30(a), according to the witness, is the call from '3942906' to '2371400', i.e. from PW11's coin box to the District Collector's office. The disclosure memo of A4 is at Ext.P23, where he speaks of the coin box near KSRTC Bus Stand, Kozhikode from where he rang up the Collectorate. It is very pertinent that though PW11 was examined, he was not holding the number at the time of deposition. There was nothing produced by the prosecution to show that the coin booth was in the name of PW11. PW11 also did not identify A4, as the person who made the call from his booth.

72. In addition to this, we have to notice the manner in which the point out memo was drawn up. PW58, after speaking of the disclosure by A4, as seen in Ext.P23, followed A4, when he pointed out the location of the various disclosures. After Markaz Masjid and the location of the bomb at the KSRTC Bus Stand, PW58 was led to a street near Mavoor Road. A4 is said to have pointed out the spot where the coin box was situated. However, since the building was being reconstructed, there was no

coin box existing there. There is no specification of the location of the building or the name or nature of the building in which the coin box is said to have been situated; either in the deposition of PW58 or in the point out memo at Ext.P24. In fact the location should have been clearly ascertained and the building identified, which location and building had to be elicited from PW11. The prosecution failed so to do. The disclosure regarding the call to the Collectorate has not been established by the prosecution. Further, the call to the Collectorate was one known to the police and hence, there is no fact discovered in tune with the disclosure made by A4. The said disclosure is not admissible under Section 27, for reason of no object having been discovered and even as a conduct, the call having been made by A4 is not corroborated by the witnesses. A4, sadly has not been connected with the call received at the Collectorate, but for the disclosure statement; which is not admissible under Section 27.

73. The next call detail relied on by the prosecution is that made by PW1, to Calicut Times. It has

to be reiterated that PW4, who received the telephone at the Calicut Times did not recognise the voice of PW1. PW29, the Commercial Officer of BSNL, in addition to the District Collector's number, by Ext.P28 confirmed the telephone number of Calicut Times daily, which is '2700834'; as seen from Ext.P28. In addition, '2361583' belongs to one Muhammed Mustafa, '2368653' was subscribed by Bushrabee and '2766010' by Muhammed Ashraf. He also states that Bushrabee's telephone number was installed in M.A. Bazar, Kozhikkode. PW12 is the witness proffered, who merely said that he operated the numbers of Muhammed Mustafa and Bushrabee; without any further proof. Anyway, PW12, at the time of deposition, was carrying on a business in mobile phones by name '120 NE' at M.A. Bazar, which was started in 2008. Before that he was running a stationery, photostat and telephone booth-coin box. The said business was also carried on in the very same premises and the name of the said shop was 'Graphline'. Though the shop belongs to his brother-in-law Muhammed, PW12 was running it since his brother-in-law left for Gulf. He spoke of having operated the coin box in the

name of Bushrabee bearing number '2368653', which was in M.A Bazar, Bank Road, which is also called Dubai Bazar. He also said that his shop was on the western side of the road and on the east there is a Gulf Bazar. PW31 also marked Ext.P30(b), which is an incoming call to the number '2700834', that of Calicut Times, at 12.33 p.m. This call came from 2368653, belonging to Bushrabee and the coin box operated by PW12; if PWs evidence alone is to be believed. Immediately we have to notice the evidence of PW1 in which his categoric statement is that he made the telephone call from the booth in Gulf Bazar, which is not the location of the coin box operated by PW12. We reiterate PW11's deposition was that 'the coin box numbers are 2368653 and 2361583; which is in Bank Road and it is on the western side of the road and Gulf Bazar is on the eastern side'. He also said that now MA Bazar is called Dubai Bazar. Obviously PW1 made the call from the coin box at Gulf Bazar, which is not the location of the coin box of PW12.

74. We again examine the deposition of PW58, with respect to the pointing out of the coin box by A7 as

per the disclosure memo at Ext.P7. Ext.P7 disclosure memo speaks specifically of a coin box booth in Dubai Bazar, contrary to the deposition. Having stated about the disclosure of A7, in his words, PW58, in page 61 speaks of having reached Dubai Bazar, Kozhikode where the accused is said to have pointed out the booth from where he made the telephone call. The statement of the accused is deposed as the red coloured coin box booth in front of a shop, which shop was specifically pointed out; but the details not noted in the memo or spoken of by PW58. It is also stated that the coin box was not found in the spot when A7 led PW58 to that location. It is also stated that since the box was not there, the accused was not able to point out the exact spot. Here, we recount the specific deposition of PW12 that the coin box was situated outside the shop named '120 NE' in the year 2006 and though the coin box was stopped, the very same premises was earlier used for another business, called 'Graphline'. The I.O has not even noticed the name of the shop pointed out by the accused, which; juxtaposed with the the deposition of PW12 that Gulf Bazar was opposite to his shop, further

debunks the evidence of PW1 regarding the call made.

75. The evidence led, to establish the calls to the Collectorate and Calicut Times having been made from two identifiable numbers, though established by the evidence of PW29 and PW31 as also Ext.P30(a) and (b), it does not offer any connection to A4 or PW1. The coin booths from which A4 and A7 had made the calls, or the exact location, have not been identified by the I.O and it can only be said that there were calls at the relevant time to the Collectorate and Calicut Times from the particular numbers. The testimony of PW1 does not stand corroborated by the evidence of PW12, regarding the location of the coin booth. There is also the discrepancy regarding the exact conversation PW1 had with PW4; as pointed out by us from the depositions of PW1 & PW4 and the S.164 statement of the former. It has also to be emphasized that the proof of subscribers of the various numbers is offered through PW29, an Official of the BSNL, through a document, Ext.P28, signed by him, showing the numbers and address of the purported subscribers which cannot be said to be primary or secondary evidence.

XIV. *The Identification of the Accused by PW1:*

76. PW1 as stated by the defence has not identified any of the accused in the dock, but for narrating their roles in the alleged incident leading to the two explosions. On behalf of the NIA it was argued that PW1 is not a chance witness and has mentioned the name of A1 many times during chief examination, after initially admitting his acquaintance with all the persons in the dock. It is the argument that the entire evidence of PW1 clearly brings out the identification and the defence also put suggestions regarding the transaction between A1 and PW1. The identity of the accused were not challenged in cross examination and hence it is admitted by the defence, is the contention. We are unable to countenance the said contention especially in the context of the declaration of another Division Bench in *Vylali Gireesan (supra).* The Division Bench in Paragraph 43 held that:

> *"43... Undoubtedly, substantive evidence is the identification of the accused by the witness before the Court. But in the instant case, the deposition of the witnesses only reveals that the learned Sessions Judge has merely recorded the rank number*

of the accused in the charge and no effort is seen undertaken to certify in the deposition, with exactitude and certainty , that the person referred by witness as one of the members of the unlawful assembly which perpetrated the horrendous act is the person who was standing in the dock. We are unable to discern for certain as to whether the witness was referring to the particular accused whose name finds a place in the charge or to some other person. Obviously the witness will not be aware of the rank number of the person standing in the dock in the array of the accused. There is absolutely no clue available from the deposition either, as the Court has not recorded this aspect in the evidence as to the manner in which the particular accused was identified. The Apex Court as well as this court, time and again, have reminded the trial Courts, the importance of recording in the deposition the most cardinal fact that the witness has specifically identified the accused as the person who was involved in the crime, so that the complicity and presence of the accused at the scene of crime could be fixed with exactitude."

77. Admittedly four persons were in the dock and a credible identification would be, by pointing out the specific person/accused from among those standing in the dock; either by their position, their dress or any other peculiar features. True the Court also should have been more vigilant in prompting the witness to make a proper identification. But it is more incumbent on the prosecution, to ensure that a credible identification is

made, which has the duty of establishing the guilt of the accused beyond any reasonable doubt. When such an identification has not been attempted by the prosecution or the Court, there is no reason why the defence should point out the default of the prosecution and thus precipitate an identification which the prosecution failed to carry out. We cannot countenance the argument of the learned Senior Counsel that there was no challenge made by the defence in cross examination of PW1, regarding the identification of A1. Other than the reference to the various accused in the narration of facts leading to the bomb explosion, the approver (PW1) only stated that he had acquaintance with A2, A6, A8 and A1. According to him when he reached the Markaz Masjid on the summons of A1, out of the six, he was familiar only with A1 and A9 and the others were introduced to him for the first time. Nowhere in the chief examination was an attempt made by the prosecution to call upon PW1 to identify each of the accused standing in the dock; which, as argued by the defence cuts at the root of the prosecution case. The identification made at the time of

disclosure statements and point out memos are relevant only if such disclosures, led to a discovery, linking that accused to the crime; which is totally absent in the above case.

XV. *The Conclusion:*

78. That the blast occurred in the two bus stands on 03.03.2006 at noon, is of common knowledge, as spoken of by the witnesses PWs.5 to 9, PW13 and PW15, all onlookers. The remnants of the material objects collected from the two sites where the blasts occurred contained explosive substances as reported by the FSL in Exts.P61 and Ext.P62, proved by PW47 and PW48 respectively; inevitably so since the bomb blasts did occurr. That the bomb was placed in a black plastic cover in the Mofussil Bus Stand has been spoken of by the onlookers. But, that cannot be projected as a corroboration of PW1's testimony of having seen two black covers at the Markaz Masjid. The police knew before hand that the bomb at the Mofussil Bus Stand was in a black plastic cover which was seen by the onlookers and the policemen who arrived at the scene, especially, the Sub Inspector PW38 who came to the scene

of occurrence before the blast occurred. This could have been conveyed to PW1, who was in police custody, for him to make such a statement.

79. The prosecution case of preparation having been made by A1, sought to be established with PWs 24 to 26 has been belied by their own evidence. The disclosure was of the purchase of gelatin from PW24's house, which was thoroughly searched and nothing obtained. The evidence of PWs 24 to 26 did not at all tally with the disclosure made and A1 was not identified by PW25 & 26. The identification of A1, by PW24 was after having been shown his photograph by the NIA. The disclosures of A3, of KL Arcade, the room of A2 was on 29.07.2009. A1 is said to have kept the bombs in the said room, before they were brought to Kozhikkode; but a search of the premises did not yield any incriminating material. The houses of all the accused were also searched by PW54, without any thing being discovered. In this context, we again refer to ***Navjot Sandhu*** [supra] where on the information of the accused the abodes/hideouts of the deceased terrorists were discovered; where from incriminating articles like

explosive materials and electronic detonators were recovered. The accused also identified certain shops from where purchase of explosives were made, which fact was spoken of by the shopkeepers who were examined before Court. The pointing out of Maidanappally beach where A3 and A1 allegedly carried out two experimental blasts also did not lead to any discovery of fact as relatable to a material object; like the remnants of explosion from the site. The conduct too is not established; which could have been, if there were witnesses to the explosion or at least people who heard the same and contemporaneously saw A1, A2 or A3 in the location. The conspiracy as alleged by the prosecution has not been established.

80. A1, pursuant to disclosures, pointed out the Markaz Masjid, the location in which the bombs were placed in the two bus stands, the room in which the bomb was made in KL Arcade and Cannanore Plastic House from which a plastic pot was purchased by him. There is no recovery of any object leading to discovery of a fact from these places which would incriminate A1. The location of the bombs were known to the police and in any

event that part of the disclosure is inadmissible. As far as other places pointed out, there is no discovery made nor is the conduct of going to such locales a relevant conduct. A1's disclosure was on 02.03.2010 and the pointing out of the locations on that day and the next. The very same locations pointed out by A4 and A7 (PW1) respectively on 10.03.2010 and 24.03.2010 in any event cannot be made admissible, since by then the police knew of the said locations. The disclosures of A1, A3, A4 and A7 (PW1) did not lead to any tangible object and there is no discovery of fact, which was not known to the police. The disclosures are all in the nature of having converged at the Markaz Masjid before the explosion, then the actual planting of bombs and later converging at Pattalam Mosque after the explosion. If the reference to the bombs and explosion are eschewed, the information supplied is only the converging of the accused at the Markaz Masjid and then at the Pattalam Mosque, which by itself is not an incriminating circumstance. The I.O having followed the accused to the said locations, there was also nothing discovered from the said locations so as to connect the

accused with the crime.

81. There is no reliable evidence on the preparation or commission of the crime that would incriminate the accused beyond reasonable doubt. The approvers evidence fails miserably in the twin tests; that of inherent reliability and credibility as also on the aspect of corroboration; the latter of which we find to be absent even in a single material particular. The threat calls have just been established to be from two numbers in two booths, the identity of the caller or even the location of the booths have not been established. We are appalled by the manner in which the confessions, purportedly under Section 27 were recorded, with portions relating to the crime as such, offending Section 25 and 26 of the Evidence Act.

82. We do understand the inherent difficulty of an investigation, in a case taken over by the NIA, almost four years after the incident. The Investigating Officers were groping in the dark for almost four years, till the arrest of A3 in another blast case. It is on the information; that on interrogation in another case, A3

admitted to be involved in the Kozhikode blast case, that he was arrested. This admission spoken of by the I.O in the other blast case cannot be relied on. A1 to A8 were arrayed after A3 was questioned and later, A1 and A4 were arrested from Bangalore, where they were in judicial custody in yet another blast case. A9 was never even taken into police custody or questioned. It is purely based on the confessions made by the accused; A3 first and then, A1, A4 and A7, in that order, that the case was framed by the NIA. We have dealt with each of the evidence tendered including the approver's deposition as also the disclosure statements and the evidence of other witnesses to find that the case against A1 to A4 was not proved beyond reasonable doubt. The Investigators, we cannot but say, did not make a concerted effort to *'go out in the sun'* to collect independent evidence of whatever version the accused told them; though we do not venture to speculate whether they employed *'red pepper'* to elicit the disclosures. In their anxiety to wrap up the case; we say anxiety since we do not think the Officers of the NIA would be ignorant of the law on the

subject, they even recorded the confessions made by the accused, clearly inadmissible under Section 25 & 26 of the Evidence Act.

83. When confessions were recorded and attested by witnesses with the fact discovered in brackets, Anna Chandy. J held so in *Karunakaran v. State of Kerala [1960 KLT 1959]*:

> ***"9. The whole thing appears to be an "intentional whittling down" of the wholesome provisions of Ss. 25 and 26 of the Evidence Act. It is very easily said that the incriminating portion of a lengthy confessional statement should be excluded. But it is a very difficult mental process to close your eyes to the details in the confessional statement and see only the bracketted portion and remain uninfluenced by the confession of the accused. This feat is possible of performance only by a few specially trained experts. There is no reason why the overburdened judicial officers should be saddled with an additional burden which has not the support of law or procedure. In this case Exts. P-2 and P3 confessional statements are attested by two witnesses and the Sub-Inspector. The witnesses are specially got down for pinning them and the accused down to a particular position by the attestation of a document of questionable legality. The accused's confessions are filed as exhibits in court and proved by attesting witnesses and used for questioning the accused under S. 342, Criminal Procedure Code."***
>
> ***[underlining by us for emphasis]***

The above view was upheld by two Division Benches; two

decades apart, in *Mohammed v. State of Kerala [1962 KLT 120]* and *Gabriel v. State of Kerala [1982 KLT 772].* The succinct statement of law stands out and survives even today; eight short of *'three score and ten years'.* What was said of exceptionally trained minds applies on all fours even now and the burden of the judicial officers has only multiplied with each year. In the present case there are no lengthy statements but the disclosures record the confession linking the accused with the crime so unabashedly, that none could escape the innuendo. This is in flagrant violation of Sections 25 and 26 of the Evidence Act and tend to impress upon the Court the need to convict, even without proof beyond reasonable doubt.

84. One ancillary contention was regarding the sanction for prosecution under The Explosive Substances Act; which by Section 7 can only be with a consent of the District Magistrate. The learned Senior Counsel argued that since the Central Government has issued sanction, it would suffice since Central Government is a higher authority. Reliance is also placed on *State Of Haryana v.*

P.C. Wadhwa [(1987) 2 SCC 602], **which is not applicable. There the question raised was on the authority to make an adverse entry in the confidential records. The decision turns on the specific rule which was interpreted as having conferred the power on the superior authority or such other authority specifically empowered by the Government; which later authority definitely should be superior to the employee. The prosecution also relies on** ***Ahamed Kalnad v. State of Kerala [2001 Crl.LJ 4448]***; **in which the Government granted the sanction to prosecute under the Prevention of Corruption Act, and not the authority competent to remove from service. The rule extracted by the learned Single Judge itself indicates that the sanction should be either by the authority competent to remove from service or the Government. We fall back upon the principle laid down in** ***Taylor v. Taylor [(1875) 1 Ch.D 426]*** **that when the statute prescribes the performance of a thing in a particular manner, the same shall be done in that manner alone or not at all. Here, the consent should be by the District Magistrate and the Central Government cannot be said to**

be the higher authority; especially when that Government does not exercise any control; supervisory or otherwise over the District Magistrate.

On the above findings and reasoning we allow the appeal filed by A1 and A4 (Crl. Appeal No. 1699 of 2011). Likewise, we find no reason to upset the finding of acquittal of A3 and A9 and reject the appeal filed by the NIA (Crl. Appeal No. 1914 of 2011). A1 and A4 shall be released forthwith, if not wanted in any other case. Ordered accordingly.

Sd/-
K.VINOD CHANDRAN, JUDGE

Sd/-
ZIYAD RAHMAN, JUDGE

Vku/jma/lgk/sp