# *IN THE HIGH COURT OF BOMBAY AT GOA*

## *CRIMINAL APPEAL NO. 8 OF 2014*

National Investigation Agency
Chikoti Garden,
Begumpet, Hyderabad,
Rep. by A.G. Kaiser, major of age,
DSP, NIA, Hyderabad. … Appellant

***Versus***

1. Vinay Talekar
S/o Dayanand Talekar, major of age,
Medical representative cum Sadhak (Seeker)
Flat No.2, MRF Housing Colony,
Prabhu Nagar, Ponda, Goa.

2. Vinayak Patil
S/o Pundalika Patil, major of age,
Driver cum Sadhak (Seeker)
C/o Sumitra Naik
H.No.154/11, Durgabhat
Ponda, Goa.

3. Dhananjay Ashtekar
S/o Keshav Ashtekar, major of age,
Student cum Sadhak (Seeker)
Temporary Address
C/o G S Ingle 3/443
Samarth Bungalow, Samarth Nagar,
Ichalkaranji Sangli, Maharashtra.

Permanent Address
Flat No. D-2/207
Gharda Housing Colony

At post Peerlote, Taluka-Khed
Dist. Ratnagiri, Maharashtra.

4. Dilip Mangaonkar
S/o Gurudas Mangaonkar, major of age,
Salesman cum Sadhak (Seeker)
H. No. B/21, Bholwada Karapur,
Sanquelim, Goa.

5. Prashant Ashtekar
S/o Keshav Ashtekar, major of age,
Building No. D-2/207
Gharda Housing Colony
At Post Peerlote, Taluka-Khed
District Ratnagiri.

6. Prashant Juvekar
S/o Hemant Juvekar, aged 25 years,
Major of age, R/o Rajashram, Lower lane
at Post Devrukh, Ratnagiri, Maharashtra. ... Respondents

Mr. P. Faldessai, Additional Public Prosecutor for the Appellant.
Mr. Sanjeev Punalekar, Advocate for Respondent Nos.1 to 4.
Mr. Nagesh Takbhate Joshi, Advocate for Respondent Nos.5 and 6.

Coram:- M.S. SONAK &
SMT. M. S. JAWALKAR, JJ.

Reserved on:- 15th September, 2020

Pronounced on: 19th September, 2020

JUDGMENT (Per M. S. Sonak, J.)

Heard Mr. P. Faldessai, learned Additional Public Prosecutor for the National Investigation Agency (NIA)- Appellant herein.

2. Heard Mr. Punalekar, learned counsel for Respondent Nos.1, 2, 3 and 4 who were styled as A3, A4, A5 and A6 before the learned Special Court.

3. Heard Mr. Joshi who appears for Respondent Nos.5 and 6, who were styled as A10 and A11 before the learned Special Court.

4. This appeal is directed against the judgment and order dated 31st December, 2013, made by the learned Special Court for NIA cases acquitting the aforesaid accused persons from various offences which they were charged with in Special SC No.01/2013.

5. Mr. Faldessai, at the outset submits that this is an appeal under Section 21 of the National Investigation Act, 2008. However, he agrees that the principle relating to appeals against the acquittal as provided under Section 378 of Cr. P.C., will govern the adjudication of this appeal.

6. It is the case of the prosecution that on 16th October, 2009, at about 21.30 hours, the improvised explosive device (IED) carried by the A1 and A2 in the dickey of an Eterno scooter bearing registration No. GA-05-A-7800 exploded near Reliance Trade Centre, Margao Goa. On account of such explosion A1 and A2 sustained injuries. A case bearing Crime No.338/09 was registered at the Margao Police Station

under Sections 120B, 121A, 122, 123, 427 IPC read with Sections 16, 17, 18 and 23 of the Unlawful Activities (Prevention ) Act, 1967 and Sections 3, 4 and 5 of the Explosive Substances Act, 1908.

7. Further, on the same date at about 22.30 hours, on receipt of information, the PSI of Verna Police Station rushed to the spot near Shantadurga Temple, Sancaole and noticed a bag lying suspiciously on on the ground adjacent to the road. PSI summoned the services of Bomb Detection Disposal Squad (BDDS). The squad found and diffused an explosive device comprising of four gelatin sticks, 4 electronic detonators with wires, box containing electric circuits with two 9 volt batteries and a clock. Accordingly, another case bearing Crime No.114/2009 was registered at Verna Police Station under Sections 121A, 122, 123, 120B, 427 read with Sections 16, 17, 18 and 23 of Unlawful Activities (Prevention) Act, 1967, Sections 3, 4 and 5 of the Explosive Substances Act, 1908 and Sections 6 and 9(B)(2) of the Explosives Act, 1884.

8. The above two cases were investigated by the team of Police Officers of the Special Investigation Team (SIT) for some time. However, vide order No.17011/116/2009-IS-VI dated 9th December, 2009, Govt. of India directed the NIA to take up the investigations in the above two cases. Accordingly, the NIA re-registered the cases as RC Nos. 7/2009 and 8/2009 and carried out the investigation therein.

9. Based upon its investigation, the NIA filed a composite final report in respect of both the cases against A3, A4, A5, A6, A10 and A11 under Sections 120B and 121A of IPC, Sections 16, 18 and 23 of the Unlawful Activities (Prevention ) Act, 1967 and Sections 3, 4 and 5 of the Explosive Substances Act, 1908. In addition to this, A4 was charged with offences under Sections 420, 468, 471 of IPC and A10 and A11 were charged with offences under Section 201 of IPC. On account of injuries sustained on 16th October, 2009, A1 and A2 expired and therefore, the cases against them abated.

10. The accused Nos.7, 8 and 9 were indicated as absconding. Therefore, the prosecution was granted liberty to file separate charge-sheet against A7, A8 and A9 as and when they could be apprehended.

11. The prosecution examined in all 122 witnesses. The statements of the accused persons were recorded under Section 313 of Cr. P.C. The accused persons examined Nagesh Gade (DW1), in support of their defence. By the impugned judgment and order, the learned Special Judge has acquitted all the accused persons of the charges levelled against them. Hence, this appeal by the NIA.

12. Mr. Faldessai, learned Additional Public Prosecutor for the Appellant submits that the view taken by the learned Special Judge is quite perverse and therefore, warrants interference. He submits that

there was overwhelming evidence on record that the incident of 16th October, 2009 did take place, in which, two of the accused persons died of explosion injuries. He points out that explosion took place hardly 400 metres away from the stage from which Narkasur effigy contest was being held and monitored. He points out that explosion took place when the accused persons were in the process of carrying the IED at or near the stage. The spot was fully crowded. He points out that if the accused persons were to have succeeded in doing this, then, a tragedy of most unfortunate proportions would have taken place killing or injuring hundreds of innocent victims. He submits that despite there being overwhelming evidence on record, the learned Special Judge has chosen to seriously doubt "*veracity of FIR*" itself and this constitutes perversity.

13. Mr. Faldessai submits that in this case, the prosecution has produced overwhelming evidence on record to establish beyond reasonable doubt the links between Sanatan Sanstha and the accused persons. In fact, the prosecution has proved beyond reasonable doubt that the accused persons are the members and sadhaks of the Sanatan Sanstha. Mr. Faldessai points out that the prosecution has also established beyond reasonable doubt that from 2001 or thereabouts, the Sanatan Sanstha of which the accused persons were members/sadhaks was opposing holding of any Narkasur effigy competition. He submits that the evidence on record establishes that this Sanstha and its members had addressed several communications to the authorities seeking a ban

on such competition. He submits that the members of such Sanstha, each year upto the year 2009 used to protest at the venues of such competitions by holding placards and raising slogans. He submits that this Sanstha was insisting that the Narkasur effigies on account of their size and splendour, undermine the role of Bhagvan Shree Krishna in the assassination of Narkasur. He submits that all this constituted the motive for the accused persons to cause an explosion at the venue of the competition and thereby instill terror not only in the minds of organizers of such competitions but also the members of the public who, in hundreds attend such competitions.

14. Mr. Faldessai submits that despite of this overwhelming evidence, there is clear perversity in the findings recorded by the learned Special Court that the prosecution had failed to prove the motive in the present case. Mr. Faldessai submits that even otherwise, absence of motive, is not vital in every case, even though the case may be based upon circumstantial evidence. For all these reasons, he submits that the view taken by the learned Special Court is perverse and warrants reversal.

15. Mr. Faldessai submits that though, there may be no evidence to establish that the conspiracy was hatched by the accused persons to create communal disharmony, the evidence on record clearly establishes that the accused persons entered into conspiracy to create

terror amongst the organizers of such Narkasur effigy contest and the members of the public who attend such competitions in hundreds, if not thousands.

16. Mr. Faldessai submits that there is overwhelming evidence on record that in pursuance of such conspiracy, the accused persons purchased several articles/items from different places in order to fabricate the bombs and IEDs for use during Narkasur competition. He points out to the evidence of vendors from where the accused persons purchased various items/articles used in manufacture of such bombs and IEDs. He points out to the evidence which indicates how the accused persons downloaded from the internet the circuits and other technical details for the manufacture of bombs and IEDs. He points out to the material seized from some of the accused persons in the form of circuits, batteries etc. by which, such bombs and IEDs were fabricated by the accused persons. He submits that all such evidence has been discarded or disbelieved by the learned Special Judge quite perversely and contrary to the well settled principles relating to evaluation of evidence.

17. Mr. Faldessai submits that several incriminating articles were recovered on the basis of the statements of the accused persons. He submits that the statements to the extent they had nexus with such recoveries were clearly admissible in evidence under Section 27 of the Evidence Act. Yet, the learned Special Judge has discarded such

evidence, which is again indicative of perversity.

18. Mr. Faldessai submits that the learned Special Judge has again erred in holding that there was no sanction to press charges under the Explosive Substances Act, 1908 and in fact in this case, there was a sanction for overall prosecution from the Home Ministry of the Central Government. He submits that in any case, the prosecution for offences other than offences under the Explosive Substances Act, had necessary sanction and there is absolutely no good ground made out in the impugned judgment and order to acquit the accused persons of such offences.

19. Finally, Mr. Faldessai points out that the learned Special Judge has failed to take into account the statutory presumption under Section 43E of Unlawful Activities (Prevention) Act, 1967 in terms of which, the onus had in fact shifted upon the accused persons. He submits that there is absolutely nothing in Section 313 of Cr. P.C., statements made by the accused persons or the defence evidence led by the accused persons on the basis of which it could be held that the accused persons have discharged their onus even to applying test of preponderance of probabilities.

20. For all these reasons, he submits that this appeal may be allowed and the accused persons be convicted of the offences for which

they were charged. He submits that upon such conviction, the accused persons, may be heard on the point of sentence and stringent sentence be imposed upon the accused persons. He submits that merely because in the tragedy which occurred on 16th October, 2009, two of the accused themselves were killed, there is no question of showing any leniency to the remaining accused persons, who were literally playing with fire and the lives of hundreds of innocent persons.

21. Mr. Punalekar and Mr. Joshi, learned counsel for the accused persons defend the impugned judgment and order on the basis of reasonings reflected therein. They point out that in this case, there is absolutely no evidence on record to convict the accused persons and the view taken by the learned Special Judge is not only a plausible view but in fact, it was only the view that could have been taken in this matter. They point out that the sanction under Section 7 of the provisions of Explosive Substances Act is required to be taken from the District Magistrate, such sanction was admittedly not taken in this matter. They therefore submit that the prosecution under Explosive Substances Act, 1908 was totally incompetent and the learned Special Judge has therefore very correctly acquitted the accused persons. They point out that since, no prosecution under the Explosive Substances Act, 1908 was permissible in the absence of sanction, there was no question of convicting the accused persons for allegedly being in possession of explosives by resorting to the provisions of Unlawful Activities

(Prevention) Act, 1967. They point out that even otherwise the evidence on behalf of the prosecution was totally sketchy and inspires no confidence whatsoever. They submit that the statutory presumption under Section 43E of the Unlawful Activities (Prevention) Act, 1967 arises only if the prosecution is in a position to establish beyond reasonable doubt the parameters provided in sub clauses (a) and (b) thereof. In this case, such parameters were never established by the prosecution and therefore, there was no question of raising any presumption against the accused persons. For all these reasons, they submit that this appeal is required to be dismissed with costs.

22. The rival contentions now fall for our determination.

23. At the outset, we note that this is an appeal against the acquittal and therefore, certain principles, in relation to adjudication of such appeals will have to be borne in mind for the purpose of appreciating the rival contentions raised in this appeal.

24. In ***Sampat Babso Kale vs The State Of Maharashtra***[1], the Supreme Court in the context of the powers of an appellate court in an appeal against acquittal has observed that the law is well established that the presumption of innocence which is attached to every accused person gets strengthened when such an accused is acquitted by the trial court and the High Court should not lightly interfere with the decision of the

1 2019(4) SCC 739

trial court which has recorded the evidence and observed the demeanour of witnesses.

25. In ***State of Goa Vs Sanjay Thakran***[2]***,*** the Hon'ble Supreme Court has held that while exercising powers in appeal against the order of acquittal, the court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the court of appeal would not take the view which would upset the judgment delivered by the court below.

26. In ***Chandrappa & Ors vs State of Karnataka***[3]*,* the Hon'ble Supreme Court, has considered several decisions on the scope of appeals against the acquittals and at paragraph 42, laid down the following general principles regarding powers of the Appellate Court while dealing with an appeal against the order of acquittal. They are as follows :

> *(1) An appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded;*
>
> *(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it*

2 2007 (3) SCC 755
3 2007(4) SCC 415

*may reach its own conclusion, both on questions of fact and of law;*

*(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.*

***(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.***

***(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."***

*( Emphasis supplied)*

27. Therefore, in adjudicating the present appeal, we have to abide by the aforesaid principles and the rival contentions will have to be evaluated on the touchstone of the aforesaid principles.

28. To begin with, we quite agree with the contention of Mr. Faldessai, learned Additional Public Prosecutor that this was certainly not a case to doubt *"veracity of FIR"*. Whether the material on record is sufficient to convict the accused persons or not, is a different matter. However, the material on record, is certainly not sufficient to doubt the veracity of the FIR itself or to express any doubts upon the purpose for which the prosecution was launched in a serious case of the present nature.

29. This is a case where there can be no dispute whatsoever that on 16th October, 2009, which was the night preceding Diwali and on which night, effigies of Narkasur are burnt all over Goa, an explosion took place at a distance of hardly 400 metres from the venue of the Narkasur effigy competition. The explosion took place in the Eterno scooter belonging to the close relation of the accused persons. In such explosion, two of the accused persons (A1 and A2) in fact expired. There is evidence on record that the accused persons had close link with the Sanatan Sanstha and there is evidence on record that this Sanstha for the period between 2001 and 2009 was protesting the holding of any Narkasur effigy competition in the State of Goa. In these circumstances, to suggest that there were any malafides in the launching of the prosecution against the accused persons or to suggest that there was a doubt on the veracity of the FIR, is not proper.

30. Similarly, to suggest that there was some manipulation in the FIR or that the prosecution was unfairly directed against a particular institution, is not an inference which could be legitimately drawn on the basis of the evidence on record. As noted earlier, the evidence on record may not be sufficient to convict the accused persons. It is possible also to hold that there were several lapses in the investigations and therefore, the prosecution, has failed to establish beyond reasonable doubt the charges against the accused persons. However, on the basis of such factors, it cannot be held that the veracity of FIR was itself doubtful or that there was any manipulation in the FIR itself. Such observations in the impugned judgment and order are really not based upon any inferences that could have been legitimately drawn on the basis of the evidence on record. Such observations therefore deserve to be interfered with and set aside. We do so accordingly.

31. In this case, the prosecution is not relying upon any direct evidence but on circumstantial evidence. The learned Special Judge has listed the circumstances relied upon by the prosecution in paragraph 75 of the impugned judgment and order. They are transcribed below for convenience of reference.

> *"1. Motive of the accused.*
>
> *2. The involvement of accused in the activities of Sanathan Sanstha.*
>
> *3. The members of the Sanathan Sanstha had been*

*objecting the narkasur effigy competition till 2008 and they did not object it in the year 2009.*

*4. That there was a conspiracy amongst the accused who are the members of the Sanathan Sanstha to create terror and communal harmony at the places during the Narakasur competition at Madgaon and Vasco.*

*5. That in pursuance of the said conspiracy accused purchased various items/articles from different places to prepare bombs to be used during the celebration of Narakasur competition.*

*6. That the accused along with other absconding accused prepared the bombs and held test blasts on a hillock at Ponda, behind the house of Laxmikanth Naik (Pw65) who is the brother of deceased accused Yogesh Naik.*

*7. That on the day of Narakasur competition i.e. 16.10.2009 an explosion took place at Madgaon behind Grace Church in which two Sanathan members i.e. accused 1 and 2 expired, when they came to Madgaon to plant them near the place of competition where a big gathering of the people including C.M. of Goa, MLA and other VIPs were participating.*

*8. Unexploded live IED was planted in a truck at Sancoale by the accused which came with a Narakasur effigy and the same was recovered and defused.*

*9. That the unexploded explosive articles attached/recovered were sufficient to cause explosion and to cause damage.*

*10. That the articles recovered/attached u/s 27 of the IE Act were purchased by A-3 and A-5 from different places.*

*11. That the accused no.3 and 4 purchased SIM cards from different dealers of Vodafone and Reliance by committing impersonation and forgery.*

*12. That the presumption u/s 43E of the UA(P) Act is applicable in this case."*

32. With the assistance of the learned counsel for the parties, we have gone through the voluminous evidence on record. According to us, it is possible to say that the prosecution in this case has succeeded in establishing that all the accused persons had very close links and nexus with the institution Sanatan Sanstha. The prosecution has also been able to establish that this Sanstha for about 7 to 8 years prior to the date of the incident was quite vocal in its protest against holding of Narkasur effigy competitions in the State of Goa. There are letters, which constitute documentary evidence which have been placed on record by the prosecution, in which this Sanstha has lodged its protest against holding of such Narkasur effigy competitions. There is evidence about demonstrations which the members of Sanatan Sanstha were holding against such competitions. This means that the prosecution can be said to have been established the circumstance nos. 1, 2 and 3 listed out in paragraph 75 of the impugned judgment and order, which circumstances, have been transcribed above for convenience of reference.

33. However, the fact that the prosecution may have proved

the first three circumstances, is by no means sufficient to convict the accused persons of the crimes for which they have been charged in this matter. As regards the conspiracy, there is hardly any evidence on record to establish the same. Merely because the accused persons may have links with Sanatan Sanstha and Sanatan Sanstha was opposing to holding of Narkasur effigy competitions, is by no means sufficient to establish the accused persons had conspired to make explosion at such competition on the fateful night of 16th October, 2009. The prosecution, may have established that there was an explosion at Margao. However, that by itself is not sufficient to hold that such explosion was a result of conspiracy hatched by the accused persons. There is no independent evidence on record to establish the conspiracy or meeting of minds amongst the accused persons. The evidence regards conspiracy is quite sketchy.

34. In fact, in so far as A10 and A11 are concerned, there is absolutely no evidence about their involvement in any conspiracy for commission of offences which are alleged against them. The prosecution has basically alleged that A10 and A11 were involved in destruction of evidence, after explosion took place. Neither there is any evidence to establish that A10 and A11 indeed destroyed any evidence or attempted to destroy any evidence, nor there is any evidence to link them to any conspiracy, in pursuance of which such serious offence came to be committed in this matter.

35. The learned Special Court, has marshaled the evidence on the aspect of conspiracy and quite correctly held that no case of conspiracy has been established by the prosecution. In the absence of any evidence as regards conspiracy, the prosecution was required to establish the role of each of the accused persons independently which again the prosecution has not succeeded, particularly applying the fact that the prosecution has to prove its case beyond reasonable doubt.

36. The prosecution has examined one Savaram Choudhary (PW34) in support of the circumstance no.5. This circumstance alleges that in pursuance of conspiracy, the accused persons purchased various items/articles from different places to prepare bombs to be used during holding of Narkasur competition.

37. PW34 has deposed that he was working as a Salesman with Heera Electricals, Ponda, for about five years since 1998 and thereafter he started his own electrical shop under the name and style "*Choudhary Electrical Company*". He has deposed that he deals in sale of all types of electrical articles and he was assisted by his brother Bharaj and nephew Bhanvarlal. He has deposed that he used to look after the cash and taking orders etc., while his brother and Bhanvarlal were managing the shop. PW34 deposed in the Court on 29th October, 2011 and stated that the said Bhanvarlal has left his employment about a year back. PW34 has deposed that the police came to his shop after Diwali in the

year 2009 during the afternoon with one person whose face was covered with mask. The masked person pointed out to the shop where PW34 was present and also to Bhanvarlal. PW34 deposed that the masked person indicated Bhanvarlal as the person from whom he had purchased the insulation tapes and two 9 volt batteries.

38. PW34 then deposed that the police removed the mask and showed the face of masked person to Bhanvarlal who identified him as the person who had purchased the insulation tapes and batteries from him. PW34, in his examination in chief itself admitted that he had seen this person on the said date for the first time and not on any earlier occasion. PW34 however added that Bhanvarlal had told him that this person used to come frequently to his shop. PW34 then deposed that he asked the masked person his name who disclosed his name as Vinay. In this case, Vinay is the accused No.3.

39. PW34 has then deposed that the police told him to give insulation tape and 9 volt battery which he handed over and this insulation tape and 9 volt battery were similar to that were sold by Bhanvarlal to the said Vinay. The police then attached the said insulation tape and the 9 volt battery under the panchanama.

40. In the cross examination, PW34 has admitted that 9 volt battery cost ₹15/- and can be used for illuminating a bulb, to run a

radio, torch, etc., and that on an average, 4 to 5 such batteries are sold in a month.

41. The evidence of PW34 is hardly sufficient to prove the circumstance no.5 in this case. In the first place, Bhanvarlal was never examined by the prosecution. Secondly, the purchase of some insulation tapes and 9 volt batteries is hardly sufficient to connect A3 or for that matter any of the accused persons to the fabrication of IED or bomb to make explosion at Narkasur competition. Even the insulation tape and 9 volt battery attached by the police, were the ones which were handed over to the police by PW34 by simply stating that same were similar to what was sold by Bhanvarlal to A3. Such evidence is hardly sufficient to establish circumstance no.5 as aforesaid.

42. The prosecution, has also examined PW49, PW50, PW52, the friends and roommates of Dhananjay Ashtekar (A5) to establish that A5 had downloaded certain circuits from the internet for making IED or explosive bombs. The prosecution, also examined these witnesses in an attempt to establish that certain circuits allegedly found with A5 were used for preparation of IED and bombs. These witnesses were also examined to establish that A10 and A11 destroyed evidence which was relevant to the present case.

43. PW49 has deposed that he knew A5 since he was one of the students residing on the first floor in the bungalow belonging to Gundopant Ingle (PW48) alongwith Sagar, Vivek Jadhav and Mandar Pandit. He has deposed that A5 was an Electronic Engineering student studying in DKTE college of Engineering, Ichalkaranji. He has deposed that he also knew Prashant Ashtekar (A10) who was the elder brother of Dhananjay, who was earlier studying in the same college.

44. PW49 has deposed that on 11.11.2009 when he had gone alongwith Sujit Kodare (PW50) to Maharashtra Chawk to get photocopies of some study material of electronics, he met one Mahesh Ambekar who was already introduced earlier by A5. PW49 has deposed that the said Ambekar told Sujit that Prashant Ashtekar had asked him to collect the hard disc of computer which was in the room shared by him with Sagar (PW47) and to give it to Ambekar. Thereupon Sujit contacted Prashant on phone and confirmed if this was so. After some time, PW48 Sujit and and Ambekar returned to Samarth bungalow, collected the hard disc and handed over it to Ambekar. PW49 has deposed that he only saw Sujit removing hard disc from the computer and hand it over to Ambekar.

45. Sujit Kodare was examined as PW50. He has also deposed that he knows Dhananjay (A5) and Prashant Ashtekar (A10) since they were the students of the same college which he was studying and

residing in the bungalow Samarth next to the house in which PW50 was residing (Mirge house ). He has deposed that on 9.11.2009 when A5 had come to his room for studies, at mid night, the police came alongwith Sagar (PW47) looking for Dhananjay (A5). The police then took A5 alongwith them and on the next morning PW50 came to know that he was taken for interrogation in connection with bomb blast in Goa. PW50 has deposed to the incident of 11.11.2009 and how, he handed over the hard disc on the instructions of Prashant (A10) to Ambekar.

46. PW50 in his cross examination has admitted that he had adequate knowledge of electronics and circuits and he had to deal with the practical aspect of preparing circuits and submit the same to the Professors as a part of their practical experience. He has deposed that the circuits can be utilized in operating computers, TVs, AC, fans etc., and these circuits are available in the text books and reference books and there is no need to even download the same from the internet. He has deposed that materials for preparing such circuits was purchased from the electrical shops and the stock is even otherwise available in the college. He has deposed that the expenses towards their preparation comes to about ₹400-500.

47. PW50 also admitted that such circuit preparation competitions were held in the college and Dhananjay (A5) used to

participate in these competitions held annually alongwith several other students. He also admitted that some students of XIIth Standard were residing on the ground floor of Himanshu Mirge's house who were in constant contact with A5.

48. PW51 Vivek Jadhav has also deposed similar to what was deposed by PW49 and PW50. PW52 Reshma Jadhav has deposed that she has cordial relation with Dhananjay (A5) who was her senior and he used to help her if she asked for any assistance. She has deposed that she helped A5 in obtaining mobile connection since A5 had claimed that he did not have necessary documents like address proof etc., to get a mobile connection. She has also deposed that she had a laptop and wireless internet connection which was used by several of her friends.

49. PW52, in her cross examination admitted that there was National Level Competition in 2009 and A5 was its main coordinator. She has deposed that she has personal knowledge that A5 used to give guidance and coaching to Ist and IInd year electronic students. She has admitted that A5 used to participate in several electronic competitions, where he was required to make circuits.

50. The prosecution also examined PW53 is Ravindra Jadhav, who used to run a shop by name J. B. Electronics dealing in wholesale and retail sale of electronic spare parts. He has deposed that A5 used to

come quite frequently to his shop and therefore he knows him closely on that count and that A5 was a student of DKTE college and he was student of electronic engineering. He has deposed that A5 used to purchase electronic items including batteries, diodes, capacitors, solders, transistors, LED etc. These visits were from 2008 and even continued in 2009. He has deposed that A5 purchased articles worth ₹1000/- to ₹1,200/- in June/July, 2009.

51. PW53 admitted that large quantities of articles similar to those sold by him to A5 were sold by him to other persons. He has admitted that there are several shops dealing with the electronic items. He in fact admitted that similar shops are concentrated in that area on account of DKTE college of Engineering. He admitted that many students are purchasing such type of articles from his shop. He admitted that such items can be used to make toys, electronic items etc.

52. The prosecution also examined PW54, one Rajesh Sonar, who has deposed that he manufacture printed circuit boards since last about 9 to 10 years from the first floor of his residence and he has also employed 4 to 5 persons. He has deposed that he used to get orders from the students of engineering college of Kolhapur and also from Ichalkarangi. He has deposed that he knew A5 who had come to his shop on 5 to 6 occasions to prepare the PCB (Printed Circuit Board) for his college projects. He has deposed that A5 first approached him in

June, 2008 and gave him two circuit diagrams and he prepared PCB at his request. He has deposed that A5 had also searched for PCB circuits on his computer and he traced on the basis of PCB circuit and a print out was taken of the circuit diagrams by A5.

53. On the basis of the aforesaid evidence, it is again not possible to hold that the prosecution has proved beyond reasonable doubt that the accused persons including in particular A5 purchased various items/articles from different places to prepare bomb or IED. Admittedly, A5 was a student studying electronic in DKTE college of engineering at Ichalkaranji. The prosecution witnesses themselves bear out that A5 was involved in organizing or taking part in competitions for preparation of electronic circuits. There is evidence on record that such circuits were required by the students including A5 for the purpose of college projects. His friends and even the shop keepers in the shops dealing with electronic items concentrated around his college have deposed to this circumstance. Therefore, on the basis of such evidence, it cannot be said that the prosecution has established beyond reasonable doubt that A5 was the one who manufactured IED or bomb by downloading circuits from the internet or that the circuits in the IED were prepared by him or commissioned by him. The fifth circumstance therefore, cannot be not held as proved by the prosecution beyond reasonable doubt.

54. In so far as the sixth circumstance is concerned, again the evidence produced by the prosecution is far from clinching. The prosecution witnesses, have merely spoken about some pits behind the house of Laximikant (PW65) who was incidentally the brother of the deceased accused Yogesh Naik. There are no forensic tests or chemical analysis undertaken by the prosecution to establish that these pits have nexus with the trial of bomb blast. Besides, there is no clinching evidence on record that it is the accused persons who were involved in such trial of bomb blast. Therefore, it cannot be said that even the sixth circumstance has been proved by the prosecution.

55. The seventh circumstance is proved to a certain extent inasmuch as there is sufficient evidence on record to establish that on the day of the Narkasur competition i.e. 16th October, 2009, an explosion took place at Margao behind Grace church, in which, the accused Nos.1 and 2 sustained injuries and ultimately expired. There is overwhelming evidence to that extent. However, rest of the ingredients of such circumstance cannot be said to have been proved by the prosecution beyond reasonable doubt. In any case, on the basis of this circumstance, it cannot be said that the prosecution has established the guilt against the accused persons beyond any reasonable doubt.

56. The eighth circumstance, relates to planting of unexploded live IED in a truck at Sancoale by the accused. The star prosecution

witness in respect of this circumstance, is Rajasab Anchi (PW58).

57. PW58 has deposed that he was a driver of mini truck TATA 709, which was engaged to carry Narkasur on 16th October, 2009 from Durgabhat, Ponda, to Narkasur competition at Sancoale. He deposed that he carried Narkasur from Durgabhat upto a distance of 150 to 200 metres from the place where the Narkasur competition was being held at Sancoale. He has deposed that the Narkasur was carried by the boys to the competition and he was also in the meanwhile went to watch Narkasur competition by locking the driver's side door and rolling up the glasses. He has deposed that the left side cabin door could not be locked as the lock was not functioning.

58. PW58 has then deposed that after the competition was over, the local boys from Durgabhat told him to bring the truck ahead so that the Narkasur could be loaded thereon. He has deposed that after he entered the truck, he heard sound of ticking of a clock inside the cabin. He then asked two boys, whether their mobile phone had fallen inside the Tata pickup but they denied the same. He told them not to enter in the cabin and switched on the light inside the cabin and started checking where the sound was coming from. He found one nylon bag whitish in colour beneath the cleaner's seat in the cabin. He lifted the bag which he found to be quite heavy and he asked two boys whether it belonged to them which they denied. He then opened it and heard the

distinct ticking sound coming from inside.

59. PW58 has then deposed that he got down from the truck since he suspected the bag contained a bomb and told two boys to move aside and went to the nearby field after crossing the road and threw away the bag with the contents far away in the field where there were bushes. He then told the said two boys regarding his suspicion and told one of the persons present in the crowd ahead to contact the police. He has then deposed that he was told by the Durgabhat boys later that there was a bomb blast at Margao. He identified the whitish nylon bag at Exhibit 1.

60. Now, there are certain contradictions and omissions which are brought on record in so far as the deposition of PW58 is concerned. However, even if the testimony of PW58 is to be accepted, there is really no sufficient evidence on record to link the accused persons with the contents or whitish nylon bag. The evidence to link the accused persons with the contents of the whitish nylon bag is quite sketchy. Besides, there is no proper evidence that whitish nylon bag and its contents were properly packed, sealed and only thereafter sent for analysis. In this state of evidence, it cannot be said that the 8th and 9th circumstances are established by the prosecution beyond any reasonable doubt. In any case, there is no clear evidence on record to link such circumstances to the accused persons. It is not merely sufficient that some IED was found

in the truck at Sancoale or that such IED was sufficient to cause explosion and damage. The prosecution had to establish beyond reasonable doubt the complicity of the accused persons in the placing of such IED in the truck at Sancoale.

61. In this case, there is hardly any evidence to establish recoveries under Section 27 of the Evidence Act. The statements allegedly made by the accused showing places where they dropped gelatin sticks in fast flowing river or the statements of similar nature are really not admissible in evidence particularly when no such incriminating articles were ever recovered by the prosecution. Therefore, even the circumstance no.10 cannot be said to have been proved by the prosecution.

62. Even the eleventh circumstance, cannot be said to have been proved beyond reasonable doubt by the prosecution. In particular, there is no clear evidence as regards any forgery or impersonation in this case.

63. The twelveth circumstance is really not a circumstance as such but it urges raising of presumption under Section 43E of the Unlawful Activities (Prevention) Act, 1967. Section 43E of the said Act reads as follows :-

> *"**43E. Presumption as to offence under section 15.**--In a prosecution for an offence under section 15, if it is proved*
>
> *(a) that the arms or explosives or any other substances specified in the said section were recovered from the possession of the accused and there is reason to believe that such arms or explosives or other substances of a similar nature were used in the commission of such offence; or*
> *(b) that by the evidence of the expert the finger-prints of the accused or any other definitive evidence suggesting the involvement of the accused in the offence were found at the site of the offence or on anything including arms and vehicles used in connection with the commission of such offence,*
> *the Court shall presume, unless the contrary is shown, that the accused has committed such offence."*

64. From the aforesaid, it is clear that firstly, it is for the prosecution to establish beyond reasonable doubt that the arms or explosives or any other substances specified in Section 15 of the said Act were recovered from the possession of the accused persons and there is reason to believe that such arms or explosives or any other substances of a similar nature were used in the commission of such offence; or that the evidence of the expert the finger-prints of the accused or any other definitive evidence suggesting the involvement of the accused in the offence were found at the site of the offence or on anything including arms and vehicles used in connection with the commission of such offence. Only if these matters are proved beyond reasonable doubt by the prosecution, the Court shall presume, unless contrary is shown that the accused has committed such an offence.

65. In the present case, we are not satisfied that the prosecution has discharged the initial burden which the law casts upon it. In the absence of discharge this initial burden by the prosecution, there is no question of raising presumption in terms of Section 43E of the Unlawful Activities (Prevention) Act, 1967.

66. In this case, the learned Special Court, has adverted to the provisions of Section 7 of the Explosive Substances Act, 1908, which provided that no Court shall proceed to the trial of any person for an offence against this Act except with the consent of the District Magistrate. The consent from the District Magistrate was a requirement introduced by way of Amendment Act No. 54 of 2001 which entered into force w.e.f. 1/2/2002. Prior to this amendment, the consent of the Central Government was contemplated.

67. In the present case, admittedly, there was no consent of the District Magistrate produced by the prosecution on record. The prosecution has however relied upon the so called consent from the Central Government. In these circumstances, the view taken by the learned Special Judge that no trial was warranted against the accused persons for offences in the Explosive Substances Act, 1908, cannot be said to be a view which was vitiated by any perversity.

68. Thus, barring the first three circumstances, the prosecution in this case, cannot be said to have proved beyond reasonable doubt, its case against the accused persons. Based upon the fact that the explosion with IED did take place on 16th October, 2009 at the spot hardly 400 metres away from the venue of the Narkasur effigy competition and the fact that the prosecution has proved first three circumstances, the observations made by the learned Special Judge doubting the veracity of FIR or suggesting any malafides in the launch of the prosecution or suggesting that certain Sanstha was undoubtedly roped in, cannot be sustained and are required to be set aside as being contrary to the weight of evidence on record. Such observations or remarks cannot, according to us, be regarded as legitimate inferences which could be drawn from the evidence on record. There was no warrant for such observations or remarks. Accordingly, we do not sustain or approve such observations. The circumstance that we quite agree with the other findings or inferences recorded by the learned Special Court may therefore not be taken as approval or endorsement to the observations relating to any doubt on the veracity of FIR or any malafides launching or directing the investigation in this matter.

69. Having said this, we quite agree with the learned Special Court that the prosecution in this case has failed to establish beyond reasonable doubt, the circumstances listed at numbers 4 to 12 in paragraph 75 of the impugned judgment and order. This is admittedly a

case not based on the direct evidence. This was a case based on the circumstantial evidence as pointed out at the very outset by Mr. Faldessai, learned Additional Public Prosecutor and Assistant Solicitor General of India.

70. The principles relating to evaluation of circumstantial evidence are quite well settled and reference can be made to the decision of the Hon'ble Apex Court in ***Sharad Birdhichand Sarda Vs State of Maharashtra***[4]***.***

71. At paragraph 153 of this decision, this is what is held :

> *"(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*
> *It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra (1973)2 SCC 793 where the observations were made: ( SCC p. 807, para 19)*
>
> *"19..... Certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."*
>
> *(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except*

4 (1984) 4 SCC 116

*that the accused is guilty,*

*(3) the circumstances should be of a conclusive nature and tendency,*

*(4) they should exclude every possible hypothesis except the one to be proved, and*

*(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

*( Emphasis supplied )*

72. Applying the aforesaid principles in the evaluation of evidence on record in this matter, we are unable to accept that the prosecution has established its case beyond reasonable doubt against any of the accused persons. At the highest, some sort of suspicion can be said to have been raised particularly since the prosecution has succeeded in proving that the incident of 16th October, 2009 did take place and the prosecution has also succeeded in proving some of the circumstances concerning the same. The proved circumstances however are not at all sufficient to convict the accused persons. Suspicion, howsoever grave, can never take place of proof which is required in such matters.

73. Even the proved circumstances in the present case, are certainly not sufficient to disturb the acquittal recorded by the learned Special Court in this matter. Applying the principles in *Sampat Babso Kale* (supra), *Sanjay Thakran* (supra) and *Chandrappa* (supra), we will not be justified in reversing the acquittal recorded by the learned Special

Judge, merely because we may not have agreed with certain remarks or observations made by the learned Special Judge particularly on the aspect of any lack of bonafides on the part of the prosecution in the present matter.

74. For all the aforesaid reasons, though we set aside the remarks and observations in the impugned judgment and order on the doubts expressed about veracity of the FIR and remarks and observations about the lack of bonafides in the launching of this prosecution or direction of the investigations, we sustain the acquittals recorded in the impugned judgment and order. This appeal, to the extent it seeks reversal of the acquittal recorded by the learned Special Court, is therefore hereby dismissed.

75. In the facts of the present case and having regard to our findings, there is no case made out for award of any costs in favour of the Respondents.

76. However, pending this appeal, if any of the Respondents have executed any bail bonds, the same are hereby ordered to be discharged.

SMT. M. S. JAWALKAR, J. M. S. SONAK, J.

*at**